ATTORNEY LIABILITY ISSUES IN ESTATE PLANNING AND PROBATE

PRESENTED BY:

MARY C. BURDETT
Calloway Norris Burdette & Weber
3811 Turtle Creek Blvd., Suite 400
Dallas, Texas 75219-4531
EMAIL: mburdette@cnbwlaw.com
(214) 521-1520 (Telephone)
(214) 521-2201 (Facsimile)

WRITTEN BY:

SARAH PATEL PACHECO
Crain, Caton & James, P.C.
1401 McKinney, 17th Floor
Houston, Texas 77010
Email: spacheco@craincaton.com
(713) 752-8630 (Telephone)
(713) 658-1921 (Facsimile)

STATE BAR OF TEXAS
Fiduciary Litigation 2008
April 24, 2008
TABLE OF CONTENTS

I. INTRODUCTION ................................................................................................................. 1

II. ATTORNEY-CLIENT RELATIONSHIP ............................................................................... 1

III. OVERVIEW OF LEGAL MALPRACTICE CLAIMS ............................................................. 1
A. Elements ................................................................................................................... 1
B. Standard Of Care ....................................................................................................... 2
C. Privity Requirement ................................................................................................... 2
D. Causation .................................................................................................................. 3
E. Damages ................................................................................................................... 4
   1. Actual Damages ............................................................................................ 4
   2. Mental Anguish ............................................................................................. 4
   3. Punitive Damages .......................................................................................... 5
   4. Attorney’s Fees ............................................................................................. 5
F. Discovery ................................................................................................................. 5
G. Related Claims .......................................................................................................... 6

IV. CLAIMS RELATED TO ESTATE PLANNING ..................................................................... 6
A. Claims by Beneficiaries ............................................................................................. 7
B. Claims by the Personal Representative of Deceased Client ........................................... 7

V. CLAIMS RELATED TO TRUSTEES AND PERSONAL REPRESENTATIVES..................... 9

VI. CLAIMS BY THE ‘UNINTENTIONAL’ CLIENT A/K/A THE BENEFICIARIES ............. 10

VII. CLAIMS RELATED TO GUARDIANSHIPS ....................................................................... 11

VIII. CLAIMS RELATED TO COURT APPOINTMENTS ........................................................... 12
A. Attorney Ad Litem Under Texas Probate Code .......................................................... 12
B. Guardian Ad Litem Under Texas Probate Code ......................................................... 12
C. Guardian Ad Litem Under Texas Rule of Civil Procedure 173 ................................. 13
D. Guardian Ad Litem Under Texas Trust Code ............................................................. 15
E. Personal Representatives and Guardian Under Texas Probate Code .................... 15

IX. CLAIMS BY NON-CLIENTS.............................................................................................. 15
A. General Bar to Claims by Third Parties ................................................................ 16
   1. Claims by Other Parties ............................................................................... 16
   2. Claims by Other Attorneys ........................................................................... 17
   3. Public Policy Supports a Bar ........................................................................ 17
B. Exceptions to General Bar .................................................................................... 17
   1. Conspiracy to Breach Fiduciary Duty ............................................................ 17
   2. Conspiracy to Defraud ................................................................................. 18
   3. Negligent Misrepresentation ...................................................................... 19
X. WAYS TO REDUCE LIABILITY DURING THE INITIAL STAGE OF THE ENGAGEMENT

A. Select Clients Carefully ........................................................................................................ 19
B. Assess Your Legal Competency .......................................................................................... 20
C. Consider Potential Conflicts of Interest ........................................................................... 20
D. Clearly Identify the Client .................................................................................................. 21
E. Obtain an Engagement/Fee Agreements ........................................................................... 21
   1. Address Joint Representation Issues .............................................................................. 21
   2. Address Identity of Client and Relevant Capacities ...................................................... 22
   3. Address Scope of Representation .................................................................................. 23
   4. Address Basis For Legal Fees & Expenses ................................................................. 24
   5. Address Payment & Sources of Fees ............................................................................. 26
   6. Include Dispute Resolution Provisions ......................................................................... 26
      a. Arbitration ..................................................................................................................... 26
      b. Mediation ..................................................................................................................... 28
      c. Waiver of Right to Jury Trial ....................................................................................... 28
F. Consider Court Appointments Carefully .......................................................................... 29

XI. WAYS TO REDUCE LIABILITY DURING THE ENGAGEMENT

A. Be Clear Who The Attorney Represents .......................................................................... 29
B. Be Clear and Careful in All Written Communications with Clients .................................. 30
   1. Use Correspondence to Confirm and Clarify ................................................................ 30
   2. Use Documents to Confirm and Clarify ......................................................................... 30
   3. Practice Safe Emailing ................................................................................................... 31
C. Be Careful in All Written Communications with Beneficiaries & Third Parties ................ 31
D. Advise Client of Client’s Fiduciary Duties & Potential Liability ........................................ 32
E. Avoid Making Alleged Representations and Use Disclaimers of Reliance When Appropriate .................................................................................................................. 32
F. Theft By A Fiduciary-Client ............................................................................................. 33
G. Consider the Possible Rights of Successor Fiduciaries .................................................... 35
H. Review Malpractice Coverage Regarding Fiduciary Appointments .................................. 35
I. Be Cognizant Of The Discovery Rule .............................................................................. 35
I. Other Thoughts .................................................................................................................. 35

XII. CONCLUSION...................................................................................................................... 36
I. INTRODUCTION

Over the past few years, there have been a substantial number of articles and presentations focusing on the liability, responsibilities, and potential claims against fiduciaries. Until recently, however, there has been substantially less focus and discussion on the potential liability, responsibilities, and claims involving the attorneys representing the fiduciary. And, until the recent Texas Supreme Court decision of Belt, there has been little discussion of the claims against estate planners.

This outline is intended to focus on the possible claims against attorneys representing clients in estate planning, probate, trust, and guardianship matters and suggestions on ways to reduce potential liability.

II. ATTORNEY-CLIENT RELATIONSHIP

The attorney-client relationship is a contractual relationship, whereby the attorney agrees to render professional services for the client. The existence of an attorney-client relationship may be either express or implied from the parties’ conduct. See Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

Once established, the attorney-client relationship gives rise to corresponding duties on the attorney’s part:

(i) Use the utmost good faith in dealings with the client,
(ii) Maintain client confidences, and
(iii) Use reasonable care in rendering professional services to the client.


III. OVERVIEW OF LEGAL MALPRACTICE CLAIMS

A legal malpractice claim may arise when an attorney breaches his duties to his client. If the attorney violates a standard of care, the cause of action is generally a negligence claim. See Anderson & Steele, Fiduciary Duty, Tort & Contract: A Primer on the Legal Malpractice Puzzle, 47 SMU L. Rev. 235, 245 (1994). If the attorney violates a standard of conduct, the cause of action is generally a breach of fiduciary duty claim. See Id.

Legal malpractice is typically based on negligence because such claims arise from an attorney’s allege failure to exercise ordinary care. See Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989). The majority of claims arises from an attorney giving a client bad legal advice or otherwise improperly representing the client. See Greathouse v. McConnell, 982 S.W.2d, 165, 172 (Tex. App—Houston [1st Dist.] 1998, review denied).

A. Elements

In order to recover for legal malpractice, a plaintiff must prove four elements:

(i) The attorney owed a duty of care to the plaintiff (generally, this is shown by the presence of an attorney-client relationship between the plaintiff and the attorney),
(ii) The attorney violated that duty,
(iii) The attorney's negligence was the proximate cause of injury to the plaintiff, and
(iv) Damages.

See Id. at 665 (citing McKinley v. Stripling, 763 S.W.2d 407 (Tex. 1989)); see also Alexander v. Turtur & Assoc., Inc., 146 S.W.3d 113 (Tex. 2004); Abetter Trucking Co. v. Arizpe, 113 S.W.3d 503, 508 (Tex.App.—Houston [1st Dist.] 2003, no pet.)

Common claims include:

(i) The attorney gave an erroneous legal opinion or erroneous
advice,

(ii) The attorney failed to give any advice or opinion when legally obliged to do so,

(iii) The attorney did not follow the client’s lawful instruction,

(iv) The attorney took an action contrary to the client’s instructions,

(v) The attorney failed to timely handle a matter entrusted to the attorney’s care by the client,

(vi) The attorney failed to use ordinary care in preparing, managing, and presenting litigation that affects the client’s interests.


B. Standard Of Care

An attorney is held to the standard of care that would be exercised by a reasonably prudent attorney. Cosgrove, 774 S.W.2d at 665. The applicable standard “is an objective exercise of professional judgment, not a subjective belief that his acts are in good faith.” Id. at 665. When the attorney’s decision is that which a reasonably prudent attorney could have made in the same or similar circumstances, then the attorney is not negligent even if an undesirable result occurred. Furthermore, the attorney’s conduct will be evaluated based on the information the attorney had at the time of the alleged act of negligence. Id. at 664.

C. Privity Requirement

In the United States, the requirement of privity in the legal malpractice context originated in Savings Bank v. Ward, decided by the United States Supreme Court in 1879. 100 U.S. 195 (1879). In Ward, the defendant-attorney issued a certificate to his client stating that the client had good title to a tract of real property. The client was able to obtain a loan from the plaintiff, Savings Bank, based on the erroneous certificate. The client, however, "was insolvent and had no title whatever to the premises." Id. at 196. When the client defaulted on the loan, Savings Bank sued the attorney for malpractice. The trial court held that privity of contract, “arising from an actual employment of the defendant by the plaintiffs, is necessary to enable the latter to maintain the action.” Id.

Upholding the decision of the trial court, the United States Supreme Court held that absent fraud or collusion, an attorney is not liable to non-clients. The Supreme Court's opinion was based primarily on concerns that the failure to limit recovery to those in privity with the attorney would lead to virtually unlimited liability of the attorney.


Not all states, however, have adopted California's “everybody has privity” stance. A few states, such as Florida and Iowa, have limited recovery by beneficiaries to those situations where “the testator's intent as expressed in the will is frustrated.” 68 Tenn. L. Rev. at 263 (citing Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993))(emphasis omitted); Schreiner v. Scoville, 410 N.W.2d 679, 683 (Iowa 1987); Mieras v. DeBona, 550 N.W.2d 202, 208 (Mich. 1996); see also Hatbob v. Brown, 575 A.2d 607, 615 (Pa. Super. Ct.
1990) (holding that if attorney's negligence thwarted testator's intent as expressed in will, beneficiary may maintain a contract, but not a tort, cause of action).

A few other states, such as Texas, have adopted a “strict privity” requirement. See Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996); Noble v. Bruce, 709 A.2d 1264, 1275 (Md. 1998); Lilyhorn v. Dier, 335 N.W.2d 554, 555 (Neb. 1983); Conti v. Polizzotto, 663 N.Y.S.2d 293 (N.Y. App. Div. 1997); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987); Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716, 718 (Tex. App.—San Antonio 1986) vacated on other grounds, 729 S.W.2d 690 (Tex. 1987).

While these states continue to bar suits by beneficiaries, some now recognize that a personal representative of a deceased client’s estate has the requisite privity to bring an action against an estate-planning lawyer. See Belt v. Oppenheim, Blend, Harrison & Tate, Inc., 192 S.W. 3d 780 (Tex. 2006), see also Hosfelt v. Miller, 2000 WL 1741909, 2000-Ohio-2619 (Ohio App. 7 Dist. Nov 22, 2000) (NO. 97-JE-50) (in case of first impression held that personal representative of client’s estate may bring claim based on preparation of estate documents or estate planning) (citing Nevin v. Union Trust Co. 726 A.2d 694, 701 (Me. 1999); Olson v. Toy, 46 Cal. App. 4th 818, 823, 54 Cal. Rptr. 2d 29 (1996)).

D. Causation

One of the elements of a malpractice claim is that the attorney's negligence was the proximate cause of injury to the client. The two components of proximate cause are cause-in-fact and foreseeability. Berly v. D&L Sec. Servs. & Investigations, Inc., 876 S.W.2d 179, 182 (Tex.App.—Dallas 1994, writ denied). Cause-in-fact means that the attorney's acts or omissions were a substantial factor in bringing about the injury that would not otherwise have occurred. See Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 904 (Tex.App.—Dallas 2001, no pet.). Foreseeability of harm means that the attorney could anticipate that his actions could injure another. Id. Foreseeability does not require that the attorney anticipate the particular injury that eventually occurs. Brown v. Edwards Transfer Co., Inc., 764 S.W.2d 220, 223 (Tex. 1988).

When the client claims that some failure by the attorney caused an adverse result in prior litigation, the client must produce evidence from which a jury may reasonably infer that the attorney's conduct caused the damages alleged. Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 181 (Tex. 1995). Mere conjecture, guess, or speculation is not sufficient to establish that the attorney’s actions proximately caused the client’s injury. For example, in the recent decision of Baker Botts v. Cailloux, the appellate court reversed a trial court judgment in favor of the client-plaintiff finding that causation was not proven at trial. _____ S.W.3d ___, 2007 WL 460643 (Tex.App.—San Antonio 2007, n.p.h.).

In Baker Botts, the client was incapacitated and her attorney-in-fact sued the law firm and others claiming that, but for its actions, the client would not have signed a disclaimer. None of the trial witnesses had any knowledge of the client’s “true wishes or intentions.” See Id. The court held that at best, any assumption what the client would have done is based on nothing more than conjecture. See Id.

Likewise, in Longaker v. Evans, the appellate court also rejected as mere speculation any assumption as to the deceased client’s motives or intent when she terminated a trust whose proceeds would have benefited her son but instead went to the brother “advising” her to terminate the trust. Longaker v. Evans, 32 S.W.3d 725, 734-35 (Tex.App.—San Antonio 2000, pet. withdrawn by agr.). In Longaker, the court noted that “while there is much speculation that the trust termination was not the result of [the decedent’s] free act, there is no competent evidence that [the beneficiary] wrongfully influenced or otherwise induced [the decedent]
to do anything she did not otherwise intend to do.” *Id.* at 734. Instead, “all indications are it was what [the decedent] wanted and there is no evidence of a contrary intent.” *Id.* at 735. In the absence of competent evidence demonstrating the deceased client never intended to divest her son of the trust assets, the court determined that it was improper to make that assumption. *Id.* at 734-35. The court therefore held there was no evidence of causation or damages. *Id.*

Some courts have held that as a general rule, expert testimony is needed to prove causation in a legal malpractice case. See Turtur & Assocs., Inc. v. Alexander, 86 S.W.3d 646, 652 (Tex.App.—Houston [1st Dist.] 2001, no pet.); Onwuakwa v. Gill, 908 S.W.2d 276, 281 (Tex.App.—Houston [1st Dist.] 1995, no writ). When a layperson would ordinarily be competent to make a determination on causation, however, expert testimony is not required. See Turtur, 86 S.W.3d at 652 (expert testimony not required if causal connection is obvious); Arce v. Burrow, 958 S.W.2d 239, 252 (Tex.App.—Houston [14th Dist.] 1997), rev’d on other grounds, 997 S.W.2d 229 (Tex. 1999) (corr. op. on motion for reh’g.) (quoting Delp v. Douglas, 948 S.W.2d 483, 495 (Tex.App.—Fort Worth 1997), rev’d on other grounds, 987 S.W.2d 879 (Tex. 1999)) (adopting rule previously applied in medical malpractice cases that expert testimony not required in cases where lay person competent to determine causation).

**E. Damages**

A plaintiff in a legal malpractice case must demonstrate that any alleged damages, including attorney’s fees, were proximately caused by the breach of a duty by the defendant. See Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 507 (Tex.App.—Houston [1st Dist.] 1995, no writ).

1. Actual Damages

The plaintiff can seek actual damages resulting from an attorney’s negligence. These are usually economic damages resulting from the failure to adequately represent a client or obtain the best settlement. See Cosgrove v. Grimes, 774 S.W.2d 622 (Tex. 1989) (damages based on amount of damages that could have been recovered from defendant in underlying suit but for attorney’s inadequate representation); Balesteros v. Jones, 985 S.W.2d 485 (Tex.App.—San Antonio 1998, pet denied) (damages based on difference between settlement received and best settlement possible, but for attorney’s inadequate representation). Additionally, actual damages may also include attorneys’ fees and expenses expended to correct, mitigate or defend due to the malpractice. See discussion infra.

2. Mental Anguish

A plaintiff cannot generally recover damages for alleged mental anguish. See Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W. 3d 780 (Tex. 2006) (estate-planning malpractice claims are limited to recovery for property damage). In Likes v. City of Tyler, the Texas Supreme Court discussed the general lack of recovery for mental anguish damages relating to breaches of legal duties. 962 S.W.2d 489 (Tex. 1997) (denying mental anguish resulting from property damage caused by negligence); see also Douglas v. Delp, 987 S.W.2d 879, 884 (Tex. 1999) (denying mental anguish damages for economic loss suffered as result of legal malpractice). The Court indicated that the two principal reasons courts have been unwilling to recognize mental anguish as compensable in every case in which it occur are: (1) “predictability is difficult because of the variability of the human response to particular conduct and the inability to distinguish those instances when it will be a reasonably foreseeable consequence”, and (2) “verifying the existence of mental anguish is difficult because of its inherently subjective nature.” Fitzpatrick v. Copeland, 80 S.W.3d 297 (Tex.App.—Fort Worth 2002, pet denied) (citing Likes, 962 S.W.2d at 494-95; Parkway, 901 S.W.2d at 444).
3. Punitive Damages

The plaintiff can seek punitive or exemplary damages relating to an attorney’s negligence. Recovery of punitive damages is, however, limited by the Texas Civil Practice and Remedies Code. The applicable version of Chapter 41 depends on when the cause of action was filed. The current version of Chapter 41, now referred to as the Damages Act, applies to causes of action filed on or after September 1, 2003. The former version, known as the Exemplary Damages Act, applies to claims that accrued after September 1, 1995.

To recover punitive damages, the client must generally show that the attorney acted with malice or his or her actions rose to the level of being fraudulent or grossly negligent.

