ISBA MUTUAL INSURANCE

Serving Illinois Lawyers

THE FUNDAMENTALS OF LOSS PREVENTION FOR LAWYERS

Contents

Chapter 1: Introduction

Many lawyers assume that if they work hard and treat their clients with professionalism and respect, they will never have to worry about being sued for legal malpractice. This is a false assumption. Lawyers are in the service business. The possibility that you will never have a client who is dissatisfied with the service, the fees, or the outcome of their case is negligible. Put another way, where there is a dissatisfied or disgruntled client, there is a potential for both a legal malpractice claim and an ARDC complaint.

According to legal malpractice experts, a lawyer in private practice today can expect an average of three malpractice claims over the course of their legal career [need updating]. Furthermore, the chance of being sued does not diminish with experience. On the contrary, statistics indicate that the greatest percentage of legal malpractice claims are made against lawyers who have been practicing ten years or more. [need updating]

Legal malpractice can generally be divided into four broad causes of claims:

- ***substantive errors***, such as a failure to know the law
- ***intentional acts***, such as fraud or theft
- ***administrative errors***, such as failure to calendar properly, or
- ***client relations***, such as failure to obtain consent/inform the client.

Substantive errors make up over half of all claimed errors, with the failure to know/properly apply the law being the most common individual error claimed. Better computer calendaring systems, e-filing, and electronic record keeping have assisted lawyers in better firm management such that administrative errors have produced far fewer claims. Notably, solo lawyers continue to generate a larger percentage of claims than any other firm-size group.

Similarly, solo/small firm practitioners also have a high risk of being the subject(s) of disciplinary actions. More than half of the lawyers disciplined by the ARDC are solo practitioners. Also, more than half of grievances submitted to the disciplinary agency are related to the lawyer-client relationship, including the failure to communicate.

ISBA Mutual is committed to providing tools and resources to insured law firms to reduce the risk of them becoming the subject of a malpractice claim. This edition of ***"The Fundamentals of Loss Prevention for Lawyers"*** is one of those resources designed to help firms implement a loss prevention plan that will significantly reduce the risk of legal malpractice.

While establishing a new loss prevention program can be a daunting task, the implementation will not only reduce your risk of professional liability, but it will also help you operate a more efficient practice and serve your clients better. Parenthetically, satisfied clients are less likely to sue their lawyers or file grievances against them.

We suggest that each lawyer start the implementation process by setting aside a minimum of one morning or afternoon each month to devote to loss prevention. You can use the chapters of this book as a guide for your program. Focus on a one or two chapters each month and within a little over a year, the program will be implemented. After that, you can use that same block of time each month to monitor your loss prevention program and ensure that systems put in place are being fully utilized.

The information contained herein is intended for educational purposes only and is not intended to constitute legal advice. For legal guidance, insured law firms are encouraged to contact us for a risk management consultation at 312-379-2000 with questions; and to sign up at our website isbamutual.com for Liability Minute Alerts for informative articles on emerging legal and practical issues.

We also encourage our insureds to take full advantage of their membership in the Illinois State Bar Association, including a variety of practice management and educational resources, including:

- Free Online CLE (sponsored by ISBA Mutual)
- ISBA Solo & Small Firm Practice Institute Series (sponsored by ISBA Mutual)
- Live CLE events
- Fastcase legal research (sponsored by ISBA Mutual)
- Practice HQ
- IllinoisLawyerFinder.com lawyer referral service
- IllinoisBarDocs forms library
- ISBA Central, the Illinois State Bar Association's private online discussion community
- The Illinois State Bar Association Ethics Page, which contains ISBA Advisory Opinions on Professional Conduct and the ISBA Ethics Infoline
- The ISBA Expert Service Directory
- And many more resources found at www.isba.org

Chapter 2: Client Relations

Every Malpractice Claim Begins with a Dissatisfied Client

This dissatisfaction often stems not from the legal services provided by the lawyer, but from the way the client was treated by the lawyer.

Let's compare the lawyer-client relationship to that of the doctor-patient. Suppose you visit a doctor and are kept waiting for half an hour. A nurse then does the preliminary work, rather than a doctor. Finally, the doctor flies into the examination room, spends five minutes with you, answers no questions and leaves you with a bill of $100. This dissatisfied patient is more likely to sue the offending doctor than a patient who is treated with care and respect by their doctor.

Similarly, clients don't want to be left waiting in your reception area when they have an appointment. They don't want you to take calls in the middle of meetings with them; and they don't want to wait a week to receive a response from you about the status of their case.

It is up to you to make sure your clients understand everything that is happening in their case because:

- Lawyers have an ethical duty to keep their clients fully informed with respect to their matters.
- Clients who have been kept informed of the weaknesses inherent in their cases will not be as shocked or upset when the outcome is less than perfect.
- Clients will grow to respect your honesty and integrity if you make it a practice to provide them with the whole picture.

Procedures to Improve Communications with Clients and Enhance Client Satisfaction

Keep the Lines of Communication Open

Communicate regularly with your client
Establish a procedure for automatically sending the client a copy of all significant documents, drafts, pleadings and correspondence relating to their matter. It takes only a few extra minutes to complete this task.

Never permit several months to pass without communicating with your client ***in writing***. If your calendaring system includes automatic file review dates, you can use these review dates as reminders to correspond with the client. On the review date, you should then send the client a quick letter, for example, informing them that you are waiting for a judge to rule on a dispositive motion. If you don't provide the client with an explanation for the inactivity on their file, the client may assume that you are neglecting their matter.

Communicating with the client solely by telephone is not sufficient. As will be discussed in the next chapter, an important part of loss prevention is documenting your representation.

Return telephone calls
The unreturned telephone call is the most common complaint lodged against lawyers by their clients. Make it a policy to return all client calls as soon as possible, but at a minimum within 24 hours. If you cannot return the call personally, have an assistant return the call, inform the client how long you will be out, and ask whether immediate action is necessary. Have procedures in place for handling any emergency that may arise in your absence. For example, leave a list of people your assistant should contact, depending upon the nature of the emergency.

Understand your client's preferences for communications
Speak with your client about how they would prefer to receive communications from you; whether they want to review everything you file or just the most important filings that will affect the disposition of the case. Advise clients when you will be away from the office for an extended period; and who they should reach out to in an emergency. Some clients may prefer email communication, but they still want to receive a hard copy in the mail. When communicating via email, keep in mind that your client may have detailed requirements for the formatting of subject lines and attachments, and those nonconforming emails may not reach their intended recipient. Finally, make sure to preserve these communications in a hard copy or electronic file.

Manage Expectations

Don't create unrealistic expectations
The practice of law is an adversarial system with winners and losers. Be careful not to convey unrealistic expectations to the client regarding the cost, outcome, or time needed to resolve the matter. If you must give the client an estimate, make sure it is a conservative, thoughtful estimate and not an off-the-cuff guess.

Give the client bad news early and often
Once you have eliminated the practice of providing clients with false hopes, you should focus on the practice of providing clients with the downside early and often.

Take time to explain legal procedures to your client and invite questions
If using legal jargon is unavoidable, take the time to explain it to your clients. Clients who understand the legal process will be in a better position to assist their lawyers and will generally be more pleased with their experience.

Some lawyers provide handouts to their clients that describe the legal process involved in the client's case or matter. For example, a divorce lawyer can distribute a brief outline of the steps necessary to obtain a divorce and the client's role in the proceedings. Take the time to discuss the handouts you provide so that your clients are more likely to ask questions.

Obtain the client's consent to all major decisions
Failure to obtain the client's consent is a major cause of malpractice claims today. To ensure that there is a meeting of the minds between you and your client, document the client's informed consent to all major decisions. For a more detailed discussion, see the chapter Documentation and Case Management.

Be Timely

Don't keep clients waiting
A client who is kept waiting or whose office visits are continually interrupted by other telephone calls often becomes frustrated and believes that their lawyer does not value their business as

much as others. This sometimes leads to the conclusion that the lawyer is neglecting the client's matter.

Establish regular billing practices
A major source of client dissatisfaction is the fee charged for the legal services rendered. Regardless of whether you work on an hourly fee or a contingency fee basis, it is critical to document the terms of your fee agreement in a clear manner. (For a more detailed discussion, see the chapter Billing, Collection of Fees, and Handling Client Funds.)

Complete assignments on time
Another frequent complaint by clients is that their case or matter is taking longer to resolve than anticipated. As stated herein, if you must give an estimate of the time needed to complete the matter, make sure it is a conservative estimate, taking into consideration unexpected problems and delays. If you give the client a date that you cannot meet, the client will be annoyed regardless of the quality of the final product. Finally, lawyers who are chronically tardy in completing projects should either reduce their workloads or improve their time management skills.

Manage Your Team

While you model effective communication, manage expectations and timeliness, you make your expectations clear to your team. Lawyers and non-lawyer employees should maintain high standards of courtesy, timeliness and professionalism when dealing with clients. Every employee in your firm has a critical role in loss prevention. Discretion and confidentiality are of special importance when employees work in more public areas like a lobby or reception desk.

For a more detailed discussion see the chapter Employee Training.

Client Relations Do's and Don'ts

Do…

- ✓ Correspond regularly with your client.
- ✓ Understand your client's preferences for communications.
- ✓ Listen to your client.
- ✓ Take time to explain legal procedures to your client and invite questions.
- ✓ Train your employees.
- ✓ Obtain the client's consent to all major decisions ***in writing***.

Don't…

- ☹ Fail to return telephone calls within 24 hours.
- ☹ Create unrealistic expectations about the client's case.
- ☹ Keep clients waiting to meet with you.
- ☹ Put off delivering bad news.
- ☹ Fail to send out invoices regularly.
- ☹ Underestimate how long it takes to complete assignments.

Chapter 3: Client Screening

Client Evaluation

Lawyers who report malpractice claims to ISBA Mutual often begin their conversation with the phrase, “I should have never agreed to represent this client because…” These lawyers have learned the hard way the importance of client screening in preventing malpractice claims.

Effective client screening begins with knowing the types of clients you want to serve and who your ideal clients are. Reviewing information about the client at the intake stage provides you with the data you need to assess whether the potential client is the right fit for your firm at that particular time.

Many legal malpractice claims are the direct result of a lawyer accepting a matter he or she does not have the expertise to handle. Lawyers should make a meaningful assessment as to whether that particular matter is a fit for the lawyer and the firm. While it may be difficult to turn down legal work, your reputation and your bottom line will suffer more by taking on clients that you did not properly screen.

It is also important to remember that it may be difficult to disengage from a client once you have established an attorney/client relationship. Once a lawyer files an appearance, they must obtain leave of court to withdraw that appearance. In state courts, this process is governed by Illinois Supreme Court Rule 13. The court is not required to grant the motion. There are circumstances under which courts will often refuse to grant motions for leave to withdraw, such as an imminent trial date, in which case the client or opponent would be prejudiced by the necessary delay for the client to obtain a new lawyer (in Illinois state courts, the court must give a party at least 21 days within which to have new counsel file an appearance). If the client objects to the lawyer’s motion for leave to withdraw, the court may deny the motion, though this is unlikely if prejudice to the client isn’t likely to result. The key inquiry will be whether the client is likely to be prejudiced to withdraw. Some judges will grant a motion for leave to withdraw only if the client has already retained a new lawyer who is ready to appear. In deciding whether to permit withdrawal, the judge may take into consideration whether the lawyer is getting paid, but it will not be a significant factor. If the client is likely to be prejudiced by the withdrawal, it won’t likely matter whether the lawyer is getting paid. The same is true relative to the lawyer’s ability to advance expert costs.

We recommend that you ask yourself a series of questions before agreeing to represent a new client or undertake a new matter for an existing client:

Are you competent to handle the new matter?

Illinois Rules of Professional Conduct Rule 1.1 (eff. January 1, 2010) requires that you provide competent representation to your clients. Competent representation requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Do not assume, for example, that because you have handled one type of litigation or transaction, you have sufficient expertise to handle other types. Every cause of action has its own unique elements that must be considered. Similarly, there can be a world of difference between a residential real estate matter and a commercial real estate transaction.

If the new matter is beyond your expertise, you have three choices. You can:

- ***decline*** the representation (we recommend doing so in writing. See Appendix Non-Engagement Letter: Basic.)
- ***engage*** a qualified co-counsel with the written consent of your client; or
- ***refer*** the matter to another lawyer.
    - Remember, however, that if you refer the matter to another lawyer for a fee, you remain legally responsible for the case.

Does your office have the time and financial resources necessary to handle the matter?

Even if you have the expertise to handle a particular case, you may not have the time or resources necessary to take on the matter competently. We recommend you consider the following factors:

- **Time: Analyze your current workload and staffing limitations.** Do you really have the time for another matter? Firms that are overwhelmed with their workloads are at risk of committing a critical error
- **If you work on a contingency fee basis, evaluate whether you have the financial resources to handle the matter.** Can you cover your office expenses and the initial costs of the case while the matter is being litigated? Do not put yourself in a position in which your case management is being dictated by economics rather than sound legal principles.

Is this the case or matter right for your firm?

- **Prior handling:** Taking on a matter as substitute or subsequent counsel is particularly challenging. You may unwittingly walk into a file that has been neglected or mishandled. As a subsequent lawyer, you have a duty to mitigate. Thus, if the prior lawyer did not perform competently, you have an obligation to rectify the situation if possible. Unfortunately, prior mistakes are often detected too late. The wiser course is to decline representation of clients who have used multiple lawyers in the past.

- **Is the person a close friend or relative?**
  There are a few important reasons to be wary of clients who are friends or relatives. First, lawyers are sometimes badgered into accepting matters for friends or relatives that are outside their expertise or for which they do not have time. As a result, mistakes are made, details are overlooked, and before you know it, Aunt Edna is suing you for legal malpractice. Therefore, before agreeing to represent a friend or relative, ask yourself whether you would take on the client if they were a stranger; if the answer is no, decline the representation.

  A second danger in performing legal services for friends and family is that lawyers routinely let down their guard in these situations and do not follow regular procedures. As an example, you may obtain the client's informed consent verbally rather than in writing and thereby open yourself up to a misunderstanding with the client. If you decide to accept a close friend or relative as a client, follow all regular office procedures, including procedures on engagement letters, conflict checks and written informed consents. There have been many claims brought against lawyers asked to do favors by disgruntled friends and family members.

For more discussion, see the chapters Documenting Engagement (and Non-Engagement) and Documentation and Case Management.

Warning signs that might mean you are looking at a difficult or troublesome client

- **Clients who are seeking your advice at the eleventh hour.** As the newly hired lawyer, you may not have time to properly investigate the matter or draft the required documents. As a seasoned lawyer, you may have so many other cases that require your immediate attention such that you cannot neglect those cases to take on the new matter with an impending deadline.
- **Clients who switch lawyers are often avoiding legal bills.** If you decide to represent a person who has had multiple lawyers in the past, consider insisting on a retainer fee.
- **Clients who are very concerned about fees.** Their concern may be based on an inability to pay.
- **Clients who were dissatisfied with a previous lawyer's work may well be dissatisfied with yours.** Do not let ego overwhelm your common sense. At a minimum, call the previous lawyer and get their side of the story. The lawyers should be able to tell you what you need to know without violating the lawyer-client privilege.
- **Does the person appear difficult to deal with or exhibit irrational behavior?** Most of us have represented the annoying or irrational client at one time or another. In the best case, these clients are just a temporary nightmare that will eventually fade from your memory. In the worst case, they become your foe in a legal malpractice claim. The bottom line is that clients who complain and second-guess everything you do are the first ones to rush to another lawyer and sue you when the results are less than perfect. Why risk the aggravation and a potential claim?
- **Is the client proceeding on principle alone?** Avoid clients who want blood at all costs, particularly if you are fronting the costs. They often do not appreciate the limitations of our legal system and will not accept anything short of total victory, however they may define it.
- **Does the client have unrealistic expectations concerning the outcome of the matter or the time needed to complete it?** While all clients have unrealistic expectations to a certain extent, this question is designed to weed out clients whose expectations are simply unobtainable. In these cases, lawyers often spend months performing solid legal work only to be sued for malpractice when the impossible expectation cannot be met. The classic example is the client who believes they are entitled to one million dollars because of a simple slip and fall. Try to find out what the client expects at the intake stage so that you can help them manage their expectations.
- **Is the client of questionable moral character or financially unstable?** If so, you may not want to represent the client, depending upon the nature of the matter. For example, a lawyer may agree to defend a particular individual in a criminal or civil matter but decline to represent that same individual in a securities offering.
- **Transactional lawyers must be particularly careful with start-up ventures**. These lawyers often discover too late that their clients are dishonest or financially incapable of consummating the deal. Frustrated investors and other third parties may then seek relief from the innocent lawyer's deep pocket. Today, a growing number of transactional lawyers investigate the background of new clients before agreeing to represent them.

For more discussion, see the chapters Documenting Engagement (and Non-Engagement) and Documentation and Case Management.

Learn How to Say No

One of the most difficult tasks for any lawyer is learning how to say "no." The only way to be sure to avoid being stuck with a troublesome client is not to take them on in the first place.

Here are some suggestions for how to say no:

> "I'd like to help you, but I have other commitments at this time that would prevent me from giving your matter the full attention it deserves."
>
> "I'm sorry but I'm not available. I suggest you contact the Illinois State Bar Association Lawyer Referral Service at illinoislawyerfinder.com."
>
> "Your matter is outside of my area of expertise, and you would be better served by seeking a lawyer who handles cases like yours."

Non-Engagement Letters

If you decide to decline representation, send a Non-Engagement letter. Otherwise, you may be surprised when you are served with a legal malpractice complaint brought by an individual that you never agreed to represent. You may consider capturing the contact information of all potential clients that you speak to so that you are able to send them the Non-Engagement letter. Whether or not a lawyer-client relationship was created is viewed from the subjective view of the client. For more discussion, see the chapter Documenting Engagement (and Non-Engagement).

Past Problem Clients

There is one final guard against the troublesome client. Make a list of clients who have been problematic in the past and search for common themes. You will often find similarities or patterns in these past representations that you can avoid in the future.

Client Screening Do's and Don'ts

Do…

- ✓ Analyze your current workload and staffing limitations.
- ✓ Evaluate whether you have the financial resources to handle the matter.
- ✓ Learn how to say no.
- ✓ Make a list of clients who have been problematic in the past and search for common themes, so you can avoid similar clients in the future.

Don't…

- ☹ Take just any matter that comes through the door.
- ☹ Take a matter outside your area of expertise.
- ☹ Take a matter where the client has switched lawyers multiple times.
- ☹ Take on a client who contacts you at the eleventh hour, who has unreasonable expectations or who cannot afford your services.

Chapter 4: Avoiding and Mitigating Conflicts of Interest

Many lawyers find the rules governing conflicts to be confusing and difficult to apply in real-life situations. Yet the consequences of acting in a conflict can be severe. Conflicts have long been among the leading causes of legal malpractice claims and disciplinary actions. Conflicted lawyers face possible disqualification. Fees earned in connection with conflicted engagements may be disgorged. And lawyers acting in more serious conflicts could even face criminal charges.

This chapter is intended to aid Illinois practitioners in identifying when a potential conflict of interest exists, in implementing appropriate conflict check procedures, and in using conflict waivers to avoid the potentially harsh consequences presented by conflicts of interest.

Types of Conflicts

In Illinois, the Illinois Rules of Professional Conduct of 2010 (the "Rules" or a "Rule) set forth the general standards for determining when a conflict of interest exists and, if so, the circumstances under which the conflict can be waived, if at all. Generally, these standards are set forth in Rules 1.7 through 1.12:

- Conflicts in connection with the representation of current clients, including so-called "direct adversity" conflicts and "material limitation" conflicts, as well as other specific conflict scenarios (Rules 1.7 and 1.8);
- Conflicts arising from duties to former clients (Rule 1.9);
- Imputed conflicts (Rule 1.10);
- Conflicts relating to work as a current or former government officer or employee (Rule 1.11); and
- Conflicts relating to employment as a third-party neutral, such as a judge, mediator or arbitrator (Rule 1.12).

In addition to the foregoing, duties to prospective clients (Rule 1.18) should be considered when evaluating whether a lawyer will be disqualified from a contemplated engagement.

This Section provides an overview of each of the more common types of conflicts discussed in Rules 1.7-1.10 and Rule 1.18, including guidance for identifying each type of conflict and a discussion of the requirements for obtaining waivers under each scenario.

Practitioners should be aware that conflicts of interest are determined not by the effect of the conflict (i.e., whether the conflict harmed the client), but rather on the quality of the representation (i.e., whether the representation itself was harmed by the conflict). This distinction is important, as a conflict of interest may occur—and conflicts often do—even where the client suffered no actual adverse effect.

Concurrent Conflicts of Interest (Rule 1.7)

There are two types of concurrent conflicts of interest, (1) those that are based on direct adversity between current clients ("direct adversity" conflicts) and (2) those where a lawyer's

representation of a client is likely to be materially limited by the lawyer's duties to different current or former client or the lawyer's own personal interests ("material limitation" conflicts). As discussed below, if properly identified, many concurrent conflicts can be waived.

Identifying "Direct Adversity" Conflicts

Pursuant to Rule 1.7(a)(1), a conflict of interest exists if "the representation of one client will be directly adverse to another client." Such conflicts are often referred to as "direct adversity" conflicts and, despite the relatively simple, straightforward language of Rule 1.7, many lawyers consider them to be among the most difficult types of conflicts to identify.

A direct adversity conflict arises where clients are directly adverse to one another in litigation or a transaction. This could occur where the lawyer represents both clients in a single matter in which the clients are adverse. More frequently, such conflicts occur where the lawyer represents the affected clients in different matters. For example, Client A asks Lawyer to pursue a claim against Client B, whom Lawyer represents in an unrelated matter. Lawyer would have to decline the engagement relative to Client A, absent an appropriate conflict waiver.

Rule 1.7(a)(1) becomes more difficult to apply when one considers that "direct adversity" does not necessarily mean that one client has asserted a claim against the other. Direct adversity could occur in the litigation context where clients have competing interests but neither has asserted a claim against the other. This could occur where Lawyer represents Clients A and B jointly as co-defendants in litigation, and Client A has an interest in minimizing liability at the potential expense of Client B's defense.

Direct adversity can occur in the transactional context, as well. For instance, if Lawyer represents Client A in estate-planning matters and is asked by Client B to represent her in purchasing Client A's home, a conflict would exist. In order to proceed with the representation of Client B, Lawyer would have to obtain conflict waivers from both affected parties. Conflict waivers for concurrent conflicts are discussed below.

Direct adversity can occur under other circumstances, as well. For instance, direct adversity could occur where Lawyer, in representing Client A, is tasked with taking the deposition of Client B, whom the lawyer represents in an unrelated matter. If Client B is likely to testify in a manner unfavorable to Client A, Lawyer should seek to impeach Client B's credibility, but doing so would be directly adverse to Client B.

Another common example is where Lawyer represents the driver (Client A) and passenger (Client B) of an automobile in personal injury claims arising from an accident with another vehicle. In vigorously representing the passenger, Client B, the lawyer may be obligated to pursue a claim against Client A, the driver, thereby presenting a direct adversity conflict. In this scenario, a direct adversity conflict exists whether or not Lawyer actually asserts Client B's claim against Client A.

Direct adversity could even occur where the lawyer represents two clients with competing economic interests, though such potential conflicts are more typically analyzed under the "material limitation" standards discussed below.

Lawyers are sometimes mistakenly concerned that they will be conflicted via the representation of clients who are directly adverse to one another in a matter in which the lawyer plays no role. Under Rule 1.7(a)(1), a direct adversity conflict does not arise where two of the lawyer's current clients are directly adverse to one another in a matter in which the lawyer does not represent

either. For instance, if Lawyer represents Client A in connection with the sale of a home, and Lawyer represents Client B in connection with the preparation of a will, the fact that Client A is suing Client B for injuries sustained in an automobile accident would not create a direct adversity conflict where Lawyer has no involvement in the personal injury lawsuit. As discussed below, though there is no direct adversity conflict, such a scenario could present a risk that the lawyer's duties to one client will be limited by his representation of the other, thereby creating a material limitation conflict.

Identifying "Material Limitation" Conflicts

Even if two (or more) current clients are not directly adverse, a conflict may nonetheless arise where there is a significant risk that the lawyer's ability to represent one client will be materially limited by the lawyer's obligations to another current client. A lawyer's representation of a current client could also be materially limited due to the lawyer's obligations to a former client or the lawyer's own personal interests. Although the latter types of conflicts do not relate to the current representation of multiple clients, they are nonetheless referred to as "concurrent" conflicts. Pursuant to Rule 1.7(a)(2), a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client*,* a former client or a third person or by a personal interest of the lawyer."

Even if the representation of a client *may* be materially limited by an obligation to a current or former client or the lawyer herself, a conflict will only exist under Rule 1.7(a)(2) if there is a *substantial risk* that such a material limitation will occur. The mere possibility of harm will not be sufficient to create a conflict.

In assessing a "material limitation" conflict, the practitioner should consider whether the lawyer has an incentive to act without appropriate diligence and zealousness due to some other interest or whether the lawyer's independent professional judgment would otherwise be compromised by such interest.

Almost any direct adversity conflict will also be a material limitation conflict, but material limitation conflicts often exist absent direct adversity. In fact, material limitation conflicts often occur during the representation of multiple clients with generally aligned interests. A common example is where Lawyer is asked to represent Client A and Client B in forming a joint venture. Lawyer may be limited in her ability to recommend or advocate for all possible positions on behalf of Client A due to her loyalties to Client B.

It can be especially difficult to identify when a lawyer's personal interests create a significant risk of material limitation. One example is where Lawyer owns stock in a corporation that Client has asked Lawyer to sue. Another example is where Client's interests require Lawyer to take a position that Lawyer considers morally objectionable. A third example is where Lawyer represents Client in litigation and the opponent files a motion for sanctions against both Lawyer and Client based on an allegation that a pleading was filed in bad faith. Under such a scenario, Lawyer and Client each arguably have an interest in blaming the other for the alleged pleading issue, thereby creating a possible conflict.

"Positional" Conflicts

Positional conflicts arise when a lawyer takes a position on behalf of a client in one matter, usually an appeal, which could have a negative impact upon a matter being handled for a different client. But such a scenario does not necessarily create a conflict of interest. Comment [24] to Rule 1.7 provides that "[t]he mere fact that advocating a legal position on behalf of one

client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest." Such a scenario presents a conflict only if there is a *significant risk* that advocating for one client's position will create precedent adverse to another client. Positional conflicts should be assessed under the standards for material limitation conflicts, and potential waivers should be addressed accordingly.

Waivers of Concurrent Conflicts

Concurrent conflicts—those based on direct adversity or a material limitation, including positional conflicts—can often be waived under appropriate circumstances. Rule 1.7(b) identifies the circumstances under which a waiver may be obtained:

> (b) *Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:*
> *(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*
> *(2) the representation is not prohibited by law;*
> *(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and*
> *(4) each affected client gives informed consent.*

There are situations in which a concurrent conflict cannot be waived. A lawyer may not represent a client in the face of a concurrent conflict of interest unless the lawyer reasonably believes that he can provide competent and diligent representation despite the conflict. If the lawyer does not reasonably believe that he can provide such representation, the conflict cannot be waived. A lawyer's reasonable belief will be judged based on an objective standard: What would an objectively reasonable lawyer believe under the circumstances?

The practitioner should also pay careful attention to subsections (b)(1) and (b)(3). A direct adversity conflict cannot be waived, under any circumstances, if one client has asserted a claim against the other client in the same litigation or other proceeding before a tribunal. Under such circumstances, the lawyer would be precluded from representing one client or, possibly, both clients. And, if such a conflict arose during the representation, the lawyer would be required to withdraw.

Assuming that the requirements of subsections (1)-(3) are met, a conflict waiver will only be effective where the lawyer also obtains the informed consent of each affected client. In a direct adversity situation, both of the directly adverse clients must consent. In a material limitation situation involving two current clients, both current clients must consent. In a material limitation situation involving a current client and a former client, *both* the current client *and* the former client must consent.

It is not enough to obtain the client or former client's consent; the affected party's consent must be *informed*. Informed consent is discussed further in the section entitled *Obtaining Conflict Waivers: Informed Consent*, below.

Notably, conflict waivers relative to concurrent conflicts of interest do not need to be confirmed in writing, much less in a writing signed by the client. However, as discussed in greater depth later in this Guide, it is strongly recommended that every conflict waiver be in writing and signed by the affected party or parties. Doing so serves multiple purposes, including providing evidence

of informed consent in the event that a dispute arises. For lawyers in multi-jurisdictional practice, obtaining written confirmation can be especially important as most states require waivers of concurrent conflicts to be memorialized in writing. Some states require the writing to be signed. By always obtaining signed, written consent, lawyers can avoid engaging in a potentially complex analysis as to which set of rules will apply to a particular scenario. In some circumstances, the ethics rules of more than one jurisdiction may apply.

Conflicts Relating to Former Clients (Rule 1.9)

As discussed above, a "material limitation" conflict may result based on the lawyer's obligations to former clients. Conflicts relating to the representation of former clients may exist for other reasons, as well. Under Rule 1.9, lawyers owe continuing duties of loyalty and confidentiality to former clients.

Rule 1.9(a) prohibits a lawyer who represented a former client in a matter from representing another client in the "same or a substantially related matter" where the current client's interests are "materially adverse" to those of the former client, unless informed consent is given. Matters are considered to be substantially related if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information obtained in connection with the representation of the former client would materially advance the current client's interests in the current matter.

Rule 1.9(b) applies where a lawyer has changed firms and is presented with the opportunity to represent a client in a matter that is the same or substantially similar to one handled by the lawyer for a client while with the prior firm. Such new engagements are prohibited absent informed consent if both (1) the current client's interests are "materially adverse" to those of a former client and (2) the lawyer obtained information relating to the prior representation that is material to the current matter.

Rule 1.9(c) prohibits a lawyer who obtained information during the representation of a former client from using that information to the disadvantage of the former client or otherwise revealing that information, with some limited exceptions. One exception is that the lawyer may use information relating to the representation of a former client if that information has become "generally known." Practitioners are cautioned that information can be made public without being "generally known."

Rule 1.9 is implicated in a number of different scenarios. For instance, if Lawyer previously represented Client in her business dealings with others, Lawyer may be prohibited from representing Client's spouse in seeking a divorce. Lawyer who previously represented Client A in a merger may be precluded from representing Client B in seeking to collect on a judgment against Client A. In both cases, the lawyer may have been privy to confidential client information relative to the former client that could be used to the current client's benefit. Although either such engagement could likely proceed with the former client's informed consent, the former client may not offer consent after being informed of all pertinent circumstances.

Conflicts under Rule 1.9 may only be waived via the informed consent of the *former* client. The current client's rights are not implicated, so consent is not required of the current client. The former client's informed consent does not need to be confirmed in writing but as discussed throughout this Guide, a prudent lawyer will always obtain written confirmation of the affected party's informed consent.

Specific Conflicts Rules (Rule 1.8)

Rule 1.8 sets forth a number of conflicts scenarios that do not fit neatly within the previously discussed categories or for which different rules apply. Below is a brief discussion of each such conflict and options for obtaining waivers thereof. As is the case with any potential conflict, a lawyer faced with a potential conflict under Rule 1.8 should consult the Rules and the Comments thereto.

For further guidance on these issues and other conflicts questions, lawyers can research ISBA Professional Conduct Ethics Opinions. Although ethics opinions do not carry the weight of law—they are not precedential in connection with ethics grievances or other civil proceedings—they can be invaluable in analyzing specific conflicts scenarios.

Business Transactions with Clients (Rule 1.8(a))

Lawyers are generally prohibited from engaging in business transactions with clients, including loan arrangements and property transactions, unless: (1) the terms are fair and reasonable to the client; (2) the terms are communicated in writing to the client in a way that is understandable to that client; (3) the client is informed in writing that client may obtain advice of an independent attorney and is given a reasonable opportunity to do so; and (4) the client gives informed consent in a signed writing to the essential terms of the transaction, including whether the lawyer is representing the client in the transaction. In Illinois, although most conflict waivers do not have to be in writing, much less signed by the client, a waiver of a Rule 1.8(a) conflict must be in writing *and* signed by the client. As with any conflict waiver, in order to obtain a client's consent to a Rule 1.8(a) conflict, the client must be adequately informed of the circumstances. The requirements for obtaining informed consent are discussed further in the section entitled *Obtaining Conflict Waivers: Informed Consent*, below.

Use of Information Relating to a Client (Rule 1.8(b))

Rule 1.8(b) provides that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Rule 1.8(b) must be read in conjunction with Rule 1.6, entitled *Confidentiality of Information*, which defines as confidential all "information related to the representation of a client," and identifies circumstances in which it may be appropriate to reveal such information.

Under Rule 1.8(b), a conflict may exist where the attorney has an interest in using confidential information to a client's detriment. Such conflicts may be resolved with the affected client's informed consent. As with most conflict waivers in Illinois, the waiver is not required to be signed by the client or even in writing. Though written confirmation is not necessary, it is prudent to obtain a signed document authorizing the disclosure of any confidential information, certainly if it is anticipated that the disclosure will or may be disadvantageous to the client. In order to obtain *informed* consent, which is discussed further below, the lawyer will likely have to inform the affected client how the information will be used and how such use will be disadvantageous to the affected client.

Gifts from Clients (Rule 1.8(c))

Rule 1.8(c) forbids lawyers from soliciting "substantial" gifts from clients and from preparing instruments, including wills and trusts, through which the lawyer or a person related to the lawyer will receive such a gift. The only exception is where the recipient of the gift (either the lawyer or a relation) is related to the person giving the gift. Rule 1.8(c) defines who will constitute a "relation."

Conflicts based on Rule 1.8(c) cannot be waived under any circumstances and engaging in a conflict of the sort described therein is likely to result in professional discipline and could result in criminal prosecution.

Literary or Media Rights (Rule 1.8(d))
Rule 1.8(d) provides that, "prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." Rule 1.8(d), like Rule 1.8(b) (use of information relating to the client) is based in great part upon the notions that all information relating to the representation is confidential (Rule 1.6) and that business transactions with current clients are inherently problematic from a conflicts perspective (Rule 1.8(b)).

The prohibition in Rule 1.8(d) is absolute—it cannot be waived—but applies only during the representation of a client. Upon termination of the engagement, such an agreement is permissible, though a prudent lawyer will consider the impact of Rules 1.6 and 1.8(b) and will ensure that appropriate steps have been taken to ensure that the engagement has, in fact, concluded. See discussion below relative to avoiding conflicts via the use of disengagement letters.

Financial Assistance to Clients (Rule 1.8(e))
Rule 1.8(e) prohibits lawyers from providing financial assistance to clients in connection with pending or contemplated litigation, except under certain enumerated circumstances. Rule 1.8(e) conflicts only explicitly apply in the case of litigation, but a "material limitation" and/or "business transaction" conflict may exist if a lawyer provides financial assistance to a client in connection with a non-litigation engagement. Rule 1.8(e) conflicts cannot be waived.

Rule 1.8(f))
Rule 1.8(f) addresses situations in which a non-client pays for a lawyer to represent a client. This scenario is especially common among family members. For instance, Mom pays Lawyer to represent Son in defending against a DUI charge following an automobile accident. Though lawyer may accept compensation from non-clients, three requirements must be met in every such instance:

First, the client must give informed consent to the arrangement. Informed consent does not need to be given in writing, but it is highly recommended that consent be memorialized in a writing explaining the risks and alternative courses of action, and that the writing be signed by the client.

Second, the lawyer may only accept an engagement under such an arrangement if the payment of fees by the non-client will not interfere with the lawyer's exercise of independent professional judgment or the attorney-client relationship. Under the scenario above, if there is evidence to suggest that Mom was actually driving the vehicle, not Son, Mom's payment of Lawyer's fees could make it difficult for Lawyer to exercise independent judgment. This is especially likely to be the case if Mom has been Lawyer's regular client, or if Lawyer has concerns that he will not be paid unless he acts in Mom's interests.

Third, the lawyer must protect information relating to the representation of the client in accord with Rule 1.6. The non-client payor is not entitled to confidential information obtained via the engagement, and this fact should be made clear to both the client and the non-client payor at

the outset of the engagement. Information may be shared with the non-client payor, but only to the extent approved by the client or otherwise permissible under Rule 1.6.

In addition to the foregoing, whenever a lawyer accepts compensation from a non-client, it is strongly recommended that the lawyer memorialize in a writing directed to the payor at the outset of the engagement that (1) there exists no attorney-client relationship between the lawyer and payor, (2) the payor is neither entitled to direct the terms of the engagement or work performed by the lawyer (unless directed to do so by the client, in which case that direction should be memorialized in the written informed consent), and (3) the payor is not entitled to confidential client information. The lawyer has to be willing to accept the consequences of such a disclosure, including the payor withdrawing the agreement to pay fees.

A lawyer asked to accept compensation from a non-client should also consider whether the arrangement violates Rule 1.7(a)(2). If such an arrangement creates a significant risk that the representation of the client will be materially limited, and if the lawyer does not believe that she can offer competent and diligent representation as a result, the conflict cannot be waived even under the circumstances discussed above.

