Chapter 1

INTRODUCTION

Any arrangement governing the transfer of property is an estate plan, and the process by which these arrangements are formulated is estate planning. Despite high income taxes, costs of living (and sometimes the health care costs of dying), expenditures for dependents, and other expenses or extractions, many people possess or control sufficient wealth to make careful estate planning important. This text introduces some of the myriad issues that must be addressed to transfer property in ways that preserve its maximum utility and the benefits it may bestow.

Statutes of descent and distribution determine to whom property passes, to the extent a person dies intestate (without a valid will). Thus, we each have the default estate plan provided by state law unless we create different plans by will or other device, including inter vivos transfers. Wills are ambulatory (they do nothing during the testator's life). In contrast, outright gifts transfer complete ownership and control of property immediately. Between these two extremes are various devices such as concurrent ownership (e.g., tenancy by the entirety, joint tenancy with right of survivorship, joint bank accounts, and jointly owned government bonds), revocable or irrevocable inter vivos trusts, and retirement benefit or life insurance beneficiary designations.

It is difficult to dispose of an entire estate solely by effective inter vivos arrangements. So no matter what else is done, wills are essential to most estate plans. For example, joint tenancy with right of survivorship avoids the need for a will only until the last tenant dies. Each concurrent owner needs a will because the survivor of them may not have time (or the requisite capacity) to make a will when the need becomes clear.

Comprehensive estate plans deal with many forms of wealth, including tangible and intangible property, cash, or real estate owned individually or jointly; business interests owned individually, in partnership form, or incorporated and represented by closely held stock; property held in trust, sometimes subject to a power to revoke or appoint; life insurance; and social security or other deferred compensation or retirement benefits. An estate plan also should anticipate expectancies that may accrue under trusts or wills of other people.

Many factors determine the most intelligent plan for a particular estate. Over 99% of all decedent estates are not subject to federal wealth transfer taxation because they fall below the federal estate tax "applicable

exclusion amount" ($1.5 million in the year this book was published, potentially rising to $2.0 million and then $3.5 million if certain changes adopted by Congress in 2001 actually occur). Even if an estate is subject to federal, state, or foreign taxation, the best estate plan may not be the one that minimizes taxes. Irrespective of taxation, estate planning may be more important for individuals with smaller estates because poor planning wastes money that beneficiaries of small estates can ill afford. In addition, nontax considerations often should influence the plan. These might include the business or financial acumen of intended beneficiaries; whether minor, disabled, or otherwise incapacitated beneficiaries are involved; the nature and location of property subject to the estate plan; the need for asset protection and flexibility to meet changing conditions; the significance of probate costs and delay; and expected costs of operating a trust or other property management or dispositive devices.

Also regardless of taxation, planning relative to small and large estates basically is the same. In both instances we seek to accomplish the most effective disposition with the least possible diminution in value. Although large estates may present a greater variety of problems, almost any problem arising in a large estate may be encountered in a smaller one. Indeed, smaller estates often present more challenges because the range of available solutions may be more limited. Thus, accomplished estate planners should be equipped to work effectively with large and small estates alike.

No artificial distinction or division between small and large estates is sensible for estate planning purposes. Any particular estate may be too small to employ certain arrangements, while the same estate may be regarded as large for other purposes. Moreover, some techniques may not be appropriate in *large* estates. Nevertheless, the asset value of an estate is significant. For example, inter vivos gifts usually are sensible only if adequate funds remain for the donor's own needs. Thus, inter vivos gifts typically are not relevant in planning a small estate, unless there is a practical assurance that the assets will be available to meet the donor's needs. So, whether gifts should be made depends on such factors as the donor's age and foreseeable needs, the nature of the property involved, and the donees.

A person whose estate is too small to make inter vivos gifts to place property in a revocable inter vivos trust still might avoid probate delays and expenses. The value of property subject to disposition may be significant in deciding which types of interests to create in various intended beneficiaries. Often other factors (such as the beneficiary's age, net worth, inexperience in managing property, or the beneficiary's own estate planning goals) may justify placing even very small dollar amounts in trust. Normally, however, long-range trusts will not be employed for smaller estates, although for a short duration almost any type of trust might be appropriate without regard for the amount involved. Trustee fees and

the requisite level of expertise may affect the decision to employ a trust. A professional trustee's fees may be too costly but individual trustees (who may be available for less) may not be qualified or appropriate.

In smaller estates life insurance frequently is a principal asset, making it important to choose between leaving the proceeds with the insurance company under a beneficiary settlement option and paying them outright to a designated beneficiary or to an insurance trust. Whether the insured should continue to own the policy becomes an increasingly important issue in estates that are large enough to be subject to federal estate tax.

Finally, even a person with little other wealth may possess a power to appoint substantial assets held in a trust created by someone else (e.g., a surviving spouse who may appoint property in a trust created by a predeceased spouse). The same problems may be involved in determining whether to exercise the power, and the types of interests to create, as arise in a large estate of owned assets to be disposed of by an estate plan. Already you can see that this can get complicated in a hurry, and not just in big or taxable estates.

Estate Planning As A Profession

Before undertaking a course in estate planning you may ask what this specialty is about, who concentrates in it (and why), and where it is heading.

Estate planning constantly undergoes change, perhaps more than any other specialty within the legal profession. At one time it involved predominantly drafting wills and trusts and probating estates; its practitioners were scriveners with fiduciary skills. In the 1950s and 1960s it went through a transition into a much more intensely tax-oriented practice. Many property-based lawyers acquired the skills of a new breed of practitioner to keep abreast of the tax factors that drove much of the estate planning practice for nearly the past half century.

Through the last quarter of the 20th century Congress enacted significant legislation aimed at minimizing tax gaming. Estate planners learned to cope with a tax environment that became much more hostile. The profession also became much more stratified because Congress took more and more people out of the wealth transfer tax system by steadily increasing the base exemption level. Today the tiny portion of the decedent population in America that is subject to wealth transfer taxation will shrink further if phased-in changes in exemption levels occur as legislated by Congress in 2001. Whether the tax is repealed, restored, or reformed, for 99% of the population federal wealth transfer taxation need not be the defining catalyst or concern for most estate planning. However, as the federal wealth transfer tax wanes, *state* taxes and federal *income* taxes are revitalized and remain relevant.

Along with all this tax change, and perhaps a reason for the tax climate, has been a major change in American demographics. The population has gotten older as individual life expectancies have increased. As a result, the estate planning practice changed to reflect the needs of an aging population. Indeed, a new elderlaw specialty arose, related to estate planning enough that parallel concerns and expertise sometimes apply to certain clients.

Although we lack a better term, traditional "estate planning" does not fully encompass what specialists in these areas do for clients today. The historical trusts and estates practice became the estate planning practice of the mid-to-late 20th century by embracing tax as well as more historical wealth transmission problems. The latest transition is from the tax-driven estate planning practice to an even more diverse endeavor. Today the practice encompasses a broad range of services that touch on every aspect of a family's financial life and may entail working with several generations of family clients. Invariably the practice includes state and federal income tax, state or federal wealth transfer taxation, state and local property taxation, and even international taxation in some cases. It also involves traditional will and trust drafting, probate, and other forms of fiduciary administration.

These lawyers still draft and revise dispositive documents and assist in the administration of estates and trusts. But some also engage in investment and financial counseling and most cannot avoid broader issues involving insurance, retirement benefits, closely held businesses (particularly succession planning), traditional portfolio investments, property management, health care and governmental benefits law, matrimonial and family law, planning in anticipation of incapacity (that is, planning for people who are going to *live* as well as for those who are going to die), and a range of other related activities.

These lawyers structure gifting programs, prepare business agreements, and plan dispositions that minimize tax and administrative costs or that qualify (or preserve qualification) of donors *or* donees for entitlement programs. These advisors may represent or serve as fiduciaries, and frequently fill the role of counselor, arbitrator, psychologist, and friend in addition to being a client's "lawyer." This latest transition represents a challenge and an opportunity to the practicing bar and provides fulfillment on both intellectual and personal levels. As compared to many of the controversy aspects of the legal profession, there is more heart-food and "everyone wins" potential in this endeavor.

Unfortunately, the future of the traditional estate planning profession is a bit uncertain because the personal counseling needs of the general public are not being served adequately by many traditional estate planners. Starting some time ago, far-sighted commentators identified changes in the desires and needs of the public and the necessary redirection of the profession that serves them. Although not written so long ago, these

authors proved to be way ahead of their time. See Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988) (hereafter cited as *Langbein*); Eubank, *The Future for Estate Lawyers*, 10 REAL PROP., PROB. & TRUST J. 223 (1975); Cantwell, *The Probate and Trust Lawyer in 2000 A.D.*, 10 REAL PROP., PROB. & TRUST J. 233 (1975). Traditional estate planning as a practice specialty is expanding to serve clients who need a total plan that considers their lifetime and testamentary goals. This largely explains the recent explosive growth in "financial planning" and other ancillary services.

Education and Practice Concerns

It is important to recognize that developments in the law and practice have not occurred suddenly (indeed, at the highest and very low ends of the client spectrum they are not relevant at all). Moreover, although there has been a significant change in the nature and scope of the practice, the dimensions and reasons for that change only now are becoming clear and some uncertainty remains, particularly as Congress waffles about wealth transfer tax repeal.

Direction of the Profession

At some law firms the traditional estate planning practice has produced a decreasing percentage of the firm's total billings. Some firms are reluctant to make new partners in this department. This especially was true during the "go-go" decades at the end of the 20th century. Moreover, the *perception* in some quarters is that traditional estate planning is not intellectually demanding because it involves mainly the production of documents that "a trained monkey at a word processor" could mass-produce. If that were true, how would the monkey decide which document to churn out?[1]

All of these *perceptions* are inaccurate. In addition to handsome compensation that tends to be much more steady than other "on-again, off-again" specialties (such as investment capital markets and bankruptcy), estate planners enjoy the psychic benefits of doing good on an intimate basis, working for real people with truly human needs, responses, and emotions. Moreover, the latest transitions have improved both the nature and scope of the practice and the perception by outsiders of the challenges and values involved. Still, it is easy to understand why misperceptions exist.

Inheritance Has Changed

Some misunderstanding of the role and function of estate planners is attributable to two fundamental changes in the nature of modern

1. Some pundits also would say that the once highly revered mergers and acquisitions practice resembled "a bunch of monkeys trading bananas." Let's not fling these charges around.

inheritance. First, educating children is the principal form of wealth transfer in many families. Parents (and often grandparents) often do not (get to) wait until death to transfer their wealth. Second, wealth accumulated before retirement often is held in a pension payable as an annuity that will terminate at death; no pool of capital remains after the annuitant dies. Add a third reality, the high cost of end-of-life health care, and these lifetime uses of property mean that "[t]ransfer on death, the fundamental pattern of former times, is . . . ceasing to characterize the dominant wealth holding and wealth transmission practices of the broad middle class." *Langbein* at 745-746.

These changes have influenced how many middle-class clients view the estate planning profession. In addition, the legal needs of the public with respect to inheritance today, and the perceived role and function of estate planning lawyers, are affected by the fact that property ownership often favors nonprobate assets and probate simplification. This means that legal services are less often required in the transfer of wealth that passes at death. Says Langbein, "one of the worst consequences of the nonprobate system is that it tempts people into the mistake of thinking that avoiding probate is the equivalent of estate planning." *Id.* at 749. Thus, both the actual and the perceived nature of wealth transfer planning has changed.

Tax Law Changes

A second (and perhaps more obvious) reason for change in the perception of traditional estate planning relates to tax laws. In large measure the futurists were right when they predicted that adoption of the unified credit (sheltering $1.5 million from tax at death after 2003, and slated to rise even further) would greatly diminish the number of clients for whom *tax* planning is necessary. Today, planning for the most significant percentage of clients involves less wealth than the applicable exclusion amount of the unified credit. For all but the richest 1% planning is not a tax-oriented endeavor.

On the other hand, the futurists could not have anticipated the astounding number of tax law changes that have made it necessary to review existing plans for clients with substantial wealth, often on an annual or biannual cycle. With this need to do renewed planning comes the need to do on-going, nearly continuous research and development to devise responses to tax and other law changes. All of this has significantly affected the traditional estate planning practice, increasing the intellectual challenge for lawyers with clients of both modest and substantial wealth.

