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Published by:
CONTINUING LEGAL EDUCATION IN COLORADO, INC.
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Denver, Colorado 80203-4301

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Source Code: PR100413L

Colorado Principles of Professionalism

Adopted by the Colorado Bar Association
Board of Governors on May 12, 2012.

Colorado Principles of Professionalism—2011

Preamble

The hallmark of a civilized society is its ability to maintain a legal system that is fair, effective and efficient. As lawyers, we have a predominant role in assuring that the legal system fulfills these goals. Toward that end, starting in 2009, the CBA-DBA Professionalism Coordinating Council undertook a project to meld existing principles of professionalism into a single unified document to create a guide for statewide use. This product of that consolidation of principles is not intended to supersede local Bar association rules of professionalism.

The wisdom and practicality of these combined Principles of Professionalism lie in two key features. First, highly experienced attorneys from many different practice areas and numerous judicial officers who are members of the Professionalism Coordinating Council reviewed, discussed, and developed the combined practice principles as "real-world" attainable goals for professional behavior to which the profession should aspire to apply every day in practice. Second, the principles have no coercive enforcement mechanism except those that have existed in our profession since the days of the quill pen and powdered wig: the fundamental commitment of attorneys to conduct themselves and their practices professionally and with integrity. Adherence to these principles brings its own rewards through the admiration of one's colleagues, and falling short of these high standards brings the opprobrium and condemnation of those same colleagues. The mark of a professional calling is that it aspires first and foremost to police itself.

For the achievement of integrity throughout the legal profession, each lawyer should aspire to adopt the following Principles of Professionalism and to perform in accordance with the Practical Considerations:

Colorado Principles of Professionalism

I. <u>Principle</u>: As licensed professionals, we understand that the law is more than a business; it is also a calling. We will keep our Lawyer's Oath in mind in our daily practice. We understand and accept our role in the American justice system, and freely accept our responsibility to support and defend the Constitutions of the United States of America and the State of Colorado.[1]

II. <u>Principle</u>: Professionalism is fundamental to the effective and efficient representation of clients in the legal system and the even-handed administration of justice. It is also indispensable to building respect for the rule of law and to preserving the integrity of the legal system.[2]

III. <u>Principle</u>: Integrity, honesty, candor, diligence, fairness, trust, respect, dignity, courtesy, cooperation, and competence are guiding principles of our conduct generally and in our dealings with judges, clients, opposing counsel, co-counsel, partners, associates, employees, and the public.[3]

Practical Considerations:

3.1 We will work together toward resolution of our cases by being reasonable.[4]

3.2 We will be cooperative to the extent it does not prejudice our clients' legitimate interests.[5]

3.3 We will treat others, but especially our clients, opponents, fellow attorneys, the courts and other legal professionals, with courtesy and respect. We will always endeavor to retain our objectivity and will try not to take personally disagreements that arise in the proper representation of our clients.[6]

3.4 We will refrain from unseemly or discourteous references to opposing parties, counsel, courts, legal systems or other civil and criminal justice professionals. [7]

3.5 We will respond to all communications in a timely manner and allow for reasonable time for opposing counsel to respond.[8]

3.6 We will communicate promptly with opposing counsel to discuss any disputes, ambiguities or other issues that arise in client representations. We recognize that, in most instances, genuine, personal interaction serves our clients better than perfunctory communication. Although electronic means are appropriate methods to communicate, we will not use electronic communication, including but not limited to facsimile transmission, email, text messaging, or telephone contact, as a means of gaining unfair advantage or as a substitute for effective interpersonal dialogue.[9]

3.7 We will allow ourselves and each other sufficient time to resolve any dispute or disagreement by communicating with one another in a timely and professional manner and by agreeing to reasonable deadlines in light of the nature and status of the matter.[10]

3.8 We will work to reduce the level of anger or animosity among or between parties to a conflict or transaction wherever and whenever we can, and we will strive whenever possible

not to add to, or manipulate, the emotional burden of any dispute or transaction by our conduct, words, or attitudes.

3.9 When scheduling, we will keep in mind that a reasonable balance between life and work helps promote the efficient and fair administration of justice and effective delivery of legal services. We will not make unreasonable demands on off-hours time when dealing with parties, witnesses, opposing counsel, co-counsel, associates, partners, or employees.

IV. Principle: In serving the client, a lawyer must be ever conscious of the broader duty to the judicial system of which both attorney and client are a part.

Practical Considerations:

4.1 We are committed to the loyal and ardent representation of our clients, using our skills and training to seek their legitimate ends. We are equally committed to preventing the use of the legal system to cause unjust harm or to gain unjust advantage. We recognize that, just as legal action pursued for legitimate ends can accomplish great good, legal action pursued for improper purposes or by unjust means can cause great harm. An unjust process can never lead to a just result, and a successful result cannot remedy the harm of an unjust process.[11]

4.2 We will scrupulously refrain from making misleading statements of law or fact, whether by omission, inference, or implication.[12]

4.3 We will abide by our promises and agreements, whether written or oral. Our word is our bond. In the event of a conflict, we will attempt in good faith to resolve the conflict before seeking court intervention.[13]

4.4 When exchanging drafts of agreements, we will call to the attention of other parties and their counsel any changes or suggestions for new language and issues that have not been agreed upon or discussed beforehand.[14]

4.5 We must accept fully the responsibility that comes with the privilege and licensure of practicing law. This requires that we respect the legal rights of others, that we act reasonably and with candor toward others, and that we not seek to advance our personal interests at the expense of the legitimate interests of others.[15]

4.6 Justice is not achieved where short-term victory plants the seed of future conflict. The satisfactory completion of a transaction or the settlement of an adversarial dispute through mutual agreement creates a foundation for future cooperation. The just resolution of a dispute begins a process of reconciliation for the parties.

4.7 Neither we nor our clients are the sole possessors of truth or righteousness in any circumstance. While we may strive zealously for our clients' rights, our zeal also must be directed to achieving justice in the process. Zealous representation is not a justification for failure to act with professionalism.[16]

V. Principle: A lawyer owes to the profession a duty to counsel, mentor, advise, educate, and guide less experienced lawyers. Mentoring should encompass not only the practical and substantive aspects of the practice of law but also the fundamental role of professionalism. As a mentor, a lawyer should encourage those lawyers to whom guidance is provided to engage in activities that enhance the image of lawyers in the eyes of the public, including becoming involved in volunteer service to the community, educating the public about the American legal system, and fostering respect and trust among lawyers. An experienced lawyer should demonstrably impart the intangible qualities of the profession of honor, duty, and pride.

Practical Considerations:

5.1 We will emphasize through mentoring, practice, and guidance the importance of collegiality and of the exercise of ethical and civil behavior.

5.2 We will emphasize through mentoring, practice, and guidance the importance of participation and inclusion in the professional associations of the Colorado bar.

5.3 We will emphasize through mentoring, practice, and guidance the mandate of providing clients a high standard of representation through competency and the exercise of sound and reasoned judgment.

5.4 We will emphasize through mentoring, practice and guidance the imperative of maintaining best practices for client representation, including following legal principles learned from practical experience and maintaining sound law office management practices.

5.5 We will promote through mentoring, practice, and guidance the role of our profession as a public service.

5.6 We will elevate the quality of legal services provided by the profession through mentoring and guiding other lawyers.

5.7 We will welcome requests from other lawyers seeking our guidance and advice on legal professionalism issues.

VI. Principle: A client has no right to demand that counsel abuse any participant in the judicial system or indulge in offensive conduct. Effective advocacy requires neither.[17]

VII. Principle: A lawyer should not use any form of discovery, the scheduling of discovery, or any other part of the dispute resolution process as a means of harassing opposing counsel or opposing counsel's client or as a means of impeding the timely, efficient, and cost-effective resolution of a dispute.[18]

Practical Considerations:

7.1 Discovery Generally

7.1.1 We will not use any form of discovery or discovery scheduling as a means of harassing anyone or for the purpose of obstructing the prosecution or defense of the case. [19]

7.1.2 We will only use definitions and instructions in written discovery that are pertinent, clear, and concise. [20]

7.1.3 We will object to disclosure or discovery only when we have a good faith belief in the merit of the objection. [21]

7.1.4 We will provide disclosures and respond to written discovery requests reasonably. We will not strain to interpret requests or disclosure requirements in the rules of procedure in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information. We will not produce documents in a manner designed to hide or obscure the existence of particular documents. [22]

7.2 Conduct During Depositions

7.2.1 We will conduct ourselves in depositions with the same courtesy and respect as is expected in court. [23]

7.2.2 We will not conduct examinations or engage in other behavior that is purposely offensive, demeaning, harassing or intimidating, or that unnecessarily invades the privacy of anyone. [24]

7.2.3 If sensitive or controversial matters are to be inquired into in a deposition, counsel should consider discussing those matters with opposing counsel in advance. When appropriate, we will attempt to engage in meaningful dialogue with opposing counsel for the purpose of exploring agreements regarding the scope of the examination and the use of the information after the deposition. [25]

7.2.5 We will refrain from coaching deponents by objecting, commenting, or acting in any other manner that suggests a particular answer to a question. [26]

7.2.6 We will not object for the purpose of disrupting or distracting the questioner or the witness. We will object only in the manner provided by the rules. [27]

7.2.7 We will not interrupt the examination for an off-the-record conference with the deponent when the purpose is solely to obstruct the deposition or to coach the witness. [28]

7.2.8 We will not intentionally misstate facts or mischaracterize prior statements or testimony. [29]

7.3 Motions And Conduct In Court

7.3.1 We will scrupulously avoid misleading the court in our presentation of the law, facts, case history, or procedure. [30]

7.3.3 We will only make objections that are concise, specific, and supported by applicable law. [31]

7.3.4 We will demonstrate courtesy and respect for the court and its staff at all times. When in court, we will stand when the judge and jury enter, when addressing the judge, and when the judge and jury leave, unless the custom and practice of a particular court is different.

7.3.7 We will not transmit correspondence or copies of correspondence to the court unless requested or encouraged by the court, authorized by the applicable law or rules and/or by all other parties or their counsel or necessitated by extraordinary circumstances. [32]

7.3.8 We will not engage the court staff in *ex parte* communications concerning the merits of a pending case, ask the court staff for an indication of how the judge may rule, or ask the court staff for legal advice. [33]

7.3.9 We will respectfully seek permission before continuing to argue after the court has ruled.

7.3.10 We will not take positions on litigated or contested matters that are legally or factually unsupportable, and we will not use motions or procedural issues to delay the prompt and fair resolution of a matter, or to harass, intimidate, or wear down an opponent. [34]

7.3.11 We will not lightly seek court sanctions. [35]

7.3.12 We will cooperate in presenting evidence by providing the court and counsel with the names of witnesses to be called and estimates of time for examination and by sharing equipment (such as audio-visual equipment) in the courtroom. [36]

VIII. Principle: A lawyer will be punctual in communications with others and in honoring scheduled appearances and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system. [37]

Practical Considerations:

8.1 We will cooperate by agreeing upon and keeping reasonable deadlines for exchanging drafts, scheduling and completing transactions and providing required documentation.

8.2 We will seek agreements on preliminary, procedural and factual matters, and we will enter into appropriate written stipulations or agreements that will make more effective use of everyone's time. [38]

8.3 We will respond promptly to requests for agreements, even when our response is that agreement on a certain issue is not possible.[39]

8.4 When discussing final stipulations or agreements, we will act promptly to submit proposals for agreement both as to form and content, and we will cooperate in assuring that the final documents fairly and accurately reflect the parties' agreements. [40]

8.5 We will act promptly to advise the courts and other interested parties of all stipulations and agreements. [41]

8.6 We will follow through to assure that all details involved in concluding any agreement or transaction are quickly and efficiently addressed and finalized. [42]

8.7 While always keeping our client's interests paramount, we will also keep in mind that our goal should be the prompt, efficient, and fair resolution of disputes, and the prompt, efficient, and fair completion of transactions on which we are engaged. [43]

IX. Principle: A lawyer providing representation in a transactional matter owes to the legal system, opposing counsel, and all parties duties of candor and transparency, subject to the protection of client confidences.

