ETHICAL ISSUES WHEN TRANSITIONING OR SELLING A PRACTICE AND DISPOSING OF CLIENT FILES

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CHAPTER 5

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I. INTRODUCTION AND STRUCTURE OF DISCIPLINARY RULES

There are several rules in the Texas Disciplinary Rules of Professional Conduct ("Rules") that affect a lawyer's management of the files related to a client's case. Proper management of active files under the Rules, such as maintaining confidentiality and affording client access, are more obvious and compliance simpler because of the ability to communicate with the client about the file and obtain consent when necessary. Another world of complication can arise when a file is inactive or closed and communication is not easy or even possible. The focus of this outline will be on managing and disposing of inactive or closed files, though there is certainly a great deal of overlap with proper maintenance of active files.

It is no secret to observant lawyers that the lawyer population in Texas is aging. But unlike other professions, lawyers are regularly continuing to practice beyond traditional retirement age. Statistics also tell us convincingly, that the stress of a law practice causes a much higher rate of depression and substance abuse among our legal peers. So at all ages, many lawyers face a current or future risk of practicing with some form of disability. This is leading to a real crisis for management of their files when ultimately left behind in these circumstances. Consequently, this outline will also address the Rules of Disciplinary Procedure ("RDP" or "RDP RULES") related to proper cessation of a law practice, for example, when a lawyer becomes disabled or dies. It also seeks to correct a myth that law practices cannot be sold in Texas and attempts to identify the Rules to which a lawyer or his or her executor must adhere when selling a law practice and transitioning file responsibility.

Certainly what CJ Hecht called the "silver Tsunami" cannot be ignored. And the concern that solo practitioner Jimmy Brill raised with the State Bar Committee for drafting Texas Disciplinary Rules of Professional Conduct for referendum ("TDRPC Committee") over 10 years ago was precisely how he and others like him might sell their practice without violating any Rules, assuming they would have that opportunity before being stopped cold with an incapacitating event.

However, particularly in connection with Rule 1.09, which addresses conflicts with former clients, The TDRPC Committee also considered the impact of the growing mobility of lawyers. That is, a familiar model in the 1980s was a new lawyer signing on with a firm in the expectation of becoming partner after 7 years. Later hearing the words, "You're just not partner material," he or she would move to another firm. In some instances, a small group of lawyers hearing those words would form their own firm, with one or more of them taking with them cases they were working on or expecting future work from repeat clients at that firm. Thus, in the case of a lateral movement and often even with a new firm, the lawyers would typically still practice in the area they did at the former firm.

Lateral movement was far more common, and often at the instigation of the lawyer—not the firm—by the early 2000s. Sometimes even partners would make a lateral move, although the more common pattern became a partner picking choice associates and starting a new firm.

As with the original model, new firms headed by former firm partners would continue the kind of work the lawyers had done before and often took with them. At times, though, the new firms—sometimes prompted by the skills and interests of the younger, workhorse associates that the senior lawyers would hire—would explore new areas or forms of practice. For example, hourly firms—often working in civil defense—never took on contingent fee cases, and contingent fee lawyers rarely did hourly work.

What this means is that lawyers may decide they want to practice in a different area and desire to sell or otherwise transfer part of their existing practice. Similarly, lawyers wanting to cut back on their current workload may choose to keep their personal injury cases involving only a single client while selling all of their mass tort cases involving a medical device.

Most law practices today will have a mixture of files relating to closed cases and files relating to open cases. Whether the lawyers took the closed or open cases with them when they left a former firm or whether the existing firm generated all of the cases, the maintenance or storage of the files will likely reflect—to some extent—the maintenance and storage practices of an earlier firm. That is, the older cases will likely be in paper form, with off-premises storage housing the closed cases, and the newer ones will likely be largely in electronic form, with the closed newer cases being stored on electronic media like CDs or hard drives. Regardless of the storage form, all former clients in closed cases have likely NOT been given an opportunity to take or reject the materials in their files. In addition, some of those files may contain materials (like originals of wills or other documents) that the former clients may need at some point.

Understanding all these causes for transition of a law practice, whether by choice or circumstance, both closed and current files may be transferred to another lawyer for handling or disposition, lawyers should avail themselves of every opportunity now to make that transference as smooth as possible.

It would be most helpful to have Rules that provide a black-line standard or timeline for proper file retention and destruction or providing methods for transitioning a practice, effectively creating safe harbors in which a lawyer or executor could operate. However, our current Texas Rules initially passed by referendum and adopted by the Texas Supreme Court in 1990, are simply not structured that way. Unlike our old Texas Canons of Ethics or the structure of the ABA Model Rules, guidance on how to ethically practice by reference to what a lawyer "should do" is essentially absent (except as might be available through clarifying comments to a Rule). Instead, our Rules based on a litigation framework state only those activities a lawyer "shall do" or "shall not do", leaving the determination of how to comply and navigation of the gray areas up to the lawyer. Thus, Texas lawyers navigating these areas must consider viable alternative methods of compliance with the Rules and determine what course constitutes practical and objectively reasonable compliance.

All of this should be viewed through the very critical lens of the high fiduciary duty a lawyer owes his client. This outline attempts to provide some of information that can help a lawyer navigate that very worthy, but sometimes precarious, path that is our professional responsibility to our client in these areas. Fortunately, this is a well-worn path and several excellent authors and ethical scholars have written about these matters, however uncertain parts of the topic may be. I am grateful for the contributions of these authors and committees producing these writings and borrowed liberally from their good work in preparing this material. In fact, most of what I present is an introduction to the addenda that is recommended reading for more detailed analysis and advice.

A note about the special circumstances facing solo and small firm practitioners and guidance:

Does the challenge of creating guidance under the structure of our Rules mean that solo and small firms have no guidance with which to navigate closed file disposition, cessation of a practice or sale of a practice? Certainly not! Solos and small firms have always made up the largest percentage of private practitioners. If the public did not want the option of small firms, those firms would not thrive and continue to attract lawyers, new and seasoned.

The Texas Bar, as well as bar organizations throughout the country, recognize that solos and small firms don't have the luxury of in-house CLEs or resident ethics counsel, as many large firms do. However, not helping these smaller firms, which are naturally focused on income production—whether they are making a living or making a killing--only hurts their clients.

That kind of assistance is known as "law practice management," and the ABA even has a Law Practice Management Section with Practice Management Advisors that work with state groups. The July-August 2007 ABA newsletter *Bar Leader* actually describes their primary goal as "help[ing] solo and small firm lawyers steer clear of the disciplinary problems that can result from simply oversight or ignorance."

The Texas State Bar has long had a law practice management program, established in 1995, which used to be a referral for lawyers who had been grieved, sometimes in conjunction with a private reprimand, if the Rule infractions seemed to have been caused by, for example, "simple oversight or ignorance."

Today the Law Practice Management Program has its own website and offers practical guidance to small firm practitioners, which is often vetted with the Chief Disciplinary Counsel's Office. As will be explored in this article and is shown in its many appendices, the Law Practice Management Committee site has an excellent overview of sale of a law practice, which was recently added. The site has practice tips and guidance materials on other topics, as well, which are periodically being updated.

II. ETHICAL RULES ON FILE RETENTION AND DESTRUCTION

An essential element in any transition of a law practice is the disposition of both active and closed client files. This section summarily reviews some of the key ethical rules that must be followed when determining how to dispose of client files and resources on how to establish sound file retention and destruction policies and implement them.

A. Whose File is it?

Texas follows the "entire file rule" when it comes to what file material belongs to a client. According to a collective reading of Texas Opinions 570, 627 and 657, a client owns and is entitled to essentially all parts of a file constituting a collection of things a reasonably prudent lawyer in a same or similar matter would collect in order to represent the client competently in that matter, whether in paper or digital format.

Stated more simply—whatever the lawyer puts in a file is IN THE FILE. For example, if one's practice is to put raw attorney time into the case file, then it will be there. Some lawyers may want that if their practice is also to adjust downwards from the actual hours based on review of the work and the lawyer or paralegal who did it.

If the lawyer has a practice of NOT putting case-specific research memos in the physical or electronic case file, he or she might need to be prepared to justify that practice, other than as a means to keep from having to turn over to the client in the future what is kept out of the file. Whatever method a lawyer chooses for file management, it should be defendable as an objectively reasonable standard of practice intended to comply with the applicable Rule.

For a more complete discussion of the ethics opinions and Rules that touch on client file ownership and what must be included in a response to a file request from a client, see the Draft of Practice Tips for Dealing with Client Files prepared for the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar, attached as Appendix 1.

A lawyer should consider three main things when reviewing these Rules on disposition of client files upon the end of the representation. First, there is language that says a lawyer must "return the file to the client." Well, in many instances that's imprecise, as the lawyer created the file—the client didn't—so the client never had it. However, the client may have provided the lawyer with things—either originals or copies that the client had to exert effort to get—so those are things the terminating lawyer need to return. Obviously, if the client is shopping for a new lawyer (which does happen) and gives the new lawyer the file the client got from a prior lawyer, then the new lawyer needs to return that to the client, whether or not he or she takes the case.

Second, one may think that no one in his right mind would hang onto a client's file if the representation ends abruptly, before the case is really over, as doing so could severely hamper the client obtaining other counsel in a timely manner and responding to some set of deadlines that have already been put into place. But it happens. One can see that frequently recited in the descriptions of private and public sanctions in the monthly *Texas Bar Journal*.

Third, lawyers should recall that the client property Rules are strict liability, meaning they have no scienter standard. A lawyer has violated a relevant Rule simply by the act, regardless of his or her frame of mind or motive (which means that a reasonably objective intent to comply has the best chance of actual compliance)

B. Fiduciary Duty and Disciplinary Rules

As a matter of law, a lawyer's relationship to his or her client is unquestionably that of a fiduciary held to the highest standard. Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1998). The following list of rules is largely developed from the practice tips page of the State Bar of Texas Law Practice Management website located at http://texaslawpracticemanagement.com/how-to-brochures/topics-maintaining-practice/retention-destruction-client-files/ , which also cites other good resources on this topic available for download. Among the duties of loyalty, acting for the best interest of the client and fair dealing are the following more specific duties relative to management of client files:

1. Communication with the client, including access to and disposition of the client's file. Rule 1.03

2. Maintaining client confidences forever except as expressly allowed. Rule 1.05.

3. Lawyer may not act adversely to a former client. Rules 1.09 and 1.10.

4. Safekeeping client property. Rule 1.14

5. Protecting client's interests and surrendering client files when terminating a client relationship. Rule 1.15(d).

6. Ethics Opinions

a. Texas Opinion 570. Declared Texas an "entire file" state and clarified a Lawyer may not assert work product privilege against his own client concerning notes in the file. See Appendix 2.

b. Texas Opinion 627. Clarified and expanded what constitutes a client's file and requires a lawyer to surrender the entire file requested unless there is an agreement otherwise. See Appendix 3.

c. Texas Opinion 657. Reiterates the position of Opinions 570 and 627, emphasizing that exceptions allowing retention of parts of a file cannot prejudice the interests of the client. See Appendix 4.

d. ABA Informal Opinion 1384. A lawyer may dispose of a file when the passage of time, the nature of the files and the absence of client instructions to the contrary, justify a reasonable conclusion that destruction of the file is not likely to harm material interests of the client. In disposing of a client's file, the lawyer should (1) protect the confidence of the client, (2) screen the file to determine parts to keep or destroy, and (3) keep an index or identification of the file parts destroyed for an extended time. Reasonable steps should be taken to avoid destruction of certain valuable property and original documents.

C. Best Practices for File Management

Fortunately, restrictions on a lawyer's ability to retain or destroy client files can be altered by a client's informed consent or a fair advance agreement reached between the lawyer and client. Express policies using reasonable and consistent practices for managing client files can also be helpful in showing reasonable compliance with the Rules.

1. Client Consent – Engagement Letters and Termination Letters

All lawyers should have a written engagement letter on all files at the initiation of their employment as counsel. This is the time when there is not yet an attorney-client relationship so the terms of that agreement (absent unfairness or overreaching) would not be subject to the kind of protections an agreement with the same client after employment would require when the lawyer is then in a fiduciary relationship. In addition to the usual scope of representation and other important features for representation (which are beyond the scope of this outline) the engagement letter should address how the client's file will be managed, the client's rights to its contents and notice and consent to its ultimate destruction. Likewise, a termination letter should accompany every end to representation with the notices and reiteration of consent (express or implied) about file destruction under the circumstances previously agreed in the engagement letter. It cannot be stressed enough how critical it can be to have all these issues addressed in writing when the client is able to be reached and give consent. Examples of clauses that can be used in these agreements are provided at Appendix 5. One of the greatest impediments to the proper disposition of closed files is the inability to reach former clients or get their consent.

2. File Retention and Destruction Office Policies

One way to show reasonable compliance with Rules impacting file retention and disposal is having a written policy for the management of all client files as well as firm administration documents. The policy should be written to reasonably comply with the Rules and relevant Ethics Opinions and specify the client's access to the file, how documents will be returned to clients, and how and when documents will be selected for destruction. Then those policies should be regularly and consistently followed by all lawyers and staff. Even when there is no engagement letter or it inadequately addresses file management, a well carried out policy can be a strong defense to client claims that might arise.

a. Written Policies and Diligent Practices

Some of the most critical elements of a sound file retention and destruction policy include:

(1) Delivery of all client property (e.g. valuable items) and any original documents to the client upon termination of the representation or other agreed time. It is critical to identify any client property of value held by the lawyer as that can never be destroyed.

(2) Notice to the client of the intent to change access to the file or destroy it. When a client's address has changed or the client is not responsive, the policy should include reasonable methods to undertake for finding clients to give notice and get consent.

(3) Immediate delivery of the file upon request of the client and if copies are to be retained at the lawyer's cost, how to determine those documents to be copied and retained.

(4) For all documents or copies retained, a schedule of when those can be destroyed that considers the nature of the representation, the potential future need for a document, and relevant statutes of limitation. No destruction should occur before the statute of limitations runs on actions against the lawyer or other pertinent statutes of limitations. Coordinate the schedule of destruction with the client's own business policies, if any.

(5) Control custody of the documents until destroyed and only destroy documents in a manner that assures client confidentiality is maintained, such as shredding.

b. File-specific Timetables for Retention

Different types of documents and types of representation require different timetables for retention or destruction. For example, criminal records may need to be kept until the end of a convicted client's sentence. Wills and trusts might be held indefinitely or perhaps until the close of administration. Tax records may need to be held until no audit can be pursued (generally after 6 years absent fraud). Note, the statute of limitations will be tolled until a child who may have a claim is an adult.

The idea that a lawyer should oversee file destruction may include that a lawyer conduct the file review. Often paralegals and legal assistants have more hands-on file familiarity than lawyers do, and they are presumed to work under a lawyer's supervision and with a lawyer's direction. Sometimes the maintenance of a log is recommended, reflecting what from a closed file went where and when, including the nature of its destruction. If a firm decides that is suitable for its practice, client base, and staffing features, a nonlawyer could be trained to handle that as well as any lawyer.

An excellent resource for determining the best methods for organizing files and determining documents to destroy and providing sample policies and schedules is "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools," Lee R. Nemchek, Law Library Journal, Vol 93:1, 2001. Another good resource is a lawyer's own malpractice insurance carrier, and even a google search of "lawyer file retention policy."

c. Special fiduciary duties with client property.