4. Attorney’s Fees

Attorney’s fees expended in prior litigation generally are not recoverable as damages unless provided for by statute or contract. See Dallas Cent. Appraisal Dist. v. Seven Inv. Co., 835 S.W.2d 75, 77 (Tex. 1992) (attorney’s fees may not be recovered unless provided for by statute or by contract between the parties); New Amsterdam Cas. Co. v. Tex. Indus., Inc., 414 S.W.2d 914, 915 (Tex. 1967) (attorney’s fees not recoverable in tort claims unless provided by statute or contract); Cupples Coiled Pipe, Inc. v. Esco Supply Co., 591 S.W.2d 615, 619 (Tex.Civ.App.—El Paso 1979, writ ref’d n.r.e.) (attorney’s fees from prior tort or contract suits against third parties are not recoverable as damages in subsequent suits).

Under certain circumstances, some appellate courts have adopted an equitable exception to the general rule of non-recovery of attorney’s fees in tort cases. See Knebel v. Capital National Bank, 518 S.W.2d 795, (Tex. 1975)(noted that “federal courts, in the exercise of their equitable powers, may award attorneys’ fees when the interests of justice so require. Indeed, the power to award such fees ‘is part of the original authority of the chancellor to do equity in a particular situation”). The Texas Supreme Court, however, has not adopted any wrongful-act basis for recovery.

But, when the attorney’s malpractice causes the client to expend attorneys’ fees to correct, mitigate or defend, the client may be entitled to recover the fees and expenses as part of the client’s actual damages. In Arlitt v. Paterson, the appellate court noted that “contractual or statutory authorization is not necessary to recover attorneys’ fees and costs as damages.” 995 S.W.2d 713, 721 (Tex.App.—San Antonio 1999, review denied)(widow entitled to recover attorneys' fees and costs she incurred in will contest and construction proceedings as damages)(citing Nationwide Mut. Ins. Co. v. Holmes, 842 S.W.2d 335, 341-42 (Tex.App.—San Antonio 1992, writ denied) Baja Energy, Inc. v. Ball, 669 S.W.2d 836, 838-39 (Tex.App.—Eastland 1984, no writ) RESTATEMENT (SECOND) OF TORTS § 914(2) (1979); but see City of Garland v. Booth, 895 S.W.2d 766, 771-72 (Tex.App.—Dallas 1995, writ denied) Peterson v. Dean Witter Reynolds, Inc., 805 S.W.2d 541, 549 (Tex.App.—Dallas 1991, no writ)); see also Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (client need not prove actual damages in order to obtain forfeiture of attorney’s fees for the attorney’s “clear and serious” breach of fiduciary duty to the client). In addition, the decedent can recover the costs incurred in restructuring his estate to minimize tax liability; Porter v. Ogden, Newell, & Welch, 241 F.3d 1334, 1337 (11th Cir. 2001) (allowing suit to recover client’s costs, incurred during lifetime, in curing problems created by negligent drafting of trust document, including funds expended in seeking judicial reformation of trust and in lobbying Florida legislature to change law affecting trust).

F. Discovery

A legal-malpractice claim does not accrue until “facts have come into existence that authorize a [client] to seek a judicial remedy.” Apex Towing Co. v. Tolin, 41 S.W.3d 118, 120 (Tex. 2001); Willis v.
Maverick, 760 S.W.2d 642, 646 (Tex. 1988); see also Little v. Smith, 943 S.W.2d 414, 420 (Tex. 1997) (statute of limitations for breach of fiduciary duty claim does not begin to run until claimant “knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the wrongful act”). Thus, a legal-malpractice claim does not arise “until the client discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of a cause of action.” Id. at 121. And, the claim does not accrue until the client discovers--or should have discovered--it was legally injured. Vacek Group, Inc. v. Clark, 95 S.W.3d 439, 443 n. 2 (Tex.App.—Houston [1st Dist.] 2002, no pet.). A claim may not accrue until after the facts alluding to the malpractice have surfaced. See Tate v. Goins, Underkofler, Crawford & Langdon, 24 S.W.3d 627, 636 (Tex.App.—Dallas 2000, pet. denied) (court held cause of action did not accrue when client learned of potential claim during deposition but only after default judgment was entered against the client).

When the engagement involves the prosecution or defense of a claim in litigation, the Texas Supreme Court has adopted a “bright-line rule” that tolls the statute of limitations until all appeals on the underlying claim are exhausted. Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 156 (Tex. 1991).

Legal malpractice claims based on transactional work are not, however, automatically tolled under the Hughes rule. See Murphy v. Mullin, Hoard & Brown, 168 S.W.3d 288 (Tex.App.—Dallas 2005, no pet.) (citing Vacek Group, Inc. v. Clark, 95 S.W.3d 439, 444-47 (Tex.App.—Houston [1st Dist.] 2002, no pet.). In Murphy, the court considered whether the Hughes rule applied to claims related to the alleged negligent drafting and/or review of the agreements creating the family limited partnerships. The court held that because it was not legal malpractice committed during “the prosecution or defense of a claim that results in litigation,” it does not fall within a category of legal malpractice cases encompassed within the Hughes definition. Therefore, the Hughes rule does not apply. See Id. at 293.

G. Related Claims

Most Texas courts have not allowed the plaintiff to fracture claims arising out of an attorney’s alleged bad legal advice or improper representation into separate claims for negligence, breach of contract, or fraud. Rather, the courts have held that the “real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise.” Averitt v. PriceWaterhouse-Coopers L.L.P., 89 S.W.3d 330, 333 (Tex. App.—Fort Worth, 2002, no pet. h.); see also Sledge v. Alsup, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ).

Therefore, when the complaint is essentially that the attorney did not provide adequate legal representation, the claim is one for legal malpractice. See Greathouse, 982 S.W.2d at 172; see also Averitt, 89 S.W.3d at 333 (cause of action based on attorney’s alleged failure to perform professional service is tort rather than breach of contract, regardless whether written contract providing for professional services existed between the attorney and client).

IV. CLAIMS RELATED TO ESTATE PLANNING

Legal malpractice claims may be based on an attorney’s negligence to properly provide estate-planning services. In the estate-planning context, the issue of privity is significant because the plaintiff is generally someone other than the client. This raises a host of issues because an alleged problem is often not discovered until after the testator/client dies.
A. Claims by Beneficiaries

Beneficiaries of a deceased client’s will or trust may not claim that the attorney was negligent in the preparation of such estate planning documents. Until 1996, it was unclear whether the beneficiary had standing to sue the drafting attorney for legal malpractice. It was then that the Texas Supreme Court rendered its decision of Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996).

In Barcelo, the Texas Supreme Court considered the issue of whether an attorney who negligently drafts a will or trust agreement owes a duty of care to the beneficiaries of the will or trust, even though the attorney never represented the intended beneficiaries. Barcelo, 923 S.W.2d at 576. The Court held that the estate-planning attorney owed no duty to the beneficiaries because the attorney did not represent the beneficiaries. Id. The Court reasoned that:

The greater good is served by preserving a bright-line privity rule that denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.

Id. at 578-79.

B. Claims by the Personal Representative of Deceased Client

Claims arising from alleged negligence in preparing estate-planning documents may now be made by the personal representative of the deceased client. On May 5, 2006, in a case of first impression, the Texas Supreme Court held a personal representative of a deceased client has the requisite privity to maintain an estate-planning malpractice claim against decedent’s estate-planning attorney because the attorney lacked privity with non-client beneficiaries and, therefore, owes them no duty. 141 S.W.3d 706, 708-09 (citing Barcelo, 923 S.W.2d 575 (Tex. 1996)). The appellate court appeared sympathetic to the plaintiff’s position, however, when it stated that it:

recognize[d] that the [plaintiffs] have also raised several policy arguments in support of their position; however, such arguments have been adversely answered by the Supreme Court in Barcelo. It is a tenet of our judicial system that we, as an intermediate appellate court, are bound by pronouncements of the Supreme Court, even though we may entertain a contrary opinion. Because we are confined to follow the dictates of Barcelo in this instance, the [plaintiffs] sole issue is overruled.

Id. at 708.

Based in part on the appellate court’s commentary, the appellant’s petitioned the Texas Supreme Court to review this issue and
made the following compelling public policy argument to the Court:

The Supreme Court should review the question, because it should not lightly adopt a policy that completely protects negligent lawyers from any possibility of liability in preparing wills or estate plans. Since *Barcelo v. Elliott* effectively shields lawyers from claims by beneficiaries, to extend that protection to claims by the decedent’s personal representatives effectively provides complete and absolute immunity to careless lawyers. No other professional enjoys such immunity from the consequences of his or her neglect. Whether the protection afforded lawyers from claims by beneficiaries should be extended as well to claims by their client’s personal representatives is a question that deserves this Court’s solemn consideration.

The Texas Supreme Court agreed to review the question in *Belt* of whether the *Barcelo* rule (that barred suits by beneficiaries against estate planners, on basis of lack of privity) also barred suits brought on behalf of the deceased client by his estate’s personal representatives. Only a handful of jurisdictions have considered this issue because the majority of states allow beneficiaries to maintain estate-planning malpractice claims. *See*, e.g., *Beastall v. Madson*, 600 N.E.2d 1323, 1327 (Ill. App. Ct. 1992); *Hosfelt v. Miller*, No. 97-JE-50, 2000 Ohio App. LEXIS 5506, at *11-12 (Ohio Ct. App. Nov. 22, 2000); *Sizemore v. Swift*, 719 P.2d 500, 503 (Or. Ct. App. 1986); *Rutter v. Jones, Blechman, Woltz & Kelly*, P.C., 568 S.E.2d 693, 695 (Va. 2002). Thus, the claim before the Court was one of first impression.

In deciding whether a personal representative could maintain the suit because an estate’s personal representative generally has the capacity to bring a survival action on behalf of a decedent’s estate. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 850 (Tex. 2005); *see also* TEX. PROB. CODE ANN. § 233A (Vernon 2003) (personal representative can institute suit for recovery of estate’s personal property, debts or damages).

In deciding whether the malpractice claim survives the client’s death, the Texas Supreme Court reasoned that an estate planner’s negligence results in the improper depletion of a client’s estate. Therefore, this type of claim involves injury to the decedent’s property. *See* TEX. PROB. CODE ANN. § 3(z) (Vernon 2003)(defining the “personal property” of an estate to include interests in goods, money, and choses in action); *see also Williams v. Adams*, 193 S.W. 404, 405 (Tex. Civ. App.–Texarkana 1917, writ ref’d) (tort claim alleging fraud, which resulted in financial loss to the plaintiff, survived death of defendant because it involved wrongful acquisition of property); *Cleveland v. United States*, No. 00-C-424, 2000 U.S. Dist. LEXIS 18908, at *9 (N.D. Ill. Dec. 27, 2000) (tort claim for financial loss resulting from estate-planning malpractice deemed an action for damage to personal property). When an attorney’s malpractice results in financial loss, the aggrieved client is fully compensated by recovery of that loss and the client may not recover damages for mental anguish or other personal injuries. *See Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999). Thus, estate-planning malpractice claims seeking recovery for pure economic loss are limited to recovery for property damage.

Consequently, in accordance with the long-standing common-law principle that actions for damage to property survive the death of the injured party, the Texas Supreme Court held that legal malpractice claims alleging pure economic loss survives in favor of a deceased client’s estate, because such claims are necessarily limited to recovery for property damage. *See G. H. & S. A. R. R. v. Freeman*, 57

---

Attorney Liability Issues in Estate Planning and Probate

© Sarah Patel Pacheco
 Tex. 156, 158 (Tex. 1882) (a cause of action “brought for damage to the estate and not for injury to the person, personal feelings or character, . . . upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as a part of his assets, because it affects his estate, and not his personal rights”); see also Traver v. State Farm Mut. Auto. Ins. Co., 930 S.W.2d 862, 871 (Tex. App.–Fort Worth 1996) rev’d on other grounds, 980 S.W.2d 625 (Tex. 1998) (legal malpractice claim arising from representation in personal injury case survives death of client).

In doing so, the Texas Supreme Court expressly disapproved of the holding in Estate of Arlitt v. Paterson, 995 S.W.2d 713, 720 (Tex. App.–San Antonio 1999, pet. denied), in which the appellate court held that an estate-planning malpractice claim does not accrue during a decedent’s lifetime—and therefore does not survive the decedent—because the estate’s injuries do not arise until after death. The Texas Supreme Court concluded that even though an estate may suffer significant damages after a client’s death, this does not preclude survival of an estate-planning malpractice claim. While the primary damages such as increased tax liability may not occur until after the decedent’s death, the lawyer’s alleged negligence occurred while the decedent was alive. Apex Towing Co. v. Tolin, 41 S.W.3d 118, 120 (Tex. 2001) (legal malpractice claim accrues “when facts have come into existence that authorize a claimant to seek a judicial remedy”). For that reason, if the decedent discovers the alleged injury prior to his or her death, he or she could have brought suit against his estate planners to recover the fees paid to them. See, e.g., Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (client need not prove actual damages in order to obtain forfeiture of attorney’s fees for the attorney’s “clear and serious” breach of fiduciary duty to the client). In addition, the decedent can recover the costs incurred in restructuring his estate to minimize tax liability. See, e.g., Porter v. Ogden, Newell, & Welch, 241 F.3d 1334, 1337 (11th Cir. 2001) (allowing suit to recover client’s costs, incurred during lifetime, in curing problems created by negligent drafting of trust document, including funds expended in seeking judicial reformation of trust and in lobbying Florida legislature to change law affecting trust).

In the end, the Texas Supreme Court appears to have agreed with the plaintiff’s public policy argument of accountability. The majority noted that precluding both beneficiaries and personal representatives from bringing suit for estate-planning malpractice would essentially immunize estate-planning attorneys from liability for breaching their duty to their clients. The Court acknowledged and adopted the rational of Justice Cornyn’s dissent in Barcelo that suggested then that estate-planning malpractice suits may help “provide accountability and thus an incentive for lawyers to use greater care in estate planning.” 923 S.W.2d at 580 (Cornyn, J., dissenting). Ultimately, the Court believed that limiting estate-planning malpractice suits to those brought by either the client or the client’s personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship.

V. CLAIMS RELATED TO TRUSTEES AND PERSONAL REPRESENTATIVES

An attorney hired by the executor or trustee to advise them in administering the estate or the trust represents the executor or trustee and not the beneficiaries. See Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex.App.— Houston [1st Dist.] 1993, writ denied)(estate beneficiaries lacked standing to bring claim for professional negligence against executor’s law firm because they were not in privity with the law firm); Huie v. DeShazo, 922 S.W.2d 920, 922 (Tex. 1996) (“under Texas law at least, the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries); see also Vinson & Elkins v. Moran, 946 S.W.2d 381, 396 (Tex. App.— Houston [14th Dist.] 1997, writ dism’d by agr.).

Also, neither a trust nor an estate is a
legal entity and, therefore, neither should be considered the client. *See Chapman Children’s Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 441-42 (Tex. App.— Houston [14th Dist.] 2000, pet. denied) (because the trusts were not clients, the trusts have “no right of recovery, under any cause of action,” as a matter of law, for conduct in connection with its representation of trustee). *But see* discussion of unintentional clients *infra.*

An issue, however, exists whether a successor trustee or personal representative would have privity with his or her predecessor’s attorney. *See* discussion *infra.*

**VI. CLAIMS BY THE “UNINTENTIONAL” CLIENT A/K/A THE BENEFICIARIES**

While it is clear that a client can bring a claim for legal malpractice, the real question is often who is the client. As discussed previously, the existence of an attorney-client relationship may be either express or implied from the parties’ conduct. *See Perez*, 822 S.W.2d at 265. Once established, the attorney-client relationship gives rise to corresponding duties on the attorney’s part.

As discussed previously, an attorney for a fiduciary generally represents only the fiduciary. It is possible, however, that the attorney for an executor or trustee could undertake to perform legal services as an attorney for one or more beneficiaries, therefore creating an attorney-client relationship, whether expressly or impliedly. *See Id.* For example, in *Moran* the fiduciary engaged a law firm to advise them in such capacity. The beneficiaries subsequently sued the law firm for legal malpractice claiming that it also undertook to represent their interests. The beneficiaries claimed that the law firm had periodic meetings with the beneficiaries, provided them tax and other advice, had direct mailings to the beneficiaries, stated that they represented “the Moran family, the Moran Estate, the Moran Estate family, [and] Moran Estate interests,” and failed to advise the beneficiaries that they did not represent the beneficiaries. *Vinson*, 946 S.W.2d at 403. They also testified that the law firm sent them documents to review and sign. *Id.* The law firm claimed that the beneficiaries were never clients, it was hired only by the fiduciaries, that some of the beneficiaries had their own counsel, and they suggested that the beneficiaries consult with their own counsel. *Id.* at 404. The jury found that an attorney-client relationship existed and awarded damages in excess of $35 million.

Likewise, even absent a clear attorney-client relationship, the attorney for the executor or trustee may be held negligent for failing to advise a beneficiary that he does not represent the beneficiary if circumstances could lead the beneficiary to believe that they are represented by attorney. *See Querner v. Rindfuss*, 966 S.W.2d 661 (Tex. App.—San Antonio 1998, writ denied). In *Querner*, the beneficiaries claimed that the attorney for the executor claimed to be the attorney for the estate. *Id.* at 666. The attorney stated in writing that the attorney “will keep the beneficiaries fully apprised of both [the executor’s] position and the other beneficiary’s position on the interpretation of the will.” *Id.* The beneficiaries sued the attorney for civil conspiracies, fraud, unlawful conversion, unjust enrichment, DTPA, constructive fraud, and breach of fiduciary duties and the court granted summary judgment for the attorney on all these claims. The appellate court upheld a portion of the summary judgment, but reversed on the claims of whether attorney for the estate engaged in fraud and converted estate’s assets through conspiracy with executrix, and whether the beneficiaries had standing to sue the attorney. *Id.* at 668. In reaching its decision, the court stated that:

[e]ven absent an attorney-client relationship, an attorney may be held negligent for failing to advise a party that he is not representing the party. *Burnap*, 914 S.W.2d at 148. “If circumstances lead a party to believe that they are represented by an
attorney,” the attorney may be held liable for such a failure to advise. Id. Furthermore, the Texas Supreme Court has recognized the difficulty in formulating a comprehensive definition of “fiduciary” sufficient to encompass all cases. General Resources Organization, Inc. v. Deadman, 907 S.W.2d 22, 31 (Tex. App.—San Antonio 1995) (citing Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp., 823 S.W.2d 591, 593 n. 3 (Tex. 1992), writ denied, 932 S.W.2d 485 (Tex. 1996). Informal fiduciary relationships or confidential relationships may arise where one person in trust relies upon another or where influence has been acquired and abused or confidence has been reposed and betrayed. Id. The existence of such an informal fiduciary relationship or confidential relationship is a question of fact. Id.