Practical Considerations:

9.1 When dealing with unrepresented persons, we will encourage them to engage counsel, we will inform them that we do not and cannot represent their interests, and we will avoid any appearance or impression that we are providing any unrepresented persons advice as to the transaction or matter. [44]

9.2 When exchanging electronically drafted documents subject to form and content negotiation, where appropriate, we will furnish to opposing counsel and *pro se* parties "redline" versions or otherwise call specific attention to all changes we have made. We will also take steps to assure that the final document executed by the parties is the document to which all parties have agreed. [45]

9.3 When representing a party in a transactional matter, we will not ask for an opinion-of-counsel from opposing counsel that we, in a similar situation, would be unable (or unwilling) to give.

9.4 We will honor reasonable requests to re-transmit materials or to provide hard copies of documents or drafts.

X. Principle: If a fellow member of the bar makes a just request for cooperation or seeks scheduling accommodations, a lawyer will not arbitrarily or unreasonably withhold consent. [46]

Practical Considerations:

10.1 We will endeavor to schedule hearings, depositions, or other matters by agreement with opposing counsel. [47]

10.2 We will give opposing counsel notice of cancellation of hearings, depositions, and other matters at the earliest possible time. [48]

10.3 We will not seek extensions or postponements for the purpose of harassment or to prolong, delay, or increase the cost or complexity of any matter. [49]

10.4 In scheduling matters, including requests for reasonable extensions of time, we will act in a spirit of cooperation and accommodation. We will act with consideration of the need for expediting the litigation or transaction and the professional and personal schedules of others involved. We will raise scheduling conflicts only when they actually exist. [50]

XI. Principle: A lawyer owes to the public a devotion to the public good and to public service; a commitment to the improvement of the administration of justice; a duty to abide by and, subject to a good-faith reservation as to existence of a violation, to report violations by others of any disciplinary rules; and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance. [51]

Practical Considerations:

11.1 We will endeavor to make legal services available to people who have legal needs, but cannot afford to pay customary charges, and we will strive to provide advisory or other assistance to non-profit community service organizations. [52]

XII. Principle: A lawyer will not attack, demean, or otherwise degrade opposing counsel. The public cannot be expected to hold the profession in high esteem if we do not ourselves respect one another. [53]

Practical Considerations:

12.1 We will not impute improper motives to other lawyers or make any statements that impugn their character unless clearly justified by the facts and essential to the resolution of an issue.

12.2 We will commit to treat the representation of the client as the client's transaction, dispute or controversy, and not as a personal dispute with opposing counsel. [54]

XIII. Principle: Above all, a lawyer owes to all with whom the lawyer comes in contact, civility, professional integrity, and personal dignity. [55]

Brought to you by the Colorado and Denver Bar Associations' Professionalism Coordinating Council

[1] (Rules of Professional Conduct, Preamble, nn. 1,7; hereafter "R.P.C.")
[2] (R.P.C. Preamble, 1.1, 1.3, 3.2, 3.3, 3.4, 3.5, 4.1, 4.4)
[3] (R.P.C. 3.3, 3.4, 3.5, 4.1, 4.3)
[4] (R.P.C. 3.2)
[5] (R.P.C. 1.6)
[6] (R.P.C. Preamble, n. 5; 4.1-4.5, 8.2)
[7] (R.P.C. Preamble, n. 5; 4.4(a), 8.2).
[8] (R.P.C. 1.3 cmt. 3; 1.4 cmt. 4; 3.2)
[9] (C.R.C.P. 1(a), 16(b)(3), 121, § 1-15(8)); R.P.C. 3.4).
[10] (R.P.C. 1.3)
[11] (C.R.C.P. 1(a); R.P.C. 1.2(d), 3.1, 3.2, 3.3, 3.4, 4.1, 4.5)
[12] (C.R.C.P. 11(a); R.P.C. 3.1, 3.3, 4.1)
[13] (C.R.C.P. 121, §§ 1-12(5), 1-15(8), 26(c))
[14] (R.P.C. 4.1, cmt. 1, 2)
[15] (R.P.C. 3.3, 3.4, 4.4)
[16] (R.P.C. Preamble, nn. 1, 2, and 8; 3.1, cmt. 1)
[17] (R.P.C., 3.4)
[18] (R.P.C. Preamble nn 5, 3.1, 3.4 and 4.4)
[19] (C.R.C.P. 26(b)(2), (c), (g)(2); R.P.C. 3.2, cmt.1, 3.4 and 4.4)
[20] (C.R.C.P. 26(g), 33(b), 34(b), 36(a))
[21] (C.R.C.P. 11(a); 30(c), (d)(1); 33(b)(1), (4); 34(b); 36(a))
[22] (C.R.C.P. 16.1(k)(1), 16.2(e), 26(a))
[23] (C.R.C.P. 30(d)(3))
[24] (C.R.C.P. 30(d)(3))
[25] (C.R.C.P. 26(c), 121, § 1-12(1), (2))
[26] (C.R.C.P. 30(d)(1)-(3))
[27] (C.R.C.P. 30(c), (d)(1))
[28] (C.R.C.P. 30(d)(1)-(3))
[29] (R.P.C. 3.3, 3.4)
[30] (C.R.C.P. 11(a); R.P.C. 3.3, 3.5, 4.1)
[31] (C.R.C.P. 11(a))
[32] (R.P.C. 3.5)
[33] (R.P.C. 3.5)
[34] (C.R.C.P. 11(a) and R.P.C. 3.1)
[35] (C.R.C.P. 26(c); 37(a)(2), (d); 121, §§ 1-12(5), 1-15(8))
[36] (C.R.C.P. 16(f), 16.1(k), 16.2(h), 121, § 1-6))
[37] (R.P.C. 1.3)
[38] (C.R.C.P. 1(a); R.P.C. 1.3)
[39] (C.R.C.P. 121, § 1-15(8); R.P.C. 3.1, cmt. 1)
[40] (C.R.C.P. 121, § 1-16)
[41] (R.P.C. 1.3)
[42] (R.P.C. 1.3)
[43] (C.R.C.P. 1(a); R.P.C. 1.3)
[44] (R.P.C. 4.1, 4.3, 4.4)
[45] (R.P.C. 3.4, 4.1)
[46] (R.P.C. 3.2)
[47] (C.R.C.P. 121, § 1-12(1))
[48] (C.R.C.P. 121, §§ 1-12, 1-15)
[49] (C.R.C.P. 11(a); R.P.C. 3.2, 3.4)
[50] (C.R.C.P. 1(a), 121, §§ 1-12, 1-15)
[51] (R.P.C. Preamble, n. 6; 6.1, 8.3, 8.4)
[52] (R.P.C. 6.1)
[53] (R.P.C. 3.4, 4.1, 4.4)
[54] (R.P.C. 3.4, 4.1)
[55] (R.P.C. Preamble, 1.3, 1.4, 1.6, 1.7, 3.2, 3.3, 3.4, 4.1, 4.2, 4.3, 4.4, 5.1, 7.1, 7.3, 8.3, 8.4)

PPA

Peer Professionalism Assistance

The **Peer Professionalism Assistance (PPA)** group (formerly known as the Metropolitan Conciliation Panel) has been sponsored by the Denver Bar Association for 15 years. In 2002, PPA was converted into a metropolitan-wide program, which now consists of attorneys from Adams, Arapahoe, Broomfield, Denver, Douglas, Elbert, Gilpin and Jefferson counties. It is part of a nationwide effort to assist the enhancement of professionalism among attorneys.

WHO DOES PPA HELP? Troubled by rude and unprofessional attorneys? Have you come across an attorney behaving in any of the following ways:

- Uncooperative in scheduling matters?
- Refusing to respond to telephone calls or correspondence?
- Personally attacking you in correspondence, e-mails or court documents?
- Rude and contentious in communications?

PPA offers **FREE**, voluntary (except when court ordered) and confidential assistance to attorneys to resolve professionalism disputes with other attorneys. PPA can assist attorneys in the following ways:

- Mentor the calling attorney and provide advice on how to handle the situation.
- Contact the offending attorney upon request to discuss the professionalism issues.
- Meet jointly with both attorneys to resolve the professionalism issues.

PPA does not assist the general community or clients with complaints, nor do we handle violations of the Colorado Rules of Professional Conduct (ethical violations).

WHO ARE THE PPA PANEL MEMBERS? The PPA panel members are a diverse, volunteer group of experienced lawyers, known for their integrity and professionalism.

HOW TO CONTACT PPA. You may call our general help line at 303-860-1115 or contact one of the PPA panel members directly. The current list of on-call PPA panel members can be found on our website through the Colorado Bar Association's Professionalism Resources page at www.cobar.org.

COLORADO BAR ASSOCIATION CLE

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AGENDA

8:30 am:	**Registration and Continental Breakfast**
9:00 am:	**Introduction and Welcome** *Extended by Mark D. Masters, Esq., and Julia McVey, Esq., Program Co-Chairs*
9:05 am:	**How to Use the Orange Book** Why It's the Swiss Army Knife for Colorado Trust and Estate Lawyers *Presented by Mark D. Masters, Esq., and Julia McVey, Esq., Program Co-Chairs*
9:30 am:	**Nontrust Wills and Wills with Contingent Trusts** Forms 6A, 6B and 7A: When to Use These Documents and Issues to Watch Out for in Drafting *Presented by Dennis N. Whitmer, Esq.*
10:15 am:	**The Engagement Letter: Factfinder, Beneficiary Designations and Deeds** *Presented by Leia Ursery, Esq.*
10:55 am:	**Networking Break**
11:10 am:	**Disclaimer Will** Form 8; When to Use This Will Instead of a Marital Deduction Will; Issues to Watch Out For; Issues to Discuss with Your Client *Presented by David K. Johns, Esq.*
11:40 am:	**Lunch Break**

1:00 pm: **Most Commonly Used Forms**
Financial Powers of Attorney (Form 1A); Parent's or Guardian's Delegation of Powers (Form 2); Appointment of Guardian by Signed Legal Writing (Form 3); Medical Durable Power of Attorney (Form 4); and Advance Directive for Medical/Surgical Treatment (Form 5); Gifting Issues to Watch Out for When Using These Forms
Presented by Laurie A. Hunter, Esq.

1:50 pm: **Marital Deduction Will**
Family Information; Specific and General Gifts; Residuary Estate; Disposition of Marital Trust; Disposition of Family Trust; Designation and Succession of Fiduciaries; Powers of Fiduciaries; Trusteeship; Administrative Provisions; Tax Provisions
Presented by J. Randolph Robida, Esq.

2:20 pm: **Revocable Trusts**
Single Person, Married Couple and Joint Trusts; Forms 13A, 16 and 13B; Issues to Watch Out For When Using These Forms
Presented by Josie Faix, Esq., and Bette Heller, Esq.

3:00 pm: **Closing Remarks; Why Join a Committee?**

3:10 pm: **Adjourn**

BIOGRAPHICAL INFORMATION

Program Chair

Mark D. Masters, Esq., limits his practice to estate planning, business planning, estate administration and tax, including planned charitable giving. Mr. Masters is Past Chair of the Colorado Bar Association Trust & Estate Section, and is former chair of the Section's Statutory Revisions Committee and member of the Colorado Probate Code (UPC II) revision committee. In addition to writing legislation, Mark contributes to the standard reference "Colorado Estate Planning Handbook," 6th Ed., co-edited the 1st and 2nd editions of the C.B.A. Senior Law Handbook, has been quoted in *Time Magazine* and *Bloomberg Business News*, has written articles for *The Colorado Lawyer*, *The Denver Post* and *Rocky Mountain News*, and is Contributing Editor of the *Colorado Will and Estate Planner* for Bradford Publishing. In his 25th year of practice, Mr. Masters holds a BA With Distinction from the University of Colorado-Boulder and a JD degree from Washburn University School of Law. He is an adjunct faculty member of the Paralegal Department of Arapahoe Community College, and has lectured for the Denver University College of Law, the University of Colorado School of Law and for Regis University. A lecturer and program planner, Mr. Masters was honored with the Doyle Award of Excellence in 2007 by CLE, Inc. of the Colorado Bar Association for his contributions to legal continuing education and publications. Since 2009 Mark has been recognized in *5280* and *ColoradoBiz* magazines for "Five Star" client satisfaction among Colorado estate planning attorneys, and is recognized in those magazines as a "Colorado Superlawyer" for 2011. Mark is a Fellow of the Colorado Bar Foundation, a member of the Rocky Mountain chapter of the Society of Financial Service Professionals, and member of the Southeast Denver Estate Planning Council and C.B.A. Tax Section.

