This is a suggested fee and engagement letter for use by an attorney in representing an individual. Before this form is used, the drafting considerations in Chapter 4 and all Notes on Use for this form should be carefully read.

ESTATE PLANNING (INDIVIDUAL)

Dear New Client:

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

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

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

We represent only you. Anything you discuss with us is privileged from disclosure to third parties, unless you authorize us to disclose the information or disclosure is required or permitted by law or the rules governing the professional conduct of attorneys. If someone else whom we do not represent, such as a family member or financial planner, is included in a meeting or copied on correspondence, the attorney-client privilege may be lost as to matters disclosed in that meeting or correspondence.

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

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

Once your estate planning documents have been executed, our representation of you with respect to the scope of work we have identified in this letter will come to an end. We will, of course, be pleased to have the opportunity to represent you again if the need arises. You should be mindful

of the fact that the nature and extent of your assets will change in the future. The services we are providing you as described above will be based on your current estate planning goals and the present state of the law. However, laws may change in the future, in which case your estate planning documents may need to be revised. Although we may, periodically send you general updates regarding changes in the law, because of the large number of clients we represent, we cannot undertake to advise you if changes in the law occur that affect your specific estate plan, nor will we review your file annually or on any other regular basis. Accordingly, we recommend that you call us or another attorney if your estate changes in size or type of assets, if your estate planning goals change, or if you read about changes in the law you think may affect you.

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

Sincerely,

_____

I have read the foregoing letter and I consent to your representing me on the terms and conditions described.

_____, 20___ _____

New Client

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

NOTES ON USE

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

2) Colorado Rule of Professional Conduct (Colo. RPC or Rule) 1.5(b) requires that, if an attorney has not regularly represented a client, the basis or rate of the attorney's fee must be communicated in writing to the client. The writing does not have to take the form of an engagement letter (*see* Colo. RPC 1.5, Comment [2]) but many attorneys use the engagement letter as a writing to satisfy the Rule. The writing should specify whether the fee is hourly

based or a flat fee. Rule 1.5 lists several factors that will be considered in determining the reasonableness of a fee, including the time and labor required, the novelty or difficulty of the questions involved, and the skill necessary to perform the legal service. If it is anticipated that the firm or attorney will raise rates over the life of the engagement, this information must be disclosed. Except as provided in a written fee agreement, any actual material changes to the basis or rate of the fee are subject to Rule 1.8(a), which requires the client to give informed consent, in writing, of any transaction with the attorney. Further, Colorado law requires that if any third party will be attempting to collect the fee owed to the attorney, any interest, charge, or expense incidental to the principal obligation (such as charges for copies, faxes, and telephone calls) must be expressly authorized by the agreement creating the debt or obligation. *See* C.R.S. § 5-16-108(1)(a).

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

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

3) Practitioners should be aware that, after the death of a client, the attorney-client privilege may be waived when heirs or devisees make a claim through the decedent. *Swindler & Berlin v. United States*, 524 U.S. 399, 404-05 (1998). Although Colorado has not yet codified this testamentary exception, Colorado courts have recognized such an exception to the attorney-client privilege as early as 1905 in the case of *Estate of Shapter*, 85 P. 688 (Colo. 1905). In that will contest dispute, the trial court permitted the attorney who drafted the will to testify as to the circumstances surrounding the will execution. This ruling was upheld in *Denver National Bank v. McLagan*, 298 P.2d 386 (Colo. 1956), in which the drafting attorney was permitted to testify as to "all matters leading up to the execution of the will including statements of the testator [and] his mental condition, and to facts relating to the issue of undue influence and other matters affecting the validity of the will." *See also Glover v. Patten*, 165 U.S. 394, 407-08 (1897); *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001); "Wills and the Attorney-Client Privilege," 14 *Ga. L. Rev*. 325, 334 (1980).

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

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

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

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

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

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

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

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

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

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

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

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

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

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