Aggregate Settlements (Rule 1.8(g))
Rule 1.8(g) prohibits lawyers representing multiple clients from making aggregate settlements in civil claims or from making aggregate guilty or *nolo contendere* pleas in criminal matters absent informed consent of all affected clients. In the civil context, Rule 1.8(g) is not limited to the representation of plaintiffs – negotiating an aggregate settlement on behalf of two or more defendants also implicates Rule 1.8(g). Here, the conflict waiver must be in writing, and it must be signed by each of the affected clients. Moreover, Rule 1.8(g) provides that the lawyer must make certain disclosures, including an identification of the claims or pleas involved and the participation of each client in the settlement. This means that, for instance, if Lawyer is settling a claim brought against two defendant-Clients for an aggregate of $100,000, with Client A to pay $95,000 and Client B to pay $5,000, both Clients must be informed of the breakdown before the settlement is reached and must consent thereto in writing.

Limitation on Malpractice Liability (Rule 1.8(h))
Rule 1.8(h) provides that a conflict may exist when a lawyer seeks to limit malpractice liability to a client or former client.

Pursuant to Rule 1.8(h)(1), a lawyer may prospectively limit malpractice liability to a client only if the client is independently represented in connection with the agreement. If the client is not independently represented, no degree of informed consent will cure or avoid the conflict. Under such circumstances, the attempt to limit liability will almost certain be given no effect, and the conflicted representation could give rise to disciplinary charges and/or civil liability.

Pursuant to Rule 1.8(h)(2), a lawyer may settle a malpractice claim with an unrepresented client or former client only if the client or former client is both (1) advised of the desirability of seeking independent counsel in connection with the agreement and (2) given a reasonable opportunity to obtain such independent legal counsel. Although not required by the Rule, if the client or former client is represented by counsel in connection with the settlement of a malpractice claim against a lawyer, it is good practice for the lawyer to memorialize this in writing, such as in the written settlement agreement itself.

Any time a lawyer seeks to negotiate a settlement or other limitation on liability with a client or former client, the best practice is for the lawyer to obtain separate legal counsel to engage in the negotiations and finalize the agreement on the lawyer's behalf.

Proprietary Interests in Subject Matter (Rule 1.8(i))
Rule 1.8(i) provides that other than attorney liens and contingency-fee arrangements, a lawyer may not obtain a proprietary interest in the subject matter of a claim pursued on behalf of a client. This conflict cannot be waived. As with conflicts relating to gifts from clients, engaging in a conflict under Rule 1.8(i) is likely to result in disciplinary charges and could subject the lawyer to criminal liability.

Sexual Relations with Client (Rule 1.8(j))
Pursuant to Rule 1.8(j), a lawyer may not have sexual relations with a client unless the consensual sexual relationship existed prior to the attorney-client relationship. Such conflicts cannot be waived. As is the case with many conflicts, identification of the client is key to determining whether such a conflict exists.

Other Types of Conflicts (Rules 1.11 and 1.12)
Rules 1.11 and 1.12 address conflicts relating to government officers and employees (Rule 1.11) and former judges, arbitrators, mediators and third-party neutrals (Rule 1.12). Lawyers who have personally served in such roles, or whose firms employ lawyers who have served in such roles, should closely consult the Rules.

Imputation of Conflicts and Ethical Walls

Lawyers frequently have difficulty applying concepts relating to the imputation of conflicts. From a high-level perspective, practitioners should understand that the vast majority of conflicts are imputed to all other attorneys with a lawyer's firm. In other words, if a lawyer is prohibited from representing a potential client due to a conflict, the lawyer's colleagues are also prohibited from representing the potential client. Or, if a lawyer must obtain a waiver in order to proceed with an engagement, the lawyer's colleagues must likewise obtain a waiver. With limited exceptions, if a lawyer has a conflict, the law firm has a conflict.

Rule 1.10(a) provides that conflicts under Rules 1.7 (concurrent conflicts) and 1.9 (conflicts relating to former clients) are imputed to all lawyers associated in a firm, with the exception of personal interest conflicts. If one lawyer has a personal interest conflict that would prohibit the representation of a client, other members of the firm may represent the client as long as the representation does not present a significant risk that the representation will be materially limited. Such a material limitation could result from a lawyer's loyalties or obligations to a colleague, such that they have an interest in protecting the colleague's personal interests, potentially at the expense of the client.

Likewise, Rule 1.8(k) provides that the conflicts identified in Rule 1.8—those discussed in the *Conflicts Exceptions and Specific Rules* section, above—are imputed to a lawyer's colleagues. A prohibition that applies to one lawyer applies to all lawyers in the firm. There is one exception to the imputation under Rule 1.8, permitting a lawyer to represent a client that is engaged in a sexual relationship with that lawyer's colleague.

Conflicts may be imputed even under circumstances where the affected lawyer has left the firm. Under Rule 1.10(b), if a lawyer has left a firm, other lawyers in the firm *may* represent a client

with interests materially adverse to those of a client of the now-departed lawyer, as long as (1) no lawyer remaining in the firm possesses confidential information material to the matter, and (2) the matter is not the same or substantially related to the matter handled by the now-departed lawyer. Practitioners should pay careful attention to the first caveat. The representation is prohibited if *any* remaining lawyer-member of the firm possesses confidential information relating to the representation of the former client. This includes associates who obtained confidential information while assisting a now-departed partner.

Conflicts are imputed among members of a firm even if the basis for the conflict—a lawyer's representation of a former client, for instance—occurred before the lawyer joined the current law firm. In other words, conflicts follow the lawyer.

An ethical wall—a procedural mechanism designed to isolate the disqualified attorney—can be effectively used to avoid imputation of a conflict that follows a lawyer upon affiliation with a new law firm. But ethical walls can only be utilized in this circumstance – shielding a law firm from imputed conflicts brought to the firm via a newly-affiliated lawyer. Rule 1.10(e) provides that "[w]hen a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom."

Ethical walls can be an important tool in avoiding an otherwise-prohibited engagement, but an effective conflict-check system must be utilized to identify the conflict promptly and an effective screen must be put in place immediately. An ethical wall cannot be used to avoid imputation of a conflict within a law firm except for those conflicts relating to newly hired lawyers.

Obtaining Conflict Waivers: Informed Consent

Once a conflict has been identified, and the nature thereof ascertained, the lawyer should consult the appropriate Rule to determine whether the conflict can be waived. If so, the lawyer should identify the particular requirements for the waiver, such as whether it must be confirmed in writing or signed by the client and whether the client must be represented by independent counsel or advised that obtaining independent representation is recommended. From a risk management perspective, it is good practice to memorialize every conflict waiver in writing and to have that writing signed by the client. A conscientious lawyer will not ask whether a signed writing is required, but rather why a signed writing should not be obtained in any given case.

Every valid conflict waiver, whether memorialized in writing or not, is founded upon the notion that the affected client or former client has waived rights with *informed consent*. Though informed consent is the backbone of any conflict waiver, lawyers are often lax in assuring that the affected party has been fully informed. Rule 1.0(e) defines informed consent as follows:

> *"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.*

In order to obtain a client or former client's informed consent, the lawyer must disclose all of the following to the affected party:

1. The circumstances giving rise to the conflict or potential conflict;

2. An assessment of the material risks created by the conflict; and
3. A discussion of reasonably available alternatives to the proposed conflicted representation.

The first requirement—disclosing the circumstances—entails disclosing all material information that forms a basis for the potential conflict. For instance, in the case of a personal interest conflict, the lawyer must explain the nature of his personal interest and how that personal interest is connected to the potential engagement.

The following sample language and documents can be a starting point for disclosing conflicts can be found in the Sample Letters and Forms portion of this guide.

- Sample Letter to Disclose Conflict and Seeking to Consent to Continue Representation
- Sample Engagement Waiver Clause
- Sample Waiver for Joint Representation

In the case of a material limitation conflict, the disclosure can present confidentiality concerns, as the lawyer may have to disclose confidential information relating to another client or former client. Practitioners should take particular care to avoid an improper disclosure. If the relevant circumstances cannot be disclosed due to confidentiality concerns, it may not be possible to obtain informed consent and, thereby, a conflict waiver.

Lawyers frequently seek to avoid full disclosure, fearing that the client will be dissuaded from waiving the conflict. Lawyers who do this do so at their own peril, as full disclosure is the essence of any valid conflict waiver. Anything less than full disclosure is insufficient and will likely result in an ineffective waiver. Often, the circumstances that the lawyer is disinclined to disclose are the very circumstances that must be disclosed in order to obtain informed consent.

A strong conflict waiver will often include not only a discussion of the factual circumstances, but also reference to the implicated Rule and a general explanation as to why the particular circumstances give rise to a conflict under the Rules.

The second requirement—risk assessment—is likewise essential to obtaining a valid conflict waiver. Ethics commentators often suggest that this requirement includes the disclosure of both the risks of the proposed course of conduct—conflicted representation—as well as the potential benefits thereof to the affected party. The lawyer should often consider whether the conflict will limit the lawyer's ability to act zealously on behalf of the affected party, and whether there is a risk of disclosure or improper use of confidential information.

The third requirement—alternatives—requires the lawyer to specifically identify other courses of action available to the affected party. In most cases, one alternative would be for the lawyer to decline the engagement or withdraw from the representation that would give rise to the conflict. The failure to disclose this alternative could invalidate a waiver.

Take care not to disclose confidential information relating to one client (or former client) when seeking the informed consent of another. If confidential information must be disclosed to communicate to the affected party an explanation of the circumstances as well as the risks and alternatives, it may not be possible to obtain a conflict waiver.

In addition to the three requirements addressed above, in multiple representation cases an effective conflict waiver should identify how confidential information will be maintained, including whether such information may be shared among the joint clients, and what action may be taken in the event that one client withdraws consent.

Whenever informed consent is memorialized in writing, whether required by Rule or obtained as a good practice, the writing should include a thorough discussion of each of the foregoing topics. Doing so accomplishes three purposes: (1) it provides the client with ample opportunity to consider and understand the disclosure; (2) it serves as evidence that an appropriate disclosure was made, in the event that the affected party later disputes the validity or effectiveness of the waiver; and (3) it forces the lawyer seeking consent to conduct a full evaluation of the situation.

The process of obtaining a conflict waiver almost always begins with a discussion between the lawyer and client (or other affected party). Although a written memorialization of the client's informed consent will ultimately be made, a thorough discussion of the circumstances surrounding the potential conflict and the requested waiver will provide the affected party with the opportunity to ask the lawyer questions and will afford the lawyer with the opportunity to explain, often more clearly than can be effectively done in writing, why the affected party may want to agree to the proposed waiver. The discussion may also provide the lawyer with additional information that should be included in the written memorialization.

Advance Conflict Waivers

Many commentators question whether advance conflict waivers can ever be appropriately obtained. Advance conflict waivers follow the same rules as any other conflict waiver, and thereby require the informed consent of the affected party or parties. It is questionable whether a client can be sufficiently "informed" when the circumstances giving rise to the conflict have not yet been identified. Practitioners seeking advance conflict waivers should tread carefully, as such waivers are frequently deemed invalid and unenforceable.

One key to obtaining a potentially enforceable advance conflict waiver is the ability to predict what conflicts may arise, and to provide the affected client with sufficient information about the potential conflicts such that the client's consent can be deemed truly "informed." An advance conflict waiver is also more likely to be upheld if the affected client is sophisticated and/or entered into the waiver with the benefit of independent legal representation.

The risks of attempting to obtain advance waivers are significant, and often outweigh the potential benefit. Among the risks are disqualification from continued representation of the affected client or clients and a not-insignificant chance that the lawyer could be ordered to disgorge fees already earned. Another risk of obtaining an advance conflict waiver is that the presence of an advance conflict waiver often lulls lawyers into complacency, and informed consent is not later obtained when an unanticipated conflict arises.

Conflict Check Procedures

The process of identifying conflicts and, if possible, obtaining conflict waivers begins with an effective conflict check system. As discussed below, an effective conflict check system will be tailored to the lawyer's practice and will often rely upon input from multiple members of the law firm in order to ensure that appropriate information is captured, that conflict checks are run at appropriate junctures, and that, when identified, conflicts are handled appropriately.

Choosing a Conflict-Check System

There are a number of products available to automate portions of the conflict check process. Computerized conflict-check systems are generally preferable to manual systems because they tend to be quicker and more reliable and have the capacity to analyze large sets of data. Computers can search through thousands of names in a matter of seconds. Computerized options include traditional software programs that can be installed on a desktop computer with access to an internal network. There are a number of mass-marketed software options, some of which, such as Clio and AbacusLaw, provide other file-management services, like billing, time-entry, invoicing, docketing and file-management. Some law firms have developed proprietary software tailored specifically to the law firm's needs. Still other firms utilize cloud-based conflict-check and practice-management systems, which are similar to traditional software systems, but the firm data is maintained on the cloud, rather than on a local server. Cloud-based systems can be preferable for lawyers and law firms that want to check for conflicts when away from the office. Still other lawyers continue to use manual systems, such as paper systems consisting of notecards containing handwritten information. Although manual file card systems can be effective in a smaller office setting if used consistently and properly, computerized systems are generally favored.

When choosing a conflict-check system, the following should be considered:

1. Ease of data entry;
2. Ability to merge data from spreadsheets and other systems when laterals are hired;
3. Speed and the ability to run multiple checks concurrently;
4. Ability to obtain customized reports; and
5. Cost.

Although cost is necessarily a factor, practitioners should consider the potentially significant cost of failing to identify a conflict due to the utilization of an insufficient conflict-check system.

Memory Check

In addition to maintaining a manual or computerized system, every law firm should distribute new client/matter intake sheets to each lawyer in the office at least once a week. A lawyer may recognize a conflict on the distribution list that was not discovered by the manual or computer search.

Capturing the Proper Information

Your conflict check system is only as accurate as the information you put into it. If you misspell a name or neglect to add the maiden name of a client, for example, you may miss a conflict in the future. The following information should be recorded and maintained in your conflict database for future reference:

Information relating to past and present client-engagements:

- Name and address of the client. If the client is an individual, include all former or maiden names and aliases, and identify suffixes, like Jr., Sr., or III. If the client is a corporation, include the corporate name, state of incorporation and any d/b/a or trade names. Also include any known subsidiaries, parent corporations and affiliates. Whether an individual or an entity, if the client's name is misspelled in a pleading, contract or other document relating to the engagement, include the misspelled name, as well.
- Names of all adverse parties and "friendly" parties, including aliases, other spellings, and known related entities, as discussed above.

- Names of other involved parties, possibly including: spouses, parents and other family members; non-party witnesses; guardians *ad litem;* child representatives; trustees; beneficiaries; executors and administrators; lienholders; lenders; principals; significant shareholders; directors; officers; subsidiaries, parent corporations and affiliates; expert witnesses and consultants; settlors, grantors and testators; victims; and creditors and debtors.
- Names of adverse and co-parties' counsel, including the individual attorneys and firms.
- If an insurer is involved, whether your client's insurer or not, include the name of the insurer.
- File name and number.
- Date the file was opened and, if applicable, the date the file was closed.
- Nature of the legal work to be performed (e.g., divorce, will, contract, tax, personal injury case).
- Name of the lawyer within the firm who is primarily responsible for the case or matter.
- Name(s) of any other lawyers within the firm who assisted in the engagement.

Information on members of the firm:

- Names of all lawyers and their spouses.
- Names of all employees and their spouses.
- For all lawyers and employees, names of any entity for which the individual has served as a director, officer, partner or employee within the last 5 years, and names of any entity in which the individual has held a significant ownership interest during that time.
- Names of trusts of which a lawyer or employee serves as trustee or has served as trustee within the 5 years.
- Any public office held by any member of the firm within the 5 years.

Information on persons/entities whom the firm has declined to represent:

- Name of the person/entity declined; and
- Names of any adverse or co-parties in the declined matter, if known.

A Common Party Search Checklist can be found in the Sample Letters and Forms part of this Guide.

Input Procedures

It is vital that everyone in the office follow the same procedures when inputting data. You may find it preferable to have one person in charge of inputting all data and checking for conflicts to ensure that the integrity of the system is maintained. (If you do rely on one individual, however, at least one other individual should be cross trained to fill in at vacation time or if otherwise necessary.)

Data should be inputted into the conflict-check system throughout the engagement and upon closure of the file. If data is inputted only at the commencement of the engagement, critical information relating to the engagement will likely be omitted from the system and a future conflict may be missed.

The firm should institute a policy as to who is responsible for updating the database. If multiple lawyers are assigned to a matter, all such lawyers should be responsible for ensuring that the database is updated, and new conflict checks are run. If the task of ensuring that data is inputted as necessary is left to the responsible partner, information learned by the subordinate

lawyer but not communicated to the responsible partner will necessarily be omitted from the database.

A Sample Conflict of Interest Search Form can be found in the Sample Letters and Forms part of this Guide.

When to Check for Conflicts

Lawyers are accustomed to running a conflict check before opening a new file, but conflict checks will often have to be performed on multiple occasions. There are four critical points at which conflict checks should be performed:

- **Before the initial consultation with a potential client.** Never receive or review confidential information from a prospective client before a conflict search is completed. Checking for conflicts before the first consultation will aid in weeding out known-conflict situations.
- **When opening a new client file upon engagement.** The person responsible for establishing new files should be instructed that a new file number cannot be assigned until a conflict check is completed and initialed.
- **Entry of a new party or new attorney** to the case/matter.
- **When hiring new lawyers, paralegals and "of counsel"** require each new lawyer and paralegal to disclose the names of their previous clients. This process is particularly important when lateral partners are brought into the firm.

Depending on the nature and circumstances of the engagement, conflicts may need to be checked at other junctures. For instance, it may be prudent to run a conflict check upon the identification of a new witness. This could be necessary if there is a close relationship between the witness and the lawyer's client, such as a family relationship or an employer-employee (or former employee) relationship.

How to Check for Conflicts

The lawyer primarily responsible of the new matter should fill out a conflict check request form and submit it to the person responsible for checking for conflicts. Although the task of preparing the request form may be delegated to a responsible staff member, the lawyer should review the form before submission.

All the names on the conflict check request form should be checked against the names in the

database (or on file cards, if a manual system is maintained) by the person responsible for checking conflicts. The results of the search should then be recorded and provided to the requesting lawyer.

If a potential conflict is found, the firm should review the Rules, determine whether a conflict actually exists, and if so, whether it can be waived with the informed consent of the affected parties. As discussed below, the firm's conflicts expert should be responsible for determining whether a conflicted engagement should go forward and, if so, on what terms.

If no conflict was uncovered, the completed request form and conflict check results should be kept in the client file. Legal assistants should be instructed not to open a file and give a matter a new file number until a completed request form and conflict check results have been received.

If a new party is added to the matter, the lawyer primarily responsible for the matter should submit an addendum to the request form listing the new party's name. This new name should be checked for conflicts and entered into the system. The completed form and updated conflict check results should then be returned to the primary lawyer for inclusion in the client file. This process should be followed not only for new parties, but for any newly learned information discussed in the *Capturing the Proper Information* section, above.

Appoint a Conflict Expert Within the Firm

If you practice with other lawyers, designate one lawyer in the office as the conflict "expert." All questionable conflicts should be discussed with and approved by this lawyer. If a potential conflict arises on a matter for which the designated "expert" is responsible, the firm should have a designated backup "expert" who can be consulted. Larger firms should consider forming conflicts committees to evaluate difficult conflicts issues. Solo practitioners can seek assistance from a trusted colleague or sources such as the ARDC, Illinois State Bar Association, a local law school or through an ISBA Mutual Risk Management Consultation.

Tips and Common Conflicts Traps

Document the Relationship

Most lawyers are aware that the consistent use of engagement letters/agreements, non-engagement letters and disengagement letters goes a long way in preventing legal malpractice claims and minimizing exposure therein, as well as in avoiding ethical discipline. Following good documentation procedures can also serve as a client relations tool, as clients (and even declined clients) will appreciate your attention to detail and your efforts to ensure that you and they have a consistent understanding of the status of your relationship. Many lawyers do not appreciate the role that engagement, disengagement and non-engagement letters can have in relation to conflicts. As discussed below, such documentation is necessary to appropriately conduct conflict checks and to avoid some less-common conflicts issues. Documenting a lawyer's relationship vis-à-vis an unrepresented party or witness can likewise minimize the risk that a conflict is later found.

- **Engagement letters and agreements** serve multiple conflict-related purposes. First, the act of preparing the letter or agreement will require the lawyer to closely evaluate (1) the exact identify of the client and (2) the role that the client contact and other client representatives will play going forward. For instance, in a corporate engagement, will the person who communicated with the lawyer during the retention process be the only authorized client contact? Is the lawyer authorized to take direction from others?

  Clearly identifying the client is essential to avoiding conflicts. For instance, in the representation of a start-up business, is the client one of the founders, more than one of the founders, the business entity itself, or some combination thereof? By identifying the client(s) clearly at the outset of the engagement, the lawyer will have clearly defined key parameters of the attorney-client relationship, including who is *not* the client. In the scenario above, if the lawyer is representing the business entity only, the engagement agreement should clearly state that fact and the fact that the lawyer does not represent

any of the founders. On the other hand, if the lawyer is being asked to represent both of the founders, the lawyer will recognize that a potentially problematic multiple-representation situation exists and will act accordingly. In either event, if a dispute arises later on, the lawyer's loyalties will be clearly defined.

Clearly identifying the client in an engagement agreement can be especially important in the representation of an entity, as the lawyer will invariably be communicating with the entity via an authorized representative. By defining the client in the engagement agreement, the representative will understand that he or she, personally, is not a client of the lawyer.

A strong engagement agreement will also identify other authorized representatives, if any, and will define with whom confidential client information may be shared.

Implementing a firm policy requiring clear identification of the client in an engagement agreement can also aid the firm in its conflict check procedures. By clearly identifying the client from the outset, the firm avoids data-entry problems that could result in a missed conflict.

- **Disengagement letters** are another key tool in avoiding conflicts. The distinction between a "current client" and a "former client" can mean the difference between a conflicted representation and an unconflicted engagement. By clearly memorializing the end of an engagement, the prudent lawyer will avoid subsequent confusion as to whether a client believed to be a "former client" could be considered a "current client" for conflicts purposes.

- **Non-engagement letters** can be just as valuable as engagement letters in protecting against conflicts. Non-engagement letters should be a ubiquitous part of any firm's intake process and should be sent out any time that a prospective engagement is declined by the lawyer or if a potential client decides not to retain the lawyer. A process should be implemented whereby within a certain period of time (seven days, for instance) after an initial consultation, an engagement letter or non-engagement letter must be sent. By documenting every non-engagement, lawyers protect themselves against misunderstandings as to whether an attorney-client relationship was created.

  By documenting non-engagements, the lawyer can also memorialize that no confidential information was shared during the consultation, thereby avoiding a conflict under Rule 1.18. Rule 1.18 defines a lawyer's duties to prospective clients and provides that a lawyer who learns information from a prospective client that could be "significantly harmful" to that individual may be disqualified from representing another client in "the same or a substantially related matter." These issues arise frequently in family-law, criminal defense, and estate-planning practices.

- **"Not-your-lawyer" letters** provide yet another safeguard against potential conflict issues. Pursuant to Rule 4.3, a lawyer has certain obligations when dealing with an unrepresented person. Among those duties are a responsibility to take reasonable efforts to ensure that the unrepresented person understands the lawyer's role in the matter, including the fact that the lawyer does not represent that individual. Rule 4.3 further provides that "[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know

that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

Whenever dealing with unrepresented persons on behalf of clients, lawyers should deliver to the unrepresented person a clearly written letter detailing that the lawyer does not represent the non-client and, under appropriate circumstances, recommending that the non-client obtain counsel in connection with the matter. Compliance with Rule 4.3, and written memorialization thereof, can go a long way in avoiding conflicts claims not only by the non-client, but by the client, as well. These issues arise most frequently in business formation, real estate transactions, and business transactions, but they can also occur in other situations, such as when a lawyer is involved in the deposition of a client's employee or former employee who may believe that the lawyer represents her for the deposition.

Be cautious when presenting a non-client for deposition

Litigators frequently "present" non-clients for depositions. As noted above, this often occurs when the employee or former employee of a client is asked to give a deposition, or it may be the case that the client's spouse or child is asked to sit for a deposition. Under any such circumstances, the lawyer should carefully consider whether the deponent is a client or not, and the lawyer should behave accordingly.

If the lawyer does take the deponent as a client, the lawyer should prepare an engagement letter and run a conflict check. The lawyer must consider whether the original client and the deponent have differing interests, such as may be the case relative to a former employee. Both the original client and the new client/deponent may have to provide informed consent to the arrangement, including consent to a procedure for sharing—or not sharing—confidential information. If the lawyer takes the deponent as a client, the lawyer should consider whether payment for the lawyer's services by a non-client presents Rule 1.8(f) issues relative to accepting compensation from someone other than the client. The lawyer should also clearly define the scope and duration of the engagement, such as defining that the engagement will relate only to deposition testimony and will terminate upon the conclusion of the deposition.

If the lawyer does not take the deponent as a client, a non-engagement letter should be provided, especially under those circumstances where the lawyer purports to prepare the non-client for the deposition or assists in negotiating the terms of the deposition. The lawyer should also be careful to act in accord with the non-engagement. For instance, an objection to a question regarding communications between the deponent and the lawyer on the basis of the attorney-client privilege may blur the lines between an ostensible non-engagement and an attorney-client relationship.

Beware of multiple-client representations

Multiple-client representations are fraught with risk, as the clients' respective interests may not be aligned from the outset, or they may diverge over time. Any multiple-client engagement necessitates a constant reevaluation of conflicts issues and, if a conflict or potential conflict becomes known, the process of obtaining informed consent must be undertaken.

Common multiple-representation situations that can create conflicts for lawyers include the following:

- buyers and sellers (in a real estate deal)

- husband and wife in estate planning matters
- multiple beneficiaries
- the testator or settlor and beneficiaries of a will or trust
- guardian and ward
- majority and minority stockholders
- a corporation and its directors or officers
- the partners in a newly formed partnership
- a general partner and the limited partners
- multiple criminal or civil defendants
- multiple civil plaintiffs

Though some of the aforementioned scenarios present obvious conflict risks, other situations can be less obvious, such as situations discussed above involving aggregate settlement issues, use of confidential information obtained by one client, or the representation of a client in forming a new business entity.

Any time a lawyer represents multiple clients in an engagement, it is especially important that the terms of the engagement are clearly laid out in an engagement agreement signed by all clients, and that the engagement agreement expressly provides for whether and, if so, how confidential client information will be shared among the clients. As a general rule, there is no confidentiality between joint clients unless agreed to in advance. If conflicts can be identified, they should be discussed in the engagement agreement such that informed consent can be provided at the outset of the engagement. Consider recommending to each client that they should obtain independent representation in connection with the engagement agreement.

Lawyers should take particular care when engaging in multiple-client representations involving family members. Even the most cautious lawyers sometimes fail to identify the conflicts between clients who are members of the same family. Because family members are less likely to themselves recognize the conflicting interests that may exist, obtaining informed consent via thorough disclosure can be especially critical in such situations.

Avoid other common conflicts traps

In addition to the multiple-client representations discussed above, the following are examples of other situations fraught with danger from a conflicts perspective:

- **Acting as a director, officer or shareholder in a corporation while acting as counsel thereto.** Although *de minimis* stock ownership in a corporate entity will not necessarily implicate a conflict, but any purchase of an interest in a current client, or any representation of an entity in which a lawyer owns stock, should be carefully considered.

- **Acting as both counsel and an officer or director of a corporate client.** Officers and directors owe fiduciary duties to the corporate entity that may be inconsistent with those duties owed by corporate counsel. A lawyer serving as both corporate counsel and an officer or director may obtain confidential information in connection with his role as counsel that should not be shared with officers or directors. Or a lawyer's personal interests relating to her role as officer or director could impact her ability to exercise independent legal judgment.

- **Failing to identify imputed conflicts resulting from the failure to appropriately screen new hires**, including not only attorneys, but paralegals, secretaries, legal

assistants, and clerks. All new hires should fill out a screening questionnaire before commencing their employment, and preferably before being hired. The questionnaire should be carefully tailored – and the hire or prospective hire should be carefully instructed – to avoid the disclosure of confidential information. The form should identify all clients that the individuals represented (or, for non-attorney staff, that they were involved in the representation of) while in prior employment. If a potential conflict with a current firm client is identified at this pre-employment stage, an appropriate conflicts screen/wall can be constructed to avoid the effect of an imputed conflict. If the disclosure is not made until after the new employee's start date, it is unlikely that an ethical wall can be appropriately constructed.

- **Failing to identify "common pool" conflicts.** Common pool conflicts, otherwise known as "finite pie" conflicts, arise when a lawyer separately represents two or more clients in seeking recovery from a limited pool of resources. The most common scenario arises when Lawyer represents Client A in suing Defendant and Lawyer separately represents Client B in suing Defendant. Defendant may have limited resources, including insurance coverage, to potentially satisfy judgments or settlements in favor of Clients A and B. Lawyers presented with such scenarios should carefully consider whether a direct adversity or material limitation conflict exists and, if so, take appropriate action to disclose the conflict and obtain waivers.

- **Failing to obtain *effective* conflict waivers.** Informed consent is the foundation of any effective conflict waiver. The client or prospective client must be advised of the material risks that the conflicted representation will or may present, and must also be advised of reasonable alternatives, likely including retaining another lawyer. Absent such a disclosure, a conflict waiver will almost never be effective.

  As discussed throughout this Guide, there are varying requirements for conflict waivers, depending upon the type of conflict presented. For instance, some conflicts can be waived only if the client has independent counsel; in other cases, conflicts cannot be waived unless the lawyer recommends that the client obtain independent counsel and provides the client with enough time to act on the recommendation; and still other conflicts require specific information to be disclosed to the client in writing. Some conflict waivers will not be effective unless the informed consent is confirmed in writing, and in some such cases the writing must be signed by the client.

- **Failing to carefully consider that another state's conflicts laws may apply**. This Guide addresses conflicts under Illinois law, including the Illinois Rules. Illinois law will generally apply to the work of an Illinois lawyer, but it is possible that the ethical rules and/or the substantive law of another jurisdiction may apply instead of, or in addition to, Illinois law.

  As of 2018, the ABA Model Rules of Professional Conduct ("ABA Model Rules") serve as the basis for the ethics rules in all fifty states and the District of Columbia, but no jurisdiction has adopted the ABA Model Rules wholesale. Under the ABA Model Rules, a client's informed consent to waive a concurrent conflict of interest must always be confirmed in writing and almost every state has adopted this requirement. Some states, like Wisconsin, go further and require the client confirmation to be signed by the client. Contrary to the majority rule, Illinois Rule 1.7 does not require a written confirmation.

It is highly recommended that every conflict waiver should be confirmed in a writing signed by the client, both as a rule of good practice and in the event that the ethics rules of another state could be applied in analyzing the waiver.

- **Failing to protect confidential information in obtaining a conflict waiver**. Lawyers must be careful that, when obtaining a conflict waiver, confidential information relating to one client or former client is not divulged to another client or former client. A conflict can be created during the process of obtaining a conflict waiver.

- **Failing to consider the impact of a joint defense agreement.** Joint defense agreements are premised on the "common interest doctrine" and are designed to protect confidential information when shared between "friendly" co-parties and their respective lawyers. Although often termed joint *defense* agreements, such agreements can be reached between co-plaintiffs, as well. Some courts have held that a lawyer's receipt of confidential information from a co-party in accord with such an agreement subjects the lawyer to a duty of confidentiality to the co-party akin to that owed to a client, former client, or potential client. In other words, the receipt of confidential information from a co-defendant or co-plaintiff could disqualify that lawyer or law firm from a future engagement. For this reason, the potential impact of a joint defense agreement should be carefully considered, and co-parties to joint defense agreements must be identified in conflict check systems in a manner that highlights that a "confidentiality" conflict may exist if the co-party is flagged during a subsequent conflict check.

- **Failing to act promptly.** Too often, conflicts are identified but not acted upon until too late. If a conflict is identified, the responsible lawyer should act promptly and obtain informed consent from all affected parties before proceeding with the engagement. There is no legal basis for obtaining a waiver of conflicts after the fact.

Conflicts of Interest Do's and Don'ts

Do…

- ✓ Establish a Conflict-of-Interest system.
- ✓ Send a letter to the unrepresented party stating that you do not represent the individual, that the interests of your client are or may be adverse to that individual, and that they should seek legal counsel immediately.
- ✓ Watch what you communicate to the unrepresented individual. Exchanging pleasantries about the weather is okay. Anything else is suspect.
- ✓ Call the ISBA Mutual Risk Consultative Services at 312-379-2000 if you are in doubt.

Don't…

- ☹ Take any matter without conducting a conflicts check.
- ☹ Make any lateral hires without conducting a conflicts check.
- ☹ Overlook of counsel, independent contractors and temporary lawyers in your conflict checks.
- ☹ Proceed with conflicted representation without reviewing the Illinois Rules of Professional Conduct to determine whether it is consentable and/or waivable.

Chapter 5: Documenting Engagement (and Non-Engagement)

Engagement Letters and Fee Agreements

The Illinois Rules of Professional Conduct do not require a lawyer who works on an hourly or fixed fee basis to have a written fee agreement with the client. Rather, the Illinois Rules of Professional Conduct state that the basis or rate of the fee should be "communicated" to the client before, or within a reasonable time after, commencing the representation. Thus, with some exceptions such as in family law, lawyers who work on an hourly or fixed fee basis are not required to have a written fee agreement or contract signed by the client. Instead, they can satisfy the Illinois Rules of Professional Conduct by sending the client an engagement letter shortly after the representation begins.

For sample engagement letters and fee agreements, see the Addenda Sample Letters and Forms.

Lawyers who work on a contingency fee basis must use written fee agreements. According to Illinois Rules of Professional Conduct Rule 1.5, a lawyer who works on a contingent fee basis must document the fee arrangement in an agreement with the client that clearly outlines the method by which the fee will be calculated.

Although in most cases only contingency fee agreements must be in writing, it is best practice (and highly encouraged) to put all lawyer-client agreements in writing. At a minimum, the agreement should explain the scope of the engagement and the fee. The agreement is also an important tool that you can use to manage the lawyer-client relationship more effectively. For example, by explaining the scope of the engagement, the client is made aware of exactly what services will be provided and what services will not be provided. When some other issue or conflict occurs, and the client claims that you agreed to also handle the new issue, you will be able to demonstrate that there was no agreement to handle the additional issue.

From a loss prevention standpoint, it is crucial to your defense to have an engagement letter in the file as that will be the starting point for your defense against a grievance or a legal malpractice claim. A case without a written lawyer-client agreement will turn on what you told the client and what the client heard you say. Your vulnerability to malpractice liability is high.

While it is ideal for the firm to obtain the client's signature in the office, firms who routinely send their engagement letters or fee agreements to clients to be signed and returned should be mindful of these three points:

- The letter or agreement should clearly state that representation will not begin, and no legal work will be performed until the signed copy is received from the client.
- You must enforce this rule and postpone the start of any work until the client's signature has been received.
- The letters should be calendared for follow-up. If the client has not sent in a signed agreement or engagement letter within a few weeks, another letter should be sent. If there is no response to that letter, the firm should send a Non-Engagement letter. This practice will eliminate any ambiguities as to whether the representation has begun.

Your engagement letter or fee agreement should contain the following elements:

A clear identification of who the client is. (For example, in a corporate setting, you must establish whether the client is the corporation, its shareholders, the directors, or one or more key officers.)

A detailed description of the legal work to be performed.

A description of any critical aspects of the matter for which the lawyer will not be responsible, such as providing tax advice or environmental impact studies.

A detailed description of the fee arrangement, including:

- the legal fees to be charged;
- who will be responsible for the fees;
- a concise statement of the expenses for which the client will be responsible;
- when the client will be expected to pay (i.e., monthly, at the end of the representation, etc.);
- a description of any referral fee or fee splitting arrangements.
- How fee disputes will be adjudicated

Other details that should be included in an engagement letter include:

- in the case of solo lawyers, the identification of a backup lawyer designee;
- language that indicates that your firm will not be delivering wire transfer instructions;
- file retention and destruction procedures.

Some lawyers maintain separate engagement letters or fee agreements for each area of law in which they practice. You can start with these basic forms and then customize them to your practice. You may also wish to ask a respected colleague for a sample of their engagement letters and fee agreements.

Non-Engagement Letters

After a thorough screening and evaluation of a potential new matter and the completion of a conflict analysis, you may decide not to accept the representation. Make it a routine office practice to obtain the name and address of every person who calls the firm or is referred to the firm by another lawyer. ***If the firm declines representation, always send a letter to the individual or entity that has been declined.*** This can be accomplished quickly with a form letter.

For Sample Non-Engagement Letters, see the Addenda Sample Letters and Forms.

The Non-Engagement letter should clearly state your decision not to represent the declined client but should never give an opinion as to the viability of a particular case or matter. If the matter involves a critical deadline, such as a statute of limitations period, the letter should inform the declined person that a deadline exists and suggest that they seek other counsel immediately. ***Do not specify the statute of limitations date in your letter.*** If you state the

incorrect date, the nonclient may later argue that they lost the right to sue based upon their reliance on the erroneous date.

Engagement and Non-Engagement Do's and Don'ts

Do…

- ✓ If the firm declines representation, always send a letter to the individual or entity that has been declined.
- ✓ Clearly state that representation will not begin and no legal work will be performed until the signed copy is received from the client.
- ✓ Calendar engagement letters and fees for follow-up. If there is no response to the letter, send a Non-Engagement letter.

Don't…

- ☹ Specify the statutes of limitations date in your Non-Engagement letters.
- ☹ Accept a matter without memorializing the scope of the engagement and the fee.
- ☹ Proceed with the matter until you have clarity as to who your client will be and who will be responsible for paying the fees.
- ☹ Predict or guarantee any outcome

Chapter 6: Documentation and Case Management

File documentation plays several critical roles in the risk management process.