The need for research and development poses a significant cost, and many lawyers who traditionally did estate planning work cannot afford to devise the necessary responses. Many now choose to limit their practice to the nontaxable 99% of the population and, in the process, limit their malpractice liability by eliminating those plans with the greatest risk of disruption caused by tax law changes. These estate planners have simply

chosen not to serve clients who have more sophisticated tax-related needs. Thus, attorneys who serve estate planning needs have become stratified and the costs of change have decreased the profitability of those who have remained in the taxable side of the profession. In a word, the specialty has become more demanding for high end planning.

Demographics

Furthermore, many law firms that have confronted the changing demographics of clients with moderate to substantial wealth have done so in a nonintuitive way. Surprising about their perception of the estate planning specialty is that the number of clients with traditional estate planning and personal counseling needs is expanding even as the tax laws reduce the need for tax driven planning. For example, the baby boomers of the post-War years are now at that stage in their lives when, for the first time, they are seriously considering their need for quality professional estate planning services. They have families, realize that mortality is a reality, and they have financial commitments that must be guaranteed even as they finally are becoming financially established. When their parents ultimately die they may inherit far more wealth than any prior generation. Meanwhile the elderly are living longer, meaning that added generations of older clients are still alive today and their heirs wait longer to inherit.

For the lack of anyone else to adequately service their needs, older-elderly clients bring to estate planners a raft of problems that seldom were considered not so long ago. These include planning for retirement and (later) for the possibility of incompetence, planning for health care or the termination of life support systems, and planning involving government entitlements (benefits such as social security and Medicaid). The perception of the estate planning profession has improved as more lawyers have expanded their practice to serve these needs. Moreover, some other professionals who have attempted to service these needs are unable to do as complete a job as estate planning and elderlaw attorneys. Thus, significant opportunities await counselors who are able to satisfy these demands.

Shrinking Talent Pool

All that being said, the number of clients with unmet needs is increasing faster than the number of professionals who are positioned to serve them. Today the profession is lean and a great need exists for advisors who are positioned to assist this burgeoning cadre of clients, virtually all with nontaxable estates. Unfortunately, there may be no other practice area that takes as long to master.

The need for full-service counselors in this area cannot be met overnight. Lawyers with vision who perceive these trends and develop their skills have a significant competitive edge. Those lawyers are eager to hire bright, talented young attorneys who recognize the evolution of

traditional estate planning and the significant demand for it. These practitioners likely are the best prospects as mentors for those who are new to this area of practice, and the mentor relation is especially important given the length of the learning process and the steep pitch of the learning curve.

Litigation and Malpractice

In addition to directing their services to previously unmet client needs, some traditional estate planners are being thrust into negotiation and litigation (controversy) work more than ever before. In fact, some traditional estate planners report that they now serve two markets. They provide estate planning and estate administration services in the first. In the second, they help to cure mistakes by assisting clients who received inadequate assistance from others, whether in the form of improper drafting, inadequate tax planning, imprudent investment advice, or otherwise deficient fiduciary services.

Given all that goes into the estate planning endeavor, it is predictable that mistakes occur, That risk raises questions about the extent of malpractice liability. One popular misconception is that this area of practice is so complex that certain mistakes are prima facie nonactionable. Thus, there is a notion that some elements of the art are beyond mastery, and this notion is augmented by a community standard defense (which is made unreliable by the inability to define the proper "community" in which to measure the average or minimum competence of estate planners in general).

The most commonly miscited example of this is the malpractice liability of the attorney who prepared the testamentary trust that violated the Rule Against Perpetuities in Lucas v. Hamm, 364 P.2d 685 (Cal. 1961). Involved was the so-called administrative infinality or administrative contingency rule (which presumes that any ministerial act could last forever). The trust was distributable five years after probate administration of the settlor's estate terminated, which might occur after expiration of the permissible period of the Rule. The court held that failure to anticipate this special aspect of the Rule Against Perpetuities was not negligence, explaining that the trust actually would violate the Rule only if estate administration might not be completed within the period of lives in being plus 16 years, and that the likelihood of such a delay was so remote that an attorney exercising ordinary skill in the same circumstance might make the same mistake.

Contrary to many popular misconceptions and statements about the case, the court did *not* accept the attorney defendant's blanket assertion that the Rule Against Perpetuities is so difficult that any violation is excusable. Indeed, the intermediate court specifically noted that general practitioners who are faced with a difficult aspect of a specialized subject must seek an expert's aid. Although that court's imposition of liability on

the attorney was reversed, the California Supreme Court also rejected the argument that no perpetuities violation can be malpractice.

Far more interesting about *Lucas* was the high court's treatment of the attorney defendant's argument that the plaintiff, who was a disappointed beneficiary under the trust, had no standing to sue because the plaintiff was not the client and therefore was not in privity of contract with the attorney defendant.[2] The personal representative of an estate (or the trustee of a negligently drafted trust) may have no standing to sue to recover damages suffered by intended beneficiaries because the fiduciary entity often is unaffected by an attorney's negligence. For example, unless additional taxes or administration expenses are incurred, the estate may be unreduced by a mistake that alters the relative interests of the estate's beneficiaries. So the *Lucas* plaintiff relied on an earlier landmark case, Biakanja v. Irving, 320 P.2d 16 (Cal. 1958), which rejected the privity defense in a negligent will drafting situation and created instead an exception to the privity defense in the estate planning context as a matter of public policy.

According to *Biakanja*, liability will be imposed if (1) the estate planning engagement was intended to benefit the plaintiff, (2) the plaintiff's harm attributable to the attorney's mistake was foreseeable, (3) it is certain that the plaintiff suffered injury, (4) the connection between the defendant's conduct and the injury was immediate, (5) there is a strong public policy of preventing future harm that is fostered by imposing liability on the attorney notwithstanding the plaintiff's lack of privity, and (6) the imposition of attorney liability to beneficiaries of negligently

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2. Although some courts are still insulating attorneys from liability, based on the notion that beneficiaries of an estate plan cannot sue the drafter without privity of contract, many more courts are holding that an attorney who fails to properly craft an estate plan to qualify for certain common benefits or to effect the desires of the contracting client will be held liable to disappointed beneficiaries. There is abundant authority supporting a strict privity requirement, but most of it is not current. Indeed, one report found only six states in which relatively recent cases specifically respect the privity defense in an estate planning context. Beglieter, *First Let's Sue All the Lawyers — What Will We Get: Damages for Estate Planning Malpractice*, 51 HASTINGS L.J. 325, 327 n.19 (2000) (Maryland, Nebraska, New York, Ohio, Texas, and Virginia). See, e.g., Noble v. Bruce, 709 A.2d 1264 (Md. 1998); Lilyhorn v. Dier, 335 N.W.2d 554 (Neb. 1983); Deeb v. Johnson, 566 N.Y.S.2d 688 (App. Div. 1991); Weingarten v. Warren, 753 F. Supp. 491 (S.D. N.Y. 1990) (applying New York law to preclude a malpractice case lacking privity between a trust remainder beneficiary and an attorney for the trustee); Simon v. Zipperstein, 512 N.E.2d 636 (Ohio 1987); Dickey v. Jansen, 731 S.W.2d 581 (Tex. App. 1987); Copenhauer v. Rogers, 384 S.E.2d 543 (Va. 1989). Cf. Estate of Arlitt v. Paterson, 995 S.W.2d 713 (Tex. Ct. App. 1999) (an action against attorneys that would be barred by the lack of privity may survive if the plaintiffs establish a breach of duty not to commit "negligent misrepresentation," which the court stated differs from malpractice (although the court did not articulate in what sense); in addition, the decedent's surviving spouse may survive the privity defense if the attorney represented both spouses jointly, as is the practice of virtually all estate planners who represent married couples). Subsequently, Robinson v. Benton, 842 So. 2d 631 (Ala. 2002) (the client died before the attorney complied with the client's request to destroy an existing will and draft a new one), concluded that privity is a requisite in Alabama as well. See also Nevin v. Union Trust Co., 726 A.2d 694 (Me. 1999) (denying a beneficiary's action against a drafting attorney on privity grounds, but only because the decedent's personal representative could assert the cause of action).

drafted estate plans does not impose an undue burden on the legal profession.

This result favors a disappointed beneficiary's tort or third party contract action to redress an attorney's estate planning mistakes. Today the privity defense is a minority rule in the estate planning context. Among the factors noted, the two common sticking points in proving a malpractice case are whether it is certain that the plaintiff suffered an injury and whether imposition of liability imposes an undue burden on the attorney.

To illustrate, consider an allegation that the decedent intended to benefit the plaintiff in an amount greater than the will bequeaths. Typically the issue is (1) whether the plaintiff may introduce extrinsic evidence of the decedent's alleged intent and (2) whether the burden on the drafting attorney to disprove this alleged intent to avoid liability many years after the estate planning representation ended is too great. Some cases (such as mistakes in execution or the proper application of state law relating to the rights of a pretermitted heir) present much easier facts to address in this connection.[3] On the other hand, a case alleging that an attorney failed to follow a testator's instructions about the inclusion or amount of a bequest would pose a far more difficult situation.

Perhaps the most daunting aspect of malpractice exposure for estate planners is that the statute of limitation may not *begin* to run until the plaintiff should have discovered the error, which in many cases is not until the estate planning client has died. See, e.g., Heyer v. Flaig, 449 P.2d 161 (Cal. 1969) (the continuing nature of the attorney's malpractice and the fact that there were no beneficiaries who could allege a loss until the testator's death prevented the running of the statute of limitation before the testator's death). In a few jurisdictions the statute of limitation is said to begin running when the attorney ceases to represent the client. In estate planning, this typically produces the same result because the representation normally ends only when the client dies. And it has been held that a claim for malpractice may survive even the attorney's death notwithstanding the common assertion that some issues are not worth worrying about because,

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3. See, e.g., Guy v. Liederbach, 459 A.2d 744 (Pa. 1983) (plaintiff, as a named beneficiary and the designated personal representative was directed by the defendant attorney to sign the will as a witness, which invalidated both the bequest and the appointment); Heyer v. Flaig, 449 P.2d 161 (Cal. 1969) (will that intended to benefit testator's two children negligently failed to preclude testator's postexecution spouse from claiming a statutory share); Stowe v. Smith, 441 A.2d 81 (Conn. 1981) (alleging that the decedent intended to provide for distribution of a trust to the plaintiff when the plaintiff reached the age of 50 and distribution to the plaintiff's descendants only if the plaintiff died prior thereto; the will called for distribution to those descendants on the earlier to occur of plaintiff's death or reaching the age of 50); Licata v. Spector, 225 A.2d 28 (Conn. 1966) (failure to procure the proper number of witnesses to the will); Needham v. Hamilton, 459 A.2d 1060 (D.C. 1983) (omission of residuary clause from will that attorney redrafted to insert an additional bequest); Auric v. Continental Casualty Co., 331 N.W.2d 325 (Wis. 1983) (attorney restated decedent's will and in the process failed to have the new will properly executed).

if they arise, it will be long after the *attorney* has died. McStowe v. Borenstein, 388 N.E.2d 674 (Mass. 1979).

Finally, it bears noting that ethics and malpractice are not the same, and that theoretically a violation of the ethics rules is not tantamount to malpractice. Model Rules of Professional Conduct Scope Comment [6] states:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.[4]

Nevertheless, the same activity that constitutes an ethics violation also may constitute malpractice, and some cases support attorney liability on the basis of an ethics violation.

Fiduciaries, investment advisors, financial advisors, and other professionals are facing increasing scrutiny and potential litigation. Indeed, with some de facto deregulation of the practice of law (nonlawyers performing tasks once regarded as the sole province of attorneys), there is a growing need for attorneys to help rectify problems or settle disputes. Some lawyers who harbor a desire to resolve disputes select estate planning to obtain the best of both worlds: a challenging office practice and a varied and sophisticated controversy specialty. The first requisite to that switch-hitting approach is knowing how things *should* be done, so as to know when they were done improperly.

Personal Counseling

Many traditional estate planners are meeting their clients' greater needs by becoming full service personal counselors who advise generations of family members about their myriad legal and related needs. Some attorneys report that their practice has evolved so that they are the primary provider of legal and other services relating to their clients'

4. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §74(2) (1999), stating that an ethics violation does not create a cause of action but may be considered on the question of lack of proper care.

wealth. They resolve legal questions of traditional estate planning dimensions, issues related to the operation of a closely held business, health care or retirement planning problems, conflict of interest and ethics concerns, and nonlegal questions such as how to make money work more profitably for the family. These lawyers are a new generation of specialist. In a sense, they are more generalized specialists who encompass more areas in their practice, rather than fewer.