Julia Griffith McVey, Esq., graduated from the University of Colorado-Boulder and received her law degree from the University of Denver College of Law in 1991. Mrs. McVey practices in the areas of estate planning and probate administration. She is a member of the Denver and Colorado Bar Associations, the Centennial Estate Planning Council, and the Rocky Mountain Estate Planning Council, where she was a past president. Additionally, Mrs. McVey has been active in committee work on behalf of the Probate and Trust Law Section of the Colorado Bar Association. She has made numerous presentations for CBA Continuing Legal Education in the area of estate planning and probate administration. She is currently co-editor of the Trust and Estate Section's *Council Notes.* She co-authored an article for *The Colorado Lawyer* entitled "Marital Agreements in Colorado," published in February 2007. She has been an attorney on the AARP Legal Services Network since 2004.

Faculty

Josie Faix, Esq., is an associate with Wade Ash Woods Hill & Farley, P.C., where her practice focuses on estate planning, estate and trust administration, and protective proceedings. Ms. Faix received her law degree from Georgetown University Law Center in 2001. Ms. Faix is active in the Trust and Estate Section of the Colorado Bar Association and is a member of the Statutory Review Committee and the Orange Book Forms Subcommittee. She is a member of the Colorado Bar Association and the Denver Bar Association.

Bette Heller, Esq., is in private practice with offices in both Centennial and Englewood. Her practice is limited to estate planning, estate and trust administration, probate, and Medicaid planning. Ms. Heller received her Juris Doctor degree from the University of Denver College of Law in 1979. As a member of the Colorado Bar Association, Ms. Heller has been a voting member of the Trust and Estate Section Council, and a member of the Elder Law Section. She has also been an active member of the Statutory Revisions Committee since 1984, and has served as its co-chair, chair, and legislative liaison. She was involved in the drafting and passage of the Colorado Probate Code II, which became effective on July 1, 1995, and is the author of the Colorado Pets Trust Statute. Ms. Heller is also a current board member of the Aurora Bar Association, a current member of the Arapahoe County Bar Association; and a past member of the Denver Bar Association, the Douglas/Elbert County Bar Association, the Centennial Estate Planning Council, and the Douglas County Seniors Council. Ms. Heller has authored several articles on legal issues for both the legal community and the general public, including *The Colorado Lawyer*. She has been a lecturer at a number of continuing legal education programs, and for Senior Law Day.

Laurie A. Hunter, Esq., is a shareholder in Wade Ash Woods Hill & Farley, P.C., Denver, Colorado. She received her J.D. degree from the University of Denver College of Law in 1981, and has been in private law practice in Denver since then, concentrating her practice in tax and estate planning. Ms. Hunter was elected as a fellow in the American College of Trust and Estate Counsel in 1998, and serves on the State Laws and Fiduciary Income Tax Committees of that organization. Ms. Hunter is active in the Trust & Estate Section of the Colorado Bar Association, and a frequent speaker on trust and estate issues. She was chair of that Section for the 1997-1998 fiscal year. Ms. Hunter was chair of the Colorado Estate Planning (Orange Book) Forms Committee 2001-2002, and she serves on the Statutory Revisions Committee and Rules and Forms Committee. She was a member of the Uniform Trust Code Committee, the Uniform Probate Code II Steering Committee, and the Uniform Probate Code III Committee.

David K. Johns, Esq., is a part-time practitioner with the law firm of Johns & Associates, LLC, and adjunct professor of law at the University of Denver College of Law. A native of Denver, he received his undergraduate degree at the University of Colorado (1983) and his law degree from the University of Denver (1990). Mr. Johns is the author of numerous articles and frequently lectures to attorneys on estate planning issues at local, state, and

national conferences. He is a member of the Trust and Estate Section of the Colorado Bar Association and a member of the Bar of the Supreme Court of the United States.

J. Randolph Robida, Esq., has a solo law office in Denver, Colorado. His practice focuses on tax law, estate planning, probate and business planning. Mr. Robida earned his B.S. in Business with a major in Accounting from Virginia Tech and his J.D. from the College of William & Mary. He also has an LL.M. in taxation from the University of Denver. He has practiced both as an attorney and as a certified public accountant. He worked in the tax department of Peat Marwick in Norfolk, Virginia and Ernst & Young in Denver. Mr. Robida has lectured frequently on tax, estate planning and estate administration issues.

Leia G. Ursery, Esq., is an associate attorney with Olsen & Traeger, LLP in Denver. Her practice focuses on estate and tax planning, estate and trust administration, and related litigation. She is an active member of the Colorado Bar Association (Trust and Estate Section, Young Lawyers Division Executive Council — former chair, and Membership Committee) and American Bar Association (Young Lawyers Division). Ms. Ursery received her J.D. and LL.M. (taxation) from the University of Denver and her undergraduate degree in international business and marketing from the University of Hawaii.

Dennis N. Whitmer, Esq., is a Special Counsel with the firm of Hamilton, Faatz and Waller, PC. His practice concentrates on representing fiduciaries and he has recently served as an expert witness in a number of cases involving complex fiduciary administration issues. He is a retired corporate trust officer with over 31 years of experience. He was most recently with Colorado State Bank and Trust N.A. from 1987 through 2011. He is a member of the CBA and is a past Chair of the Trust and Estate Section. He has served as the Chair of the Statutory Revision Committee and as a member of the Orange Book Committee (Colorado Continuing Legal Education - Estate Planning Forms). He has also recently served as the Chair of the Statutory Revision Sub-Committee which reviewed the Uniform Estate Tax Apportionment Act, which was adopted in Colorado in 2011. He has made numerous presentations for CBA Continuing Legal Education. He received his J. D. from Kansas University in 1979 and an M. S. from Kansas State University in 1972. He is also been admitted to the Kansas and Minnesota Bar.

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TABLE OF CONTENTS

Section 6: **Marital Deduction Will**

Family Information; Specific and General Gifts; Residuary Estate; Disposition of Marital Trust; Disposition of Family Trust; Designation and Succession of Fiduciaries; Powers of Fiduciaries; Trusteeship; Administrative Provisions; Tax Provisions

Presented by J. Randolph Robida, Esq.

Section 7: **Revocable Trusts**

Single Person, Married Couple and Joint Trusts; Forms 13A, 16 and 13B; Issues to Watch Out For When Using These Forms

Presented by Josie Faix, Esq., and Bette Heller, Esq.

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SECTION 1

How to Use the Orange Book

Presented by

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Horen, Lockwood & Masters, LLP
Englewood, CO

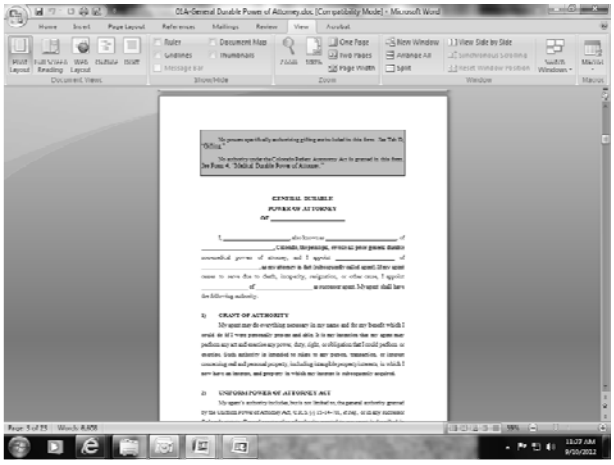
Julia McVey, Esq.
The Law Office of Julia Griffith McVey, Esq.
Lakewood, CO

NOTES:

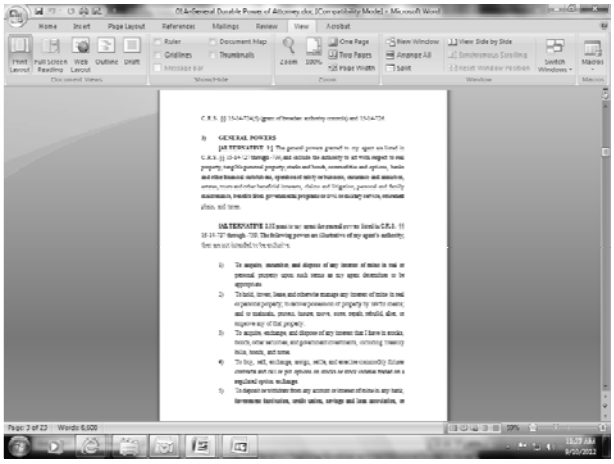
How to Use the Orange Book:
Why It's the Swiss Army Knife for Colorado Trust and Estate Lawyers

Mark D. Masters, Esq., and
Julia McVey, Esq.

Form 1A: GENERAL DURABLE POWER OF ATTORNEY



Form 1A: GENERAL DURABLE POWER OF ATTORNEY



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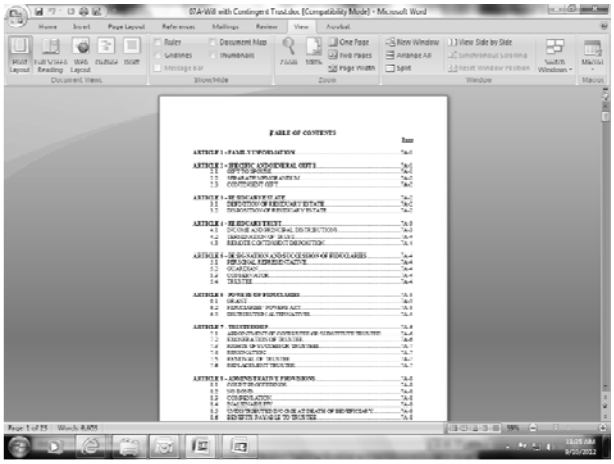

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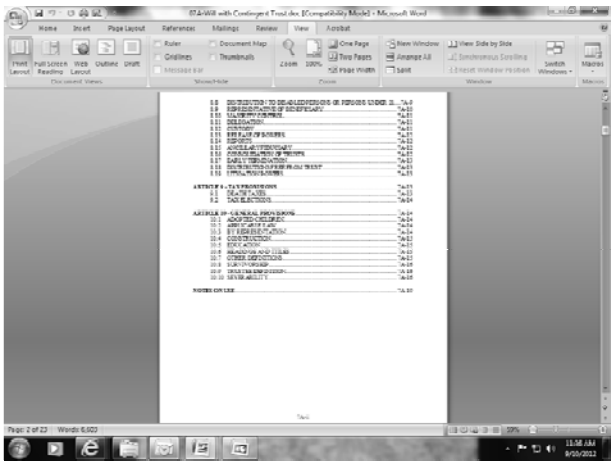

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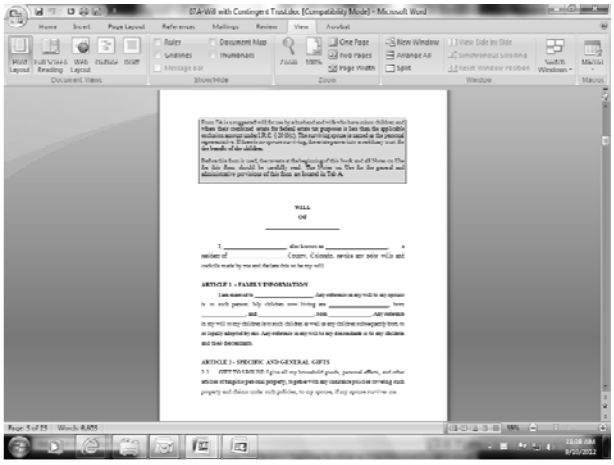