Any property of others held by a lawyer is in the nature of a fiduciary relationship. Rule 1.14 provides that any client funds or other property of a client or third party must be separated from the lawyer's property and held in safekeeping until its secure return to the owner. Upon receipt of funds of another, the owner should be promptly notified. Then, upon request of the owner to return such funds to which they are entitled, the funds must be returned, and if requested, accompanied by a full accounting.

d. Special problems with safekeeping of Wills and other originals

When the absence of original documents or other vital records will cause financial loss or other harm to a client or perhaps lead to more costly proceedings, there may be liability on the part of the custodian (in this context, the lawyer). As Jimmy Brill, a wise and frequent author on these topics, so chillingly warns – a lawyer maybe a trustee over each retained will, trust or similar documents with a perpetual duty owned until the documents are no longer necessary.

Probate lawyers can all shudder at the thought of learning decades after a Will is signed by a client who has only that one contact with the lawyer, that the client is deceased and a vastly different earlier Will was probated or the estate was administered intestate because the family did not know better. A proactive approach to never hold original Wills or similar documents for a client after signing is the simplest and best solution to this problem. Dealing with abundant stockpiles of old Wills with no inexpensive or efficient method of locating the client to deliver it or dispose of it is another colossal problem of its own.

This is where well-crafted and considerate policies might help to show a reasonable method of compliance with applicable Rules and Ethics Opinions. For example, if the client is unreachable or does not respond after a diligent effort to find the client and give notice of the lawyer's possession of the original Will and desire to deliver it, then filing the Will in the county of last known residence is a possible solution. This method of depositing the Will is now codified in Estates Code Section 252.001. Other methods are well explored in James E. Brill's numerous articles on this issue that are easily found in the Texas Bar CLE Library, a few of which are noted in the resources below.

3. When a Non-consenting Client Cannot be Notified

When a client or former client cannot be reached and there is no agreement on file destruction procedures, the lawyer is faced with fewer and more challenging options for resolving the file destruction question. While it is clear that an attorney is not obligated to hold all such files forever, the lawyer must at least demonstrate reasonable efforts to identify parts of the file that can be destroyed within the guidelines of applicable Rules and Ethics Opinions and reasonable efforts to reach the client for consent without breaching confidentiality. Property of the client cannot be destroyed. Further, if there is property of value with no one to receive it, some items may be subject to mandatory reporting and delivery to the Texas Comptroller as unclaimed property when determined to be abandoned after three years under Texas Property Code, Title 6, Chapters 72-76. Failure to do so may constitute a Class B Misdemeanor.

4. Implications for Cessation or Sale of a Practice.

One question any lawyer might ask is, "If I became unable to practice, what challenges would a successor lawyer face with my files on closed cases?" A lawyer contemplating taking over (through purchase or otherwise) all or part of a practice of another lawyer should ask the same question. Any lawyer will narrow his or her choices of a successor lawyer AND a purchasing lawyer by the nature of client files—closed and current. A purchasing lawyer could understandably pay less for a practice area based on any work required by the state of the files.

D. Resources:

One often overlooked but excellent resource is the Ethics Helpline of the Chief Disciplinary Counsel's office. The special benefit one can get from a discussion with the Helpline is an analysis of the answer. That is, although a lawyer may be looking for a particular answer to whether and/or how long he or she should keep a certain document—yes, no, 5 years, longer than 5 years, etc.—what he or she gets is something with which the lawyer can defend an action if ever questioned about it. It will do the lawyer little to no good to say the Helpline told the lawyer what to do. However, because that CDC lawyer will review the relevant Rules and ethics opinions, the inquiring lawyer can get those and have them ready for any future explanation. Another option, of course, is to detail a question and send it to the Professional Ethics Committee (appointed by the Texas Supreme Court to pen ethics opinions), but that answer won't be nearly as quick, nor will the lawyer be able to discuss the question and analysis with the PEC.

1. Law Practice Management Tips: "Retention and Destruction of Client Files" http://texaslawpracticemanagement.com/how-to-brochures/topics-maintaining-practice/retention-destruction-client-files/ See Appendix 6.

2. "Save or Shred, the ethics of destroying closed client files." Fred C. Moss, Texas Bar Journal, July 2016.

3. Practice Tips for Dealing with Client Files (Draft), prepared by the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar of Texas when drafting proposed comments to relevant Disciplinary Rules regarding client files, for consideration and approval by the Discipline and Client Attorney Assistance Program Committee and the Law Practice Management Section of the State Bar of Texas. Because it was discontinued, the Committee did not finalize any proposed comments or produce even a final version of the practice tips. Still, this is an excellent resource for the history and summary of relevant rules and a major source of the practice tips identified in Resource 1 above. See Appendix 1.

4. "What Can Be Done With All These Old Files," James E. Brill, State Bar of Texas 39th Annual Advanced Real Estate Law Course, San Antonio, July 13-15, 2017.

5. "Will Vaults Profits Center or Malpractice Trap?", James E. Brill, State Bar of Texas, Nuts & Bolts of Estate Planning and Probate, Chapter 2.6, Houston, June 9, 2009.

III. ETHICAL RULES ON CESSATION OR TRANSITION FROM A LAW PRACTICE

A. Client Attorney Assistance

1. Statistics.

If a lawyer simply looks at his calendar of upcoming matters and looks around his own practice file room or storage, it will likely become painfully clear how someone unfamiliar with those files would be lost trying to pick up where things were left in the event he or she becomes incapacitated or dies. Moreover, there is great risk to the client who could be irreparably harmed by the paralysis of the practice when the lawyer's knowledge of deadlines and planned strategy is not available.

In March 2014, the State Bar of Texas Task Force on Aging Lawyer Issues published a Report noting that the number of lawyers practicing beyond the traditional age of retirement (between 65 and 70) was indeed growing and that many lawyers were practicing law into their 80's.

Presently, there are roughly 5.5 million people afflicted by Alzheimer's disease, and it afflicts 10% of those over age 65, according to statistics from the Alzheimer's Association. The association also tells us that the percentage of people with Alzheimer's dementia increases with age: 3 percent of people age 65-74, 17 percent of people age 75-84, and 32 percent of people age 85 and older have Alzheimer's dementia. By the year 2025 (just 7 years from now) the percentage of Texans over 65 afflicted by Alzheimer's dementia is expected to increase further by nearly 30 percent (28.9%). Applying those figures to the lawyer population suggests that a good portion of attorneys we know will continue to practice beyond those ages may develop some capacity issues that would necessitate the reduction of the number and complexity of matters they handle or cause them to leave the practice altogether.

To deal with abandonment of client matters for these and other reasons, procedures were developed for cessation of a practice and are found in Section 13.01 through 13.03of the Texas Disciplinary Rules of Procedure. In addition, several guidelines have been written and are available on websites for the Law Practice Management Section and the Texas Center for Legal Ethics, as well as Texas Bar CLE articles, some of which are mentioned in the Resources below.

2. Duty to Report

Rule 8.03 obligates lawyers to report professional misconduct of other lawyers, and specifically a lawyer's fitness to practice (Rule 8.03(a)). The definition of misconduct also includes a failure to provide notice of the cessation of a practice as required by DRP 13.01 (see DRP 1.06(W)(5)). Fortunately, as it relates to misconduct arising from a chemical dependency or mental illness (such as dementia) this reporting requirement can be met by reporting anonymously to Texas Lawyers Assistance Program (TLAP), a peer assistance program. These programs are designed for, and quite successful in, getting lawyers who suffer from these impairments back on their feet while protecting their clients.

Rule 8.03(a) provides a great example of the effect of scienter, especially in light of much qualification: a lawyer must ("shall") report another lawyer *If* the first lawyer *knows* (scienter) that the other lawyer has violated a Disciplinary Rule (first qualification) that causes the first lawyer to *question substantially* (second qualification) the other lawyer's *suitability as a lawyer* in some other circumstance that hasn't yet occurred (third qualification). If all of those are met, the first lawyer does have an obligation, but the lawyer may comply with that by reporting to a peer assistance program as provided in Rule 8.03(c). And the first lawyer may feel a moral duty, as well, to help a colleague.

Still, when a solo lawyer's practice ceases, for whatever reason, the procedures of DRP 13.01 et seq. provide the proper method for notice and transition of the practice absent advance consent of a client.

B. Disciplinary Rules of Procedure for Custodian Appointment and Duties (DRP 13.01, 13.02 and 13.03).

The procedural rules for cessation of practice have three parts (1) required notice to clients, (2) petition for appointment of a custodian to handle the abandoned files, and (3) appointment of a custodian by the court. Alternatively, a successor attorney or custodian can be designated by the attorney with consent of the client avoiding the need for court appointment. Estates Code Section 456.002 also specifically addresses handling of IOLTA accounts with client funds when the attorney is deceased and allows the designation of a lawyer by the personal representative to settle and disburse those funds. Of course, the best practice for attorneys in solo or small practices is to designate a successor attorney or custodian in a client engagement letter so the client consent requirement is fulfilled and a procedure is well established in advance. Samples of such letters can be found in links located in the article at Appendix 7, for which a link is provided in Resource 1 below.

> *PART XIII. CESSATION OF PRACTICE*
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> *13.01. Notice of Attorney's Cessation of Practice: When an attorney licensed to practice law in Texas dies, resigns, becomes inactive, is disbarred, or is suspended, leaving an active client matter for which no other attorney licensed to practice in Texas, with the consent of the client, has agreed to assume responsibility, written notice of such cessation of practice shall be mailed to those clients, opposing counsel, courts, agencies with which the attorney has matters pending, malpractice insurers, and any other person or entity having reason to be informed of the cessation of practice. If the attorney has died, the notice may be given by the personal representative of the estate of the attorney or by any person having lawful custody of the files and records of the attorney, including those persons who have been employed by the deceased attorney. In all other cases, notice shall be given by the attorney, a person authorized by the attorney, a person having lawful custody of the files of the attorney, or by Chief Disciplinary Counsel. If the client has consented to the assumption of responsibility for the matter by another attorney licensed to practice law in Texas, then the above notification requirements are not necessary and no further action is required.*
>
> *13.02. Assumption of Jurisdiction: A client of the attorney, Chief Disciplinary Counsel, or any other interested person may petition a district court in the county of the attorney's residence to assume jurisdiction over the attorney's law practice. If the attorney has died, such petition may be filed in a statutory probate court. The petition must be verified and must state the facts necessary to show cause to believe that notice of cessation is required under this part. It must state the following:*
>
> *A. That an attorney licensed to practice law in Texas has died, disappeared, resigned, become inactive, been disbarred or suspended, or become physically, mentally or emotionally disabled and cannot provide legal services necessary to protect the interests of clients.*
>
> *B. That cause exists to believe that court supervision is necessary because the attorney has left client matters for which no other attorney licensed to practice law in Texas has, with the consent of the client, agreed to assume responsibility.*
>
> *C. That there is cause to believe that the interests of one or more clients of the attorney or one or more interested persons or entities will be prejudiced if these proceedings are not maintained.*
>
> *13.03. Hearing and Order on Application to Assume Jurisdiction: The*

court shall set the petition for hearing and may issue an order to show cause, directing the attorney or his or her personal representative, or if none exists, the person having custody of the attorney's files, to show cause why the court should not assume jurisdiction of the attorney's law practice. If the court finds that one or more of the events stated in Rule 13.02 has occurred and that the supervision of the court is required, the court shall assume jurisdiction and appoint one or more attorneys licensed to practice law in Texas to take such action as set out in the written order of the court including, but not limited to, one or more of the following:

A. Examine the client matters, including files and records of the attorney's practice, and obtain information about any matters that may require attention.

B. Notify persons and entities that appear to be clients of the attorney of the assumption of the law practice, and suggest that they obtain other legal counsel.

C. Apply for extension of time before any court or any administrative body pending the client's employment of other legal counsel.

D. With the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client's rights.

E. Give appropriate notice to persons or entities that may be affected other than the client.

F. Arrange for surrender or delivery to the client of the client's papers, files, or other property.

The custodian shall observe the attorney-client relationship and privilege as if the custodians were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this part. Except for intentional misconduct or gross negligence, no person acting under this part may incur any liability by reason of the institution or maintenance of a proceeding under this Part XIII. No bond or other security is required.

Comment: Chapter 456, Estates Code, authorizes the personal representative of a deceased attorney to designate an attorney—including him- or herself, if the personal representative is an attorney—to disburse and close the deceased attorney's trust or escrow accounts for client funds. See TEX. EST. CODE § 456.002. Before appointing an attorney to wind up a deceased attorney's practice under this rule, the court should determine whether the deceased attorney's personal representative has designated an attorney under Chapter 456 to close the deceased attorney's trust and escrow accounts.

C. Rules Primarily Implicated in the Cessation or Transition of a Law Practice.

Among the many ethical concerns when ceasing and transitioning a law practice, the following five are some of the most common encountered that need proper planning to avoid violating.

1. Maintain client confidentiality by preventing access by unauthorized persons to client files. 1.05(b)(1)(ii). A lawyer cannot reveal confidential information to "…anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

2. Avoid conflict of interest with the successor lawyer(s). Rules 1.06 and 1.09.

3. Communication with the client with full disclosure of all material information about the process and their rights. Rule 1.03.

4. Competence of the successor attorney to handle the matters. Rule 1.01.

5. Solicitation or barratry in contacting clients to accept the successor lawyer. Rule 7.03.

D. Need for Help.

The number of law practices being terminated or abandoned in Texas is growing each year, and as the demographics outlined above demonstrate, the growth will continue as our elder lawyer population continues to practice. The Disciplinary Council's office now has a special division dedicated to cessation of practice and its business is booming with "boomer" lawyers ceasing their practices. Since all calls involving cessation of a practice have been centralized in the last 7 months, already more than 100 law practice cessation cases have been referred to the division. Custodians are needed to help transition those practices that cannot be taken over other ways, which is difficult. Custodian volunteers are needed and all able attorneys who can help are encouraged to commit to helping when they become aware of such cases.

E. Resources and Forms

There are several good resources available that provide advice and guidelines on best practices to plan for practice cessation and how to perform the duties of a custodian. There are also forms for notice and for the pleadings under DRP Part XIII provided in some of these materials.

1. Assumption of Practice: A Custodian's Guide (with forms), State Bar of Texas Resource Guides https://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides1/ClosingaLawPractice/AssumptionPractice.htm See Appendix 7.

2. Checklist for an Attorney Who Closes another Attorney's Practice. Texas Bar CLE Estate Planning Strategies Course, 2010. See Appendix 8.

3. What to Do When Your Boss or Relative Is No Longer Able to Practice Law, Law Practice Management Resource Guides. See Appendix 9.

4. Closing a Law Practice, Yours or Someone Else's, James E. Brill and Kevin Mutscher, State Bar of Texas CLE Essentials for the General Practitioner, January 28, 2015.

5. Just in Case: Strategies for Successfully Transitioning Your Law Practice, Rebekah Steely Brooker and Alex Yarbrough, Texas Bar CLE, Lawyer Competency in the 21st Century, November 21, 2014

6. Law Practice Transition: Preparing Yourself and Your Practice for Sale or Retirement, Claude E. Ducloux, Texas Bar CLE 19th Annual Advanced Elder Law, April 13, 2018.

IV. ETHICAL RULES ON SALE OF A LAW PRACTICE

A. Historical View

Contrary to the belief of many Texas lawyers, there is no prohibition in the Rules for the sale of part or all of a law practice. The common misconception primarily stems from Texas Ethics Opinion 266 issued in 1963 that concluded the sale of a practice would violate Canon 24 prohibiting lawyer solicitations and Cannon 34 on confidentiality under the old Texas Canons of Ethics. Those canons have long been replaced by the Texas Disciplinary Rules of Professional Conduct and while its rules on professional conduct clearly limit the manner in which a sale can take place, it does not prohibit it per se. Moreover, as discussed above, the Rules are written in a "shall" or "shall not" format, that is, the Rules do not lend themselves to describe a permissible method of selling a practice like the ABA Model Rules, which nevertheless provide helpful guidance on navigating similar ethical rules implicated in a sale.