As an indication of this generalized practice, consider a client whose child was arrested for driving under the influence or who is subject to domestic abuse. For several reasons that client is more likely to seek help from the lawyer who drafted the estate plan than from a lawyer who reorganized the family business or did a real estate deal or fixed an employment problem. A law school curriculum designed to encompass all the areas touched by an estate planner likely would include courses in property law (including joint ownership, encumbrances, gifts, and future interests); trusts and estates (including intestacy, powers of appointment, future interests, and fiduciary administration); income, corporate, partnership, and wealth transfer taxation; income taxation of trusts, estates, grantors, and beneficiaries; state, local, and foreign tax; business associations and business planning; estate planning; accounting theory; social security and retirement benefits law; elderlaw; and domestic relations or family law. This book presumes that only the first two courses are prerequisites. It assumes that you have no knowledge of taxation, because it is designed to be accessible to the greatest number of readers who can assist the greatest number of clients. The specialized knowledge you need is provided as we go along.

To comprehend the nature of such a practice, imagine to whom an instantly wealthy winner of the state lottery would turn for help in dealing with all that money. An estate planner is the specialist in the legal profession who is able to provide that guidance, along with more sophisticated assistance to clients with far more complicated needs. Some attorneys decide that they cannot afford the learning-curve expense involved in keeping up-to-date in this ever changing environment. They leave their clients without the services they need. Because these clients are not served adequately elsewhere, the new breed of estate planning attorney is called upon to represent the client as the specialist the client consults first. Moreover, many estate planners accept so many referrals from other lawyers that "boutique" firms doing only estate planning and counseling are commonplace. As boutique lawyers, they don't represent the risk of piracy (diverting the client's other work from the referring lawyer), and therefore are more popular as a referral object than the mega firms that may have separate departments staffed with multiple lawyers who collectively could accomplish the same tasks.

Networking

Attorneys provide personal counseling often wisely conclude that they are unable or unwilling to handle every type of issue or problem, legal or otherwise, that arises in the context of a client engagement. These lawyers become a direct service-provider and a "clearinghouse" of legal and other services for their clients. Sometimes they identify and engage other specialists who can perform necessary services while overseeing the total representation and ascertaining that the product of these referred services is properly integrated into the client's overall situation. There also are a growing number of miniature "family offices" headed by the former estate planner. In either role the attorney replicates a law firm by locating independent service-providers to whom various tasks could be referred, much like a medical profession general practice "family doctor" or internist who refers patients to other specialists when appropriate.

Yet another practice format is for the attorney (or perhaps a group of attorneys) to form a captive organization (perhaps a subsidiary of the attorney's own firm or an entity owned by a number of otherwise unrelated attorneys, akin to a lawyers' title co-operative). Referrals are made to this entity because it allows the attorneys to maintain better control over the cost to the client. It also allows a better form of oversight in terms of hiring personnel in the service-providing organization. And it affords a better review of all the different pieces that go into the final product. There is some debate whether this third form of ancillary business activity by lawyers is appropriate, as discussed in Chapter 3 at pages 22 through 27 on ethics involving conflicts of interest and lack of independent professional judgment.

Although the most promising or appropriate of these formats is something on which most attorneys will not agree, two things are clear. First, although there may be substantial similarities or overlap, this practice and its networking or referral aspects is not the same as "financial planning." Financial planning is one of numerous functions that could be performed by an attorney or referred to a third party, but the term "financial planning" does not do justice to the scope and complexity of the services that an estate planner directly or indirectly might provide. Furthermore, unlike some financial planners, the estate planner avoids the ethical concerns that flow from deriving commissions on the sale of financial products. Second, the most important aspect of this form of practice is that the estate planner remains in control of the planning and services provided to the client, and can oversee and ensure that each element of the planning is properly performed and integrated. The client need not worry about missing pieces to the puzzle presented by the client's situation.

Perhaps the most difficult aspect of the attorney's relationship with clients is how to refer aspects of the planning to other professionals. For a

lawyer in a large law firm, this aspect may involve referral of certain tasks to other lawyers in the firm, or to non-lawyers, but typically not to lawyers outside the firm. Lawyers who are not in a large firm may delegate aspects to outside lawyers and non-lawyers alike. In this respect, the legal profession is light-years behind the medical profession, with many lawyer referral arrangements being poorly analyzed, structured, or supervised. Lawyers who practice in a setting that makes such referrals relevant should consider establishing a referral network and procedure.

To address this problem, the Real Property, Probate and Trust Law Section of the American Bar Association developed a comprehensive manual on how to engage in referral arrangements, LAW OFFICE WITHOUT WALLS, A HANDBOOK FOR THE CORRESPONDENT RELATIONSHIP AMONG ATTORNEYS (1987) covers such important questions as what type of referral relationships are available; how to identify consultants; how to structure the financial arrangement between the client and the two advisors; maintaining malpractice liability insurance and drafting hold harmless provisions; and the ethical aspects of referrals. The manual originally was designed to assist rural lawyers. Typically they are the primary source of legal services available to their clients, but in many cases they find the law has become so sophisticated that they must rely on specialists to supply expertise. These American Bar Association materials are equally relevant, however, to lawyers who are highly skilled in some aspects of a representation (in most cases being business or estate planning) but are responsible for other aspects of the client's affairs and must secure expert assistance to avoid committing malpractice.

One-Stop-Shopping

As the foregoing illustrates, many clients want "one-stop-shopping" for their financial and related needs.

> Many clients who come to a lawyer for a will or estate planning . . . want someone to tackle virtually every aspect of their present and future financial life. They want someone to visualize the big picture and to paint it for them in detail, present and future, after having analyzed it and formulated recommendations.
>
> Eubank, *The Future for Estate Lawyers*, 10 REAL PROP., PROB. & TRUST J. 223, 224 (1975).

The financial planning and multiple disciplinary practice concepts are, in large part, responses to clients who want a single advisor to help them deal with all their financial and related problems, whether those problems involve estate planning, retirement planning, family or health law, investment advice, business counseling, property management, or other matters.

For these clients, probably the most important single element they hope to find in an advisor is someone they trust. In most cases their relationship with an estate planner provides exactly this element, often to a

degree that cannot be duplicated by other professionals. Thus, from the attorney's perspective, it is essential to learn how to provide all the services needed by a client, either directly or through referrals, in a manner that justifies the client's trust. The client is better served with such arrangements, and the attorney better manages the personal counseling engagement and ensures better overall results for the client.

Fiduciary Services

Similar to one-stop-shopping for personal counseling, many clients need an individual to perform fiduciary services for themselves and their beneficiaries. Especially on the East coast, private trust operations conducted by law firms satisfy a desperate need of many clients who, for whatever reason, have no other satisfactory candidate to serve as their fiduciary. In addition, some attorneys provide fiduciary services because they are better able to satisfy individual client needs than traditional fiduciaries. And some attorneys serve as fiduciaries simply because it pays well.

Attorneys who wish to serve their clients' fiduciary needs must consider the costs involved, the personnel required, the standard of care to which they will be held, the potential for malpractice liability (and whether their existing insurance coverage protects them), and whether any investment advice will be incident to the practice of law or will make it necessary or desirable to register as an investment adviser.[5] Perhaps most important, they will need to avoid even the appearance of impropriety, in the form of conflicts of interest, overreaching, or self-dealing, all as discussed in Chapter 3 at pages 24, 28, and 55-56 on ethics. There is danger in being an inept fiduciary: don't consider this as a casual sidelight to your practice, no matter how lucrative or tempting it appears.

The Intangible Element

Estate planners have numerous career opportunities. The psychic benefits that attorneys derive from this practice come from the people with whom they deal, the close client contact and clients' strong reliance on their counsel, the interpersonal and counseling skills that are involved and, for some, lifestyle differences between this practice and that experienced by other attorneys. Estate planning and personal counseling are services that most individuals need (regardless of wealth), they reach into the lives of virtually every person, and the work is challenging, gratifying, and remunerative. It is not, however, for everyone. Consider the following

5. See Investment Advisers Act of 1940, 15 U.S.C. §80b-2(a)(11)(B): "'Investment adviser' . . . does not include . . . any lawyer . . . whose performance of [investment advisory] services is solely incident to the practice of his profession . . . ." And see id. §80b-3(b)(3), providing an exception from the registration requirements if fewer than 15 clients are represented and the adviser does not hold out as providing such services.

testimonial (from a transcript of a professional estate planners' association meeting):

> The reality is that, in a large firm, the trusts and estates department is not the driving force in terms of numbers of people and the perception of the community. If I were starting practice anew and if my principal purpose was to try to be a major force in a large law firm, I would not select trusts and estates as an area of practice. That's not my objective in life, however. I've seen enough of the driving forces in major firms and the style of practice and the kinds of people with whom I would deal and I would rather be a trusts and estates practitioner or a personal lawyer. There is much that gives us a greater satisfaction and worth. The practice is different but I think in the major firms the lawyers involved in personal law are the heart and soul of the institution. They tend to be the ones who relate to the outside world and are involved more likely than not in professional activity and have a far more well-rounded and diversified practice.
>
> We have a different kind of existence, we play a different role in the profession. We are serving a major piece of society and we have the satisfaction of knowing that we have a highly varied practice.

As expressed by another commentator:

> The trust-and-estate field is the one branch of the legal profession that specializes in [helping] . . . people build, maintain, and protect families. . . . You help clients provide for spouses, children, parents, friends, [to] . . . channel the noblest human aspirations into workable means. . . . The trust-and-estate lawyer can make a boast that comes honestly to the lips of too few lawyers. It is that virtually every human being you touch in the course of your work is better off for your having been there.

Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission and the Future of the Probate Bar*, 14 THE PROBATE LAWYER 1, 46-47 (1988). With these thoughts in mind, we turn to an aspect of estate planning and personal counseling that often gets lost in a tax-oriented shuffle. We address it now at the beginning of this course, and come back to it periodically all the way through. It is worth remembering at all times, in all circumstances.

Interpersonal Aspects of Personal Counseling

Mastery of technical legal skills is a challenge but it is not the most difficult aspect of successful client representation. Instead, especially for lawyers not yet experienced in interpersonal relations, it is the need to keep the human equation of the relationship in focus and avoid being lured

to other aspects of the chore that are less important to the client. In a word, psychological or interpersonal aspects of the counselor's role must be kept in mind when representing the *people* who are your clients.

For example, estate planning interviews are a critical component of the engagement. It is essential that you discover or develop your personal "style" and hone your counseling techniques, because the way you begin the representation may set the tone for your entire relation. You know the expression about not getting a second chance to set a first impression. It is hard to cause someone who formed a first impression to realize that they pegged you wrong and should relate to you differently. The tone you set from the first meeting or telephone conversation likely will either create or imperil the trust that clients need to feel in you before allowing you to truly "represent" them.

As you can well imagine, every estate planner has a slightly different style, all their own, and it either "works" for them or it stands in their way. I could no more mimic your personal style than you could emulate mine, although we both could learn something useful from each other about how to put clients at ease, how to make the most of the limited time spent with a client, and how best to establish the rapport that is critical to effective client representation. The important aspect here is that you *think* about who *you* are, how you relate to people, how people respond to you, and ways that you can improve on that critical aspect of your client representation. Truly, it isn't just "what" you know that counts in estate planning. A large chunk of your success will be a function of whether you can relate to the people you serve, and they to you.

If you could be better at your people skills (and few of us could not improve), now is a great time to begin thinking about how to make that happen. Focus on how others interact, how they make strangers feel comfortable with them, how they command or earn respect or trust. Try to look in the mirror and think about how these things work for you. If you are less successful than you would like to be at these critical elements (and who is not?), start asking the hard, embarrassing questions from people you love and trust: what must you do to be more effective in relating to people? Putting yourself in their shoes always works an improvement, as does being nice, friendly, and polite: all the things you learned (or should have) as a child. A heartfelt smile still goes a long way toward making someone feel welcome.

Some aspects of the interrelation can be learned easily. For example, imagine being your client, in terms of the message you send by your demeanor, your dress, the staff you employ, their attitude and grace, and the office atmosphere you create and control. Can you remember a job interview, perhaps a doctor visit, or some other situation in which you were quite ill at ease, uncertain about your place in another person's environment and what to expect, anxious about what would be expected of you or how you would be perceived? What could your host have done

differently to put you more at ease? Your client may feel the same way coming to your office, meeting with you for the first time. Does your office décor, your staff, and your style say the right things to visitors? How do clients perceive your work space, and what message do you intend to send? Are you intimidating, with a massive desk set between you and your guests, imposing books on the shelves, imponderable journals on the side table or in the reception room, diplomas, trophies, and honorifics on the wall? Is that how you want to be perceived, first or lasting?