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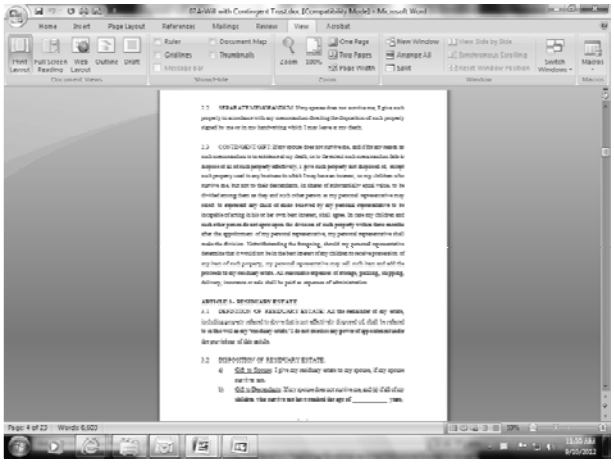

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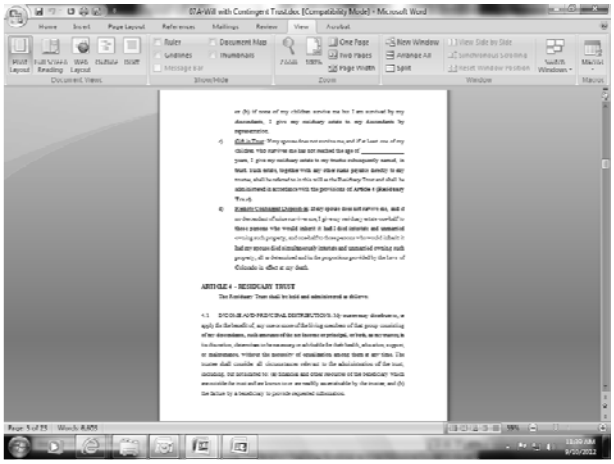

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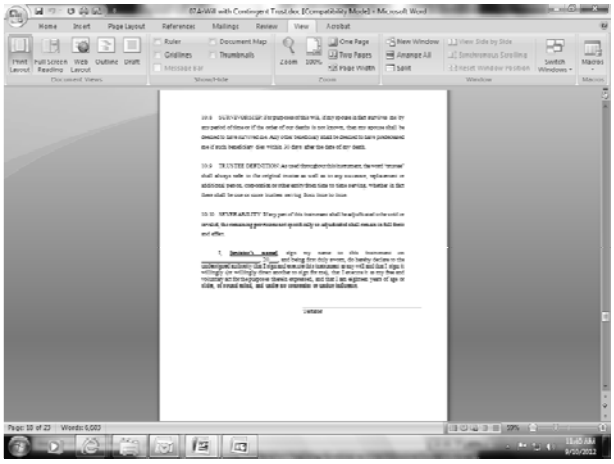

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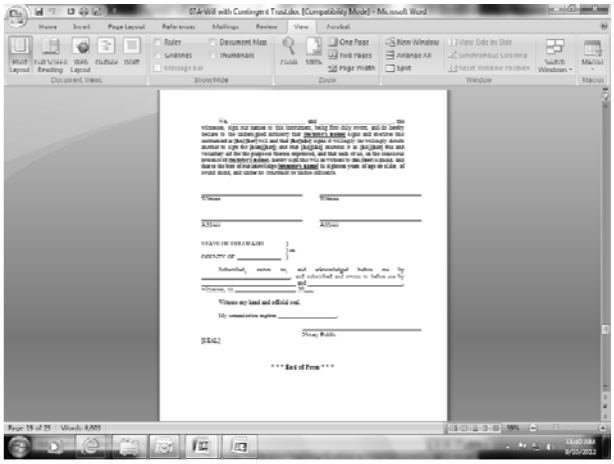

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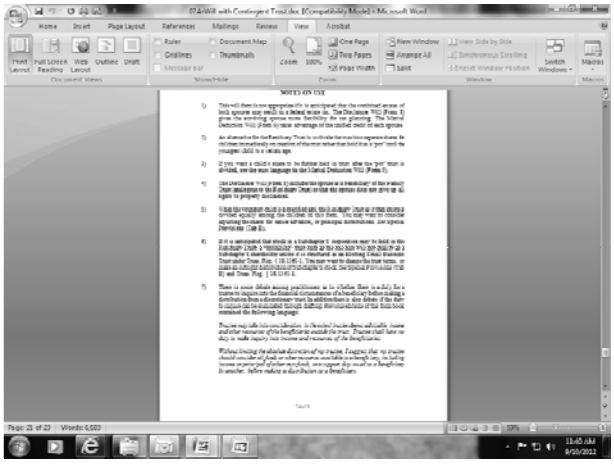
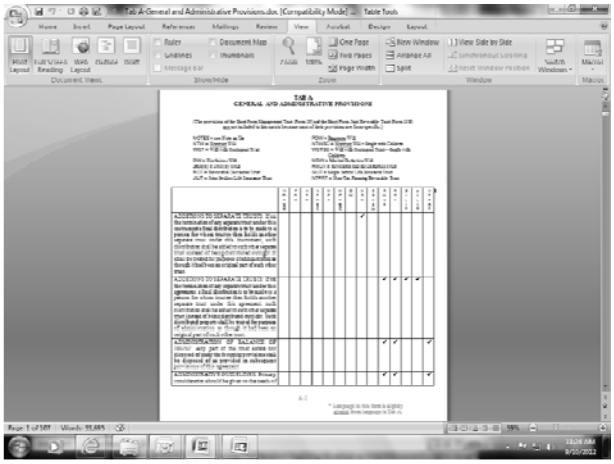


TAB A: GENERAL AND ADMINISTRATIVE PROVISIONS



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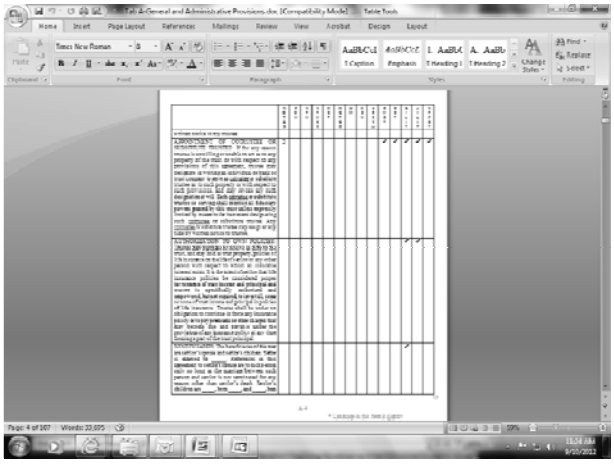
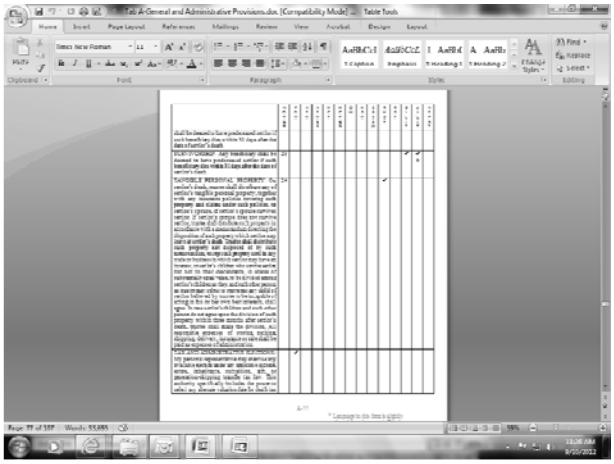
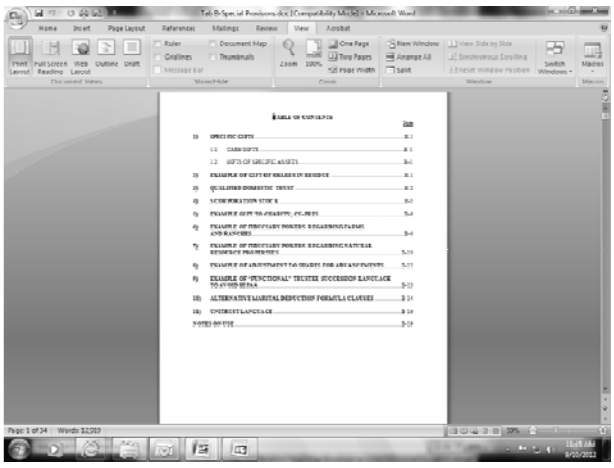


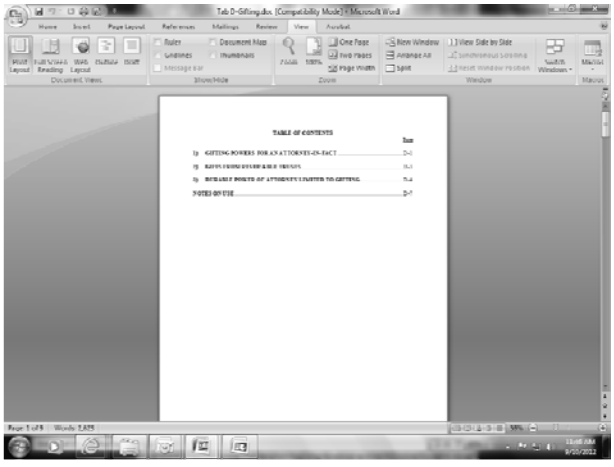
TAB A: GENERAL AND ADMINISTRATIVE PROVISIONS



TAB B: SPECIAL PROVISIONS



TAB D: GIFTING



NOTES

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SECTION 2

Nontrust Wills and Wills with Contingent Trusts

Presented by

Dennis N. Whitmer, Esq.
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Greenwood Village, CO

NOTES:

Colorado Bar Association CLE

Orange Book Forms – The Must Have Tool

October 4, 2012

Nontrust Wills and Wills with Contingent Trusts

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Nontrust Wills and Wills with Contingent Trusts

Forms: 1. 06A- Nontrust Will
2. 06B- Nontrust Will Single with Children
3. 07A-Will with Contingent Trust
4. 07B-Will with Contingent Trust Single with Children

Appropriate Circumstances for use

Nontrust Will

Form 6A is a suggested will for use by a husband and wife who have adult children and where their combined estate for federal estate tax purposes is less than the applicable exclusion amount under I.R.C. § 2010(c).

Nontrust Will Single with Children

Form 6B is a suggested will for use by an unmarried individual where the value of the individual's estate for federal estate tax purposes is less than the applicable exclusion amount under I.R.C. § 2010(c). (The children are adults.)

Will with Contingent Trust

Form 7A is a suggested will for use by a husband and wife who have minor children and where their combined estate for federal estate tax purposes is less than the applicable exclusion amount under I.R.C. § 2010(c). If there is no spouse surviving, the estate passes into a residuary trust for the benefit of the children.

Will with Contingent Trust Single with Children

Form 7B is a suggested will for use PRIMARILY by an unmarried individual where the value of the individual's estate for federal estate tax purposes is less than the applicable exclusion amount under I.R.C. § 2010(c). (The children are minors.)

Issues To Watch Out For When Drafting

Residue Clauses – Don't leave home without one.

Perhaps one of the more common mistakes a practitioner can make in will drafting is the failure to include a residue clause. Often practitioners will draft a will that contains an extensive list of specific bequests that appear to cover all of the property of the testator. Times change people get forgetful. Assets come and go. If it is a significant item and intestate succession is the rule that will apply to this asset it is often an unpleasant experience for the practitioner.

Specific Bequests and Percentages - be careful when mixing.

The future is unpredictable. Consider the possibility that a relatively small (in relation to the estate) dollar amount specific bequest, going to a low priority devisee, may due to estate shrinkage edge out a high priority devisee who was to receive a large percentage of the estate.

Anti-Lapse - To Lapse or not to Lapse that is the question.