- Lawyers who keep detailed and neat files are less likely to misplace an important paper or skip a deadline.
- Lawyers who correspond regularly with their clients and document all major decisions made by clients are less likely to be sued over a misunderstanding.
- Lawyers who have a complete file will be better prepared to defend themselves against malpractice claims.

Ask yourself this simple question: If you were sued for malpractice on any given matter, would the paper file substantiate the legal services you performed and verify the client's consent to all vital decisions? If not, your file documentation procedures need improving.

Documentation

When a lawyer is sued for legal malpractice documentation is needed to back up their version of events. Otherwise, it becomes a battle of the lawyer's word against the client's — a battle the lawyer rarely wins. To avoid such misunderstandings, lawyers should train themselves to document in the following circumstances:

Document when a client instructs you to proceed in a manner that is against their own best interest

Whenever a client instructs you to take a course of action against their best interests, an alarm should sound in your brain warning you to "document, document, document." If you don't document these instructions, the client may later regret their course of action and allege that you were not acting with their permission.

> **Example:** Lawyer represents wife in a divorce action. Husband owns stock in a few small, closely held corporations. During a conference at which many subjects are discussed, lawyer advises wife to hire an appraiser to establish a value for the shares. Wife is determined to keep the legal fees to a minimum and instructs lawyer to accept husband's estimate of the stock's value. Lawyer complies and the divorce is finalized.
>
> A year later wife is having financial difficulties and starts to believe that she did not receive her just share in the divorce. Wife believes husband's stock was in fact worth far more than originally estimated. Wife doesn't remember her five-minute conversation with the lawyer regarding the decision not to obtain the appraisals and blames the lawyer. She sues the lawyer for legal malpractice alleging that the assets were undervalued due to the lawyer's negligence. The lawyer does not have any written proof to the contrary. The lawyer should have taken ten minutes and drafted a letter to wife memorializing her decision not to pay for the appraisals.

Lawyers who practice in highly emotional areas such as family law are more exposed to this problem. Clients who are under a great deal of stress or who are emotionally distraught often

instruct their lawyer to pursue a particular course of action that they later regret. Common sense therefore dictates that lawyers document the representation more carefully in these situations.

Document the unusual

Get in the habit of identifying and documenting unusual circumstances that arise during your representation of a client.

> **Example:** Farmer owns 9/10ths of the family farm, and his sister owns the other 1/10th. Farmer decides to sell the farm. He instructs his lawyer to divide the proceeds of the sale equally between himself and his sister. Lawyer completes the sale as requested.
>
> Farmer dies a few months after the sale. Farmer's children sue lawyer for legal malpractice, alleging that the lawyer negligently distributed 1/2 rather than 1/10th of the proceeds to their aunt, thereby depriving them of that portion of their father's estate. Lawyer has no documentation to verify the farmer's instructions to him.

This could have been accomplished with a letter to Farmer restating his instructions.

Document the client's consent to all major decisions

Despite the best efforts of any lawyer, sometimes things just don't go your client's way. Unfortunately, many clients cannot accept defeat. Instead, they choose to second guess their lawyer or have selective memories regarding decisions that were made during the representation. Let's look at a few examples:

> **Example A:** Client hires lawyer to represent client with respect to injuries client suffered in a work-related accident. In addition to the worker's compensation claim, the lawyer investigates the merits of a medical malpractice claim against the doctor who treated the client and a products liability claim against the manufacturer that produced the machine that injured client. The client verbally agreed not to pursue either the medical malpractice or the product liability claim because the chances of success seem remote and the cost of pursuing the claims would be significant. After the statute of limitations period has run on these claims, the client sues the lawyer for failing to pursue the additional causes of action. The lawyer has no documentation of the client's decision not to pursue the additional actions.
>
> **Example B:** Lawyer represents wife in a divorce. The wife instructs the lawyer to waive maintenance because she wants to "preserve her friendship" with the husband. Lawyer complies and the divorce is quickly finalized. A year later, the wife is barely making ends meet and regrets her decision to waive maintenance. She sues the lawyer for legal malpractice alleging that the lawyer was negligent in not recommending that she seek maintenance.

Both claims could have been avoided (or successfully defended) if the lawyers had taken the time to send their clients letters verifying the clients' instructions.

Document all demands/offers and the client's response

All settlement demands and offers should be documented so that a lawyer has proof of what transpired. If demands or counteroffers are conveyed verbally during the heat of battle, write the demand or offer on a piece of paper and have your client sign it, indicating their approval or

rejection. At a minimum, confirm the day's events with a letter to the client later that day. If you don't take this precaution and things turn sour, it will be your word against the client's.

> **Example:** Lawyer represented client, disabled from birth, in a suit against hospital. Before trial hospital made a large offer to settle. Lawyer communicated offer to client's guardian, and it was declined. The guardian says the offer was never communicated and if it had it would have been accepted.
>
> The case went to trial and there was a verdict for hospital. Client's guardian then sued the lawyer. The suit against the lawyer went to trial and the lawyer lost. The large verdict was the amount of the offer that the hospital had made but that the lawyer had not communicated in writing to the client.

This precaution is particularly important for defense lawyers who may be dealing with several different corporate representatives. For example, the claims handler who verbally approved a defense strategy yesterday may be gone or outranked by a superior tomorrow.

Increase your documentation for troublesome clients

What do you do with a troublesome client who is second-guessing you every step of the way? Document the representation very carefully (assuming withdrawal is not an option). In our experience, these clients are the first ones to sue you over an unfavorable result or their legal bill.

Send letters to unrepresented parties

As noted in Avoiding and Mitigating Conflicts of Interest, lawyers who are involved in matters with unrepresented parties are sometimes later sued by an unrepresented party who claims that a lawyer-client relationship in fact existed. To avoid such claims, we recommend that you send a letter to the unrepresented party as soon as possible stating that you do not represent the individual, that the interests of your client are or may be adverse to that individual, and that the unrepresented individual should seek independent legal counsel immediately.

For a Sample Letter to Unrepresented Party, see the Addenda Sample Letters and Forms.

Document telephone calls

Get into the habit of documenting all significant telephone calls, including conversations with clients, witnesses, opposing counsel, and experts. These telephone records will provide proof that you were attentive to the client, particularly if you work on a contingency fee basis and will not have the luxury of producing time sheets.

There are several ways to document telephone conversations. Some lawyers document important calls on the notepad section of their computers. Others keep a pad of paper handy at their desk. When they receive a call, they jot down the date, the caller's name and anything of significance that is said. Still other lawyers use preprinted telephone conference pads on colored paper. They record all significant conversations on these pads and then file them in the client file. If all else fails, keep the "pink slips" your receptionist fills out when a call comes in and write down on the pink slip the date you returned the call and a brief notation on anything of substance that was discussed.

For a sample Telephone Conference Memorandum, see the Addenda Sample Letters and Forms.

Retain a record of your research

Lawyers should maintain notes on the research they perform. While you do not have to retain a copy of every case or statute which you consulted, you should at a minimum keep a list of the citations. Furthermore, if you retain a printout of your Fastcase, Lexis or Westlaw searches, you won't end up re-running those months later when you can't remember exactly how you phrased the search. In addition, by maintaining research notes, others in the office will be able to pick up the file and continue where you left off. Finally, if sued, you will be able to prove that you adequately researched the case or matter in question.

Retain copies of all drafts of agreements and contracts

During contract negotiations, many provisions are revised and/or deleted from the original draft. Retaining copies of prior drafts with notations as to why changes were made will enable you to later prove that critical provisions were revised or deleted at the client's instruction. Some lawyers accomplish this task by making handwritten notes in the margins of draft documents indicating whether the client instructed them to pursue or drop a specific provision. This is particularly important when your client asks you to drop a critical provision because it is a "deal breaker." (Note: You may destroy drafts that contain only typographical corrections.)

Send a disengagement letter when you are withdrawing from representation

Lawyers who withdraw from representation prior to the completion of a matter should send the client a withdrawal letter, even if the client is the one who requested the withdrawal. The withdrawal letter serves as proof of the date the representation ended. This can be important in establishing your innocence if a subsequent lawyer commits malpractice with respect to that file. It also puts the client on notice of their need to seek other counsel.

In addition, never rely on the subsequent lawyer's entrance of an appearance to terminate your representation. You must independently withdraw so there is no confusion as to when representation was terminated.

For Sample Disengagement Letter, see the Addenda Sample Letters and Forms.

File Management

Implementing the following procedures in your office is one of the best ways to reduce the likelihood of a malpractice claim:

Establish routine procedures for file openings

Files should be opened immediately after a lawyer accepts a new matter or client. The new file should contain copies of:

- the New Client/Matter Intake Form;
- the Engagement Letter or Contingency Fee Agreement; and
- the completed Conflict of Interest Search Form.

For sample New Client/Matter Intake Form, Engagement Letters, Contingency Fee Agreements and Conflict of Interest Search Form, see the Addenda Sample Letters and Forms.

Establish standard subfiles by practice area for all new files

Take an afternoon and make a list of each area in which you practice. Then determine standard file and subfile names for each of these practice areas. For example, a medical malpractice file might contain subfiles for: medical authorizations and records, expert reports, correspondence, pleadings, depositions, and research. Once you have established the standard file categories, your assistant can automatically prepare each new file. If you practice with other lawyers, try to establish standardized files throughout the firm. This process will make filing easier for everyone and insure the quality of the firm's documentation.

Weekly filing

Establish a rule that all new correspondence and other materials must be filed in the appropriate client file by Friday of each week. If the filing is delayed for weeks, a lawyer reviewing the file may miss an important document or piece of correspondence.

Maintain files in a central location. All files should be kept in a centralized location when they are not being used by a lawyer. Require everyone in your firm to fill out a file "out" card when withdrawing a file from the central filing location.

Case Management Systems

ISBA Mutual does not endorse the use or non-use of case management systems or any other on-line providers; but lawyers are encouraged to independently investigate whether the use of such systems may be beneficial to the operation of their practice.

Generally speaking, case management systems can allow lawyers to open new matters, track important dates, track time, process payments, generate accounting reports, and allow the transfer of documents and information with clients through client portals. There can be integration with Gmail, Outlook, Drobox and systems that allow for on-line payments such as LawPay and PayPal. There is usually a monthly fee and some setup required. Most case management systems allow for the use of demos so that you can see whether the system suits your needs.

ISBA Advisory Opinion No. 16-06 specifically addresses the use of cloud-based case management systems and provides helpful guidance for the lawyer conducting due diligence into third-party vendors of cloud-based services. Opinion No. 16-06 suggests the following reasonable practices and inquiries:

1. Reviewing cloud computing industry standards and familiarizing oneself with the appropriate safeguards that should be employed;
2. Investigating whether the provider has implemented reasonable security precautions to protect client data from inadvertent disclosures, including but not limited to the use of firewalls, password protections, and encryption;
3. Investigating the provider's reputation and history;
4. Inquiring as to whether the provider has experienced any breaches of security and if so, investigating those breaches;
5. Requiring an agreement to ensure that the provider will abide by the lawyer's duties of confidentiality and will immediately notify the lawyer of any breaches or outside requests for client information;
6. Requiring that all data is appropriately backed up completely under the lawyer's control so that the lawyer will have a method for retrieval of the data;

7. Requiring provisions for the reasonable retrieval of information if the agreement is terminated or if the provider goes out of business.

If you are using or later decide to use a case management system, be sure to stay up to date on any changes in their terms of services, as well as any changes in the technology that may alter the services you receive.

Visit the www.isba.org for more resources on choosing case management systems.

Documentation and Case Management Do's and Don'ts

Do…

- ✓ Always document a client's instructions to proceed in a manner against the client's best interests.
- ✓ Document the unusual.
- ✓ Document the client's consent to all major decisions.
- ✓ Increase documentation for troublesome clients.

Don't…

- ☹ Rely on memory. Document everything.
- ☹ Maintain files without subfiles for each practice area.
- ☹ Use a case management system without making sure the vendor understands a lawyer's professional responsibilities.
- ☹ Forget to send letters to unrepresented parties or disengagement letters when you are withdrawing from representation.

Chapter 7: Calendaring and Time Management

Better computer calendaring systems, e-filing, and multiple modes of communication with clients have resulted in fewer claims for failure to calendar or file, procrastination and lost documents. The use of case management systems and e-filing will be discussed at the end of the next section on file management, but if you do not currently use a case management system you must be particularly mindful of calendaring and time management.

Consider the following guidelines in establishing a calendaring system:

Calendar all types of dates and deadlines:

- statutes of limitation (municipal, state, federal);
- administrative hearing dates;
- all court appearances;
- closing dates;
- procedural deadlines;
- request to admit deadlines;
- pleading and discovery dates;
- appointment/meeting dates;
- service of process follow-ups;
- tax filing deadlines;
- notice of appeal deadlines;
- corporate filing deadlines;
- vacations and personal appointments; and
- mandatory file review dates.

Be sure you are referencing the correct statute of limitations

Municipal, state and federal statutes of limitations may differ. Another factor that may influence a statute is the entities involved. Many lawyers have blown statutes of limitations by misidentifying a municipal entity as a private entity.

Maintain a redundant calendaring system

The mechanics of a redundant calendaring system are quite simple: two different people must enter every date into two different calendars. If you don't have a redundant system, it's not sufficiently error-proof. For example, let's suppose that a docketing clerk inadvertently enters the statute of limitations date for a particular case as 7-1-99 instead of the correct date of 1-7-99. If another person has independently calendared the correct date in a separate calendar, the mistake can be caught before it's too late.

If you are a solo practitioner, you can accomplish a redundant calendaring system by maintaining one calendar yourself and having your assistant maintain the other. If you work in a firm that uses a centralized calendaring system, the second calendar should be maintained by the lawyer who is primarily responsible for the case or matter.

Don't maintain different calendars for different types of dates

The saying goes, "If you have two calendars, you don't have one." Maintaining one calendar for court appearances, another calendar for statutes of limitation deadlines, and a third calendar for client appointments and personal commitments can lead to confusion and broken commitments. For example, you may schedule a series of depositions for the same week that a major brief is due in another case. In other instances, a real estate closing may inadvertently be scheduled for the same date a tax return is due.

The point is that a lawyer should be able to consult one calendar and obtain a complete picture of all their commitments for that day, that week and that month. In this way, the lawyer can plan their schedule to accommodate all their commitments.

Include tickler dates in your calendar

Your calendaring system should contain periodic "tickler" dates to remind lawyers of impending deadlines and to provide lawyers with sufficient lead time within which to respond. In the case of a statute of limitations deadline, the system should generally tickle a lawyer at least 180, 90, 60, 30 and 15 days before the limitation period expires.

Establish procedures for reviewing the mail for new deadlines

Each piece of mail should be date-stamped received and then reviewed for dates that need to be calendared, such as deposition dates and tax payment dates. Those dates should then be placed into both the central calendar and the backup calendar as suggested above. If a clerk reviews the mail, they should initial or highlight each date that is calendared so that the lawyer ultimately receiving the mail knows that the date was identified and calendared.

Mandatory File Review Schedule

Mandatory file review systems are designed to ensure that each file in your office is reviewed on a regular basis. Periodic file reviews serve several important functions from a loss prevention standpoint:

- They prevent files from slipping through the cracks, particularly during periods when lawyers are overworked or preoccupied with other matters.
- They remind lawyers to correspond with clients on a regular basis.
- They provide lawyers with an opportunity to review files without the pressure of an impending deadline.
- They also allow you to catch files that are lost or misplaced before it's too late.

The key to a mandatory file review system is to calendar regular file review dates every 30 to 60 days. You should begin this process when you open a new file by indicating on the New Client/Matter Intake Form the date on which the file should be reviewed. Files should generally be reviewed every 30 to 60 days. This form should then go to the calendaring clerk who will calendar the first review date. If you use a computerized calendaring system, it can be programmed to automatically enter 30-day reminders until the file is closed.

For a sample New Client/Matter Intake Form, see the Addenda Sample Letters and Forms.

Every Monday morning your assistant should then pull the files that are calendared for review that week. It is critical that you physically review the file — don't just look at the file name and re-calendar it for another 30 days. By reviewing the physical file, you may discover that a critical

document has not been prepared or that service has not yet been perfected on a particular defendant. In short, don't rely on your memory to determine whether any work needs to be completed — check the file instead.

Computerized file review systems are preferable because the reminder dates can be automatically programmed. In contrast, manual file review systems are extremely time intensive and more prone to error. If your assistant forgets to enter the next file review date or refile an index card, the system breaks down. This cannot happen with an automatic calendaring system.

If you do not have the option of using a computerized system, you can establish an index card file review system in the following manner: You will need a set of index cards divided by month, day and year. Each client/matter must have a separate index card. If the Smith file is opened on January 15, then the Smith index card is placed behind the February 15 divider for a 30-day review. Every Monday your assistant will then pull the files scheduled for review that week.

Procedures to avoid missed statutes of limitations

- **Make your initial calculation of the statute of limitations date immediately.** Determine the potential statute of limitations date on the same day that you are notified of a potential case, even if you have not decided whether to accept the representation. If the statute is blown while you are investigating whether to take the case, you may be held responsible.
- **Calendar a verification date** for 90 days into the future, once you have established a preliminary statute of limitations date. At that point, review any new information you have received to determine whether it changes your calculation.
- **Don't assume you already know the correct statute of limitations.** Missed statutes occur when lawyers become complacent and assume they know the answer. Therefore, go back and check the statute. Remember, most legal malpractice claims are brought against lawyers who have been practicing for at least ten years.
- **Be on the alert for unusual circumstances that might impact your statute of limitations analysis.** For example, does the injury involve a government entity? Did the injury occur in an unusual setting such as on a cruise ship or an international air flight? When in doubt, call a colleague who is an expert in the area.
- **Always call local counsel to verify foreign statutes of limitations.** This simple practice could eliminate many missed deadlines each year. Consider this -- how many Indiana lawyers would know the proper deadline for filing suit against the Chicago Transit Authority without asking a local lawyer? Don't leave yourself vulnerable to comparable questions in other jurisdictions.
- **Don't rely solely on information provided by any one source, particularly clients,** in establishing the statute of limitations date.

> ***Example:*** Client said their car accident occurred at 12:03 a.m. Saturday morning. Their Lawyer relied on this information, foolishly waited until the last day to file the complaint and missed the statute deadline by one day. Why? According to the police report, the accident actually occurred at 11:55 p.m. on Friday night.

There are two lessons to be learned from this story.

- Always verify the accident date (or other dates critical to establishing when the statute of limitations period began to run) through sources other than the client, such as a physician's report or police records.
- Never wait until the last possible day to file a complaint or file a document electronically.

Calendar all critical deadlines for cases that you refer out to other trial lawyers for a fee

Follow up before the deadline expires and verify that the receiving lawyer has taken the necessary action. If the receiving lawyer misses the deadline, the referring lawyer can be held liable for the error.

Be wary of clients or referring lawyers who create unreasonable time constraints by seeking your counsel at the eleventh hour. If you will not have time to investigate and perform, do not accept the representation. Lawyers operating under severe time restrictions often fail to identify the proper defendants before the statute of limitations expires. Even if another lawyer sat on the file for months before the case was transferred to you, you will probably be sued if you are the lawyer of record on the date the statute runs out.

Don't procrastinate. Keep in mind that even the most sophisticated calendaring system won't help if you chronically ignore the tickler dates and procrastinate. This is particularly important for lawyers who represent plaintiffs. If a plaintiff's lawyer waits too long to investigate a case, they may be time barred from suing an additional defendant or pursuing another cause of action because the statute of limitations deadline for that particular defendant or action has already passed.

Calendaring Do's and Don'ts

Do…

- ✓ Maintain a redundant calendaring system.
- ✓ Include tickler dates in your calendar.
- ✓ Establish procedures for reviewing the mail for new deadlines.
- ✓ Establish procedures to avoid missing statutes of limitations.

Don't…

- ☹ Maintain different calendars for different types of dates.
- ☹ Allow more than 60 days to pass without reviewing a file.
- ☹ Overlook deadlines for cases that you refer out to other lawyers for a fee.
- ☹ Procrastinate.

Chapter 8: Billing, Collection of Fees, and Handling Client Funds

Fee disputes are at the heart of a significant percentage of all legal malpractice claims each year. When a lawyer sues their client for unpaid fees it is inevitable that the lawyer will be countersued for legal malpractice, or a grievance with the disciplinary agency is filed. In some cases, merely mailing a final bill triggers threats of legal malpractice. To avoid fee disputes, use the following guidelines in billing and collecting fees for legal services:

Don't accept clients who cannot afford your legal services

As stated in the chapter on Client Screening, it is a lose/lose situation to take on a client who is overly concerned about fees and who ultimately will not be able to pay your bills. If you represent such clients, you will be torn between putting in the required number of hours and minimizing the final costs. Learn to Say No to these clients.

Written fee agreements

Each engagement letter or contingent fee agreement should contain a clear explanation of the legal fees that will be charged for the work to be performed. In addition, be specific regarding the types of out-of-pocket expenses for which the client will be responsible – for example: filing fees, court costs, expert witness fees, photocopy charges, and computer research. Clients are often astonished by the amount of out-of-pocket expenses incurred on their behalf.

Sample Engagement Letters and Contingency Fee Agreements can be found in the Addenda Sample Letters and Forms.

Bill monthly

Lawyers who charge an hourly fee should always bill the client on at least a monthly basis, unless the client has specifically requested another arrangement. Avoid billing the client at the project's completion unless the total cost of the representation has been agreed upon in advance. ***The key to hourly billing is to send bills and collect your fees on a frequent basis to avoid large, unexpected bills.***

Detailed billing statements

Provide detailed billing statements that describe the work performed by each lawyer, how long it took, and the reason for the work. Entries such as 20 hours for "research" are unacceptable. Rather, the entry should read "research Illinois case law on piercing the corporate veil to support Motion for Summary Judgment."

Daily time entries

Every lawyer who bills on an hourly basis should record their time ***daily***. Billing software is preferred and can assist in the creation of invoices. However, manual time keeping remains a viable method as well. It is recommended that each lawyer keep a time sheet or pad of paper on which to record your work. Require each lawyer to submit their time sheets for the preceding week every Monday morning or more often Some firms go so far as to impose penalties on lawyers who are delinquent in submitting their time sheets.

Review all bills

The lawyer responsible for the case or matter should review each bill for errors before it is mailed to the client.

Copy the client on all correspondence and other materials relating to the client's matter

Ask yourself which client is more likely to pay their monthly bill: the one who hasn't received a single sheet of paper from their lawyer in three months or the one who regularly receives informational copies from their lawyer? Before copying a client on email correspondence, make sure that the client understands that a "reply all" to the email could result in an inadvertent disclosure of information meant to be kept confidential.

Take prompt action on accounts in arrears

This is the single biggest mistake that lawyers make with respect to fee disputes. Most lawyers joined the legal profession to practice law, not to collect delinquent fees. Unfortunately, the client who can't pay your fee today isn't likely to pay it tomorrow. Lawyers must therefore deal with the delinquent client without delay.

To begin with, the firm's partners should review all past due accounts monthly. Next, the partner responsible for a matter in arrears should contact the client and schedule a face-to-face meeting. At that time, the client should be informed that the firm will withdraw from the matter if the fee issue is not resolved promptly. Beware of clients who promise you money "next month." It usually doesn't materialize. The moral of the story is that it is better to withdraw and cut your losses when you are owed $1,000 rather than to wait and later sue the client when you are owed $10,000.

Sample Disengagement Letters can be found in the Sample Letters and Forms.

Collect retainer fees

If you are having difficulty collecting fees on a regular basis, require a retainer fee up front.

Handling Client Funds

When so requested, lawyers have a fiduciary duty to hold property of others with care.

According to the ARDC Annual Report 2020, 22% of the complaints filed that year involved claims of improper handling of client funds.

Separate accounts

Every law firm should have a separate operating account that is only used for firm expenses. This is separate from your personal account.

IOLTA Trust Accounts

If your firm accepts retainer fees or is entrusted to hold funds for a certain amount of time, those funds must be placed in a client trust account, commonly referred to as an IOLTA account. Illinois Rules of Professional Conduct Rule 1.15 explains that funds shall be deposited in a separate identifiable interest-bearing client trust account maintained at an eligible financial

institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person.

Many well-meaning and/or seasoned lawyers find themselves the subject of complaints because they didn't take the time to understand their ethical responsibilities to maintain their IOLTA account. You can learn about the specific requirements for maintaining an IOLTA account by going to the ARDC website at https://www.iardc.org/EducationAndOutreach/ClientTrustAccounts where you will find the following resources:

- Client Trust Account Handbook
- Client Trust Account FAQs
- On-Demand CLE programs
- Articles from *Illinois Courts Connect*

If there is an overdraft of your client trust account, the financial institution is ***required*** to report the overdraft to the ARDC. Every year the ARDC receives over 250 overdraft reports. To avoid or at least reduce the risk of being the subject of such a report, read the Illinois Rules of Professional Conduct; review the information on the ARDC website; and review the Time, Billing & Accounting section of the Illinois State Bar Association Practice HQ site at www.isba.org/practicehq. You can also work with an accountant to ensure that your client trust account is being properly maintained.

Billing, Collecting and Handling of Funds Do's and Don'ts

Do…

- ✓ Make sure clients sign engagement letters and fee agreements before beginning any work.
- ✓ Every lawyer who bills on an hourly basis should record their time ***daily***.
- ✓ The lawyer responsible for the case or matter should review each bill for errors before it is mailed to the client.

Don't…

- ☹ Accept clients who can't pay.
- ☹ Forget to send invoices monthly.
- ☹ Try to manage your trust accounts without reviewing the requirements and your ethical obligations.

Chapter 9: File Retention and Destruction

Many Illinois lawyers are surprised to learn that there are few legal or ethical requirements that a lawyer keep a client file for any defined period post resolution of the matter. Under most circumstances, the client file could be destroyed immediately upon the conclusion of an engagement. Nonetheless, prudence dictates that lawyers maintain client files for a defined period following the conclusion of the engagement. This resource is designed to aid Illinois lawyers in determining what documents must be kept, how, and for how long following the end of a representation.

Illinois Legal and Ethical Rules Regarding File Retention

The requirements for the retention of a lawyer's or law firm's client files are contained in Illinois Supreme Court Rule 769, Rule 1.15(a) of the Illinois Rules of Professional Conduct (a "Rule" or the "Rules") (Safekeeping of Property) and Rule 796 (Proof of MCLE Compliance).

Illinois Supreme Court Rule 769 (Maintenance of Records) requires lawyers to maintain "originals, copies or computer-generated images" of two types of records:

1. records identifying the name and last known address of the lawyer's clients and whether the representation is ongoing or concluded; and
2. "all financial records relating to the lawyer's practice."

Records identifying the name and last known address of the lawyer's clients and whether the representation is ongoing or concluded must be kept indefinitely. Financial records must be kept for no less than seven years after the representation has concluded. Financial records subject to Illinois Supreme Court Rule 769 are generally considered to include bills and invoices, checks, check stubs, receipts, expense reports, account ledgers, bank statements, time-entry and billing records, tax returns and reports and financial audit records. Illinois Rule of Professional Conduct Rule 1.15(a), much like Illinois Supreme Court Rule 769, requires that all records of trust accounts or other property held in trust be kept for a period of seven years after the end of the engagement.

For all client-file contents other than those addressed above, there are no state-specific rules that specifically address how long a lawyer must keep records contained within their files (unless a lawyer had been disciplined in which case Illinois Supreme Court Rule 764 applies).

As discussed below, although there may be no ethical requirement that a lawyer maintain file contents other than those discussed above, there are compelling reasons to preserve the entirety of all client files for at least seven years after the conclusion of the engagement. Also, lawyers possessing original wills, trust instruments, deeds and tax records should take care to maintain or dispose of such records appropriately. Under most circumstances, if the lawyer is unable to return such documents to their client, they should either keep the document

indefinitely or, in the case of a will, make arrangements to submit the will to the Illinois Secretary of State's "will deposit" in accord with Illinois Compiled Statutes 15 ILCS 305/5.15.

Establishing and Implementing a Record Retention, Destruction and Return Plan

As a risk management tool and to ensure compliance with ethical obligations, it is essential for every law firm and sole practitioner to have an established ***written*** record-retention policy. A sample File Closing Procedures Checklist can be found in the Sample Letters and Forms portion of this document. Every retention plan should include detailed procedures for the retention, destruction, and return of client files, including the following:

- A written statement as to where each file is kept (i.e., identify the storage facility at which hard copies are kept, include instructions as to how to access electronic file documents saved in the cloud, identify where other electronic media is kept, such as an external hard drive);
- Policies regarding the maintenance, destruction and return of different sorts of files, such as litigation files, trusts and estates files, tax files, real estate files; and
- A plan for regular and systematic review as to compliance with the record retention procedures.

The retention plan should take into consideration the following:

Closing the file and returning file contents to the client

Upon conclusion of the representation, lawyers have an obligation pursuant to Illinois Supreme Court Rules 1.15(d) and 1.16(d) to return to their clients all property and papers to which the clients are "entitled." Including a File Closing Form can be included with every closed file to ensure completeness of files. Depending on the circumstances, clients will be entitled to different components of the legal file. If the client is involved in an ongoing legal matter, a lawyer may be obligated to deliver the majority of the file to the client to avoid prejudicing the client's rights. This is subject to the lawyer possessing and appropriately enforcing a retaining lien, in some circumstances. If the client requests the file following the conclusion of the engagement, the client is entitled to certain portions of the file, including any documents and materials "furnished by the client." See, e.g., ISBA Advisory Opinion on Professional Conduct No. 94-13. A File Closing Checklist can be found in the Sample Letters and Forms of this guide.

Although under most circumstances lawyers will not be required to return file contents to their clients at the end of the representation, there are good reasons to do so anyway. As noted above, if the lawyer possesses documents with legal significance, such as original wills, trust documents, stock certificates, deeds, tax documents or other documents prepared for the client's use, it may be prudent to return such documents to the client promptly upon the conclusion of the representation. Otherwise, the lawyer may have an obligation to keep such documents indefinitely to avoid prejudice to the client. For instance, a lawyer retained to draft a trust instrument on behalf of a client may have an obligation to preserve the original instrument following the conclusion of the representation, but this duty can be discharged by delivering the document to the client.

Even if the client will not be prejudiced by the destruction or loss of an original document, it is recommended that lawyers return all original documents to their clients at the conclusion of the representation. Doing so will avoid any arguable obligation to preserve the original documents.

Whenever a lawyer turns over file contents to a client, the transaction should be appropriately memorialized in a writing identifying with particularity the item(s) transmitted, the method of doing so, the date of transmission and the identity of the recipient of the item(s). The lawyer should obtain the recipient's signed acknowledgment of receipt of the file contents. If the file contents are given to someone other than the client, such as the client's family member or new lawyer, the client's authorization to make the transfer should also be memorialized in writing and signed by the client.

Although clients may be entitled to the return of some portions of the client file and the lawyer may choose to return other portions of the file to the client, the lawyer should, under all circumstances, keep copies of all file contents. Below, we address how and for how long such documents should be kept.

Options for storing a closed file

An accumulation of closed legal files can quickly overwhelm even a large law office and off-site storage costs can mount rapidly. Although it is appropriate to maintain hard copies of client files, it is often more cost-effective to store closed files in electronic format and to destroy the hard copies (see below for a further discussion of the destruction of client-file contents).

Hard Copies

For lawyers and law firms that choose to keep hard copies of client files, the files should be maintained in a manner such that client confidentiality will be protected. It is recommended that when physical files are sent to offsite storage a detailed description of the contents of each file be generated and kept in the office to allow for easy identification and retrieval of the client file.

Electronic Format

Many lawyers and law firms choose to store closed files in electronic format. Other than documents of legal significance – original wills, deeds, etc. – most documents can be scanned, and the hard copies destroyed. The electronic documents can be saved to cloud-based storage, the firm's local server or other electronic media, such as an external hard drive. We recommend keeping at least two copies of all electronically stored documents in the event that one version is lost, destroyed or corrupted. Keeping an extra copy also provides a modicum of insurance if a cyber attacker is able to access documents and hold them hostage.

The maintenance of electronic versions of closed files, just like open files, must be done in a manner that reasonably protects client confidences. Illinois Supreme Court Rule 1.6(e) provides that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Depending on the circumstances, this may mean encrypting electronically stored data.

Note also that, in addressing certain documents that a lawyer is required to maintain, Illinois Supreme Court Committee Comment to Rule 769 approves the use of digital media like CDs and DVDs but notes that, as of 2003, "certain other storage media, such as floppy disks, tapes, hard drives, zip drives, and other magnetic media are not sufficient to meet the requirements of Rule 769 because they have normal life spans of less than seven years." Electronic data

storage methods have advanced considerably since 2003, but it is important to remember that a decision as to how to maintain records in an electronic format should take into consideration the issues addressed in the aforementioned committee comment.

How long should a file be kept?

One-size does not fit all when addressing file-retention. When determining how long to maintain a client file, lawyers should exercise prudent judgment in light of the particular circumstances. For instance, a lawyer suing for unpaid lawyer fees may require the complete file to establish the basis for the fee-claim or, as noted above, a lawyer may be responsible for maintaining original documents such as wills, deeds, trust instruments and some tax records. Under such circumstances, there may be a need to maintain the client file longer than would otherwise be prudent.

A complete file is often necessary to effectively defend against allegations of legal malpractice or an ethical violation. Any file-retention policy should take this consideration to heart. Although an ethical complaint may be brought at any time, legal malpractice claims must be brought within the applicable statutes of limitations and repose. In Illinois, the statute of limitations for legal malpractice is two years from the time the person bringing the action knew or reasonably should have known of the injury (keeping in mind that the statute of limitations could be extended if the client is a minor or incompetent) and the statute of repose is six years from the last act of representation with regard to the act or omission upon which the malpractice claim is founded, per Illinois Compiled Statutes 735 ILCS 5/13-214.3.

Under most circumstances, the statute of repose will expire no later than six years following the conclusion of the engagement. However, if the lawyer is sued for malpractice on the eve of the expiration of the statute of repose, the lawyer may not be served promptly and, thus, may not learn of the lawsuit for many months thereafter. Although Illinois Supreme Court Rule 103(b) requires diligence in effecting service of a complaint, courts will often afford a plaintiff six months or more following the expiration of the statute of limitations (or repose) to obtain service. As such, a lawyer sued for legal malpractice may not be aware of the lawsuit until well over six years after the engagement concluded.

By seven years after the representation ends, a lawyer will very likely know if they have been sued for legal malpractice. For this reason, we recommend that lawyers and law firms maintain complete client files (or copies thereof) for no less than seven years after the conclusion of the engagement.

In some cases, lawyers should maintain client files for longer than seven years. For example:

- If the client was a minor or if the engagement involved the interests of a minor, a legal malpractice claim may still be timely years after the minor turns eighteen. Files should be kept for at least three years after the minor reaches the age of majority.
- In the case of wills, trusts and other estate-planning work, the statute of limitations will not expire until two years after the client's death. Files should be kept for a minimum of three years after the client dies or the estate is settled.
- If the client was under a legal disability or becomes under a legal disability, the time within which a malpractice claim must be filed could be tolled. If the disability is known to the lawyer, when determining for how long to preserve the file consideration should be given to the tolling of the statute of limitations. In any event, files relating to the foregoing

should be kept for no less than seven years following the conclusion of the representation.

Lawyers should carefully consider all relevant issues when determining for how long to maintain each and every client file. In addition to issues relating to original client documents, pending or contemplated fee claims, and the running and tolling of statutes of limitations and repose, lawyers may want to consider other factors, such as the quality of the relationship between lawyer and client. A poor lawyer-client relationship is more likely to lead to a legal or ethical complaint, in which case it would be prudent to hold on to the client file.

Destroying Client Files

At some point, either the entire client file or a portion thereof will need to be disposed of properly. Whether destroying physical files that have been scanned and saved to electronic media or disposing of files in accord with a record retention and destruction policy, lawyers should be mindful that file destruction must be performed in compliance with the applicable ethical requirements. Appropriate precautions should be taken to minimize the risk of inadvertent disclosure of client confidential information. The lawyer or law firm should formulate a file-destruction procedure including detailed record-keeping as to the identification of destroyed files and the date of destruction. The File Destruction Authorization Form found in Sample Letters and Forms can be used to ensure all the details are included in the record.

Additional Considerations

Strong file retention, return and destruction policies and procedures will take into account the particular characteristics of each and every client matter and will be tailored thereto. If your engagement letter calls for specific treatment of client files upon the conclusion of an engagement, your policies and procedures should be adjusted accordingly for such matters. Likewise, future engagement letters should contemplate your current policies. In this resource, we discuss the Illinois legal and ethical rules, but it is possible that federal rules or other states' rules could be relevant, too.

An effective procedure also calls for reevaluation of a previously set file-destruction date. For instance, though it may be appropriate to set a seven-year destruction date when the engagement concludes, if the client later threatens to make a civil or ethical complaint, it would be prudent to maintain the file indefinitely.

Formulating a comprehensive yet tailored set of policies and procedures relative to file retention, destruction and return is essential to a smoothly running practice and an effective risk-management program; however, policies and procedures are only effective if they are regularly revisited and followed. There is no substitute for good judgment and diligence.

File Retention and Destruction Do's and Don'ts

Do…

- ✓ Carefully review the contents of a file before closing it.
- ✓ Review files to ensure that all documents or materials originally furnished by the client are returned before closing.
- ✓ Review your closed file list annually and destroy only those files that have been retained for the required number of years.
- ✓ Label files with special retention requirements.
- ✓ Consider scanning your files.