What about the placement of your furniture: is the desk a barrier or did you arrange your space to foster conversation? Perhaps you would do well to sit around a small table or even in an upholstered chair setting such that you are removed from your computer, the phone, the piles and mess on your desk, and other reminders that your client is infringing on your principal work space and time. Think about "seeing" with your client's eyes. Literally! Does the glare from a window prevent you from seeing your client's eyes because of the reflection in their eyeglasses, which may prevent you from reading their visual reactions? Much more important for many older clients, does that glare hurt their eyes such that they are in pain when facing you and the window behind, and literally cannot wait to leave your office? In a word, have you sought to put your clients at ease, or do you intimidate them (or worse)?

You might do well to cruise the hallway in an office environment, making a mental note of your visceral reaction when observing the work spaces and the furniture layouts of various people. Try to put your personal feelings in touch with what you experience in those places, even if you don't understand *why* you react positively or otherwise. Attempt to catalog the kinds of things that seem to make a place feel inviting or off putting. After a while you will discover that people and the places they occupy have an impact on their client relations. There are ways to arrange your space and even forms of decoration if you want formality, rigidity, or sharp dividing lines in your representation. But if you want to place clients at ease, there are things and arrangements that are better suited to that purpose. Experiment, judge reactions, get a feel for it from the client's side of the environment you create, until you generate the kind of atmosphere that works to your client's best interest in the representation you want to foster.

There are other, more substantive things to focus upon. For example, are you prone to be judgmental about your client's wishes, family, foibles and flaws? Shaffer, *Some Thoughts on the Psychology of Estate Planning*, 113 TRUSTS & ESTATES 568 (1974), wrote about an attorney who opined that it was wrong (not "the proper way") for a client to want division of an estate per capita among a child and two grandchildren, in equal thirds. Shaffer wrote that he was appalled that the attorney actually said so to the client, and suggested that the client's "psychological satisfaction" through disposition of an accumulated estate is "not to be scoffed at." Yet clients

need to know whether a desired plan is likely to create problems, and whether the solution crafted to address those problems is likely to be worse than the original objective sought by the client.

The point is that there is a line between being sensitive to the client's feelings about such an important endeavor as the disposition of an inheritance and doing a disservice by not advising the client about alternatives and the experience of doing things one way or another. You need not opine that distribution of an estate at the age of 18 or 81 is "too darn early" or "way too late" to point out the dangers of an inheritance before the age of maturity or after the greatest need for wealth is long past. Note also that each of these things may betray your personal prejudice: what *is* the "right" age to receive an inheritance? We all harbor a notion in that regard, but nothing makes one person's prejudice more compelling than another.

An important exercise for you during this course of study is to identify your personal opinions and quirks about various topics relevant to the estate planning engagement. Do you, for example, have preconceived ideas about the better pattern for wealth transmission, the use of dead hand controls, the role of women, or of children in a family business? Do you instinctively favor per stirpes division of an estate over per capita, or per capita at each generation? And do you think like a beneficiary or like a donor when you conjure the "right" age for an inheritance? You may not be surprised to learn that you still think like a beneficiary, notwithstanding that your client wants you to think like a donor. As this course unfolds, consider your approach to various problems revealed in these kinds of quirks and whether the personal prejudices we all possess are appropriate to your role as counselor.

Author Shaffer recommended that an attorney not be reluctant to state to a client that "I don't like that" about an aspect of the plan that seems inappropriate to the attorney. But he also admonished that the attorney must avoid passing judgment by saying that a proposal is "wrong" or "bad." Is there a better way to deal with such an issue without being judgmental at all, and is there a reason to be as forthright as Shaffer suggests?

Shaffer also suggested that clients can tell the sometimes subtle difference between an attorney's sharing feelings about a client's desires and being judgmental. Clients can detect other subtle prejudices as well. One of the most prevalent of these is sexism, manifested in numerous ways but often revealed by an attorney's assumption that the man in a husband-wife representation is the "lead" or primary client. You may discover some glaring will or trust drafting errors made because the attorney wrote a man's document with care and then carelessly tried to "flip" it to serve as the woman's plan as well — in the process failing to make all the appropriate gender specific or gender related changes.

Sometimes prejudice is revealed in such a benign manner as use of the masculine gender in speech that could refer to either spouse as the client. You will notice in reading this book that it is gender neutral to the fullest possible extent, mainly to persuade you that it is easy enough to write and speak without gender bias. Hopefully it also will help you get in the habit of being aware of sexist assumptions. This can be important in both interpersonal and economic currency and can be illustrated by a simple, rhetorical question. Assume that you represent a husband and wife; he has been the breadwinner and most of their wealth is in his name. In your dealings with them you assumed that he would die first and you treated him with more deference than his wife. If she *is* the surviving spouse and has the choice, and if she perceives your subtle (and maybe not so subtle) clues that you regard her as an appendage to "the real" representation, do you think she will hire you as attorney for the estate after his death?

The following excerpts also indicate of the type of attitudes you might expect to develop as you become experienced in estate planning. Knecht, *The Human Equation in Estate Planning,* 114 TRUSTS & ESTATES 854 (1975), reported that his main focus as a rookie estate planner "was on the technique of the business — new ways that you could utilize trusts, wills, . . . and all the rest. Part of the fun was in being able to move property around as you wished, and part was in the excitement of saving taxes in the process." He reports that "wishes of the individual clients were always paramount" but admits that the client's "deep inner needs and feelings did not too much enter into my field of awareness." At some point, all that changed:

> It seems that the primary matter of concern is first to find out what the clients are thinking about — where their main feeling lines run. This encompasses not only the material things with which we are dealing, but also how [they] regard the personalities in the total framework. One of the great insights that has come to me is that the *beliefs* people profess are many, many times almost the opposite of their real *value* structures, that is, the way they *act out* situations when they have to apply those beliefs. And I'm far more concerned with that final action . . . .

In a less than direct way, Knecht says something that is stressed throughout this book. Many newly minted attorneys can't resist the urge to "try out" all the tools of their trade by seeking opportunities to employ all the wonderful tax or related planning techniques of the moment. As Knecht admits, over time most counselors learn to resist that urge and to avoid creating a twenty thousand dollar masterpiece if a two thousand dollar plan is really all the client wants or needs. In the context of estate planning with an eye on the tax laws, this sometimes is referred to as not letting the "tax tail wag the family-planning dog." In addition, he surely is right in saying that "if you want to save taxes, there will be some price that

will have to be paid in some part of the picture. Most commonly, this is in the form of surrendering a freedom."

A significant percentage of the fancy planning techniques recommended to clients are rejected. Clients shun those recommendations in most cases simply because they are not what the client wants or perceives to be necessary. Sometimes the price to be paid, or the risk of the plan failing, is too great. To guard against the tendency to over plan, it makes sense to ask, often in the initial interview, what the client would do with his or her property if there were no tax or other laws. Only then can you present suggestions that work the desirable goal of minimizing taxes or other intrusions without corrupting the desired family plan. This is not to say that you should not learn techniques or that you should be reluctant to use them when appropriate. It is natural and essential for new lawyers to master that aspect of the craft first. Rather, use caution until experience can be your guide in judging whether good technical planning should bow to more important personal goals of the client.

A wise estate planner wrote the following list of professional skills required by successful estate planners:

> Some of the characteristics I have seen in the best practitioners are that they are people-oriented and caring, sensitive and thoughtful about relationships, nonjudgmental and kind, they listen well and summarize or interpret accurately, they are perceptive (attuned to verbal and nonverbal signals) and communicate effectively (most especially without legalese). They like challenges, want to be involved, exhibit leadership and accept responsibility. They have learned to organize, define objectives, build confidence, facilitate, and cooperate.

What other skills or characteristics would you add to such a list? You might reflect on which of these you have (or are likely to develop), and consider how different you think other types of lawyers are from those who select estate planning for a professional specialty. In that regard, surveys of estate planners reveal that they *are* different individuals by personality than your "typical" lawyer, be it a litigator or otherwise. See Moore & Pennell, *Survey of the Profession II,* 30 U. MIAMI INST. EST. PLAN. ¶1502 (1996). You can "test" your personality profile and compare it to survey results by going online and searching for "Myers-Briggs" or the "Keirsey Temperament Sorter." All kinds of folks are excellent estate planners, but some square pegs don't conform so well to a round hole. The question to ask yourself as we turn to more substantive issues is: are you cut out to be an estate planner? This is a good time to begin that introspection.

Chapter 2

GETTING STARTED

Some clients' reasons for initiating estate planning are straightforward and pleasant, such as the birth of a child, a planned trip, or an impending marriage. Other clients may be motivated by a desire to keep property out of the hands of an expectant heir, fear of adverse tax results, an impending divorce, knowledge of a fatal illness, or other equally disturbing factors. Most importantly, estate planning disturbs many people because it is a tacit recognition of their mortality.

You must earn your clients' confidence as quickly as possible, because you will gather relevant information and inquire into personal details of their lives. You also must be sensitive to client reasons for planning their estates, their feelings about the process, and problems that the estate planning process may create or exacerbate, as you discuss personal circumstances, tax matters, dispositive devices, assets, fees, and other substantive matters.

personal
very personal
financial

Gathering Information

Now and again you will be asked to prepare estate planning documents without being told all the relevant facts. Be extraordinarily careful with such a situation, because it is a prescription for error. Almost without exception you must know the facts about the client's situation before performing any estate planning representation. Many clients are unwilling to reveal information about themselves, especially to someone they don't really know. To succeed as an estate planner you must become both a counselor to your client and in many respects a confidant. You must acquire basic and sometimes very private information without appearing either too curious or too impersonal.

Does it seem odd to you that some clients refuse to admit their need for estate planning services, or that you may need to educate them about the need for expert specialized estate planning guidance before they will even consider the value of full disclosure to make that planning feasible? Don't be surprised, for example, if a client comes to see you only because a spouse or trusted professional advisor has insisted that their estate plan be done. Don't be reluctant to discuss the value of undertaking the task and explaining what the process will involve, all to put the client at ease with the notion of revealing necessary information to you. Even a client referred to you by another professional advisor may not be fully aware of the need for estate planning and what it may entail. Beware, for example, of a client

who is thinking in terms of "just a simple will" and assumes that you don't need to know specific asset information to accomplish that "routine" drafting chore.

After your client understands the scope of normal estate planning, you must discuss the potential costs involved and establish a fee agreement, preferably reduced to writing. You should inform the client about the potential tax and other costs of administering and transferring the estate, because eventually you should consider ways to minimize those costs. Although attorneys are notoriously reluctant to discuss fees and costs, a frank discussion early in the process often is the best way to avoid later problems. Not surprisingly, frequently cost is foremost in the minds of clients, and an early discussion tends to put them at ease. Notice, however, that you must understand the client's situation before any of this can be done. Thus, as you gather information pertinent to the estate planning you are about to provide, recognize that the extent of this fact gathering may differ, consistent with the extent of the engagement and any limitations imposed by the client.

Usually you (or someone under your supervision) will gather the facts before establishing an appropriate plan and drafting necessary documents. This is true regardless of the origin of the representation (whether you were the initial contact or became involved by referral). Obtaining information that is pertinent to the circumstance is subject to limitations imposed by the amount of time available to perform the estate planning process, the relative costs involved, the client's willingness to reveal or produce needed information, and the extent of the particular estate planning task that you have agreed to perform. For example, you need not obtain detailed information about every investment or asset the client owns if you are not responsible for the client's overall financial plan. Knowing asset classes (e.g., stocks, bonds, realty) and general value usually will suffice. Nor is it normally your responsibility independently to verify facts or other representations made by the client in a typical engagement. It may be wise to establish a procedure by which the client confirms the accuracy of information reported to you and to create a record that this was done, but usually you need not go beyond an inquiry or request for information if the client is unwilling to respond or unable to comply.

Estate planners differ, sometimes greatly, on how best to solicit necessary information. Some prefer that the client complete a questionnaire, sometimes even before the first office visit. This requires the client to sift through relevant information (files, drawers, and boxes) and allows you, during that first meeting, to clarify or correct the information provided, to obtain additional information as suggested by answers on the initial questionnaire, and then to concentrate on the client's needs as revealed in the questionnaire. This approach is not feasible if the client is infirm or marginally incompetent. Some clients will respond better to a request for information only after a conference in which you

have developed some rapport, discussed the nature of the process, and explained the need for all this disclosure.