Id. at 666.

VII. CLAIMS RELATED TO GUARDIANSHIPS

An issue has arisen in the last decade whether an attorney representing a guardian also represents the ward. At least one Texas court has recognized that a guardian’s retention of an attorney for a ward establishes an attorney-client relationship as between the attorney and the ward. See Daves v. Comm. for Lawyers Discipline, 952 S.W.2d 573 (Tex. App.—Amarillo 1997, writ denied).

In Daves, the parents of a minor retained an attorney to file an application to be appointed the minor’s legal guardian. The parents then also sought permission from the guardianship court to allow the attorney to represent the minor in pursuing a cause of action for personal injuries. After the settlement of a fee and other disputes with the parents’ prior counsel, the attorney was charged with violating the Texas Rules of Professional Conduct and subsequently suspended from the practice of law. The violations included conflicts of interest in the representation of both the parents and the minor.

The attorney first alleged that he had no attorney-client relationship with the minor/ward as a matter of law because he was not “court-appointed.” Id. at 576. The appellate court held, however, that comment 12 to Rule 1.02 of the Texas Rules of Professional Conduct does not provide that a lawyer must be court appointed to represent a person under disability. Id. at 577 (comments to Rule 1.02 only apply to that particular rule and do not apply to other rules, including conflicts of interest). The appellate court further held, regardless of Rule 1.02, the actions of the attorney and the parents/guardian clearly demonstrated that the attorney was representing the minor/ward. The court noted that “attorney-client relations may be implied if the parties by their conduct manifested an intent to create such a relationship.” Id. at 577 (citing Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App. – Corpus Christi 1991, writ denied); Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App. – Texarkana 1989, writ denied); Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 633 (Tex. App. – Amarillo 1983, writ ref’d n.r.e.)). Finally, the appellate court held that even if Rule 1.02 did apply, the parents, as guardians, had a duty to the minor/ward and they retained the attorney to assist them in pursuing the minor/ward’s claims. Therefore, even though retained by the parents, the court found that the attorney “had a duty not only to the Parents as co-guardians, but also to the Child whose claims he was asserting, and the attorney-client relationship was established between the Child and the [attorney] under comment 12 to Rule 1.02.” Id. at 577.

The Texas Rules of Professional Conduct also appear to recognize that a person under a disability, via a guardianship or otherwise, can be the “client.” See TEX. R. DISCIPLINARY P. 1.02, comment 13, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2006). Comment 13 to Rule 1.02 provides that “if a legal representative has
already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.” Id. The possible existence of an attorney-client relationship could also be argued based on Texas decisions that have found an attorney-client relation existed between a minor child and the attorney retained by the child’s next friend. See Byrd v. Woodruff, 891 S.W.2d 689, 700-01 (Tex. App. – Dallas 1994, writ dism’d by agr.); but see Wilz v. Sanders, 2005 WL 428467 (Tex.App.—Waco, 2/23/05) (memorandum opinion)(not designated for publication)(guardian ad litem is entitled to derived judicial immunity when recommending approval of a settlement on behalf of a ward).

While a Texas case directly on point has yet to be decided, Texas could follow the lead of other states that have recognized the existence of an attorney-client relationship between the lawyer and both the guardian and the ward. See Fickett v. Superior Court, 558 P.2d 988, 990 (Ariz. 1976) (rejecting attorney’s claim of no privity, court found that attorney who undertakes to represent guardian of incompetent person assumes relationship not only with guardian but also with ward.); Schwartz v. Hamblen, 685 N.E. 2d 871 (Ill. 1997). Like Texas, these states follow the general rule that an attorney owes a duty only to the person who is his or her client. Geaslen v. Berkson, Gorov & Levin, Ltd., 581 N.E.2d 138 (Ill. 1991). However, they have recognized that an exception must exist when an attorney is hired by a client specifically for the purpose of benefiting a third party. Pelham v. Griesheimer, 440 N.E.2d 96 (Ill. 1982); Schechter v. Blank, 627 N.E.2d 106 (Ill. App. 1993); see also McLane v. Russell, 546 N.E.2d 499 (Ill. 1989). In determining whether a duty is owed to a third party, the key factor to be considered is whether the attorney acted at the direction of or on behalf of the client for the benefit of a third party. Schwartz, 685 N.E.2d at 174; Pelham, 440 N.E.2d at 96.

VIII. CLAIMS RELATED TO COURT APPOINTMENTS

While many attorneys may welcome court appointments, they are also a source of potential liability. Often times, the attorney is an unwelcome attorney or party to the proceeding. These appointments should be carefully considered both as to the issues involved in the potential appointment and the potential basis for liability.

A. Attorney Ad Litem Under Texas Probate Code

An attorney ad litem is an attorney appointed by a court to represent and advocate on behalf of a person with a legal disability, a nonresident, an unborn or unascertained person, or an unknown heir in any probate proceeding, or a minor, proposed ward, an incapacitated person, or an unborn person in a guardianship proceeding. TEX. PROB. CODE ANN. § § 34A, 601 (Vernon 2003). Texas courts have held that it is the attorney ad litem’s duty to defend the rights of this involuntary client with the same vigor and astuteness he would employ in the defense of clients who had privately engaged him or her for such purpose. As such, the attorney ad litem should exhaust all remedies available to him or her, including but not limited to appealing an adverse finding, when and if appropriate.

Thus, regardless of the basis or the engagement, the attorney ad litem should exercise due diligence and zeal as a privately retained attorney. See discussion supra.

B. Guardian Ad Litem Under Texas Probate Code

The term “guardian ad litem” means a person who is appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding. TEX. PROB. CODE
ANN. § 601(11) (Vernon 2003). A guardian ad litem is an officer of the court and must consider the best interests of the ward or proposed ward. Section 681(4) also provides for the appointment of a guardian ad litem where the court determines that (i) the person who has applied to be appointed guardian is also a party to a lawsuit concerning or affecting the proposed ward’s welfare and (ii) the appointment of a guardian ad litem to represent the best interests of the proposed ward throughout the litigation will avoid a possible conflict.

The guardian ad litem protects the incapacitated person in a manner that will enable the court to determine what action will be in the best interests of the incapacitated person. See TEX. PROB. CODE ANN. § 645 (Vernon 2003). Attorneys serving as a guardian ad litem have been held to owe a fiduciary duty to the proposed ward or ward depending on his or her role in the proceeding. Until a few years ago, the Texas courts had not addressed the issue of an attorney’s potential liability for serving as a guardian ad litem. One of the first cases to address this issue is Woodruff v. Boyd, 891 S.W.2d 689 (Tex. App.—Dallas 1994, writ denied). See discussion infra.

Unfortunately, the role of the guardian ad litem, i.e., to advocate what he or she believes is in the proposed ward’s best interest, has lead to claims against these appointees. To balance the need for some protection of these appointees, in 2003 the Texas Legislature enacted Section 645A to provide limited immunity. Section 645A provides as follows:

(a) A guardian ad litem appointed under Section 645, 683, or 694A of this code to represent the interests of an incapacitated person in a guardianship proceeding involving the creation, modification, or termination of a guardianship is not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian ad litem.

(b) Subsection (a) of this section does not apply to a recommendation or opinion that is:
   (1) willful wrongful;
   (2) given with conscious indifference or reckless disregard to the safety of another;
   (3) given in bad faith or with malice; or
   (4) grossly negligent.

TEX. PROB. CODE ANN. § 645A (Vernon Supp 2006).

C. Guardian Ad Litem Under Texas Rule of Civil Procedure 173

Until a decade ago, no Texas court has considered the issue of the liability of a guardian ad litem appointed pursuant to Texas Rule of Civil Procedure 173. Rule 173 provides:

When a minor ... is a party to a suit either as plaintiff, defendant or intervener and is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor ... the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as part of the costs.

TEX. R. CIV. P. 173.

Rule 173 authorizes appointment of a guardian ad litem only when it appears that the next friend has an interest adverse to the person represented. See Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992); Newman v. King, 433 S.W.2d 420, 421-22 (Tex. 1968). The court must appoint a guardian ad litem when it determines that a conflict exists. See Jaynes v. Lee, 306 S.W.2d 182, 185 (Tex. Civ. App.—Texarkana 1957, no writ). Once appointed, the guardian ad litem replaces the role of the next friend or other purported representative of the

When it determines the requisite conflict exists, Texas courts commonly appoint an attorney in this role. The question then arises as to the attorney’s liability for his or her actions as guardian ad litem. One of the few cases to consider this issue is the Dallas appellate court decision of Byrd v. Woodruff, 891 S.W.2d 710 (Tex. App.—Dallas 1994, writ denied); but see Wilz v. Sanders, 2005 WL 428467 (Tex.App.—Waco, 2/23/05) (memorandum opinion)(not designated for publication)(guardian ad litem is entitled to derived judicial immunity when recommending approval of a settlement on behalf of a ward). In a case of first impression, the Byrd court was asked to consider the role and potential standard of liability of a guardian ad litem appointed to represent a minor in the context of a settlement hearing involving the apportionment of settlement proceeds. The court noted that:

The guardian ad litem participates in such proceedings—not as an attorney for the minor—but as the personal representative of the minor. Dawson v. Garcia, 666 S.W.2d 254, 265 (Tex. App.—Dallas 1984, no writ); Pleasant Hills, 596 S.W.2d at 951. While Texas case law does not specifically recognize a fiduciary relationship between a minor and guardian ad litem appointed under rule 173 in a friendly suit, the law recognizes the fiduciary duty of a guardian of a ward or the personal representative of an estate. See TEX. PROB. CODE ANN. §§ 3(aa), 110(g), 230(a) (Vernon 1980); Bailey v. Cherokee County Appraisal Dist., 862 S.W.2d 581, 590 (Tex. 1993); Gulf Ins. Co. v. Blair, 589 S.W.2d 786, 787 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.).

Id. at 705.

In further comparing the role of the guardian ad litem to a guardian, it noted that a guardian is “charged with the duty to properly and prudently manage and control the ward and her estate” and “a fiduciary duty to maintain and preserve the estate’s assets.” Id. at 705 (citing Blair, 589 S.W.2d at 787). The court found that the “guardian ad litem acts as both a personal representative and a guardian to the minor” with regard to the limited matters he or she is appointed to serve as a guardian ad litem. Id. The court held the “guardian ad litem’s court-appointed role to act as the representative of the minor’s interests is sufficient to establish a fiduciary relationship between the minor and the guardian ad litem.” Id. (citing Moore, 595 S.W.2d at 508; cf. TEX. PROB. CODE ANN. §§ 3(aa), 110(g), 230(a) (Vernon 1980); Bailey, 862 S.W.2d at 590; Gulf Ins. Co., 589 S.W.2d at 787).

Furthermore, the guardian ad litem will not be immune from civil liability on the basis of derived judicial immunity. Id (citing Turner v. Pruitt, 161 Tex. 532, 342 S.W.2d 422, 423 (1961)). The court held that a guardian ad litem “is not an agent of the court and has no delegated authority to act in the name of the court.” Id. at 707 (“if we cloak the guardian ad litem with judicial immunity, the minor has no recourse for an inadequate representation of her interests”). Therefore, a guardian ad litem appointed pursuant to Rule 173 is required to “(i) use the skill and prudence that an ordinary, capable, and careful person would use in the conduct of his own affairs, (ii) use diligence and discretion in representing the minor’s interests, and (iii) be loyal to his fiduciary.” Id. (citing InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ) (duty of trustee to manage trust property)).

It is notable that while the court found that an attorney serving as a guardian ad litem under Rule 173 was a fiduciary, it also found that no attorney-client relationship existed
between the minor and attorney. Thus, the guardian ad litem could not be held liable for attorney malpractice. *Id.* at 709. This can create a coverage issue if the attorney does not have a policy that covers claims based on breach of fiduciary duty. See discussion infra.

The recent decision of *Wilz v. Sanders*, however, disagreed with the *Byrd* decision and found that a guardian ad litem is entitled to derived judicial immunity when recommending approval of a settlement on behalf of a ward. In *Wilz*, the plaintiff argued that pursuant to *Byrd v. Woodruff*, the guardian ad litem was not entitled to immunity because he was appointed to represent the interests of the ward, displacing the ward’s father as next friend in a federal lawsuit. She argued that a guardian ad litem is not an agent of the court, but instead acts to protect the best interests of the ward. The court of appeals disagreed and, when affirming the holding of the trial court, noted that a guardian ad litem has derived judicial immunity in that the federal judge had appointed him to review the settlement on the ward’s behalf.

**D. Guardian Ad Litem Under Texas Trust Code**

Finally, a guardian ad litem may be appointed pursuant to Texas Trust Code Section 115.014. See TEX. PROP. CODE ANN. § 115.014 (Vernon 1995). Section 115.014 provides:

> At any point in a proceeding a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If there is not a conflict of interests, a guardian ad litem may be appointed to represent several persons or interests.

See *Id.*

Unlike a guardian ad litem appointed under the Texas Probate Code, there is no statutory immunity for a guardian ad litem appointed under the Texas Trust Code. Therefore, while there is no Texas case clearly on point, it is assumed that a guardian ad litem appointed pursuant to Section 115.014 will be subject to the same standard of liability as one appointed pursuant to Texas Rule of Civil Procedure 173. See discussion supra.

**E. Personal Representatives and Guardian Under Texas Probate Code**

An attorney appointed as a personal representative of an estate or guardian of either the person or estate is subject to the same fiduciary duties, responsibilities and liabilities as any other individual.

**IX. CLAIMS BY NON-CLIENTS**

Texas law has long held that when an attorney, acting for his client, participates in fraudulent activities, his or her actions are “foreign to the duties of an attorney.” *Querner v. Rindfuss*, 966 S.W.2d 661 (Tex. App.—San Antonio 1998, writ denied) (estate attorney may be held liable for fraud) (citing *Poole v. Houston & T.C. Ry. Co.*, 58 Tex. 134, 137 (Tex. 1882); *McKnight v. Riddle & Brown, P.C.*, 877 S.W.2d 59, 61 (Tex. App.—Tyler 1994, writ denied); *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ)). In such event, the attorney may be held personally liable if he or she “knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person.” *Id.* (citing *Likover*, 696 S.W.2d at 472). The attorney cannot shield himself or herself from liability on the basis that he or she was an agent of the client because no one is justified on that ground of knowingly committing a willful and premeditated fraud for another. *Id.* (citing *Poole*, 58 Tex. at 137-38; *Likover*, 696 S.W.2d at 472; *Hennigan v. Harris County*, 593 S.W.2d 380, 383 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.)).
Depending on the facts of the case, an attorney could be held liable for fraud, conversion, conspiracy, unjust enrichment, breach of fiduciary duty, and constructive fraud. *Querner*, 966 S.W.2d at 670-671. Each claim must, however, be considered in light of the actions shown to have been taken by the attorney in order to determine whether he or she can be held liable for such actions. If the facts show that the attorney actively engages in fraudulent conduct in furtherance of a conspiracy or otherwise, the attorney can be held liable. *Id.* at 666.

Similarly, if the facts show that an informal fiduciary relationship or confidential relations exists, the attorney may also be held liable. *Id.* at 667. The Texas Supreme Court has recognized the difficulty of formulating a definition of “fiduciary” that is sufficient to cover all cases. *Crim Truck & Tractor v. Navistar Intern.*., 823 S.W.2d 591, 593 n. 3 (Tex. 1992). In Texas, certain informal relationships may give rise to a fiduciary duty. These informal fiduciary relationships have been called “confidential relationships” and may arise “where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.” *Id.* at 594; see also *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261 (Tex. 1951).

Confidential relationships exist in those cases “in which influence has been acquired and abused, in which confidence has been reposed and betrayed.” *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980). The existence of confidential relationships is usually a question of fact. *Crim Truck & Tractor*, 823 S.W.2d at 594. A brief summary of the current state of Texas law as it relates to claims by non-clients against an attorney follows.

**A. General Bar to Claims by Third Parties**


Attorneys representing clients may “practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.” *White v. Bayless*, 32 S.W.2d 271, 275 (Tex. App.—San Antonio 2000, pet. denied). “An attorney’s duties that arise from the attorney-client relationship are owed only to the client, not to third persons, such as adverse parties.” *Id.; but see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAW. § 51 (2000)(duty of care to certain nonclients).*

**1. Claims by Other Parties**

Based on this fundamental precept, Texas law does not allow an opposing party to sue opposing attorneys for litigation activity. *See Bayless*, 32 S.W.3d at 275; *Renfroe*, 947 S.W.2d at 288; *Mitchell v. Chapman*, 10 S.W.2d 810, 812 (Tex. App.—Dallas 2000, pet. denied); *Taco Bell v. Cracken*, 939 F. Supp. 528, 532-33 (N.D. Tex. 1996). For example, in *White v. Bayless*, White alleged that Bayless’ attorneys conspired with Bayless to harm him through various legal filings, including actions attempting to obtain property contributed to a trust by White without informing White. 32 S.W.3d at 275. White also claimed that Bayless’ attorneys acted improperly by obtaining legal orders beyond the subject matter of Bayless’ original petition. *Id.* The court dismissed, however, all of White’s claims against the attorneys because the attorneys performed each of the challenged actions in the context of representing Bayless. *Id.* at 275-76.

Even when the attorney’s conduct in the

---

Attorney Liability Issues in Estate Planning and Probate

© Sarah Patel Pacheco
course of representation is claimed to be frivolous or without merit, that conduct is still not actionable. See Chapman’s Children’s Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 440-41 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). As a result, “an attorney may assert any of his client’s rights without being personally liable for damages to the opposing party,” and “attorneys cannot be held liable for wrongful litigation conduct.” Renfroe, 947 S.W.2d at 287-88.

2. Claims by Other Attorneys

Similarly, in Bradt, the appellate court held “that an attorney does not have a right of recovery, under any cause of action, against another attorney arising from conduct the second attorney engaged in as a part of the discharge of his duties in representing a party in a lawsuit in which the first attorney is also a party.” Bradt, 892 S.W.2d at 71-72.