Fortunately, there is ample information available online and in Texas Bar CLE articles on best practices to meet the requirements of the rules, many of which are listed in the resources below. A more detailed history of the rules and opinions on sale of a practice and discussion of the implicated Rules and comments that must be addressed in a sale can be found in the draft of Sale of Part or All of a Law Practice prepared for the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar in 2017, attached as Appendix 10. A summary of the Rules implicated can also be found in the Law Practice Management Practice Tips on Sale of a Practice in Appendix 11.

Additionally, the sale of a practice is similar in many respects to other service business sales, so best practices with respect to valuation of the practice, due diligence, proper structure and terms of the sale and a sound purchase agreement are equally applicable here. An article of particular help on these issues was published in the ABA Journal, March 2015, *Valuing and Selling a Firm Takes time, Matchmater Skills*, by Susan A. Berson, which is in Appendix 12.

There have been other methods of transferring a practice traditionally used by firms that raise fewer ethical concerns. One is to join or merge with another firm and introduce those attorneys to the clients and receive compensation from the firm for the expected or actual work generated by those clients or upon retirement pursuant to a retirement agreement. Another is for a firm to bring on a younger lawyer who will be groomed to take over the practice and will compensate the more senior lawyer in a similar fashion. Because the successor lawyers work for the same firm and there is continuity in the continued involvement of the senior lawyer, there is less concern with many of the ethical issues outlined below. These methods, however, are not an option for a disabled or deceased lawyer whose client base may still have significant value for the lawyer or his family.

B. Applicable Rules. Most of the following guidance is derived from the Law Practice Management Tips on Sale of a Practice noted above and in the resources. Only relevant portions of the applicable rules are provided in italics below.

1. Practice Transition DPR 13.01

Some sales of a practice may implicate the requirements of DPR13.01 – 13.03, such as when the sale is made because of a disability or death. Those provisions serve as a guide on how to assure notice is adequate to a client, and when a lawyer as custodian may need to be appointed to assist in the sale.

2. Competence

Rule 1.01. Competent and Diligent Representation. A lawyer shall not accept or continue employment in a legal matter in which the lawyer knows or should know is beyond the lawyers' competence…

A lawyer taking over a practice or a practice area in a sale must be competent to handle each of the client matters to be transferred. This presents a challenge when the acquiring lawyer may not know enough about the matters in the files to determine competence to represent particular clients without first reviewing the files. See the discussion on confidentiality below.

3. Confidentiality

Rule 1.05. Confidentiality of Information. (c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

With few exceptions not relevant in this context, lawyers cannot reveal client confidences to another lawyer or others without the client's consent. Thus, before disclosure of information relating to a specific representation of an identifiable client, the selling lawyer should secure consent from the client and an agreement to maintain client confidences from the acquiring lawyer.

4. Communication

Both the selling and acquiring lawyer need to fully and adequately communicate with the client about the intent to sell, the effect of the sale on the client and terms of representation going forward, as well as an opportunity to choose to seek other counsel.

a. *Rule 1.02. Scope and Objectives of Representation. (b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.*

If the acquiring lawyer intends to change the scope, objectives, or general methods of representation from those agreed upon with the selling lawyer, the acquiring lawyer should seek to clarify with the client within a reasonable time and enter into a new representation agreement. Note that the acquiring lawyer owes a fiduciary duty to the new clients and must avoid taking advantage of the clients or deceiving them in any way by a misrepresentation. See Rule 8.04. Therefore, it is incumbent upon the acquiring lawyer to review carefully the prior engagement terms (including all fee arrangements) and make any adjustments to them and to the clients' expectations before commencing representation.

b. *Rule 1.03. Communication. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

The selling lawyer should provide notice to affected clients and communicate with candor. The notice should include the following information:

(A) the selling lawyer's intent to sell all of the lawyer's practice or an entire subject area of the lawyer's practice;

(B) the client's right to retain other counsel or take possession of the client's file;

(C) the identity of the acquiring lawyer and the location where that lawyer intends to practice;

(D) the location of the client's file and when it will be available for retrieval, that a written receipt will be required, and that the selling lawyer is entitled to make and retain copies of the file at the selling lawyer's expense;

(E) the selling lawyer's intent to handle funds on deposit in the selling lawyer's IOLTA or other client trust account and any other client property by transferring them either to the acquiring lawyer, who will be responsible for such funds and property, or to the client, if the acquiring lawyer's representation is not accepted by the client;

(F) whether the acquiring lawyer intends to represent the client on the same basis as that between the selling lawyer and the client or the acquiring lawyer intends to alter the terms of the engagement in the future; and

(G) the selling lawyer's and acquiring lawyer's intent to presume the client's consent to the transfer of the client's file if the client does not take any action or does not otherwise object within 45 days of the receipt of the notice.

In addition, the acquiring lawyer should consider that the client may have communication expectations based on the selling lawyer and attempt to adjust those expectations as needed.

Two words of caution with respect to any list of compliance factors: First, any list like that included in the practice tips can never be all-inclusive. Thus, a lawyer should not feel he or she has a disciplinary safe harbor by providing only what the list requires (or, in this case, suggests). Each lawyer simply must consider whether what he or she tells the clients is "objectively reasonable" (or even necessary) under the circumstances. The second word of caution is for the acquiring lawyer: That lawyer should really review for accuracy and necessary completeness what the seller is telling the clients. They are the acquiring lawyer's prospective clients, and the acquiring lawyer owes them a duty of candor.

c. *Rule 1.04. Fees.*

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if . . .

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed…

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f).

The acquiring lawyer should establish the basis or rate of fees with the new clients, preferably in writing, before or within a reasonable time after taking over the representation. In addition, the selling lawyer is not permitted to sell individual client matters. The sale price for an individual client matter is effectively a referral fee earned for simply turning the matter over to another lawyer while retaining no responsibility for the matter. Whether a selling lawyer is engaged in a "sham sale" in violation of prohibited fee-splitting under Rule 1.04 depends on the specific facts and circumstances of the transaction.

Factors to consider that might suggest a sham sale include:

- Motivation for the sale.
- Sale of less than an entire subject area or relatively small number of client matters.
- Whether agreement permits seller to, or seller continues to, practice in the sold subject area or practice area.
- Whether change in practice ensues by seller, such as a judicial or government appointment or other wholesale change
- Frequent sales of a portion of a seller's practice.

See also Rule 5.06 below, concerning rules related to "Restrictions on Right to Practice."

d. *Rule 1.15. Declining or Termination of Representation. (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.*

The selling lawyer should provide notice to affected clients regarding the termination of their representation. See Rule 1.03 above, "Communication."

5. Conflict of Interest.

a. *Rule 1.09. Conflict of Interest: Former Client. (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:*

An acquiring lawyer who ultimately decides not to purchase all or a part of the selling lawyer's practice must consider conflicts of interest. Specifically, the information learned during review of the selling lawyer's client matters may prohibit future representation and require withdrawal from current representation if adverse to clients in the matters being sold.

6. Other Restrictions.

a. *Rule 1.14. Safekeeping Property.*

Comment 1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Paragraph (a) requires that complete records of the funds and other property be maintained. …

Attorneys hold property of a client in a fiduciary relationship and should keep it separate from their own. The acquiring lawyer should verify with the clients, and with other interested parties, the nature of any property the lawyer will be safekeeping and the means of doing so.

b. *Rule 5.06. Restrictions on Right to Practice. A lawyer shall not participate in offering or making:*

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyers right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

The selling lawyer and the acquiring layer may enter a negotiated non-compete agreement pursuant to the sale of all or part of a law practice. In fact, the sale may be conditioned on the selling lawyer ceasing to engage in the private practice of law or some particular subject area of practice for a specified period within the geographic area in which the practice has been conducted (or within some other geographic area agreed to by the selling and acquiring lawyers). This type of agreement is not within the scope of Rule 5.06 and may provide evidence that the transaction is not a "sham sale" under Rule 1.04.

C. ABA Model Rule on Sale of a Practice.

Structured differently than the Texas Rules, the ABA Model Rules identify a proper sale structure that would not violate the ABA Model Rules and can provide some useful general guidance.

ABA Model Rule 1.17. A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

1. *the proposed sale;*
2. *the client's right to retain other counsel or to take possession of the file; and*
3. *the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.*

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon *entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.*

(d) The fees charged clients shall not be increased by reason of the sale.

D. Resources

1. Sale of Part or All of a Law Practice, draft prepared for the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar, 2017. See Appendix 10.

2. Law Practice Management Practice Tips on Sale of a Practice. See Appendix 11.

3. *Valuing and Selling a Firm Takes time, Matchmater Skills*, by Susan A. Berson, ABA Journal, March 2015. See Appendix 12.

4. Closing and Selling the Lawyer's Practice, Your Own or Someone Else's, James E. Brill, State Bar of Texas, Turning 65: What You Need To Know If You Or Your Clients Are Turning 65.

5. Law Practice Transition: Preparing Yourself and Your Practice for Sale or Retirement, Claude E. Ducloux, Texas Bar CLE 19th Annual Advanced Elder Law, April 13, 2018.

V. CONCLUSION

A mature law practice presents many challenges with respect to managing inactive client files and transitioning the practice when it is time to cease practicing, whether planned or not. Navigating the relevant Rules and ethics opinions can seem daunting, but is much easier with advance planning through well designed and implemented policies and advance agreements with clients. The importance of advance planning and client consent cannot be stressed enough. But when there is not an advance plan or consent, there are methods for handling these facets of transitioning a practice which then rely on diligence in notifying clients and employing objectively reasonable procedures to meet the critical confidentiality and other obligations owed to those former clients. Finally, when a lawyer is not able to manage or transition his own practice, it is not only our duty to the public as lawyers to pitch in and provide help whenever possible - it is the right thing to do.

Appendix 1

Practice Tips for Dealing with Client Files (Draft), prepared by the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar of Texas when drafting proposed comments to relevant Disciplinary Rules regarding client files, for consideration and approval by the Discipline and Client Attorney Assistant Program Committee and the Law Practice Management Section of the State Bar of Texas. Because it was discontinued, the Committee did not finalize any proposed comments or produce even a final version of the practice tips.

PRACTICE TIPS FOR DEALING WITH CLIENT FILES
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(2017)

BACKGROUND

The Texas Disciplinary Rules of Professional Conduct (TDRPC) make only one oblique reference to client files, and that is in the Rule that dictates a lawyer's obligations when the lawyer declines or terminates an attorney-client relationship. Rule 1.15(d) says that upon the termination of the representation a lawyer is obligated to "surrender[ ] **papers and property** to which the client is entitled . . . .[but the lawyer] may retain **papers** relating to the client" to enforce a retaining lien for payment of the fee. Thus, the Rule distinguishes client "papers" from other client "property." According to Texas Ethics Opinion 627 (April 2013), "papers" refers to the rest of the client's file other than personal property and funds belonging to the client. Therefore, Rule 1.15 requires a lawyer to tender the client's file ("papers") to the client unless the lawyer and client have agreed otherwise.

Also relevant is the Rule that dictates how a lawyer must treat items that the client has given the lawyer to safeguard or that have come into the lawyer's possession by virtue of the attorney-client relationship, such as settlement or recovery funds. TDRPC 1.14(a) requires a lawyer, upon a client's request, to promptly render a full accounting regarding "any funds or **other property that the client . . . is entitled to receive**." Texas Ethics Opinion 627 held that the "other property" in Rule 1.14(a) does not refer to the client's file, per se, but to "'property similar to cash' (such as bonds and stock certificates)."

While the analysis in Opinion 627 distinguishes the reference to "property" in Rule 1.15 from that in Rule 1.14, the practitioner can benefit from this brief guidance:

> Rule 1.14, the safekeeping-client-property Rule, has multiple references in the Rule and comments to "property," typically calling it "other property," once calling it "[o]ther client property," and frequently calling it "funds or other property," which should signal that this is property that has come into the lawyer's possession, for the client's convenience or for safekeeping, during the attorney-client relationship.
>
> Rule 1.15, the termination-of-representation Rule, has but a single reference to "property" in the entire Rule and all of the comments, in the phrase "papers and

> property." Accordingly, in shorthand, Rule 1.15 refers to "papers," which is not mentioned in Rule 1.14, and encompasses the client's file.
>
> Neither of these two Rules contains the word "return." To the extent case law does, only what the client has given the lawyer can be returned, pursuant to Rule 1.14. As the client has never had the file, it cannot be "returned," which is why Rule 1.15 says that the lawyer must "surrender" papers to the client at the end of the representation. The client may have provided "papers" to the lawyer pursuant to the engagement, such as original wills or deeds, which would be property to be returned under Rule 1.14 or papers to be surrendered under Rule 1.15.

THE CLIENT'S "FILE"

What, then, comprises the "client's file?" The TDRPC do not directly address this practical question. Rule 1.15(d) implies that the client's file is comprised of "papers relating to the client." While not subject to easy or precise definition, the client's file is generally the logical collection of documents, information, communications and other things, regardless of whether they are in digital or paper format, that a reasonably prudent lawyer in the same or a similar matter would collect and keep in order to represent the client competently in that matter.

What in the file is the client entitled to when the representation terminates for any reason? The answer to this question lies outside the TDRPC. Texas Ethics Opinion 570 (May 2006) held that Texas is an "entire file" jurisdiction, based upon *Hebisen v. State,* 615 S.W.2d 866 (Tex. App.—Houston [1st Dist.] 1981, no writ), *In re George*, 28 S.W.3d 511, 516 (Tex. 2000), and *Resolution Trust Corp. v. H____, P.C.,* 128 F.R.D. 647 (N.D. Tex. 1989). The Professional Ethics Committee read these cases to mean that the client's papers and other documents in the lawyer's file, including the lawyer's notes, that were created during the representation were "[papers and] property to which the client is entitled" under Rule 1.15(d).

This conclusion was reinforced by Texas Ethics Opinion 657 (May 2016), as follows:

> In general, the documents, papers and other information received from a client or received or generated in the course of representing the client, including work product and notes, are the property of the client. When a lawyer receives a request for those materials from a former client, the lawyer must make those materials available for delivery to the former client, except as prohibited by statue, court order or the lawyer's duties to third parties or the client, or unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation.

Neither Opinion details what comprises "notes," so as to answer whether attorneys must retain, in anticipation of providing to a client at the end of the representation, items like reminders jotted on notepads or Post-It-Notes, scribblings made during or in preparation for telephone calls, or even emails comprising no or marginal substance, such as those serving as transmittals or confirming scheduled events. Concluding that such things should be included is tempting based on the term "papers." However, the Professional Ethics Committee observed in Opinion 627 that practicality and the changing ways in which client files are created and maintained, govern:

> . . . Particularly in the last twenty years or so, the law practice of most lawyers in Texas has evolved to the extent that paper notes and documents are frequently a small part of the total records of a lawyer's work on a matter. The increasingly important part of most lawyers' files is electronic data stored in digital form on the lawyers' computers and servers. These relatively recent developments would make it even more difficult to use the literal terms of Rule 1.14 and Rule 1.15(d) as the primary source of guidance on handling closed client files.

Based on the rough definition of a client's file offered earlier--the logical collection of the documents, information, communications and other things, regardless of whether they are in digital or paper format, that a reasonably prudent lawyer in the same or a similar matter would collect and keep in order to represent the client competently in that matter—handwritten reminders, scribblings, and many emails may be part of the client's file only if the lawyer placed them in it or collected them in order to represent the client competently.