Some estate planners prefer the client to complete a questionnaire *after* the first interview because it is easier to determine whether to use a long or short form (or to forego the questionnaire approach entirely and interview the client directly). Attorneys also differ on how to conduct the client interview. Some attorneys believe an effective interview can be conducted by an associate, paralegal, or other nonlawyer member of the estate planner's staff. Others insist the lead attorney should interview the client. Moreover, estate planners disagree about whether it is best to use a less than comprehensive questionnaire; some argue that many (most?) clients are overwhelmed by this task so they opt for a shorter form that elicits only basic information about the client's assets, philosophy, and dispositive wishes. The detailed approach may trigger additional thought by the client about these matters, but a long form questionnaire may overwhelm, give offense, or discourage further action by clients of more modest means, needs, or capacity.

The most obvious function served by a client questionnaire is to help identify assets and the amount of wealth involved. This should not be overestimated, however, because some clients will refuse to reveal relevant information or will forget to mention assets, especially those that have little or no tangible value to them during life (a common example is employment related benefits like group term life or disability insurance and a retirement fund). Often a questionnaire is designed to allow you to conduct a follow up interview that reveals other less obvious facts. The questionnaire also may educate your client by focusing attention on the nature and extent of various assets and the potential recipients involved.

A final difference in approach relates to the perceived need to inspect or review various client documents. At a minimum the client needs to produce any existing power of attorney, will or trust, and any document granting a power of appointment or other benefits that could cause inclusion of nonprobate property in the client's estate. Additional useful documents are insurance policies, beneficiary designations for insurance and retirement benefits, and agreements that impose obligations on the estate (such as prenuptial or property settlement agreements). In many cases you will not know enough about the client to ask for copies of these documents until after the initial client interview.

Sample client questionnaires are reproduced in Chapter 19. No matter how basic or detailed you choose to be, the following information is likely to be important to most estate planning engagements.

Family and Personal Data

The correct names of the client and all family members, their dates of birth, marriage(s), divorce(s), occupation, employment (to verify employee

benefit information), and the dependency status of various family members (or others) are basic. It may seem silly to ask the client to provide all names in writing, but few things are as embarrassing (and as easily avoidable) as producing documents that misspell the name of the client or a beneficiary. For all of these individuals, it may be appropriate to inquire about obligations arising from marriages or divorce, about special health problems (either physical or mental), adoptions, nonmarital children, children of the "new biology," and domicile. Discussions about some of these items may require that you meet privately with each spouse if you are representing a married couple, because they may need to reveal information that they never have told their spouse; this raises significant ethical and conflict of interest questions addressed in Chapter 3.

You also may need to ask questions to determine domicile for state law purposes: employment, residence(s), location of moveable assets, drivers licenses, and automobile or voter registrations. It is wise to inquire of married clients about prior residences, particularly if they may have lived in a (non)community property state (whichever differs from your own state property law) at any time during the marriage. Also ask about military service; National Service Life Insurance or other government benefits may be available. Because the estate tax marital deduction is denied if a surviving spouse is not a citizen of the United States (unless special planning is applied), you also *must* inquire in every situation about the spouses' citizenship.

Family and Personal Objectives

The questionnaire or client interview must ascertain the client's desires about beneficiaries, including provisions for a surviving spouse, descendants, parents or other relatives, friends, employees, dependents, and charities. Often it is instructive to get a sense of the client's feelings about the use and protection of wealth before you suggest ways to structure various gifts. This may entail asking whether disposition should be by outright bequest or only in trust, inquiring about the exercise of life insurance or retirement plan options, or about exercising powers of appointment. The issue may arise whether lifetime gifts are desirable. Other important factors are the client's attitude about fiduciaries (corporate, professional individuals, family members, and others), and the client's desires concerning guardians for any minors or incapacitated beneficiaries. The client should note other dispositive matters of particular concern, and you may need to prompt the client regarding any special needs of various family members or beneficiaries. Recognizing that the client's desires regarding all of the foregoing choices are paramount, you should be prepared to discuss their relative advantages and disadvantages.

Financial Data

You need to determine the client's assets and their value largely to ascertain the effect of state, federal, or foreign wealth transfer taxes that may apply, and to evaluate whether administrative problems relating to the form or location of assets are likely. For example, a valuable collection of tangible art objects will generate insurance, storage, shipping, and valuation problems after a client's death or incapacity, and realty located in another jurisdiction may pose ancillary administration issues that easily could be avoided with proper planning.

Although most estate planners are not competent — and many are not willing — to render general investment advice, a basic asset evaluation will reveal whether the client has serious diversification problems, opportunities involving basis[1] or other income tax attributes, shared ownership issues, and liquidity problems. Because asset mix and values are likely to change (perhaps significantly) over a client's lifetime, a precise listing of assets by type, fair market value, and basis may not be worth the effort required to produce it. Instead, a net worth statement that provides general financial information may be the easiest single item to obtain.

Although you should obtain information about all major assets or asset groups that the client owns, a client may fail to complete a questionnaire that is too burdensome or imposing. Thus, the questionnaire should compromise between an inquiry that provides essential information and educates the client about the need to consider certain basic investment and portfolio issues, and one that is merely a make-work turn-off. Be sure to obtain information about liabilities as well as assets, particularly if debts may be accelerated by death or a transfer of encumbered property.

A substantial amount of additional information will be required if you agree to prepare a complete financial plan for the client (in addition to preparing an estate plan). You may need to know income tax basis, investment reviews, property insurance, disability or medical insurance, information regarding cash flow, and so forth. Otherwise, keeping in mind the scope of the engagement and any limitations imposed by the client, and assuming the circumstances are favorable, you should:

- Determine how assets, such as bank accounts, real estate, stocks, and bonds are titled (for example, in the client's name, in a spouse's name, as joint tenants or tenants by the entireties, or as tenants in common, and whether any is community property).
- Establish the status of existing business interests, such as stock in closely held corporations, partnership interests, sole proprietorships, real estate, oil and gas interests, or other joint ventures. If real estate is involved, you probably will not need to

1. Basis is an income tax concept that is used to calculate gain or loss and that informs a variety of other concepts (such as the depreciation deduction). For our purposes it essentially means the taxpayer's cost or investment in the asset. See §1011 et seq.

examine the legal description, but it may help to inspect the deed or title and any title insurance policies and perhaps to glance at a survey. It will be helpful to ascertain that homestead has been elected if the property could qualify. If a business is involved, you may want to review the corporate records, partnership or operating agreements, and any existing redemption, buy-sell, shareholders, option, or similar agreement. In these cases, a meeting with the client's accountant or other business advisors also may be wise.

- Special care is required with respect to insurance and it is wise not to take the client's or the insurance agent's word for any information that you can verify (unless the policy is insubstantial), because the risk and attendant cost of an error at any of several levels is significant. Ascertain the amount of insurance on the client's life, the type of policy involved, and the options selected or available. Be particularly careful to review the exercise of any policy options and other incidents of ownership (such as applicable beneficiary designations) and confirm who possesses all available incidents of ownership. Often it will be impossible to deal with life insurance effectively without complete and accurate information about the insured and owner of the policy, the face amount of the coverage, date of issue, carrier, policy number, primary and contingent beneficiary designations, accidental death benefit, policy loan interest rate, outstanding loans, basis, premium (and how it is being paid), and the current dividend option. In addition, you must ascertain whether the policy is community property and whether prior planning has attempted to remove the proceeds of the policy from the client's gross estate for wealth transfer tax purposes. Also inquire about disability insurance, especially if provided in the workplace.
- Investigate retirement benefits available to the client and question the client regarding any nonqualified deferred compensation, stock option, or other benefits. You may need to review the summary plan description provided by the client's employer if substantial benefits are involved. In all cases you should verify beneficiary designations, income tax consequences of the plan and any of its options, and (in extraordinary circumstances) you may need to study copies of the applicable plan documents.
- Obtain information regarding unusual assets, such as patents, copyrights, intellectual property and other unusual intangibles, collections, valuable works of art, or other valuable items of tangible personal property. Also inquire about vested or contingent remainder interests, expectancies, intrafamily loans or advancements, powers of appointment, and trusts of which the client is a beneficiary or trustee or over which the client may be deemed to have a power of appointment.

Tax Information

Be sure to ascertain whether the client made gifts in prior years and whether they eroded the unified credit and generation-skipping transfer tax exemption that otherwise is available. Although you often will not like the answer, you need to inquire whether gift tax returns were filed as required by law and you may want to obtain copies of both income and gift tax returns for prior years. Determine the approximate income of the client, the client's spouse, and any children who are being considered as part of a dynastic plan. This will give some indication about future growth potential and the opportunity for income shifting. It also may allow a double check on information solicited previously about gifts, employment, and assets, and may confirm dependency status and indicate whether disability insurance planning is relevant.

Consultations

You should consider whether other professional advisers should be involved in the planning process at an early stage if a useful relationship exists between the client and accountants, financial or investment advisors, insurance counselors, fiduciaries, or other legal counsel. Coordination with them (with the client's consent) is advisable and proper if their input may be valuable in preparing a proper estate plan. Indeed, in many cases these individuals will have done much of the investigation into facts that you need and can save you valuable time and protect you from errors or blind spots that otherwise might cause your planning to be flawed. Also be sensitive to the dynamics involved if the client has selected fiduciaries, especially if the fiduciary was the source of the recommendation that you be retained. As discussed in Chapter 3, serious ethical issues can arise if a fiduciary is involved in the early stages of a representation but you later determine that it might be better if that particular fiduciary not be used.

The Engagement Letter

Estate planners do not focus exclusively on postmortem aspects of an estate plan to the exclusion of lifetime needs and objectives. Instead, often they are employed to advise clients on comprehensive lifetime planning as well as disposition of the client's estate after death, in each case in a manner that effects the client's wishes with minimum expense, taxation, disruption, and anxiety.

Many clients will experience some form of disability during life that will present a need for assistance in physical care, asset management, or both. Pay attention to providing for the cost of medical care, including insurance or other protection against catastrophic or extended medical costs. In addition, the planning process should provide an appropriate mechanism to deal with disability. Otherwise it may be necessary to conduct the client's affairs in a judicially supervised proceeding, which

frequently can be cumbersome and expensive. Even absent a disability, some clients will want help in managing their affairs. Before beginning the representation, therefore, the attorney and client should reach some understanding about the scope of the representation and, in some states, this understanding must be reduced to a written agreement. Even if not mandated, an engagement letter usually is a good idea.

The engagement may entail any or all of the following:

- Living wills that express a preference about medical procedures in terminal illness situations, and powers of attorney for health care that permit substituted judgment in other, less dramatic medical care situations.
- Durable powers of attorney for financial matters that provide a simple alternative to a guardianship, conservatorship, or living trust; and permit the agent to accomplish the client's needs and objectives after the client becomes disabled.
- Inter vivos trusts that combine in one instrument the potential for lifetime management of property, succession of management upon disability, and disposition following death.
- Buy-sell agreements that make appropriate provision for disposition of stock upon retirement, disability, and death.
- Arrangements to defer payment of taxes under §6166 with respect to any qualifying business interest.
- Income tax related transactions that have favorable inter vivos tax implications (such as sale of a principal personal residence), and use of the annual exclusion and the unified transfer tax credit to make gifts. An estate often can effectively be reduced by transfers that qualify for the gift tax marital deduction or gifts of property that shift future income or appreciation.
- An irrevocable life insurance trust that creates wealth and, if necessary, liquidity in a format that avoids inclusion in the estates of either the client or the client's surviving spouse.
- Taking steps to insure that the client's estate is sufficient to adequately support surviving dependents. You may appropriately play a role in instituting and encouraging the process of estate enhancement. Some of the more readily available estate augmentation devices include life insurance, qualified retirement benefit plans, Keogh accounts, IRAs, and various education saving and investment programs.

The text of an engagement letter might look similar to those found in Chapter 19. As you read them, consider such things as whether they set the interest rate you would choose on late payments, the proper retainer you would feel comfortable collecting, and the right tone you want to set at the outset of an engagement.