Don't…

- ☹ Close a file before the lawyer who is primarily responsible for it has determined that all work related to the file has been completed.
- ☹ Just put files in the garbage. Your destruction method must preserve client confidences.
- ☹ Forget that the client file is the most valuable weapon in a legal malpractice claim.

Chapter 10: Data Breach and Privacy

If you think law firms are not attractive targets for data breaches, think again. Law firms have been increasingly targeted because they are holding massive amounts of information that can include business data, clients' personal information, and litigation theories. Experienced hackers have come to learn that they don't have to target the business or the entity; they can target their lawyers and obtain the sensitive information they are seeking.

There are two major cyber security threats to law firms:

- Data theft – these attacks are usually in the form of malware that is downloaded from legitimate high traffic websites. It can collect data without being detected.
- Data leakage – disgruntled employee misuses or mishandles confidential information; or cloud-based sharing devices such as Google Docs become compromised.

While most of the newsworthy stories of law firm hacks are associated with large firms, all law firms regardless of size are attractive targets for hackers. These hacks put the law firm at risk for breaching the duty of confidentiality to keep client data safe; potentially subject the firm to malpractice claims; and may require costly data-breach notification actions.

Example A

> Jerry, a lawyer, who is at his desk working, receives an email from his friend Steve, who owns an all-you-can-eat burger joint, which invites him to join the thousands of others who have tried this great new weight loss smoothie for only $19.99. There is a button that reads "Click Here to Learn More About This Product." Jerry is intrigued that Steve would send him this email and he clicks on it. Within seconds, all the computers in the office shut down.

Example B

> Jodi is a new associate at the firm. She is doing a great job and she receives great performance reviews. For a variety of reasons, none of which make sense to Jodi, the firm will not promote her or increase her salary. She continues to work every day, but she is starting to get angry by the lack of recognition. She decides she is going to leave the firm and she downloads all the client files and firm templates to her personal computer. Later she uploads all the documents on the internet to embarrass the firm.

Review your cyber insurance policy to understand the coverage that you can expect to receive if either of these scenarios happens to your firm. Most policies provide coverage for Breach Response Coverage. Ideally, your firm should have a crisis management plan in place that will guide you through the adverse impact on your firm's reputation and the impact to your firm's clients when confidential information becomes public.

Safeguarding Client Data

You may be wondering if there is anything you can do to avoid the scenarios described. Candidly, you will not likely be able to avoid these situations but here are some things you can do to reduce your risk of being a victim of a cyber-attack.

- Use encryption so that all data on all firm devices is inaccessible without the pass key.
- Install threat detection and prevention software.
- Require strong passwords and/or authentication mechanisms.
- Protect firm networks with firewalls or other technology that limits access.
- Ban access to certain websites like file sharing services from firm devices.
- Develop and maintain procedures for when breaches occur.
- Prohibit employee use of personal emails and/or limit
- Internet access to certain sites.
- Implement firm policies and procedures relative to the use of mobile devices with access to firm systems, including email.

Computer Backups

A law firm should generate a backup copy of all computer data on a weekly basis. This back up copy should then be stored outside the office in a secure location such as a safe deposit box or your home. Not only will it protect your client data in the event of a computer breach, but it will also protect your client data in the event of a system crash, power failure or fire.

Data Breach and Privacy Do's and Don'ts

Do…	*Don't…*
✓ Use encryption so that all data on all firm devices is inaccessible without the pass key.	☹ Assume your employees will be able to identify infected emails.
✓ Install threat detection and prevention software.	☹ Assume you will never have a disgruntled employee
✓ Protect firm networks with firewalls or other technology that limits access.	☹ Allow firm devices to access file sharing services.
✓ Develop and maintain procedures for when breaches occur.	☹ Allow employee use of personal emails. (Or limit internet access to certain sites.)
✓ Implement firm policies and procedures relative to the use of mobile devices with access to firm systems, including email.	☹ Forget to backup all computer data on a regular basis.

Chapter 11: Employee Training

A successful risk management program requires the participation and commitment of your entire office, including lawyers, paralegals, secretaries, clerks, receptionists, and the office manager. These individuals assist the lawyer in providing legal services to the client and all of them have the power to enhance or impede your representation of a client.

Law firm partners and supervisors are required to make reasonable efforts to ensure that other lawyers conform to the Illinois Rules of Professional Conduct Rule 5.1. With respect to non-lawyer assistance, reasonable efforts must be made to ensure that the person's conduct is compatible with the professional obligations of the lawyer (Illinois Rules of Professional Conduct Rule 5.3).

Explain the Goals of Loss Prevention

In training office personnel on loss prevention procedures, start with a basic discussion of loss prevention as a concept. Inform your employees that a great percentage of all legal malpractice claims arise not out of substantive legal errors but from administrative errors and client relation problems. Give them some tangible examples of administrative errors which can cause malpractice claims: missed statutes of limitations, undetected conflicts of interest, misplaced files, inadequate billing procedures, or the lack of a written fee agreement or disengagement letter, to name a few. Explain to them the enormous economic and emotional cost to a firm which is faced with a malpractice claim, even when insurance coverage is available.

Discuss the Ethical Rules

Don't forget to properly educate your non-lawyer employees regarding the Illinois Rules of Professional Conduct, including the importance of client confidentiality and avoiding conflicts of interest. Consider giving the support personnel highlighted copies of the Illinois Rules of Professional Conduct to read and review; it will foster a better understanding of the unique duties and responsibilities imposed upon lawyers and will help the employees assist lawyers in meeting those duties. Make sure that paralegals and the lawyers who work with them understand the Illinois Rules of Professional Conduct Rule 5.5 regarding the unauthorized practice of law. Implement a system to check the tasks performed by paralegals and other office employees to ensure that they are adequately supervised and are not overstepping their authority.

Train Your Employees on Office Procedures

Once you and your employees have discussed the significance of risk management, there are several specific areas in which to train your employees, including:

- calendaring procedures (for more, see Calendaring and Time Management);
- filing procedures, including the importance of weekly filing and copying the client on all documents and correspondence (for more, see Documentation and Case Management);
- conflicts of interest procedures (for more, see Avoiding and Mitigating Conflicts of Interest);

- telephone etiquette and maintenance of telephone records (for more, see Documentation and Case Management and the sample Telephone Conference Memorandum in Sample Letters and Forms);
- billing procedures (for more, see Billing, Collection of Fees and Handling Client Funds);
- client relations, including scheduling meetings to avoid long delays or cancellations and maintaining a professional attitude and atmosphere in the workplace at all times (for more, see Client Relations).

You should also encourage your employees to make suggestions or report any perceived problems with existing procedures or personnel and to whom they should direct such observations. The employees may know that a particular lawyer chronically neglects to check for conflicts and/or misses appointments. Furthermore, you may be surprised by your support employees' ideas for improving office administration and risk management.

Cross-Train Employees or Have a Backup Plan

While it is a mistake to exclude your non-lawyer employees from the firm's loss prevention program, it is equally dangerous to rely too heavily on any particular employee in implementing the program. Even the most conscientious, hard-working assistant will take a vacation, call in sick, or move on to another position. For example, ***a calendaring system that relies solely on the dedication of one individual is a malpractice claim waiting to happen.***

It is particularly important in smaller offices to cross-train employees so that if one employee is ill or leaves the job, the work can be finished. Remember that the key to a truly successful loss prevention program depends upon a system of checks and balances; there should be safeguards built into the system so that if one person drops the ball, another one can pick it up. In short, ***loss prevention is a team effort***.

Employee Training Do's and Don'ts

Do…	***Don't…***
✓ Include all employees in your loss prevention program.	☹ Assume your employees understand your ethical obligations.
✓ Cross-train employees and have a plan for emergencies.	☹ Forget your obligations for non-lawyer employees.

Chapter 12: Backup Lawyers

According to the Illinois Attorney Registration and Disciplinary Commission (ARDC) 2021 Report, nearly fifty percent of registered lawyers in Illinois are fifty years old or older. Out of nearly 50,000 active registered lawyers in a private practice setting, over 13,200 are solo practitioners and over 12,300 additional lawyers practice at law firms of ten or fewer lawyers. Among those approximately 25,500 solo and small-firm lawyers, only about one in four reported that they had a written succession plan in place. The figure is even lower for solo practitioners – only 21.3% reported that they had a written succession plan in place.

Contingency planning is prudent not only for ethical reasons, but for professional and personal considerations, as well. Absent a written succession or "backup" plan, you cannot provide your clients with the level of service that they expect from you. If you suffer from a short but incapacitating illness, you are likely to return to a law practice experiencing potential malpractice claims, breach of contract claims, lost clients, and cash-flow problems. Moreover, without a backup plan in case of your death or incapacity, you are likely to leave your loved ones and devoted office staff with the burden of trying to ensure that your clients' needs are met.

This resource is designed to aid in the process of developing and implementing a backup plan whereby you designate a backup lawyer as part of a plan designed to protect you, your firm, your reputation, your clients, your staff, and your family in the event of an unplanned (or, possibly, planned) long-term absence from your practice.

This resource is applicable whether or not you are a solo practitioner. If you practice in a small firm, consider whether it is appropriate to have another lawyer in your firm act as a backup lawyer. It may not be. In that case, consider entering a backup-lawyer relationship with a lawyer outside your firm. For instance, if you are the sole owner and partner in a small firm with one or more associate lawyers, you may not want to delegate control over your firm to a young associate. Also consider that even if you are comfortable leaving the day-to-day operation of your firm to a young associate, you should ensure that the associate understands how the firm is run on a day-to-day basis. Most young associates are not entrusted with this level of responsibility. This resource can provide you with a starting point for your evaluation of your own associates as potential backup lawyers.

Starting the Process: Finding a Backup Lawyer and Formulating a Plan

Before jumping headfirst into the process of selecting candidates to serve as a backup lawyer for your firm, first consider the purposes for which you may need a backup lawyer. Your particular needs will govern the formulation of a plan and the implementation thereof. Unfortunately, no plan is universally applicable. Any plan will have to be made with your particular requirements in mind.

Under most circumstances, an appropriately designated backup lawyer can provide an invaluable service when a lawyer unexpectedly dies or becomes physically, mentally, or emotionally disabled or incapacitated. But a backup lawyer can be of use under other circumstances, as well, such as in the event of a lengthy absence from your office due to a planned vacation, a military deployment, childbirth or adoption, a long trial, family emergency or

recuperation from a medical procedure. Clients will appreciate the foresight and attention to their important legal matters.

Once you have decided why coordination with a backup lawyer will aid your practice, you should begin the process of looking for an appropriate backup lawyer. Consider this an important due diligence process and give it the same care and attention that you would when investigating a potential associate hire or proposed partnership arrangement.

A good backup lawyer will exhibit all the following characteristics:

- Is skilled, dependable, and trustworthy;
- Has a good reputation within the legal community;
- Practices in the same area of law (*e.g.*, estate planning or criminal defense litigation);
- Practices in the same geographical area; and
- Carries adequate professional liability insurance.

Just as importantly, a good backup lawyer must be willing to serve in such a capacity for you. You may find that a backup lawyer is willing to help you in this regard if you are willing to provide the same service to them. Using checklist What to Look for in a Backup Lawyer found in Sample Letters and Forms addenda of this guide can help you narrow your search for an appropriate backup lawyer.

For many solo practitioners, especially those practicing in smaller cities and towns, you may have trouble finding a skilled lawyer in the same practice area who is willing to provide you and your clients with this service. If you have trouble finding a backup lawyer, consider reaching out to former colleagues or law-school classmates or joining a local bar association and getting involved in a section focusing on your practice area(s).

Implementation: Documenting the Details

Once you have found a dependable, trustworthy, ***insured*** lawyer in your geographical location who practices in your area, you will need to implement your plan by documenting the details in three important respects:

1. Notifying clients of the arrangement and obtaining their consent thereto;
2. Documenting the operational information for your firm and providing the backup lawyer with an introduction to your practice; and
3. Documenting the arrangement with backup lawyer.

Obtaining Clients' Informed Consent

A backup-lawyer relationship will only work if the client offers their informed consent to the arrangement. This is not only the case for practical reasons, as a client would almost certainly be unhappy if their important legal matters were delegated without their permission to an outside lawyer with whom they were not familiar, but for ethical reasons, as well.

For new clients or for new matters on behalf of existing clients, the clients' informed consent should be memorialized in a written engagement/retainer agreement. For instance, the agreement should contain a provision like the following:

> *"I have arranged with another lawyer (the "Backup Lawyer") to provide legal services to you in connection with the engagement described herein in the event that I am unable to provide those services due to my death, impairment, disability or incapacity [or in the event that I have a planned absence from the office of over fourteen days]. Under such circumstances, and where the Backup Lawyer has verified that there exists no conflict of interest, you hereby authorize the Backup Lawyer to take all reasonably necessary action to provide those legal services described herein, including receipt of confidential information connected with this engagement. There will be no lawyer-client relationship between you and the Backup Lawyer unless and until the Backup Lawyer begins to provide legal services to you in accord with this provision and my agreement with the Backup Lawyer."*

You should include in the engagement agreement a disclaimer stating that the client will have no lawyer-client relationship with the backup lawyer unless services are performed in connection with the backup-lawyer role. A potential backup lawyer will not likely agree to accept such a responsibility if doing so could subject them to malpractice liability merely by having agreed to serve in such a role.

For ongoing legal matters on behalf of current clients, you should either enter into an amended engagement agreement including a provision such as that set forth above or you should notify such clients in writing of the plan to utilize a backup lawyer under the circumstances discussed above and ask each client to sign a copy of the letter acknowledging their grant of consent to act in accord therewith.

As discussed in further detail below, it is important that you keep a list of all open client matters for the backup lawyer's use as a reference if their services are needed. The list should articulate for which matters you have obtained written informed consent from the client to use a backup lawyer. Your goal should be to obtain written acknowledgment and consent from every client, so that the backup lawyer will not be restricted in terms of which matter(s) they can handle on your clients' behalf. If you fail or are unable to obtain a client's consent, there is a chance that the client will be left with no legal assistance.

Creating the Backup-Lawyer Agreement

A thorough written agreement between your firm and the backup lawyer is key to an effective backup-lawyer arrangement. Below is a non-exhaustive list of provisions that should be included in the agreement between you and the backup lawyer. Under many circumstances, it will make sense to enter into a reciprocal arrangement, whereby you act as backup lawyer for the other lawyer. The Sample Backup Lawyer Agreement found in Sample Letters and Forms portion in this guide can serve as a starting point.

Initiation/Duration/Termination

Identify how it will be decided when backup lawyer will be authorized and responsible for taking over your law practice, even temporarily. Will it be up to the discretion of the backup lawyer? Will it be upon the occurrence of some other event, such as your death or disability as defined by a medical professional, or something else? Will it be based upon the discretion of someone else, such as a close family member or a trusted member of your office staff? Could it be based upon the direction of a personal representative designated in your will? The agreement should also identify the duration of the arrangement and should set forth a procedure for the termination thereof. For instance, it could terminate immediately upon delivery of written notice by you to the backup lawyer; it could terminate immediately upon delivery of written notice by

the backup lawyer to you; and/or it could terminate immediately upon delivery of written notice by your designated legal representative to the backup lawyer.

Conflict-Check Procedure
The agreement should set forth a process whereby the backup lawyer will conduct conflict checks in accord with established and documented conflict-check procedures. It would not be surprising for a backup lawyer to be conflicted out of representing one or more of your clients, especially if both of you practice in a small town. Your agreement should ensure that proper conflict-check procedures are followed and, if a conflict exists, it should include a provision dictating a procedure for what to do in such instances (*e.g.*, if a conflict exists, the backup lawyer may not provide services on behalf of your client, but the backup lawyer is given the power to find another lawyer—an alternate backup lawyer—who can serve as a backup lawyer to assist the client).

Independent Contractor
The agreement should provide that the backup lawyer will be acting as an independent contractor to your law firm and that the independent-contractor relationship will begin only upon those terms set forth in the agreement. Omitting such a clause could cause your arrangement to be considered an employer-employee relationship, in which case there may be agency and tax implications that could have been avoided. You may also want to include a disclaimer that there is no lawyer-client relationship and/or partnership relationship between you and the backup lawyer.

Confidentiality
Include a provision requiring the backup lawyer to keep in strict confidence all client information and requiring the backup lawyer to use any such confidential information only to the extent reasonably necessary to carry out the terms of the representation as set forth in the agreement. The backup lawyer should also keep any information relating to the operation of your firm in strict confidence.

Minimum Insurance
You should require the backup lawyer to maintain appropriate professional liability insurance coverage, with policy limits equal to your own. (You should also check the ARDC's website, www.iardc.org, to ensure that the backup lawyer has disclosed to the ARDC that they have malpractice coverage.) Consider that your own professional liability policy as well as the backup-lawyer's professional liability policy could be implicated in a malpractice claim arising from or relating to the backup-lawyer's work on behalf of one of your clients. For this reason, it is preferable that you and the backup lawyer be insured with the same professional liability insurer.

Power of Attorney
Consider whether you want the backup lawyer to have power of attorney or other authorizations, such as an authorized signatory for your financial accounts. If so, include a specific provision in your written agreement to that effect.

Fees
Detail how the backup lawyer will be compensated for their efforts on behalf of your clients. Will the backup lawyer be paid an hourly rate? Will that rate be defined by your agreement with your client? Will the backup lawyer be paid based on a different calculus? Be specific. You may want to include in the agreement a procedure for the adjudication of a fee dispute or a fee claim.

Succession
In the event of your death or permanent incapacity, is the other lawyer asked to wind up the affairs of your law office? Will doing so be based upon the discretion of someone else, such as a close family member or a trusted member of your office staff? Could it be based upon the direction of a personal representative designated in your will?

If the backup lawyer is asked to wind up the affairs of your law office, you may want to consider including in your agreement a method of valuation of your law firm so that, in such an instance, the backup lawyer can buy your law firm with the purchase price paid to you or your estate. Or, if the backup lawyer does not wish to buy your firm, you may want to authorize the backup lawyer to sell the firm to a third party. If you choose to include such a provision, you should include a provision identifying the particular circumstances under which the backup lawyer is authorized and/or required to wind up the affairs of your law firm or to buy or sell the firm. You will also want to designate the backup lawyer as an attorney-in-fact under such circumstances, so that the lawyer can take all necessary actions to wind up or sell the law firm.

Introducing Your Firm and Documenting Firm Procedures for the Backup Lawyer

To ensure a seamless transition to the backup lawyer should the need arise, you must plan ahead. This means that the backup lawyer should be intimately acquainted with the manner of operation of your law practice. Upon the implementation of a Backup-Lawyer Agreement, you should give the backup lawyer a tour of your office. Introduce them to your staff, if any. Demonstrate how to use your computer system, including e-mail, calendaring, and file-management software. Inform them how to use your redundant calendaring system. Show them where files are kept and how to find open or closed files. Explain your conflict-check procedures and ensure they understand how to obtain a list of current clients to perform their own conflict check should they be required to take over the representation of your clients.

Although a tour of your law office will provide the backup lawyer with an invaluable introduction to your law practice, it is no substitute for keeping detailed written information relating to the operation of your firm and arranging for this information to be available to the backup lawyer if needed. You should keep the following information in an accessible and easy-to-understand format:

- A list of all open or active matters, including a clear identification of the client(s) and whether the client has authorized the backup lawyer to provide services on their behalf (also, show the backup lawyer how to generate a current version of such a list, as they will need to do so to run a conflict check);
- If the status of the open/active matters is not apparent from the foregoing list or a cursory look at the file, consider including a short status report, as well;
- A list of all closed matters, including an identification of the client(s);
- A list of the financial institutions at which your firm has accounts, as well as the account numbers and an identification of the individual who is an authorized signatory to the accounts in your absence (as part of a good system of checks and balances, we recommend that you separately designate a different lawyer to be the backup authorized signatory to your financial accounts);
- The contact information for your firm's IT professional or vendor;
- A list of other vendors and/or individuals who provide the firm with other services;
- Instructions to access file-management, e-mail, voicemail, and billing systems, including any applicable passwords (consider also providing access to accounting information,

such as trust-account ledgers, to the lawyer designated as the backup authorized signatory to your financial accounts);
- A description of the firm policy for preserving client files and records;
- A description as to where original client property, including documents, is kept;
- A description of office policies for hiring and paying vendors;
- An explanation as to how to access mail, if the firm has a post-office box or other mail-receipt service, and faxes; and
- If your office space is leased, provide the contact information for the property owner.

We recommend that you keep the list in a secure location, such as a safe deposit box, a safe in your office, or in an encrypted file accessible to the backup lawyer. If there is a trusted member of your office staff, we recommend making the list accessible to that individual who can then pass it along to the backup lawyer if the circumstances so require. The Initial Setup of Backup Lawyer System Checklist found in the Sample Letters and Forms portion of this guide can serve as a starting point.

Remember, the backup lawyer is likely to be busy handling their own law practice and the more difficult and time-consuming the process to become acquainted with your practice, the more likely the backup lawyer will be unable to provide your clients with the level of care that they expect of you. As such, you should not only take care to provide the backup lawyer with all the information identified above, but you should take care to routinely update the information. This will greatly aid in the backup-lawyer's ability to identify quickly, and painlessly which matters need immediate attention and to act accordingly. Otherwise, the backup lawyer is likely to spend critical time figuring out what needs attention as opposed to taking the necessary action.

Under the best circumstances, you will have a trusted family member or member of your office staff who will be able to provide the backup lawyer with the foregoing information and with access to your office if you are unable to do so. If not, you will need to provide the backup lawyer with a set of keys to your office and instructions to access the foregoing information.

Additional Considerations

Financial Institutions

As discussed briefly above, you will need to decide whether the backup lawyer will be given full access to your firm's bank accounts and account ledgers. Depending on the circumstances, such as the death or permanent incapacity of a solo practitioner, it may be necessary for a third party to have such privileges. We recommend that you designate a different individual – not the backup lawyer – as an authorized signatory to your law firm accounts. Rule 1.15 of the Illinois Rules of Professional Conduct, which addresses the safekeeping of client property, generally requires that client property and the property of other third persons be held by a "lawyer." As such, the authorized signatory, like the backup lawyer, must be a licensed lawyer.

You should inquire of your financial institution what is necessary to authorize another to sign on your account. Your bank may require that you grant power of attorney, in which case a limited and contingent power of attorney should be executed and approved by the bank. Be sure to articulate in the power of attorney the particular situations under which the power of attorney is to be given, such as only upon your death or only upon written authorization by the backup lawyer. The decision to designate an authorized signatory is incredibly important, as the authorized signatory will have full access to your accounts, even if for only a limited time. You could be held legally and ethically responsible if the designated signatory mishandles client funds.

Your Estate
When entering into a Backup-Lawyer Agreement, you should update your will to include provisions for the continued handling of client matters and the disposition of your law firm that are consistent with those set forth in your Backup-Lawyer Agreement. Designate a personal representative for the express purpose of winding up your law practice. Direct either the executor or the backup lawyer to notify your lawyers' professional liability carrier of your death or disability and to activate or purchase an extended reporting period for your policy.

The terms of your will must necessarily depend on the nature of your practice and the particular provisions in your Backup-Lawyer Agreement.

Life Insurance
You may want to consider taking out a small life insurance policy with your estate as the beneficiary and with an explicit instruction in your will that the proceeds should be used to close out your law practice. A disability policy may be appropriate, as well. Remember that running a law practice costs money and the backup lawyer will not likely be willing to incur those costs.

Professional Liability Insurance
Disclose your backup lawyer to your professional liability insurer. You want to ensure that you are covered in the event of a claim.

Just like any relationship, a good relationship with a backup lawyer will require some time and effort to maintain. On a yearly basis, obtain confirmation from your backup lawyer and through the ARDC website, www.iardc.org, that your backup lawyer carries professional liability insurance.

As mentioned above, in the event of your death or disability, your will and your Backup-Lawyer Agreement should direct either your executor or backup lawyer to notify your lawyers' professional liability carrier and activate or purchase an extended reporting period.

Annual Self-Assessment
You should also conduct an annual self-examination. Are you still keeping records in the same manner? Are you still using the same case-management and docketing/calendaring software or other systems? Do you still have the same office staff? The same vendors? The same policies/procedures? Have you kept up on your efforts to memorialize and obtain consent from *every* client to use a backup lawyer? Has your will changed? Have your client lists been kept current? Have newly hired office staff been introduced to your backup lawyer? Have office procedures (including passwords) changed? If any of the foregoing have occurred, the written procedures left for the backup lawyer should be updated. If the nature of your practice changes dramatically, you may want to reconsider your choice of backup lawyer. In any event, you should renew your Backup-Lawyer Agreement yearly to ensure that it takes into consideration not only the changes in your practice, but potential changes in the circumstances of your backup lawyer.

A Sample Annual Review of Backup-Lawyer Procedures can be found in the Letters and Forms addenda of this guide.

Remember, it does no good to have office policies/procedures if you don't follow them

It is essential to a working backup-lawyer relationship that you follow your own policies and procedures. For instance, if you delay in documenting that new files have been opened or old files have been closed, a backup lawyer may have no way of knowing which client matters need tending to and which can be ignored.

Be proactive. There is simply no effective way to address your clients' needs in the event of your unexpected incapacitation or death without thinking ahead. Take time this week to consider whether the sort of succession planning discussed herein is appropriate for your practice and, if so, what would be necessary to best protect your firm, your reputation, your clients, your staff, and your family.

Backup Lawyer Do's and Don'ts

Do…

- ✓ Have a written Backup-Lawyer Agreement.
- ✓ Reach out to the Illinois State Bar Association and the Section Council related to your area of practice if you have trouble finding the right lawyer to serve as your backup.
- ✓ Memorialize in writing your clients' informed consent to your Backup-Lawyer Agreement.
- ✓ Keep a list of all open client matters for the backup-lawyer's use as a reference if their services are needed.
- ✓ Make sure your Backup-Lawyer Agreement addresses: initiation/duration/termination procedures, conflict-check procedures, independent-contractor status, confidentiality, minimum insurance, power of attorney, fees, and succession.
- ✓ Perform an annual self-assessment to make sure that you and your backup lawyer are aware of changes in your practice.

Don't…

- ☹ Leave important stakeholders out of the loop.
- ☹ Limit your planning to when you retire or close your practice for good.
- ☹ Choose a backup lawyer who isn't experienced in your area of practice.
- ☹ Create a backup plan and leave it on the shelf. Keep your plan, your staff, and your backup lawyer up to date on changes to your practice.
- ☹ Overlook the little things. Give your backup lawyer a tour of the office and your procedures. Demonstrate how to use your computer system, including e-mail, calendaring, and file-management software. Inform them how to use your redundant calendaring system.
- ☹ Overlook your personal estate-planning needs. Take this time to make sure your estate plan and life insurance are also up to date.

Chapter 13: Reducing Risk of Substantive Errors

Most of the preceding chapters have focused on office management issues. The focus of this chapter is improving your legal work product. Many legal malpractice claims boil down to a lawyer's failure to know the law or a misinterpretation of the law. These are called "substantive errors." There are several steps that lawyers can take to increase the quality of their legal services and reduce the likelihood of a substantive error:

Know your areas of expertise

A surprising number of malpractice claims arise each year because lawyers accept work that is outside the areas of their expertise. If you are unsure of the law in a particular area, decline the representation or co-counsel with an expert in the field. (Remember to always obtain the written permission of the client when splitting fees.)

If you are a member of a larger firm, don't forget to tap into the knowledge and expertise of other lawyers in the firm. Solo practitioners can develop relationships with colleagues in other practice areas through bar associations. The Illinois State Bar Association Section Council chairs should be able to recommend practitioners in your area who specialize in particular fields.

Supervise and train younger lawyers

Establish a program for training and supervising younger lawyers. Assign a senior lawyer to monitor the work of each younger lawyer on a regular basis.

Peer review

An effective peer review program can identify weaknesses in your firm's risk management practices before a claim arises. Under a peer review program, a random sampling of each lawyer's files is reviewed by another lawyer in the firm at least once a year. The designated lawyer then reviews the file for the following:

- conflicts check;
- engagement letter;
- organization and documentation;
- communication with the client;
- timeliness;
- client consent;
- client satisfaction with performance and fees;
- closure letter; and of course,
- work product.

Statistically, most malpractice claims are made against lawyers who have been practicing for at least ten years. Thus, every member of the firm should benefit from peer review, not just junior lawyers. Solo practitioners can also use peer review by asking a respected colleague to review their files. ***You must, of course, obtain written permission from the client first and the process should be properly documented to ensure that confidentiality is maintained relative to the reviewed materials***. Most clients will look favorably upon a lawyer's request to improve the quality of their work through the peer review process.

Require the approval of two partners for opinion letters

Many transactional firms require at least two partners to review and approve all opinion letters that are issued by the firm. This practice may prevent one partner from providing an opinion that is overly broad or promises too much. Solo practitioners can seek the advice of a respected colleague without revealing the client's name.

Continuing legal education

Lawyers must continually keep abreast of new developments in the law. This can be achieved in many ways, such as attending seminars and reviewing legal periodicals or advance sheets. Joining a specialty bar or a practice section of a state or local bar association is also an excellent way to stay informed and current. ISBA Mutual sponsors free online CLE, the ISBA's Solo & Small Firm Practice Institute Series, both of which can be found at www.isba.org. We also encourage all insureds to take advantage of the Risk Management resources on our website at www.isabamutual.com, including subscribing to the Liability Minute for updates about emerging risk issues and attending the Jerry Mirza Memorial Risk Management Conference, which is a live seminar available exclusively to our insureds.

Use checklists and forms

Even seasoned lawyers make mistakes. Checklists are a vital safeguard against errors and omissions. There are literally thousands of checklists and forms available to assist lawyers in every practice area. Begin with a checklist from the library or a colleague and then add your own enhancements over time.

Transactional lawyers should use closing lists that clearly set forth the items that must be accomplished and which party is responsible for each item (e.g., the lawyer, opposing counsel, the client, or an outside expert such as an accountant). Before the file is closed, require the responsible lawyer to initial the closing list, evidencing that all items were completed, including post-closing items such as filing security interests.

Many useful forms are available through the Illinois State Bar Association website at www.isba.org/forms. When using a form to draft a document that is submitted to a client, court, or third party, be sure that your final product is complete and appropriately tailored to the case, and that it does not contain leftover references to unrelated parties or matters.

Check the credentials of new lawyers and lateral hires

Before hiring new associates or bringing new partners into the firm, check their credentials. Verify their law school affiliations and previous employment history. Also check the ARDC Lawyer Search to ensure that the lawyer is registered to practice law in Illinois and is in good standing. In addition, ***determine whether the new partner or associate is willing to learn and follow your firm's office procedures*** with respect to such matters as client selection, calendaring, conflict checks, and documentation. (For more information, see the Chapters Client Screening, Calendaring and Time Management, Avoiding and Mitigating Conflicts of Interest, and Documentation and Case Management.)

One rogue lawyer who refuses to follow the Illinois Rules of Professional Conduct can wreak havoc on a firm. You should of course also check for potential conflicts between the incoming lawyer's past and present clients and your firm's client base. (For resources, see Common Party Search Checklist and Conflict of Interest Search Form in the Addenda Sample Letters and Forms.)

Reducing Risk of Substantive Errors Do's and Don'ts

Do…

- ✓ Engage in peer review.
- ✓ Supervise and train younger lawyers.
- ✓ Use checklists and forms.

Don't…

- ☹ Take on matters outside of your expertise without help from a seasoned practitioner.
- ☹ Hire new lawyers' or laterals' without checking their credentials.
- ☹ Miss CLE programs that can help you keep abreast of changes in the law.

Chapter 14: Director or Officer and Other Risky Business Relationships

Adopt a policy forbidding any lawyer from serving as a director or officer of a corporate client or entering a business relationship with a client without the express written consent of each partner. Several troubling issues are raised when lawyers engage in such activities:

Conflicts of Interest

Lawyers who serve on the boards of directors of clients or engage in other business activities with clients run a substantial risk of exposing themselves to conflict-of-interest charges. For example, assume that the board of directors is voting on two different courses of action: one will generate legal work and revenue for the lawyer/director's firm, while the other will not. If the lawyer/director votes for the former course of action, they may later have trouble convincing a shareholder that their decision was unbiased.

The Deep Pocket

Many corporations today do not carry Directors and Officers liability insurance. Even if the corporation carries a D & O policy, the coverage is often too low to cover a major claim or is severely limited by numerous exclusions. A lawyer's malpractice insurance policy provides the third-party claimant with an attractive alternative deep pocket. To bring your legal malpractice policy into play, the claimant merely needs to allege that you were acting as both director/officer/owner and legal counselor.

Ethical Concerns

In addition to the potential conflict of interest issues, the client and the lawyer should each be aware that the lawyer-client privilege may be lost in certain circumstances where the lawyer is also a member of the client's board of directors. For example, the opposing party may argue that a lawyer-director's comments at a board meeting were made in their capacity as a director, not as a lawyer, and are therefore not protected by the lawyer-client privilege.

Disqualification of the Firm

In cases where both the firm and the client are sued as co-defendants, the firm may be disqualified from defending the client because the lawyer is also serving as an officer or director or was a business partner. Thus, the client could lose the services of the lawyer who possesses the most experience and knowledge regarding the client and its business.

Insurance Coverage Issues

Lawyers also risk their legal malpractice coverage when they venture outside their traditional role as legal advisors. Most legal malpractice policies do not cover wrongful acts committed in a lawyer's capacity as a director, officer, owner, or manager of a corporation or partnership. The best advice is to stick to the practice of law.

Serving as a Director or Officer and other Risky Business Relationships Do's and Don'ts

Do…

- ✓ Be rigorous in the prevention of conflicts of interest.
- ✓ Review your insurance policy to make sure you understand your coverage.

Don't…

- ☹ Serve as a director of a corporate client.
- ☹ Venture outside the role of legal advisor without reviewing your insurance policy.

Chapter 15: Lawyer-to-Lawyer Relationships That Create Liability

Every lawyer knows that they can be held liable for the wrongful acts of their law partners. Many are unaware, however, that there are other, less obvious relationships between lawyers that can create risks.

Referrals

Lawyers remain legally responsible for matters they refer to other lawyers in ***exchange for a fee***. Therefore, before you refer legal matters for a fee, make sure that you have confidence in the abilities of the lawyer to whom you are referring the matter (the "receiving lawyer"). You should of course always obtain the written, informed consent of the client pursuant to Illinois Rules of Professional Conduct Rule 1.5 (e).

In addition, always calendar any critical dates with respect to the referred matter, such as statute of limitations deadlines, and follow up with the receiving lawyer before the date expires. If the receiving lawyer misses the deadline, the referring lawyer can be held liable for the error. Finally, as the referring lawyer, you should also require proof that the receiving lawyer has sufficient legal malpractice insurance.

Office Sharing Relationships

Lawyers often enter into a variety of office-sharing arrangements with colleagues to pool resources and share overhead costs. While there are certain advantages to office sharing, this relationship can pose significant risk for the unwary lawyer. Specifically, a court may hold that such practices have created a partnership by estoppel among the office-sharing lawyers and that one office-sharer is therefore liable for the acts of the others.

In a real partnership, the partners establish controls to prevent malpractice claims and ethical violations. Those controls are often missing in an office-sharing arrangement. Lawyers who plan to share office space should take the following steps to avoid increasing their malpractice risk or breaching their ethical obligations:

- Put the office-sharing arrangement in writing.
- Require written verification that each office mate carries legal malpractice insurance. Ideally, each office mate should carry professional liability insurance with the same insurer, at the same limits and deductible, and with the same renewal date. The same principles should be employed in the case of an "of counsel" relationship with an associated lawyer in a separate office.
- Do not use common stationery if you are not in fact partners. (See Illinois Rules of Professional Conduct Rule 7.5 (d) and ISBA Advisory Opinion No. 764.)
- Review door signs, business cards, and telephone listings to make sure they are not misleading. For example, it can be misleading to simply list the names of all office-sharers on the door to the office suite or on the reception wall. Instead, list the names as John Doe Law Firm, Law Office of Jane Smith, and Tom Johnson, Ltd. with gold lines between each firm's name.

- Answer telephones properly. The safest option is for each office sharer to have a separate telephone number. If you share a common telephone number, answer the telephone by reciting the telephone number only ("Extension 4444") or the phrase "law offices."
- Protect client confidentiality. Review office procedures regarding files, mail, telephone calls, and faxes to prevent an accidental breach of confidence.
- Document work-sharing arrangements and obtain the client's written permission whenever splitting fees.
- Do not file pleadings or tax returns as a partnership.

Letterhead Listings

Some lawyers in Illinois engage in the disturbing practice of listing themselves on another lawyer's stationery as if they were partners. For example, let's suppose that Solo Practitioner Smith and Solo Practitioner Jones use stationery labeled "Smith & Jones." Like some office-sharing relationships, such stationery-sharing practices can create a partnership by estoppel between the lawyers listed on the letterhead.

This practice raises ethical concerns as well. See Illinois Rules of Professional Conduct Rule 7.5 and ISBA Advisory Opinion No. 764.

Increasingly, lawyers are forming relationships with other lawyers for limited circumstances to increase their capacity or maybe to utilize the expertise of another lawyer for a particular matter. The other lawyer may be given the designation "of counsel"; or the lawyer might be an independent contractor. Before creating these relationships, understand the Illinois Rules of Professional Conduct in relation to confidentiality and conflicts of interest will still apply and must be reviewed and analyzed.