C.R.S. §15-11-706 contains the rules which are generally described as the anti-lapse statute. Note that the statute protects against a lapse of a gift just because a devisee predeceases the testator. A statement in the governing instrument such as "to Bill, if he survives me," is usually not enough to cause the gift to lapse. The statute presumes that in family situations that the testator really intended the gift to go to the issue of the predeceased devisee. Best practice for insuring that the gift will lapse is a provision such as – "To Bill, if he survives me and if not this gift shall lapse and is to be added to the residue of my estate."

Formalities – More is better with a mobile client.

Follow the most stringent Colorado requirements and the requirements of states that the client may have property in or has a likelihood of being a resident of when he or she assumes room temperature. Note that Colorado, as a Uniform Probate Code state, permits the witness to be interested parties who take under the will (see C.R.S. §15-11-505). Non-UPC states may have a requirement that the witnesses be disinterested and not take under the will. A valid Colorado will if probated in such a state could be invalid.

Identity – Testator, Devisee and Property

If testator is known by a variety of names then identifying all names and aliases is a best practice, especially if the testator owns property under a variety of names.

Even more important is the question of identity of devisees. Persons know by a variety of names, including married women who have taken their husband's name, should be clearly identified in the instrument by all those names. This importance increases with the advent of same sex marriage. Colorado has not adopted a statute recognizing such marriages but the impact upon probate law will become an issue within Colorado for same sex couples married outside of this state.

Use of nicknames is discouraged, as the persons probating the will can be unfamiliar with the nicknames.

Identification of testators' spouse and children, natural born or adopted, is encouraged even if one or more of these individuals are omitted from the will. Such a clause demonstrates that the testator is aware of the "natural heirs of his/her bounty." It also helps the person probating the will by making it easier to identify who should receive notice. Additionally, it helps eliminate the potential for a claim against the estate by persons claiming to be a spouse or child of the decedent, without notice of the proceedings, and to claims of being a forgotten or omitted child of the decedent.

The same precision and completeness as a best practice for identification of a person is equally important for identification of property, both real and personal. Avoid the use of generic terms such as "car". Precise identification can save time and money during the probate process by avoiding wild goose chases.

C.R.S. §15-11-513 requires that the identification of personal property be done "with reasonable certainty". At times it may seem impossible to impress the importance of this matter on the testator when they fill out the personal memorandum, but the attempt should be made by the practitioner.

Boilerplate - Take the time to understand meaning and purpose.

Tab B – General and Administrative Provisions. Take some time to review the various clauses and understand when they should be used and when they shouldn't. If you do not understand where a provision fits or its impact fell free to give this presenter a call. Another resource is chapter 25 of the Colorado Estate Planning Handbook by CLE of Colorado, written by yours truly. If you are having problems understanding an administrative clause it is probably because it was not explained it as well as it should have been. Your input will be helpful in rectifying this problem.

The forms you encounter in the Orange Book are designed to be used in the most common circumstances and take and approach that is most likely to keep the practitioner out of trouble. However, this doesn't mean that they are appropriate for all cases. Note that in estate planning and document drafting there are a number of moving parts. The more complex the circumstances and the ensuing plan the more moving parts. Be aware that by changing one moving part you may affect another critical moving part.

Be cautious in removing boilerplate that appears in the Orange Book just because it does not seem to apply. In addition it is probably best not to change boilerplate

language because you believe it may sound better. There may be a reason for the exact wording. In addition when the court (or even worse a litigator) spots a clause that has different language than commonly used the temptation is to try to read a different meaning into the unique language. This is probably not what your client wants his or her family to experience.

Consider the following clauses:

Inquiring into the circumstances of the beneficiary - Note on use 7 Will with Contingent Trust.

Exoneration of Trustee – 7.2 Will with Contingent Trust.

Compensation - 8.3 Will with Contingent Trust.

Inalienability – 8.4 Will with Contingent Trust, 6.4 Nontrust Will.

Distribution to Disabled Persons of Persons under 21 – 6.5 Nontrust Will.

Distribution Alternatives – 5.3 Nontrust Will.

Death Taxes – 7.1 Nontrust Will.

Powers of Fiduciaries
Grant- 5.1 Nontrust Will.
Fiduciaries' Powers Act – 5.2 Nontrust Will

Applicable Law – 8.2 Nontrust Wil.l

By Representation – 8.3 Nontrust Will.

Trustee Provisions:

Representative of Beneficiary – 8.9 Will with Contingent Trust.

Majority Control – 8.10 Will with Contingent Trust.

Delegation – 8.11 Will with Contingent Trust.

Custody – 8.12 Will with Contingent Trust.

Release of Powers – 8.13 Will with Contingent Trust.

Reports – 8.14 Will with Contingent Trust.

Ancillary Fiduciary – 8.15 Will with Contingent Trust.

Consolidation of Trusts – 8.16 Will with Contingent Trust.

Early Termination – 8.17 Will with Contingent Trust.

Distributions Free From Trust – 8.18 Will with Contingent Trust.

Litigation Powers – 8.19 Will with Contingent Trust.

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SECTION 3

The Engagement Letter: Factfinder, Beneficiary Designations and Deeds

Presented by

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Olsen & Traeger, LLP
Denver, CO

NOTES:

NOTES:

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SECTION 4

Disclaimer Will

Presented by

David K. Johns, Esq.
Johns & Associates, LLC
Salida, CO

NOTES:

THE ORANGE BOOK
COLORADO ESTATE PLANNING FORMS

FORM 8 – DISCLAIMER WILL

By:
David K. Johns
Johns & Associates, LLC
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Salida, Colorado 81201
303/321-1600
dkjohns@earthlink.net

A. What Form 8 Does

Form 8 is a will form intended to give flexibility to married couples needing basic estate tax planning who have a combined net worth near or above the exclusion amount for federal estate taxation. After one spouse dies this Form gives the surviving spouse the option to shelter assets in a family trust which can then lead to minimizing federal estate taxation when that second spouse dies.

Looking at Form 8, there are the same or similar provisions as what you've seen in previous forms – e.g. FAMILY INFORMATION, SPECIFIC AND GENERAL GIFTS SECTIONS are the same; many of the ADMINISTRATIVE and GENERAL provisions are also the same.

What is DIFFERENT with the Disclaimer Will Form is that this Form provides basic estate tax planning – not *income* tax planning but *estate* tax planning. Form 8 does this by adding a testamentary trust identified as the "Family Trust" that may or may not ultimately be used by the Clients.

Why add a testamentary trust - which may or may not be used? 3 answers: FLEXIBILITY, FLEXIBILITY and FLEXIBILITY.

This form only works with clients who are married couples! Further, this form is relatively simple and easy to explain to your estate planning clients.

B. How does Form 8 work?

A Married couple with adult children each sign their own "disclaimer will."

In Article 3.2A (the "residuary clause") if one spouse dies, the surviving spouse gets everything. - nothing different so far from other forms.

However, at that point in time – AT THE TIME OF THE FIRST DEATH - the surviving spouse can assess whether or not it is prudent, from an ESTATE tax perspective, if that's a good thing to do. The question is this:

KEY QUESTION: By receiving that inheritance, will the surviving spouse be in a position where at his/her death, there will be a potential federal estate tax liability?

If the answer is **NO**. The surviving spouse can receive "outright" the residuary estate. If the answer is **YES**, the surviving spouse may DISCLAIM a portion or all of that inheritance. It is completely discretionary, the surviving spouse has the FLEXIBILITY to disclaim – he or she doesn't have to disclaim anything. If the spouse does disclaim a part or all of the intended inheritance, those assets will be placed into the "Family Trust" and administered in accordance with Article 4.

Remember, a "disclaimer" is a complete and unqualified refusal to accept property, made in writing, irrevocable, which needs to be made within 9 months after the date of death.

Note: Form 8 anticipates a "Qualified" Disclaimer be made by the surviving spouse. A qualified disclaimer is a disclaimer which complies with certain rules as outlined by Internal Revenue Code Section 2518. Those rules, along with Colorado's statutory method for disclaiming property,[1] are beyond the scope of these materials.

As mentioned, the "disclaimed" property (or would-be inheritance) is then placed into the "Family Trust." The wonderful aspect of Form 8 is that the surviving spouse is the primary beneficiary of the family trust – along with children, grandchildren ("descendants"). The surviving spouse may, although not advisable, be named the trustee. Further, the surviving spouse has the FLEXIBILITY to also disclaim any interest in the Family Trust.

The trustee of the family trust can distribute to the surviving spouse and descendants under the ascertainable standards of "health, education, support, or

maintenance." Don't expand the criteria. "Health, education, support, or maintenance" have special meaning for tax purposes and DO NOT alter to include additional phrases such as "happiness," "comfort" or "welfare."[2]

Bottom Line: The surviving spouse "disclaims" property FOR TAX PURPOSES but then gets to enjoy the benefits from those same assets as a beneficiary of the family trust. At the surviving spouse's death, the assets remaining in the Family Trust are "sheltered" and not included in the surviving spouse's estate for estate tax purposes.

C. Post Mortem Planning

In essence, Form 8 gives married couples the flexibility to engage in *post death planning* to reduce or eliminate potential estate taxes. After the first death, the surviving spouses can assess what is the potential estate tax exposure is of the survivor based upon the facts and circumstances AT THAT TIME.

After the first death, questions would include:

1. What is the then estate tax 'threshold' or 'exclusion amount'? Is it scheduled or likely to change?
2. What are the assets of the surviving spouse?
3. What probate assets may be disclaimed?[3] Note, there are time limits and qualifications to disclaim.
4. What assets does the surviving spouse need long-term?

D. Why Use Form 8?

To provide ***flexibility*** (has this been mentioned yet?). No one has the perfect crystal ball to predict the facts and circumstances of their clients' situation in the event one spouse dies. Questions that create uncertainty include:

1. *How will the estate taxes law change?* Currently, estates valued at $5,000,000 and higher are subject to estate taxes. Unless the U.S. Congress acts the "threshold" of $5,000,000 will change to $1,000,000 on January 1, 2013.[4] What's going to happen, if anything, between now and January 1st? How will the results of the

presidential election influence this issue? Will Congress act sometime after January 1st and make changes retroactive?

2. *Will "portability" remain*? Portability is the concept whereby a deceased spouse's unused exclusion amount can be carried over to the surviving spouse.[5] Will this change along with whatever changes occur to estate taxes?

3. *Will our client's net worth change*? How clients' predict their net worth will change and how it actually changes over time are often two different things.

Form 8 is the first step to providing effective estate tax planning to married couples as it removes some (*not all*) of the uncertainly with regard to potential estate taxes.

E. When to use Form 8

This form is particularly useful when you have clients who:

1. Are Married. The ability of using a "disclaimer" will is available to married couples. There will be no estate tax benefits unless Form 8 is used with married couples.

2. Have combined assets near or exceeding the estate exclusion amount. For example, IF (and it's a big "if") the estate tax exclusion is $1,000,000 and your clients net worth is in the range of say $800,00 to $2,000,000, then using Form 8 may be a prudent. If the clients' net worth is less, Form 8 could still be used, but it is likely "overkill." If the clients' net worth is near or above $2,000,000, Form 9 may be a more appropriate form to use.

3. Have a "traditional" family. When the clients are husband, wife and all children are a result of the marriage. Typically under those circumstances, the surviving spouse is most likely to provide for "descendants" of the first-to-die spouse. As written Form 8 contemplates that the clients have adult children, the Form could be modified (e.g. in Article 4.3) to provide that the trust continue for the benefit of minor children. Add,

F. When NOT to use Form 8

Couples who are not married or single parents. The key aspect of Form 8 is to minimize potential estate taxes by use of the unlimited marital deduction. The estate tax savings cannot be achieved unless the clients are married.

Assets valued too high, too low. As previously mention, if the combined net worth of the couple does not approach the estate tax exclusion amount, the use of this form will likely be "overkill." Conversely, if the couple's combined net worth exceeds twice the estate tax exclusion amount, Form 9 may be more appropriate (as well as utilizing additional estate tax planning techniques).