Conflicts of Interest

A conflict of interest may be discovered early in the investigatory phases of an estate planning interview, but often it will not be revealed until the client discloses assets and liabilities. You cannot merely continue to represent the client once a conflict is discovered, at any stage of the estate planning process. Instead, you will need to advise the client that you must withdraw from the representation unless an appropriate resolution can be reached. (See, e.g., Rule 1.7 of the Model Rules of Professional Conduct, stating the proposition that mutual consent, based on full disclosure, will permit continued representation notwithstanding the conflict). For example, as discussed in more detail in Chapter 3, conflicts may develop in drawing estate plans for parents and their children, or for spouses. In addition, a conflict of interest also may require that you withdraw if a client wishes to benefit you or a member of your immediate family. (See, e.g., Rule 1.8(c) of the Model Rules of Professional Conduct, also discussed in Chapter 3.)

Confidentiality

You must preserve the confidentiality of all information revealed in the estate planning process, including information concerning or identifying the client and the client's assets, liabilities, family, and beneficiaries. As noted in the sample engagement letters, you should make it a point to assure a client that facts and documents disclosed during the estate planning process will be kept confidential to the extent the client has not consented to disclosure to others. Otherwise, the client may withhold essential information, and full disclosure usually is essential to proper estate planning.

For example, the client may have a disabled child for whom special provision should be made, or an adopted or nonmarital child who might make an otherwise unexpected claim against the estate. Facts may disclose that it would be unwise for a particular individual to serve as a fiduciary or to receive a substantial amount of property outright. Potential beneficiaries may be inexperienced in investments or may suffer from profligacy, improvidence, substance abuse, or addiction. There may be antagonism between siblings, between children and parents or stepparents. There also may be embarrassing or confidential relationships or histories. Each of these matters could be confronted in the estate plan, but only if fully disclosed.

The point here, as we turn to a more directed study of ethics for estate planners and then to more substantive matters, is that none of these facts is likely to be revealed to you unless you have the client's confidence. To gain that will require that you be conscious about it, work affirmatively to make the client comfortable with the process, and garner the client's trust and respect.

ESTATE PLANNING QUESTIONNAIRE

date _____

YOUR PERSONAL INFORMATION

Social Security Number

_____ _____
Your Full Name Nickname

_____ _____ _____ _____
Date of Birth Place of Birth Citizenship Date of Naturalization

_____ ☐ **no health problems**
Medical Conditions

SPOUSE'S PERSONAL INFORMATION

Social Security Number Spouse's Full

_____ _____
Name Nickname

_____ _____ _____ _____
Date of Birth Place of Birth Citizenship Date of Naturalization

_____ ☐ **no health problems**
Medical Conditions

RESIDENCES:

Your principal residence address: _____
Residence Phone:_____ Residence Fax:_____ County:_____
Your second residence address: _____
Residence Phone:_____ Residence Fax:_____ county _____
Home E-Mail Address _____ Work E-Mail Address _____
Other E-Mail Address _____ In what state are you domiciled? _____

MARRIAGE INFORMATION

Marital Status: ☐ Never Married ☐ Married ☐ Divorced ☐ Widowed
Date of Marriage _____ Place of Marriage _____
Prenuptial Agreement? ☐ No ☐ Yes _____

Husband Prior Marriages / Wife Prior Marriages

Spouse	Date of Divorce	Date of Death	Obligations	Spouse	Date of Divorce	Date of Death	Obligations

FOR INTERNAL USE ONLY

☐ Draft List ☐ New Matter ☐ Engagement ☐ Orig. ☐ Contact Mgr.
☐ Net Worth ☐ PW Referral ☐ Fax Pink Sheet ☐ Database

EMPLOYMENT INFORMATION

Your current or most recent Employer: _____ ☐ Retired _____

Title:_____ Address:_____

Office Phone:_____ Fax:_____ Other Phone:_____

E-Mail Address: _____ anticipated retirement date: _____

Spouse's current or most recent Employer: _____ ☐ Retired _____

Title:_____ Address:_____

Office Phone:_____ Fax:_____ Other Phone:_____

E-Mail Address: _____ anticipated retirement date: _____

INFORMATION REGARDING PARENTS:

Name Age Health Address

Your Father:_____

Your Mother:_____

Expected inheritance _____

_____ ☐ **not applicable**

Name Age Health Address

Spouse's Father:_____

Spouse's Mother:_____

Expected inheritance _____

_____ ☐ **not applicable**

YOUR ADVISORS:

Business Accountant:_____

Personal Accountant:_____

Stockbroker:_____

Stockbroker:_____

Financial Planner:_____

Life Insurance Advisor:_____

Bank:_____

Trust Department:_____

Other Attorney:_____

Types of Services provided by that Attorney: _____

Please list where all of your bank safety deposit boxes are located:_____

Have You Ever Filed Form 709? ☐ **Yes** ☐ **No** **Which Years?** _____

Have you ever lived in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington State or Wisconsin?

☐ **Yes** ☐ **No** **If so, where?** _____

Fiduciary 1

Full Name Social Security # Date of Birth

_____ _____ _____

Citizenship:_____ Relationship to you: _____

Address:_____

Phone:_____ Fax:_____ Email:_____

Occupation:_____ Health Issues? _____ ☐ **No Health Problems**

good relationship with beneiciaries? ☐ Yes ☐ No _____

Fiduciary 2

Full Name Social Security # Date of Birth

_____ _____ _____

Citizenship:_____ Relationship to you: _____

Address:_____

Phone:_____ Fax:_____ Email:_____

Occupation:_____ Health Issues? _____ ☐ **No Health Problems**

good relationship with beneiciaries? ☐ Yes ☐ No _____

Fiduciary 3

Full Name Social Security # Date of Birth

_____ _____ _____

Citizenship:_____ Relationship to you: _____

Address:_____

Phone:_____ Fax:_____ Email:_____

Occupation:_____ Health Issues? _____ ☐ **No Health Problems**

good relationship with beneiciaries? ☐ Yes ☐ No _____

Fiduciary 4

Full Name Social Security # Date of Birth

_____ _____ _____

Citizenship:_____ Relationship to you: _____

Address:_____

Phone:_____ Fax:_____ Email:_____

Occupation:_____ Health Issues? _____ ☐ **No Health Problems**

good relationship with beneiciaries? ☐ Yes ☐ No _____

CHILD 1

Full Name _____ Social Security # _____ Date of Birth _____

Citizenship:_____ Natural Born ☐ Adopted ☐ By whom? _____

Address:_____ Phone:_____

Occupation:_____ Health _____ ☐ **No Health Problems**

☐ Married ☐ Divorced ☐ Widowed ☐ Never Married Child's Spouse:_____

Occupation:_____ Other Parent _____

comfortable with child's asset Management? ☐ Yes ☐ No _____

good relationship with child? ☐ Yes ☐ No _____

Grandchild	SSN	DOB	Other Parent

CHILD 2

Full Name _____ Social Security # _____ Date of Birth _____

Citizenship:_____ Natural Born ☐ Adopted ☐ By whom? _____

Address:_____ Phone:_____

Occupation:_____ Health _____ ☐ **No Health Problems**

☐ Married ☐ Divorced ☐ Widowed ☐ Never Married Child's Spouse:_____

Occupation:_____ Other Parent _____

comfortable with child's asset Management? ☐ Yes ☐ No _____

good relationship with child? ☐ Yes ☐ No _____

Grandchild	SSN	DOB	Other Parent

CHILD 3

Full Name Social Security # Date of Birth

_____ _____ _____

Citizenship:_____ Natural Born ☐ Adopted ☐ By whom? _____

Address:_____ Phone:_____

Occupation:_____ Health _____ ☐ **No Health Problems**

☐ Married ☐ Divorced ☐ Widowed ☐ Never Married Child's Spouse:_____

Occupation:_____ Other Parent _____

comfortable with child's asset Management? ☐ Yes ☐ No _____

good relationship with child? ☐ Yes ☐ No _____

Grandchild	SSN	DOB	Other Parent

CHILD 4

Full Name Social Security # Date of Birth

_____ _____ _____

Citizenship:_____ Natural Born ☐ Adopted ☐ By whom? _____

Address:_____ Phone:_____

Occupation:_____ Health _____ ☐ **No Health Problems**

☐ Married ☐ Divorced ☐ Widowed ☐ Never Married Child's Spouse:_____

Occupation:_____ Other Parent _____

comfortable with child's asset Management? ☐ Yes ☐ No _____

good relationship with child? ☐ Yes ☐ No _____

Grandchild	SSN	DOB	Other Parent

CHILD 5

Full Name Social Security # Date of Birth

Citizenship:_____ Natural Born ☐ Adopted ☐ By whom? _____

Address:_____Phone:_____

Occupation:_____ Health _____ ☐ **No Health Problems**

☐ Married ☐ Divorced ☐ Widowed ☐ Never Married Child's Spouse:_____

Occupation:_____ Other Parent _____

comfortable with child's asset Management? ☐ Yes ☐ No _____

good relationship with child? ☐ Yes ☐ No _____

Grandchild	SSN	DOB	Other Parent

CHILD 6

Full Name Social Security # Date of Birth

_____ _____ _____

Citizenship:_____ Natural Born ☐ Adopted ☐ By whom? _____

Address:_____Phone:_____

Occupation:_____ Health _____ ☐ **No Health Problems**

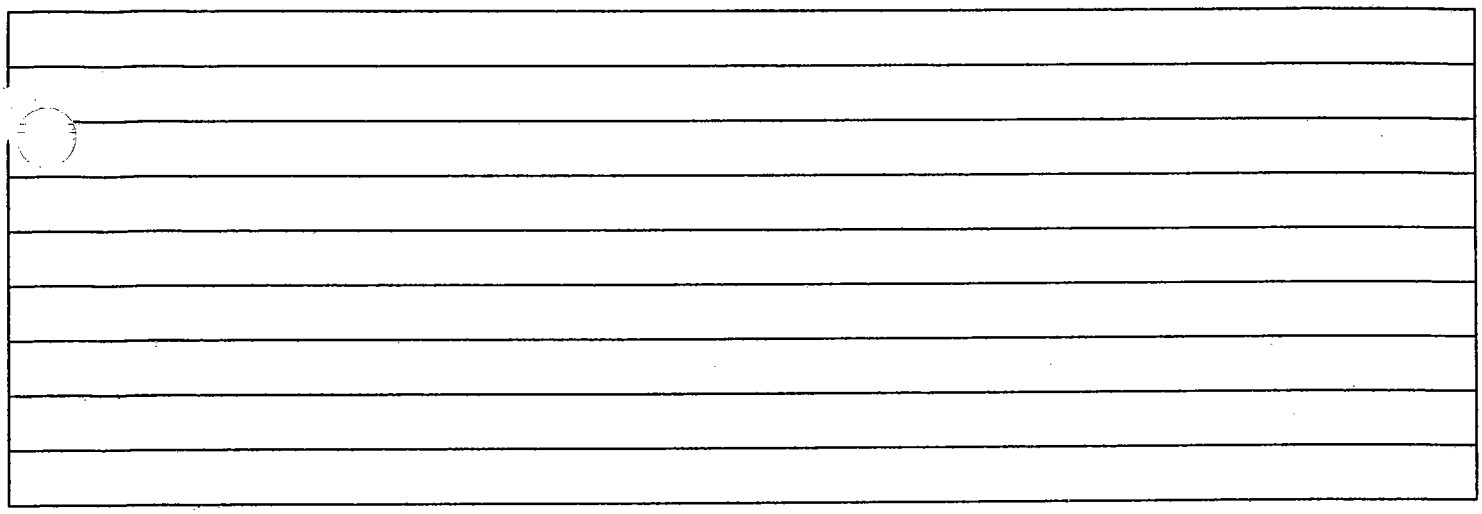
☐ Married ☐ Divorced ☐ Widowed ☐ Never Married Child's Spouse:_____

Occupation:_____ Other Parent _____

comfortable with child's asset Management? ☐ Yes ☐ No _____

good relationship with child? ☐ Yes ☐ No _____

Grandchild	SSN	DOB	Other Parent



NET WORTH STATEMENT

Asset	Husband	Wife	Joint	HR	WR	NC	INC
R[illegible] Estate:							
Marketable Securities:							
Closely Held Businesses:							
[illegible]rsonal Property:							
Ta[illegible]e Retirement Assets:							

Nontaxable Retirement Assets:
[illegible]e Insurance:
Li[illegible]ties:
TOTAL
GRAND TOTAL

SOURCES OF INCOME

Source of Income	Husband	Wife	Joint
Base Compensation / Salary			
Bonus			
Corporate Distributions / Dividends			
Interest / Dividends from Securities			
Option Exercise Income			
IRA / Retirement Plan Distributions			
Social Security			
Disability Income ☐ taxable ☐ nontaxable			
Annuity Payments			
Partnership Distributions			
Trust Distributions			
Rental Income			
Farming Income			
Other Income			
Expenses			
Liabilities			
Other Expenses			

TOTAL **GRAND TOTAL**			

How much do you give to charity each year? _____ ☐ **cash** ☐ **Stock** ☐ **Other**

CLOSELY HELD BUSINESS #1

Business Name _____

Fictitious or "Doing Business As" Names:_____

Address _____ Phone:_____ Fax:_____
Other Locations: _____

Is this Business:
☐ C (Regular Corporation)? ☐ S Corporation?
☐ General Partnership? ☐ Limited Partnership?
☐ Limited Liability Company (LLC)? ☐ Sole Proprietorship?