Co-Counsel/Local Counsel Relationships

As with fee referrals, a firm that hires co-counsel on a particular matter is basically forming a partnership with respect to that matter from a risk standpoint. Legal malpractice in these cases often stems from a miscommunication between the co-counsel. This can be avoided if the co-counsel begins their relationship by documenting the duties of each lawyer/firm and meeting regularly to check on the progress of each task. Like referrals, you should also have confidence in your co-counsel's skills, calendar all important dates, and verify that the co-counsel has sufficient malpractice coverage.

Of Counsel Relationships

Perhaps the biggest problem with "of counsel" relationships is defining their scope. The term "of counsel" means different things to different people.

There are four generally recognized types of "of counsel" relationships:

1. The part-time practitioner who practices law in association with a firm, but on a different basis as the firm's partners or associates;
2. A retired partner of the firm who provides institutional recollections of their experiences and is available for consultation;

3. A lawyer brought into the firm with the expectation that the lawyer will shortly become an associate or partner; and
4. A lawyer who occupies a permanent senior position in the firm with no expectation of becoming a partner.

One risk inherent in the "of counsel" relationship is that a client may believe that the firm and its "of counsel" are working together on all legal matters. Therefore, if the "of counsel" commits an error, the client may name the firm as a defendant as well. Firms can reduce the likelihood of these risks by taking the following precautions:

- ***Put the "of counsel" relationship in writing.*** Lawyers should ensure that all parties involved—including the "of counsel" lawyer, the associated firm, and the client—are notified of the extent and any limitations upon the "of counsel" lawyer's relationship with the firm, and of the firm's and the lawyer's respective roles in the client's representation. When notifying the client, this information can be included in an engagement letter.
- Don't allow an "of counsel" lawyer to use firm stationery for matters they undertake for their own clients.
- The firm and its "of counsel" lawyers should verify that each is covered by legal malpractice insurance.

Independent Contractors

Independent contract lawyers or temporary lawyers are usually paid by the hour to handle a specific matter and to achieve a specific result. The firm cannot dictate specifically how the contract lawyer arrives at such a result. If the contract lawyer works without direct supervision, the client must be informed, and consent must be obtained. Care should be taken to ensure that the independent contractor has access to the matters related to the assignment but is restricted from accessing materials relating to other firm clients.

Former Associates/Partners

Former members of the firm can sometimes leave hidden exposures behind. After a lawyer departs from your firm, document all the files that the lawyer was working on, and which ones went with the departing lawyer. Have someone review the remaining files to check for any looming problems. Next, send your clients a letter informing them of the departure and allowing them to select who will represent them in the future. Finally, never rely on the departing lawyer to file a substitution of counsel. Instead, send the client a letter stating the date your firm ceased its representation and, if appropriate, obtain the court's permission to withdraw.

See the Addenda Sample Letters and Forms for a Sample Notice to Client of Departure of Partner/Associate from Firm.

Lawyer to Lawyer Relationships that Create Liability Do's and Don'ts

Do…

- ✓ Put office sharing, work sharing and "of counsel relationship" agreements in writing.
- ✓ Require written verification that each office mate carries legal malpractice insurance.
- ✓ Review door signs, business cards, and telephone listings to make sure they are not misleading.
- ✓ Protect client confidentiality.

Don't…

- ☹ Use common stationery if you are not in fact partners.
- ☹ Add an "of counsel" lawyer without verifying they have legal malpractice insurance.
- ☹ file pleadings or tax returns as a partnership.
- ☹ Allow "of counsel" lawyers to use firm stationery for matters they undertake for their own clients.

Chapter 16: General Loss Prevention Tips You Need to Know

Professionalism/Diversity

Lawyers should be careful to screen and/or filter their communications with clients, opposing counsel, and judges to ensure that all communications meet the high standard of professionalism. Lawyers have been disciplined for rude, obnoxious, sexist or discriminatory behavior during depositions, during a trial, or in relation to colleagues and fellow employees.

As of this writing, Illinois Rules of Professional Conduct Rule 8.4(j) states that it is professional misconduct to "violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer."

If you would like to learn more about professionalism and civility you can go to the website for the Illinois Supreme Court Commission on Professionalism at www.2civility.org. The Commission is charged by Illinois Supreme Court Rule 799 to promote among both lawyers and judges in Illinois greater integrity, professionalism and civility; to foster commitment to the elimination of bias and divisiveness within the legal and judicial systems; and to ensure those systems provide equitable, efficient and effective service to the citizens of Illinois.

Since July 1, 2017, lawyers in Illinois have been required to complete at least one hour of continuing legal education regarding diversity and inclusion and at least one hour regarding mental health and substance abuse to satisfy their Professional Responsibility CLE obligations. Attending these programs will help us learn more about these very important topics.

Maintaining the Lawyer-Client Privilege with Client Email

Lawyers should be careful to advise their individual clients not to use work email when communicating with them as an employee who uses their company email account to communicate with their lawyer almost certainly forfeits any claim to privilege concerning those communications. However, courts have held that communications between a lawyer and an employee using a web-based email account on a company computer may still be privileged.

Lawyers and Claims for Defamation

Lawyers are generally protected from claims of defamation for statements they make in the context of pending litigation under an absolute privilege as provided in the Restatement of Torts. However, lawyers should be careful not to read the contours of the privilege too broadly and should be careful with their extra-judicial statements, particularly those they broadcast over the internet and through social media. Such statements may still be covered by the absolute privilege, but application of the privilege is not always clear-cut and may not protect a lawyer from defamation claims.

Email/Fraudulent Check Schemes

Recent years have seen a proliferation and variations of the same basic scheme: A lawyer is sent an email from a potential client in a foreign jurisdiction who wishes to retain a lawyer to pursue a collection matter from a customer; the lawyer agrees to the representation; the lawyer thereafter receives a message stating that the customer has agreed to pay the balance owed, that the customer will be sending a check to the lawyer, that the lawyer should deduct any fees for their services, and send the client the remainder.

Many lawyers have fallen victim to this scheme because they believe that once a deposited check has "cleared" and the funds are available there is no risk in wiring those funds. This is simply not true.

A check "clearing" and a bank's making funds available is only provisional until the check is actually paid by the payor bank (i.e., final settlement). Prior to final settlement, the depositor's bank merely acts as the customer's agent for collection of the check and any advancement of funds by the depositor's bank is provisional. If there is no final settlement (i.e., the payor bank does not pay the check), the depositor's bank may charge back the sum of any provisional advancement of funds or demand a refund from the customer.

As applied to the illustration above, this means that the lawyer who deposits the check and wires the funds to their "client" once the check "clears" may ultimately be liable to the bank for the amount of the fraudulent check. The bank may either charge the lawyer's account if sufficient funds are available in the lawyer's account or demand a refund and pursue legal action against the lawyer for the amount of the check.

To prevent this scenario, lawyers should be extremely wary of taking on any representation from a foreign client who contacts you only via email. As with any new client, a lawyer should investigate the client thoroughly. This includes determining the actual existence of the client and the validity of its operations. A diligent lawyer should call references for the client, check public records, and obtain supporting documentation of the alleged debt that it owed to the client.

A prudent lawyer should also never assume simply because a check has "cleared" and funds are available that a check has been paid by a payor bank. Upon receiving a check from a suspicious client, a diligent lawyer should call the payor bank to verify the account and determine if the check is a forgery. A lawyer should also not draw on deposited funds from a suspicious client until they receive confirmation from the bank that there has been a "final settlement" and the deposited check has actually been paid by the payor bank.

Reducing the likelihood that a client acts on fraudulent wire instructions

Another fraudulent check scheme involves someone posing as a member of your firm, possibly by phone or with an email address that looks like it comes from your firm. In an effort to avoid a problem with wire transfer instructions, we recommend that you include the following language in your correspondence with clients, including in your Retainer Agreements:

> "Law Offices of _____ will no longer be delivering wire instructions. If you receive wire instructions from anyone at our firm, please notify us immediately via telephone. All wire instructions must be obtained directly from the Title Company or Lender. NO EXCEPTIONS.

For more on avoiding cybersecurity breaches and fraudulent check schemes, read Liability Minute: Lawyers Are Increasingly the Targets of Email/Fraudulent Check Schemes on our website www.isbamutual.com

Chapter 17: Social Media

While many lawyers may use social media to market their practices or establish their expertise in a particular field, they get in trouble for not reviewing the Illinois Rules of Professional Conduct before they post.

Example

> Lucy is a public defender who is often frustrated by her clients and the judges before whom she appears. To reduce her stress, she has started a blog. Initially, the blog discussed things that interested her like bird watching and cooking. Later, as she felt more pressure at work, she began to blog about how stupid her clients were and how incompetent the judges were in the criminal courts. She provided so much information (but not their names) that eventually her supervisor and her colleagues were able to figure out who she was talking about. She has breached her duty of confidentiality under Illinois Rules of Professional Conduct Rule 1.6.

Just because everyone else seemingly posts anything they want about anything they want, doesn't mean that lawyers can too. The Illinois Rules of Professional Conduct still apply and lawyers must be mindful of their ethical obligations when they engage in social media.

Tips For Lawyers Who Use Social Media

Don't give legal advice outside of your jurisdiction through social media.

It is easy to connect with readers and encounter inquiries on social media, especially if you have developed a continuous, reputable blog or following on a particular outlet. However, Rule 5.5 states "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so." State lines can be easily crossed on social media platforms, and lawyers should avoid providing legal advice (offering recommendations tailored to the unique facts of a particular circumstance). While lawyers who provide legal information such as the discussion of trends, considerations, or summarizing a relevant case may not implicate a Rule 5.5 violation, lawyers should nevertheless be wary of crossing the line into 'legal advice' situations.

Avoid forming lawyer-client relationships on social media outlets

Rule 1.8 states "A person who discusses with a lawyer the possibility of forming a lawyer-client relationship with respect to a matter is a prospective client." A lawyer-client relationship could be accidently formed if a client "reasonably relies" on what they believe to be the lawyer's legal advice through social media.

Don't divulge a client's personal information in connection with representation on social media

Lawyers should avoid recounting details about one's day at work on social media platforms, including seemingly innocent details about a "certain client" or ambiguous fact pattern. Even if a lawyer does not explicitly name the client being referred to, Rule 1.6, which prohibits a lawyer from revealing information relating to the representation of a client, may still be violated.

Social Media Do's and Don'ts

Do…

- ✓ Review your ethical obligations before posting anything on social media.
- ✓ Assume that anything on social media has the potential to become public.

Don't…

- ☹ Give legal advice online to avoid unintended lawyer-client relationships.
- ☹ Post angry.

Chapter 18: The Malpractice Time Bomb: Stress and Substance Abuse

ISBA Mutual has noticed a disturbing increase in the number of legal malpractice claims associated with lawyers dealing with stress or substance abused issues. Even more disturbing, these claims are coming from small to mid-sized firms where problems, theoretically, should be easier to identify. Alcohol is the number one substance abuse problem among lawyers followed by the abuse of prescription drugs. Many jurisdictions have discovered that there is a correlation between alcoholism and malpractice and discipline. Almost a third of the lawyers disciplined by the ARDC have a substance abuse or mental impairment problem.

Example

> Alan practiced law for 20 years and is a named partner in his law firm. Every afternoon he goes to lunch with friends from another law firm. They all have at least three and sometimes five alcoholic drinks. For a while, Alan can function and perform his work well. Over time, his drinking increases, and he fails to return client calls; misses court dates; ignores discovery requests; and shows up late or not at all for firm meetings. His billings have dropped, and he is under increased financial pressure. He starts to transfer funds from the firm trust account into his personal account so he can stay afloat. Everyone in the firm knows Alan has a drinking problem. They try to confront him by pointing out the numerous grievances and threats of lawsuits against the firm, but Alan maintains that he does not have a problem.

Evaluation of Firm Culture

The tragedy of the troubled or problem lawyer is usually compounded by the inaction of the firm. Yet in most cases, the firm could have taken measures to detect and deal with the problem.

Improve communication among firm members

Does your firm convey an open-door policy to its lawyers? Would an associate or fellow partner feel comfortable approaching a partner to discuss a problem? Too many lawyers today view partnership as a purely economic relationship and feel no sense of loyalty to one another. These are the firms in which dysfunctional or troubled lawyers have no place to turn. They are also the law practices in which dishonest and incompetent lawyers flourish.

Your firm can foster an atmosphere of openness and communication by meeting on at least a monthly basis. Ask your coworkers for advice on sticky files, update one another on new statutes and case law, and discuss firm-wide procedures for servicing clients. You may also consider appointing a fair-minded and well-respected partner as an ombudsman to whom other lawyers can turn when problems develop.

Practice workload management

Stress can push predisposed lawyers into clinical depression or other mental illnesses such as anxiety disorders. To reduce stress and the incidence of depression in your office, evaluate your firm's workload practices. Is your firm measuring its members' worth based solely upon the number of hours worked or the quantity of open files? Find out what each lawyer's average caseload is and then set limits on the number of files or cases that may be handled at one time.

In addition, take an honest look at the firm "culture." Are firm members encouraged to take an hour off to go to their children's school activities - or are they made to feel guilty when they do? Consider instituting a policy that ***requires*** lawyers to take vacation. Many firms find that such an approach keeps their lawyers fresh and enthusiastic.

Firms should also be sensitive to and accommodate a lawyer who is wrestling with the added stress of a personal crisis. During this period, try to lessen the work responsibilities of the affected lawyer. Everyone has a breaking point; don't wait until your colleagues reach theirs.

Institute uniform and strict office procedures

Firm-wide procedures ensure that all lawyers are maintaining the same quality and standards in their practice. As an illustration, it should be impossible for a lawyer to accept a new client and obtain a new file number without following the firm's procedures. It is also recommended that firms establish checks and balances for monitoring all money flowing in and out of the firm. For example, is more than one signature required on checks for significant amounts? Does more than one partner review the books periodically?

Use peer review and client satisfaction surveys

Firms can monitor the quality of their legal work by implementing a peer review system (see the chapter Reducing Risk of Substantive Errors for more on implementing a peer review system). These reviews not only uncover the incompetent lawyer but also provide you with early warning of a lawyer who is neglecting matters because of depression or substance abuse.

Client satisfaction surveys may also be helpful in identifying problem lawyers. Just send a survey to each client for whom work has been performed over the past 12 to 24 months. The survey should ask the client to rate the firm's members anonymously on a variety of topics, such as timeliness, cost, courtesy, responsiveness, and result.

Know the signs for substance abuse and common mental illnesses such as clinical depression

According to the Lawyers' Assistance Program, the following are some noticeable symptoms of substance abuse:

- tardiness;
- missing deadlines, neglecting mail or failing to keep appointments or answer phone calls; and
- defiance, impatience, intolerance, or impulsiveness.

There are several symptoms associated with clinical depression that can also be detected by astute coworkers. They include:

- tardiness or chronic tiredness;
- restlessness or irritability;
- difficulty concentrating, remembering, or making decisions; and
- persistent sad, anxious, or empty moods.

Where to Go for Help

Seek help from professionals in cases of mental illness or substance abuse

There are numerous resources available if one of your lawyers is struggling with a mental illness or substance abuse problem. Two good places to start are the Mental Health America of Illinois at www.mhai.org and the Lawyers' Assistance Program a www.illinoislap.org. Lawyers' Assistance Program is dedicated to assisting lawyers with both chemical dependency and mental health problems. As a concerned member of a firm, you can contact them confidentially and discuss the options for assisting the troubled lawyer.

You can also check whether your group major medical or disability insurance policy has an employee assistance program (EAP). EAPs usually provide employees and their families with a hotline to seek assistance for a wide variety of personal problems, including depression and drug and alcohol abuse. Under these programs, both the concerned coworker and the troubled lawyer can reach out independently and confidentially for advice.

Remember that mental illness and substance abuse are treatable, particularly if detected early

Don't give up on a fellow lawyer without a fight. Mental illnesses such as clinical depression and substance abuse are treatable, particularly if recognized and dealt with at an early stage. Watch for warning signs and seek help before the lawyer's behavior causes irreparable damage.

Help is on the way

Since July 1, 2017, lawyers in Illinois have been required to complete at least one hour of continuing legal education regarding diversity and inclusion and at least one hour regarding mental health and substance abuse to satisfy their Professional Responsibility CLE obligations. Attending these programs will help lawyers learn what they can do and how lawyers can help each other.

Stress and Substance Abuse Do's and Don'ts

Do…

- ✓ Use peer review and client satisfaction surveys.
- ✓ Remember that mental illness and substance abuse are treatable, particularly if detected early.

Don't…

- ☹ Ignore a troubled lawyer.
- ☹ Create a culture that punishes lawyers who take time off.

Addenda: Sample Letters and Forms

NOTE: This material is intended as only an example, which you may use in developing your own letters and forms. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will ISBA Mutual Insurance Company be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Client Screening: New Client Intake Form

Date File Opened: _____

File Number: _____ Matter Type: _____

File Name: _____

Client Name: _____

Contact Name and Title (if different): _____

_____

Client Address: _____

_____

Client Telephone Numbers: Work _____ Home _____ Cell _____

Client Fax Number: _____ Email Address: _____

Responsible Lawyer: _____

Billing/Fee Information

- □ Retainer: $_____ Billing Cycle:
- □ Hourly $_____ □ Monthly
- □ Contingent $_____ □ Other (explain) _____
- □ Fixed Fee $_____ □ N/A

Calendaring Information

File Review Dates:
- □ Every 30 days
- □ Every 60 days

Statute of Limitations Date:(Reminders 180, 90-, 60-, 30- and 15-days prior)

Verified by: _____ (Lawyer Initials)

Other Critical Dates to Calendar: _____

_____

Calendaring Information
- □ Added to Calendaring System
- □ Conflict Search Completed
- □ Engagement Letter sent or Contingent Fee Agreement signed

File Opened By: _____ Date: _____

Conflicts: Common Party Search Checklist – Internal Document

When checking the names of a new client for potential conflict of interest, it is necessary to take your search beyond the names of your current and former clients. The list below suggests other parties that should be included in your search.

ANCILLARY BUSINESSES

- ☐ Name of any business in which a firm member has an equity interest or director/officer role

BANKRUPTCY

- ☐ Client
- ☐ Spouse
- ☐ Client's partners
- ☐ Client's other businesses
- ☐ Client's family members
- ☐ Creditors

COMMERCIAL REAL ESTATE BUSINESS/CORPORATE

- ☐ Client
- ☐ Owner/Spouse
- ☐ Key employees
- ☐ Buyer
- ☐ Seller
- ☐ Partners/Shareholders
- ☐ Directors/Officers
- ☐ Brokers
- ☐ Lenders
- ☐ Any opposing party in a transaction
- ☐ Parcel number/location/address
- ☐ Title insurer

CRIMINAL

- ☐ Client
- ☐ Victim
- ☐ Witnesses
- ☐ Expert witnesses
- ☐ Co-Defendants
- ☐ Potential Co-Defendants

DECLINED CLIENTS

- ☐ Person declined
- ☐ Adverse parties, if known
- ☐ Spouse, if known

ESTATE PLANNING

- ☐ Testator/Testatrix
- ☐ Spouse
- ☐ Children/Heirs
- ☐ Devisees/Beneficiaries
- ☐ Personal representative(s)
- ☐ Trustees

FAMILY LAW — DISSOLUTION

- ☐ Client
- ☐ Spouse (former & current)
- ☐ Children
- ☐ Expert witnesses
- ☐ Witnesses (if any)
- ☐ Adverse family members
- ☐ Guardian ad litem
- ☐ Related parties
- ☐ Witnesses
- ☐ Experts

LITIGATION

☐ Client
☐ Insured
☐ Plaintiffs
☐ Defendants

IMMIGRATION LAW

☐ Insurance carriers
☐ Client
☐ Guardian ad litem
☐ Spouse (former & current)
☐ Children
☐ Witnesses (if any)
☐ Expert witnesses
☐ Co-Counsel
☐ Adverse family members
☐ Co-Plaintiffs/Co-Defendants
☐ Opposing counsel
☐ Employers
☐ Persons residing with client

PATENT

☐ Client (by name and type of products)

Patent Prosecution:

☐ Subject matter of patent/trademark
☐ Inventors
☐ Research & Development personnel (within reason)
☐ Assignees of patent/trademark
☐ Affiliates, subsidiaries, parent & holding companies
☐ Graduate student assistants
☐ Foreign patent agents

Patent Litigation:

☐ Client affiliates, subsidiaries, parent & holding companies
☐ Opposing parties & affiliates (to the extent identifiable)
☐ Opposing counsel

RESIDENTIAL REAL ESTATE

☐ Client
☐ Owner/Spouse
☐ Buyer
☐ Seller
☐ Brokers
☐ Lender/Mortgage company
☐ Any opposing party in a transaction
☐ Parcel number/locations/address
☐ Title insurer

WORKERS COMPENSATION

☐ Client
☐ Employer
☐ Insurer

NOTE: This material is intended as only an example, which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will ISBA Mutual Insurance Company be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Conflicts: Conflict of Interest Search Form – Internal Document

To: File Room

Requesting Attorney: _____

Date: _____

Prospective Client Information

Name: _____

Address: _____

_____

Phone: (Work) _____

(Home) _____

Principals: _____

_____

_____

Related Entities: _____

_____

_____

Prior Representation of Client, Principals or Related Entities: _____

_____

_____

File Name: _____

Adverse Party Information

Name: _____

Address: _____

Principals: _____

Related Entities: _____

Check Completed By: _____

Date: _____

Conflicts: Letter to Disclose Conflict and Seeking Consent to Continue Representation

[Date]

[Name and Address of Client]

Re: Consent to continued representation

Dear [Client's Name]:

I have been representing you in your claims against_____ for _____. As we discussed, the statute of limitations on your claims of [identify claims] has expired. Your claim of [_____ however, continues to be viable. I would be pleased to continue to represent you in that claim, but the Rules of Professional Conduct [ABA Model Rule 1.7(b) - consult the rule in your jurisdiction] require that I may not represent a client if my representation of that client may be materially limited by my own interests unless I reasonably believe that the representation will not be adversely affected and you consent to my continued representation.

I believe that I can represent you in the [identify claim] claim against [adverse party]. The fact that you may have a claim against me for not filing the [identify claims] claims within the statutory time period will not, in my opinion, materially limit my loyalty to you as my client.

As we discussed, you may consult independent counsel regarding any claim you may have against me and regarding your consent to my continued representation of you in the [identify claim] claim. By executing this letter, you shall be deemed to have (i) consented to my continued representation of you in the [identify claim] against [adverse party]; (ii) understood the potential conflict of interest arising out of that representation; (iii) waived any conflict of interest that has arisen as a result of that representation; and (iv) acknowledge that you have been advised that you may consult with independent counsel regarding the waiver of any conflict of interest and consent to my continued representation of you.

If you consent to the above, please execute this letter in the place indicated below and return a fully executed original to me. If you have any questions or concerns, or wish to discuss any aspect of this letter, please contact me as soon as possible.

Sincerely yours,

[Name of Firm]

By _____ _____

[Name of Attorney]

Accepted On _____ By _____

[Date] [Client]

Conflicts: Engagement Waiver Clause – Waiver of Potential Conflicts of Interest Forms

Whenever the interests of a current client might affect, or be affected by, the personal, business, financial, or professional interests of a lawyer, a professional or business associate or relative of the lawyer, another current client, or a former client, there is always a possibility for the existence of such multiple interests to interfere with the lawyer's ability to serve one set of interests without adversely affecting other interests. Whenever such interests become conflicting, it is necessary for the lawyer to withdraw from all attorney-client relationships affected by such conflict, and it is then necessary for each person to hire a new lawyer.

With respect to [describe representation and subject matter], there exists the possibility for the following interests of the following persons to become conflicting: [describe all reasonably foreseeable interests that each client and former client might, in the course of after-the-fact dissatisfaction, claim to have adversely affected the lawyer's judgment or performance, and describe the potential adverse effects on each client].

Despite possibilities for such interests to conflict, you believe one lawyer can adequately represent, advance, or protect each such interest without harming any other such interests. Therefore, you agree that you want me to represent each of you in this matter, and you each refuse to exercise your right to hire a different lawyer and hereby waive the conflicts described.

Conflicts: Waiver Joint Representation

VIA REGULAR MAIL AND VIA ELECTRONIC MAIL

[Client A]

[Client B]

RE: _____
Matter No.: _____
File No.: _____

Dear ***[Client A and Client B]***:

We have been asked to represent both of you, Client A ("A") and Client B ("B"), with respect to ***[identify nature and scope of the proposed joint engagement]*** (the "Joint Engagement").

Although we reasonably believe that the representation of both of you in the Joint Engagement will not adversely affect our representation of either of you, the purpose of this letter is to discuss with each of you the actual and potential risks and consequences of such simultaneous representation, to identify any potential alternative courses of action, and to explain the circumstances under which we would be willing to represent both parties simultaneously if, after full consideration of the consequences, both of you wish us to do so.

Simultaneous representation of parties with potentially adverse interests by the same attorneys involves a number of departures from professional norms and should not be undertaken by any such party without careful consideration. In particular, we want you to be aware of the following.

1. Under applicable rules of professional conduct, a law firm owes each of its clients a duty of loyalty, which would normally preclude any attorney within the firm from undertaking a representation adverse to any client of the firm without the affected client's informed consent. Other rules generally prohibit a firm from undertaking any representation involving an actual or potential conflict of interest without the informed consent of all affected parties. Such a situation may exist when a firm represents two clients simultaneously in a situation in which their interests are actually or potentially adverse.

2. The conflict of interest and the need for informed consent exist no matter how cordial the ***[business/family/etc.]*** relationship between the two parties currently is or is anticipated to be, and no matter how non-controversial the subject of the engagement is anticipated to be.

3. We recommend that each of you seek the advice of independent counsel of your own choice regarding this written consent. If, however, it is the wish of both clients that we undertake the simultaneous representation of both parties with respect to the ***[subject of the proposed Joint Engagement]***, we will undertake to do so under the terms described herein.

4. ***[Explain how the Joint Engagement will mean that (1) the clients' interests will be adverse or (2) there is a significant risk that the lawyer's representation of one client will be materially limited by the lawyer's responsibility to the other. For instance, the Joint Engagement will require that information learned from B shall be kept confidential as between the lawyer and B and may not be shared with A. Identify the Rule(s) of Professional Conduct that are implicated and either quote or summarize the applicable Rule(s).]***

5. ***[Explain the risks of the foregoing to each of A and B.]***

6. ***[Explain alternatives to the foregoing, such as the clients' ability to retain other counsel.]***

7. In light of the foregoing, it may not be possible for a single law firm to represent both of you in the same aggressive manner as would two separate and independent law firms. By giving the consent requested in this letter, you are, in effect, waiving that kind of zealous representation of your individual and conflicting interests with respect to the subject matter of the proposed Joint Engagement. It is possible that each or both of you might be advised by independent counsel to demand or offer different or more favorable terms and conditions with respect to the subject matter of the proposed Joint Engagement than we can or will demand or offer.

5. Moreover, regardless of the terms upon which the matters between the two clients are concluded, the fact that one law firm has been involved in the representation of both parties may give rise to a perception on the part of ***[shareholders/investors/third parties/etc.]*** that different terms might have been arrived at had each of the joint clients had separate representation by independent law firms.

6. Notwithstanding the foregoing, we believe that we will be able to provide competent and diligent representation to each affected client.

7. If a dispute should arise in the future between the two of you concerning the ***[subject of the proposed Joint Engagement]*** or any other aspect of your dealings with each other, we believe we may have to withdraw, or would be disqualified, from representing either of you with regard to that dispute or any other relationship you might then have with each other. You would then each have to retain separate counsel, resulting in additional expense and inconvenience that you might not have incurred had you been separately represented from the outset.

We will be pleased to answer any questions you may have concerning this representation or this requested consent. If you do wish to consent, please sign the enclosed extra copy of this letter and return it to us in the enclosed envelope.

Very truly yours,

[Attorney Name]

Acknowledgement and Consent

Despite any actual or potential conflict of interest which exists now or may in the future, as discussed above, we hereby consent to ***[the firm's]*** simultaneous representation of both ***[Client A and Client B]*** with respect to the subject matter of the Joint Engagement as described above. We further agree that ***[the firm]*** may withdraw its representation of either client or both clients without prejudice should it determine that continued representation will or might violate applicable rules of professional conduct.

[Client A}	***[Client B]***
By: _____	By:
_____	

Engagement Letter: Contingent Fee

[Date]

[Name and Address]

Dear _____:

It was a pleasure meeting with you on _____ to discuss _____ representation of you regarding your personal injury claim. The purpose of this agreement is to set forth the terms upon which _____ agrees to represent you, in order to establish and maintain a mutual understanding of the goals and respective responsibilities of you, as client, and _____.

Scope of Service
You have retained _____ (_____) to investigate and represent you on your claim for [____] on or about _____ in the City of ____, County of _____, State of _____. [As we discussed, _____ will not be representing your spouse, _____, in this litigation because of potential attorney/client privilege and conflict of interest concerns. I have advised _____, by letter dated _____, that _____ cannot represent her and that she is responsible for retaining separate counsel to pursue her claim for damages arising out of this same automobile accident.] (Conflict of interest acknowledgment)

Client Cooperation
In order to effectively advocate your interests, you have an affirmative obligation to cooperate with _____ during the pendency of this matter. For example, you will be required to furnish certain documents, information and releases and may be required to attend depositions and court appearances. Consequently, you are expected to provide requested documentation promptly to the appropriate firm representative, whether an attorney, paralegal or secretary. You must also be available to work with _____ attorneys in preparation for depositions, court appearances and to discuss issues as they arise throughout this matter. A client's non-cooperation is grounds for _____ withdrawal.

In return, _____ agrees to keep you informed of the status of this matter and to consult with you when appropriate. Copies of significant correspondence and documents will be sent to you for your review and file. In the event that we are out of the office or otherwise unavailable, please leave a message with my secretary disclosing the nature and urgency of the call. Even if the attorney cannot respond directly, someone will return your call with an appropriate response.

Legal Fees, Costs and Disbursements
As compensation for our services, _____ will be paid in accordance with the attached Contingent Fee Agreement which is incorporated herein by reference.

General Lawsuit Information
In order to demystify the lawsuit process, _____ would like to explain, in some detail, how a lawsuit is handled and what you can expect during the pendency of this action.

A lawsuit is commenced by the service and filing of a Summons and Complaint. The Complaint recites facts upon which the Plaintiff asserts liability against the Defendant, which, in this case, would be for _____. The Defendant then has a limited number of days in which to serve and file an answer which typically denies the claims asserted in the Complaint.

After the lawsuit is commenced, both the Plaintiff(s) and Defendant(s) are afforded a limited period of time called “discovery”, during which they investigate the strengths and weaknesses of each other’s claims. Written questions called “interrogatories” are frequently exchanged which require written responses about the facts and claims asserted by both parties. Oral depositions are also commonly used as a discovery tool. Parties to the action, as well as witnesses, orally answer questions posed by opposing counsel which are simultaneously recorded by a stenographer. Depositions are very important, because the testimony can later be used at trial to perhaps point out inconsistencies between deposition and trial testimony. Also, depositions are helpful in ascertaining the strength and credibility of the deponent. If interrogatories are sent to us, we will explain the procedure and assist you and any other company employees with answering the questions. If your deposition is taken, we will meet with you prior to the deposition to discuss the process and will also be present at the deposition.

If your case does not settle after discovery is terminated, then a trial will take place, usually before a judge and six-person jury. Prior to trial, we will spend considerable time with you and any other witnesses explaining how a trial is conducted and reviewing everyone’s testimony. It is entirely possible that several trial dates will be set, only to be continued because of crowded court calendars. It is very important that you understand the delays that often attend suits; they can stretch on for years, which is why your commitment to and patience with this process is imperative.

Assignment of Firm Personnel
I will be primarily responsible for the supervision of your matter, but you are hiring _____, not me individually. If necessary, I reserve the right to draw upon the talent and expertise of other partners and associates within the firm and to utilize paralegal staff to handle ministerial tasks.

Withdrawal
You have the right to our representation at any time, subject to payment of any outstanding costs and disbursements. Conversely, _____ serves the right to withdraw from representation, subject to the ethical restrictions imposed upon us by the applicable Rules of Professional Responsibility. If _____ chooses to terminate representation, notice will be sent to your last known address.

Binding Agreement
This Agreement, which incorporates the attached Contingent Fee Agreement, represents the entire agreement between _____ and _____. By signing below, you acknowledge that this Agreement has been carefully reviewed and its content understood, and you agree to be bound by all of its terms and conditions. Furthermore, you acknowledge that _____ has made no representation to you regarding the outcome of this action for which _____ has been retained.

If this Agreement reflects your understanding of our relationship, please sign and return the enclosed duplicate copies of both this Engagement Agreement and the attached Contingent Fee Agreement. In conformance with firm policy, we cannot commence work upon your matter until we have received both this executed Agreement and the retainer.

Thank you again for this opportunity to be of service to you.

Sincerely,

_____
[Name]

ARBITRATION
Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in the County of _____, State of _____, as follows:

[Insert appropriate jurisdictional requirements regarding a) selection of arbitration; b) arbitration procedure; c) procedural impact of arbitrator's decision; d) review rights; and e) costs of arbitration.

I have reviewed and agreed to the above terms of engagement of _____.

_____ Date: _____

[Name]

Engagement Letter: Contingent Fee, Short Form

I, _____, [on behalf of _____,] hereby retain _____ to make an investigation of and represent me [on behalf of _____], in my [his/her] claim for personal injuries sustained by _____ on or about _____ at the intersection of _____ in the City of _____, County of _____, State of _____.

I agree to pay _____, as compensation for services rendered, a Contingent Fee of ____% of the amount finally awarded either by way of settlement, trail or appeal. No settlement of [_____'s] claim may be made without my express authorization. I acknowledge that _____ has explained to me the right to engage any attorney(s) of my choice and that I have the choice of alternative fee arrangements for compensating _____.

If my case is resolved on a structured basis (a lump sum cash payment plus periodic cash payments), I further agree that the fee payable to _____ shall be payable in full on the date of the first cash payment and shall be based upon the then present cash value of the entire structured settlement.

I will also reimburse _____ for any out-of-pocket expenses advanced by it for investigation or litigation on my [_____'s] behalf. These expenses include, but are not limited to, filing fees, investigators, expert witness fees, depositions, court costs, travel and other out-of-pocket expenses. Costs exceeding $100 may be billed directly to me and I agree to promptly and directly pay these costs. I will send notice to_____ of all such payments. Otherwise, _____ agrees to contact me prior to advancing any cost exceeding $300.

I agree to pay _____ a deposit of $_____, as a partial advance against anticipated costs and disbursements. _____ will send me monthly itemized statements of costs and disbursements, which once the deposit is depleted; I agree to pay within thirty days of the invoice date. I understand that _____ reserves the right to charge me interest, not to exceed _____% per annum, on any bill outstanding for more than thirty days. This deposit will be refunded to the extent it has not been utilized in this matter.

In the event that a recovery is made by settlement, trial or appeal, the expenses shall be deducted from my share of the recovery after the attorneys' fees have been calculated and deducted from the recovery. I understand that a recovery cannot be guaranteed and that I remain responsible for any out-of-pocket expenses regardless of the outcome.

I understand that in the event that _____ concludes at any time that there is not sufficient likelihood of recovery to justify further time and effort, _____ shall have the right to withdraw from employment, which shall terminate their right to compensation for professional services, except for any outstanding costs and disbursements.

_____acknowledge that if no recovery has been made upon the final conclusion of my claim, _____ will not be entitled to any compensation for professional services rendered, and I will have no obligation beyond reimbursement of costs.

Date: _____ Name _____

On behalf of _____

Date: _____ Name _____

Engagement Letter: Contingent Fee, Long Form

_____ ("Lawyer") will provide legal services to _____ ("Client"), according to the terms set forth below.

1. **CONDITIONS.** This Agreement will not take effect, and Lawyer will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit (advanced fee), if any, called for under Paragraph 5.

2. **SCOPE OF SERVICES.** Client is hiring Lawyer to represent Client in the matter of Client's claims against _____ and possibly others as future investigation may indicate, arising out of _____, which occurred on, or about _____.

   Lawyer will represent Client until a settlement or judgment is obtained by way of negotiations or arbitration or trial. Lawyer will oppose any motion for a new trial or any other post-trial motions filed by an opposing party or will make any appropriate post-trial motions on Client's behalf. After judgment, Lawyer will not represent Client on any appeal, or in any proceedings designed to execute on the judgment, without such additional compensation as may be agreed upon in a separate Agreement.

3. **CLIENT.** The lawyer is representing the Client _____ only in this matter. It is understood by Client and any third party who may be assisting Client financially, emotionally or otherwise in this matter, that lawyer's duty is to act in the best interest of the Client and lawyer cannot share information about Client's case with anyone other than Client without express permission.

4. **RESPONSIBILITIES OF THE PARTIES.** Lawyer will provide those legal services reasonably required to represent Client in prosecuting the claims described in Paragraph 2. Client agrees to appear at all legal proceedings (including depositions, hearings including but not limited to trial) when Lawyer deems it necessary. Client further agrees to be truthful with and to generally cooperate fully with Lawyer in all matters related to the preparation and presentation of Client's claims (including but not limited to interrogation, written discovery, trial preparation, client interview) and to keep Lawyer informed of any information or developments which may come to Client's attention. Further, while it is impossible to predict the course of a representation, it may be important for Lawyer to contact Client immediately, or upon short notice, to confer with Client regarding the status of Client's case. An inability to do so may result in Client's case being prejudiced and detrimentally affect the outcome of the case. Accordingly, Client agrees to keep Lawyer informed of Client's current address, phone number and whereabouts. If Client leaves town, for example, to travel on

business or vacation, Client agrees to notify Lawyer before leaving of the expected duration of the trip and how Client may be contacted in the meantime.