HOW LONG MUST A LAWYER RETAIN CLOSED FILES?

As for whether the lawyer has a duty under the TDRPC to retain a client's file for any minimum period of time, TDRPC 1.14(b) states, "Complete **records** of such [trust and escrow] account funds and **other property** shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." Texas Ethics Opinion 627 decided that the term "other property" in Rule 1.14 does <u>not</u> include the client's file. Therefore, according to that Opinion, no Texas Disciplinary Rule dictates how long a lawyer must retain closed client files, much less for any specific period of time.

Even when it is proper to destroy a client's file, the lawyer remains obligated by TDRPC 1.05(b) to protect the former client's confidences. Thus, a lawyer must dispose of client files in such a manner as to prevent unauthorized persons from gaining access to specific information within the file. A lawyer who simply dumps files of closed matters into the trash would most likely not comply with this duty

Other important resources on this topic are lawyer malpractice insurance policies and carriers. Some carriers have made their file retention advice available to all for free on the web. Lawyers can search for "lawyer file retention policy" or "law firm records management" in their internet browser.

Below is a recommended checklist addressing the handling of closed files based upon Texas Opinions 570, 627, and 657 and other resources.

GUIDELINES FOR HANDLING CLIENT FILES AFTER TERMINATION OF THE REPRESENTATION

PLANNING AHEAD

1. Law firms should develop policies and procedures for the handling of closed client files in order to protect client confidences, preserve client property, and inform clients about how their respective files will be handled at the conclusion of the representation. Lawyers and law firms should ensure that every firm lawyer and non-lawyer employee is familiar with and follows these policies and procedures.

2. The policies and procedures should address how records should be created and maintained, how long they should be preserved, how they are to be disposed of, and who will oversee the process. Law firms should have a scheduled file review process to determine which closed files can be destroyed. It is recommended that this review be supervised by a lawyer.

3. The lawyer or law firm's engagement letter or fee contract should address its policy and procedure for handling and disposing of client files when the representation concludes. (Sample engagement letters with such provisions can be found on the web.) The client should be informed which documents will be retained, how long the material will be retained before it is destroyed if the client does not take possession of it, and who will pay for storing and copying the file after the representation concludes. This initial agreement will eliminate uncertainty as to what can be done with the file if, for example, the client dies or disappears. It is a good practice to remind the client of the firm's file-handling policies and procedures in the firm's termination letter.

4. A client file, generally, may contain three types of documents.

   a. "Originals" include documents, regardless of their origin, that have possible continuing legal significance, such as business records, wills, deeds, leases, contracts, tax records, corporate documents, birth and marriage certificates, estate papers, insurance policies, and stock certificates -- any document that creates or extinguishes legal rights or obligations. These documents should not be destroyed without the client's consent unless the passage of time or other events have clearly rendered the document no longer legally effective, such as a lease that has expired or a contract that has been performed and the statute of limitation for breach has expired. If the original of any intrinsically valuable document has been delivered to the client, a copy retained by the lawyer is not property to which the client is entitled and can be destroyed at any time, absent a contrary agreement with the client.

   b. The lawyer's "work product" consists of items like pleadings, discovery products, correspondence, filings with governmental agencies, and opinion letters.

   c. Documents intended only for dissemination within the law firm such as research memos, billing records, personnel assignments, internal communications between lawyers and staff regarding the handling of the client's matter, and lawyer notes and memos regarding the matter or the client.

5. The client is entitled to all three of these types of documents unless the documents must or may be retained by the lawyer under an exception spelled out in Texas Ethics Opinion 657. Thus, in general, at the conclusion of the representation, and absent an exception to this guideline, the lawyer should tender and make available to the client the entire file that the lawyer created and maintained in connection with the representation, unless the client has already received the material or the client has agreed to a different disposition of the file. By thinking ahead and anticipating what documents should be in the client file, a lawyer can avoid having to complete the file, when the client requests it, with documents maintained in various locations and in various forms throughout the office.

6. A law firm may copy a file, at its own expense, before tendering it to the client.

DETERMINING WHAT ELSE THE CLIENT MUST RECEIVE

7. A lawyer or firm may possess personal property to which the client is entitled, such as funds, jewelry, artwork, firearms, or other such property either obtained from the client or obtained by a lawyer on behalf of the client. Such items should be promptly transferred to the client or the client's representative at the conclusion of the representation unless the client or the representative have agreed otherwise.

8. With regard to personal property belonging to the client and "original" documents as described above, if the client or a legal representative to whom the property should be delivered cannot be located after a reasonably diligent search, the property should be segregated and retained for three years and then it must be turned over to the state as abandoned property. See Tex. Prop. Code, Title 6, Chpts 72-76. In no event should lawyers destroy this type of client property because they do not know what to do with it.

CONVEYING THE FILE FOR A CLOSED MATTER TO THE CLIENT

9. If the client has not previously agreed to a specific file retention process when the representation concludes, the lawyer, at the conclusion of the client's matter, should attempt to contact the client for instruction on what to do with the file. If the client does not want the file, the lawyer should obtain a signed release allowing the lawyer to destroy it in due course. If a client refuses to take possession of the file and also refuses to consent to the lawyer's destruction of it, the lawyer may give the client notice of the client's remaining options: either pay the costs of storing the file, or the lawyer will destroy the file after a fixed reasonable time after the client is notified, such as five years.

10. No Disciplinary Rule dictates the format in which a client's file must be maintained and provided to the client or preserved. With proper precautions, lawyers may maintain client files entirely in digital format. However, technological advances during a file's storage period, even before the matter is closed, could render it inaccessible to the client. Lawyers must

maintain or attain the ability to deliver the file to the client in a format that the client can reasonably access for a reasonable amount of item. Lawyers must bear this cost.

HANDLING CLOSED FILES THE CLIENT DOES NOT TAKE

11. A lawyer or law firm may end up retaining, perhaps for years, files for closed matters. Sometimes this is a result of neglect on the part of the lawyers and their client, as well as clients not having any interest in obtaining their files. With the passage of time, the lawyer or firm may have lost track of the clients and are now unable to seek instruction on what to do with the old files. Firms that merge with older firms may inherit their closed files and need guidance regarding their disposition. As explained in the "Background" above, the Disciplinary Rules and court opinions provide no particular minimum length of time a lawyer or firm must preserve closed files. This makes sense given that different practice areas may cause differing retention times to be required. But, a lawyer generally is not required to retain closed client files indefinitely.

12. In order to reasonably protect the interests of a former client and the lawyer, lawyers are best advised to retain a client's closed file at least until the statutes of limitations (S/L) have run for breach of contract and breach of fiduciary duty actions against the lawyer. A retention period of at least five years after termination of the representation is recommended to cover the time in which a former client might sue a former lawyer. However, a statute of limitations may be tolled; thus, prior to file destruction, lawyers should consider whether they will be accused of depriving the former client of materials that could support the client's claims and/or deprive themselves of materials with which they could defend their own actions.

13. It may be advisable, if not necessary, due to the lawyer's type of practice or the nature of a file's contents, for files to be kept for longer than five years, as in the following examples:

    a. Estate and trust files should be retained indefinitely.

    b. Files involving minors are best kept until the minor reaches majority and the S/L has run.

    c. Files involving continuing obligations between the parties are best preserved until the obligations cease and the S/Ls have run.

    d. In criminal cases, the best practice is to not destroy a file while the government has control over the client as a consequence of the matter.

    e. In civil actions, it is best that a file be retained until the judgment has been satisfied, or is not to be or cannot be renewed.

    f. A file should not be destroyed while a dispute related to the matter – between the client and the lawyer or a third party -- is ongoing or has been threatened. Texas Ethics Opinion 627: "A lawyer [is required to] protect from destruction files arising from the representation of the client if the lawyer has reason to believe there is a reasonable likelihood that important interests of the former client would be harmed by destruction of information and documents contained in the file."

14. Before destroying closed client filed, a lawyer should have a basis for being reasonably assured that personal property and documents having intrinsic legal value, such as jewelry, currency, stock and bond certificates and original deeds, are not in the files. A reasonable assurance can be based upon the type of matter handled, or the existence of firm procedures whereby such items are culled from every file and sent to the client when it is closed and before it is stored. Absent a reasonable basis for assurance, the destruction policy should require at least a brief visual review of the contents of the physical files for such items, preferably by an attorney who handled the matter.

15. When closed files are destroyed they should be shredded or incinerated by the firm or a reputable disposal company. They cannot be disposed of in a manner whereby unauthorized persons would have access to client confidential information in the files. Digital files may have to be destroyed through the use of special software or with the assistance of an information technology specialist. Third-party vendors should be required to enter into confidentiality agreements to ensure the protection of client files.

16. Today, much or all of a client's file is created and kept digitally, possibly in several different formats and locations, such as central servers, the cloud, smart phones, computer hard-drives, flash drives, and email file folders. Digital documents should be identified, segregated, and cataloged to facilitate retrieval and destruction.

17. If the client's file contains original material that has obvious unique or significant value in the form acquired by the lawyer (such as an original will or deed), it should be delivered to the client in its original form, even if the rest of the file is destroyed. If the client or a legal representative to whom the property should be delivered cannot be located after a reasonably diligent search, the property should be segregated, preserved, and retained for three years and then it must be turned over to the state as abandoned property. See Tex. Prop. Code, Title 6, Chpts 72-76.

Appendix 2

Opinion Number 570

May 2006

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer refuse a former client's request to disclose or turn over the lawyer's notes made in the course of and in furtherance of his representation of the client?

STATEMENT OF FACTS

A former client of a lawyer has demanded to see the lawyer's file on the representation of the client. The lawyer has previously provided copies of most of the file to the former client but has withheld copies of the lawyer's notes created during the representation of the client. The lawyer is not claiming a lawyer's lien or other similar right over the notes.

DISCUSSION

Although no lawyer's lien is asserted in this case, the issue here considered has arisen in the past primarily in cases in which the lawyer was asserting such a lien. In the context of cases concerning a lawyer's lien, this Committee has distinguished between matters of legal ethics and matters of law. Specifically, prior Professional Ethics Committee Opinions have recognized that a lawyer is permitted to retain a client file pursuant to a proper legal claim so long as doing so will not prejudice the client in the subject matter of the representation. See e.g. Opinion 411 (January 1984) and Opinion 395 (May 1979, modified March 1980).

It is also important to note that a lawyer's file may contain many different types of documents or records created by the lawyer, documents obtained from the client, documents obtained from third persons, pleadings, court orders and contracts. A lawyer's ethical obligations may vary depending on the type, source, or content of the document and other relevant factors. This opinion is limited to a consideration of the issue with respect to notes created by a lawyer, and this opinion does not address the issue with respect to other types of documents or information contained in a lawyer's file.

Rule 1.14(b) of the Texas Disciplinary Rules of Professional Conduct provides that "[e]xcept as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client ... any funds or other property that the client ... is entitled to receive ...." In *Hebisen v. State*, 615 S.W. 2d 866 (Tex. App. - Houston [1st Dist.] 1981, no writ), the court interpreted the meaning of the predecessor of current Rule 1.14(b), holding that the term "other properties" included the client's papers and other documents that the lawyer had in his file. 615 S.W.2d at 868.

Rule 1.15(d) provides as follows:

"(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation."

Read together, Rules 1.14(b) and 1.15(d) provide that, generally, the documents in a lawyer's file that are property to which the client is entitled must be transferred to the client upon request unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation.

In *In re George*, 28 S.W.3d 511 (Tex. 2000), the Court ruled on the issue of whether the work product of disqualified counsel should be made available to the disqualified counsel's client and successor counsel. The Court struggled with the conflict between the client's right to access work product and the interest in preserving the purposes of the underlying disqualification by restricting access to the tainted work product. In the course of its analysis, the Court noted that "[t]he attorney is the agent of the client, and the work product generated by the attorney in representing the client belongs to the client." 28 S.W.3d at 516, citing Rule 1.15(d) and the opinion in *Hebisen v. State*, discussed above.

In *Occidental Chemical Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995), the Texas Supreme Court described the work product privilege:

"First, the privilege protects the attorney's thought process, which includes strategy decisions and issue formulation, and notes or writings evincing those mental processes. Second, the privilege protects the mechanical compilation of information to the extent such compilation reveals the attorney's thought processes." 907 S.W.2d at 490.

Work product has been subsequently defined in Rule 192.5(a) of the Texas Rules of Civil Procedure as follows:

"(a) Work product defined. Work product comprises:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents: or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents."

In *Resolution Trust Corporation v. H ___, P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989), the court considered the issue of the ownership of files generated by a law firm during its representation of a client and determined that the entire contents of the law firm's files concerning the representation of the client belonged to the client and ordered the law firm to turn over the entire contents of the firm's files, including work product generated by the lawyer such as notes and legal memoranda. In reaching this decision the court considered the predecessor to current Rule 1.14(b), this Committee's Opinion 395 (May 1979, modified March 1980), *Hebisen v. Texas*, 615 S.W. 2d 866 (discussed above), and *Matter of Kaleidoscope, Inc.*, 15 Bankr. 232 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (D.C. Ga. 1982). The court considered and rejected arguments that the files did not have to be turned over when there were allegations of misconduct by the lawyer or because the documents contained information that was attorney-client privileged or work product (including documents produced in anticipation of litigation with the client).

Restatement (Third) of The Law Governing Lawyers (American Law Institute 2000) (the "Restatement") Section 46 addresses a lawyer's duty to provide to the client documents held by the lawyer. A portion of the discussion in Comment c to Section 46 of the Restatement recognizes circumstances that Texas courts have not recognized but that some courts in other jurisdictions have found would justify not providing a portion of a lawyer's client file to the client:

"A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved ....."

In light of the Texas cases discussed above that recognize a strong obligation on Texas lawyers to provide files to clients and in the absence of any Texas court decision recognizing a limitation such as that stated in the Restatement passage quoted above, the Committee is of the opinion that the exception described in the quoted passage for internal law-firm materials relating to a client should not apply in the application of Rules 1.14(b) and 1.15(d). As in all other circumstances, the lawyer is an agent of and in a fiduciary relationship with the client. The Committee recognizes that a lawyer's motivation for withholding his notes from a client may be the result of a temptation to put the lawyer's own interests ahead of those of the client. The Committee believes that allowing a lawyer to unilaterally make a decision to withhold from a client notes relating to the client and created in the course of the representation of the client because the notes may reflect the firm's interests vis-à-vis the client undermines the duties owed by the lawyer to the client. In addition, withholding such notes from a client denies the client the full benefit of the services the lawyer agreed to provide to the client.

However, like the Restatement, the Committee recognizes that there are some other unusual circumstances that would justify the withholding of certain lawyer's notes from a client. Examples include notes that contain information obtained in discovery subject to a court's protective order forbidding disclosure of the information to the client, notes where the disclosure would violate the lawyer's duty to another person, and notes containing information that could reasonably be expected to cause serious harm to a mentally ill client. See generally Comment c to Section 46 of the Restatement. These exceptions are based on a lawyer's duties owed to others, including other clients, third persons and courts, or to the client, but are not based on the lawyer's own interests or concerns vis-à-vis the client. Thus, a lawyer may withhold from a client or former client certain specific notes (or portions of notes) when required to do so by a court or when not doing so would violate a duty owed to a third person or risk causing serious harm to the client.