Describe the business of the entity:_____
state of incorporation or organization?_____
Foreign Qualifications? ☐ Yes ☐ No Which Jurisdictions?_____

☐ start up ☐ Purchased/Gifted ☐ Other: _____

fiscal year end of the business?_____ date of incorporation or organization?_____

taxpayer identification number?_____ how many employees?_____

What is the book value of the business?_____ As of what date?_____

What were the gross revenues of the business in its most recent fiscal year?_____

Owners	Relationship To You	Number of Ownership Units	Percentage of Ownership Units
_____	_____	_____	
_____			
_____	_____	_____	
_____			
_____	_____	_____	
_____			
_____	_____	_____	
_____			
TOTAL		_____	

President:_____ Director:_____
Vice President:_____ Director:_____
Vice President:_____ Director:_____
Vice President:_____ Director:_____
Treasurer:_____ Director:_____
Secretary:_____ Director:_____
Other:_____ Director:_____
Other:_____ Director:_____

managing partners or managing members:_____

buy-sell agreement? ☐ Yes ☐ No _____

CLOSELY HELD BUSINESS #2

Business Name _____
Fictitious or "Doing Business As" Names: _____
Address _____ Phone: _____ Fax: _____
Other Locations: _____

Is this Business:
☐ C (Regular Corporation)? ☐ S Corporation?
☐ General Partnership? ☐ Limited Partnership?
☐ Limited Liability Company (LLC)? ☐ Sole Proprietorship?

Describe the business of the entity: _____
state of incorporation or organization? _____
Foreign Qualifications? ☐ Yes ☐ No Which Jurisdictions? _____

☐ start up ☐ Purchased/Gifted ☐ Other: _____

fiscal year end of the business? _____ date of incorporation or organization? _____

taxpayer identification number? _____ how many employees? _____

What is the book value of the business? _____ As of what date? _____

What were the gross revenues of the business in its most recent fiscal year? _____

Owners	Relationship To You	Number of Ownership Units	Percentage of Ownership Units
_____	_____	_____	
_____			
_____	_____	_____	
_____			
_____	_____	_____	
_____			
_____	_____	_____	
_____			
TOTAL		_____	

President: _____ Director: _____
Vice President: _____ Director: _____
Vice President: _____ Director: _____
Vice President: _____ Director: _____
Treasurer: _____ Director: _____
Secretary: _____ Director: _____
Other: _____ Director: _____
Other: _____ Director: _____

managing partners or managing members: _____

buy-sell agreement? ☐ Yes ☐ No _____

RETIREMENT ASSETS

Qualified Plans

Employer	Plan Name	Type	Husband	Wife	Pay?
Total					

Pre 1983 Election? ☐ Yes ☐ No ☐ Don't know benefits with a prior employer? ☐ Yes ☐ No

Taxable IRAs

Custodian	Acct No.	Roll?	Husband	Wife	Pay?
Total					

Roth IRAs

Custodian	Acct No.	Roll?	Husband	Wife	Pay?
Total					

Annuities

Company	Contract No.	Q/NQ	Value	Ann	Own	Benef	Pay?
Total - Husband							
Total - Wife							

LIFE INSURANCE

Policies Insuring Your Life

Insurer	Policy No.	Type	DB	O	B	Date	CV	Loan	Pre	In

Total										

Policies Insuring Your Spouse's Life

Insurer	Policy No.	Type	DB	O	B	Date	CV	Loan	Pre	In
Total										

Policies Insuring Both of Your Lives

Insurer	Policy No.	Type	DB	O	B	Date	CV	Loan	Pre	In
Total										

Do you have long term care insurance? ☐ yes ☐ No _____

Do you have Disability insurance? ☐ yes ☐ No _____

NEW FILE FORM

Referred by: _____ Referred to: _____ (put on call list)

Insurance Discussed _____YES_____NO Corporate Trustee Discussed _____YES_____NO

Originating Atty:_____
Responsible Atty:_____
Billing Atty:_____

Fees: ☐ Hourly with Description on Face of Invoice (Template 19)
☐ Quoted Fee with Tax Legend (Template 29)_____
_____
☐ Quoted Fee Billed to Entity (Template 33) _____
_____
Name of Entity_____
☐ Hourly Billed to Entity with Description attached separately (Template 44)
Name of Entity_____
☐ Retainer Amount _____ ☐ Send Invoice for Retainer
☐ Client will send Retainer Check
☐ Retainer Check Attached
☐ Legal Services Plan Invoice needed

☐ Corporate Update Invitation

☐ GDM Law letter ☐ Japanese Law letter ☐ Health Letter ☐ Kentucky Air Quality
☐ Kentucky Employment Letter ☐ Ohio Employment Letter ☐ Mine Safety & Health
☐ Corporate & Securities Digest ☐ Tax Update
☐ Other _____

Drafting List? ☐ Yes Wait For Receipt of Retainer & Engagement Letter? ☐ Yes ☐ No
☐ No

Follow Up List? ☐ Yes ☐ No Why? _____ When? _____

Preparation Date ☐ Normal ☐ Rush - Date _____

People to Contact: _____
(Put on Call list separately)

Do not share info. with _____

Please share info. with ☐ Accountant ☐ Investment Advisor ☐ Banker ☐ Insurance Advisor ☐
Financial Planner ☐ Trust Officer ☐ Banker ☐ Children
☐ Other _____

PERSONAL DOCUMENTS TO BE PROVIDED BY YOU

☐ Copies of your existing wills and trusts

☐ Copies of any wills or trusts of which you are a beneficiary
☐ Original life insurance policies and most recent annual

statements
☐ Change of beneficiary forms for all life insurance policies

(including employer or organization group policies)
☐ Change of ownership forms (absolute assignment forms) for
all life insurance policies (including employer or

organization group policies)
☐ Copies of split dollar agreements for employer paid life

insurance
☐ Change of beneficiary forms for employer pension, profit

sharing and other employee benefit plans
☐ Copy of summary booklet for employer pension, profit

sharing and other employee benefit plans
☐ Copies of most recent employee benefit plan account

statements

☐ Copies of most recent IRA account statements and change of beneficiary forms

☐ Copies of most recent brokerage account statements

☐ Copies of most recent mutual fund account statements

☐ Copies of most recent bank statements

☐ Original stock, bond, partnership and unit trust certificates

☐ Copies of promissory notes and mortgages payable to you
☐ Copies of annuity contracts and beneficiary designation

and payment option selections

☐ Change of beneficiary forms for annuity contracts

☐ Change of ownership forms for annuity contracts

☐ Copies of most recent financial statements

☐ Copies of most recent Federal income tax return(_____)

☐ Copy of all Federal gift tax returns since 1975

☐ Copies of deeds to real estate

☐ Copies of promissory notes and mortgages payable to you

☐ Copies of lease agreements

☐ Copies of premarital or prenuptial agreements
☐ Copies of divorce decrees, separation agreements, property

settlement agreements and support decrees or agreements
☐ Copies of schedule of valuables from homeowner's

insurance policy
☐ Prepare letter of instruction to executor for disposition of
personal effects

☐ _____

(GDM Copy)

PERSONAL DOCUMENTS TO BE PROVIDED BY YOU

☐ Copies of your existing wills and trusts

☐ Copies of any wills or trusts of which you are a beneficiary
☐ Original life insurance policies and most recent annual

statements
☐ Change of beneficiary forms for all life insurance policies

(including employer or organization group policies)
☐ Change of ownership forms (absolute assignment forms) for
all life insurance policies (including employer or

organization group policies)
☐ Copies of split dollar agreements for employer paid life

insurance
☐ Change of beneficiary forms for employer pension, profit

sharing and other employee benefit plans
☐ Copy of summary booklet for employer pension, profit

sharing and other employee benefit plans
☐ Copies of most recent employee benefit plan account

statements

☐ Copies of most recent IRA account statements and change of beneficiary forms

☐ Copies of most recent brokerage account statements

☐ Copies of most recent mutual fund account statements

☐ Copies of most recent bank statements

☐ Original stock, bond, partnership and unit trust certificates

☐ Copies of promissory notes and mortgages payable to you
☐ Copies of annuity contracts and beneficiary designation

and payment option selections

☐ Change of beneficiary forms for annuity contracts

☐ Change of ownership forms for annuity contracts

☐ Copies of most recent financial statements

☐ Copies of most recent Federal income tax return(_____)

☐ Copy of all Federal gift tax returns since 1975

☐ Copies of deeds to real estate

☐ Copies of promissory notes and mortgages payable to you

☐ Copies of lease agreements

☐ Copies of premarital or prenuptial agreements
☐ Copies of divorce decrees, separation agreements, property

settlement agreements and support decrees or agreements
☐ Copies of schedule of valuables from homeowner's

insurance policy
☐ Prepare letter of instruction to executor for disposition of
personal effects

☐ _____

(Client Copy)

BUSINESS DOCUMENTS TO BE PROVIDED BY YOU

☐ Copy of most recent Federal income tax return (_____)
☐ Copies of five most recent Federal income tax returns

(_____)

☐ Copy of most recent financial statement (_____)

☐ Copies of five most recent financial statements (_____)

☐ Copies of partnership agreements and amendments

☐ Copies of stock purchase agreements and amendments

☐ Copies of buy-sell agreements and amendments
☐ Copies of any previous appraisals or valuations of the business

☐ Copies of deferred compensation plans

☐ Copies of medical reimbursement plans

☐ Copies of salary continuation plans

☐ Copies of lease agreements
☐ Copies of employment and independent contractor agreements

☐ Corporate minute book
☐ Copies of most recent annual statements and beneficiary and owner designations on corporate life insurance
☐ Copies of most recent annual statements and beneficiary and owner designations on buy-sell life and disability insurance
☐ Copies of most current qualified plan documents and amendments
☐ Copies of two most recent tax forms (forms 5500 or 5500-C), together with Schedule B for defined benefit plans
☐ Copies of two most recent actuarial valuation reports for defined benefit plans
☐ Copies of two most recent account balance statements for money purchase pension plans, profit sharing plans, and target benefit plans

☐ Current employee census data
☐ Copies of most recent annual statements for all life insurance policies held in qualified plans

☐ Copies of most recent valuations of plan assets

<|<BOX2>|>We are pleased that you selected Greenebaum Doll & McDonald pllc to represent you regarding your estate planning. We will strive to represent your interests professionally and effectively. Set forth below are the terms of our engagement as your lawyers. **This engagement is contingent upon the approval of the firm's new business committee.** Until we notify you that the matter has been approved, we are not your counsel, and you should not share with us any information that you want kept confidential because until we become your counsel we have no obligation to maintain confidentiality and no attorney-client privilege exists.

A. No Solicitation. You confirm that this engagement did not result from direct solicitation to you from our firm or any of its lawyers.

B. Representation of Spouses.

1. No Confidences between Spouses and Us. If you are married and are asking that we represent both spouses, each spouse confirms that you have requested and consented to our joint representation of both of you in connection with your estate planning, and each of you agrees that communications and information we receive from either of you that is relevant to this representation will not be kept confidential from the other of the two of you. You are both considered our client, collectively. Each of you needs to understand the need for full disclosure and candor in our discussions with each other.

2. Communication from one of you. 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 issues to that individual. Of course, we will respond at any time to any questions put to us by either of you.

3. Conflicts between you and withdrawal. Our experience has been that it is quite unlikely, but not impossible, that a relatively serious difference of opinion or disagreement might arise between the two of you in the development of your estate plan, and in that event considerations of legal ethics might compel us to cease representing either of you. If that happens, we will promptly notify both of you that we cannot continue to represent either of you in connection with your estate plan or any other matter that is related to your estate plan, and we will not be obliged to disclose to either of you the precise reason or reasons for our decision.