3. Public Policy Supports a Bar

Texas has adopted this rule as a matter of public policy, because an attorney who fears suit arising from his representation may hesitate to represent his client zealously. See Bradt, 892 S.W.2d at 72. The threat of liability “would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to threat of liability for defending his client’s position to the best and fullest extent allowed by law, in availing his client of all rights to which he is entitled.” Morris v. Bailey, 398 S.W.2d 946, 947-48 (Tex. Civ. App.—Austin 1966, writ ref’d n.r.e.).

If an attorney misbehaves in the context of representation, the appropriate redress is found in procedural rules or statutory remedies providing sanctions for the conduct. See Chapman’s Children’s Trust, 32 S.W.3d at 440; Taco Bell, 939 F. Supp. at 532.

B. Exceptions to General Bar

The existence of an attorney-client relationship is not, however, a prerequisite to a claim against a trust and estate attorney. Due to the nature of the relationship involved, other claims have evolved and/or have been made by creative plaintiffs seeking to sue attorneys involved in these matters. The following is an overview of the more common claims brought against a trust and estate attorney by a non-client.

1. Conspiracy to Breach Fiduciary Duty

Texas courts have recognized that when a third party disrupts the confidential relationship between fiduciaries, that party may be liable for aiding and abetting a breach of fiduciary duty. See, e.g., Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942). If an attorney is that third party, he may be sued under limited circumstances.

For example, in Toles v. Toles, the court acknowledged that a wife in a divorce proceeding had raised an actionable claim against her husband’s attorneys for allegedly aiding and abetting a breach of fiduciary duty by the receiver charged with selling their home. 113 S.W.3d at 912. When an attorney acts on behalf of his client to disrupt a fiduciary relationship between two non-client parties, that conduct can be “foreign to the duties of an attorney” and exceed the bounds of the law’s protection for litigation conduct.

The same principle was applied in Querner v. Rindfuss. See discussion supra. In Rindfuss, the attorney represented the “estate” of Patti Querner in probate. 966 S.W.2d at 664. The court recognized that the beneficiaries of that estate had raised claims against Rindfuss sufficient to defeat summary judgment for conspiring with the executrix of the estate to defraud the beneficiaries. Id. at 669-70. For liability to attach, however, the attorney must have knowingly engaged in wrongful conduct.
beyond the ordinary course of representing his or her client. See Toles, 113 S.W.3d at 910-11.

In the recent decision of Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398 (Tex. App.—Houston [1st Dist.] 2005, pet denied), the appellate court limited, however, these potential claims by holding that “[a]bsent any allegation that Crain Caton committed an independent tortious act or misrepresentation, we decline Alpert's invitation to expand Texas law to allow a non-client to bring a cause of action for “aiding and abetting” a breach of fiduciary duty, based upon the rendition of legal advice to an alleged tortfeasor client.” Id at 407.

In Alpert, the plaintiff sued the law firm representing his opponent in litigation. The plaintiff sued the law firm for aiding and abetting a breach of fiduciary duty. Plaintiff did not allege that Crain Caton committed any acts or misrepresentations, independent of its representation of its client, upon which he justifiably relied, but rather based on the law firm’s representation of its client. The trial court dismissed the plaintiff’s lawsuit and awarded sanctions against both the plaintiff and the plaintiff’s counsel. The dismissal and sanctions were upheld on appeal. See Id.

2. Conspiracy to Defraud

Likewise, Texas law recognizes that “an attorney is liable if he knowingly commits a fraudulent act that injures a third person or if he knowingly enters into a conspiracy to defraud a third person.” See Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ); See also Querner v. Rindfuss, 966 S.W.2d 661, 666 (Tex. App.—San Antonio 1998, pet. denied) (noting that “[i]f an attorney actively engages in fraudulent conduct in furtherance of some conspiracy or otherwise, the attorney can be held liable”).

An actionable civil conspiracy is a combination by two or more persons to accomplish a lawful purpose by unlawful means must establish a fraudulent act. See Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398 (Tex. App. Houston [1st Dist.] 2005, pet denied) (citing Tri v. J.T.T., 162 S.W.3d 552, 556 (Tex. 2005)).

The elements of fraud are: (1) a material misrepresentation was made; (2) it was false; (3) when the representation was made, the speaker knew it was false or the statement was recklessly asserted without any knowledge of its truth; (4) the speaker made the false representation with the intent that it be acted on by the other party; (5) the other party acted in reliance on the misrepresentation; and (6) the party suffered injury as a result. See DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 688 (Tex. 1990); see also Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001), quoted in Toles, 113 S.W.2d at 911.

For example, in Likover, the attorney held liable for fraud and conspiracy had represented Ritter & Associates in the sale of an apartment complex and construction contract for work on that complex. 696 S.W.2d at 470-71. Ritter represented to Sunflower Terrace that they would perform the contract work, but they were completely incapable of performing the work. Nevertheless, Ritter induced Sunflower Terrace to do business with Ritter based on its representation, and Sunflower Terrace relied on that representation to its detriment. See Id. Ritter’s attorney, Likover, then came up with the idea that they should use the property deeds they had not signed over to the rightful owners as leverage to extort a settlement payment. Id. at 473-74. The court upheld the jury’s finding that Likover had conspired with the Ritters to defraud Sunflower Terrace. Id. at 474-76.

To determine whether a valid claim for conspiracy to defraud exists against a lawyer, the court must examine the nature of the complained-of conduct. See Alpert, 178 S.W.3d at 408. Actions that related to a lawyer’s representation of his or her client, such as defending against the other party’s claims, filing
lawsuits, involvement in settlement negotiations, asserting privileges, and otherwise representing his or her client do not constitute “conduct ‘foreign to the duties of an attorney’ in the representation of a client.” Id. Hence, such actions are not grounds for an actionable fraud claim against an attorney independent of a claim based on (1) legal privity, or (2) any independent duty to the non-client, coupled with justifiable reliance upon any representation or act made by the lawyer. See Id. citing White v. Bayless, 32 S.W.3d 271, 274-76 (Tex.App—San Antonio 2000, pet denied) (holding no cause of action exists in petition claiming that opposing attorney conspired to defraud him by filing numerous pleadings, attempting to evict him, filing false proof of claim in bankruptcy court, and using scurrilous language); Chapman Children's Trust, 32 S.W.3d at 440-43 (holding that allegations that opposing attorney refused to provide documentation, denied knowledge of facts, filed motions, pushed settlement, and concealed facts did no more than demonstrate that attorney attempted to negotiate smaller settlement and did not raise issue of fraud); Renfroe, 947 S.W.2d 287-89 (holding no cause of action against attorney for his participation in filing writ of garnishment with inaccurate facts); see also McCamish, 991 S.W.2d at 795 (limitations exist upon duty of counsel to non-clients).

3. Negligent Misrepresentation

Until a few years ago, an attorney representing a party in a legal proceeding could proceed without concern that another party (i.e. non-client) in the litigation could sue him or her for negligent misrepresentation. Although Texas courts had previously recognized this cause of action against other professionals, they had not recognized such a claim as between an attorney and an opposing party. But, in 1999, the Texas Supreme Court established such a claim in its decision of McCamish, Martin, Brown & Koeffler v. Appling Interests, 991 S.W.2d 787 (Tex. 1999) rehearing of cause overruled (Jun. 24, 1999) rehearing overruled (Jun. 24, 1999).

In McCamish, an attorney and his law firm represented their client in litigation that ultimately settled before trial. The parties entered into a settlement agreement that included certain representations regarding the capacity and authority of McCamish’s client to enter into a binding settlement agreement. The agreement included a provision in which both McCamish and its client made certain representations. It was subsequently determined that McCamish’s client did not have the requisite authority to enter into a binding settlement agreement. Id. at 790. Appling then filed suit against McCamish on the basis of negligent misrepresentation. The trial court held that McCamish owed no duty to Appling and could not be liable. The court of appeals reversed finding that an attorney may owe a duty to a non-client for material misrepresentation. Id. at 790. On petition for review, McCamish argued it should not be held liable to a non-client for a claim arising out of its representation of a client in litigation. Appling, on the other hand, asked the Court to recognize the distinction between legal malpractice cases, which require privity, and negligent misrepresentation cases, which do not. Id. Agreeing with Appling, the Texas Supreme Court extended the tort of negligent misrepresentation as described in Section 522 of the Restatement (Second) of Torts to attorneys. In doing so, however, the Court also recognized that an attorney may reduce or eliminate liability to a non-client by (i) setting forth limitations as to whom should rely on the representation, or (ii) providing disclaimers as to the scope and/or accuracy forming the basis of the representation. Id. at 794; see also Schlumberger Technology Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997). See discussion infra.

X. WAYS TO REDUCE LIABILITY DURING THE INITIAL STAGE OF THE ENGAGEMENT

A. Select Clients Carefully

It is rumored that Abraham Lincoln
gave the following advice to a new attorney upon passing the bar, “Young man, it’s more important to know what cases not to take than it is to know the law.” Jay G. Foonberg, How to Start and Build a Law Practice (3d. 1991) at 135. Unfortunately, neither President Lincoln nor anyone else can advise an attorney which clients, or cases, should be taken. Rather, it is a product of the attorney’s legal education, practical experience, intuition, and sometimes moral and ethical beliefs. Each case must be evaluated based on the facts and circumstances of that particular proposed representation. Some cases involve greater litigation risks than others. Warning signs of a representation that may cause potential litigation include:

- A client who has been represented by a number of attorneys
- A client who is emotionally out of control
- A client with unreasonable expectations
- The know it all client
- The client who wants to micromanage the representation
- A client who wants to exclude the beneficiaries in administration matters
- A client who is dependent on a third party
- The out of control fiduciary
- The out of control beneficiary
- Hostile or vindictive fiduciary
- Hostile or vindictive beneficiaries
- A estate planning client that seeks an unusual disposition of estate
- A potentially incapacitated client
- Representing spouses, particularly those with disparate wealth between spouses
- Beneficiaries with drug, alcohol or other dependencies
- Existing or anticipated family conflict

While the preceding is not intended to be a complete list, these situations are often a precursor to future litigation, which could include the attorney. An attorney is not under an ethical obligation to accept every requested engagement. It is appropriate for an attorney to consider whether the proposed engagement will result in him or her becoming an unwilling witness in, or party to future litigation.

**B. Assess Your Legal Competency**

Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct provides that an attorney may not accept or continue the representation, which the attorney knows or should know, is beyond his or her legal competence. When determining whether a matter is beyond an attorney’s competence, the practice area of the underlying representation is not the only issue. Relevant factors include the complexity of the particular case, the attorney’s experience in addressing the facts of that particular case, the time the attorney is available to address the issues, and the attorney’s experience in handling issues raised by such representation.

Furthermore, while an attorney may be technically competent to handle the proposed engagement, the attorney may determine that the proposed client’s needs could be better served by referring the potential client to another attorney who has dealt with the specific issues and complexities that may be raised during the representation. An attorney does not violate the Rules of Ethics, however, if he or she associates with another attorney for purposes of gaining additional knowledge or expertise with regard to the client’s specific issues, provided, the client’s representation can be carried out in a competent manner upon receiving such additional advice. See Tex. R. Disciplinary P. 1.01(a), reprinted in Tex. Gov’t Code Ann., tit. 2, subtit. G app. (Vernon Supp. 2006). See discussion infra.

**C. Consider Potential Conflicts of Interest**

The Texas Disciplinary Rules of Professional Conduct provide that an attorney should not represent individuals who have material conflicts of interest. See Tex. R. Disciplinary P. 1.06, reprinted in Tex. Gov’t...
CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2006). In a civil proceeding, clients may consent to certain conflicts of interest created by joint representation provided the consent is obtained after full disclosure. See Id.; see also FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995). Potential or alleged conflicts of interest are generally raised when an attorney represents both a husband and a wife, or other joint clients, in a trust, estate or estate-planning context. While potential conflicts of interest do not prohibit all joint representations, it is necessary to evaluate the potential conflicts and the nature, implications and possible consequences of the joint representation before agreeing to the joint engagement. The failure to recognize conflicts of interest can lead to claims by the client and/or a third party. See discussion infra.

D. Clearly Identify the Client

Care should be taken to clearly (i) identify the client, (ii) identify the specific capacities the client will be represented, and (iii) confirm the authority of the client to enter into the engagement. In matters relating to trust and estates, one person may represent a variety of interest. For example, a surviving spouse may seek representation as an executor and/or trustee of a trust created under the deceased spouse’s will. He or she may also have individual claims or interests that require representation. The attorney should be clear whether he represents the spouse in all capacities, if no conflict exists, or only certain capacities. See discussion infra.

Likewise, it is advisable to review any relevant documents to confirm the potential client or clients have the legal ability to retain the attorney. For example, co-fiduciaries may require joint agreement under the terms of the governing instrument. See Conte v. Conte, 56 S.W.3d 830 (Tex. App.—Houston 2001, no pet). Likewise, engagement by an entity requires the consent of certain officers or directors or appropriate resolutions.

E. Obtain an Engagement/Fee Agreements

As with any representation, a well drafted engagement or fee agreement can both provide protection to the attorney and be beneficial to the client. The agreement should set out the scope of the engagement as well as the method of calculating and collecting fees. If entering into a joint representation of, for example, a husband and wife or co-fiduciaries, the fee agreement should also discuss potential conflicts of interest and the expected course of action in the event of an actual future conflict. The agreement may also contain dispute resolution provisions.

A detailed discussion of engagement agreements is beyond the scope of this outline. See Patrick J. Pacheco’s outline entitled “The Engagement Agreement: One Knee and a Diamond Ring – Lawyer Style” for a detailed discussion of the various issues and sample provisions. However, a brief discussion of some of the more prevalent provisions that may reduce future litigation follows:

1. Address Joint Representation Issues

The engagement letter should address the issues involving a joint representation, provide any necessary disclosures and obtain the client’s consent to the joint representation. With regard to a potential engagement involving the joint estate planning of a husband and wife, the fee agreement may address the joint representation as follows:

Clients have elected to jointly hire Firm. By agreeing to a joint representation rather than engaging separate independent counsel, Clients have each foregone the potential benefits of having Clients’ own lawyer advocate on each Clients’ behalf in an effort to minimize expenses and facilitate the development of a coordinated estate plan. As Firm has discussed, many couples have reasonable differences of opinion with regard to one or more aspects of their estate
plan, however, Firm, in representing both Clients, cannot advocate on behalf of just one of the Clients over the other. Rather, Firm will balance both views, advise both Clients regarding the positives and negatives associated with each view, and attempt to resolve disagreements before they rise to the level of an actual conflict of interest. Firm does not currently have knowledge of any existing conflict between Clients, or any knowledge of any facts that may result in a future conflict. If any conflict or potential conflict does arise, however, Clients agree to make Firm aware of the conflict immediately. If Firm is unable to resolve the conflict, Firm will withdraw from representation of Clients jointly and each of the Clients, individually.

In a joint fiduciary representation situation, the agreement may provide as follows:

The Clients have requested that the Firm represent them jointly. The Clients are aware that the Firm has a duty to exercise independent professional judgment on behalf of each of the Clients. When an attorney is requested to represent multiple clients in the same matter, he or she can do so if he or she concludes that he or she can fulfill this duty with regard to each of the clients on an impartial basis and obtains the consent of each client after an explanation of the possible risks involved in the multiple representation situation. Further, if at any time during the representation it is determined that, because of the differences between the joint clients, an attorney can no longer represent each of the clients impartially, then the attorney must at that time withdraw from representing all of the clients. If any conflict arises that could affect the Firm’s representation of any of the Clients, the Clients agree they shall promptly inform the Firm of the conflict. The Clients understand, however, that if in the future the Clients’ differences of opinion arise which cannot be resolved on an amicable basis or that the Firm concludes that the Clients’ differences of opinion cannot be resolved on terms compatible with the best interest of all the Clients, then the Firm will withdraw from the representation. In the event of withdrawal, the Firm will be entitled to payment for their fees and expenses incurred to date.

Finally, the attorney should inform the client that information provided by one joint client will be shared with the other joint client, and obtain all the clients’ consents to such disclosure. For example, the fee agreement may provide as follows:

The Clients further understand that any documents or information disclosed or provided by any of the Clients may be disclosed to the other Clients in connection with this representation. Each Client consents and agrees that the Firm may disclose such information to all Clients and waive any privilege it may have as to such documents and information as between the Clients.

2. Address Identity of Client and Relevant Capacities

As discussed previously, the attorney should be clear whether he represents the potential client in all capacities, if no conflict exists, or only some capacities. It is advisable to address these in the fee engagement. For example, the fee agreement may provide that:

Firm’s representation, with respect to this matter, will include advising, counseling, processing, litigating, and advising Client in Client’s
capacity as the executor of Mr. X’s estate. Firm’s services may also include advising Client regarding the administration of Mr. X’s estate so that Client may properly carry out Client’s duties and responsibilities as executor. Note that as we discussed, Firm will not be representing Client individually or advising Client on Client’s individual claims or interest. Firm recommend that Client seek the advice of separate and independent counsel if Client has any questions regarding Client’s individual rights and claims with the regard to Mr. X’s estate.

3. Address Scope of Representation

Because an estate planning or fiduciary engagement may include a host of issues related to the engagement, it is advisable for the attorney to be clear as to the scope of the engagement. It is suggested that the fee agreement include a statement as to those matters on which the attorney is being engaged. Likewise, the fee agreement should attempt to be as clear as possible as to any limitations on the scope of the representation with regard to specific actions that will and will not be undertaken. See TEX. DISCIPLINARY R. PROF’L CONDUCT 1.02(b).

For example in an estate planning engagement, the agreement may provides as follows:

Client has retained Firm to prepare the following estate planning documents for Client:
- Last Will and Testament;
- Directive to Physicians;
- Durable General Power of Attorney;
- Power of Attorney for Health Care - Designation of Health Care Agent;
- Declaration of Guardian Before Need Arises; and
- Instructions for preparing beneficiary designations to coordinate transfer of non-probate assets.

With regard to these documents, client has advised Firm that his total property is worth less than $1,000,000 and notwithstanding the fact that he net worth may increase in the future, he has decided that he does not want to engage Firm to prepare wills that provide for estate tax planning or otherwise address potential estate taxes. Client agrees that once Firm has prepared and assisted Client in the execution and implementation of Client’s estate plan, Firm’s representation of Client in this matter will terminate.