Accordingly, documents that the former client is entitled to obtain include a lawyer's notes that constitute work product and relate to the client and the lawyer's representation of the client. Rule 1.15(d) requires that any such documents must be given to the client upon request unless the lawyer is permitted by the exceptions discussed above or by other law to retain those documents and can do so without prejudicing the interests of the former client in the subject matter of the representation.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer must upon request provide to a former client the notes of the lawyer from the lawyer's file for that former client except when the lawyer has the right to withhold the notes pursuant to a legal right such as a lawyer's lien, when the lawyer is required to withhold the lawyer's notes (or portions thereof) by court order, or when not withholding the notes (or portions thereof) would violate a duty owed to a third person or risk causing serious harm to the client.

Appendix 3

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 627

April 2013

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, what are the responsibilities of a law firm for preserving or disposing of files of a former client after the lawyer who represented the former client leaves the firm?

STATEMENT OF FACTS

Lawyer A is a Texas lawyer who was a member of Law Firm X for several years. During his time at Law Firm X, Lawyer A represented many clients, including some who later ceased to be clients of Lawyer A and Law Firm X. When Lawyer A left Law Firm X to become a member of Law Firm Y, Lawyer A's existing clients instructed Law Firm X to transfer their open files to Law Firm Y and these files were transferred. The closed files of Lawyer A's clients and former clients remained with Law Firm X in storage along with Law Firm X's other closed files.

Under Law Firm X's record retention policy, files are scheduled for destruction five years after being closed. Law Firm X notified Lawyer A of its plan to destroy such files of Lawyer A's clients and former clients. Lawyer A informed Law Firm X that he did not want those files and that he wanted no responsibility for maintaining or destroying those files.

Law Firm X then contacted Lawyer A's former clients to inquire whether they wanted their closed files returned to them. In most cases, those former clients responded that they did not want their closed files and that they would not be responsible for storing or disposing of them. Some of Lawyer A's former clients, however, requested that Law Firm X review the closed files to determine whether the files contained any "important papers" that should be retained. Conducting such a review would be expensive for Law Firm X, especially because Law Firm X, unlike Lawyer A, is not familiar with the contents of the files, making it difficult for Law Firm X to evaluate whether any of the contents are potentially "important."

DISCUSSION

At the outset it must be recognized that there are no specific provisions of the Texas Disciplinary Rules of Professional Conduct that provide detailed guidance for the question considered in this opinion. The Texas Disciplinary Rules contain specific governing rules on many subjects important in the proper conduct of the practice of law in Texas–for example, protecting client confidences, conflicts of interest, solicitation of legal business, and lawyer advertising. But, with few exceptions, the Texas Disciplinary Rules themselves do not specifically set out requirements or prohibitions with respect to the stored files relating to a lawyer's past representation of clients. The only exception relates to the continuing requirements set forth in Rule 1.05(b)(1) and (3) to protect confidential information relating to a former client against disclosure and adverse use against the former client.

Another possible source of guidance in the Texas Disciplinary Rules are rules governing the handling of clients' money and other property (Rule 1.14) and the handling of a client's files when a lawyer's representation of the client in the matter terminates (Rule 1.15(d)). Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct, entitled "Safekeeping Property," provides in full as follows:

> "(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a 'trust' or 'escrow' account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and other person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separated by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately."

Rule 1.15(d) provides as follows:

> "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating

to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation."

The committees of other states that deal with questions of professional ethics of lawyers are split as to whether the equivalent of Texas Disciplinary Rules 1.14 and 1.15(d) provide specific guidance for a lawyer's handling of closed client files. See Louisiana State Bar Association Rules of Professional Conduct Committee Public Opinion 06-RPCC-008 (2006) (Louisiana rules, which include provisions similar to Texas Rule 1.14, do not contain any specific provisions dealing with the retention of client files); Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2007-100 (2007) (provisions equivalent to Texas Rule 1.14 do not directly apply to the complete client file); Illinois State Bar Association Advisory Opinion on Professional Conduct No. 95-2 (1995) (the equivalent of Texas Rule 1.14(b) applies to closed client files); and Alabama Ethics Opinion 2010-02 (2010) (applying the equivalent of Texas Rule 1.14 to closed client files). Although the committees in other states differ as to whether the detailed provisions of the equivalent of Texas Rule 1.14 and Rule 1.15(d) should be treated as applying to closed client files, most or all committees on professional ethics in other states that have considered the issue have made reference to these rules (particularly to part or all of the equivalent of Texas Rule 1.14) for guiding principles on lawyers' handling and disposition of closed client files.

Although this Committee relied in part upon Rule 1.14(b) and Rule 1.15(d) of the Texas Disciplinary Rules of Professional Conduct in Professional Ethics Committee Opinion 570 (May 2006), which ruled that a lawyer is normally required to turn over files including the lawyer's notes if requested by a client, the Committee does not believe that Rule 1.14 and Rule 1.15(d) should be interpreted as providing specific, detailed guidance for lawyers with respect to the disposition of closed client files generally. Rule 1.14 does not refer to "files" but does refer to "other property" as part of the phrase "funds and other property" in contexts where clearly the meaning of the word "property" is "property similar to cash" (such as bonds and stock certificates). The conclusion that "property" in Rule 1.14 refers to valuable property like certificates for stocks or bonds and not client files is supported by the analysis used in the American Law Institute's Restatement of the Law Governing Lawyers (2000) (the "Restatement"). Sections 44 and 45 of the Restatement, entitled "Safeguarding and Segregating Property" and "Surrendering Possession of Property" respectively, are based largely on Rule 1.15 of the American Bar Association Model Rules of Professional Conduct which is similar to Texas Rule 1.14 quoted above. These sections of the Restatement deal with lawyers' obligations concerning money and valuable property of clients and others, but these sections do not include client files within the scope of "property." On the other hand, Section 46 of the Restatement, entitled "Documents Relating to a Representation," deals with client files as a category separate from "property."

Rule 1.15(d) of the Texas Disciplinary Rules uses the term "papers" in a way that clearly refers to client files in paper form. However, that Rule by its terms applies at the time a lawyer's representation of a client terminates and the Rule does not apply to files that are retained and stored by a lawyer as closed files after the representation of the client in a matter ends.

An additional factor that makes specific provisions of the Texas Disciplinary Rules unsuited to be a source of detailed guidance for the handling of closed client files is that the files of clients and former clients are no longer solely, or in most cases even primarily, in tangible paper form. Particularly in the last twenty years or so, the law practice of most lawyers in Texas has evolved to the extent that paper notes and documents are frequently a small part of the total records of a lawyer's work on a matter. The increasingly important part of most lawyers' files is electronic data stored in digital form on the lawyers' computers and servers. These relatively recent developments would make it even more difficult to use the literal terms of Rule 1.14 and Rule 1.15(d) as the primary source of guidance on handling closed client files.

The conclusion that the literal terms of Rule 1.14 and Rule 1.15(d) do not supply specific guidance for a lawyer's handling of closed client files does not mean that these Rules are irrelevant to the Committee's response to the question here considered. Instead the principles and values underlying these Rules – particularly the emphasis on the duty of lawyers to protect the interests of current and former clients – are critical guides for lawyers' conduct with regard to closed client files.

A number of principles relating to a lawyer's or law firm's closed files of clients or former clients arise from provisions of the Texas Disciplinary Rules. Application of these principles will in most cases be subject to modification by agreement between lawyer and client and will also be subject to any requirements of applicable statutory and decisional law.

First, since client files almost invariably contain confidential information concerning clients, lawyers in possession of client files must comply with the obligations of Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct requiring that confidential information of current and former clients not be disclosed outside the law firm except in specific, narrowly defined circumstances set forth in Rule 1.05. The obligation to protect confidential client information would preclude any disposition of closed client files that could result in unauthorized persons having access to the contents of the files.

Second, subject to limitations to protect important interests of other persons as well as the interests of clients themselves in certain circumstances, the client concerned normally has the right to obtain possession of the lawyer's files arising from the lawyer's representation of the client. See Professional Ethics Committee Opinion 570 (May 2006); *Hebisen v. State,* 615 S.W. 2d 866 (Tex. App. – Houston [1st Dist.] 1981, no writ) (applying former Disciplinary Rule 9-102(B)(4) of the Texas Code of Professional Responsibility as in effect before 1990, which is a predecessor of current Rule 1.14(b) of the Texas Disciplinary Rules of Professional Conduct).

Third, under the Texas Disciplinary Rules a lawyer has continuing obligations not to harm the interests of former clients with respect to matters for which the lawyer provided legal services. Under Rule 1.09 and Rule 1.10, a lawyer may not act adversely to a former client on a matter for which the lawyer provided legal services. In the case of closed files held by a lawyer, this principle requires that a lawyer protect from destruction files arising from the representation of the client if the lawyer has reason to believe there is a reasonable likelihood that important interests of the former client would be harmed by destruction of information and documents contained in the file. Among the factors that a lawyer should consider in determining whether there is a reasonable likelihood that important interests of the former client would be harmed by destruction of a file are any client instructions concerning the file, the amount of time that has passed since the file was closed, the nature and content of the file as known to the lawyer based on memory or on the labeling of files, and normal business practices. A detailed review of files for items of information that might be of value to a particular client is not required before closed files are destroyed. However, the obligations to protect property of current and former clients embodied in Rule 1.14 would require that a lawyer proposing to destroy closed files have an adequate basis for assurance that items of property–such as jewelry, currency, stock and bond certificates, and original deeds–are not included in the files destroyed. There would be an adequate basis for such assurance if the law firm had procedures in place to review all files prior to placing the files in storage so that all items of property that had been contained in the files are identified and delivered to the client before the closed files are sent to storage. Where there is not another adequate basis for certainty as to the absence of client property in closed files, there should be at least a brief visual review of the actual contents of physical files proposed to be destroyed so that items of property that can be identified in such a review may be removed and not destroyed along with the rest of the files. These obligations to protect closed files from destruction that would be likely to be harmful to former clients and to protect items of property contained in closed files will apply not only to the lawyer or law firm in possession of a particular closed file but also to other lawyers of the former client if these lawyers are requested by the former law firm or by the former client to assist in the evaluation of closed files.

Beyond the principles set forth above, the Texas Disciplinary Rules of Professional Conduct do not provide guidance as to how these principles should be implemented. For example, questions of how long files should normally be retained by a lawyer, whether notice should be given to clients before closed files are destroyed in a manner consistent with the principles discussed above, which lawyers should continue to hold closed client files when a lawyer or lawyers leave a law firm, and whether closed files originally in paper form may be converted and stored as electronic files are questions of importance but are simply not specifically answered in the Texas Disciplinary Rules. Instead these and similar questions must be answered with reference to the principles set forth above as these principles relate to particular circumstances.

Costs of complying with the basic principles of the Texas Disciplinary Rules governing closed client files may be substantial. In many cases the most significant cost will be the cost of secure storage of files before the time when the files may be appropriately destroyed. It is implicit in the Texas Disciplinary Rules that, in the absence of agreement with clients for a different treatment, ordinary costs of complying with applicable rules, whether relating to the treatment of client files or other matters, should be borne by the lawyers incurring these costs and should be treated as part of the costs of providing legal services to clients. Thus costs of storing client files should, absent an agreement to the contrary or other special factors, be borne by the lawyers concerned. However, costs of complying with client requests concerning closed client files that go beyond what is required by the principles of the Texas Disciplinary Rules of Professional Conduct should be borne by the client making the requests. Consequently, if a client requests that a lawyer continue to hold files beyond the time that the files are required to be held under the principles discussed above, a lawyer need not comply with the former client's request unless the client takes appropriate steps to pay for the requested additional period of storage. Moreover, if, after a law firm determines that files may be destroyed under the principles discussed above, a former client requests a lawyer to undertake a detailed review of the contents of closed files to identify information that the client would want to preserve, such detailed review should be treated as additional legal services subject to normal rules as to lawyer competence to provide the services requested and subject to arrangements for the client to pay for the additional legal services involved in such a review.

In view of the discussion above, it is clear that Law Firm X is permitted under the Texas Disciplinary Rules to destroy, after evaluation of the files as discussed above, closed files of a current or former client as to which lawyers in Law Firm X do not have reason to believe there is a reasonable likelihood that important interests of the client would be harmed by destruction of the files. If Lawyer A is notified or otherwise becomes aware of the proposed destruction by Law Firm X of closed files of a former client and Lawyer A has reason to know that there is a reasonable likelihood that important interests of the former client will be harmed by destruction of the information and any documents contained in the closed files scheduled for destruction, Lawyer A will have a duty to inform Law Firm X and to offer to assist in other steps necessary to protect the apparent interests of Lawyer A's former client. Law Firm X and Lawyer A should each bear their own costs of steps necessary to protect likely interests of the former client, and any additional services requested by the client should be provided if the lawyers believe themselves competent to provide the services and if the client makes arrangements to provide compensation for the additional services provided.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, closed files of current or former clients that are held by a lawyer or law firm are held subject to certain basic principles. First, confidential information of clients or former clients must be protected from unauthorized disclosure. Second, except when important interests of other persons or the client would be compromised, a lawyer or law firm possessing closed client files should turn them over to the client if requested by the client to do so. Third, a lawyer or law firm is permitted to destroy closed files when circumstances, including the passage of time, the nature of the files, and the absence of client instructions to the contrary, justify a reasonable conclusion that destruction of the file is not likely to harm material interests of the client concerned, provided that reasonable steps (such as a brief visual review of physical files) have been taken to avoid destruction of items of client property, such as currency, bonds and original deeds, that might be included in the files to be destroyed. Outside lawyers who are no longer practicing law with the lawyer or law firm in possession of closed client files may be called upon to assist the lawyer or law firm in possession of closed client files with respect to decisions as to the appropriateness of destroying particular closed files that were created or contributed to by the outside lawyer. Lawyers are not required to undertake a detailed review of the contents of closed files if destruction of the files is otherwise permitted, and any such detailed review should be treated as additional legal services subject to normal rules concerning lawyer competence to provide particular services and agreed compensation for legal services provided. Costs of complying with the basic principles of the Texas Disciplinary Rules of Professional Conduct applicable to closed client files should be borne by the lawyers and law firms having responsibility for the files, and costs of additional services provided at the request of a client should be borne by the client requesting such services. In addition to the principles of the Texas Disciplinary Rules of Professional Conduct, requirements with respect to the treatment of closed client files may also be created or modified by statutory or decisional law of Texas and by agreement between client and lawyer.

Appendix 4

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 657

May 2016

QUESTIONS PRESENTED

1. What documents and information must be delivered by a lawyer to a former client convicted of a criminal offense when requested by that former client?

2. Who bears the costs of delivering the documents and information to the former client?

3. In what form must the documents and information be delivered?

STATEMENT OF FACTS

A lawyer represented a former client in a criminal matter in which the client was convicted. All appeals in the matter have been exhausted. The former client requests the lawyer to furnish the entire contents of the lawyer's file regarding the matter. The lawyer is not claiming a lawyer's lien or a similar right over the file contents.

DISCUSSION

In general, the documents, papers and other information received from a client or received or generated in the course of representing the client (including the lawyer's notes and work product) are the property of the client and must be transferred to a former client on request unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation. Professional Ethics Committee Opinion 627 (April 2013). As Opinion 570 (May 2006) recognized, exceptions to the former client's right to some of the contents of a client's file may arise from the lawyer's duties to others or the client. The exceptions noted in Opinion 570 include:

> ". . . notes that contain information obtained in discovery subject to a court's protective order forbidding disclosure of the information to the client, notes where the disclosure would violate the lawyer's duty to another person, and notes containing information that could reasonably be expected to cause serious harm to a mentally ill client."