5. **DEPOSIT (ADVANCED FEE).** Client agrees to pay Lawyer an initial deposit (advanced fee) of $_____, to be returned with this signed Agreement. Lawyer will hold this initial deposit (advanced fee) in a trust account. Client hereby authorizes Lawyer to use that deposit to pay the costs and other expenses incurred under this Agreement.

   When Client's deposit (advanced fee) is exhausted, Lawyer reserves the right to demand further deposits (advanced fees). Once a trial or arbitration date is set, Lawyer will require Client to pay all sums then owing, and to deposit the costs Lawyers estimates will be incurred in preparing for and completing the trial or arbitration, as well as the jury fees, court costs or arbitration fees likely to be assessed. Those sums may exceed the deposit (advanced fee).

   Client agrees to pay all deposits (advanced fees) required under this Agreement within _____ days of Lawyer's demand. Any deposit (advanced fee) that is unused at the conclusion of Lawyer's services will be refunded.

6. **LEGAL FEES AND BILLING PRACTICES.** Lawyer will only be compensated for legal services rendered if a recovery is obtained for Client. If no recovery is obtained, Client will be obligated to pay only for costs and expenses, as described in Paragraph 7.

   ALTERNATE ONE

   The fee to be paid will be a percentage of the "gross recovery," depending on the stages at which settlement or judgment is reached. The term "gross recovery" means the total of all amounts received by settlement, arbitration award or judgment, including any award of lawyer's fees. The fee will be calculated before the deduction of any costs and expenses as set forth in Paragraph 7, and the costs and expenses will remain the responsibility of Client to be paid from the portion of any amounts received by Client after deduction of the fee.

   Upon conclusion of the matter, Lawyer will provide Client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to Client and the method by which the remittance was calculated.

   ALTERNATE TWO

   The fee to be paid will be a percentage of the "net recovery," depending on the stage at which settlement or judgment is reached. The term "net recovery" means: 1) the total of all amounts received by settlement, arbitration award or judgment, including any award of lawyer's fees; 2) minus all costs and expenses as set forth in Paragraph 7.

Upon conclusion of the matter, Lawyer will provide Client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to Client and the method by which the remittance was calculated.

Lawyer's fee shall be calculated as follows:

(i) If the matter is resolved before filing a lawsuit or formal initiation of proceedings, then Lawyer's fee will be _____ percent (____%) of the net recovery;

(ii) If the matter is resolved prior to days before the date initially set for the trial or arbitration of the matter then Lawyer's fee will be _____ percent (____%) of the net recovery; and

(iii) If the matter is resolved after the times set forth in (i) and (ii), above, then Lawyer's fee will be _____ percent (____%) of the net recovery.

In the event of Lawyer's discharge or withdrawal for cause as provided in Paragraph 12, Client agrees that, upon payment of the settlement, arbitration award or judgment in Client's favor in this matter, Lawyer shall be entitled to be paid by Client a reasonable fee for the legal services provided the extent to which Lawyer's services have contributed to result obtained. Such fee shall be determined by considering the following factors:

7. **COSTS AND EXPENSES**

Lawyer will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs and expenses paid or owed by Client in connection with this matter, or which have been advanced by Lawyer on Client's behalf and which have not been previously paid or reimbursed to Lawyer. Costs and expenses commonly include court fees, jury fees, service of process charges, court and deposition reporters' fees, long distance telephone charges, messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses and consultants' fees and other similar items. Except for the items listed below, all costs and expenses will be charged at Lawyer's cost.

In-office photocopying _____ /page

Facsimile charges _____ /page

Mileage _____ /mile

Other: _____

ALTERNATE ONE

Experts, Consultants and Investigators. To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants, or

investigators. Client agrees to pay such fees and charges. Lawyer will consult with client on the selection of any expert witnesses, consultants, etc., to be hired and their charges.

Additionally, Client understands that if the matter proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such payment will be entirely the responsibility of Client.

ALTERNATE TWO

Experts, Consultants and Investigators. To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants, or investigators. Lawyer will select, in consultation with client, any expert witnesses, consultants or investigators to be hired and Client will be informed of persons chosen and their charges.

Client authorizes Lawyer to incur all reasonable costs and to hire any investigators, consultants, or expert witnesses reasonably necessary in Lawyer's judgment unless one or both of the clauses below are initialed by Lawyer.

Lawyer shall obtain Client's consent before incurring any costs in excess or $_____.

Lawyer shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

If an award of fees and/or costs is sought on Client's behalf in this action, Client understands that the amount which the court may order as fees and/or costs is the amount the court believes the party is entitled to recover, and does not determine what fees and/or costs Lawyer is entitled to charge its clients or that only the fees and/or costs which were allowed were reasonable. Client agrees that, whether or not lawyer's fees or costs are awarded by the court in Client's case, Client will remain responsible for the payment, in full, of all lawyer's fees and costs in accordance with this Agreement.

8. **BILLING STATEMENTS.** Lawyer will send Client periodic billing statements for costs and expenses incurred in connection with this matter. Each statement is to be paid in full within ____ days of the date of such statement.

9. **DISCHARGE AND WITHDRAWAL.** Client may discharge Lawyer at any time, upon written notice to Lawyer. Lawyer may withdraw from representation of Client (a) with Client's consent, (b) upon court approval, or (c) if no court action has been filed, for good cause and upon reasonable notice to Client. Good cause includes Client's breach of this Agreement, refusal to cooperate with Lawyer or to follow Lawyer's advice on a material matter or any fact or circumstance that would render Lawyer's continuing representation unlawful or unethical.

   Notwithstanding Lawyer's withdrawal or Client's notice of discharge, and without regard to the reasons for the withdrawal or discharge, Client will remain obligated to pay Lawyer for

all costs incurred prior to the termination. In the event that there is any recovery obtained by Client after conclusion of Lawyer's services, Client remains obligated to pay Lawyer for the reasonable value of all services rendered from the effective date of this Agreement to the date of discharge.

Lawyer will maintain Client's file for ____ years after this matter is concluded. Client may request the file at any time during, upon conclusion of, or after conclusion of, this matter. ____ years after the conclusion of this matter, the file may be destroyed without further notice to Client.

10. **DISCLAIMER OF GUARANTEE AND ESTIMATES.** Nothing in this Agreement and nothing in Lawyer's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Lawyer makes no such promises or guarantees. Lawyer's comments about the outcome of the matter are expressions of opinion only. Client acknowledges that Lawyer has made no promise or guarantees about the outcome.

11. **NEGOTIABILITY OF FEES.** The rates set forth are not set by law but are negotiable between a lawyer and client.

12. **APPROVAL NECESSARY FOR SETTLEMENT.** Lawyer will not make any settlement or compromise of any nature of any of Client's claims without Client's prior approval. Client has the absolute right to accept or reject any settlement. Client agrees to seriously consider any settlement offer Lawyer recommends before making a decision to accept or reject such offer. Client agrees not to make any settlement or compromise of any nature of any of Client's claims without prior notice to Lawyer.

13. **LIMITATION OF REPRESENTATION.** Lawyer represents Client only on the matter described in Paragraph 2 (Scope of Services). Lawyer's representation does not include independent or related matters that arise, including, among other things, claims for property damage, worker's compensation disputes with health care providers about the amount owed for services, or claims for reimbursement (subrogation) by any insurance company for benefits paid under an insurance policy.

    In the event there is a dispute between Client and a third party regarding any amounts allegedly owed by Client to the third party and there is a colorable claim to a lien on any proceeds in Lawyer's possession by the third party, Lawyer will interplead those proceeds to the court for resolution of the dispute, if Client and the third party are unable to resolve the dispute amicably after a reasonable amount of time.

    This Agreement does not include defending Client against or representing Client in any claims that may be asserted against Client as a cross-claim or counter-claim in Client's case. This Agreement does not apply to any other legal matters. If any such matters arise later, Lawyer and Client will either negotiate a separate Agreement if Client and Lawyer agree that Lawyer will person such additional legal work or Client engage separate counsel with respect to cross claims or counter claims or additional legal work.

Client may have other possible causes of action arising from the facts and circumstances giving rise to this representation. As Lawyer does not represent Client on these other possible claims, Client should seek independent representation if Client wishes to pursue a remedy. Delay or failure to do so may result in Client being barred by a statute of limitations from being able to recover under these other causes of action.

14. **CONCLUSION OF SERVICES.** When Lawyer's services conclude, all previously approved costs and expenses will immediately become due and payable. Lawyer is authorized to use any funds held in Lawyer's trust account as a deposit (advanced fee) against costs to apply to such unpaid costs and expenses. After Lawyer's services conclude, upon request, Client's file and property will be delivered to Client, whether or not Client has paid any fees and/or costs owed to Lawyer. Client understands that to the limited extent Lawyer has paid out-of-pocket expenses for items, which have not yet been reimbursed by Client, Lawyer may be reimbursed for that particular expense before releasing that item.

15. **LIEN.** Client hereby grants Lawyer a lien on any and all claims or causes of action that are the subject of Lawyer's representation under this Agreement. Lawyer's lien will be for any sums owing to Lawyer for any unpaid costs, or lawyer's fees, at the conclusion of Lawyer's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise.

16. **RECEIPT OF PROCEEDS.** All proceeds of Client's case shall be deposited into Lawyer's trust account for disbursement in accordance with the provisions of this Agreement. No disbursement may be made until the settlement/or recovery check has cleared the bank.

17. **ENTIRE AGREEMENT.** This Agreement contains the entire Agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

18. **SEVERABILITY IN EVENT OF PARTIAL INVALIDITY.** If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

19. **MODIFICATION BY SUBSEQUENT AGREEMENT.** This Agreement may be modified by subsequent Agreement of the parties only by an instrument in writing signed by both of them or an oral agreement only to the extent that the parties carry it out.

20. **EFFECTIVE DATE.** This Agreement will govern all legal services performed by Lawyer on behalf of Client commencing with the date Lawyer first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Lawyer the reasonable value of any services Lawyer may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE LAWYER FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

Dated: _____

Client Name _____

Address _____

Phone _____

DATED: _____

LAW FIRM

By _____

[Name], Partner

OTHER CLAUSES FOR CONSIDERATION IN FEE AGREEMENTS

1. **RESOLUTION OF A FEE DISPUTE**

If a dispute concerning fees or expenses should occur during or at the conclusion of this matter, if the Lawyer and Client are not able to resolve the dispute, the parties agree to use the services offered by the Fee Dispute Resolution Program in their jurisdiction. The services provided by the fee dispute resolution program are offered at no cost to the Lawyer and Client unless either party wishes to be represented by counsel at their own expense. The Lawyer will inform the Client about how to start the proceedings and the differences between mediation and binding arbitration.

If Lawyer and Client agree to binding arbitration, they waive their right to have the fee dispute decided in Court. Binding arbitration does not absolve the Lawyer from liability or limit liability.

By initialing below, Client confirms that s/he has read and understands the options that are available should a fee dispute arise, and Lawyer and Client voluntarily agree to participate in the services offered by the Fee Dispute Resolution Program.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION, WHICH MAY BE ENFORCED BY THE PARTIES.

_____ _____

(Client's Initials) (Lawyer's Initials)

2. **INTEREST CLAUSE**

If a billing statement balance is not paid in full when due, interest will be charged on any unpaid balance that remains past due beginning on the first day it is past due and continuing until paid at the rate of ____ percent (_____%) per annum (or the maximum lawful rate if less.)

3. **REPLENISHING DEPOSIT (ADVANCED FEE)**

To commence the representation, Client has provided [must provide] Lawyer with a $_____ deposit (advanced fee). Lawyer will hold the deposit (advanced fee) in Lawyer's trust account and apply it to each statement when rendered by Lawyer. Client will pay any additional balance due upon receipt of Lawyer's statements each month and also will replenish the deposit (advanced fee) each month in the amount of all payments made to Lawyer from the deposit (advanced fee). At the conclusion of the matter, the deposit (advanced fee) will be applied to the final statement, in which event Client will be

responsible for any amount due over and above the deposit (advanced fee) or be entitled to a refund of any amount remaining after the final statement is satisfied in full.

4. **OTHER PAYOR CLAUSE-PERSONAL**

Client has informed Lawyer that Client has arranged for [employer/relative-name and relationship] to be responsible for some or all of Lawyer's fees which may become due under this Agreement. It is understood that should [name] fail for any reason to pay Lawyer's statements as they become due, Client shall remain responsible for paying all Lawyer's statements as they are rendered upon the billing and payment terms set forth in this Agreement.

[Provide signature line for employer/relative in Agreement.]

5. **"OTHER LAWYER" CLAUSE-CONTINGENCY**

It is agreed that Lawyer will divide the lawyer's fees in this case with another lawyer, [name], who will be compensated out of the fees which Lawyer otherwise will earn under this Agreement. The total fee to Client will not be increased. Lawyer _____has agreed to assume joint responsibility for this matter. (This will require a second signature by the associated lawyer.)

6. **SUCCESSOR LAWYER CLAUSE**

Client agrees that a successor lawyer maybe appointed to temporarily assist with the case in the event of the lawyer's illness, vacation, or other similar absences. In the event of Lawyer's death, disability, impairment, or incapacity, the Client agrees that a successor lawyer can review the Client's file for the limited purposes of protecting the Client's rights and can assist with the closure of Lawyer's law practice. Client maintains the right to select a Lawyer to represent him/her.

Engagement Letter: Contingency Fee Agreement for Legal Services – With Referral Fee

I, the undersigned client, do hereby retain and employ [name of firm] (the "Firm") as my lawyers to represent me [describe case or matter – see options provided below]

Option 1: ***[concerning injuries I received arising from an accident that occurred on ___/___/_____ at _____]***

Option 2: ***[in a claim for the death of _____ arising out of incidents that occurred _____]***

Option 3: ***[in a claim against _____ regarding _____]***

As compensation for the services rendered by ***[name of firm]***, I agree to pay ***[name of firm] [describe contingency fee – see options provided below]***.

Option 1: ***[% of whatever may be recovered from said claim whether through settlement, trial, arbitration, or mediation.]***

Option 2: ***the following contingency fee based on whatever proceeds are recovered:***
_____ % if settled without suit being filed;
_____ % in the event suit is filed;
_____ % in the event a second trial or an appeal becomes necessary.]

Option 3: ***[____ % of the first $_____;***
_____ % of the next $ _____;
_____ % of any amount of proceeds recovered over $.][1]

I understand and agree that the firm of _____ ***[name of referring lawyer or firm]*** will receive a fee of ***[_____]*** for referring this matter to ***[name of your firm]***. This fee shall be paid from the total agreed contingent fee identified in the foregoing paragraph and shall not impact the client's share of the amount recovered. ***[Name of referring lawyer or firm]*** agrees to assume the same legal responsibility for the performance of the services in question as would a partner of ***[name of your firm]***.[2]

I understand and agree that the court may review contingent fee agreements for fairness, and that, in special circumstances where a lawyer performs extraordinary services involving more than usual participation in time and effort, lawyers may apply to the court for approval of additional compensation.

I further agree that the expenses and other costs associated with this matter will be deducted from the sum recovered ***after the lawyer fee is deducted***. Such expenses may include but are not limited to items such as costs of investigation, subpoena fees, court fees, expenses for consultants, experts and other witnesses, deposition costs, postage, photocopy fees and travel costs. Other costs may include required reimbursement of others pursuant to valid liens.

In the event no recovery is made, I understand and agree that I will still be responsible for the payment of such expenses but will not be responsible for the payment of any lawyer fees. At the time the ***[case/matter]*** is closed, ***[name of firm]*** will provide me with an accounting of the disbursements made in my ***[case/matter]***.

[Optional retainer fee provision:

We require that you pay a security retainer of [enter dollar amount] before we will commence any work on your behalf. We will place the security retainer in our client trust account and the retainer funds shall remain the property of the client until applied to our expenses. Charges will be made against the retainer as out-of-pocket expenses are incurred on the file until such time as the retainer is exhausted. The retainer must be received by [insert date].[3]

I acknowledge that the Firm has suggested that I should keep a copy of all of the documents related to my claim in a file folder that the Firm has provided to you. After the matter is closed, I may obtain copies of my file by paying the Firm's standard photocopying charges and a minimum fee to compensate the Firm for the time necessary to duplicate the file.[4]

I agree that the Firm has made no promises or guarantees regarding the outcome of my claim. I understand that the firm will investigate my claim and if, after such investigation, the claim does not appear to them to have merit, the Firm shall have the right to cancel this agreement and shall have the right to withdraw from any lawsuit by giving me notice by regular mail.

I understand that, due to storage constraints, portions of the file may be destroyed upon the conclusion of the engagement.

[Notice pursuant to Personal Injury Representation Agreement Act][5]

I acknowledge that I received and read a copy of this agreement on this _____day of _____, 20__, and understand its provisions.[6]

_____
Client Signature

_____
Print Name

ACCEPTED BY: _____
[Name of Receiving Firm]
ACCEPTED BY: _____
[Name of Referring Firm]

Sincerely,
_____

[1] Note Regarding Medical Malpractice Claims: Pursuant to Illinois law (735 ILCS 5/2-1114), the total contingent fee for plaintiff's lawyers in all medical malpractice actions shall not exceed 33 1/3% of all sums recovered.

[2] See Illinois Rules of Professional Conduct Rule 1.5 regarding referral fees.

[3] If you use the suggested retainer language, calendar the retainer due date. If the retainer is not received by that date, send a nonengagement letter. This will avoid a situation in which the potential client forgets or ignores the retainer request but still believes that a lawyer-client relationship exists.

[4] For a more detailed discussion on file retention issues, see File Documentation, Management and Retention.

[5] **NOTICE OF PERSONAL INJURY REPRESENTATION AGREEMENT ACT**
The law in Illinois (815 ILCS 640/1) regarding Personal Injury Agreements provides:

> "Any person who makes an agreement with any other person to represent him in his claim for settlement of a personal injury claim within 5 days after the occurrence which gives rise to the claim may, within a 10-day period after the occurrence, elect to avoid the agreement by notifying the other person in writing of the election by registered or certified mail, return receipt requested."
>
> "The person undertaking the representation of the injured party by such agreement must, at the time of the agreement, furnish the party with whom the agreement is made a copy of the agreement and the address to which the notice may be sent and a copy of this Act, and obtain written acknowledgment of receipt of such from the party represented. If he fails to do so, the 10-day period provided for in this Act does not commence to run until the agreement, address and a copy of this Act are furnished."

[6] Calendar a follow-up date after sending the letter. If a signed copy of the letter is not received from the client by that date, send another letter. If that is not answered, send a Non-Engagement Letter. This will avoid any misunderstanding as to whether you are representing the client.

DISCLAIMER: This sample form is designed to reduce the likelihood of being sued for legal malpractice. It is not intended to be, nor should it be considered legal advice. It is not the intent of this form to suggest or establish practices standards or standards of care applicable to a lawyer's performance in any given situation. Rather, the sole purpose of this sample form is to assist lawyers insured by ISBA Mutual in avoiding legal malpractice claims, including meritless and frivolous claims. To that end, the intention is to advise lawyers insured by ISBA Mutual to conduct their practices in a manner that is well above the accepted norm and standards of care established by substantive legal malpractice law. The recommendations contained in these materials are not necessarily appropriate for every lawyer or law firm and do not represent a complete analysis of each topic.

Engagement Letter: Basic Hourly

[Date]

[Name and Address of Client]

Dear [Client]:

We are pleased to have the opportunity to represent you.

FEES AND COSTS

Legal services for which you will be billed include time spent on legal research, document review and drafting, correspondence, deposition, court appearances, conferences, telephone calls, travel, negotiations, closing of transactions and other services related to our engagement. Whenever possible, we will consult with you before beginning work on any new areas of the engagement inconsistent with our discussions. Our general practice is to bill clients based on the time expended by the attorneys and legal assistants involved in the matter at each individual's then current hourly billing rate. Our current hourly rates for legal assistants and lawyers range from $____ to $____ per hour, depending primarily on the particular lawyer's or legal assistant's background and experience. Currently, it is anticipated that I will have primary responsibility for this engagement. My current hourly rate for this type of engagement is $____ per hour. These rates are adjusted periodically, usually at the beginning of the calendar year, and any modification of such rates is applicable to legal services preformed after the new rates become effective.

I may assign parts of your work to other lawyers or other personnel in the office under my supervision and may use other firm lawyers where specialized help is needed. I will continue to be responsible to you for the entire assignment, however, and will be available to discuss the use of other personnel with you. It is our practice to assign tasks among lawyers, legal assistants and document and docket clerks in such a way as to produce quality work at a reasonable cost to you given the nature of the specific project. Though the extent of our work on a specific assignment is frequently not within our control, I am always prepared to discuss with you the scope of our assignment.

It is not always possible to be immediately available to respond to your questions and concerns about your case. The nature of a litigation practice naturally involves a significant amount of time in court or in depositions during which time we will be unavailable. We will do our best to respond to you as quickly as we possibly can. We will use email to communicate with you with your permission. You should be aware that communications using company email may not be protected by the attorney/client privilege.

Our performance of legal services may involve direct costs that we will incur on your behalf. These disbursements and charges include items incurred and paid by us on your behalf such as long-distance telephone charges, postage, special mail or delivery charges, recording fees, transportation, meals, lodging and other costs necessary for out-of-town travel, photocopying, and use of other service providers such as printers or experts, if needed. In

litigated matters, we include payment we must make for filing fees, court cost, process servers, court reporters, witness fees, and similar costs. These charges may include the actual cost plus administrative charges for the uses of computerized legal research systems, including “Lexis” and “Westlaw” that in our experience significantly reduce lawyer research time. If the time pressures of an assignment require overtime work by our nonprofessional staff that is directly attributable to that assignment, we charge the client for the cost that we incur. We may also incur charges from local counsel from whom we seek information on your behalf. Where we pay these charges, they will be included in your invoice. However, to the extent practical we may ask you to pay charges directly to outside vendors.

We customarily send monthly invoices for services rendered and other charges incurred for your account during the previous month. The monthly invoice details the work performed and the type of charges incurred. Payment will be due thirty (30) days after the date of our invoice. Payments should be made in U.S. dollars, in checks or drafts payable to “_____”. While we will not require a retainer, interest will be charged on all invoices unpaid after thirty (30) days at the rate of eight per cent (8%) per annum. You agree to pay all costs of collection (including attorney’s fees) that we may incur in connection with unpaid invoices.

ADDITIONAL TERMS

In undertaking this representation, we have taken precautions to determine whether the firm has any conflicts of interest with other clients. While we are a relatively small firm, we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or transactions with you during the time that we are representing you. Therefore, as a condition to our undertaking the representation described herein, you agree that this firm may continue to represent or may undertake in the future to represent existing or new clients in any manner that is not substantially related to our work for you described herein, including legal proceedings, even if the interest of such clients in those other matters are directly adverse to you. We agree, however, that your prospective consent to conflicting representation contained in the preceding sentence shall not apply in any instance where as the result of our representation of you we have obtained sensitive, proprietary or other confidential information of a non-public nature that, if known to any such other client of ours, could be used in any such other matter by such client to the material disadvantage of you.

SECURITY AND INTEGRITY OF COMMUNICATIONS

During the course of our representation, each of us may have the opportunity to correspond using numerous communication mediums. In addition to traditional delivery methods, such as postal service and telephone, constantly developing technology offers further means that are generally accepted and used by individuals and businesses. For convenience and expediency, each of us may utilize these other means, which include facsimile, cellular and cordless telephones, and electronic mail. It is important to understand that these mediums are not necessarily secure from interception or alteration by others and may not receive protection under state or federal law. Transmitted information is capable of interception and immediate reproduction, alteration, and widespread distribution at relatively little cost or effort. (Name of Firm) intends to use these mediums to communicate with you and others during the course of our representation. However, we should each be aware of the security

concerns and take these issues into consideration when using these means of communication.

PRIVACY POLICY

Lawyers, as providers of certain personal services, are now required by the Gramm-Leach-Bliley Act to inform their clients of their policies regarding privacy of client information. Our law firm understands your concerns as a client for privacy and the need to ensure the privacy of all your information. Your privacy is important to us and maintaining your trust and confidence is a high priority. Lawyers have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by such Act. Therefore, we have always protected your right to privacy. The purpose of this notice is to explain our Privacy Policy with regard to personal information about you that we obtain and how we keep that information secure.

NONPUBLIC PERSONAL INFORMATION WE COLLECT

We collect nonpublic personal information about you that is provided to us by you or obtained by us with your authorization or consent.

WE DO NOT DISCLOSE ANY PERSONAL INFORMATION ABOUT OUR CLIENTS OR FORMER CLIENTS TO ANYONE, EXCEPT AS PERMITTED BY LAW AND ANY APPLICABLE STATE ETHICS RULES.

We do not disclose any nonpublic personal information about, current or former clients obtained in the course of representation of those clients, except as expressly or impliedly authorized by those clients to enable us to effectuate the purpose of our representation or as required or permitted by law or applicable provisions of codes of professional responsibility or ethical rules governing our conduct as lawyers.

CONFIDENTIALITY AND SECURITY

We retain records relating to professional services that we provide so that we are better able to assist you with your professional needs and to comply with professional guidelines or requirements of law. In order to guard your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

TERMINATION OF REPRESENTATION

You have the right to terminate our representation of you at any time. If you do so, you will be responsible for charges incurred in connection with our representation up to termination. We also may terminate our representation for any reason consistent with the Virginia Rules of Professional Conduct, including non-payment of fees and expenses.

If you have questions about any aspect of our arrangements or our invoices from time to time, feel entirely free to raise those questions. It is important that we proceed on a mutually clear and satisfactory basis in our work for you.

The foregoing covers the essential elements necessary for the establishment of the attorney-client relationship between [Name of Firm] and you. If you have any questions or comments about the terms of our agreement as herein outlined, please call me to discuss them.

If the scope of the services we are to render to you and terms of the engagement are satisfactorily described above, please indicate your agreement by executing the enclosed copy of this letter and returning it to us. Thereafter, unless we agree in writing to alter these arrangements, we will assume that these terms are acceptable to you for this matter and for all future matters on which you retain [Name of Firm] to serve you.

Thank you for the opportunity to work with you. It is our goal to provide prompt and responsive legal services at all times.

Very truly yours,

[Name]

SEEN AND AGREED TO

this _____ of _____, 20____.

_____

Engagement Letter: Hourly Rate

ATTORNEY'S FEES

The attorney's fee in this matter will be set as follows:

[ ] Fixed Fee of $_____

[ ] Hourly Rate at $_____ per hour plus ___% of amount* ( ) recovered saved

[ ] Estimated Fee in the range of: $_____ to $_____

[ ] Contingent Fee of $_____ ( ) saved ( ) recovered ( ) other

*Contingent contract and statement of client's rights signed as required

[ ] Fee determined on all relevant factors

[ ] Minimum retainer of $_____

[ ] Number of hours of attorney time covered by retainer is: _____

[ ] Other: _____

This office will bill you:

[ ] Monthly on the _____ of each month

[ ] Upon completion

[ ] Other arrangement: _____

ALL BILLS ARE PAYABLE UPON RECEIPT. IF YOU DO NOT PAY WITHIN THIRTY (30) DAYS OF RECEIPT, YOUR ACCOUNT WILL BEGIN TO ACCRUE INTEREST CHARGES IN THE AMOUNT OF EIGHTEEN PERCENT (18%) ANNUALLY.

RETAINERS

Retainer of $_____ is to be applied

[ ] towards fee and out-of-pocket expenses.

[ ] towards fee.

[ ] towards out-of-pocket expenses.

[ ] Retainer is refundable.

[ ] Retainer is nonrefundable.

COSTS AND EXPENSES

Typical out-of-pocket expenses (**NOTE:** These are not attorney fees) for this matter may include:

[ ] Costs such as court costs, filing fees, process server fees, deposition costs, sheriff or clerk of court fees, investigator's fees, etc.

[ ] Abstracting charges or title insurance premiums, clerk's recording fees.

[ ] Photocopying, long-distance telephone, postage, travel costs.

[ ] Other: _____

[ ] Estimate for costs and expenses (not including attorney's fees): _____

[ ] Expected to range between $_____ and $_____ .

[ ] Not expected to exceed $_____ .

[ ] No expenses expected.

NOTE: This is an estimate for your convenience; it is not a guarantee.

If the above properly sets forth our agreement, please sign below and keep one copy. Return the original together with your check in the amount of $_____ .

We will draw $_____ towards attorney fees and apply $_____ towards out-of-pocket expenses as outlined above. If we do not receive the signed original of this agreement (you retain the copy), and your check within _____ days, we shall assume that you have obtained other counsel and shall mark our file "CLOSED" and do nothing further. Thank you.

Dated: _____ By: _____

Attorney at Law

The above is understood and agreed to by me.

Dated: _____ By: _____

Client

Engagement Letter: Hourly Rate Fee

[Date]

[Name and Address]

Dear _____:

It was a pleasure meeting with you on _____ to discuss _____ representation of _____. The purpose of this agreement is to set forth the terms upon which _____ agrees to represent _____, in order to establish and maintain a mutual understanding of the goals and respective responsibilities of _____ and _____.

SCOPE OF SERVICE AND RETAINER

_____ (_____) has hired _____ (_____) to represent it in connection with the prosecution of _____ for alleged age discrimination against _____ and _____. [As we discussed, _____ will not be representing _____ subsidiary, _____Corporation, in this litigation because of potential attorney/client privilege and conflict of interest concerns. I have advised _____Corporation, by letter dated _____ that _____ cannot represent it and that _____Corporation is responsible for retaining separate counsel to defend it in this discrimination action.] **(Conflict of interest acknowledgment)**

As is our policy with new clients, we are requesting an initial deposit of $_____. [This retainer is a partial advance against anticipated legal fees and disbursements and must be paid before the firm will commence work upon the file. The retainer will be deposited in the firm's client trust account, subject to IOLTA requirements, and applied against _____ bills for legal services and disbursements. If the retainer is exhausted prior to the conclusion of this matter, _____ reserves the right to request replenishment of the retainer before additional work is performed. The retainer will be refunded, to the extent it has not been utilized in this matter, immediately upon resolution.] or [This deposit is nonrefundable and is the minimum fee _____ will be charged for legal services and costs associated with this matter. The deposit must be paid before _____ will commence work upon the file.] **(Refundable or non-refundable option)**

CLIENT COOPERATION

In order to effectively advocate _____ interests, _____ has an affirmative obligation to cooperate with _____ during the pendency of this matter. For example, _____ will be required to furnish certain information and documents and designated _____ representatives may be required to attend depositions and court appearances. Consequently, _____ is expected to provide requested documentation promptly to the appropriate firm representative, whether an attorney, paralegal or secretary. _____ representatives must be available to work with _____ attorneys in preparation for depositions, court appearances and to discuss issues as they arise throughout this matter. A client's non-cooperation is grounds for _____ withdrawal, and thus, it is essential that we maintain open communication.

In return, _____ agrees to keep _____ informed of the status of this matter and to consult with _____ when appropriate. Copies of significant correspondence and documents will be sent to _____ through _____ and any other designated personnel. In the event that we are out of the office or otherwise unavailable, please leave a message with my secretary disclosing the nature and urgency of the call. Even if the attorney cannot respond directly, someone will return your call with an appropriate response.

GENERAL LAWSUIT INFORMATION

In order to demystify the lawsuit process, _____ would like to explain, in some detail, how a lawsuit is handled and what you can expect during the pendency of this action.

A lawsuit is commenced by the service and filing of a Summons and Complaint. The Complaint recites facts upon which the Plaintiff asserts liability against the Defendant. In this case, _____ and _____ are alleging that _____ terminated their employment exclusively on the basis of age. The Defendant then has a limited number of days in which to serve and file an answer, which typically denies the claims asserted in the Complaint.

After the lawsuit is commenced, both the Plaintiff(s) and Defendant(s) are afforded a limited period of time called "discovery", during which they investigate the strengths and weaknesses of each other's claims. Written questions called "interrogatories" are frequently exchanged which require written responses about the facts and claims asserted by both parties. Oral depositions are also commonly used as a discovery tool. Parties to the action, as well as witnesses, orally answer questions posed by opposing counsel, which are simultaneously recorded by a stenographer. Depositions are very important, because the testimony can later be used at trial to perhaps point out inconsistencies between deposition and trial testimony. Also, depositions are helpful in ascertaining the strength and credibility of the deponent. If interrogatories are sent to us, we will explain the procedure and assist you and any other relevant _____ employees with answering the questions. If

depositions are scheduled, we will meet with you or the relevant _____ employee/deponent prior to the deposition and discuss the process. We will also be present at every deposition.

If your case does not settle after discovery is terminated, then a trial will take place, usually before a judge and six-person jury. Prior to trial, we will spend considerable time with you and other witnesses/parties explaining how a trial is conducted and reviewing everyone's testimony. It is entirely possible that several trial dates will be set, only to be continued because of crowded court calendars. It is very important that you understand the delays that often attend lawsuits; they can stretch on for years, which is why _____ commitment to and patience with this process is imperative.

LEGAL FEES, EXPENSES AND BILLINGS

Fees

_____ agrees to pay fees for services provided on this matter, in excess of those amounts covered by the initial retainer, based upon the following rates:

Shareholder	$_____/hour
Associate	$_____/hour
Paralegal	$_____/hour

The above hourly rates are subject to adjustment in _____ of every calendar year without prior notice to _____. Current billing rate schedules are available upon request. Hourly billing will be to the tenth (1/10th) of an hour for time spent on _____ matter. "Time spent" includes telephone and personal conferences with both _____ and assigned firm personnel, legal research, conferences, court appearances, discovery, preparation and review of necessary documents and correspondence.

Although our fees are primarily based upon the value of the time actually spent on your matter, the following factors are also considered when determining our fee: a) the nature of the legal problem, including its novelty, complexity and importance; b) preclusion of other employment; c) the amount or consequence at stake and the result obtained; d) time limitations imposed by the client or situation; e) the experience, reputation and ability of the attorney(s) retained; and f) the skill necessary to handle the matter correctly.

_____ understands that personal and telephone consultations with _____ attorneys shall be part of its representation and _____ may be billed for the time spent on each consultation.

It is difficult to estimate, in advance, the amount of fees which _____ will incur in connection with this matter. We anticipate the fees will be in the range of $_____, exclusive of expenses described below. This figure is not, however, a maximum fee, but is

simply an estimate to allow _____ to budget appropriately. If we see that the fees will be exceeding this estimate by a significant amount, we will notify _____.

Costs and Disbursements

_____ is responsible for payment of any expenses incurred on _____ behalf, including reimbursement of all disbursements advanced by _____. Such expenses and disbursements include, but are not limited to, photocopying and facsimile charges, long distance telephone calls, travel expenses and computer research charges. Costs exceeding $100, such as expert witness fees and deposition costs, may be billed directly to _____, for which _____ agrees to make prompt, direct payments to the vendor. Notice of payment should be sent to _____. Otherwise, _____ will attempt to notify _____ prior to advancing any cost exceeding $300.

Billing

Itemized statements of services and disbursements will be sent to _____ monthly, with payment to be made within thirty (30) days of the invoice date. _____ reserves the right to charge _____ interest, not to exceed % ____ per annum, on any bill outstanding for more than thirty (30) days. If _____ has any questions regarding the billing format or any information contained therein, please contact me or my secretary. Otherwise, we assume everything is satisfactory.

ASSIGNMENT OF FIRM PERSONNEL

I will be primarily responsible for the supervision of _____ matter, but _____ is hiring _____, not me individually. If necessary, I reserve the right to draw upon the talent and expertise of other partners and associates within the firm and to utilize paralegal staff to handle ministerial tasks.

WITHDRAWAL

_____ has the right to terminate our agreement at any time, subject to payment of any final billings. Conversely, _____ reserves the right to withdraw from representation, subject to the ethical restrictions imposed upon us by the applicable Rules of Professional Responsibility. If _____ chooses to terminate representation, reasonable notice will be given to _____.

BINDING AGREEMENT

The foregoing represents the entire agreement between _____ and _____. By signing below, _____, by its President, _____, acknowledges that this Agreement has been carefully reviewed and its content understood and _____

agrees to be bound by all of its terms and conditions. Furthermore, _____ acknowledges that _____ has made no representations to _____ regarding the outcome of the legal matter for which _____ has been retained.

If this Agreement reflects _____ understanding of our relationship, please sign and return the enclosed duplicate copy. In conformance with firm policy, we cannot commence work upon your matter until we have received both this executed Agreement and the retainer.

Thank you again for this opportunity to be of service to _____.

Sincerely,

_____

[Name]

ARBITRATION

Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in the County of _____, State of _____, as follows:

[Insert appropriate jurisdictional requirements regarding a) selection of arbitrator; b) arbitration procedure; c) procedural impact of arbitrator's decision; d) review rights; and e) costs of arbitration.]

_____, by its President, _____, has reviewed and agreed to the above terms of engagement of _____.

_____

[Firm Name]

By: _____

Its: _____ Date: _____

Engagement Letter: Hourly, Potential Conflict of Interest

[Date]

[Name and Address of Client]

Dear _____:

I enjoyed meeting with you on _____ to discuss your representation by this firm. This letter will confirm our agreement and if after reviewing it, you have no further questions about the terms of my representation, please sign the extra copy enclosed and return it to my office in the postage-paid envelope enclosed for your convenience. Our work will begin when we receive the signed copy of this letter [and required deposit].