A sample of an engagement involving the settlement of an estate may provide as follows:

Firm will represent Client in Client’s capacity as personal representative (i.e., executor and/or any other related fiduciary capacities) of the Estate. Firm will provide legal advice and counsel regarding Client’s fiduciary rights and duties under applicable law, including the Texas Probate Code, the Texas Trust Code, the Texas Tax Code, and the Internal Revenue Code, and will assist Client in the proper fulfillment of those duties. Once Firm becomes more familiar with the circumstances and issues of the Estate Firm will provide more detail but, generally, Firm’s anticipated services include the following:

- Estate administration: Firm will determine whether probate
and/or administration are necessary or desirable. If so, Firm will prepare the required Court pleadings and documents, attend the required Court hearings, and advise Client on matters relating to the collection and administration of Estate assets.

- Tax returns: Firm will determine whether a federal estate tax return and any state inheritance tax returns are required for the Estate once Client provide the information needed to make such a determination. If so, Firm will prepare the returns as required. (Note: Firm do not prepare income tax returns, such as Form 1041 or the deceased’s final Form 1040. Generally, a CPA will prepare income tax returns and Firm advises Client to engage a qualified CPA to advise Client on such matters).

- Estate distribution—implementation and winding up: Firm will advise Client on matters relating to the final distribution of Estate assets in accordance with the provisions of the deceased’s Will and other estate planning documents.

Finally, it is advisable to clearly identify matters that the attorney will not handle. This is generally those that commonly arise during the course of the engagement that could be claimed to be handled by a trust and estate attorney, such as fiduciary income tax returns. For example, a sample provision confirming the attorney will be providing estate tax advice but not income tax advice may provide:

Client understands that Firm’s representation does not include rendering any income tax advice to Client or the preparation of any income tax returns. Client must seek such advice from Client’s accountant or other financial advisor. Firm will, however, be advising Client regarding the federal estate tax and the Texas inheritance tax and preparing the appropriate federal estate and Texas inheritance tax returns.

4. Address Basis For Legal Fees & Expenses

The fee agreement should generally set forth the method of computing attorney’s fees. This is consistent with the expressed preference of the Texas Disciplinary Rule of Professional Conduct 1.04 in the non-contingent fee situation and the express requirements of Texas Disciplinary Rule of Professional Conduct Rule 1.04 and Section 82.065 of the Texas Government Code in the contingent fee situation. See TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04 & cmts.; TEX. GOV. CODE ANN. § 82.065 (Vernon Supp. 2006).

For example, a fixed fee estate planning agreement may provide as follows:

Based on Firm attached customary fixed-fee schedule for estate planning services, Firm have agreed on a total fixed fee of $____. The balance will be due when Client sign the documents described above, or, if sooner, one month after Firm first deliver to Client proposed drafts of the documents described above. The fixed fee covers: (1) Firm’s initial conference or review of financial information and proposed estate plan, (2) preparation of first drafts of the estate planning documents indicated above in accordance with Firm’s discussions or review and written instructions to date and (3) an in-office signing conference. The fixed fee also includes up to ___ hour(s) of
additional attorney time (at the undersigned’s hourly rate) for (a) any additional conferences and communications (in person, by phone, or by e-mail) with Client or others on Client’s behalf, and (b) any revisions to the initial drafts (e.g., where Client changes his mind or because information Client have given Firm so far proves to be inaccurate or incomplete). Note, Firm fixed fee includes standard expenses (basic photocopying, postage, etc.) but does not include additional expenses Firm may incur on Client’s behalf (such as requested messenger delivery charges, staff overtime when Client requests rush service, filing and recording fees, long distance charges, extra photocopies, etc.), which Firm will bill to Client.

An hourly rate engagement may provide as follows:

Firm’s fee will be a reasonable fee based primarily on the time Firm expends providing the service outlined above (including additional conferences and communications, in person, by phone, by letter or by e-mail, with Client or others on Client’s behalf). Firm generally charge its time in minimum units of ¼ hour—15 minutes. More than one attorney or paralegal with the Firm may assist with respect to this matter. Currently, hourly rates for Firm’s paralegals and attorneys vary from $___ to $___. Firm review and may adjust its billing rates from time to time and Client agrees that Firm may do so.

It may alternatively provide:

In consideration of this representation, Client agrees to pay Firm, in ___, Texas, the following amounts: a fee of $___ per attorney hour for the time spent on the case for all work, including but not limited to pleadings, preparation for trial, research, telephone calls, drafting of documents, depositions, interrogatories and court appearance; a fee of $___ per hour for support staff time. Each portion of a quarter hour is billed as a full quarter hour. Client promises to reimburse and indemnify Firm for and against all sums that they may spend or incur in representing Client such as Court costs, taking of depositions, the gathering and adducing of evidence, expert or otherwise, obtaining photographs and x-ray pictures, medical examinations and treatment, duplication expense, long distance telephone calls, certified mailing charges and travel. Client agrees to pay all fees and costs on a monthly basis, with payment due upon receipt of a statement from the Firm. This fee schedule will be valid for a period of one year from the date of this contract, but will be subject to change after that time.

If fee is based on a percentage, the contingency must be approved in writing, preferably prior to the commencement of the engage. A contingency fee agreement may provide as follows

Client hereby assigns, sells, conveys, and agrees to pay and deliver to the Law Firm the following contingent interest in the Lawsuit measured by the amount or recovery to be enjoyed, realized out of or collected from Lawsuit (whether in money, other property, future relief, or other consideration), either through settlement, compromise or judgment (such
amount of recovery is hereinafter referred to as the “Litigation Proceeds” and is more specifically defined below):

- If, after the effective date of this Agreement, the Lawsuit is settled, thirty percent (30%) of the Litigation Proceeds;
- If the Lawsuit is tried in the initial trial court, thirty-five percent (35%) of the Litigation Proceeds (for the purpose of this Agreement, the Lawsuit will be deemed to be “tried” if the Law Firm announces ready at a trial on the merits of the case or if any hearing approving a settlement agreement is contested);
- If the judgment of the initial trial court is appealed to a Court of Civil Appeals, thirty-seven and one-half percent (37 ½ %) of the Litigation Proceeds (for the purpose of this agreement, the lawsuit will be deemed to be “appealed” if the first step in such appeal such as filing the cost bond by either side has been done). Client understands that a case may be tried and a settlement reached in principle but not documented by the time cost bonds and other filings are done which would increase the attorney’s fee;
- If the judgment of the Court of Civil Appeals is appealed to the Texas Supreme Court, forty percent (40%) of the Litigation Proceeds.

5. Address Payment & Sources of Fees

Likewise, the agreement should be clear in what capacity the client is responsible for the payment of the attorney’s fees and expenses. See discussion supra. For example, when the client is a fiduciary, the fee agreement should clarify whether the client is liable only in his or her fiduciary capacity or whether he or she is also individually liable. This should be confirmed in both the provisions of the fee agreement by requiring the client to sign in all relevant capacities.

Furthermore, care should be taken to confirm that any payments from fiduciary assets are authorized under the instrument or Texas law. As discussed previously, the payment of an attorney has lead to claims against the attorney for conspiracy. While many times such claims are frivolous, the attorney will be forced at a minimum to defend against such claims.

6. Include Dispute Resolution Provisions

While not required, it is advisable to include a mechanism to resolve future disputes relating to the engagement. These provisions may range from mediation to arbitration. A brief discussion of the most common provisions follows:

a. Arbitration

Arbitration continues to provide parties an alternative forum in which to settle disputes and often avoids unwanted publicity or disclosures associated with a public proceeding. To be binding, parties must contractually agree to submit their disputes to arbitration in lieu of, or in addition to, other remedies available under Texas law. In the past decade, arbitration procedures have been routinely included in agreements involving business associations such as partnerships, employment, purchase and sale, and professional services agreements. More recently, they are being used to attorneys to resolve disputes with their clients.

Although Texas law is still developing in this area, it appears that Texas Court’s have supported the enforcement of arbitration provisions in engagement agreements. In the
case of *In re Hartigan*, 107 S.W.3d 684 (Tex. App.—San Antonio, 2003, orig. proceeding, pet. denied), the San Antonio appellate court considered the enforceability of an arbitration provision in an attorney engagement agreement. The former client claimed that an arbitration provision in an engagement agreement violated Texas Disciplinary Rule of Professional Conduct 1.08(g). *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 1.08(g). Texas Disciplinary Rule of Professional Conduct 1.08(g) reads as follows:

(g) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith. *See Id.*

The court, however, found that that the arbitration provision in the engagement agreement did not violate Texas Disciplinary Rule of Professional Conduct 1.08. Rather, it found that arbitration provisions merely prescribed the procedure for resolving any disputes between attorney and client and did not act to limit the attorney’s potential malpractice liability. Therefore, the court ruled that requiring the client to arbitrate her legal malpractice claims would not violate Texas Disciplinary Rule of Professional Conduct 1.08(g).

If arbitration is desired, the arbitration provision should expressly address the matters that may be submitted to arbitration, the process of arbitration, who shall pay the fees of arbitration, and whether there are any specific requirements as to the proposed arbitrators, such as board certified attorneys, etc.

For example, the a simple provision allowed either side to compel arbitration follows:

The Client and Law Firm agree that any disputes arising out of or in any way related to Law Firm’s agreement (including but not limited to the services performed by any attorney under this agreement) shall be submitted to confidential binding arbitration in X County, Texas in accordance with the rules of the American Arbitration Association.

A more detailed provision that limits the qualifications of the arbiter may provide as follows:

Any dispute that may arise with respect to or relate to any aspect of this fee agreement or Law Firm (including but not limited to the fees charged by and/or services performed by any attorney under this agreement) shall, on the written request of either of us, be submitted to arbitration in accordance with appropriate statutes of the State of Texas and the Commercial Arbitration Rules of the American Arbitration Association; and, judgment upon the award rendered by the arbitrators may be entered in any court having appropriate jurisdiction. Each party shall appoint one person as arbitrator, and a third arbitrator shall be chosen by the two arbitrators previously selected by the parties; provided however, if there is no agreement as to the third arbitrator within 60 days after the notice of arbitration is served, then the third arbitrator shall be selected by a district or probate judge in X County, Texas, having subject matter jurisdiction over the dispute. We further agree that the expenses of arbitration shall be paid
in such proportions as the arbitrators decide, except that the successful party in any such proceeding seeking enforcement of the provisions of this agreement shall be entitled to receive from the party not prevailing reasonable and necessary attorneys’ fees and expenses, in addition to any other sums to which such successful party may be entitled. The arbitrators shall decide the identity of the successful party for purposes of the preceding sentence. We also agree that each of the arbitrators shall be either (I) Board Certified as an Estate Planning and Probate Law specialist by the State Bar of Texas, or (ii) a Fellow of the American College of Trust and Estate Counsel. Arbitration is final and binding on the parties. The parties are waiving their right to seek remedies in court, including the right to jury trial. Pre-arbitration discovery is generally more limited than and different from court proceedings. The arbitrators’ award is not required to include factual findings or legal reasoning and any party’s right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

b. Mediation

Whether or not an arbitration provisions is included, it is advisable to include, at a minimum, a provision to mediation any disputes. This allows issues to be address in a non-public forum, preferably before litigation is filed that could cause either party to become entrenched in defending their position. For example, the engagement agreement may provide:

Before resorting to litigation or arbitration, any disputes arising out of or connected with this engagement agreement or Law Firm’s engagement (including but not limited to the services performed by any attorney under this agreement) will be submitted to mediation in __ County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. Firm and Client will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential.

c. Waiver of Right to Jury Trial

If arbitration is not included, another alternative to reduced future litigation costs is to include a jury trial waiver on any issues relating to the representation. While there is no Texas case that has addressed this in the context of an engagement agreement, the Texas Supreme Court has currently upheld such an provision in a commercial contract. See In re The Prudential Insurance Co. of America and Four Partners L.L.C., 148 S.W.3d 124 (Tex. 2004); see also In re General Elec. Capital Corp. 203 S.W.3d 314 (Tex. 2006)(trial court abused its discretion in refusing to enforce jury waiver because contractual provision was not proven to be invalid or impliedly waived by the knowing conduct of the party seeking to enforce it).

In Prudential, the Texas Supreme Court considered the issue of whether a lease provision waiving a jury in any litigation over the lease is by itself unenforceable and, if not, whether the provision is invalid in a lease. The underlying lawsuit involved a restaurant company’s lease with Prudential’s agent and the restaurant owners guaranty that incorporated provisions of the lease by reference. The restaurant company and the owners sued to end the lease because of an allegedly foul odor on the premises and requested a jury trial. Prudential moved to quash their jury demand, but the trial court denied the motion. The court of appeals then denied mandamus relief. Reversing the lower courts, the Texas Supreme Court held that a jury
trial-waiver clause in an agreement does not violate Texas law or public policy. Rather, public policy that permits parties to waive trial altogether does not forbid waiver of trial by jury. Thus, if the parties willingly agree to a non-jury trial, enforcing that agreement is preferable to leaving them with arbitration as their only enforceable option because in arbitration parties waive not only their right to trial by jury but their right to appeal. As with any waiver, the waiver of the constitutional right to a jury trial should be voluntary and with an understanding of the legal consequences. See Id.

A sample jury waiver provision based on the Prudential decision may provide:

THE CLIENT HEREBY UNCONDITIONALLY WAIVES CLIENT'S RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF, DIRECTLY OR INDIRECTLY, THIS ENGAGEMENT AGREEMENT (INCLUDING BUT NOT LIMITED TO THE SERVICES PERFORMED BY ANY ATTORNEY UNDER THIS AGREEMENT), OR ANY OF ITS PROVISIONS. IN THE EVENT OF LITIGATION, THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.

In light of the recent General Elec. decision, it is advisable to make this provision as conspicuous as possible to avoid a claim that the potential client did not see it or was not aware of its inclusion. In re General Elec. Capital Corp. 203 S.W.3d at 316 (conspicuous provision is prima facie evidence of knowing and voluntary waiver and shifts burden to opposing party to rebut it).

F. Consider Court Appointments Carefully

As discussed previously, attorneys should consider court appointments carefully before accepting them. See discussion supra. Considerations should include:

- The legal issues involved;
- Competency to handle the appointment;
- Time to commit to the appointment;
- The potential liability involved;
- The hostility of the parties; and
- The financial ability to adequately carry out the appointment.

When in doubt, the attorney should consider declining the appointment.

XI. WAYS TO REDUCE LIABILITY DURING THE ENGAGEMENT

A. Be Clear Who The Attorney Represents

As discussed previously, the existence of an attorney-client relationship may be either express or implied from the parties’ conduct. See Perez, 822 S.W.2d at 265. Once established, the attorney-client relationship gives rise to corresponding duties on the attorney’s part. Thus, an attorney representing a fiduciary should be careful to never create the impression that he or she represents a beneficiary, creditor or other third party. These impressions can be formed via meetings, letters and other communications with third parties. Ways to reduce such potential claims include the following:

- Any meetings should be preceded with a statement that the attorney only represents the fiduciary;
- A written notice of non-representations can be give to any potential beneficiaries and creditors in the initial letter or contact;
- A written acknowledgement of no representation may be requested before
any meetings with the third parties;
- The attorney should not answer any questions regarding the third parties rights;
- Documents to be signed by the third party should not be prepared by the attorney, if possible; and
- Documents to be signed by the third party and prepared by someone other than his or her attorney should confirm that the drafter does not represent such person and that the signor has been advised to seek independent counsel before signing.

While the preceding list is not exclusive or even mandatory, these reflect efforts to reduced claims made in actual proceeding over the past few years.

B. Be Clear and Careful in All Written Communications with Clients

Decisions related to estate, trust and guardian issues are often not black and white. Rather, the advice provided often depends on financial and personal factors that differ from case to case. For example, a client with a substantial estate may elect to have a simple non-taxed-planned will when most would opt for tax planning. Likewise, in litigation, one client’s litigation tolerance may be substantially different than another’s.

1. Use Correspondence to Confirm and Clarify

As the objectives of clients may differ in hindsight, it is often advisable to confirm in writing ones advice on significant issues. For example, in the estate planning area the correspondence forwarding drafts and final documents provides an opportunity to confirm the client’s objectives, including any decision not to take advantage of certain techniques. In a litigation matter, a letter forwarding a draft of a settlement agreement may discuss the client’s decisions to settle and potential recovery if the client elected not to settle and the case proceeds to trial. Sample letters to a client forwarding drafts and final documents are attached as exhibits.

2. Use Documents to Confirm and Clarify

Additionally, in the wake of Belt, some estate planning attorneys have been considering how to allow the documents prepared to speak to the client’s planning objections. For example, Steve Saunders has provided the following paragraph that could be inserted in a client’s will:

#. Consideration of Disposition: I recognize that the law allows me to dispose of my estate in any way and to any beneficiary or beneficiaries that I wish to leave my property to. I have carefully considered this plan for the disposition of my estate over a period of __________ and this will reflects my wishes.

I also recognize and have been apprised, and have considered, that there are many other things I could do in my estate planning to, among other things, minimize potential taxes (including estate and generation skipping taxes) and to protect assets from the claims of my creditors and those of my beneficiaries. I recognize that some of
those estate-planning techniques could protect assets from creditor’s claims and minimize taxes. Those estate planning techniques include, but are not limited to, making gifts, (including charitable gifts), using [more or additional] trusts in my planning, life insurance planning, rearranging my financial assets to concentrate them in assets exempt from creditors’ claims, [offshore planning], and the use of partnerships and other entities. My attorney and I have discussed these planning opportunities available to me and I have explicitly declined to pursue them. I fully recognize that I have not taken advantage of every opportunity available to me in my estate planning, including all opportunities to minimize taxes and protect assets from creditor’s claims. My current planning meets my wishes in every respect.

3. Practice Safe Emailing

Finally, care should be taken in email correspondence with clients. This form of communication is rapidly becoming the norm with many clients. For many clients, it has become desirable as it invites a quick response and they believe is less costly than calling the attorney. While a short response to some inquiries is appropriate, many times the inquiry does not include all the relevant information and the response does not include the detailed analysis that the attorney would include in a more formal communication. Also, continued email communications have a tendency to inhibit the formation of a strong attorney client relationship. Therefore, the client may be more apt to change counsel instead of discussing a concern regarding a bill or related matters with the attorney.