These exceptions would include documents or information that might reveal the identity of the lawyer's other clients or the nature of the other clients' representations, such as the results of internal conflict of interest checks and information about other clients contained in "forms" or pre-existing research memoranda placed in the former client's file during the representation.

A lawyer's duty to turn over file materials to a former client is also subject to exceptions created by Texas law. In particular, the lawyer's file in a criminal representation may contain documents and information produced by the state pursuant to Tex. Code Crim. Proc. art. 39.14(a). Article 39.14(f) prohibits defense counsel from providing a copy of such documents to the defendant (other than the defendant's own statement). Article 39.14(f) also prohibits defense counsel from disclosing to the defendant certain personal information regarding witnesses. Accordingly, a lawyer may not deliver to a former client documents provided to the lawyer pursuant to article 39.14(a) (other than the defendant's own statement). Further, if the lawyer's file materials (including notes) contain information that must be withheld from the defendant under article 39.14(f), the lawyer must redact that information before turning over the file to the former client.

Similarly, Tex. Code Crim. Proc. art. 35.29 prohibits the disclosure of personal information about jurors except as permitted by the court upon hearing. A lawyer responding to a former client's request for the client's file must therefore ensure that any such information is removed before turning over the file.

Subject to certain exceptions such as those discussed above, the client's file must be surrendered to the former client by making it available for the former client or a designated representative of the former client. Because the file belongs to the former client, if the lawyer desires to retain a copy of documents and information in the file, that expense must be borne by the lawyer in the absence of an agreement otherwise. The lawyer may tender the client's file to be picked up during ordinary business hours at the lawyer's office. In the absence of an agreement otherwise, the former client bears the expense of delivering or shipping the file to another location. See Opinion 627 (April 2013) (costs of complying with a client's request concerning closed client files beyond what is required by the principles of the Texas Disciplinary Rules of Professional Conduct are borne by the client).

In most cases, the client's file will consist of paper documents, electronically stored documents or information, or some combination of the two. The lawyer may generally provide such portions of the client's file to the former client in any format that is reasonably accessible to the ordinary client. The lawyer may provide the file as it is maintained, or convert (at the lawyer's expense) some or all of it to paper or to a reasonably accessible electronic format for delivery to the client. However, if some of the information in the file is maintained in a special format that is not reasonably accessible to the ordinary client, the lawyer must bear the cost of converting the information to a reasonably accessible format or print the information in a format that can be read by the client. If the file contains material that has unique or significant value in the form originally acquired by the lawyer, such material should be returned to the client in its original form.

CONCLUSION

In general, the documents, papers and other information received from a client or received or generated in the course of representing the client, including work product and notes, are the property of the client. When a lawyer receives a request for those materials from a former client, the lawyer must make those materials available for delivery to the former client, except as prohibited by statute, court order or the lawyer's duties to third parties or the client, or unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation.

A lawyer must make the client's file available for transfer to the client or a designated representative at the lawyer's office. The lawyer may require the client to pay any delivery or shipping expenses associated with delivering the file to the former client at a location other than the lawyer's office. If the lawyer deems it necessary to retain a copy of the file, that expense will be borne by the lawyer in the absence of an agreement otherwise.

The lawyer may provide the client's file in the form in which it is maintained, or convert some or all of it to paper or to a reasonably accessible electronic format for delivery to the client. However, if some of the information in the file is maintained in a special format that is not reasonably accessible to the ordinary client, the lawyer must bear the cost of converting the information to a reasonably accessible format, or print the information in a format that can be read by the client. If the client's file contains material that has unique or significant value in the form originally acquired by the lawyer, such material should be returned to the client in its original form.

Appendix 5

SAMPLE RETAINER/TERMINATION LETTER

You agree that it is your responsibility to obtain your file, and that if you fail to return this letter, or if you return it saying you would like your file but you do not pick it up within sixty days after we notify you that it is available, we can assume that you do not want it.

In that case, we will retain the file for [*X*] years and then destroy it in accordance with our file retention policy and procedures and the Texas rules of ethics for lawyers.

If you wish us to retain your file beyond [*X*] years, you agree to pay the reasonable costs of storage.

If you do not seek the return of your file [*now/at the conclusion of representation of you on this matter*], you may request it at any time prior to its destruction, but understand that you will not receive any further notices regarding when the file will be destroyed or that destruction has taken place.

(Ala. Bar Assn's Sample File Retention Procedure)

Unfortunately, there is no one specific rule in Texas regarding the requirements for retention and destruction of client files.

Texas Disciplinary Rules of Professional Conduct

However, Texas Disciplinary Rules of Professional Conduct give us some guidance:

> TDRPC 1.05 requires that confidential information of current and former clients not be disclosed outside the law firm except in specific, narrowly defined circumstances set forth in Rule 1.05.
>
> TDRPC 1.09 and 1.10 provide that a lawyer may not act adversely to a former client on a matter for which the lawyer provided legal services.
>
> TDRPC Rule 1.15(d) of the Texas Disciplinary Rules of Professional Conduct states:
>
> *(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law only if such retention will not prejudice the client in the subject matter of the representation.*

ABA Committee on Ethics and Professional Responsibility

Informal Opinion 1384 provides:

"4. In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.

> . . .
>
> "6. In disposing of a file, a lawyer should protect the confidentiality of the contents.
>
> "7. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.
>
> "8. A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of."

A lawyer or law firm is permitted to destroy closed files when circumstances including the passage of time, the nature of the files and the absence of client instructions to the contrary, justify a reasonable conclusion that destruction of the file is not likely to harm material interests of the client concerned. But, reasonable steps must be taken to avoid destruction of the client's property such as currency, bonds, and original deeds.

Create Internal Procedures

Create internal procedures for the retention and destruction of client files:

1. Start with your employment contract. Be sure to have a provision in your contract that outlines your file retention and destruction policies.
2. Send a letter to the client when representation has been concluded (i.e., termination letter).
3. Along with the final bill or the termination letter, include a copy of the firm's file retention and destruction policy.
4. When closing the file:
   a. Send a letter to the client reiterating the firm policy on destruction of their file.
   b. Review the file and return all of the client's property to the client (i.e., currency, bonds, pictures, deeds, titles or other original documents).
   c. Give client the opportunity to retrieve the file.
5. Prior to the expiration of the time limitation for keeping the file as outlined in your employment contract, send the client another letter that the file will be destroyed and give him an opportunity to retrieve their file.
6. After the expiration of the time limitation for keeping the file as outlined in your employment contract, destroy the file.

Destruction in Compliance with FACTA

The U. S. Department of Defense created the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). Within this Act, is a "Disposal Rule" which states that any person who maintains or possesses "consumer information" for a business purpose must properly dispose of such information by taking "reasonable measures" to protect against unauthorized access to or use of the information in connection with its disposal. An attorney is specifically included as an individual that is required to comply with the Rule. "Reasonable Measures" is defined as:

"Reasonable Measures" taken to protect consumer information as required by FACTA Disposal Rule:

1. Burn, pulverize, or shred papers containing consumer report information so that the information cannot be easily read or reconstructed;

2. Destroy or erase electronic files or media containing consumer report information so that the information cannot be easily read or reconstructed; or

3. Conduct due diligence and hire a document destruction contractor to dispose of material.

Additional rules may apply depending on the nature of the records as both state and federal laws apply to methods of disposing of personally identifying information.

Appendix 7

Assumption of Practice: A Custodian's Guide

Issued by the State Bar of Texas

INTRODUCTION

There are a variety of reasons why an assumption of a lawyer's practice may be necessary. In an ideal world, every attorney would take appropriate steps to plan for the eventual closure of his or her practice. However, often times the assumption of a lawyer's practice is required because the lawyer has been suspended or disbarred, is suffering from a disability, has passed away, or has simply abandoned the practice. In these situations, the State Bar relies on attorneys from around the state to volunteer to serve as "custodian" of these practices for the purpose of examining client matters, notifying clients, contacting courts, and returning client papers and files. This handbook is a tool for those volunteers. It offers insight and guidance regarding the process of assuming an attorney's practice, forms that may be useful in facilitating the process, and contact information of those who can provide assistance.

INITIATING THE PROCESS

A client, the Office of the Chief Disciplinary Counsel of the State Bar of Texas, or any other interested person may file a petition initiating custodianship proceedings ("assumption of jurisdiction") designating the volunteer as custodian. The current possessor of the attorney files will be ordered to show cause as to why the Court should not assume jurisdiction of the attorney's practice, which he or she may waive. The custodian will receive a copy of the assumption order and may proceed with custodial duties detailed below. The custodian will then prepare a report for the Court describing services rendered and the status of all client files, and seek an order dissolving the custodianship.

GUIDELINES TO MANAGING CUSTODIAL DUTIES

This is intended as guidance only. Each situation will be unique, and the action required will vary accordingly.

The cessation of a law practice is governed by Texas Rules of Disciplinary Procedure Section 13 (also available here), which sets forth the requirements applicable to assuming jurisdiction of a lawyer's a practice. This handbook aims to provide guidance supplemental to those requirements. Please note that these guidelines are not comprehensive and are intended only to provide a general roadmap for navigating the assumption of a practice. Every case will be different and the action required to successfully assume a practice will vary accordingly.

Successor Attorney? Determine if attorney had an arrangement with another attorney (sometimes called a successor or assuming attorney) who previously agreed to assume practice of deceased or disabled attorney. Check with staff, close friends, and relatives.

Ask local bar association(s) to send e-mail alerts to members and place a public notice in bar publications announcing death or disability of attorney. The notices should ask for information as to any successor attorney(s) with client matters with the deceased or disabled attorney.

Getting in. Obtain a set of keys, access codes, and/or passwords to the premises and to interior locked file cabinets, safes, and offices. Ask staff and the landlord for help. Change locks, codes, and passwords to protect the office files and assets.

Utilize attorney's staff. To the extent possible, utilize attorney's staff to assist in the closure of the practice. Inquire as to client and contact lists, office procedure manual, locating files, accessing information (e.g., keys, passwords), calendars, and other matters pertaining to the practice.

Track and document all action taken. From the moment you begin sorting through the attorney's files, prepare and maintain an inventory of client files, the status of those files, and actions you have taken and that need to be taken on each file. This information will be included into the Custodian's report to the Court.

Deadlines and other urgent matters. First, determine which files are active and identify any deadlines or other urgent matters that require immediate attention, such as cases with a statute of limitations running, scheduled court appearances, or cases with discovery or filing deadlines. Check with staff. Review all office calendars, both physical and electronic. Ask the local court administrator to run a search to determine if the lawyer is attorney of record on any open matters.

Contact the client regarding urgent matters and ask for permission to reset. Encourage the clients to hire new counsel as soon as possible. Confirm extensions and resets in writing. Ensure these scheduling arrangements do not pose a conflict of interest for you or your clients. If a conflict exists, contact another attorney about handling these matters.

Notify courts agencies, opposing counsel, and other appropriate entities of the assumption and, with client consent, seek extensions of time or continuances, and/or reset scheduled settings. File notices, motions, and pleadings on behalf of clients who cannot be contacted prior to immediately required action.

Contact clients. Notify clients of attorney's death, disability, incapacity, or other inability to act. When possible, client communications should be in writing. If you are unable to reach a client, consider publishing notice of the assumption in a local publication.

Send clients who have active files a letter explaining that the law office is being closed and instructing them to retain a new attorney. Send clients who have closed files a letter informing them of the assumption and giving them the opportunity to collect their file or authorize destruction of their file.

If the client wants to pick up his or her file, obtain a written request and make appropriate arrangements. It is advisable to designate a single pick-up location for all client files. The file must be returned even if client has an outstanding balance. The file can be returned by certified mail with written consent from the client. Be sure to get proof of delivery.

If the client wishes for the file to be sent to new counsel, have the client sign transfer authorization for the original file to be released to the new attorney. If the case is pending in court, ensure that a Substitution of Attorney is filed.

If the client prefers that the file be destroyed, obtain written authorization.

Ensure that a phone number is available for the clients to either speak with someone about their file or so that the client can leave a message.

Client files. Consider the following guidelines in organizing and disposing of all client files in the attorney's possession:

- **Locate and inventory all files**, including all physical and electronic materials corresponding to each. Note that closed files may be kept in more than one location. Physical files may be stores in places such as public warehouses, the attorney's home, or even with a client. Electronic files may be stored on servers, hard drives, laptops, home computers, and/or removable media such as thumb drives or disks. Be sure to add copies of all digital files to the physical files. Ask staff, relatives, and close friends about off-site locations, passwords, and keys.

- **Update all files** with any new mail, stray documents, or any action pertaining to urgent matters.

- **Return files to clients** promptly upon client request. Coordinate a time and location in which client may pick up his or her file. Ask for identification. Absent written consent, file materials should not be released to anyone but client. Have client sign an acknowledgement of receipt. Again, if the client has provided written authorization of certified mail delivery, be sure to get proof of delivery.

- **Transfer files to third party** promptly upon client request. Ensure you have obtained a transfer authorization signed by the client. Obtain an acknowledgment of receipt from third-party recipient.

- **Destroy client files** only if authorized. Authorization may be obtained through written client authorization, court order obtained through a motion for authorization to destroy files, or as authorized under a file-retention provision in the fee agreement. The file should then be completely destroyed. The safest way to destroy closed files is to shred them or have them shredded by a company that provides professional shredding services. A list of client files destroyed with dates of destruction will be included in the Custodian's report submitted at the conclusion of the proceeding.

- **Properly store closed files** of clients who cannot be reached and that may not be destroyed. Texas Disciplinary Rule of Professional Conduct 1.14(a) (available here) provides, in part, that "Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." Make information available regarding where these files will be stored and whom clients should contact in order to retrieve a closed file. Notify the Bar of where closed files will be stored and the name, address, and phone number of the contact person for retrieving the files.

- **Original documents** that a client might need to establish substantial personal or property rights—such as wills, signed contracts, stock certificates, promissory notes, property deeds, trust instruments—or other original documents like birth and marriage certificates and passports, must be returned to the client, safeguarded by the lawyer, or disposed of by court order.

  Special attention should be paid to closed files that contain documents pertaining to a minor (such as custody and support judgments and adoption records), corporate books or records, intellectual property files, or any other file in which it appears the client's or attorney's interest may be ongoing.

Financial affairs. Identify and contact a family member, business associate, or close friend of the attorney to encourage them to initiate a probate proceeding or obtain a guardianship to handle the attorney's financial affairs.

Office matters.

- **Review all unopened mail**, especially certified mail, and place in corresponding client files. Look for information on pending client matters, bills that have to be paid, tax returns that have to be filed, income that may come in, etc.

- **Contact the landlord** or other leasing entity and, if necessary, arrange for the assignment of the lease to the custodian, the termination of the lease, or the subletting of the lease to another party.

- **Notify post office** of assumption, as well as building management and some nearby offices. Post office forwarding will prevent mail from being delivered and left at an empty office. Request building management and nearby office to collect mail, express deliveries and anything else that might be important.

- **Tend to voicemail and email.** If you can obtain passwords, clear all voicemails that may contain client or other important communications. If passwords are not available, disconnect all voicemails and consider using a simple answering machine instead. Arrange for automatic forwarding of all emails to a mailbox of the responsible person. It is also possible to reject or answer all emails with a notice instructing the sender whom to contact.

Track hours and expenses. Keep a record of all time spent in the performance of custodial duties and associated expenses, including receipts. This will be useful in preparing your Court report and may be applied toward pro bono credit.

Report to the Court. Prepare and submit a report to the Court describing all custodial services rendered in the assumption of the practice and requesting dissolution of the custodianship. Consider including exhibits that detail disposition of client files and expenses incurred in the course of performing all custodial duties. Submit a proposed order dissolving the custodianship.