I will undertake the following work on your behalf: [set forth the scope of the representation]. [My work will not include {set forth specific matters excluded from the representation if appropriate}].

You will receive an itemized monthly statement of fees and expenses associated with our services. [Payment is due upon receipt.] [The fees and expenses will be deducted from your deposit, and we will advise you from time to time if an additional amount is needed to maintain a sufficient deposit to cover anticipated fees and expenses.] My rate per hour for work is $_____. Often, from time-to-time, other members of the firm as well as our staff may engage in work on this matter, and their rates are as follows: partners, $_____ per hour; associate attorneys, $_____ per hour; legal assistants, $_____ per hour.

Previously, we discussed orally the potential for a conflict of interest in my [firm's] representation of you [client]. As I explained, a conflict may arise whenever the interests of a current client might affect, or be affected by, the personal, business, financial or professional interests of a lawyer, a professional or business associate or relative of the lawyer, another current client, or a former client. When there are such multiple interests, there is always a possibility for the existence to interfere with the lawyer's ability to serve one set of interests without adversely affecting other interests. Whenever such interests become conflicting, it is necessary for the lawyer to withdraw from all attorney-client relationships affected by such conflict, and it is then necessary for each person to hire a new lawyer.

With respect to [describe representation and subject matter], there exists the possibility for the following interests of the following persons to become conflicting: [describe all reasonably foreseeable interests that each client and former client might, in the course of after-the-fact dissatisfaction, claim to have adversely affected the lawyer's judgment or performance, and describe the potential adverse effects on each client].

Despite possibilities for such interests to conflict, you believe one lawyer can adequately represent, advance, or protect each such interest without harming any other such interests. Therefore, you agree that you want me to represent each of you in this matter, and you each refuse to exercise your right to hire a different lawyer and hereby waive the conflicts described.

In addition to the fees set forth above, you will be responsible for expenses incurred in connection with this matter. Such expenses may include, among others, copying, delivery, and

telephone charges, fees for professional services, and travel expenses. If the firm makes payment for you, you will need to reimburse us promptly.

[If we have to bring suit against you to collect any balance owed, you agree to pay us an additional amount of ____% of the balance owed as attorney fees. To secure any balance you we us, you grant us a security interest in any property that may come into our possession in the course of our representation and any claim or cause of action on which we are representing you.]

To achieve the best possible representation of you will need to cooperate with us fully and provide us all the information we need to assist you. I encourage you to keep detailed notes of questions that may arise and of any new information, witnesses, or other important matters that come to your attention. Please call me if something is truly urgent, but otherwise it is best to schedule an appointment to discuss your accumulated questions and concerns. So that we may maintain continuous contact with you throughout the representation, please notify us immediately if there is any change in your address or telephone number.

If at any time you become dissatisfied with our handling of this matter, you should not hesitate to tell me immediately so we can discuss and resolve the problem. It is essential to your representation that we maintain a good relationship throughout. You may terminate our representation at any time. In the event of termination, you will be responsible for payment of any fees earned or expenses incurred. We may terminate this representation only as permitted or required by laws and regulations. Failure to pay [fees or] [1] expenses or make deposits when due will be cause for such termination.

[Optional [2]] In this joint representation, I must and will treat you [both] equally in all regards, including all communications. I will communicate all matters to both of you and will share all communications from each of you with the other.

While the agreement is intended to prevent any confusion of the terms of my representation, should a fee dispute arise you are agreeing pursuant to this paragraph to submit any fee dispute between us to _____ arbitration with [your bar's program name]. You understand that you have the right to use other court forums to address fee disputes, but we are both agreeable to compromising those rights to submit to binding arbitration. Any decision made by the arbitration panel whether for you or me will be final and non-appealable. It has the same effect and enforceability as if rendered by a court of law. The arbitration panel would hear us in [locality] and would be composed of those individuals, two attorneys and one layman. The [local bar organization] selects the panel from among a list of volunteers who have agreed to hear fee disputes. There are no costs associated with the panelists. You can seek additional independent legal counsel on this issue before signing this agreement, if you wish.

We will use our best efforts in representing you in this matter, but you acknowledge that we can give no assurances as to the final outcome.

If the above terms are acceptable, please sign and return one of the enclosed copies of this letter. I look forward to working with you.

Sincerely yours,

[Name of Firm]

By_____

[Name of Attorney]

I understand and accept the terms of this Agreement.

_____

[Name of Client]

_____

Date of Acceptance

---

1 Do not use this phrase if this is a contingent fee agreement.
2 Use if joint representation.

Engagement Letter: Estate Planner Representing Both Spouses

For use when representing both spouses

Dear ***[Name of Client(s)]***:

I am writing to confirm our agreement to represent both of you jointly regarding your estate plan. Spouses can sometimes have conflicting interests regarding their estate plan. For example, they may have different views as to how much power the surviving spouse should have over the property of a deceased spouse, how assets should be distributed upon the death of one or both of them, and how family assets should be divided between them during their lifetimes. Also, in order to take advantage of available tax benefits, lawyers frequently recommend that family assets be divided between a husband and wife to increase one estate or decrease the other by dividing jointly owned assets or by recommending gifts from one to the other. These are just some examples of potential conflicts that sometimes arise during the estate planning process.

If each of you had your own separate lawyer, you would each have an “advocate” for your position and would each receive totally independent and confidential advice from your own lawyer. Under such an arrangement the information given to your respective lawyers would be confidential and could not be disclosed to your spouse without your consent. This is not the case when one firm advises both of you jointly.

Although we will encourage the resolution of any differences of opinion or conflicting interests, we cannot be an advocate for one of you against the other if we represent both of you. When your individual interests differ, we will attempt to explain to both of you the interests of each of you and the effect on each of you of a particular course of action. Similarly, anything that either of you tells us relating to your estate plan cannot be kept confidential from the other.

In the interests of efficiency, you may choose to communicate with us primarily through one of you, in which event we will provide any necessary explanation of the issues to that individual. Of course, either of you may put questions to us at any time.

By signing this letter, each of you confirm that you have requested and consented to our joint representation of both of you in connection with the preparation of your estate plan and that you each agree that communication and information received from each of you relating to your estate plan will not be kept confidential from the other. Of course, either of you may retain separate counsel at any time. In that event, we will be free to continue to represent the other one of you only with the consent of the one who retained separate counsel.

In very unusual circumstances, a law firm representing both the husband and wife regarding their estate plan confronts a conflict of interest between them that is so serious that the firm can no longer continue to represent either of them. Although such a situation seems highly unlikely in your case, were it to occur, we would promptly notify both of you that we could no longer

continue to represent either of you. In some cases, it may not be possible to disclose to both of you precisely why we have concluded that we should discontinue our representation.

Our fee will be based upon the prevailing hourly rates in effect for our law firm. Currently, these rates range from $___ to $___ per hour, depending upon the experience and position of the individual lawyer. Paralegal services, if reasonably required, will be billed at a rate of $____ per hour. During the period of our representation, it is possible that individual hourly rates in the firm may be increased ***[by some modest amount]***. You will be informed of any changes immediately.

You will be billed for all of the time spent handling your matter, including but not limited to time spent on telephone conferences, research and drafting. In addition to our fee for services, you will also be billed for out-of-pocket costs incurred on your behalf such as postage, photocopying, long distance charges, facsimile charges, costs of using computerized legal research facilities, filing fees and messenger fees.

We will bill you monthly for the amount of work that was performed on your file during the preceding month. At this time, it is impossible to estimate the amount of time and expense that will be necessary to adequately represent you in this matter.

During the representation, we will supply you with copies of all substantive correspondence ***[as well as a complete set of your estate plan documents upon completion of the matter]***. We suggest that you keep a copy of all of the documents regarding your matter in the file folder we have provided to you. After the matter is closed, you may obtain copies of your file by paying our standard photocopying charges and a minimum fee to compensate us for the time necessary to duplicate the file. ***[Due to storage constraints, the file will be destroyed after ____ years.]***

We understand that we are being retained solely to prepare your estate plan and related documents, that our representation will cease when the documents are signed, and that thereafter you prefer that we not advise you of changes in the law or provide additional or ongoing services, except at your specific request. Because estate taxes and other relevant laws change from time to time and your estate planning goals may also change, we would be pleased to review your estate plan in the future upon your request. We urge that you consider such a review at least once every five years.

Your primary contact for this matter will be _____. If you have any questions regarding this matter, please feel free to contact _____directly at ***(###) ###-####***.

If you disagree with any of the terms and conditions set forth above, please contact me immediately. We will not commence any work on your behalf until we have received a copy of this letter with both of your signatures acknowledging agreement. We look forward to representing you in the preparation of your estate plan.

Sincerely,

Agreed to:

Signature	Print Name	Date
Signature	Print Name	Date

Engagement Letter: Limited Scope Representation

Identification of Parties: This agreement, executed in duplicate with each party receiving an executed original, is made between _____, hereafter referred to as "Attorney," and _____, hereafter referred to as "Client."

1. **Nature of Case:** The Client is requesting ongoing consulting services from Attorney in the following matter:

   _____

   _____

2. **Client Responsibilities and Control:** Client shall remain responsible for the conduct of the case and understands that he/she will remain in control of and be responsible for all decisions made in the course of the case. Client agrees to:

   a. Cooperate with Attorney or office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;

   b. Keep attorney or office advised of Client's concerns and any information that is pertinent to Client's case;

   c. Provide Attorney with copies of all pleadings and correspondence to and from Client regarding the case;

   d. Immediately provide Attorney with any new pleadings or motions received from the other party;

   e. Keep all documents related to the case in a file for review by Attorney.

3. **Services to be performed by Attorney:** Client and Attorney have agreed that Attorney will provide the following services, indicated by writing 'YES' or 'NO' [Attorney will not perform any services indicated by the word 'NO']:

   a. _____ Legal advice: office visits, telephone calls, fax, mail, email;

   b. _____ Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;

   c. _____ Evaluation of Client's self-diagnosis of the case and advising Client about legal rights and responsibilities;

   d. _____ Guidance and procedural information for filing or serving documents;

   e. _____ Review pleadings and other documents prepared by Client;

f. _____ Suggest documents to be prepared;

g. _____ Draft pleadings, motions and other documents;

h. _____ Factual investigation: contacting witnesses, public record searches, in-depth interview of Client;

i. _____ Assistance with computer support programs;

j. _____ Legal research and analysis;

k. _____ Evaluate settlement options;

l. _____ Discovery: interrogatories, depositions, requests for document production;

m. _____ Planning for negotiations, including simulated role-playing with Client;

n. _____ Planning for court appearances, including simulated role-playing with Client;

o. _____ Standby telephone assistance during negotiations or settlement conferences;

p. _____ Backup and troubleshooting during the hearing or trial;

q. _____ Referring Client to expert witnesses, special masters or other counsel;

r. _____ Counseling Client about an appeal;

s. _____ Procedural assistance with an appeal and assisting with substantive legal argument in an appeal;

t. _____ Provide preventive planning and/or schedule legal check-ups;

u. _____ Other

_____

4. **Attorney's Responsibilities:** Attorney will exercise due professional care and observe strict confidentiality in providing the services identified by the word "YES" in Paragraph 4 above. In providing those services, Attorney WILL NOT:

   a. Represent, speak for, appear for, or sign papers on the Client's behalf;

   b. Become attorney of record on any court papers or litigate on Client's behalf;

   c. Provide services which are not identified by the word 'YES' in Paragraph 4;

   d. Make decisions for Client about any aspect of the case;

   e. Protect Client's property by means of restraining orders while discovery and/or negotiations are in progress.

   f. The Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services will be specifically listed in an

amendment to this Agreement, and initialed and dated by both parties. The date that both the Attorney and the Client initial any such list of additional services to be provided will be the date on which the Attorney becomes responsible for providing those additional services. If the Client decides to retain the Attorney as the Client's Attorney of record for handling the entire case on the Client's behalf, the Client and the Attorney will enter into a new written Agreement setting forth that fact, and the Attorney's additional responsibilities in the Client's case.

g. **Right to Seek Advice of Other Counsel:** Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in paragraph 3, which are identified with the word 'NO' at any time during or following this Ongoing Consulting Agreement.

5. **Method of Payment for Services:**

a. **Hourly Fee:**

The current hourly fee charged by Attorney for services under this agreement is $____. Unless a different fee arrangement is established in clause b) of this Paragraph, the hourly fee shall be payable at the time of the service. Attorney will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest one tenth of an hour.

If, while this agreement is in effect, Attorney increases the hourly rate(s) being charged to clients generally for Attorney's fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided thirty days or more after written notice of the increase is mailed to Client. If Client chooses not to consent to the increased rate(s), Client may terminate Attorney's services under this agreement by written notice effective when received by Attorney.

b. **Payment from Deposit:**

For a continuing consulting role, Client will pay to Attorney a deposit of $____, to be received by Attorney on or before _____, and to be applied against Attorney's fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the Illinois IOLTA Fund. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

Costs: Client will pay Attorney's out of pocket costs incurred in connection with this agreement, including long distance telephone and fax costs, photocopy expense and postage. All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees and the like will be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

c. Should it be necessary to institute any legal action for the enforcement of this agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorney fees incurred in such action from the other party.

6. **Discharge of Attorney:** Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services provided and to reimburse Attorney for all costs incurred prior to such discharge.

7. **Withdrawal of Attorney:** Attorney may withdraw at any time as permitted under the Illinois Rules of Professional Conduct. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: a) The client consents; b) the client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively; and c) the client fails to pay Attorney's fees or costs as required by his or her agreement with the Attorney.

   Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided, and to reimburse Attorney for all costs incurred before the withdrawal.

   At the termination of services under this agreement, Attorney will promptly release all of Client's papers and property to Client on request.

8. **Resolving Disputes Between Client and Attorney**

   a. **Notice and Negotiation:** If any dispute between Client and Attorney arises under this agreement regarding the payment of fees, Attorney's professional services rendered to or for Client, and any other disagreement, regardless of the nature of the facts or legal theories involved, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.

   b. **Mediation:** If the dispute is not resolved through negotiation, Client and Attorney will attempt, within fifteen (15) days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If the Attorney and Client cannot agree on a neutral mediator, they will request that the _____ select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of the mediation, provided that the payment of costs and any attorney's fees may be mediated. Nothing in this provision shall constitute a waiver of Client's rights to State Bar fee arbitration or a trial de novo after a State Bar fee arbitration.

9. **Amendments and Additional Services:** This written Agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 4, a photocopy of Paragraph 4 which clearly denotes which extra services are to be provided, signed and dated by both Attorney and Client and attached to this Agreement, shall qualify as an amendment.

10. **Severability in Event of Partial Invalidity:** If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

11. **Statement of Client's Understanding:** I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

    a. _____ I have accurately described the nature of my case in paragraph 1.

    b. _____ I will be responsible for the conduct of my case and will be in control of my case at all times as described in paragraph 2.

    c. _____ The services Attorney has agreed to perform in my case are identified by the word 'YES' in paragraph 3. I take responsibility for all other aspects of my case.

    d. _____ I understand and agree to the limitations on the scope of Attorney's responsibilities identified in paragraph 4 and understand Attorney will not be responsible for my conduct in handling my case.

    e. _____ I will pay Attorney for services as described in paragraph 5.

    f. _____ I will resolve any disputes I may have with Attorney under this Agreement in the manner described in paragraph 8.

    g. _____ I understand that any amendments to this Agreement shall be in writing, as described in paragraph 9.

    h. _____ I acknowledge that I have been advised by Attorney that I have the right to consult with another independent attorney to review this Agreement and to advise me on my rights as a client before I sign this Agreement.

_____ _____

(Client) (Attorney)

_____ _____

(Date) (Date)

Non-Engagement Letter: Basic

[Date]

[Name and Address of Client]

RE: Consultation of [Date of Consult]Certified Mail No.

Return Receipt Requested

Dear _____:

Thank you for your visit today. As we discussed, although I have not investigated the merits of your matter, I do not feel it would be appropriate for [Name of Firm] to represent you in your possible action against [Name of Company] for [legal matter]. In declining to undertake this matter, the firm is not expressing an opinion on whether you will prevail if a complaint is filed.

Please be aware that whatever claim, if any, that you have may be barred by the passage of time. Since deadlines may be critical to your case, I recommend that you immediately contact another firm for assistance regarding your matter.

Thank you again for your interest in [Name of Firm].

[Name of Firm]

By_____

[Name of Attorney]

Non-Engagement Letter: Conflict of Interest

[Date]

[Name and Address of Client]

RE: Potential Claim Against [_____] Certified Mail No.

Return Receipt Requested

Dear [Client]:

Thank you for your visit yesterday. As we discussed during our meeting, before [Name of Firm] could accept representation of your matter, we must investigate whether this representation will adversely affect existing or former clients' interests or there is some other element that would undermine our ability to adequately represent your interests.

After you left our offices yesterday, we performed a formal conflict of interest check and found that our firm does indeed have a conflict of interest involving your intended adversary in this case, [Company that there is a potential claim against]. Unfortunately, this conflict cannot be resolved in a manner that would allow us to represent you in this matter. Consequently, [Law Firm] is formally declining representation of you in your potential action against [Company that there is a potential claim against].

Please be aware that whatever claim, if any, that you have may be barred by the passage of time. Since deadlines may be critical to your case, I recommend that you immediately contact another firm for assistance regarding your matter.

Although we were not able to assist you in this matter, I hope that you will consider [Law Firm] in the event you require legal services in the future. Thank you again for your consideration.

[Name of Firm]

By_____

[Name of Attorney]

Non-Engagement Letter: Conflict of Interest

VIA REGULAR MAIL, CERTIFIED MAIL[1] RETURN RECEIPT REQUESTED,

AND VIA ELECTRONIC MAIL

[Name]

[Address]

RE: Declination of Representation

Dear ***[Name]***:

You contacted our firm ***[last week]***[2] and requested that we represent you in the ***[describe case/matter]***. Although we did not discuss the particulars of your legal matters, our review has revealed that we have a possible conflict of interest. We appreciate the confidence you have expressed in our firm; however, because it does not appear that the ethical rules will permit an engagement under these circumstances, we must decline to represent you. ***[Enclosed herewith are the documents that you provided to us for review. We have not kept any copies thereof.]***[3]

In declining to accept your matter, the firm is not expressing an opinion as to the merits ***[or value]*** of such matter. You should be aware that any advice provided during our consultation were based on a preliminary understanding of the pertinent facts and were not based on a thorough legal analysis.

[It appears that your legal matter is time-sensitive. This means that the failure to take prompt legal action may result in your legal matter being barred by a time limit.[4] ***In order***

[1] If the firm is returning documents to the individual or entity seeking representation, or if the statute of limitations is fast approaching, it is recommended that the firm send the letter by certified mail. Because the certified letter may not be accepted by the intended recipient, it should be sent via regular mail, as well. If the individual or entity seeking representation has an email address, the declination letter should be sent via email as well as via regular mail and, under the aforementioned circumstances, via certified mail.

[2] The nonengagement letter should be sent within a reasonable time after the engagement is first sought, especially if the legal matter for which representation is sought involves time-sensitive matters, such as a statute of limitations.

[3] Preferably, the proposed client will not have provided any documentation to the lawyer, as documentation should be obtained only after a conflict-check has been run and a determination that no conflict exists has been made.

[4] As a general rule, lawyers should not specify the exact date on which they believe a statute of limitations period will expire or even the length of the statute of limitations (i.e., one year, two years). This is because lawyers who are declining a case may not have all of the information necessary to establish either the correct date or the statute of limitations that applies to the matter. Case law suggests that a lawyer who states an incorrect limitations period or date in his nonengagement letter may be held liable for providing negligent advice if the nonclient relies on that advice to her detriment.

to preserve your rights, I strongly recommend that you contact another lawyer regarding this matter immediately.] [Although your legal matter may not be time-sensitive, I recommend that you contact another lawyer promptly should you wish to pursue the matter.]

Non-Engagement Letter: Default Judgment Option Clause

[Date]

[Name and Address of Client]

Re: Consultation of [date of consult]

Dear _____:

Thank you for [meeting with me] / [speaking with me by telephone] on _____ to discuss _____. I greatly appreciate the confidence you have expressed in our firm, but we are not in a position to represent you on this particular matter.

OPTION 1 [Please be advised that your claim may become barred by the passage of time as a result of the applicable statute of limitations. Therefore, you should consult another attorney immediately about your claim.]

OPTION 2 [Please be advised a default judgment may be entered against you if an answer or other action is not taken in a timely manner. Therefore, you should consult another attorney immediately about responding to this claim.]

I would also like to emphasize that in declining to represent you, the firm is not expressing an opinion on the merits of your case. We neither had an opportunity to investigate the facts in this matter nor to research the applicable law.

[Since we did not undertake to provide you with any legal advice regarding this matter, no charge is being made for any legal fees or expenses.]

[I am enclosing all the original documents and materials you left with me following our meeting.][1] In the future should you require legal assistance regarding some other matter, I hope you will contact me.

Sincerely yours,

[Name of Firm]

By_____

[Name of Attorney] _____

1 Keep a copy of any documents which establish basic information on the case including the statute of limitations.

Non-Engagement: Lost Client

[Date]

[Name and Address of Client]

Re: [LEGAL MATTER]

Dear [Client]:

We have been pleased to have represented you for the past TIME FRAME] in [LEGAL MATTER]. We have not heard from you, however, for the past [TIME FRAME]. We have attempted to communicate with you by letter and telephone, but we have not been successful. Our letters [ARE RETURNED], and [OUR TELEPHONE CALLS GO UNANSWERED] [YOUR TELEPHONE HAS BEEN DISCONNECTED].

Because we are unable to communicate with you, we must assume that you no longer wish us to represent you in this matter.

Because your case is pending before the court, we may only withdraw with the court's permission. Enclosed is a copy of the motion we intend to file within [number] days from the date of this letter. We believe the court will grant our request for leave to withdraw. You should begin looking for another attorney immediately so that the transition may be as smooth as possible and to insure that no time deadlines are missed. Your failure to take some action regarding this matter may result in [your claim being forever barred] [a default judgment being entered against you].

Of course, we will cooperate with the attorney you choose. If your new lawyer wishes to discuss this case with us, we will do so only if you agree to pay us for the additional time and expense involved in such a consultation. We will also turn over our file to your new lawyer if we have a reasonable assurance that you will pay the outstanding fees and costs for the services we have provided through this date. Without such an assurance, the law allows us to assert a retaining lien on your file until you have either paid the fees owed or posted security for payment unless our retention of the documents would cause prejudice to your case.

If you desire that we continue to represent you, we will do so if you contact us immediately upon receipt of this letter. If you do not contact us within [number] days, we will file the motion to withdraw. I look forward to hearing from you and hope that we can continue representing you in this matter.

[Name of Firm]

By_____

[Name of Attorney]

Non-Engagement: Letter to Unrepresented Party

[Unrepresented Party Name]
[Address]

RE: ***[Identify Matter]***

Dear ***[Name]***:

As you know, I represent ***[Client Name]*** with respect to ***[describe matter]***. I understand that you have decided not to seek the advice of legal counsel and will be representing yourself in this matter at this time. Because I do not represent you, I cannot provide you with legal advice and I will be unable to answer any legal questions you may have. I urge you to seek independent legal counsel immediately to protect your interests and represent you on this matter.

Should you obtain legal counsel relative to this matter in the future, I ask that you please have your counsel contact me as soon as possible.

If you do not have a local lawyer, you may want to use the Illinois Lawyer Finder, which can be found at http://www.isba.org/public/illinoislawyerfinder.

Sincerely,

Disengagement Letter: Sample

Removing yourself from a case/matter after having accepted it but before the matter has concluded[vii]

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Client Name]
[Client Address]

RE: Withdrawal of Legal Representation
[State name of Case/Matter]

Dear ***[Name]:***

The purpose of this letter is to inform you that this firm, ***[name of firm]***, is terminating its representation of you with respect to ***[identify matter].***[viii] ***[Briefly describe the reason for the termination. If you are withdrawing due to unpaid legal fees, use "Sample Disengagement Letter-Unpaid Fees".]***

[Include language from one of the four options below].

Option 1: Matter in litigation where leave to withdraw is required.

In accord with the applicable rules of ***[identify jurisdiction]***, we will promptly file a motion for leave to withdraw as your counsel and we will provide you with a copy thereof. We will continue to serve as your counsel until the court grants our motion. In the event that our motion is granted, our lawyer-client relationship will be immediately terminated, and we will cease to provide legal services to you.

Several items remain pending with regard to your case/matter. Specifically, ***[summarize the case status and notify client of any impending deadlines or otherwise time-sensitive matters]***.[ix] You should therefore seek other counsel to represent you on this matter immediately. I will of course cooperate in the smooth transition of your files to another lawyer of your choosing. With this correspondence, we are returning the ***[personal property, including original records and documents]*** which you previously provided to us.[x]

Option 2: Matter in litigation where substitution of lawyer must be filed with court.

In accord with the applicable rules of ***[identify jurisdiction]***, we will work with your new counsel to file with the court a substitution of lawyers form that, when approved by the court, will automatically substitute your new lawyers for our firm as counsel of record on your behalf. We will continue to serve as your counsel until the court approves the substitution. In the event that the court approves the substitution, out lawyer-client relationship will be immediately terminated, and we will cease to provide legal services to you.

Several items remain pending with regard to your case/matter. Specifically, ***[summarize the case status and notify client of any impending deadlines or otherwise time-sensitive matters]***.[3] You should discuss these matters with your new counsel. I will of course cooperate

in the smooth transition of your files to your new counsel. With this correspondence, we are returning the ***[personal property, including original records and documents]*** which you previously provided to us.

Option 3: Non-litigation matter where new/successor counsel has been retained by client.

You have informed us that the law firm of ***[name of firm]*** will be serving as your successor counsel in connection with the matter identified above. Accordingly, we are terminating our lawyer-client relationship immediately. We will work with your successor counsel to ensure a smooth transition of legal services. Unless you direct otherwise, we will promptly transfer all appropriate files to your successor counsel. With this correspondence, we are returning the ***[personal property, including original records and documents]*** which you previously provided to us.

Several items remain pending with regard to your case/matter. Specifically, ***[summarize the case status and notify client of any impending deadlines or otherwise time-sensitive matters]***.[3] You should discuss these matters with your new counsel.

Option 4: Non-litigation matter where client has not identified new/successor counsel.

Several items remain pending with regard to your case/matter. Specifically, ***[summarize the case status and notify client of any impending deadlines or otherwise time-sensitive matters]***.[3] You should therefore seek other counsel to represent you on this matter immediately. I will of course cooperate in the smooth transition of your files to another lawyer of your choosing. With this correspondence, we are returning the ***[personal property, including original records and documents]*** which you previously provided to us.

[Additional statement where outstanding fees are owed][4]

Fees for our legal services are paid through ***[Month, Day, Year]*** and unpaid through ***[Month, Day, Year]***.[xi]

Sincerely,

Disengagement Letter: Unpaid Fees

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Client Name]
[Client Address]

RE: Withdrawal of Legal Representation
[State name of Case/Matter]

Dear ***[Name]:***

During the past ***[__years/months]***, it has been our pleasure to serve you as counsel in ***[case/matter]***. In the course of that representation, you have paid us ***[dollar amount currently paid]*** in legal fees and expenses. Unfortunately, contrary to our Engagement Agreement, you have not paid our statements in a timely manner for the past few months.

At this time, the outstanding and overdue fees and expenses total approximately ***[dollar amount currently owing]***. Our firm desires to continue our relationship but does not have the ability to finance your case. Moreover, you expressly agreed that the hourly fees and expenses in this matter would be kept current.

We have continued to represent you for the past ***[time]***, even though each month the outstanding fees and expenses increased. We did so because we value our relationship with you and would like to continue representing you.

At this point, in our opinion, the trial court will permit us to withdraw. There is still sufficient time for you to retain other counsel without jeopardizing your case or adversely affecting the court's calendar. However, if we wait several more months, it is possible that one of these conditions for withdrawal may not exist.[xii]

Your new counsel may wish to discuss this case with us. That would be to your advantage both substantively and economically. We are willing to do so as long as satisfactory arrangements are made to compensate us for the additional time and expense which will be incurred. In addition, it will be necessary to agree on a plan to gradually reduce the outstanding fees and expenses. We also have certain work product which has been generated during the past ***[time]***. We are willing to share it with your new counsel to the extent our legal obligations require us to do so in the absence of full payment of our fees and expenses.

I enclose a petition for leave to withdraw which will be filed with the court ten days from your receipt of this letter. In the meantime, if you wish us to continue representing you, we would be pleased to do so if satisfactory arrangements are made to take care of the outstanding and overdue fees and expenses, as well as to take care of the future fees and expenses. I look forward to hearing from you and remain hopeful the representation can continue.

Sincerely,

Disengagement Letter: Termination of Representation – Case Closed

[Date]

[Name and Address of Client]

RE: Termination of Representation

FILE: [FILE NUMBER]

Dear [Client's Name]:

We are pleased to have had the opportunity to represent you in connection with your [LEGAL MATTER]. The case is now concluded. Since we have completed our legal work, we are closing our file and removing it from our active files list.

Enclosed are the documents from your file, which are being returned to you. We are in possession of no other funds or property belonging to you. We suggest that you keep all of the contents of your personal file in a safe place where you can easily find them. We periodically clean out and destroy our closed files. Unless we hear from you to the contrary in writing, our file regarding this will be destroyed on our regular schedule.

There is some follow up required in this matter, specifically [SUMMARIZE DETAILS] (e.g., filing of continuation statements within five years of the date of the original financing statements were filed; changing beneficiaries on the life insurance policies, discharging the liens in bankruptcy, etc.). Our firm will not be doing those tasks, and you will need to take the further action, as appropriate.

Again, it was our pleasure representing you. Thank you for your confidence in us. Please contact us if we can be of service to you in the future.

Sincerely,

[ATTORNEY SIGNATURE]

[NAME OF ATTORNEY]

[FIRM NAME]

Enclosures

Disengagement: Termination of Representation – Permissive Withdrawal

[Date]

[Name and Address of Client]

Dear [Client's Name]:

This letter will confirm our understanding that effective [DATE] this firm will no longer represent you in connection with [LEGAL MATTER].

I urge you to promptly retain other counsel to represent you in this matter. I will cooperate with your new counsel during the transition process and will provide him/her with any original documents [keep copy for yourself], correspondence, pleadings, investigative reports and records, which I have not previously sent to you.

[WHERE COUNSEL OF RECORD] I will notice the Court and have prepared the enclosed Order releasing me as counsel of record. Please endorse the Order releasing me and return it in the enclosed stamped envelope so I may present it to the Court for entry. Without your signature, it will be necessary for you to appear at the hearing. If you have already retained new counsel, please let me know who it is so I may forward the appropriate Order to your new attorney.

Sincerely,

[ATTORNEY SIGNATURE]

[NAME OF ATTORNEY]

[FIRM NAME]

Disengagement: File Closing Letter (Form ER03)

[Date]

[Client Name]

[Address]

[City, State, Zip]

Dear [Client Name]:

This letter will serve to confirm our recent conversation of [Date] regarding the conclusion of our representation in the matter of [name of matter], as settlement was reached on [Date] and the matter has thus reached its natural conclusion. I want to again express my gratitude for the opportunity to represent you in this matter and my appreciation for your business and your confidence in this firm's work.

As a reminder, our firm will retain the complete file for this matter for a minimum of 10 years but may destroy the file after 10 years have passed without further notice to you. All original documents you provided to me were returned to you at our meeting of [Date], but the rest of the file remains at our office and will soon be placed in storage. You are welcome to pick up the file at any time, but please be advised that we will need advance notice in order to retrieve the file from storage and copy the documents, per our retainer agreement, at your expenses. If you choose not to collect the file in the next 10 years, it will be destroyed in accordance with our file destruction policy, taking care to preserve your confidentiality and conform to environmental standards without further notice to you.

Thank you again for entrusting this matter to our firm, it has been my pleasure to work with you and your family. If you have any further questions regarding this matter, please do not hesitate to contact me.

Sincerely,

[ATTORNEY SIGNATURE]

[NAME OF ATTORNEY]

[FIRM NAME]

Billing: Status of Activity Letter

[Date]

[Client Name]

[Address]

[City, State, Zip]

RE: [Matter]

File Number: [File Number]

Dear [Client Name]:

In order to keep you informed on a regular basis regarding your matter, I will send status reports on a [regular/weekly/monthly] basis. As always, though, feel free to contact me at any time for more detailed information concerning the progress of your case.

Since our last meeting or report on [Date], the following has occurred:

[Status Report]

I have enclosed copies of correspondence, filings, and any other documents [I have] [our firm has] prepared on your behalf since my last status report. I have also enclosed the monthly bill for services. Please remit payment if the bill reflects a payment due.

Thank you for your trust in me as your attorney. [I] [We] will continue to work on your behalf and provide reports as the case continues.

Sincerely,

[Attorney Name]

[Firm Name]

Enclosure[s]

Billing: Monthly Status Letter

[Date]

[Client Name]

[Address]
[City, State, Zip]

Re: File Number _____

Dear [Client Name]:

In order to keep you informed on a regular basis regarding your case, I will be sending you status reports such as this one on a monthly basis. Please do not hesitate to contact me at any time for more detailed information concerning the progress of your case.

Since our last meeting [last status report] on _____, the following has happened: (specify court appearances, discovery, motions filed, etc.)

I have enclosed copies of correspondence, filings, other documents our firm has prepared on your behalf since our last status report, and a monthly bill for our services, which I trust you will find in order.

Thank you for allowing our firm to represent you in this matter. We will continue to apply our best efforts on your behalf and report to you as your case continues.

Very truly yours,

_____
[Attorney Signature]

[Insert Attorney Name]
[Insert Firm Name]

Enclosure[s]

Billing: Sample Billing Statement Letter

[Law Firm Letterhead]

[Date]

[Client Name]
[Address]
[City, State, Zip]

Legal Services Rendered

February 2, 2009

Initial office consultation with client. Discussed fact situation and relative merits of complaint. Agreed to and signed representation agreement. NO CHARGE.

February 3, 2009

Drafted Notice of Acceleration. (.5 hour)

February 16, 2009

Arranged for title search to determine any additional parties in interest. (.25 hour)

February 17, 2009

Drafted foreclosure Complaint and Notice of Lis Pendens. (1.0 hour)

February 26, 2009

Telephone conference with defendant's attorney re possibility of agreeing to conditional judgment for purposes of allowing additional time for refinancing. (.5 hour)

Total fee for legal services	**$270.00**

Costs Incurred

February 16, 2009	
Title search w/AAA Corporate Services	$100.00
February 18, 2009	
Filing fee – Complaint	$150.00
Service of Process	$75.00
Total costs incurred	**$325.00**
BALANCE IN TRUST ACCOUNT as of February 1, 2022	**$1,500.00**
TOTAL SERVICES AND COSTS for February, 2022	**$595.00**
DRAWN FROM TRUST ACCOUNT on February 27, 2022	**$595.00**

CURRENT BALANCE IN TRUST ACCOUNT	**$905.00**
AMOUNT DUE THIS STATEMENT	**$0.00**

Please contact this office immediately if you have any questions. Thank you!

Billing: 30-Day Follow-up

[Date]

[Client Name]
[Address]
[City, State, Zip]

Dear [Client Name]:

In reviewing our accounts receivables, I noticed that we have not received payment in the amount of $_____ for invoice #_____, dated _____.

I am sure this is just an oversight on your part. If, however, you have a problem with the service we have provided, please contact me immediately so we can discuss the matter.

If I do not hear from you, I will assume that you have no difficulty with the service or with paying the invoice and will look for payment by [date].

Sincerely yours,

[Lawyer's Name]
[Firm Name]

Billing: Retainer Collection Letter

[Date]

[Client Name]
[Address]
[City, State, Zip]

Dear [Client Name]:

This is a reminder that the firm still has not received your retainer check in the amount of $_____.

In order for us to continue representing you on the (specify) matter, your file must be current. If we do not receive your retainer within seven (7) days, we will assume that you are no longer interested in our continued representation of you in this matter. If this is the case, we will withdraw from your matter and will bill you for time already spent on it.

We would like you to remain a client of the firm and are anxious to mark your account current. Please attend to this matter today. I have included a self-addressed, stamped envelope for your convenience. If you have already sent us a check, we thank you.

If you have any questions or are not able to send payment immediately, please call me at [telephone number] today. Thank you.

Sincerely,
[Lawyer's Name]
[Firm's Name]

Documentation: File Closing Checklist

Client: _____

Matter Name: _____

Matter No.: _____

Responsible Lawyer: _____

Signature: _____

Date: _____

Responsible Party	Initials	Date	Task
Lawyer			Work on behalf of client is complete.
Lawyer			If a litigation matter, has matter concluded or withdrawal been granted?
Lawyer			Any deeds, judgments, *lis pendens*, liens, orders, contracts that must be filed or recorded before engagement is complete have been filed or recorded as necessary.
Lawyer			Final accounting/invoice has been issued to client or other responsible party.
Lawyer			Final bill is paid. (If not, either keep file open or document write-off and proceed with file closure.)
Lawyer			All firm costs have been paid and, if necessary, reimbursed by client or other responsible third party.
Lawyer			Trust account balance has been zeroed.
Lawyer			Correspondence sent to client doing the following: 1. Identifying any work that was not completed. 2. Identifying any pending dates or future actions that are the client's responsibility. 3. Identifying any limitations upon the work performed by the firm. 4. Identifying any other outstanding issues. 5. Confirming conclusion of engagement.
Lawyer			Client has been informed in writing of file retention and destruction policy.
Lawyer			All documents of particular legal significance, such as wills, trusts and documents for which the authenticity could reasonably be disputed have been copied and the originals returned to the client.