Blended Families. Form 8 leaves the surviving spouse in considerable control of the assets. If there are children/descendants from a previous marriage, those individuals may ultimately be left with no inheritance. This could be an unintended result. Under those circumstances practitioners could utilize a QTIP clause, or other estate planning technique, which limits distributions and control by a surviving spouse.[6]

G. Other Considerations When Using Form 8

How Are Assets Titled. One **critical** aspect of using Form 8 is to insure that at the death of either spouse there are probate assets which the surviving spouse would then be able to disclaim. As is often the case, married couples have virtually all their assets titled in "joint tenancy with right of survivorship" or accounts have "POD" or "TOD" designations.[7] Consequently, there may not be any "probate" assets for a surviving spouse to disclaim. All such assets would automatically pass to the surviving spouse by non-probate transfers and therefore defeat the purpose of Form 8. Although interests in joint tenancy property may be disclaimed, often a surviving spouse will unknowingly change title or benefit from such property and thus jeopardize the ability to later disclaim the interest. Therefore, it is prudent to evaluate and change titles to assets as needed in order to eventually have "probate" assets that can be disclaimed.

Asset Balancing. Just as **critical** and in conjunction with the above, that each spouse hold a certain level of assets. If one spouse holds title to the majority of assets, the ability of that spouse to "disclaim" from the 'impoverished' spouse will be severely limited and thus negate the tax saving benefits of Form 8. Transferring title to property from one spouse to

the other may be necessary to fully utilize the estate tax planning aspects of Form 8. An example of a financial sheet that can be used for asset balancing is attached.

Careful consideration should be given before retitling of assets takes place. There may be unintended income tax consequences by doing so. For example, if assets were acquired while the couple resided in a "community property" state. Other concerns can arise if the clients subsequently divorce.[8]

"*Hold Tight to Everything*" After a death, a surviving spouse may be reluctant to disclaim property that he/she will not have 100% control over - even though they will benefit from those same assets while held in the "family trust." The estate tax saving benefits may not be enough to overcome such apprehension. The idea of utilizing Form 8 may be good in theory and practice during the "estate planning" process, but after a death emotions may not lead to a cooperative surviving spouse. In such event, your skills as a "counselor" at law may be tested.

Review Notes On Use. Always review the Notes on Use with Form 8 or any form you are contemplating using. Practitioners who created the forms strive to alert readers to particular issues that may arise. Notes on Use should be carefully read and not be ignored.

H. Conclusion

Form 8 is a useful document by giving couples "flexibility" in their estate plan. The form is suggested to be used by a husband and wife who have adult children and where their combined estate for federal estate tax purposes exceeds the threshold or "exclusion amount" but less than double that amount. The surviving spouse will have the "flexibility" to disclaim property which will fund a "family trust," which the surviving spouse may benefit from and at the second death the balance will be excluded from calculating federal estate taxes.

FINANCIAL STATEMENT

ASSETS	Husband	Wife	Joint
Checking & Savings			
Money Market Funds			
CDs			
Stocks & Stock Funds			
Taxable Bonds & Bond Funds			
Other Marketable Securities			
Annuities			
Limited Partnerships			
Real Estate			
Life Insurance (Face Amount)			
Other Non-marketable Assets			
Personal Residence			
Personal Property			
Other Personal Assets			
IRAs/Retirement Plan Accounts			
Has someone given you a "General Power of Appointment"	Yes / No	Yes / No	N/A
Other:			
Total Assets:	$	$	$
LIABILITIES	Husband	Wife	Joint
Credit Card Debt	$	$	$
Personal Loans			
Other Short-Term Debt			
Home Mortgage			
Real Estate Mortgage			
Auto Loans			
Business Loans			
Other Long-Term Debt			
Total Liabilities:	$	$	$
Net Worth (Total assets less total liabilities):	$	$	$

[1] C.R.S. Section 15-11-801; *See also,* Section 40.9.1, *Colorado Estate Planning Handbook (Orange Book Handbook),* David K. Johns *et al.* eds., CLE in Colo., Inc. (Supp. 2011) *and* Section 21.2.2 Wade/Parks *Colorado Law of Wills, Trusts and Fiduciary Administration* (CLE in Colo., *Supp. 2011).*

[2] *See*, Section 40.8.2, *Colorado Estate Planning Handbook (Orange Book Handbook),* David K. Johns *et al.* eds., CLE in Colo., Inc. (Supp. 2011).

[3] The spouse may not be able to disclaim assets he/she has already benefited from. *See,* Section 40.9.1, *Colorado Estate Planning Handbook (Orange Book Handbook),* David K. Johns *et al.* eds., CLE in Colo., Inc. (Supp. 2011) *and* Section 21.2.2 Wade/Parks *Colorado Law of Wills, Trusts and Fiduciary Administration* (CLE in Colo., *Supp. 2011).*

[4] The Tax Relief, Unemployment Insurance Authorization, and Jobs Creation Action of 2010 was signed into law by President Barack Obama on December 17, 2010 (TRA). Certain provisions relating to estate and gift taxes were retroactive to January 1, 2010. The provisions of TRA sunset on December 31, 2012. TRA increased the exclusion amount for estates to $5,000,000. Unless Congress passes and the President signs new legislation, the federal estate, gift and generation skipping transfer taxes will return to the laws in affect as of 2001. For estate taxes the exclusion amount will be reduced to $1,000,000.

[5] To preserve "portability" a timely Federal Estate Tax Return (Form 706) needs to be filed after the first spouse's death and appropriately elected on the return. For a general discussion on "portability" and issues related therewith, *See,* Robert H. Leonard & Mario M. Rampulla, *The Uncertain World of Estate Planning*, 35 Wyo. Law 20 (June, 2012).

[6] For an discussion on qualified terminable interest property (QTIP) under I.R.C. § 2056(b)(7), *see* Notes on Use, Notes 6 & 7, of the Revocable Marital Deduction Trust (Form 13A).

[7] POD - "Pay on Death" beneficiary designations are often used with checking or savings accounts; TOD – "Transfer on Death" beneficiary designations are often used with accounts holding stocks or similar securities. *See generally,* Chapter 8, "Nonprobate Transfers," *Colorado Estate Planning Handbook (Orange Book Handbook),* David K. Johns *et al.* eds., CLE in Colo., Inc. (Supp. 2011);

[8] It may be prudent to have an agreement between the husband and wife that any retitling of assets be done for estate planning purposes only and in the event of a subsequent divorce the parties agree that such assets be treated in accordance to their original classification as either separate or martial property.

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SECTION 5

Most Commonly Used Forms

Presented by

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Wade Ash Woods Hill & Farley, PC
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NOTES:

NOTES:

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SECTION 6

Marital Deduction Will

Presented by

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NOTES:

NOTES:

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SECTION 7

Revocable Trusts

Presented by

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Trust & Estate Law
CLE in Colorado, Inc.
October 4, 2012

ORANGE BOOK FORMS

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Form 23 - Non-Tax Planning Revocable Trust
Form 13A - Revocable Marital Deduction Trust
Form 16 - Revocable Disclaimer Trust

After a Will, the revocable trust is the most common estate planning tool used to transfer property at death. You will hear a variety of names, such as the living trust or even a "loving" trust, but all of these refer to the same arrangement. The settlor creates a trust to hold property for the settlor's benefit during the settlor's life, and distribute that property after the death of the settlor. Unlike a Will, a revocable trust is also useful during the settlor's life, and is often employed as a way to hold and manage property. Before using a revocable trust, the careful practitioner must consider how it will be used by the client, and if it will help the client achieve his or her estate planning goals.

1. Factors to Consider: Will v. Revocable Trust. There are a number of factors to consider before deciding to use a revocable trust. Here are a few main issues to discuss with your client.

    a. Does the client own (or plan to own) property outside of Colorado? Titling property in the name of a revocable trust will in many instances avoid the need to open an ancillary probate in a jurisdiction outside of Colorado to transfer real property. Carefully review client's oil/gas interests to

determine if those are considered real property, and only transferred by deed.

b. Does the client have a variety of assets that require management? When a client has varied assets that require attention (rental properties, oil/gas interests, investments), management of those assets can sometimes be streamlined by using a revocable trust. There are instances when management by a trustee during the settlor's lifetime may be easier than using a financial power of attorney.

c. Does the client have specific privacy concerns or other concerns with the public nature of probate?

d. The client wants to avoid probate. Period. There are clients that walk in the office, determined to use a revocable trust to avoid probate. Thoroughly describe the need for maintaining a fully funded trust, and that even the most careful client sometimes dies with at least one asset outside of the revocable trust.

e. Tax and Creditor Consideration. Often clients are often VERY misinformed as to the benefits of revocable trusts. Be clear that using a revocable trust WILL NOT reduce or eliminate tax, both during a client's life, and after death. Nor will use of a revocable trust ensure against creditor's claims during or after the settlor's life. Only in probate can the claims period for unknown creditors be limited to four months.

    i. During Life. During the life of the settlor, revocable trust assets are available to the settlor's creditors, and the revocable trust assets are available to the settlor's estate creditors at death. The assets are usually held using the settlor's social security number, and any income from assets titled in the name of the revocable trust will be taxed to the settlor.

    ii. At Death. No elimination of estate tax by using a revocable trust, and creditors can reach assets titled in the revocable trust.

FORM 23 - Non-Tax Planning Revocable Trust

This form can be used by both a single or married client, and has continuing trusts

for children. As noted in the gray box, this form should be used when there is no need for any estate tax planning, meaning the settlor's estate is less than the current federal estate tax exemption amount. Be sure to discuss with clients the uncertainty surrounding the estate tax exemption laws, and perhaps using a disclaimer trust to hedge your bets regarding the current law, which returns the estate tax exemption to $1,000,000 as of January 1, 2013. In this form, all property will pass at the death of the settlor to the spouse.

Important Issues to Consider When Using This Form:

1. CAREFULLY study the Notes on Use, and consider attending a CLE specifically on drafting revocable trusts.

2. Trustee Selection. The settlor can be sole trust, can name another sole trustee, or may want to be a co-trustee with a spouse or another person.

3. Article 2. This article allows the settlor to direct distributions during the settlor's lifetime.

    a. Note section 2.2, allowing the trustee to make distributions to an incapacitated settlor. Be sure to discuss how the client's power of attorney works with the direction of the revocable trust, to ensure coordination between the trustee (especially a successor trustee) and the financial agent.

    b. If the settlor has no spouse or children, consider the necessity of section 2.3 regarding payments to the settlor's family. Also, consider the language regarding the trustee's duty to inquire when making decisions regarding distributions to family.

    c. Review the amendment and revocation language under section 2.6 and whether requiring trustee consent to an amendment is appropriate.

4. Article 4. This article directs the trust administration after the settlor's death.

    a. CAREFULLY consider how to manage payment of expenses and taxes after the settlor's death. Consider who is getting the property, and how the client wants the expenses and taxes related to those

assets to be paid. Carefully review the options, specifically looking at Form 13A, the Marital Deduction Revocable Trust. Also, this must be coordinated with the language of the pour-over Will so the provisions do not conflict with each other.

b. Consider adding a provision to distribute tangible personal property, especially if the client's goal is to avoid probate entirely. See Article 5 of Form 13A for a provision to distribute tangible personal property.

5. Article 5. This article controls the distribution of trust property after the settlor's death. This form gives all property to the surviving spouse. For the unmarried client, this must be changed according to the client's wishes.

a. This form is only one example of a contingent distribution to children. This issue is often the most involved discussion with a client. This form creates a "pot" trust for children under a certain age, and when the children are all above a certain age, the trust terminates and distributes outright to the children. But discuss a client's goals for providing for children, and if some type of continuing trust is more appropriate.

b. See Article 10 of Form 13A if you want to use continuing trusts.

6. Article 6. This article directs the distribution of income and principal for the children. Again, discuss specifics with the client, and if you want the trustee to consider other assets available to the beneficiaries. Also, discuss the needs of the children, their ages, and whether using a residuary trust that is a pot trust is appropriate for the circumstances. Discuss termination, and the advantages of using a continuing trust for each of the children, or if a standard other than age should control distribution or termination.