OTHER CUSTODIANSHIP ISSUES

Representation. The custodian does ***not*** assume representation of the client upon appointment as custodian. The custodian must inform the client accordingly and advise the client to retain new counsel. The custodian may not transfer the file without written consent. If the attorney was a partner at a law firm, another lawyer(s) within the firm does not automatically assume the attorney's practice. The client must be informed of the closure and retained independently. The custodian may represent the client, but representation must be established by a new, separate agreement between the custodian and the client. Check your client list for possible client conflicts before undergoing representation or reviewing confidential information of the client.

Confidentiality. The custodian is bound by Texas Disciplinary Rules of Professional Conduct 1.05 (also available here) in performing all duties pertaining to the assumption of practice. The custodian must maintain the confidences and secrets of a client and protect the attorney-client privilege as if the custodian represented the clients of the attorney.

Liability. The custodian will not be liable to attorney or attorney's estate for any act or failure to act in the performance of his/her duties as custodian, except for intentional misconduct or gross negligence. The custodian will not process, pay, or in any other way be responsible for payment of attorney's personal bills.

Questions? For questions or information pertaining to custodial proceedings or duties, please contact **James Ehler** at (210) 208-6600, or **Timothy Baldwin** at (713) 758-8200.

Checklist for an Attorney Who Closes Another Attorney's Office

This checklist is intended as a guideline only as circumstances surrounding the closing of a law office vary.

1. Check the attorney's calendars to look for case deadlines.

2. Search the attorney's office to look for documents that need to be filed.

3. Open and review all unopened mail, especially certified mail, and file it.

4. Review electronic sources to ensure that the client file is complete and up to date. Review the firm's electronic records for client-related material, including such things as e-mail communications, instant messages, or other documents generated during the course of the case, especially those communications that indicate pending deadlines.

5. Look for an office procedure manual. Determine whether anyone has access to a list of clients with active files.

6. Review active client files to determine which cases need to be dealt with first.

7. Make sure that any case with a statute of limitations running, or that is set for hearing or trial, are handled immediately. Look for cases with discovery settings. It is important to handle these cases immediately.

8. Contact the client for matters that are urgent or set for the near future. Ask the client for permission to reset. As an attorney assisting with closing down the practice, make sure these scheduling arrangements do not pose a conflict of interest for you and/or your clients.

9. Contact courts and opposing counsel immediately for files that require court appearances or have discovery pending. Obtain resets of hearings or extensions when necessary. Confirm extensions and resets in writing.

10. **Send clients who have active files a letter explaining that the law office is being closed and instructing them to retain a new attorney. Inform the clients about time limitations and time frames important to their cases.**

11. If the client wishes for the file to be sent to new counsel, have the client sign an authorization for the **original** file to be released to the new attorney.

12. If the client is obtaining a new attorney and the case is pending in court, be certain that a Substitution of Attorney is filed.

13. If the client wants to pick up their file, inform the client of days and times when they can pick up their **original** file.

14. The law firm may want to keep a copy of the file. If so, the file should be copied at the law firm's expense.

15. Try to ensure that a phone number is available for the clients to either speak with someone about their file or so that the client can leave a message.

16. Texas Disciplinary Rule of Professional Conduct 1.14(a) provides, in part, that "Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." Client files are considered "other client property." *Hebisen* v. State, 615 S.W.2d 866 (Tex.Civ.App. – Houston 1981)

17. The office may want to make concerted efforts to contact closed file clients when those closed cases: 1) involve a minor; 2) involve signed original wills; 3) involve contracts or other agreements that are still being paid off at the end of five years; 4) in which a judgment should be renewed; 5) support and custody files in which the children are minors or the support obligation continues; 6) corporate books and records; 7) adoption files; 8) intellectual property files; and 9) any other file in which it appears the client's or attorney's interest may be ongoing.

18. If a client determines he/she does not want the closed file, obtain a signed release giving the client's permission to destroy the file.

19. When it is determined that a client file can be destroyed, the file should be shredded or otherwise appropriately destroyed.

20. If you have authorization to handle the Attorney's financial matters, look around the office for checks or other funds that have not been deposited. Determine whether funds should be deposited or returned to the clients, as some funds may not have been earned.

21. Prepare a final billing statement showing any outstanding fees due.

22. Prepare an accounting for any client who has money being held in trust.

23. Obtain instructions from clients concerning any funds belonging to them that are being held in trust. Unearned trust account funds should be either returned to the clients or forwarded to their new attorneys.

24. If you are authorized to do so, handle financial matters, and pay business expenses.

Restrictions for Use of Oregon Materials

Appendix 9

The Law Practice Management Program of the State Bar of Texas

1-800-204-2222 x1300 lpm@texasbar.com

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What to Do When Your Boss or Relative Is No Longer Able to Practice Law

A Checklist for Staff and Family Members

When an attorney is, with or without warning, unable to practice law and is a sole practitioner, what to do with the attorney's law practice can be bewildering to the attorney's staff, if there is any staff, and devastating to the family. This checklist is intended as a guideline to help the incapacitated or deceased attorney's staff and/or family to close down the attorney's practice.

1. First, remember that although it may seem an impossible task to close down an attorney's office, it has been done by others, including those without any legal experience, and it can be done by you.
2. For remaining staff, if there it is any way you can afford it, please consider staying around to help close down the practice. Some staff might agree to help close the practice while looking for another job, helping out a few hours here and there. The family will be very grateful.
3. For the family member left with the attorney's practice, try to get the attorney's staff to stay with you for at least a month to help close down the practice. This will probably work fine if you can afford to pay the staff and are willing to provide a good reference. Make sure you are flexible about allowing the staff to interview for new jobs.
4. If an attorney friend offers to help, a family member or staff person should contact the clients and ask for the clients' permission for the attorney friend to contact them. With permission to contact the clients, the attorney friend is not engaging in solicitation by contacting the clients.
5. If no one has stepped forward to help, and you feel that you need help, consider contacting a law section or local bar association the incapacitated or deceased attorney was associated with. In the past, law sections such as the local Family Law Section, or the local bar association, has had members help close an attorney's practice.
6. If it is left to you to close the practice, start by checking the attorney's calendars to look for case deadlines.
7. Search the attorney's office to look for documents that need to be filed.
8. Open and review all unopened mail, especially certified mail, and file it.
9. Review electronic sources to ensure that the client file is complete and up to date. Review the firm's electronic records for client-related material, including such things as e-mail communications, instant messages, or other documents generated during the course of the case, especially those communications that indicate pending deadlines.
10. Look for an office procedure manual. Determine whether anyone has access to a list of clients with active files.
11. Review active client files to determine which cases need to be dealt with first.
12. Make sure that any case with a statute of limitations running, or that is set for hearing or trial, are handled immediately. Look for cases with discovery settings. It is important to handle these cases immediately not only to protect the clients' interests but to prevent malpractice lawsuits against the attorney's estate.
13. Contact the client for matters that are urgent or set for the near future. Give the client the contact information for the court so that the client can reset any pending deadlines as necessary.
14. Contact courts and opposing counsel immediately for files that require court appearances or have discovery pending.
15. Send clients who have active files a letter explaining that the law office is being closed and instructing them to retain a new attorney. Inform the clients about time limitations and time frames important to their cases.
16. If the client wishes for the file to be sent to new counsel, have the client sign an authorization for the original file to be released to the new attorney.
17. If the client wants to pick up their file, inform the client of days and times when they can pick up their original file.
18. The law firm may want to keep a copy of the file. If so, the file should be copied at the law firm's expense.
19. Try to ensure that a phone number is available for the clients to either speak with someone about their file or so that they can leave a message.
20. Texas Disciplinary Rule of Professional Conduct 1.14(a) provides, in part, that "Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation." Client files are considered "other property." Hebisen v. State, 615 S.W.2d 866 (Tex.Civ.App. – Houston 1981)
21. The office may want to make concerted efforts to contact closed file clients when those closed cases: 1) involve a minor; 2) contained executed original wills; 3) involve contracts or other agreements that are still being paid off at the end of five years; 4) in which a judgment should be renewed; 5) support and custody files in which the children are minors or the support

obligation continues; 6) corporate books and records; 7) adoption files; 8) intellectual property files; and 9) any other file in which it appears the client's or attorney's interest may be ongoing. If you have questions about what to do with these files, ask an attorney.

22. If a client determines he/she does not want the closed file, obtain a signed release giving the client's permission to destroy the file.
23. When it is determined that a client file can be destroyed, the file should be shredded or otherwise appropriately destroyed.
24. If you have authorization to handle the attorney's financial matters, look around the office for checks or funds that have not been deposited. Determine whether funds should be deposited or returned to the clients, as some funds may not have been earned.
25. Obtain instructions from clients concerning any funds in the attorney's trust account. Unearned funds should be either returned to the clients or forwarded to their new attorneys.
26. Prepare a final billing statement showing any outstanding fees due.
27. Prepare an accounting for any client who has money being held in trust.
28. Obtain instructions from clients concerning any funds belonging to them that are being held in trust. Unearned trust account funds should be either returned to the clients or forwarded to their new attorneys.
29. If you are authorized to do so, handle financial matters, and pay business expenses.

Related Documents:

- **Letter Advising that Lawyer Is No Longer Able to Practice Law: Closed File (refers to authorization for file to be destroyed)**
- **Letter Advising that Lawyer is No Longer Able to Practice Law: Active File (refers to authorization for file to be transferred)**
- **Request for File**
- **Authorization for Transfer of Client File**
- **Acknowledgment of Receipt of File**
- **Office Closure File Tracking Chart**

Appendix 10

Practice Tips for Sale of a Law Practice (Draft), prepared by the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar of Texas when drafting proposed comments to relevant Disciplinary Rules regarding sale of a law practice, for consideration and approval by the Discipline and Client Attorney Assistant Program Committee and the Law Practice Management Section of the State Bar of Texas. Because it was discontinued, the Committee did not finalize any proposed comments or produce even a final version of the practice tips.

Sale of All or Part of a Law Practice

Introduction

Lawyers may decide to engage in a different type of practice, to reduce their case load for professional or personal reasons, or to leave the practice of law altogether, whether on a temporary or permanent basis. Thus, they may choose to sell all or an entire subject area of their practice.

Whatever else the sale may include, the seller will virtually always have one or more active client matters in the area(s) of practice the seller will leave. The lawyer could respond to time pressures (e.g., the lawyer may be assuming a judicial bench on a specific date or may be required to report for a new position, in a different profession, in another state or country) and other professional or personal demands by bringing the client matters to a premature termination, which could elevate the lawyer's interests over those of the affected clients. Thus, the lawyer may decide that the interests of his or her current/active clients, as well as those of the lawyer, would be better served by another lawyer taking over the cases of those clients. Many, if not all, of the client matters will have a value, as yet unrealized by the lawyer, that another lawyer could realize and, on the basis of which, the generating lawyer could be compensated through a sale of the matters.

Historical overview

Decades ago, selling a law practice was deemed "unethical," based on language that originally appeared in New York County Lawyers Association Ethics Opinion 109 issued in 1943: "Clients are not merchandise. Lawyers are not tradesmen." This was the basis of Texas Ethics Opinion 266, issued in 1963, which concluded that a sale of practice would violate Canons that prohibited attorney solicitation and confidentiality requirements, *not* Canons that prohibited a sale of a law practice.[1] The Texas Canons of Ethics

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[1] **Canon 24**

SOLICITATION, DIRECT OR INDIRECT. A member should not solicit professional employment by circulars or advertisements, or by personal communications or interviews not warranted by personal relations, or endeavor to procure such employment through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills, or offering retainers in exchange for executorships or trusteeships to be influenced by a member. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments about causes in which the member is engaged or the importance of the member's position, and all other like self-laudation should be avoided.

preceded the Texas Code of Professional Responsibility, which in turn was superseded in 1990 by the current Texas Disciplinary Rules of Professional Conduct. For reasons explained below, the Canon language relied on in Opinion 266 no longer exists, causing that opinion to be obsolete.

Historically, attorney solicitation (advertising) was also prohibited by the ABA Model Rules and the Texas Code of Professional Responsibility, although Texas deviated from the advertising guidance in the Model Rules because they were "highly complicated and inordinately restrictive." Schuwerk and Hardwick, HANDBOOK OF TEXAS LAWYER & JUDICIAL ETHICS, Vol. 48A, 359 (Thomson Reuters 2016). Texas later sought to amend the far less restrictive solicitation guidelines that initially appeared in the Texas Disciplinary Rules of Professional Conduct, but the 1994 attempt did not survive constitutional challenge, and the 1998 attempt failed the referendum voting requirement of 51% of Texas lawyers because 51% of lawyers did not vote (after that, a statutory change required only 51% of those who voted). The revisions proposed in 1998 were adopted later, at the same time the referral fee rule changes were made. Schuwerk and Hardwick, 359-63.

The Canons of Ethics that resulted in Opinion 266 were not even enforceable in the disciplinary scheme in Texas after 1990, as they contained "should" instead of "shall" (the one "shall" provision between them simply cited to the requirement for client confidentiality, which can be achieved with a sale of practice). As former University of Texas Law School Dean John Sutton explained the shift from the "ethical" guidance of the Canons and the Code to the current Disciplinary Rules, "Lawyers were disinterested in the EC statements of ethics, were concerned about the CPR's emphasis on litigation, and wanted the rules to be recast in 'Restatement form.'" Sutton, "Reflections," 55 THE ADVOCATE 79, 80 (Summer 2011).

Canon 34

CONFIDENCES OF A CLIENT. The duty to preserve his client's confidence outlasts the members' employment and extends as well to his employees; and neither of them should accept employment which involves the disclosure or use of these confidences, either for the private advantage of the member or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A member shall not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client. If a member is falsely accused by his client, he is not precluded from disclosing the truth in respect to his false accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.

The result was that our current Texas Disciplinary Rules excluded the bases on which Opinion 266 relied:

> Every proposed Disciplinary Rule – except the rule of definitions – is a rule of prohibition. No "may" provisions appear in the Disciplinary Rules other than as exceptions to a prohibitory rule. No grant of permission to a lawyer is appropriate, and no rule purports to grant authority. It is axiomatic that every lawyer is completely free from professional discipline. Otherwise, lawyers may act as they wish. The rules are not "standards of ethics" but are simply legal standards for the imposition of penalties, sometimes severe penalties, on erring lawyers.

Sutton, 81.

While, given the historical context of sale of a law practice, lawyers may be under the impression that the Disciplinary Rules prohibit it, that is not the case.[2] The subject is not even present in any of the Rules or their interpretive comments. Thus, as Dean Sutton observed, even with the sale of a law practice, "lawyers may act as they wish" in selling (and buying) a law practice "unless [they act] illegally or in violation of a specific law or Disciplinary Rule." Sutton, 81.

As with virtually all activities a lawyer undertakes, both the seller and the purchaser of a law practice (in whole or part) may violate one or more of the Disciplinary Rules. The discussion below indicates which Rules these are and how their violations may occur during the sale of a law practice, which should guide buying and selling lawyers in conducting the process.

Disciplinary Rules implicated in the sale and purchase of a law practice

For purposes of selecting applicable Disciplinary Rules, "sale of a law practice" refers to the conveyance of client matters from the lawyer who has an attorney-client relationship with the client to another lawyer.