Responsible Party	Initials	Date	Task
Lawyer			Relative to other original documents: 1. All such documents have been returned to client; or 2. Client has approved, in writing, of file-retention and destruction policy as it applies to original documents.
Lawyer			All third-party document returned and/or destruction requirements have been complied with. (For instance, medical records obtained pursuant to HIPAA authorization or documents obtained pursuant to protective order often must be returned or destroyed within a certain period of time following the conclusion of a matter).
Lawyer			File has been reviewed for documents that may be added to firm's "forms" bank.
Lawyer			File retention and destruction checklist has been completed and turned in to Assistant [or Administrator].
Assistant [or Administrator]			File retention and destruction checklist has been received.
Assistant [or Administrator]			Deadlines relative to file retention and destruction recoded in calendaring system.
Assistant or Administrator			File has been marked "closed" in file-management system.
Assistant or Administrator			File has been marked "closed" in billing system.
Assistant or Administrator			Matter has been removed from active case list and added to closed case list.
Assistant or Administrator			Matter has been assigned closed file number.
Assistant or Administrator			All pertinent names (client, opponent, etc.) have been added to conflict-check system.
Assistant or Clerk			Hard file contents compiled, and unnecessary items removed from hard file. For instance, notebooks, binder clips, and duplicates of documents.)
Assistant or Clerk			Hard file labeled for storage.

Responsible Party	Initials	Date	Task
Assistant, Administrator, or Clerk			Electronic file contents compiled and saved in accord with firm's policy for retention and destruction of such materials. Check the following for electronic documents/items: 1. Local network servers; 2. E-Mail; 3. Cloud storage; 4. Laptops; 5. Portable/removable electronic storage for electronic documents.
Assistant or Clerk			Send hard file to storage
Assistant or Clerk			Place hard copy of completed checklist in file and save copy to file-management system.

Comments/Notes:

_____

_____

_____

_____

_____

_____
Initial

DISCLAIMER: This checklist is intended to be an example that may be useful in developing your own policies and procedures and in creating your own form. The tasks that must be performed upon the closing of a file will depend upon the nature of your practice and your office procedures. This is not intended to be legal advice and should not be relied upon as such.

Documentation: Notice to Client of Departure of Partner/Associate from Firm

[Date]
[Client Address]

RE: ***[Smith v. Jones]***

Dear ***[Client Name]***:

On ***[date of withdrawal]***, [departing lawyer] [is leaving/left]the law firm of ***A B & C, Ltd.*** [to join law firm D & E, LLC].

Inasmuch as [departing lawyer] was your designated lawyer on the above matter, we are required by the Illinois Rules of Professional Conduct to inform you that you have the right to choose to have [departing lawyer] continue in [his/her] new capacity to represent you in this matter, or you may have our firm continue to represent you, in which case the file will be handled by [current firm lawyer], or you can choose to retain an entirely new lawyer.

We have appreciated the opportunity to serve you in the past. If you wish to have [departing lawyer] or a new lawyer continue to represent you, arrangements to secure your outstanding account with us will have to be made before the file can be released to [departing lawyer] or new lawyer. [If applicable: You may be liable for fees and costs for services already provided by the firm.] [If applicable: Any retained/unspent fees or costs currently held by the firm will be promptly returned or transferred to [departing lawyer] or [new lawyer] as you designate. Please advise [departing lawyer] and us, as quickly as possible, of your decision so that continuity in your representation is assured. You may do so by indicating your choice below and returning a signed and dated copy in the enclosed stamped envelope. Please retain the additional copy of this designation letter for your records.

Should you have any questions related to these matters, please contact us for further information.
Sincerely,

A B & C, Ltd.

By: _____

Instructions

__ I wish my file to stay with A B & C, Ltd.
__ I wish my file and trust account balalnce to be transferred to [name of departing lawyer].
__ I will retain new counsel and have them contact [name of current firm lawyer].

Comments:

1. See Illinois Rules of Professional Conduct Rule 1.16 for ethical guidelines concerning withdrawal from representation and termination of the lawyer-client relationship.

2. Remember when withdrawing from representation, you must take reasonable steps to avoid foreseeable prejudice to the rights of the client, including the following:
    a. giving due notice to the client in writing;
    b. allowing time for employment of other counsel;
    c. delivering to the client all papers and property to which the client is entitled; and
    d. refunding promptly any part of the fee that was paid in advance, but which has not been earned.
3. Don't forget to promptly file substitutions of counsel with the court.
4. If the client has decided to retain other counsel, send a closure letter. If the client has opted to move his/her file to your new firm, send an engagement letter.

DISCLAIMER: This sample form is designed to reduce the likelihood of being sued for legal malpractice. It is not intended to be, nor should it be considered legal advice. It is not the intent of this form to suggest or establish practices standards or standards of care applicable to a lawyer's performance in any given situation. Rather, the sole purpose of this sample form is to assist lawyers insured by ISBA Mutual in avoiding legal malpractice claims, including meritless and frivolous claims. To that end, the intention is to advise lawyers insured by ISBA Mutual to conduct their practices in a manner that is well above the accepted norm and standards of care established by substantive legal malpractice law. The recommendations contained in these materials are not necessarily appropriate for every lawyer or law firm and do not represent a complete analysis of each topic.

Documentation: Telephone Conference Memorandum

Matter Name/No: _____

Date: _____ Time: _____ A.M. / P.M.

Telephone Call to: _____

from: _____

Notes:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

File Retention & Destruction: File Closing Procedures Checklist – Internal Document (Form ER02)

_____ Complete original documents concluding matter (Release executed, Dismissal Entry filed, etc.)

_____ Confirm final invoice if paid in full. Be sure to check on all court costs and other expenses.

_____ Return original documents and papers to the client. Note: You may not charge the client for copying any documents you wish to retain for your files.

_____ Copy useful forms for office form file. Do not charge client for copies of file.

_____ Remove duplicates and “clean out” file for storage.

_____ Copy all stored electronic data – including all e-mails – related to client matter to DVD disk to be included with file.

_____ Send closing letter to client.

_____ Calendar future docket dates such as Uniform Commercial Code and judgment renewals.

_____ Send client survey to client.

_____ Enter case into closed file database for future conflicts checks.

_____ Assign date for review/destruction of file. Ask client if s/he prefers to have the file returned or destroyed after the assigned date.

File Retention & Destruction: Checklist

Client: _____

Matter Name: _____

Matter No.: _____

Responsible Lawyer: _____

Date: _____

CHECK ONE	AREA OF LAW	RETENTION PERIOD	DESTRUCTION DATE (IF CHECKED)
☐	Antitrust	Conclusion of engagement plus 7 years	
☐	Banking	Conclusion of engagement plus 7 years	
☐	Commercial Finance	Conclusion of engagement plus 7 years	
☐	Bankruptcy	Conclusion of engagement plus 7 years	
☐	Collections	Conclusion of engagement plus 7 years	
☐	Commercial Litigation	Conclusion of engagement plus 7 years	
☐	Commodities	Conclusion of engagement plus 7 years	
☐	Contract Actions	Conclusion of engagement plus 7 years	
☐	Corporate	Conclusion of engagement plus 7 years	
☐	Criminal	Review annually and destroy 10 years after client's release from incarceration	
☐	Employee Benefits	Conclusion of engagement plus 7 years	
☐	Estate Litigation	Conclusion of engagement plus 7 years	
☐	Estate Planning and Administration	Indefinite	
☐	Family Law - Adoption	Until adopted child reaches age of majority plus 7 years.	
☐	Family Law - Dissolution of Marriage	If no minors or disabled individuals involved, conclusion of engagement plus 7 years. If minor(s) and/or disabled individuals involved, until the latest of the youngest child reaching the age of majority plus 7 years OR the	

CHECK ONE	AREA OF LAW	RETENTION PERIOD	DESTRUCTION DATE (IF CHECKED)
		removal of the disability plus 7 years.	
☐	Family Law - Pre-nuptial	Conclusion of engagement plus 7 years.	
☐	Government Regulations or Legislation	Conclusion of engagement plus 7 years.	
☐	Health Care	If minor(s) and/or legally disabled individuals involved, until the latest of the youngest child reaches the age of majority plus 7 years OR the removal of the disability plus 7 years. Otherwise, conclusion of engagement plus 7 years.	
☐	Intellectual Property	Conclusion of engagement plus 7 years.	
☐	Joint Ventures	Conclusion of engagement plus 7 years.	
☐	Juvenile	Until minor reaches age of majority plus 7 years.	
☐	Labor	Conclusion of engagement plus 7 years.	
☐	Litigation - General	Conclusion of engagement plus 7 years.	
☐	Litigation - Appellate	Conclusion of engagement plus 7 years.	
☐	Merger and Acquisition	Conclusion of engagement plus 7 years.	
☐	Municipal	Conclusion of engagement plus 7 years.	
☐	Personal Injury - Adults	Conclusion of engagement plus 7 years.	
☐	Personal Injury - Minors or Legally Disabled Individual	If minor(s) and/or disabled individual(s) involved, until the later of the youngest child reaches the age of majority plus 7 years OR the removal of the disability plus 7 years.	
☐	Products Liability	Conclusion of engagement plus 7 years.	
☐	Real Estate Transaction	Conclusion of engagement plus 7 years.	
☐	Regulatory	Conclusion of engagement plus 7 years.	
☐	Securities	Conclusion of engagement plus 7 years.	

Notes:

A legal matter may fall into more than one of the categories set forth above. If so, use the longest retention period.

There are many exceptions to the general guidelines set forth above. For instance, if you or your client have entered into an agreement to maintain certain materials, this should be taken into consideration. Or, if you or your client know or have reason to know that file contents would be material to a potential civil action, the documents should be kept for the purpose of avoiding a spoliation claim or presumption. Moreover, if another law applies, such as the Uniform Preservation of Private Business Records Act., 805 ILCS 410/1, *et seq.*, or the Illinois State Records Act of 1957, 5 ILCS 160/1, *et seq.*, and requires preservation of records for a longer period of time, the longer period should control.

Documents of independent legal significance, such as original wills, trusts or deeds, if not returned to the client should be retained indefinitely.

Before a file is destroyed, the lawyer responsible for the engagement or another responsible lawyer with the firm should review the basis for establishing a file-destruction date, as circumstances may have changed which should necessitate a re-evaluation of the file-destruction date. For instance, if it is known that the client or an intended third-party beneficiary of the engagement became legally disabled after the engagement concluded, the file should be preserved until 7 years after the disability is removed.

DISCLAIMER: This checklist is intended to be an example that may be useful in developing your own policies and procedures and in creating your own file retention and destruction policy. Determining what documents may be destroyed and when, if at all, the documents may be destroyed will turn on the particular nature of each engagement. This is not intended to be legal advice and should not be relied upon as such.

File Retention & Destruction: File Closing Form – Internal Process

Client Name: _____ File No.: _____

File Title: _____ Matter Code: _____

Responsible Attorney(s): _____/_____/_____ Closing Date: _____

Attorney Responsible for Final File Closing Review: _____

Materials Returned to Client	Date / Means of Return
_____	_____/_____
_____	_____/_____

Materials to be Retained

_____

_____

Materials to be Destroyed

_____

_____

Date File Closing Letter Sent to Client: _____

Date Signed Acknowledgement Letter Re Returned Materials Received from Client:

_____

Comments/Notes:

_____

_____

File Retention & Destruction: File Destruction Authorization Form

RE: [File Name and Close File No]

I, _____, the responsible attorney on this case, have reviewed this file and found:

_____ It has been over ten (10) years since the file was closed.

_____ I have examined the file and have found no client property in it or have returned any
and all client property found.

_____ I have examined the file and found no reason to retaining it.

_____ The pending destruction letter has been sent to the client and the client has either consented or there has been no response from the client.

This file may, therefore, be purged from the closed file archive and destroyed.

[Firm Name]

_____

[Attorney Name]

_____

Date

[Date]

A & C, Ltd. 111 Main Street
Chicago, IL 60000

RE: ***Smith v. Jones***

Dear ***Ms. A:***

□ We choose to have ***A & C, Ltd.*** continue to handle the above-referenced file in the future.

□ We choose to discharge ***A & C, Ltd.*** and transfer the above-referenced file to ***B & Associates.***

□ We choose to transfer our file to the law firm of ***[new law firm]***, thereby discharging the firm of ***A B & C, Ltd.***

With respect to any files which we have decided to transfer to ***[new law firm]***, please make arrangements to transfer those files promptly in an orderly manner. We recognize that ***A B & C, Ltd***. has a compensation claim for services rendered and expenses advanced on our behalf to date.

_____
Signature

_____
Print Name

_____
Date

Backup Lawyer: Checklist – What to Look for in a Backup Lawyer

- Is the potential backup lawyer skilled?
- Is the potential backup lawyer dependable?
- Is the potential backup lawyer trustworthy?
- Does the potential backup lawyer have a good reputation within the legal community?
- Does the potential backup lawyer practice in the same area of law (*e.g.*, estate planning or criminal defense litigation) for which you may need their services?
- Does the potential backup lawyer practice in the same geographical area?
- Has the potential backup lawyer been disciplined by any disciplinary or regulatory authority?
- Does the potential backup lawyer carry adequate professional liability insurance?
- Do you trust the potential backup lawyer to maintain your legal practice in your absence?

Backup Lawyer: Checklist – Initial Setup of Backup-Lawyer System

- **Due diligence.** Before deciding upon a backup lawyer, conduct a thorough due diligence process relative to candidates for the position. See the ***Checklist: What to Look for in a Backup Lawyer*.**
- **Obtain clients' informed consent.** Before entering into a formal agreement with a backup lawyer, you should obtain each client's informed consent to be represented by the backup lawyer in the event of your serious impairment, disability, or incapacity. Your clients' consent should be confirmed in writing, either via a signed letter or an engagement/retainer agreement or supplement thereto. For new engagements, use an engagement/retainer agreement that contains the appropriate disclosure of your backup-lawyer agreement.
- **Prepare and maintain a list of open client matters.** The list should identify each matter and should indicate for which matters you have obtained written informed consent from the client to use a backup lawyer. The backup lawyer may only take over the legal representation of clients who have given their informed consent to the system. This list will be made available to the backup lawyer and will provide the backup lawyer with the necessary information to decide which clients they may assist.
- **Prepare a Backup-Lawyer Agreement.** You will need to prepare a proposed Backup-Lawyer Agreement to be executed by you and the backup lawyer. See the ***Sample Backup-Lawyer Agreement*** to get started. You may want to consider entering into a reciprocal Backup-Lawyer Agreement, whereby you will serve as a backup lawyer to your backup lawyer.
- **Designate an authorized signatory to your financial accounts.** Under optimal circumstances, your backup lawyer will not have direct access to your financial accounts. Rather, another lawyer should be appointed to exercise control over your legal practice's financial accounts if you are unable to do so. You should then introduce the authorized signatory and the backup lawyer to one another, as they will have to work together in the event of your serious impairment, disability, or incapacity. You will need to contact your financial institutions to ensure that your authorized signatory agreement will satisfy the financial institution's requirements.
- **Consult your estate-planning lawyer.** Depending upon the scope of your Backup-Lawyer Agreement, you may need to arrange for the disposition of your legal practice upon your death or permanent incapacitation. You should consult an estate-planning lawyer to incorporate instructions for the disposition of your legal practice into your estate plan and to coordinate plans for the disposition of your legal practice with your Backup-Lawyer Agreement.
- **Prepare and maintain a thorough Office Procedures Manual.** Your backup lawyer will be lost without a thorough, up-to-date manual detailing important information relating to your practice. The manual should include the following and should be updated as circumstances change:
    - A list of all open or active matters, including a clear identification of client(s) and whether the client has authorized the backup lawyer to provide services on their behalf (also, show the backup lawyer how to generate a current version of such a list, as they will need to do so to run a conflict check).

- If the status of the open/active matters is not clear from the foregoing list or a cursory look at the file, consider including a short status report.
- A list of all closed matters, including an identification of the client(s).
- A list of the financial institutions at which your firm has accounts, as well as the account numbers and the contact information for your authorized signatory. Consider providing the backup lawyer with access to view, if not edit, your trust-account ledger.
- Contact information for all office staff.
- Contact information for your spouse or other closest relative and the personal representative of your estate.
- The contact information for your firm's IT professional or vendor.
- A list of other vendors and/or individuals who provide the firm with other services.
- Instructions to access the following systems (including login and password):
  - File-management;
  - E-mail;
  - Voicemail;
  - Time-entry, billing, and invoicing.
- A description as to where files are kept and how they are organized.
- A description of the firm policy for preserving client files and records, including client property.
- A description as to where original client property, including documents, is kept.
- A description of office policies for hiring and paying vendors.
- An explanation as to how to access mail, if the firm has a post-office box or other mail-receipt service, and faxes.
- Instructions as to how to run a conflict check.
- If you have a safe-deposit box, consider providing information as to its location and how to access it. Otherwise, provide this information to your authorized signatory.
- If your office space is leased, provide the contact information for the property owner. Consider introducing your property owner or building management to your backup lawyer.

- **Introduce the backup lawyer to your practice.** Give the backup lawyer a tour of your office. Do the following during the tour:
  - Introduce the backup lawyer to your office staff, if any.
  - Identify for the backup lawyer where files and other important documents are kept.
  - Demonstrate how to use your e-mail, file-management, and calendaring systems.
  - Describe how to use your redundant calendaring system.
  - Explain your conflict-check procedures.
  - Ensure that the backup lawyer knows where to find the Office Procedures Manual (which should be kept in a secure location).

- **Provide the backup lawyer with access to your office.** If you choose not to give a key to your office to the backup lawyer, introduce the backup lawyer to someone, such as a family member or trusted member of your staff, who can provide the backup lawyer with access if necessary.
- **Stay up to date.** Ensure that all pending dates are calendared. Thoroughly document your files as though they are going to be transferred to another lawyer tomorrow. Maintain current time-entry and billing records.
- **Introduce the backup lawyer to your spouse or other closest relative and the personal representative of your estate.** In the event of your disability or death, the backup lawyer will likely have to coordinate with your family and personal representative.
- **Inform your carrier.** Provide the name and address of your backup lawyer to your professional liability insurer.
- **Disability and/or life insurance.** Consider obtaining disability and/or life insurance policies and naming your legal practice as beneficiary. If the backup-lawyer's services are needed, you will want to ensure that your practice has the funds necessary to remain open and functional. Your backup lawyer will not want to use their personal funds to fund the operation of your practice. Moreover, the backup lawyer may not be focused on ensuing that accounts receivable are paid promptly.
- **Update the Office Procedures Manual regularly.**
- **Conduct an annual review of your backup-lawyer system.** See ***Checklist: Annual Review of Backup-Lawyer System***.

Backup Lawyer: Checklist – Annual Review of Backup-Lawyer System

Having a functional backup-lawyer system requires regularly updating your Office Procedures Manual, keeping your backup lawyer apprised of significant changes in your firm, and conducting a yearly self-assessment of your Backup-Lawyer System. Below checklist to aid in your annual review.

- ☐ **Is the backup lawyer still the right backup lawyer for you?** Take time to reevaluate your choice of a backup lawyer based on the same criteria used to select the backup lawyer in the first place. Consider the following (see the ***Checklist: What to Look for in a Backup Lawyer***):
    - Do you still believe that the backup lawyer is skilled, dependable, and trustworthy?
    - Does the backup lawyer still have a good reputation within the legal community?
    - Has your practice changed? Has the backup-lawyer's practice changed? If so, does the potential backup lawyer still practice in the same area of law for which you and your clients may require their services?
    - Has the backup lawyer moved? Does the backup lawyer still practice in the same geographical area?
    - Has the potential backup lawyer been disciplined by any disciplinary or regulatory authority?
    - Does the potential backup lawyer still carry adequate professional liability insurance?
    - Do you still trust the potential backup lawyer to maintain your legal practice in your absence?

  If you no longer believe that the backup lawyer should serve in that role for you, restart the process of selecting a backup lawyer. Remember to terminate the Backup-Lawyer Agreement with the former backup lawyer.
- ☐ **Is your Office Procedures Manual current?** Go through the manual and ensure that every item is complete and up to date. For instance:
    - Are you still using the same case-management and docketing/calendaring software or other systems?
    - Do you still have the same vendors?
    - Do you still have the same policies and procedures?
    - Have you kept up on your efforts to memorialize and obtain consent from *every* client to use a backup lawyer? Does your client/matters list reflect this?
    - Has your will changed?
    - Have your passwords changed?
- ☐ **Has your estate plan changed?** If your estate plan has changed, consider how the change will affect your Backup-Lawyer Agreement and take any necessary action.
- ☐ **Has there been a significant change in your office staff or office procedures?** If so, consider giving your backup lawyer another tour of your office. Introduce the backup lawyer to new staff. Demonstrate new office procedures to the backup lawyer.
- ☐ **Renew your Backup-Lawyer Agreement.** Review the agreement and, if appropriate, update it to address any significant changes in your practice or your backup-lawyer needs.

Backup Lawyer: Sample Agreement

Below is a sample agreement for use as a template in situations where a backup lawyer will be taking over your law practice in the event of your impairment, disability, or incapacity. This is meant to be a starting point for the drafting of a Backup-Lawyer Agreement that will suit the particular needs of your practice, and which will be appropriate for your backup lawyer, as well.

The sample agreement does not provide for the planning lawyer to provide the backup lawyer with a power of attorney to take actions on the planning lawyer's behalf, including closing the law firm in the event of a permanent incapacity or death, nor does the sample agreement contemplate that the backup lawyer arrangement will survive your death. You should consult with your estate-planning lawyer before including any such provisions in your agreement or preparing a separate agreement to designate another individual to close your law practice. For solo practitioners, we recommend making a provision in your will for the disposition and, if appropriate, closing of your law practice in the event of your death.

Because the backup lawyer will be representing your clients and will thereby owe fiduciary duties to your clients, the backup lawyer should not serve as your lawyer or fiduciary, as conflicts of interest may result. As such, we recommend authorizing another individual to close your law practice in the event of your death or to coordinate with the backup lawyer in closing your practice in the event of a permanent impairment, disability, or incapacity.

The sample agreement contemplates that the backup lawyer will represent your clients and, as such, will receive confidential information from and relating to your clients; however, the backup lawyer will not be an authorized signatory to your financial accounts. We recommend that you enter into a separate agreement with another individual to serve as authorized signatory to your financial accounts.

The sample agreement provides that the backup lawyer will have discretion to determine when you have become impaired, disabled, or incapacitated such that the backup-lawyer's responsibilities under the agreement would commence. Depending upon your circumstances, it may be appropriate to have a spouse or close family member, a trusted member of your office staff or some other person determine when the agreement will become effective.

The sample agreement is not reciprocal in nature.

The sample agreement also does not provide for the funding of your law practice during your impairment, disability, or incapacity, other than to the extent that accounts receivable may be used for such purposes. You may want to consider purchasing a disability insurance policy or other insurance policy and naming your legal practice as beneficiary.

The sample agreement does not include an indemnification provision, whereby the planning lawyer will indemnify the backup lawyer for actions taken in good faith in connection with the backup-lawyer's role under the terms of the agreement. You may want to include such a provision.

The sample agreement also contains no provision restricting or purporting to restrict the backup lawyer from forming their own lawyer-client relationship with any of your clients either during the period of your incapacity or afterwards. You may wish to include such a provision, though you should be aware that agreements that purport to restrict a lawyer's ability to enter into a lawyer-client relationship are, in many cases, unenforceable.

SAMPLE AGREEMENT

This agreement (the "Agreement") is between [your name] (the "Planning Lawyer") and [the backup-lawyer's name] (the "Backup Lawyer") (the Planning Lawyer and the Backup Lawyer are referred to collectively as the "Parties") and is intended to protect the Planning Lawyer's clients and the Planning Lawyer's legal practice in the event of the Planning Lawyer's serious impairment, disability or incapacity.

1. Effective Date and Duration. This Agreement shall become effective upon Planning Lawyer's impairment, disability, or incapacity. This Agreement shall remain in effect during the pendency of the Planning Lawyer's impairment, disability, or incapacity or until otherwise terminated as addressed in Paragraph 9 herein.

2. Determination of Impairment, Disability, or Incapacity. The Planning Lawyer shall be considered to be impaired, disabled or incapacitated for the purposes of Paragraph 1 where such impairment, disability or incapacity is such that the Planning Lawyer is unable to practice law or is substantially limited in their ability to practice law. A determination whether the Planning Lawyer is impaired, disabled or incapacitated for the purposes of Paragraph 1 shall be made by the Backup Lawyer in their sole discretion. In making such determination, the Backup Lawyer shall act upon any reasonably reliable information, including but not limited to communications with members of the Planning Lawyer's family and, if available, the written opinion or opinions of one or more licensed physicians or other medical professionals responsible for care of the Planning Lawyer. By this Agreement, Planning Lawyer authorizes the disclosure of Protected Health Information to the Backup Lawyer.[5] The Backup Lawyer may also rely upon the opinions of other individuals with a close and continuous relationship with the Planning Lawyer, including their spouse, relatives, close friends, colleagues, and office staff.

3. Compensation. Planning Lawyer agrees to compensate Backup Lawyer a reasonable sum for services performed by Backup Lawyer pursuant to this Agreement, including acts of representation of Planning Lawyer's clients and acts otherwise taken in connection with the administration of Planning Lawyer's legal practice. Backup Lawyer shall maintain accurate, detailed time records for the purpose of determining the reasonable sum that shall be paid to Backup Lawyer.[6] Upon the termination of this agreement, Backup Lawyer shall provide to Planning Lawyer or, in the event of Planning Lawyer's continued impairment, disability or incapacity as defined in Paragraphs 1 and 2, above, or in the event of Planning Lawyer's death, to Planning Lawyer's representative, a complete and accurate accounting of the services provided by Backup Lawyer pursuant to this agreement.

4. Rights and Duties of Backup Lawyer. The Planning Lawyer consents to and authorizes the Backup Lawyer to take any action that the Backup Lawyer, in his sole judgment, reasonably deems necessary to represent clients of the Planning Lawyer in the event of the Planning Lawyer's impairment, disability or incapacity, including but not limited to the following:

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[5] The Planning Lawyer should execute HIPAA Authorizations identifying the Backup Lawyer and authorizing the disclosure of Protected Health Information to the Backup Lawyer upon the Backup-Lawyer's request.

[6] You may wish to include a provision mandating that disputes relative to the compensation provision of the agreement shall be submitted to arbitration.

A. **Representation of Clients.** The Backup Lawyer is authorized to represent each of the Planning Lawyer's current clients as of the effective date of this Agreement, subject to the requirement that the Backup Lawyer has conducted a conflict check in accord with Planning Lawyer's conflict-check procedures and has no conflict of interest with such client. Should Planning Lawyer have a conflict of interest with one or more clients, the Planning Lawyer shall take the actions to appoint an Alternate Backup Lawyer as set forth in Paragraph 5 herein as to any such clients and shall continue to represent any clients with whom no conflict exists. Should the Backup Lawyer commence legal representation of any of the Planning Lawyer's clients, the Backup Lawyer shall take reasonable steps to notify any such client of the same.

B. **Litigation and Settlement of Claims.** The Backup Lawyer is authorized to take any necessary action to litigate and/or settle claims on behalf of the Planning Lawyer's clients.

C. **Access to Office and Legal Files.** The Backup Lawyer is authorized to have complete, unfettered access to the Planning Lawyer's office, office equipment, client files and office administrative documents. This includes access to file-management systems, off-site storage, regular and electronic mail, and computer servers. This also includes the right to use the Planning Lawyer's electronic mail and regular mail to send mail as necessary for the representation of Planning Lawyer's clients. The access authorized pursuant to this paragraph and subparagraph does not include direct access to the Planning Lawyer's financial accounts, including client-trust and operating accounts.

D. **Communication with Clients.** The Backup Lawyer shall serve as counsel to Planning Lawyer's clients, subject to the limitations set forth in subparagraph A, above, and shall be entitled to and required to engage in communications with clients as set forth in the Illinois Rules of Professional Conduct and any other applicable disciplinary or regulatory rule.

E. **Maintain and Store Client Files.** The Backup Lawyer is authorized to take any necessary actions to maintain and store client files.

F. **Accounting.** The Backup Lawyer is authorized to provide a financial accounting and/or statement of legal services to any of Planning Lawyer's clients upon request. The Backup Lawyer is authorized to communicate with the authorized signatory to Planning Lawyer's financial accounts to accomplish such purposes.

G. **Return Client Property.** The Backup Lawyer is authorized to return client property upon appropriate request by a client of the Planning Lawyer.

H. **Charge and Collect Fees.** The Backup Lawyer is authorized to charge fees to Planning Lawyer's clients and to take necessary actions to collect fees from Planning Lawyer's clients, assuming no conflict of interest exists.

I. **Administration of Planning Lawyer's Practice and Payment of Business Expenses.** The Backup Lawyer is authorized to take any reasonably necessary action to engage in the day-to-day administration of Planning Lawyer's legal practice, including but not limited to payment of the usual and customary expenses of the Planning Lawyer's business, the employment of office staff and any tasks incident thereto.

J. **Conclude Legal Representation.** The Backup Lawyer is authorized to take any action necessary to conclude legal matters on behalf of Planning Lawyer's clients and to conclude the legal representation of Planning Lawyer's clients.

K. **Communications with Professional Liability Insurer.** Backup Lawyer is authorized to contact Planning Lawyer's Professional Liability Insurer to provide notice of any claims or potential claims. In the event of any such claims or potential claims, the Backup Lawyer shall cooperate with Planning Lawyer's Professional Liability Insurer.

5. Alternate Backup Lawyer. In the event that Backup Lawyer is unwilling or unable to represent any of Planning Lawyer's clients, by virtue of a conflict of interest, lack of experience or competence, or otherwise, the Planning Lawyer authorizes the Backup Lawyer to appoint an alternative backup lawyer (the "Alternate Backup Lawyer") to carry out the purposes of this Agreement. Upon execution of this Agreement, the Alternate Backup Lawyer shall have all of the rights, duties and obligations of the Backup Lawyer under this Agreement, subject to those rights, duties, and obligations exclusive to the Backup Lawyer, except that in no event shall an Alternate Backup Lawyer appoint an alternative backup lawyer.

6. Backup Lawyer Is Not Counsel for Planning Lawyer. Backup Lawyer is not the attorney for Planning Lawyer, and nothing contained within this Agreement shall create an attorney-client relationship between Backup Lawyer and Planning Lawyer. Backup Lawyer may, at their sole discretion, inform the Planning Lawyer's Professional Liability Insurer of any errors or potential errors. Backup Lawyer may also, at their sole discretion, inform clients of Planning Lawyer of any such errors or potential errors and, under such circumstances, shall advise such clients to obtain independent legal advice in connection therewith. Backup Lawyer may also, at their sole discretion, inform any applicable regulatory or disciplinary body of any violations of the Illinois Rules of Professional Conduct or other applicable regulatory or disciplinary rules.

7. Preservation of Client Confidences and Attorney-Client Privilege. Backup Lawyer shall comply with Rule 1.6 of the Rules of Professional Conduct. Backup Lawyer shall take reasonable measures to protect the confidential nature of confidential information learned by or shared with them in the course of their activities as Backup Lawyer pursuant to this Agreement, including in the course of representation of Planning Lawyer's clients. Backup Lawyer is authorized to disclose confidential information to the extent reasonably necessary to carry out the representation of Planning Lawyer's clients.

8. Avoidance of Conflicts of Interest. Before taking any action to represent any of Planning Lawyer's clients, Backup Lawyer shall conduct conflict checks in accord with Planning Lawyer's conflict-check procedures and shall further confirm that there exists no conflict of interest with any such client. This conflict-check procedure shall include a review of Backup Lawyer's own list of clients and client matters. Backup Lawyer shall also create a list of Planning Lawyer's clients with whom an attorney-client relationship is created by virtue of or in connection with this Agreement and Backup Lawyer shall use such list when performing conflict checks relative to Backup Lawyer's own practice. In the event that a conflict of interest is present, Backup Lawyer shall act appropriately to ensure that client confidences are not revealed or shared and shall further give consideration to whether the Backup Lawyer may continue to represent their own client in light of the fact that confidential information has been obtained by virtue of or in connection with this Agreement.

9. Termination of Agreement. This Agreement shall terminate upon (1) the Backup Lawyer's determination that the Planning Lawyer's impairment, disability or incapacity as defined in Paragraphs 1 and 2 has ceased, terminated or concluded and the Backup Lawyer's written notice to the Planning Lawyer of the same; (2) delivery of written notice of termination, with or without cause, by the Backup Lawyer to the Planning Lawyer and the Planning Lawyer's representative; or (3) delivery of written notice of termination, with or without cause, by the Planning Lawyer or the Planning Lawyer's representative, a legally appointed Guardian over the person of the Planning Lawyer, or the Executor or Administrator of the Planning Lawyer's estate to the Backup Lawyer. Termination shall be effective three (3) business days following delivery of such notice. Termination of this Agreement on the foregoing terms is subject to and limited by any legal or ethical requirement that the Backup Lawyer continue the legal representation of one or more of Planning Lawyer's clients undertaken pursuant to this Agreement. Upon termination of this Agreement, Backup Lawyer shall return to Planning Lawyer or, in the event of Planning Lawyer's continued impairment, disability or incapacity as defined in Paragraphs 1 and 2, above, or Planning Lawyer's death, to Planning Lawyer's representative, any files, records or

other property of or relating to Planning Lawyer's legal practice and/or Planning Lawyer's clients. Backup Lawyer shall, and is hereby authorized to, maintain a list of clients that Backup Lawyer represented or whose confidential information Backup Lawyer accessed in connection with this Agreement.

10. Nature of Relationship. The relationship of the Backup Lawyer to the Planning Lawyer as established by and described in this Agreement is that of an independent contractor. Nothing in this Agreement shall be construed to create any agency or employment relationship between the Planning Lawyer or any of its employees, on the one hand, and the Backup Lawyer, on the other hand.

11. Minimum Insurance. At all times during the pendency of this Agreement, the Planning Lawyer and the Backup Lawyer shall maintain in place minimum professional liability insurance with policy limits of $250,000 per claim and $500,000 in the aggregate.[7]

12. Notice. All notices to Planning Lawyer, the Planning Lawyer's representative and the Backup Lawyer shall be given by electronic mail as well as overnight courier or certified mail return receipt requested and shall be effective upon receipt, as follows:

If to Planning Lawyer, to: [identify name, address, and email address]

If to Planning Lawyer's representative, to: [identify name, address, and email address]

If to Backup Lawyer, to: [identify name, address, and email address]

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date indicated by each signature below.

PLANNING LAWYER

_____ _____
[Planning Lawyer name] **Date**

BACKUP LAWYER

_____ _____
[Backup Lawyer name] **Date**

[7] You may wish to require that the Backup Lawyer carry a more significant amount of insurance. If you operate a limited liability legal practice, at a minimum, both you and the backup lawyer should carry sufficient insurance to comply with Illinois Supreme Court Rules 721 and 722.

ALTERNATE BACKUP LAWYER

[Alternate Backup Lawyer name] **Date**

[vii] See Rule 1.16, Illinois Rules of Professional Conduct, for ethical guidelines concerning withdrawal from representation and termination of the lawyer-client relationship. Specifically, when withdrawing from representation, you must take reasonable steps to avoid foreseeable prejudice to the rights of the client, including the following:

a. giving due notice to the client in writing;
b. allowing time for employment of other counsel;
c. delivering to the client all papers and property to which the client is entitled; and
d. refunding promptly any part of the fee that was paid in advance, but which has not been earned.
e.

[viii] If you are withdrawing from a plaintiff's matter, it is suggested that you provide the client with as much notice as possible before the statute of limitations expires.

[ix] It is recommended that you provide the client with a summary of the status of his/her matter, including any impending deadlines for uncompleted activities. Example: "Answers to interrogatories are due on or before ***[date]***, and the failure to complete them may result in court-ordered sanctions."

[x] If you are asserting a retaining lien over the client's file, it may be appropriate to delete this sentence; however, recall that Rule 1.16 requires a lawyer to take reasonable steps to avoid foreseeable prejudice to the rights of a client. Depending upon the circumstances, this may include returning original client documents and/or other client property.

[xi] It is suggested that you provide a status on your fees. If you are waiving any uncollected fees, state that in your letter. If you intend to assert a retaining lien, we suggest the following language:

"Please be advised that by reason of the outstanding invoice for fees and costs, we have the right to retain certain of your property in our possession in exercise of our retaining lien rights. We would much prefer to work out a mutually agreeable method of payment and delivery of property. Please contact us to achieve that goal."

Disclaimer

This booklet includes loss prevention techniques designed to reduce the likelihood of being sued for legal malpractice. It is not the intent of these materials to suggest or establish practice standards or standards of care applicable to a lawyer's performance in any given situation. Rather, the sole purpose of these materials is to assist lawyers insured by ISBA Mutual in avoiding legal malpractice claims, including meritless and frivolous claims. To that end, the intention is to advise lawyers insured by ISBA Mutual to conduct their practice in a manner that is well above the accepted norm and standards of care established by substantive legal malpractice law. The recommendations contained in these materials are not necessarily appropriate for every lawyer or law firm and do not represent a complete analysis of each topic.

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