7. Article 7. This article has options and powers for the trustee to manage and distribute the trust.

a. Section 7.1 is usually intended for a beneficiary other than the spouse or descendants. If the residuary trust will terminate and distribute outright, you will want to coordinate the ages under each section.

b. Article 7.1(a) specifically deals with a trust for a disabled person. Note the distribution standard is completely discretionary, so as not to interfere with any means-tested benefits the disabled beneficiary may receive.

c. Article 7.1(b) gives a limited power of appointment to the beneficiary, and is drafted to avoid the trust being included in the trust beneficiary's estate for federal estate tax purposes. There are other, more restrictive options for a limited power of appointment. See Form 13A, section 10.1(d).

8. Article 8. The remote contingent disposition is used when all of the named beneficiaries are dead. This form is drafted to give property to the settlor's heirs at law, and the spouse's heirs at law. This should be discussed with the client and changed accordingly.

9. Article 10 deals with trusteeship. Be sure to delineate for the client the two main time periods - during the settlor's life (and incapacity) and then trustee for the duration of any continuing trusts. This is even more important than selecting the personal representative, as the trustee may be acting for a much longer time. In addition, spend time discussing removal and appointment of trustees, and who should have those powers and when those powers can be exercised. This is a critical issues and time will need to be spent altering the form to accord with the clients wishes and to manage their concerns.

FORM 13A - Revocable Marital Deduction Trust

This form is appropriate for married couples with estates that exceed the federal estate tax exemption. Caution! This form will create a continuing trust at the death of the first spouse to die. Please review the gray box for warnings about using this form. This form creates a marital and family trust at the death of the first spouse, with the marital trust qualifying for QTIP treatment and the family trust is a spray trust. The discussion will highlight some of the issues the careful practitioner will consider when using this form.

STRONG CAUTION: This form has designed for practitioners that understand the many issues involved with marital deduction planning. A new practitioner should consider taking a CLE on marital deduction planning. This presentation will not cover marital deduction planning, but will note the places in the form where the practitioner should proceed with caution.

Important Provisions to Consider:

1. Trustee. Many married couples will select to act as co-trustees of each trust. However, consider who should be the trustee once the settlor dies of the continuing trusts.

2. Article 5. This form includes a distribution of tangible personal property. Please note in this form all tangible personal property passes to the spouse before allowing for use of a separate memorandum to distribute property. Consider switching that order depending on the client's needs. This form also includes the option for a specific gift, which should be deleted if not needed.

3. Article 6 directs the division of the residue upon the death of the settlor.

    a. Section 6.1 directs the trust property to the common trust for descendants if settlor's spouse does not survive settlor. YOU MUST REVIEW marital deduction planning, and carefully review the Orange Book material on marital deduction planning (see Form 9). The selection of the appropriate marital deduction formula depends on the kinds of assets the clients have, and where they want the appreciation (in the marital trust or the family trust). This form uses a pecuniary marital deduction formula. This means the marital trust will only be funded once the family trust is fully funded. With the federal estate tax exemption at $5.12M this year, be careful to consider the marital trust may not be funded. In blended families, this should be reviewed carefully, and consider limiting the amount passing to the family trust, as with an exemption this high, the family trust may be over funded.

    b. Section 6.3 discussed allocation of assets between the marital and family trusts. Pay careful attention to ensure only assets that qualify for the marital deduction pass to the marital trust.

4. Article 7 contains the provisions for administration of the marital trust, which is for the benefit of the surviving spouse only. This form is a classic QTIP, and includes the necessary mandatory income distribution, and has a permissive provision regarding distribution of principal.

a. Note the language under section 7.2 which requires the trustee to inquire as the surviving spouse's outside resources. This form can be altered per the client's wishes, so long as the necessary provisions that allow the trust to qualify for the marital deduction remain.

b. Section 7.5 gives the spouse a power of appointment, limited to the settlor's descendants. The client may want the surviving spouse to have additional flexibility and expand the class of permissible appointees, or if the spouse should not have a power of appointment at all. This may have a direct relationship to the specific family circumstances.

5. Article 8 pertains to the administration of the family trust. Because there is no need to qualify for the marital deduction, the drafter has additional flexibility when drafting the provisions of this trust.

a. The family trust in the form is for the benefit of the spouse and descendants for ascertainable standards, with a mandatory income distribution. There are many other options, such as no mandatory distributions and limiting the family trust for the benefit of the spouse only. Similarly, powers of appointment need discussion and careful consideration.

b. At the death of the surviving spouse, the family trust terminates, and any property not distributed by the spouse's exercise of the limited power of appointment passes to a common trust under article 9. The family trust can also be drafted to split into shares for the children at the death of the spouse, and skip the common trust, depending on the family's situation.

6. Article 9 contains the terms for the common trust, which is created if there are children under the age of 23, or if there are children who have not graduated from college. This may not be appropriate for every family, and the practitioner should spend time discussing the goals for the family once both spouses pass away. There are many options that can be tailored for the client.

7. Article 10 directs administration of the shares upon division of the common trust. This form directs each of these trusts pay out ½ after three years, and terminates after year six.

a. When using the marital deduction form, you may be dealing with significant wealth in the family, and should consider drafting these trusts to not terminate until the death of the beneficiary. There are many reasons to keep inheritance in trust. This brings up issues related to the generation skipping transfer tax exemption.

   i. The trust will generally be protected from the beneficiary's creditors.

   ii. The trust will not be included in the beneficiary's estate for estate tax purposes.

   iii. The trust may be excluded as an asset of the beneficiary if the beneficiary gets divorced.

b. Under section 10.2, a share for a deceased child's descendants passes outright to that descendant. The practitioner with understanding of generation skipping transfer tax should consider putting these shares into trust, just like those for a child.

8. Article 14 has the trusteeship provisions. As mentioned, this is even more important in a trust that has continuing trusts, that might go on for decades. These provisions should be drafted carefully, and take into account the different layers of trusts. It may be appropriate for a child to eventually be trustee of his or her separate trust.

FORM 16 - Revocable Disclaimer Trust

This trust is a hybrid between the non-tax form and the marital planning form. A surviving spouse has an opportunity to disclaim assets passing from the decedent to the surviving spouse, and those disclaimed assets pass to a family trust. In this form, the family trust is for the benefit of the surviving spouse and the settlor's descendants, however, it can be for the surviving spouse only. The surviving spouse CANNOT have a power of appointment over the family trust. A disclaimer trust has become more popular with the ever increasing estate tax exemption, and with the uncertainty in the sudden reduction of the estate tax exemption amount. NOTE disclaimers can be tricky, and it is very easy for a surviving spouse to "ruin" a disclaimer by handling or managing an asset, as the disclaimer rules are very specific as to when someone has "accepted the benefits" of an asset, and thereby making that asset unavailable for disclaimer.

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October 4, 2012

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Form 25 (new) – Funding Revocable Trusts

A new addition to our Orange Book is Form 25, which gives you a Memorandum to send to your clients, along with a cover letter, that will give you and your clients a road map as to how to Fund a Revocable Trust. Why did we design this as something to send to your clients??? Because funding a trust can often take hours of work - making phone calls, staying on hold, and in many cases filling out easy forms - clients are reluctant to pay their attorney for the time that it takes to accomplish this, so they often say that they will take care of it themselves. And even if they are willing to pay the attorney to do the initial transfers when the Trust is executed, they are often not willing to contact the attorney when they acquire new assets. Either way, more times than not, the clients either don't get the work done because they don't understand how to do it, or they do it incorrectly. The result is that when the Settlor becomes incapacitated or dies, the transfers have not been done, or not been done properly, and the purpose of creating the Revocable Trust is not accomplished, creating unanticipated adverse results for the client's Estate.

- If the purpose was to avoid estate taxes, the planning may be thwarted, costing the client's estate thousands of dollars in taxes.
- If the purpose was to avoid probate, that also could be thwarted, resulting in additional attorney and court costs for the estate.
- And, if beneficiary designations are not filled out properly, the result could be that the people who receive the funds are not the people that the Settlor intended.

Since you would not be giving the client information on the ins and outs of the legal and tax consequences of these issues, they are not addressed in the Form. Therefore, the **Notes on Use** are invaluable for the practitioner and should be continually consulted.

The Memorandum covers all types of assets that the Orange Book Committee could think of that would need to be either transferred into the name of the trust, or that the client should keep in his/her individual name but designate the trust as the beneficiary. Of course, not all clients are going to have all types of assets, so the practitioner can always delete provisions that he/she feels are not needed by the

particular client. However, the practitioner should consider that the client may acquire these types of assets in the future and either not think to contact the practitioner, or not want to spend the money they think it will cost them to do so. So you may want to give the entire Memorandum to the client.

We don't have time to go over every paragraph of the Memorandum, so we will merely point out those assets that we feel require the most attention.

A. <u>Title to assets</u>

1. <u>Basic Trust Title = Paragraph 1)</u>
    a. It is better not to use the name of the Trustee in the title of assets since the trustee can change from time to time, and then you would need to change the title again.
    b. For all assets, (including and especially real estate), the title should be:

        "The _____ Trust dated _____, 20___"

        "The John Doe (for Joint Trust = The Doe) Revocable Trust dated October 4, 2012"

        i. Note on Use #2 =
            1. Date is optional unless needed to identify the trust
            2. Can also add "as may be amended"

2. <u>Identification of Trustee/Statement of Authority (C.R.S. §38-30-172)</u> = Paragraph 2)
    a. For Real Estate, Colorado is different than most other States which DO list the name of the Trustee on the title of the property = the transfer Deed.
    b. Of course, you will record the Deed with the Clerk and Recorder in the County in which the Real Estate is located, like in other States.
    c. However, since the Deed does not list the name of the trustee, then you must also prepare and record a Statement of Authority which tells the County Clerk and Recorder who the current Trustee is = the person who has the authority to sign any transfer documents should the property be sold or encumbered.
    d. By not using the name of the trustee in the title of the Trust on the transfer Deed (as other states do), there is no need to prepare another Deed when the Trustee changes. You only need to prepare and record a new Statement of Authority.

3. <u>Real Estate = Paragraph 8)</u>
    a. Note that the form of Deed that you use to transfer real estate into the name of the Trust is important
        i. If, when the property was purchased/received by the client, the client received a Warranty Deed, then use a Warranty Deed to transfer the property into the trust. This extends any warranties that the client received to the trust.

ii. If, when the property was purchased/received by the client, the clients received a Quit Claim Deed, then there were no Warranties given to the client, so you should use a Quit Claim Deed to transfer the property into the trust so that the client is not giving any warranties that he did not receive.

iii. Same for a Bargain and Sale Deed. And if the client purchase/received the property from an Estate, using a Personal Representative's Deed, then use a Bargain and Sale Deed. This Deed is something in between the other two. It gives to the buyer whatever warranties the seller had, no more, no less.

b. Be sure to have the client add the Trust as a named insured under the appropriate insurance policies that cover the property. I would suggest using a Rider or Endorsement to add the Trust as a named insured, but also keeping the coverage with the client individually, in case he decides to revoke the trust or transfer the property out of the trust and back into his individual name. This may be necessary in order to obtain a loan/mortgage on the property, as many mortgage companies in Colorado do not like to give loans to trusts, but prefer to have the individual client as the debtor.

i. The homeowners insurance policy – if not, if there is damage to the property covered by that insurance, the company will refuse to pay, since the client/insured is not the owner in title

ii. The Title Insurance Policy that the client received when he purchased/received the property. This policy covers the client in case of defects in title in the future. However, it will no longer cover the property if the title is no longer in the clients individual name. So you should obtain an Endorsement from the Title Company on a Form 107.9, which will result in a small, one-time premium (often $25-$100).

iii. Notes on Use #10 also give you some language to include in your letter to the client sending them the recorded Deed that states that you prepared that deed with information that was provided by the client (usually a copy of the current deed), and that the client did not authorize you to obtain a new title report to confirm the legal description or the names of the Clients as they appear in title.