C. Be Careful in All Written Communications with Beneficiaries & Third Parties

It is common when representing a fiduciary to communicate with the beneficiaries and/or creditors of the estate or trust on the fiduciary’s behalf. As discussed previously, these contacts may create a claim that the beneficiary, creditor, etc., believed that the attorney represented the beneficiary, creditor, etc. Thus, it is suggested that any written communication with any potential non-client reiterate (i) who the attorney represents, and (ii) that the attorney does not represent the recipient.

Furthermore, it is advisable for an attorney to avoid preparing legal documents, such as waivers, disclaimers, etc., for non-clients. However, given the realities of the estate and trust area, it is sometimes necessary for the fiduciary’s attorney to prepare such documents to expedite his or her appointment or the settlement of the estate or trust. If the attorney is providing the non-client a document for execution, the correspondence should clearly suggest that the recipient have the document reviewed by his or her own counsel.

For example, it is common to require waivers of service from various heirs or beneficiaries in order to proceed on an application regarding an estate or trust. The letter forwarding a waiver of service may provide as follows:

A number of matters must be completed before Mr. X’s appointment. Among those is to provide a copy of the application to you and serve it upon you in accordance with Texas law. Therefore, by separate copy of this letter, we have forwarded you a copy of the enclosed by certified mail to meet this technical requirement. It is possible, however, to expedite this matter by asking you to sign the enclosed Waiver of Citation. Assuming you are willing to do so, we enclose a Waiver of Citation for your review. If the enclosed meets your approval, please sign where indicated in the
presence of a Notary Public. Once signed, please arrange to forward your signed Waiver to my offices in the enclosed self-addressed stamped envelope. Upon receipt, we can file it with the court indicating you have received a copy of the enclosed application. This will help Mr. X in moving this matter forward as soon as possible. Note, that we must remind you that we do not represent you in this matter. Therefore, if you have any questions or wish to discuss the legal significance of the enclosed Waiver, we suggest you contact counsel of your own selection before signing the enclosed Waiver as it may affect your legal rights with regard to the Estate.

Likewise, it is advisable to include in the document an acknowledgement of non-representation. It is notable the lending industry has been requiring these statements and acknowledgements in real estate closings for number of years. For example, a Section 145 designation may include the following provisions:

I further acknowledge that X Firm has prepared this Designation on behalf of its client, Mr. Y, as the proposed Independent Administrator with Will Annexed of the Estate of ________, Deceased, and does not represent me in this matter. I further acknowledge that I am aware that I may retain my own counsel to advise me regarding this Designation and/or the Estate.

Furthermore, a personal representative or trustee winding up his or her affairs may seek a receipt and release from various heirs or beneficiaries in order to seek his or her discharge as the fiduciary for the estate or trust. The letter forwarding a receipt and release may include the following:

We remind you that we only represent Ms. X, in her capacity as trustee, in matters relating to the ABC Trust. Therefore, if you have any questions regarding this matter, we ask that you discuss those with counsel of your choosing before signing and returning the enclosed Receipt and Release and negotiating the enclosed check.

Finally, any letter to a potential beneficiary or heir should be written, if possible, in a manner that confirms, each time, that the attorney cannot answer any legal questions of the recipient. For example, the letter may include the following:

Thank you in advance for your prompt attention and assistance in the preceding matters. Please feel free to call my legal assistant or me with any inquiries regarding Mr. X’s administration of the estate; however, any legal questions should be directed to your attorney.

D. Advise Client of Client’s Fiduciary Duties & Potential Liability

The attorney for a proposed personal representative or guardian should explain to the potential fiduciary his or her powers, duties and potential liability prior to his or her appointment, if possible. In these discussions, it is important to impress upon the potential or new appointee the possibility of being sued as a result of their fiduciary appointment. It is advisable to then follow-up with a letter confirming these discussions and reducing them to writing. Sample letters to an executor and guardian are attached as exhibits.

E. Avoid Making Alleged Representations and Use Disclaimers of Reliance When Appropriate

It is common for other parties to request
that a fiduciary make certain express representations to verify certain facts or conditions. Representations may be used to confirm assets, liabilities, past events or other matters that an interested party deems relevant to an estate or trust. While such information is needed or even mandatory to meet certain fiduciary duties, the attorney for the fiduciary should avoid being the one making such representations. When he or she does, and it turns out to be incorrect, the attorney may face claims of negligent misrepresentation. See discussion supra.

Furthermore, in any written documents that may be prepared by the attorney for the fiduciary and signed by a beneficiary or third party, it is suggested to include a statement that the attorney and/or his law firm does not represent the other parties. For example, a distribution or settlement agreement may include the following provision:

Each Party confirms and agrees, and the law firm of ________________________, solely represent A and B and do not and have never represented any other Party and have not provided any other Party legal advice or services, information or made any representation to any other Party.

The Texas Supreme Court has sanctioned the use of such disclaimers of reliance to reduce potential claims based on reliance or negligent misrepresentation. See Schlumberger Technology Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997); Atlantic Lloyds Insurance Company v. Butler, 137 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2004, pet. filed July 6, 2004) (disclaimer of reliance in settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties). A disclaimer of reliance may provide as follows:

Each party confirms and agrees that such party (i) has relied on his or her own judgment and has not been induced to sign or execute this Agreement by promises, agreements or representations not expressly stated herein, (ii) has freely and willingly executed this Agreement and hereby expressly disclaims reliance on any fact, promise, undertaking or representation made by the other party, save and except for the express agreements and representations contained in this Agreement, (iii) waives any right to additional information regarding the matters governed and effected by this Agreement, (iv) was not in a significantly disparate bargaining position with the other party, and (v) has been represented by legal counsel in this matter or has voluntarily and of his or her own judgment waived his or her right to seek counsel.

**F. Theft By A Fiduciary-Client**

Attorneys representing guardians generally advise their clients of their fiduciary duties at the time of their appointment and assist those clients in complying with the provisions of the Texas Probate Code during the period of their administration. However, the realities of practicing law teach us that not all clients are perfect and not all clients follow their attorney’s advice. When those clients are acting as a fiduciary, the client’s actions may become a reflection on his or her attorney. Furthermore, the client may have unknowingly used the attorney’s services to further the client’s fraudulent conduct.

For example, a person may use the attorney’s services to obtain his or her appointment as a fiduciary and then use those fiduciary assets for his or her personal benefit. Upon discovering the nefarious conduct, the attorney representing the fiduciary must decide whether he or she can continue to represent the fiduciary and, regardless, whether they can do anything ethically to rectify or mitigate the
damage cause by the fiduciary’s breach.

In deciding on a course of action, it is important to recognize that there is no clear authority that requires the disclosure of information gained from attorney-client communications regarding theft of fiduciary property, or fraud on the fiduciary estate. Rule 1.05 provides as follows:

(c) A lawyer may reveal confidential information:

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.


However, the comments to Rule 1.05 also indicate that full protection of client information is not justified when a client plans to or engages in criminal or fraudulent conduct or where the culpability of the attorney’s conduct is involved. The comments elaborate on several situations where an attorney may disclose client communications. First, the attorney may reveal information relating to the representation in order to avoid assisting a client’s criminal or fraudulent conduct, and Rule 1.05(c)(4) permits doing so.

Furthermore, an attorney has a duty to not to use false or fabricated evidence and Rule 1.05(c)(4) permits revealing information necessary to comply with this rule. Third, the attorney may have been unknowingly involved in past conduct by the client that was criminal or fraudulent. In this circumstance, the attorney’s services were made an instrument of the client’s crime or fraud and, therefore, the comments state that the “lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer’s participation was culpable.” Id. cmt 12.

Rule 1.05(c)(6) and (8) give the attorney the discretion to reveal both unprivileged and privileged information in order to serve those interests. Finally, when an attorney learns that a client intends prospective conduct that is criminal or fraudulent, his or her knowledge of the client’s purpose may enable the attorney to prevent commission of the prospective crime or fraud. The comments state that “[w]hen the threatened injury is grave, the attorney’s interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information.” Id. at cmt 13. Rule 1.05(c)(7) grants the attorney the professional discretion, “based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client’s commission of any criminal or fraudulent act.” Id. Finally, comment 13 to Rule 1.05 provides that:

The lawyer’s exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction, and factors that may extenuate the client’s conduct in question. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional
conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.


At a minimum, the attorney should consider resigning as attorney of record. Often times this will signal the court and the other parties that a problem exists that requires closer scrutiny. This also allows the attorney to comply with comment 21 to Rule 1.05 which provides that “[i]f the attorney’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the attorney must withdraw, as stated in Rule 1.15(a)(1).” Id. at cmt 21.

G. Consider the Possible Rights of Successor Fiduciaries

Attorneys representing a fiduciary should be aware that an issue exists regarding the right and privity of a successor fiduciary to the agents of the prior fiduciary. When a fiduciary has been removed or died, a successor fiduciary is generally imposed with a duty to redress his or her predecessor’s actions. When counsel represents a fiduciary, the question then becomes whether the successor is entitled to the predecessor’s legal files. While the Texas Supreme Court decision of Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996), seems to imply that the attorney only represented that fiduciary/client, no Texas court has clearly addressed this issue in the context of an estate, or guardianship and at least one trial court has ordered the turn over of the prior attorney’s files.

Until this issue is decided, an attorney for a former fiduciary should request the consent of the client or the client’s representative’s before releasing his or her files to a successor fiduciary. If consent cannot be obtained, the attorney should request a court order compelling the turn over.

H. Review Malpractice Coverage Regarding Fiduciary Appointments

As discussed previously, court appointments may result in a range of potential claims from attorney malpractice to breach of fiduciary duty. Before accepting a court appointment, he or she should consider whether the potential claim will be covered by his or her errors and omission policy. For example, some policies do not cover fiduciary claims. This coverage can be generally added with a fiduciary rider. It is suggested that the potential role of the attorney be candidly discussed with the insurance representative to avoid a coverage issue in the future.

I. Be Cognizant Of The Discovery Rule

While the standard statute of limitation on legal malpractice is two years and breach of fiduciary duty is four years, the discovery rule can toll these applicable limitations period for years into the future. The Texas Supreme Court has twice held a fiduciary’s misconduct to be inherently undiscoverable. See Willis v. Maverick, 760 S.W.2d 642, 647 (Tex. 1988) (attorney-malpractice actions subject to discovery rule because of fiduciary relationship between attorney and client and client’s lack of actual or constructive knowledge of injury); Slay v. Burnett Trusts, 187 S.W.2d 377, 394 (1945) (trustee). The discovery of such claims may relate the attorney’s representation of the fiduciary and/or the fiduciary’s actions or inactions. As a result, consideration should be given to retaining files and other information or documentation relevant to these engagements far beyond the standard period.

J. Other Thoughts

Finally, common sense probably provides the best guide to avoiding becoming a defendant in the estate, trust and guardianship area. When representing a fiduciary, both the

Attorney Liability Issues in Estate Planning and Probate

© Sarah Patel Pacheco
fiduciary and his or her attorney (as the fiduciary’s agent) appear to be held to a higher standard. Thus, care should be taken by both in carrying out their respective roles. Some final suggestions include:

- Avoid “Rambo” litigation
- Be cognizant of a fiduciary’s duties of disclosure
- Do not allow fiduciary-client to use attorney’s services to enable a clear breach of his or her duties
- Consider when to put matters in writing and when not to – even to the fiduciary
- Appropriate payment and segregation of fees and expenses

XII. CONCLUSION

The preceding outline does not purport to cover all the potential liability, responsibilities and potential claims involving attorney representing the fiduciary or representing clients in estate planning, probate, trust and guardianship matters. Rather, it is a starting place and hopefully provides the reader an overview of the most prevalent claims without necessarily agreeing with their validity. Furthermore, the suggestions should not be taken as mandates; however, they may provide a starting place for discussion of ways to reduce potential claims in a practice area that has become fertile ground for litigation.
[DATE]

________________________
________________________
________________________
________________________:

Enclosed are the drafts of your Wills, Directives to Physicians, General Powers of Attorney, Anatomical Gifts Statements, Medical Powers of Attorney, and Authorizations for Release of Health Information that we discussed when we met. I have highlighted the most important provisions of each of them for your convenience. Please keep in mind as you review these documents that they are only drafts to be used for discussion purposes and that they can be revised easily. Several comments about them are in order.

**Powers of Attorney**

The General Powers of Attorney are drafted so that they can only be used when you are incapacitated. While the documents can be revised to be immediately effective we generally suggest the requirement of incapacity because these Powers of Attorney are only intended to be used during incapacity. As I mentioned when we talked, the purpose of the General Powers of Attorney is to allow someone to handle almost any and every business matter for you if you are legally incapacitated. That being the case, it is of the utmost importance that you have the highest confidence in the integrity and diligence of the persons appointed.

Even a person with the largest of estates is unlikely to need all of the powers granted in these documents. However, if one of those powers were needed and was not included, possibly the only way to take care of something that needed to be done would be to create a guardianship for you, at substantial cost and with much delay. Another reason for the comprehensive nature of the General Powers of Attorney is that people and institutions are generally reluctant to accept them and to allow the person appointed to act. For example, the I.R.S. takes the position that some actions taken under a Power of Attorney (such as making gifts) are void unless the document explicitly allows the actions. The extraordinary detail and the extensive listing of powers do much to clarify the powers granted and, thus, make the documents far more readily acceptable. Unfortunately, even with the powers listed and the changes made in Texas by our relatively new Power of Attorney statute, there is no guarantee that third parties will always accept them without some difficulty.

If either of you has ever executed another power of attorney that is still in effect other than ones we prepared for you I should review it before these Powers of Attorney are executed. These Powers of Attorney revoke all other powers of attorney you have ever executed, if any. There may be a reason to keep an existing power of attorney in effect and, if so, we should provide for that in these documents.

**Medical Documents**

The language in the Directives to Physicians and Family or Surrogates can be changed in almost
any way you wish. These drafts cover the points we discussed, but you may elaborate on any of them. Again, the purpose of these documents is to help you communicate your decisions about life-sustaining treatment. It takes precedence over your Medical Power of Attorney.

The Medical Powers of Attorney allow you to appoint an agent to deal with medical decisions to be made on your behalf, such as operations, medication, procedures and life support. It is important that you carefully read and understand the Disclosure Statement before you come in to sign the final version. It is possible to place restrictions on the decisions that can be made under this document. However, the drafts do not include any restrictions.

The Anatomical Gifts Statement provides that any useful organ or tissue will be donated, with priority given to donations for therapy and transplantation. We think that approach is better than trying to be specific about a specific organ being donated.

If you become incapacitated, the Authorizations for Release of Individually Identifiable Health Information permit your doctors and other health care providers to provide the necessary information to enable the agents you have appointed in your General Power of Attorney and your Medical Power of Attorney to begin acting on your behalf. The Authorizations are primarily meant to deal with recent legislative changes that prevent doctors and health care providers from disclosing your personal and private health information to any third party without your prior express consent.

**Wills**

Finally, we try to provide for unforeseen circumstances and include substantially more powers in Wills than may be required. These drafts allow a great deal of flexibility for your Executors and Trustees and give them broad discretion. Our feeling is that they should be chosen carefully and they should be trusted with the broadest powers and discretion to deal with circumstances as they will be at your death and possibly many years beyond. Because you are providing for independent administration of your estate, and the powers granted to your Executor are so broad, it is imperative that you have the highest level of confidence in the diligence and integrity of the persons you appoint. We have seen several cases where a poor choice for an Executor or Trustee has led to disastrous results. If you have any questions or concerns about the administrative powers please let me know so we can talk about them and make sure you are comfortable with those provisions. We can, of course, revise the drafts as needed.

The drafts of your Wills assume that you do not own any property outside of Texas, particularly property in Louisiana, and that your assets, net worth, and family circumstances are as we discussed. The drafts also assume that no provisions need to be made for unusual obligations or matters, such as buy/sell or shareholder agreements, partnership agreements, special debts, contractual Wills, family matters (such as unadopted children), or trusts or estates of which you or either of you is a beneficiary. They are prepared on the basis of you both being U.S. citizens and residents. As with all of the documents, we need to be sure that you have carefully reviewed them. We expect that you will ask any questions you have and get clarification on any issues you need to.

One of the issues we should be sure to talk about again is any separate property you might have. If either of you (i) brought property into your marriage, (ii) inherited or was given property since you were married, or (iii) has had any sort of personal injury recovery, we should talk about it again. All
property is presumed to be community property, but dealing with separate property in an estate can be a very difficult problem. We can either clearly document which property is separate or make all of your property community, if you like.

(Brief, general discussion of most important Will provisions, i.e. fiduciaries, specific bequests, disposition of residue, etc. - also cover unusual dispositions and tax issues ______

______________________________________________________
______________________________________________________.

Other Planning

We specifically discussed other estate planning issues and options you have. Among other things, we discussed ways you could minimize or eliminate potential estate taxes and ways you could protect your assets from creditors during your lifetime and from the creditors of your beneficiaries after the death of the survivor of you.

In the first category we discussed annual exclusion gifts (currently $12,000 per person per year), the gift of your current lifetime tax free amount, gifts beyond that, charitable planning, life insurance planning, and entity/partnership planning, among other things. In the latter category we discussed charitable planning, partnership/entity planning, off-shore planning, and rearranging your assets to be invested in assets exempt from creditors’ claims, among other things.

You have specifically said that you do not want to spend the time or money now to further explore that discussion, much less implement any of those planning techniques, despite the fact that potential benefits may be derived from those techniques. If you ever want to revisit that discussion, please notify us in writing and we will be happy to discuss them with you further and pursue any of those planning possibilities that you wish to pursue.

Our Representation

It is common for lawyers to address potential conflicts and ethical issues whenever more than one client is involved, even in estate planning matters when one lawyer represents both spouses. Technically, the couple should be informed that all matters discussed with the lawyer by either spouse must be shared with the other just as a lawyer representing partners in a partnership would. Also, if the spouses ever develop a serious conflict of interest (such as how to deal with gifts or separate property), the lawyer may have to withdraw from the representation of both spouses so that they can each get independent counsel. That is imperative because of the possibility that the lawyer's advice to either of them could be compromised or influenced by the simultaneous representation of the other. Many lawyers require clients to acknowledge in writing that they understand and agree to those points.