C. Representation of Other Family Members. If you are aware that we are representing other members of your family, you understand that the representation of both of you may create certain potential conflicts of interest. If an actual conflict occurs, we will notify you of that conflict, and give you an opportunity to either waive that conflict, or to seek other counsel. You understand that we will keep your affairs confidential from other family members, and their affairs confidential from you. You acknowledge that we already represent the following family members:_____
_ (none if not completed).

D. Conflicts with Other Clients. Our Firm consists of more than 200 professionals located in six offices in different cities. We represent a large number of clients, including businesses of all types, individuals, charitable and nonprofit organizations and governmental entities.

It is possible that while you are a client, some of our present and future clients will have disputes or transactions with you. You agree that we may continue to represent, or may undertake in the future to represent, existing or new clients in any matter which is not substantially related to our work for you, even if the interests of our other clients in those matters are directly adverse to you. We agree, however, that your prospective consent regarding conflicting representation in the preceding sentence shall not

apply to any instance where, as a result of our representation of you, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used by such client to your material disadvantage.

You agree that if we represent you adverse to any governmental department, agency or entity, such representation shall not preclude us from continuing to represent or thereafter representing any other governmental department, agency or entity in matters unrelated to our representation of you.

E. Delegation of Work. Customarily, each client of the Firm is serviced by a principal attorney contact. Subject to the decision of the principal attorney, your work or parts of it may be performed by other lawyers and legal assistants in the Firm. Such delegation may be for the purpose of involving lawyers or legal assistants with special expertise in a given area or for the purpose of providing services on the most efficient and timely basis. It is our practice to delegate work to the most economical level appropriate.

F. Scope of Engagement. You are retaining us to provide the following services. Fees for services not indicated below will be in addition to any fee estimate indicated in Section G below.

- ☐ Wills
- ☐ Powers of Attorney, Health Care Powers of Attorney, Living Wills
- ☐ Revocable Trusts
- ☐ Irrevocable Life Insurance Trust
- ☐ Other Irrevocable Trust _____
- ☐ Transfer of Real Estate _____
- ☐ Assistance in Transfer of Other Assets _____
- ☐ Assistance in Transfer of Life Insurance _____
- ☐ Formation of Entity _____
- ☐ Other _____

G. Fees. In determining the amount you will be charged for the legal services we provide to you, we will consider a number of factors including the time and effort required, the novelty and complexity of the issues presented, the skill required to perform the legal services promptly, the fees customarily charged in the community for similar services, the value of the services to you, and the extent to which office procedures and systems have produced a high quality product efficiently. The estimated the amount of fees to be incurred in connection with this matter to be $_____. This estimate is based upon my professional judgment, and I will try to adhere to it. The ultimate cost can be more or less than the amount estimated. We reserve the right to revise this fee estimate if you do not retain us within 60 days of the date when the estimate is made.

The foregoing estimate is based upon the amount of work ordinarily involved in a project of this type. However, in the event that the amount of work involved exceeds the amount ordinarily involved in a project of this type, we reserve the right to increase the fees to cover that additional cost. The reasons for such an increase in fees might include the following:

(1) a higher than ordinary number of revisions in documents, or multiple meetings which do not result in the execution of documents.

(2) your failure to provide needed documents when requested.

(3) a greater than ordinary number of investment accounts, securities, insurance policies or tracts of real estate to be transferred, or unanticipated problems involved in such transfers. This would include real estate title problems, the need for real estate surveys or subdivisions, or other delays in transferring real

estate.

If you have any questions regarding our charges or services, please call me.

H. Costs Advanced. We typically incur a variety of expenses arising in connection with legal services. These include charges made by outside service vendors. Typical of such expenses are messenger, courier and express delivery charges, travel expenses and charges for outside experts and consultants, including accountants, appraisers and other legal counsel.

Expenses for long-distance tolls, in-house photocopies, secretarial overtime, facsimiles, routine postage, errands performed by our personnel, and interoffice courier are determined using a factor of the actual charge billed ("Administrative Expense"). The current factor used in calculating Administrative Expense is 5.25% and is adjusted periodically. The payment of our charges is not dependent upon the successful outcome of this matter.

I. Retainer. It is our policy that new clients of the Firm are asked to deposit a retainer. Our representation of you will commence upon our receipt of a copy of this letter signed by you and our receipt of an initial retainer of $_____.

J. Billing. We will ordinarily bill you after your estate planning documents are signed. However, if there is a substantial delay on your part in completing the plan, we will bill you earlier. All statements are due upon receipt. The Firm reserves the right to charge a late payment penalty in the form of interest calculated at a rate of 10% per annum on any statements not paid within 30 days after the statement date. The payment of our fee is not dependent upon the successful outcome of the matter. We reserve the right to terminate our representation of you at any time for any reason, including the nonpayment of our fees or costs. If your payments will originate from outside the United States, you agree to make payment promptly following receipt of our statement in US dollars by wire transfer. Our wire transfer routing number is 083000056 to Account 22572806.

K. Termination of Engagement. Either of us may terminate the engagement at any time for any reason by written notice, subject on our part to applicable rules of professional conduct. In the event of termination of our engagement, we will, at your request, return whatever papers and property you have provided to us. Additionally, we will deliver to you all of the other material in our files relating to our representation of you, to which you are entitled under the applicable rules of professional conduct, provided that we reserve the right to make at your expense and retain a copy of all material delivered to you. The termination of our services will not affect your responsibility for payment for any outstanding charges owed to us.

Circumstances and types of conduct which may require us to withdraw from representing a client or which will clearly be a basis for our withdrawal, include, for example, nonpayment of our charges, misrepresentation or failure to disclose material facts, action contrary to our advice, and conflicts of interest with other clients of the Firm. We try to identify in advance and discuss with our client any situation which may lead to our withdrawal, and if withdrawal ever becomes necessary, we will immediately give you written notice of our withdrawal. If permission for withdrawal is required by a court, we will promptly apply for such permission and you agree to engage a successor counsel to represent you.

Unless previously terminated, our representation of you will terminate upon our completion of any services that you have retained us to perform. Following such termination, any otherwise non-public information you have supplied to us which is retained by us will be kept confidential in accordance with applicable rules of professional conduct. If you later retain us to perform further or additional services, our attorney-client relationship will be revived subject to these terms of engagement, as they may be supplemented at that time. You agree that unless you engage us after completion of a matter to provide

additional advice on issues arising with respect to the matter, the Firm has no continuing obligation to advise you in connection with future legal developments pertaining to the matter. Upon termination of the attorney-client relationship, we may continue to send you copies of Firm newsletters and other items and invite you to Firm seminars. Receipt of such information or invitations shall not be considered evidence of any on-going attorney-client relationship.

L. Disclosure to Third Parties. You authorize us to discuss with the following persons matters necessary to the proper completion of your estate plan:

☐ Accountant ☐ Investment Advisor ☐ Banker ☐ Insurance Advisor ☐ Banker
☐ Financial Planner ☐ Trust Officer ☐ Children
☐ Other _____

M. Privacy Act Notice. Attorneys and other professionals who provide advice on personal financial matters are now required by federal law to inform their clients of their policies regarding privacy of client information. As you know, attorneys have been and continue to be *bound by professional standards of confidentiality that are even more stringent than those required by this new law.* We have always taken very seriously our ethical responsibilities to protect the privacy and confidentiality of client information.

While providing you with income, estate or gift tax advice or counseling, employee benefits advice, real estate settlement activities, advice in connection with divorce proceedings or settlements, or other services relating to your financial activities, we may obtain certain "nonpublic personal financial information" about you. This personal information may include information received directly from you as well as personal information we receive from any of your advisers or financial institutions with which you do business.

- All information we receive about you is held in confidence, and is not released to people outside our offices, except as agreed to by you, or as required under applicable law.

- We maintain physical, electronic and procedural safeguards that protect your personal information.

You do not need to call or do anything as a result of this notice. This notice is intended to inform you of how we protect and safeguard your nonpublic personal financial information.

Please acknowledge your acceptance of the terms of this letter by signing and dating the enclosed copy of this letter and returning it to us.

We look forward to working with you.

Greenebaum Doll & McDonald pllc

By: _____ Date: _____

ACCEPTED AND AGREED TO:

_____ Date: _____

_____ Date: _____

|<BOX3>|>We are pleased that you selected Greenebaum Doll & McDonald pllc to represent you regarding your estate planning. We will strive to represent your interests professionally and effectively. Set forth below are the terms of our engagement as your lawyers. **This engagement is contingent upon the approval of the firm's new business committee.** Until we notify you that the matter has been approved, we are not your counsel, and you should not share with us any information that you want kept confidential because until we become your counsel we have no obligation to maintain confidentiality and no attorney-client privilege exists.

A. No Solicitation. You confirm that this engagement did not result from direct solicitation to you from our firm or any of its lawyers.

B. Representation of Spouses.

1. No Confidences between Spouses and Us. If you are married and are asking that we represent both spouses, each spouse confirms that you have requested and consented to our joint representation of both of you in connection with your estate planning, and each of you agrees that communications and information we receive from either of you that is relevant to this representation will not be kept confidential from the other of the two of you. You are both considered our client, collectively. Each of you needs to understand the need for full disclosure and candor in our discussions with each other.

2. Communication from one of you. 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 issues to that individual. Of course, we will respond at any time to any questions put to us by either of you.

3. Conflicts between you and withdrawal. Our experience has been that it is quite unlikely, but not impossible, that a relatively serious difference of opinion or disagreement might arise between the two of you in the development of your estate plan, and in that event considerations of legal ethics might compel us to cease representing either of you. If that happens, we will promptly notify both of you that we cannot continue to represent either of you in connection with your estate plan or any other matter that is related to your estate plan, and we will not be obliged to disclose to either of you the precise reason or reasons for our decision.

C. Representation of Other Family Members. If you are aware that we are representing other members of your family, you understand that the representation of both of you may create certain potential conflicts of interest. If an actual conflict occurs, we will notify you of that conflict, and give you an opportunity to either waive that conflict, or to seek other counsel. You understand that we will keep your affairs confidential from other family members, and their affairs confidential from you. You acknowledge that we already represent the following family members:_____ (none if not completed).

D. Conflicts with Other Clients. Our Firm consists of more than 200 professionals located in six offices in different cities. We represent a large number of clients, including businesses of all types, individuals, charitable and nonprofit organizations and governmental entities.

It is possible that while you are a client, some of our present and future clients will have disputes or transactions with you. You agree that we may continue to represent, or may undertake in the future to represent, existing or new clients in any matter which is not substantially related to our work for you, even if the interests of our other clients in those matters are directly adverse to you. We agree, however, that your prospective consent regarding conflicting representation in the preceding sentence shall not apply to any instance where, as a result of our representation of you, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used by such client to your material disadvantage.

You agree that if we represent you adverse to any governmental department, agency or entity, such representation shall not preclude us from continuing to represent or thereafter representing any other governmental department, agency or entity in matters unrelated to our representation of you.

E. **Delegation of Work.** Customarily, each client of the Firm is serviced by a principal attorney contact. Subject to the decision of the principal attorney, your work or parts of it may be performed by other lawyers and legal assistants in the Firm. Such delegation may be for the purpose of involving lawyers or legal assistants with special expertise in a given area or for the purpose of providing services on the most efficient and timely basis. It is our practice to delegate work to the most economical level appropriate.

F. Scope of Engagement. You are retaining us to provide the following services. Fees for services not indicated below will be in addition to any fee estimate indicated in Section G below.

- ☐ Wills
- ☐ Powers of Attorney, Health Care Powers of Attorney, Living Wills
- ☐ Revocable Trusts
- ☐ Irrevocable Life Insurance Trust
- ☐ Other Irrevocable Trust _____
- ☐ Transfer of Real Estate _____
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While providing you with income, estate or gift tax advice or counseling, employee benefits advice, real estate settlement activities, advice in connection with divorce proceedings or settlements, or other services relating to your financial activities, we may obtain certain "nonpublic personal financial information" about you. This personal information may include information received directly from you as well as personal information we receive from any of your advisers or financial institutions with which you do business.

- All information we receive about you is held in confidence, and is not released to people outside our offices, except as agreed to by you, or as required under applicable law.
- We maintain physical, electronic and procedural safeguards that protect your personal information.

You do not need to call or do anything as a result of this notice. This notice is intended to inform you of how we protect and safeguard your nonpublic personal financial information.

Please acknowledge your acceptance of the terms of this letter by signing and dating the enclosed copy of this letter and returning it to us.

We look forward to working with you.

Greenebaum Doll & McDonald pllc

By: _____ Date: _____

ACCEPTED AND AGREED TO:

_____ Date: _____

_____ Date: _____