4. <u>Small Estate Affidavit (C.R.S. §15-12-1201) = Paragraph 4)</u>

a. This can be used for transfer of assets in the sole individual name of the client at death without the necessity of opening a Court Probate Proceeding. Note that the amount will change each year due to cost of living increases. This year it is $61,000.00.

b. Thus, it may not be necessary to title vehicles or tangible personal property into the name of the trust in order to still avoid probate.

5. Income Tax Matters = Paragraph 5)
    a. Whenever discussing any type of tax matters with the client, whether estate taxes, income taxes, corporate taxes, etc., it is wise to inform them that the laws change on a regular basis, and encourage them to consult with their tax professional.
    b. Note that a Revocable Living Trust is considered a "Grantor Trust" during the life of the Settlor, and thus it is not necessary to get a separate Tax ID# for the trust.
        i. A "Grantor Trust" is one over which the Settlor has sufficient control that the IRS allocates all income earned by the Trust to the Settlor, who must then report that income on his individual income tax return, even if he does not receive a distribution of the income.
        ii. The Trust should use the Settlor's Social Security Number as long as the Settlor is living.
            1. If it is a Joint Revocable Trust, use the number that the couple files their personal tax returns under, usually the Husband's Social Security Number.
            2. In the case of a Joint Trust, when the Husband dies, you will want to switch over to the Wife's Social Security Number.
            3. Often a Bank will tell the client that they need a Tax ID#, but you can talk to the appropriate person and educate them or go up the ladder to someone who knows that it is not necessary. This is especially true when the Settlor is also the Trustee.
            4. However, some Banks or Investment Companies have internal policies that require a Tax ID# when the Settlor is not the trustee, and often it is easier to comply than to fight with them over it.
        iii. Once the Settlor is deceased (or for a Joint Trust, once both Settlor's are deceased), then the Trust becomes irrevocable and is no longer a "Grantor Trust". At that time, the trustee will be required to obtain a separate Tax ID# for the trust. But if they already have one, a new one is not required.

6. Safe Deposit Boxes = Paragraph #7)
    a. Boxes are no longer "sealed" upon the death of the owner – State or Federal law
    b. Banks will refuse access after death to anyone other than a Personal Representative with Letters of appointment from the Court
        i. A Durable Power of Attorney ends at death of Principal
        ii. Access should be granted under a Small Estate Affidavit
    c. What if you don't know who the Personal Representative should be or if probate is necessary until you find out if there is a Will?
        i. A safety deposit box can be entered upon presentation of a death certificate for the sole purpose of looking for a Will (C.R.S. §15-10-111)
            1. A Bank Official will supervise you to be sure nothing else is removed.

B. Life Insurance, Annuities, Retirement Plans, Pension and Profit Sharing Plans

a. Life Insurance = Paragraph 12)

i. Policies on the client/Settlor(s) should remain titled in their individual name (not the name of the Trust). This trust does not shelter such policies from being included in the Settlor's taxable estate. To do that, you should prepare an Irrevocable Life Insurance Trust (ILIT) – see Form 17)

ii. It is probably adviseable to have this Trust named as the primary or secondary beneficiary of the policy.

1. Sometimes companies have their own wording for the beneficiary designation. Advise the client to contact you if that is the case to be sure the wording will work.

iii. Note on Use #15 advises you to determine if the client is the beneficiary of a life insurance policy that insures someone else. If so, it may be beneficial to ask that person to name the trust as the beneficiary, instead of the client individually.

b. Retirement Plans = Paragraph 13)

i. Again, ownership should stay in the name of the client

ii. Whether or not to make the trust the beneficiary of these plans is something that should require careful consideration by the attorney, often in consultation with the client's tax professional

1. Note on Use #16 discusses including in the trust provisions that will let the trust "stretch" the payment of benefits over the life expectancy of the oldest beneficiary.

c. Annuities = Paragraph 14)

i. Whether or not the client should transfer ownership to the trust and/or make the trust the beneficiary of an Annuity will depend on whether:

1. The client is the Owner, the Annuitant, or Both
2. The Annuity is taxable or tax-deferred

C. Business Interests = Paragraph 18)

a. Before putting any type of Business Interest into this trust, you should:

i. Read the governing documents to see if there are any pertinent restrictions

ii. Make sure that the transfer is allowed under Tax Laws

iii. Make sure there are no adverse tax consequences

iv. Make sure there are no special rules to prevent the transfer

v. Consult with the Business' tax professional

D. Oil, Gas and Mineral Interests = Paragraph 20)
    a. Before transferring such interests into this trust, you need to determine:
        i. What type of interest it is
            1. Ownership
            2. Lease Interest
            3. Under ground that the client owns
            4. Under ground that is owned by someone else
            5. Royalty Interest
            6. Working Interest
        ii. Whether the interest is considered Real Property or Personal Property
    b. If the ground is located in another state, you should retain legal counsel in that state, so that you are not practicing law without a license in that state.

E. Bring Attention to Notes on Use 1A – 1E
    a. Always use a Pour Over Will with a Revocable Trust
    b. Revocable Trusts can be left unfunded until the Settlor becomes incapacitated
        i. This is particularly useful when the client does not want the complexity during his/her life of handling a trust, but does want a Professional or Corporate Fiduciary to handle his/her affairs upon incapacity or death.
            1. Corporate Fiduciaries will not act under a Durable Power of Attorney, other than to fund a Trust
    c. It is always advisable to include in the client/Settlor's Durable Power of Attorney a provision that allows the Agent to fund the trust – whether or not any funding is done immediately upon execution of the trust or contemplated to be done only upon incapacity.
        i. Clients hardly ever have all their assets titled properly in the trust at incapacity or death.
    d. It may also be advisable to give the Agent under a Durable Power of Attorney the power to change beneficiary designations in order to carry out the Settlor's intent – but this "hot power" should not be given without considerable thought, as the Agent could substantially change the disposition of assets at death, thereby thwarting the Settlor's intent.

THE END

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October 4, 2012

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Form 18 – Short Form Management Trust
Form 13B – Short Form Joint Revocable Trust

Both Trusts were designed at the request of several Bank Trust Officers, for use in dealing with clients with modest estates who desire having a Corporate Trustee (Bank) manage their investment assets for them, particularly their securities. This arrangement will often include bill paying services.
These trusts can be created by individuals. OR, by their agent under a Durable Power of Attorney that gives the "hot power" to create a trust.

The Settlor (or Settlors) may serve as the initial Trustee, and designate a third party to serve after their incapacity for property management, and/or disposition at death.

Form 18 is for a single Settlor

Important Provisions to consider:

1. Article 3:
    a. Trustee shall distribute the income and principal as Settlor may direct, and if not so directed, all net income shall be paid to Settlor at least quarterly.
    b. If Settlor becomes incapacitated, Trustee shall distribute the principal and income for the benefit of the incapacitated Settlor as Trustee shall determine – making this a totally discretionary trust.
2. Article 4:
    a. Upon the death of the Settlor all property shall be distributed to the Settlor's Estate – so no avoidance of probate.

(See Form 13B for Alternative provisions that can be used in this Trust as well as that Trust).

Form 13B is designed for a Married Couple as Settlors

This is a SIMPLE Joint Revocable Trust. And many couples moving from Community Property States are used to the vehicle of a joint trust, since they are used all the time in those states.

So what is a Joint Revocable Trust? Well, it is just like a single Revocable Trust, but it is set up by two Settlors (husband and wife) for the benefit of both Settlors, who are most often the Initial Trustees, and it is revocable in whole or in part while either of the Settlors is living.

First, Note that the gray box at the beginning of the Form states that it should be limited to use by:

1. Married couples
2. Either without children or with children who are the children of both spouses
3. Couples whose combined taxable estate is under the Exemption Equivalent amount – in other words, there are no estate tax planning provisions in this trust.

Why use this type of Trust?

1. Allows property of the Spouses to be administered jointly by them as Trustees, which is often preferable for married clients. Often clients are reluctant to create separate trusts as they feel that dividing joint assets between the separate trusts is the equivalent of getting a divorce. Usually, they have obtained the joint assets together during their marriage, and want to continue to manage them jointly.
2. Allows for the management of jointly held property between the Spouses by a Professional or Corporate Fiduciary, either while competent or upon incapacity, without the necessity of severing the joint tenancy and creating two separate trusts
    a. This is particularly helpful if the Settlors do not have a family member who they trust to manage the property for them in case of their incapacity.
3. Upon the death of the first spouse to die (the Deceased Spouse), the trust leaves all assets to the Surviving Spouse, which is usually what they want anyway
4. Upon the death of the second to die (Surviving Spouse) the trust will designate who shall receive the funds. Usually, the clients want the funds to go to their joint children. As long as the funds do NOT go to the Settlor's Estate:
    a. If the clients own real property outside of Colorado, Ancillary Probate proceedings in another state can be avoided.
    b. If the clients have all of their domiciliary assets titled in the trust before death, and the estate is not the designated beneficiary of any assets, then Colorado Probate can also be avoided in both estates

Important provisions to consider:

3. Article 1:
    a. The trust cannot be amended without the consent of both Settlors/Spouses while they are both living.

b. After the death of the first to die, the Surviving Settlor/Spouse can amend the trust at any time.
c. However, either Settlor can unilaterally revoke the trust at any time.
    i. If only one Settlor is living, all assets will be delivered to that Settlor, individually.
    ii. If both Settlors are still living, then all assets will be delivered to them as joint tenants. So, in effect, by transferring assets into this trust, they become joint assets, regardless of how they were titled before the transfer.

4. Article 2:
    a. Trustee shall distribute the income and principal as Settlors may direct, both before and after the first death – no provision for distribution of income if trustee is not directed otherwise.
    b. If either Settlor becomes incapacitated, Trustee shall distribute the assets for the benefit of the incapacitated Settlor under an ascertainable standard (health, comfort, support and welfare).
    c. Upon the death of the Surviving Settlor (paragraph 2.3), the drafter has 3 options:
        i. To the Personal Representative of the Estate of the surviving spouse – which would not avoid probate.
        ii. To the Surviving Settlor's descendants – which would avoid probate; and if none, to his/her Estate – which would not avoid probate, (consider using a provision that gives the remainder to those that would take under intestate laws) or
        iii. The drafter can draft any disposition provision that the clients desire. However, if funds are to continue to be held in trust after both Settlors die, DO NOT use this Form.

(See Form 18 for Alternative provisions that can be used in this Trust as well as that Trust).

Why these options:

The form is designed to be used by Bank officials to set up a management trust for the client with limited assets for a modest fee, or no fee. The Bank Officers do not want to act as an attorney in advising the client as to the disposition of assets at death. Instead, they will advise the client to consult with an attorney to write their will so that their assets will pass at death as they desire. So, it is being used strictly as a vehicle for management of assets, and then as a type of beneficiary designation to the Settlor's Estate.

In addition, the client may already have a valid Will that disposes of his/her assets at death. By providing that the assets pass to Settlor's Estate, Settlor does not have to re-write his entire estate plan into the trust and then create a new Pour-Over Will.

If you are an attorney drafting this document and you do not want to re-write the client's existing Will, and you do not want to re-state in the trust the dispositive provisions of the Will (thus requiring that both documents need to be changed if the client wants to change the disposition at death), you might consider a provision in the trust which incorporates by reference the provisions of the Will.

5. Article 4:
    a. Settlors have the right to remove a Trustee without cause, and appoint a new Trustee.

6. Again, PLEASE NOTE that this is NOT a form to be used when dealing with a taxable estate. Although a Joint Revocable Trust can be an excellent tool for clients with taxable estates consisting of almost all jointly held assets, just as with using any estate tax planning technique, extreme care needs to be taken in using such trusts for such estates, in order not to run afoul of the many IRS Code Sections that might disqualify that trust from the estate tax savings it is trying to accomplish. Although it has been suggested from time to time that the Orange Book contain a form for a Taxable Joint Revocable Trust, we do not have one as yet.
    a. The funding of a joint trust with separate property can create unintended gifts that might require reporting and even payment of taxes.
    b. Look at other notes on use.

THE END