 Needless to say, our obligation is to advise both of you fairly, thoroughly, and impartially. We have only occasionally encountered conflicts between spouses in estate planning work that generated problems for our continued representation, but it does occur from time to time. If either of you has any questions concerning the potential for conflict of interest or any concerns about our joint representation of
you on these matters, let's fully discuss these issues to their resolutions. If not, I suggest that we let common sense dictate when we need to talk further about these issues, whether the point is raised by either of you or by me. We will proceed on that basis unless I hear from you to the contrary.

We only represent you in your planning. We do not represent your children or other family members, any business you have an interest in, or any of your business associates or other persons in your planning.

We may have, in the past, represented either of you, members of your family, or business entities in which you or your family members have or have had an interest. That representation is unrelated to your planning. We reserve the right to continue representing existing clients and new clients in any matter not substantially related to our work for you. Just as we will not represent their interests in our planning work for you, we will not represent your interests in our work for them. (An example of that sort of situation is a person's planning that leaves his or her property unequally to family members, excludes some family members, or leaves his or her estate to charity to the exclusion of family members when we represent one or more of those family members in their own planning.) If a conflict ever arises, we will bring it to the attention of all of our clients concerned and seek agreement as to our ability to continue our representation of any or all involved. Conversely, it is your duty to inform us of any conflicts you become aware of that could affect our work for you.

If there is any other matter, now or in the future, that you want us to represent you in please let us know. If we are the appropriate counsel for you we will confirm our representation in writing so that our role and fee agreement is clear.

Other Matters

As I mentioned, the cost of the work on your estate planning is generally based on the amount of time we must spend on it, plus expenses. (We do not bill for faxes, long distance phone charges, or photocopies. We do charge for direct expenses, such as filing fees and Federal Express costs.) However, assuming that we can discuss the drafts [on the phone or in a conference of an hour or so/a couple of hours or so] and then execute them soon after that I estimate that the total cost will be in the range of $_________ to $___________, if you are able to get back to me fairly promptly after reviewing the drafts. If anything develops that would make that estimate substantially incorrect (such as unexpected travel or substantial changes to the planning of these drafts, filing fees and Federal Express costs) I will try to let you know promptly.

The handwritten Wills you executed are only intended to be temporary. Those Wills should be replaced as soon as possible.

We talked about [unusual tax issues or dispositions] - __________________________
If you decide that you want to discuss ____________________ further we can visit about whenever you like.

I want to mention again that we do not (i) prepare income tax returns, (ii) give financial or investment advice, or (iii) sell or analyze insurance or financial plans or products. If you need help finding qualified professionals to assist you with any of those matters or for other matters outside the practice of law or outside the areas of law we practice we will be happy to help you find them if you ask us to do so.

We try to be as available as possible to our clients. If, for whatever reason, you are not able to reach me by phone or email, there is always someone else in our office who can help you, particularly in an emergency. If you ever have an issue that needs urgent attention please make that known to whoever answers the telephone in our office and we will make sure someone is available to assist you. We regularly communicate with clients by email and fax and will do so in our work for you unless you instruct us not to.

I think that the drafts reflect decisions you made on the matters we discussed when we met. However, the purpose of drafts is to raise any remaining issues that need additional consideration. Please review the documents very carefully to make certain that I have stated your wishes correctly and make note of any questions you have about them. There are several blanks in the documents which relate to matters you need to consider. If you will give me a call at your earliest convenience [I might be able to answer any questions you have on the telephone and complete the documents before our next meeting. Or, if you prefer, we can set a time to] meet again to discuss the drafts and execute them soon after that meeting.

I look forward to hearing from you.

Sincerely,

C. Stephen Saunders

Enclosures
Dear ______________:

Enclosed are your original Wills, Medical Powers of Attorney, Directives to Physicians, Powers of Attorney, _____ of the original Anatomical Gifts Statements for each of you, Authorizations for Release of Health Information, and copies of each of them. Your Powers of Attorney have been recorded in the County Clerk’s Office.

**Wills and Other Documents - Originals and Copies**

Texas law provides that if a person keeps his or her original Will and it cannot be found at the time of his or her death (whether it has been hidden too well or lost) then the presumption is that he or she revoked the Will. The result would be that the person would be treated as if he or she died without a Will. Therefore, it is very important that you keep your original Will in a safe place and let your Executors know where it is. You should also have a notation in your records at home about where you are keeping them.

The Medical Powers of Attorney, Authorizations for Release of Health Information, Powers of Attorney, Anatomical Gifts Statements, and Directives to Physicians should be kept in a safe but accessible place at home. We suggest that you give your doctors copies of the Directives, Authorizations for Release of Health Information, and Medical Powers of Attorney and one original Anatomical Gifts Statement for their files. (Extra copies are enclosed.) You should consider giving copies of the Directives, Authorizations for Release of Health Information, Medical Powers of Attorney, the Powers of Attorney and an original Anatomical Gifts Statement to __________, __________, and __________ as the persons appointed in your respective Powers of Attorney, with a handwritten notation on each copy explaining where the original of that document is kept. (Extra copies are enclosed.) You should also consider advising __________, __________, and __________ of their appointments as successor Executors or Trustees in your Wills and telling each of them where the original Wills are being kept. We generally suggest that you do not give copies of your Wills to anyone. You should give an original Anatomical Gifts Statement to anyone else you think appropriate.

Enclosed is an example for your handwritten memorandum for personal property. I think it is self-explanatory, but if you have any questions about it please let us know. If you do prepare a handwritten memorandum, the best way to ensure that it will be read with your Will is to keep it with your original Will.

**Review and Changes**

We suggest that you review your Wills at least annually to be certain that they carry out your
wishes as they may change from time to time. Because it is impossible for us to be certain that we could notify you of changes, if any, in the law relating to your Wills, we suggest you call us to have us review them at least every two to five years. As we have discussed, tax law generally and estate tax law in particular is very much in a state of flux. It is even more important than ever that your Wills and planning be reviewed regularly.

If you (i) have a substantial change in your financial situation or in your family, (ii) if you purchase or contemplate the purchase of a substantial amount of additional life insurance, (iii) if you spend a substantial amount of community property funds on the separate property of one of you, or a substantial amount of the separate funds of one of you on your community property, (iv) if you move from Texas (especially outside of the United States), (v) change your citizenship, (vi) acquire property outside of Texas (particularly in Louisiana), (vii) become a beneficiary of an estate, (viii) acquire any other rights under a trust or estate (such as a power of appointment), (ix) contemplate creating a trust, or (x) learn of any changes in the law that you think might affect you or your estate we suggest that you contact us immediately to review your Wills. If you become a beneficiary of an estate you should contact us immediately because you may have some planning opportunities that last only nine months from the person’s death. Before entering into any business agreements (such as buy/sell or shareholder agreements) or making any major gifts you should check with us. You cannot change your Wills by writing on the originals or copies of them, and if you ever want to change them please don’t hesitate to call us.

Powers of Attorney and Health Care Documents

Your Powers of Attorney can only be used when you are incapacitated. They are valid until revoked and will remain on file in the County Clerk’s office. They can only be revoked by filing a written revocation in the County Clerk’s office. Any power of attorney you execute in the future, whether a general or special power of attorney, might provide for revocation of these Powers of Attorney by generally revoking all prior powers of attorney. Therefore, if you ever sign another power of attorney for any purpose, you should be careful not to revoke these Powers of Attorney unintentionally.

For the same reasons that the Powers of Attorney and Health Care documents are important to you, anyone you might ever have responsibility for if he or she is incapacitated should have the same documents. For example, if you might have responsibility for family members who might be incapacitated they should at least have Powers of Attorney in place and health care documents if they want them. The savings in terms of cost, time, and difficulty by having those documents can be enormous. We generally recommend that anyone eighteen or over have those documents, even if he or she does not have property that would warrant having a Will.

Account Styling

We strongly advise you not to ever take or hold title to any type of property (including items such as stock certificates) or have any type of account (including checking, savings, money market, brokerage, or certificates of deposit) as “joint tenants with right of survivorship” with anyone, including each other, without checking with us. That also applies to any other form of survivorship or P.O.D. (i.e. “pay on death”) accounts that causes the property to pass outside your Wills. It would be a very unusual situation in which taking title that way or having an account styled that way would be beneficial to you and in nearly all instances it could lead to substantial problems. Property passing by
survivorship passes outside of the provisions of your Wills and, therefore, does not get the benefit of the tax planning and management provisions of your Wills. If you have any accounts or property currently held in that form it should be changed promptly. We generally suggest that title be taken “as community property” or “tenants in common”, neither of which should be with right of survivorship.

**Safe Deposit Boxes**

You should also never hold a safe deposit box with anyone other than each other, or use anyone else’s safe deposit box. Either of those situations can present issues of ownership, taxation, and access.

**Beneficiary Designations**

If you ever purchase any more life insurance, initiate another retirement plan, have any life insurance obtained for you (such as group insurance) or anything similar, the beneficiary designations should be carefully coordinated with your Wills. To the extent possible, any beneficiary designations (other than for retirement plans or IRA’s) should provide for the Trustee named in your Will as the primary beneficiary (i.e. “the Trustee named in the Insured’s Will”) and the Executor of your estate as the contingent beneficiary (i.e. “the Executor of the Insured’s estate to be administered as a part of the estate”) to coordinate with your Wills. All current beneficiary designations should also read that way and any that do not should be changed promptly. If you have any questions about or difficulty with beneficiary designations, I will be happy to help you with them. You will almost always want to name each other as beneficiary of your respective IRA’s or retirement plans. But, we should visit any time you get ready to sign an IRA or other type of retirement plan beneficiary designation.

**Thinking Ahead**

We are often asked to give people advice about how to make sure the administration of his or her estate is as smooth, efficient, and economical as possible. Some of the best advice we can give is to keep good, fairly current information about assets and liabilities in his or her files. That is true whether the Executor is a spouse, child or other relative, a friend, or a bank or trust company. The administration of a person’s estate is generally just a reflection of his or her life—it is as simple or complex as the person’s assets and business affairs are. The better organized that information is for an executor, the easier the job of the Executor and the lower the cost of the work.

If you have any questions about asset and liability information please let us know and we will be happy to help you. There are estate questionnaires and filing systems that are available in bookstores.

The other issue that planning can deal with and help save substantial costs in an estate administration is the clear documentation of separate and community property, as I mentioned in my letter accompanying the drafts. If you acquire separate property in the future we should visit about it.
Other Planning

We have discussed other estate planning issues and options you have. Among other things, we discussed ways you could minimize or eliminate potential estate taxes and ways you could protect your assets from creditors during your lifetime and from the creditors of your beneficiaries after the death of the survivor of you.

In the first category we have discussed annual exclusion gifts (currently $12,000 per person per year), the gift of your current lifetime tax free amount, gifts beyond that, charitable planning, life insurance planning, and entity/partnership planning, among other things. In the latter category we discussed charitable planning, partnership/entity planning, off-shore planning, and rearranging your assets to be invested in assets exempt from creditors’ claims, among other things.

You have specifically said that you do not want to spend the time or money now to further explore that discussion, or implement any of those planning techniques, despite the fact that potential benefits may be derived from those techniques. If you ever want to revisit that discussion, please notify us in writing and we will be happy to discuss them with you further and pursue any of those planning possibilities that you wish to pursue.

Other Issues

We strongly suggest that you periodically review your homeowners insurance and your automobile insurance policies. Those policies, coupled with an adequate umbrella liability policy, will probably cover the vast majority of liabilities most people will ever have. Umbrella liability policies are astonishingly inexpensive and frequently overlooked by both individuals and their agents.

I want to reiterate my comments about the documents. First, they divide into two groups. The Powers of Attorney and health care documents, which are for use during your lifetime if needed, and your Wills, which are obviously only effective at your death. Second, the dollars they potentially save you are substantial. Under current law, the Wills can save approximately $________ in taxes at the survivor’s death by use of the [disclaimer/bypass] trust and ________________________________

The Powers of Attorney, particularly, can save an incalculable amount of money if you are ever incapacitated.

If your mailing address, phone numbers, or email addresses change, we would appreciate it if you would contact us to let us know. We would like to always have your most current contact information so we can reach you if we need to.

Finally, I have enclosed the bill for your estate planning work to date. I think it is fairly self-explanatory, but please do not hesitate to call me if you have any question about it.

This concludes our current work on your estate planning. We will be happy to help you in any way we can in the future. As I may have mentioned, we also handle a variety of other legal work, including business and tax work of many types, and some real estate work. For other sorts of legal work, such as personal injury matters, banking, bankruptcy, litigation, criminal, and environmental law, we are
able to assist our clients in finding the legal help they need, whether in the United States or abroad. As I mentioned in the letter accompanying the drafts of your documents there is work some lawyers do that we do not do. If you ever have need of any other legal help or other professional help or if you have any questions about your Wills, Medical Powers of Attorney, Authorizations for Release of Health Information, General Powers of Attorney, Directives to Physicians, Anatomical Gifts Statements or related matters please do not hesitate to contact us.

Sincerely,

C. Stephen Saunders

Enclosures
[DATE]

Re: No. __________; Estate of ______________, Deceased; In Probate Court No. ___ of Harris County, Texas

Dear *:

By this letter, we want to furnish you with some basic information concerning the administration of your __________’s estate. You should retain this letter for future reference. This summary is not intended to discuss all matters of administration or to be an exhaustive treatment of the subject matter. Although it is lengthy, it is really just an overview, and it will be useful for reference purposes over time. In fact, we have already discussed many of these issues over the last few weeks, and _ and we will undoubtedly revisit them in the months to come.

General Matters

As you know, the Order admitting ________’s will to probate was signed on __________, 200__. You have qualified as independent executor of the estate by filing your oath of office. An “executor” is the legal representative of an estate, the person appointed in a will to carry out the testator’s wishes as expressed in that will and to administer the estate.

An “independent” executor, such as you, may act independently of the Probate Court’s control, except with respect to those matters which have already been accomplished (i.e., filing an application for probate and being appointed independent executor) and the filing of the required Inventory, Appraisal and List of Claims (which we will discuss later). If you had not been appointed independent executor in __________’s will, virtually all of your duties and actions would be subject to prior approval by the court, and that procedure would be cumbersome, time-consuming and expensive.

An independent administration is unique to the state of Texas, and it will greatly facilitate the administration of this estate. As an independent executor, you have broad powers, limited only by the will and the Texas Probate Code, and you are authorized to do, without court approval, all things authorized by the will and all things which an ordinary executor would be permitted to do only with court approval.

Your qualification as independent executor entitles you to receive Letters Testamentary from the County Clerk. Letters Testamentary evidence your appointment as independent executor and your authority to act for and on behalf of the estate. We have previously ordered and received Letters for your use. We suggest that you forward to __________ with __________ on Letter for his records.

Please keep in mind that Letters are only valid for sixty (60) days each time the Clerk issues
them, as required by the Texas Business and Commerce Code. Thus, as a rule, we do not order more than is needed. You may need additional Letters at various times during the estate administration; if so, please give us a call.

Estate Administration

Simply stated, the administration of __________’s estate involves the collection of all assets owned by and all claims owing to him, the payment of all debts, liabilities, claims, and expenses owed by him or his estate, including applicable federal and state death taxes, and finally, the distribution of the remaining assets to the beneficiaries entitled thereto pursuant to __________’s will.

As you are aware, __________ are the beneficiaries of _________’s estate. However, the admission of the will to probate can be challenged for up to two (2) years from _____________, the date it was admitted to probate. If challenged, the court could order you to account for all your actions as independent executor to third parties. [Because your situation presents a significant potential for a will contest or because of potential creditor issues, we suggest that you administer the estate with the highest level or formality]. While this may be overly cautious, it may be helpful in defending you against potential claims by, and allow you to avoid potential liability to, the ultimate beneficiaries and/or creditors.

Thus, the remainder of this letter will generally discuss your fiduciary duties, as executor, and certain notice and filing requirements of which you should be aware.

Fiduciary Powers and Duties

As we discussed previously, your appointment as independent executor grants you broad powers which are coupled with very high fiduciary duties that are designed to protect the interests of the beneficiaries of __________’s estate, the taxing authorities, and the estate creditors. Briefly stated, you should observe the following guidelines at all times:

- You should keep the beneficiaries of the estate reasonably informed of the administration and use your best efforts to promptly collect the assets and administer and settle the estate.
- You must always be in a position to account for all revenue received, moneys spent, assets sold (or for some reason purchased), and as to all other matters that directly or indirectly affect the estate.
- Do not commingle __________’s property with your own or that of any of your businesses or __________’s business interests. Commingling usually is done with cash, and it is imperative that you never commingle your __________’s funds with funds that are not his, not even for a day.
- Do not leave estate funds uninvested. We will address the issue of investments in a separate letter to you.
- Do not engage in any self-dealing with __________’s estate. However, some types of self-dealing can be accomplished, such as the sale contemplated by a buy/sell agreement if that becomes advisable. This is allowable because __________ approved the sale in writing in
advance of his/her death.

Compliance with many of these guidelines can be accomplished by setting up appropriate estate accounts and handling the estate accounting matters in the manner we will discuss in more detail below.

**Accounts and Records**

The best way to handle accounting matters is for the estate to open one or more accounts at a bank and/or trust company of your choosing, and then place all the cash and investment grade assets into that account. As we discussed, the first step in setting up the estate account is to obtain a separate taxpayer identification number for your __________’s estate. You have arranged for _________ to obtain this number on your behalf. This new number should be used as the taxpayer identification number for the estate accounts.

The next step is to establish an estate account agreement with the bank or trust company of your choosing. The account should be styled as follows:

“________________, Independent Executor of the Estate of ____________, Deceased.”

It is important for you to see that all cash received and expended for the estate passes through the estate account. Generally, the account will operate as follows:

- As estate revenue is received, be it dividends, interest, sales proceeds, or other revenue, the revenue should be deposited into the estate account, and the exact nature of the deposit should be identified in the account ledger.

- All estate disbursements should be made from the estate account, and a detailed record should be maintained of all distributions.

- As we will discuss below, you may have paid some estate expenses to date, including funeral expenses and debts outstanding at the date of death, from your own separate funds or from the company. Those estate expenses should be reimbursed to you after the account is opened.

If the above routine is followed consistently throughout the administration of the estate, you will be able to utilize the account statements as the primary resource for information regarding estate receipts and disbursements. We also will be able to note any sales of any non-investment grade assets, such as the car and ________________, if the proceeds are placed into the account.

Note that any debts, expenses or other disbursements should not be paid by __________’s business interests, including ____________ or _________________. This will preserve the autonomous nature of these businesses. However, should the estate require a distribution from one or more of __________’s business interests, we can assist you with the coordination of any allowed distribution or the structuring of an appropriate loan.

**Expenses Incurred to Date**

There will be a number of expenses which should properly be borne by the estate. As soon as it
is convenient, we suggest that you prepare a simple accounting of all transactions that have occurred as of this date with respect to the estate, and provide copies to __________ and us. If certain expenses have been paid on behalf of the estate, arrangements can be made to reimburse the proper person or entity from the account.

**Insurance**

It is your duty as independent executor to insure the estate property against loss and liability. We advise you to insure any real property (including structures), and any other property of significant value against theft or loss. We also suggest that you carry liability insurance on the real properties and any other estate property which warrants such coverage.

Further, you may determine it is appropriate to employ one or more individuals during the administration of the estate. Please let us know prior to their employment so we may discuss whether it is appropriate to obtain workman’s compensation or similar insurance during the term of their employment.

**Notice to Creditors**

Your appointment as independent executor requires you to meet certain failing deadlines with respect to notice to creditors and governmental agencies. The first deadline requires you to notify certain potential creditors of __________. Within one (1) month from the date of the filing of your oath, a statutory notice must be published to the general creditors of the estate. As you are aware, we have prepared this notice on your behalf, and we have previously forwarded you a copy for your records.

You are also required to give notice to all secured creditors. Secured creditors are creditors whose indebtedness is secured by real or personal property, and secured by property __________ owned an interest in, individually, at the time of his/her death. The notice to each secured creditor must be given within two (2) months of your appointment as executor. If an executor fails to give the required notice, he or she can be held personally liable for any damages which any person suffers as a result of the failure to give the notice. You have confirmed that you are not aware of any secured creditors.

With regard to unsecured creditors, an executor is no longer required to give an unsecured creditor notice of an executor. However, an executor may choose to give unsecured creditors notice to force the creditors to either establish their claims of payment or be permanently barred from seeking payment from the estate. Texas law requires that the notice to unsecured creditors include the following: (i) date of executor’s appointment; (ii) address where the claim may be presented; (iii) to whom the claim should be addressed; and (iv) a statement that the claim must be presented within four (4) months after the date of the receipt of the notice or the claim is barred. This notice may be given at any time before the estate is closed.

The advantage of giving unsecured creditors notice is that it expedites the process of identifying any potential creditors and settle the debts as promptly as possible. This will allow you, as executor, to eventually distribute the remaining estate assets without the concern that a creditor will attempt to collect on a debt. The disadvantage is that the notice may prompt a creditor to file a claim that would not have been filed without the information contained in the notice. However, it is rare that a creditor will do nothing for up to six (6) years, at which time the debt is generally barred by the applicable statute of limitation. It is generally preferable to address any potential claims in the initial stages of the administration versus waiting to see when and if the creditor will attempt to collect the debt.
To date, you have requested that we give ______________ notice to expedite the resolution of the alleged debt they claim is still due. If you become aware of any other potential creditors and wish us to provide them a similar notice, please provide us with each such creditor’s name, address, and a general description of the alleged debt. If possible, please also provide us with copies of any recent invoices, contracts, or any other document which you or __________ executed relating to the alleged debt for our review. Upon receipt, we will prepare and send the appropriate notice on your behalf.

**Inventory**

You are also responsible for filing with the probate court, for the court’s approval, an Inventory and List of Claims, sworn to by you to be accurate to the best of your knowledge. The Inventory is essentially a catalog of estate properties which must be carefully prepared. It must include proper and complete descriptions of the various probate assets together with accurate valuations of such assets as of the date of death. Contrary to the laws of some states, in Texas it is only necessary to report in the Inventory the probate assets and claims owing to the decedent. It is not necessary to include non-probate assets or debts owing by the decedent or the estate.

While the Inventory is generally due to be filed within ninety (90) days from ______________, our practice is to coordinate the information on the Inventory with the Federal Estate and Texas Inheritance Tax Returns, which are due nine (9) months from the date of death (unless extended). This allows us to prepare the Inventory based on the asset information and valuations included in the final death tax returns. It also allows us to avoid any duplication of effort and related expense between ____________ and us in gathering information which will be necessary to prepare the death tax returns and the Inventory.

Accordingly, we have petitioned the Court for an extension of time to file the Inventory until after the death tax returns are filed. The Court has granted our request and the Inventory is now due ____________.

Once the death tax returns are finalized, we will prepare the Inventory for your review and execution. After the Inventory has been executed by you, we will file the Inventory with the court and obtain an Order approving it.

**Non-Probate Property**

At this point, we want to discuss with you the difference between probate and non-probate property, because often times this is a matter of some confusion. Some types of property belonging to a deceased individual may not be subject to the will or the control of the executor, but instead may pass to a beneficiary or beneficiaries by contract or operation of law. Such assets are commonly referred to as non-probate assets. A common example of non-probate property is life insurance proceeds payable to a named beneficiary other than the decedent’s estate. Any death benefit payable under such a policy would not be subject to the control of you, as executor, and is not required to be reported in the Inventory. On the other hand, if a decedent had an interest in life insurance on the life of another person, that asset is required to be reported in the Inventory.

While non-probate assets are not required to be reported in the Inventory, such assets generally must be reported in the decedent’s estate for federal and state death tax purposes. Therefore, if you locate
any asset which may be a non-probate asset, please advise us of the potential asset so that we may advise you whether the asset is a probate or non-probate asset and how to handle the collection of such asset.

**Estate and Income Tax Returns**

Additionally, a Federal Estate Tax Return will be required to be filed for __________’s estate if the estate has a value of $________ (including prior taxable gifts and certain transfers). The return is due nine (9) months from the date of __________’s death. For good cause shown in a written application, a six (6) month extension of time may be obtained for filing the returns. [__________ and his/her firm of ______________ will handle the preparation of these death tax returns.]

Further, although __________ will be advising you with respect to all income tax matters, we want to take a moment to discuss a few of the most basic matters relating to the estate and income taxation of __________’s estate.

In connection with the death tax returns, under certain circumstances an estate is offered an election to value the estate on the date of death or on the date six (6) months thereafter. This is referred to as “alternate valuation date” and in __________’s case, is __________. For purposes of this election, the entire estate may be valued as of either __________, or __________, whichever produces the lowest estate valuation. However, if any assets are sold during the six-month period, the actual sales price of the sold assets determines the alternate value of those assets. Alternate valuation is a valuable and important election, and it is a decision that __________ will discuss with you in greater detail after he/she has more information about your __________’s investment assets.

You should also be aware that the income tax cost basis of all the assets ______ owned, except those which might be classified as income in respect of a decedent (e.g., accrued interest or dividends), will now be the fair market value on __________, or the alternate valuation date of __________, if elected. Thus, in the event of the sale of any assets, the only capital gain for purposes of income taxation would be that in excess of the new income tax basis.

Further, we anticipate it will be necessary to prepare and file a final federal income tax return for __________ covering the period beginning on January 1st of _____ and ending on the date of his death, but it is not due until April 15, _____. We understand that you have requested an extension of time to file this return. Note that once the return is prepared, you should sign it in your fiduciary capacity, i.e., as independent executor.

A federal fiduciary income tax return (Form 1041) will have to be filed by the estate for any year during the administration in which the gross income of the estate exceeds $600. If required, the return is due on the fifteenth (15th) day of the fourth (4th) month following the closing of the estate’s tax year. The estate may select for its tax year either a calendar year or a fiscal year. Furthermore, the estate is not required to estimate its income taxes for its first two tax returns. In this case, tax planning and savings might be accomplished in connection with income tax matters and returns involving the estate because of deferral and because the estate is a separate taxpayer. It will be to your advantage to maintain the estate as a separate taxpayer throughout the administration, so we advise you not to change the names on any accounts or other assets in __________’s name without checking with us.

We understand __________ with the accounting firm of ______________ will be assisting you in the preparation and filing of all these income tax returns over the course of the
administration. As the administration of the estate progresses, we anticipate that ________ will be discussing with you these income tax matters in greater detail. However, please feel free to call us if you have any questions.

**Conclusion**

There no doubt will be questions which you will have from time-to-time and you should feel free to call me at any time.

Very truly yours,

[Attorney]
By this letter, we want to furnish you with some additional information about your appointment as Guardian of ______’s person and estate. Please retain this letter for future reference. This summary is not intended to discuss all matters relating to your appointment as Guardian of h__ person and estate or to be an exhaustive treatment of guardianship law; it is really just an overview and it will be useful for reference purposes over time. Many of the matters discussed in this letter have been discussed briefly with you at various times or you may have read about them in the article on guardianships we previously provided you.

**General Matters**

As you know, you were appointed Permanent Guardian of _____’s estate at the hearing on __________, 200__. You have now “qualified” as Guardian of h__ estate by obtaining and the filing of your Oath and bond on __________, 200__, in the amount of $_______. This date is important because many of your filing deadlines, for example the time to file your inventory and accountings, are based on a set number of days calculated from this date.

A “guardian of the estate” is the legal representative of a ward’s estate. Generally, a guardian of the estate is entitled to the possession and management of all property belonging to the ward, to collect all debts, rentals, or claims that are due the ward, and to bring and defend suits by or against the ward. Further, it is your duty as Guardian of ______’s estate to take care of and manage the estate as a prudent person would manage their own property.

Your qualifying also entitles you to receive Letters of Guardianship. The Letters of Guardianship evidence your appointment as permanent Guardian of the Estate of ________ and your authority to act for and on behalf of h__ estate. We have previously provided you with _____ original letters for your use. You may need additional letters at various times in the future. If so, please give us a call and we can usually order and receive them within two days.

**Notice to Creditors**

Within one month from the date of your qualification, i.e., receiving your Letters, a statutory notice must be published to the general creditors of the estate. We have prepared and filed that notice on the permanent guardianship.
You also must give actual notice of (i) ________’s incapacity, and (ii) your appointment as Guardian, by certified mail to the following:

- each person, business entity, etc., having an outstanding claim for money against ______’s estate if the claim is secured by a deed of trust, mortgage or vendor’s, mechanic’s, or other contractor’s lien on real property belonging to the estate; and
- each person, business entity, etc., having an outstanding claim for money against ______’s estate if you, as Guardian, have actual knowledge of the claim.

If you fail to give the required notice, you can be held personally liable for any damages that any person suffers as a result of the failure to receive the notice. The deadline for accomplishing this task is ________, 200__.

Accordingly, we ask that you provide us with a list of all such creditors that you are aware. Please include in this list the name, address, and general description of the basis of the claim. If the claim is based on an account, such as a credit card, please provide us with the account number so we may reference the account in our notice. The other option is to simply provide us with copies of the most recent statements or notices relating to these potential creditors. These will generally provide us sufficient information to prepare the notices. Note that, potential creditors may include anyone holding a mortgage on any of the real properties, outstanding utility expenses, i.e., water, gas, electric and/or telephone, personal debts (such as credit cards), or any other unpaid bill or claim.

Once we receive the list or other documentation, we will prepare the notices and forward them to the respective potential creditors. To ensure that all creditors, if any, are given the requisite notice, please provide us with the information no later than ________, 200__.

Inventory

The next order of business with the Probate Court is to prepare an Inventory and List of Claims for ________’s estate. The inventory must be filed with the Probate Court within thirty days after you qualify, unless the Court grants you an extension. The inventory is a record of all the property of ________ that has come into your possession or knowledge. Please send us a listing of any significant additional property which ________ owns, including the life insurance proceeds and the pension benefits. It is not necessary, however, to include the property which will be held in the testamentary trusts created pursuant to ________’s will.

We will prepare the inventory for execution by you from information you provide us and, after it is executed by you, we will file the inventory with the Court and obtain an Order approving it.

General Duties and Powers of Guardian of the Person

As Guardian of the Person you are responsible for ________’s care, placement, medical, and living arrangements. You should stay in touch with ________’s treating physician and supervise ________’ living arrangements. An annual report will be due once a year describing ________’s abilities and progress. In addition, Section 767 of the Texas Probate Code gives you:

(i) the right to have physical possession of ________, and to establish ________ legal
domicile;
(ii) the duty of care, control, and protection of _________;
(iii) the duty to provide _________ with clothing, food, medical care, and shelter;
(iv) the power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of _________.

General Duties and Powers of Guardian of Estate

Your appointment as Guardian of _________’s Estate comes with very high fiduciary duties that are designed to protect the interests of _________. Briefly stated, you should observe the following guidelines at all times:

- You must always be in a position to account to _________ and the court as to all matters of revenue received, monies spent, assets sold (or for some reason purchased), and as to all other matters that directly or indirectly affect h__ estate.

- Do not co-mingle _________’s property with your own or anyone else’s. Co-mingling usually is done with cash, and it is imperative that you never co-mingle _________’s funds with funds that are not his, not even for a day.

- Do not leave estate funds uninvested.

With regard to your duties, the first duty as Guardian of _________’s Estate is the collection of all assets owned by and all claims owing to _________. It is your affirmative duty to actually collect or otherwise render unto your sole control all of these assets. As h__ Guardian, you are entitled to the possession and management of all property belonging to _________, to collect all debts, rentals, or claims that are due _________, and to bring and defend suits by or against _________.

It is important to remember that, in carrying out your powers, Texas law imposes on you the duty as _________’s Guardian to take care of and manage the estate as a prudent person would manage their own property. Texas law further provides that, immediately after receiving your Letters of Guardianship, you are required to collect and take into possession _________’s personal property, record books, title papers, and other business papers. Of course, you are considered in “possession” of any items that your agents, such as your attorneys, accountants or other advisors, have actual possession on your behalf. You should also arrange to have all of _________’s mail forwarded to your address.

As part of your duty to collect and safeguard the estate assets, it is important that you verify that each insurable asset, both real and personal property, is adequately insured. By adequately insured, we mean both property (general, fire, flood, etc.) and liability insurance where applicable. If you are unsure that an asset is properly and adequately insured, you should immediately obtain full coverage on the property. Such property includes _________’s house, any other real property, household furnishings, automobiles, recreational vehicles, jewelry, art collections, etc. If any property is co-owned with another individual, we suggest that you coordinate the acquisition and issuance of all personal and real property, including but not limited to fire, wind, flood, and liability and verify _________’s interest will be covered under such policy. We also advised you that the policies should cover you, in your fiduciary capacity as Guardian. Finally, you may want to arrange to purchase an umbrella policy to cover you in your fiduciary capacities.
At this time, we wish to give you more specific instructions with regard to the management of __________’s funds. First, you should open a separate interest bearing account for __________’s cash funds. As previously stated, you should never commingle ____’s funds with your own property, or borrow from h__ property, not even for a day. An unauthorized disbursement of guardianship property, even if repaid, may be a breach of your duties to your ward and subject you to personal liability. The accounts should be either a money market or savings account, or certificate of deposit, depending upon how flexible an arrangement you wish to make with respect to __________’s cash. We usually recommend that a money market checking account be opened which should hold a nominal amount of funds to cover emergencies. The remainder of the cash should be invested as follows:

1. in bonds or other obligations of the United States;
2. in Texas tax-supported bonds;
3. in tax-supported bonds of an incorporated city or town or a county, district, or political subdivision in Texas subject to certain restrictions;
4. in shares or share account of a building and loan association which is organized under Texas law and insured by the Federal Savings and Loan Insurance Company;
5. in shares or share account of a federal savings and loan association which is domiciled in Texas and insured by the Federal Savings and Loan Insurance Company;
6. in collateral bonds of companies incorporated under Texas law and which have paid in capital of $1,000,000 or more and which are a direct obligation of the company which issued the bonds and are specifically secured by first mortgage real estate notes or other securities pledged with a trustee; or
7. certificates of deposits that have a term of one year or less in a bank that does business in Texas and which are insured by the Federal Deposit Insurance Corporation.

The style of _____’s bank account, certificate of deposit, etc., should be as follows:

_________________, Guardian of the
Estate of _________________, an Incapacitated Person

Prior to investing ____________’s assets and within 180 days of your qualification as Guardian, you are required to file a management plan with the Court. This plan informs the Court of how you will manage _____________’s assets or declare that investment is not feasible due to the value of _____________’s estate.

Essentially, all disbursements from ____________’s funds should be made after Probate Court No. __ has given written approval for the expenditure in question. You should never disburse funds without court approval, except for payment of taxes, bond premiums or insurance on property of the estate. We cannot stress the importance of gaining court approval for any expenditures because you can be held personally liable for any unauthorized expenditures. Within thirty (30) days of your qualification as Guardian, you are required to file an application requesting a monthly allowance based on an estimate of _____________’s education and living expenses. Please contact our office, as soon as possible to review
We will then prepare the appropriate application and order and submit it to the court for consideration. Usually these matters do not require a formal hearing because the court’s audit staff handles these matters and submits the applications to the Judge without any hearing. Thus, our fees are minimized with respect to these matters.

You should use your home address for each account, and ______’s social security number should be used for h__ respective accounts so as not to confuse the interest income from the accounts with your taxable income.

**Accounting**

Please keep accurate records of all income, receipts and disbursements which are placed into and taken out of _____’s accounts. As you are aware, it will be necessary to report these receipts and disbursements each year in an annual accounting to the court. The annual account is due each year within sixty (60) days of the date you qualified as Guardian. Therefore, the first set of accountings will be due on or before ______________, 200__. We have entered this matter in our firm’s calendar and we will alert you when the annual accounting is due.

**Income Tax Returns**

Finally, you are responsible for the filing of ______’s individual income tax return and paying all taxes that _he may owe when due. We do not prepare these individual income tax returns and we suggest that you discuss the handling of these returns with an accountant as soon as possible. If you wish to hire an accountant to prepare these income tax returns, we will need to file an application with the court to obtain court approval to retain the accountant.

If you have any questions about your duties as Guardian or any other matter, please do not hesitate to call _ or me at any time.

Very truly yours,

[Attorney]