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[2] *See also* Dennis A. Rendleman, "The evolving ethics of selling a law practice," YOUR ABA, Nov. 2012 ("the sale of a lawyer's practice [has] happened regularly. First, it has always been the normal course of business for lawyers in a firm to buy out a partner, shareholder or any of the other myriad ownership interests used by law firms. And through mergers and acquisitions, law firms managed to 'sell' themselves to each other."), available at http://www.americanbar.org/newsletter/publications/youraba/201211article11.html.

Other issues that may be attendant to a sale, such as the conveyance of an office building, staff, library, etc., may implicate one or more Rules, depending on details of the transaction, but not predictably so, as the transfer of client matters will.

In addition, senior lawyers in small firms and solo practitioners have long been transferring client matters (or transitioning from the practice of law) in a way that complies by its very structure with the Rules indicated below. They bring another lawyer into their practice who then also becomes the lawyer for existing client matters. The new lawyer assumes increasing responsibility for those matters and may even be the primary or sole lawyer on new matters coming into the firm, while the original lawyer gradually decreases his or her involvement, without any decrease in compensation from the firm, eventually retiring with a pension from the firm. If and when the original lawyer stops practicing altogether or even stops working on particular matters, the affected clients are free, of course, to stay with the lawyer who has gradually assumed responsibility for the cases or to seek other counsel.

For lawyers who prefer a more expeditious transfer of current client matters, the following practice tips offer helpful guidance.

Rule 1.01 Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence . . .

Current Comment 1. A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. . . .

> ***Practice Tip:*** *This requirement applies even if someone other than the client initiates the employment, such as when a lawyer ceases the practice of law due to death, disability, or misconduct and another lawyer assumes the practice (perhaps being contacted by the lawyer's heirs or designated representatives) or when a lawyer sells all of his or her practice, or an entire subject area of law practice, and has made known the intent to do so*.

Current Comment 5. A lawyer offered employment or employed in a matter beyond the lawyer's competence generally must decline or withdraw from the employment or, with the prior informed consent of the client, associate a lawyer who is competent in the matter. . . .

> ***Practice Tip****: A lawyer considering the assumption of part or all of a practice of a lawyer who has become unable to practice or the purchase of all of another lawyer's practice, or an entire subject area of law practice, may be unable to make the determination of competence until after a review of the client matters being transferred or sold.*

Rule 1.02 Scope and Objectives of Representation

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

Current Comment 1. Both lawyer and client have authority and responsibility in the objectives and means of representation. . . .

> *Practice Tip: A lawyer who assumes part or all of a practice due to a lawyer's inability to continue to practice or who purchases all of another lawyer's practice, or an entire subject area of law practice, should seek to clarify with the client any change to the scope, objectives, and general methods of the representation from those with the original lawyer prior to the engagement and, within a reasonable time, enter into a new representation agreement with the client.*

Rule 1.03 Communication

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Current Comment 2. . . . The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

> *Practice Tip*: *A lawyer who seeks to sell (or otherwise transfer) client matters from the lawyer's practice should provide notice of that to the affected clients. The notice should provide the following information:*
>
> *(a) the lawyer's intent to sell all the lawyer's practice, or an entire subject area of the lawyer's practice;*
>
> *(b) the client's right to retain other counsel or take possession of the file;*
>
> *(c) the identity of the buyer and the location where the buyer intends to practice;*
>
> *(d) the location of the client's files and when they will be available for retrieval, that a written receipt will be required, and that the seller is entitled to make and retain copies of the files at the seller's expense;*
>
> *(e) the seller's intent to handle funds belonging to the client that are on deposit in the seller's IOLTA or other client trust account and other client property by transferring them either to the buyer, who will be responsible for such funds and other property, or to the client, if the buyer's representation is not accepted by the client;*

(f) whether the buyer intends to represent the client on the same basis as that between the seller and the client or the buyer intends to alter the terms of the engagement in the future with the seller's client; and

(h) the seller's and buyer's intent to presume the client's consent to the transfer of the client's files if the client does not take any action or does not otherwise object within forty-five days of receipt of the notice.

A lawyer who assumes part or all of a practice due to a lawyer's inability to continue to practice or who purchases all or an entire subject area of another lawyer's practice should consider that the client may have expectations about the degree and frequency of communication based on the initial lawyer and attempt to adjust those expectations as necessary.

Rule 1.04 Fees

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Current Comment 2. . . . A written statement concerning the fee reduces the possibility of misunderstanding, and when the lawyer has not regularly represented the client it is preferable for the basis or rate of the fee to be communicated to the client in writing. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth*. . . .*

> *Practice Tip: A lawyer who assumes part or all of a practice due to a lawyer's inability to continue to practice or who purchases all or an entire subject area of another lawyer's practice should establish the basis or rate of the fee with the new clients in accordance with this Rule. The lawyer who takes over the client matters should consider whether an increase in the fee structure to the client occasioned purely by the assumption or purchase of the practice would comply with paragraph (a).*

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if . . .

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, shall be confirmed by an arrangement conforming to paragraph (f).

> *Practice Tip (1): Paragraphs (f) and (g) do not apply to the sale or transfer of all or part of a lawyer's practice. However, lawyers could thwart the goals of paragraphs (f) and (g) by selling client matters rather than complying with the requirements of those paragraphs. The sale price would effectively be a referral fee, earned by virtue simply of the original lawyer turning the matters over to another lawyer with the original lawyer retaining no*

responsibility for the matters, which paragraphs (f) and (g) prohibit. Whether a seller would be in violation of paragraphs (f) and (g) depends on a determination of various factual issues that cannot be sufficiently delineated in these Rules.

However, by way of guidance, indications of a sham sale to avoid the requirements of paragraphs (f) and (g) include the following:

(1) sale of less than an entire subject area of practice (with particular scrutiny being warranted if there is sale of individual client matters or sale of a small number of client matters relative to the total number of client matters the seller has in a specific subject area of practice);

(2) conditions for the sale that do not include the seller ceasing practice in the sold subject area of practice or the private practice of law entirely;

(3) the seller actually continuing to practice in the same or substantially similar subject areas of practice as the sold subject area of practice;

(4) sale of an subject area of practice not occasioned by a significant current or anticipated change in the professional practice of the seller; and

(5) repeated sales by the seller of the same or substantially similar subject areas of practice.

Factors that suggest a legitimate sale include the following:

(1) acceptance by the seller of a judicial or other public office that prohibits or impairs the private practice of law;

(2) acceptance by the seller of employment (such as with a public agency, legal services entity, as in-house counsel to a business) that would prohibit or impair the seller's continued representation in the sold matters;

(3) the seller's ceasing to practice in the sold subject area of practice or the private practice of law entirely for a substantial period of time following the sale;

(4) the seller making representations of an intent to cease practice to the buyer and the seller's clients; and

(5) the seller entering into a non-compete agreement to cease the practice of law entirely or in the sold subject area of practice.

The mere fact that a seller returns to practice in the sold subject area of practice does not itself indicate a sham sale. For example, a lawyer who has sold a practice in its entirety to accept an appointment to judicial office but who later resumes private practice has not necessarily acted in a way contrary to a legitimate sale.

Practice Tip (2). *If the seller continues to practice in the subject area in which the seller has represented an intent to cease practicing, which is the stated motivation for the sale, the seller, along with the purchaser in some instances, may be in violation of Rule 8.04(a)(3) as well as paragraphs (f) and (g).*

Rule 1.05 Confidentiality of Information

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

Practice Tip: *A deceased or incapacitated lawyer is unable to make a disclosure, and a lawyer who has abandoned his or her practice is typically unavailable to do so. The Texas Rules of Disciplinary Procedure set out a procedure for the assumption of jurisdiction over a law practice in those instances and indicate disclosure guidelines. Sellers and purchasers of all or an entire subject area of a law practice may comply with the confidentiality provisions of Rule 1.05, prior to the disclosure of information relating to a specific representation of an identifiable client, to the same extent as lawyers do when engaging in preliminary discussions concerning the possible association of another lawyer or mergers between firms. Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires an agreement to maintain client confidences and the consent of the client.*

Rule 1.09 Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

Current Comment 4A. The third situation where representation adverse to a former client is prohibited is where the representation involves the same or a substantially related matter. The "same" matter aspect of this prohibition prevents a lawyer from switching sides and representing a party whose interests are adverse to a person who sought in good faith to retain the lawyer. It can apply even if the lawyer declined the representation before the client had disclosed any confidential information. . . .

> *Practice Tip: Thus, a lawyer who seeks to purchase all or an entire subject area of a lawyer's practice, but ultimately does not do so, should consider whether the information learned in reviewing the client matters to be sold would prohibit a representation adverse to the clients in those matters.*

Rule 1.14 Safekeeping Property

Current Comment 1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Paragraph (a) requires that complete records of the funds and other property be maintained. …

> ***Practice Tip****: A lawyer who assumes part or all of a practice due to a lawyer's inability to continue to practice or who purchases all or an entire subject area of another lawyer's practice should verify with the client(s) and others, as necessary, the nature of the property that the lawyer will be safekeeping following the acquisition of the practice and the means of doing so.*

Rule 1.15 Declining or Termination Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

> *Practice Tip*: *A lawyer who is terminating representations due to selling (or otherwise transferring) client matters from all or an entire subject area of the lawyer's practice should provide notice of that termination to the affected clients.*

Rule 5.06 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyers right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Current Comment 1. An agreement restricting the rights of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Current Comment 2. Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

> *Practice Tip: A negotiated non-compete agreement pursuant to the transfer or sale of a law practice is not within the scope of Rule 5.06. Thus, the sale of a law practice or an entire subject area of practice may be conditioned on the seller ceasing to engage in the private practice of law or some particular subject area of practice for a specified period of time within the geographic area in which the practice has been conducted (or within some other geographic area agreed to by the seller and buyer).*

Best Practices When Selling a Practice

One of the most misunderstood "non-rules" in the Texas Disciplinary Rules of Professional Conduct (TDRPC) is the so-called ban on selling a legal practice. There simply is no such ban. There are no rules that prohibit lawyers from selling all or part of their practices.

That being said, there are TDRPC Rules that impact the sale of a law practice, and lawyers need to be familiar with them. For purposes of selecting applicable Rules, "sale of a law practice" refers to the conveyance of client matters from the lawyer who has an attorney-client relationship with the client ("selling lawyer") to an acquiring lawyer. The relevant TDRPC Rules include the following:

Rule 1.01 Competent and Diligent Representation

The acquiring lawyer needs to have the competence to render legal services and represent the clients in the particular matters previously handled by the selling lawyer. This presents a challenge when the acquiring lawyer may not know enough about the matters in the files to determine competence to represent particular clients. See Rule 1.05 below, "Confidentiality of Information."

Rule 1.02 Scope and Objectives of Representation

If the acquiring lawyer intends to change the scope, objectives, or general methods of representation from those agreed upon with the selling lawyer, the acquiring lawyer should seek to clarify with the client within a reasonable time and enter into a new representation agreement.

Rule 1.03 Communication

The selling lawyer should provide notice to affected clients. The notice should include the following information:

(A) the selling lawyer's intent to sell all of the lawyer's practice or an entire subject area of the lawyer's practice;

(B) the client's right to retain other counsel or take possession of the client's file;

(C) the identity of the acquiring lawyer and the location where that lawyer intends to practice;

(D) the location of the client's file and when it will be available for retrieval, that a written receipt will be required, and that the selling lawyer is entitled to make and retain copies of the file at the selling lawyer's expense;

Rule 1.03 Communication (continued)

(E) the selling lawyer's intent to handle funds on deposit in the selling lawyer's IOLTA or other client trust account and any other client property by transferring them either to the acquiring lawyer, who will be responsible for such funds and property, or to the client, if the acquiring lawyer's representation is not accepted by the client;

(F) whether the acquiring lawyer intends to represent the client on the same basis as that between the selling lawyer and the client or the acquiring lawyer intends to alter the terms of the engagement in the future; and

(G) the selling lawyer's and acquiring lawyer's intent to presume the client's consent to the transfer of the client's file if the client does not take any action or does not otherwise object within 45 days of the receipt of the notice.

In addition, the acquiring lawyer should consider that the client may have communication expectations based on the selling lawyer and attempt to adjust those expectations as needed.

Rule 1.04 Fees

The acquiring lawyer should establish the basis or rate of fees with the new clients, preferably in writing, before or within a reasonable time after taking over the representation.

In addition, the selling lawyer is not permitted to sell individual client matters. The sale price for an individual client matter is effectively a referral fee earned for simply turning the matter over to another lawyer while retaining no responsibility for the matter. Whether a selling lawyer is engaged in a "sham sale" in violation of Rule 1.04 depends on the specific facts and circumstances of the transaction. See Rule 5.06 below, "Restrictions on Right to Practice."

Rule 1.05 Confidentiality of Information

Before disclosure of information relating to a specific representation of an identifiable client, the selling lawyer should secure consent from the client and an agreement to maintain client confidences from the acquiring lawyer.

Rule 1.09 Conflict of Interest: Former Client

An acquiring lawyer who ultimately decides not to purchase all or a part of the selling lawyer's practice must consider conflicts of interest. Specifically, the information learned during review of the selling lawyer's client matters may prohibit future representation and require withdrawal from current representation if adverse to clients in the matters being sold.

Rule 1.14 Safekeeping Property

The acquiring lawyer should verify with the clients, and with other interested parties, the nature of any property the lawyer will be safekeeping and the means of doing so.

Rule 1.15 Declining or Termination of Representation

The selling lawyer should provide notice to affected clients regarding the termination of their representation. See Rule 1.03 above, “Communication.”

Rule 5.06 Restrictions on Right to Practice

The selling lawyer and the acquiring layer may enter a negotiated non-compete agreement pursuant to the sale of all or part of a law practice. In fact, the sale may be conditioned on the selling lawyer ceasing to engage in the private practice of law or some particular subject area of practice for a specified period within the geographic area in which the practice has been conducted (or within some other geographic area agreed to by the selling and acquiring lawyers). This type of agreement is not within the scope of Rule 5.06 and may provide evidence that the transaction is not a “sham sale” under Rule 1.04.

Appendix 12

COVER STORY

Valuing and selling a firm takes time, matchmaker skills

BY SUSAN A. BERSON

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Illustration by Stephen Webster

Selling a law practice is akin to a dating game for solo and smaller-firm practitioners. Finding the right buyer who fits with a particular seller doesn't happen overnight.

"Generally, for a lawyer who decides he or she is going to sell, the process starts with being careful to reveal just enough information to pique a prospective buyer's interest in learning more about you and your business," says Ed Poll, a lawyer who has been helping other lawyers sell and buy firms since 1990. He is the author of *Selling Your Law Practice: The Profitable Exit Strategy*.

Wisconsin lawyer David J. Herrick, for example, is seeking an eligible buyer.

"I'm looking to retire," says Herrick, who has been practicing more than 30 years in rural Niagara. "I have my own building and office in it. File cabinets, desks, chairs. I know the building and office could be used for many commercial applications. I have the option of listing it with a Realtor. But I'm the only lawyer for our tricounty area. I'd really like to see another lawyer who's a good fit to take over what I did."

What Herrick did was build his practice from the ground up. "I graduated from the University of South Dakota, but I was born and raised in Waukesha [west of Milwaukee]. When I graduated, I knew I wanted to come back to Wisconsin. I studied for the bar, passed and always knew I wanted a rural area, so I came here and started my own practice."

Herrick understands the daunting nature of starting a practice out of law school in general, but also in this economic environment. "Of course, a problem today for so many young lawyers is that so many are graduating with significant debt, which can make financing a firm difficult," says Herrick.

"When you're a young attorney like I was coming to an area that didn't have any attorneys, you try to get the blessing of the mayor and the city council. I was a member of the American Legion, and you participate—get to know people. That's the way to get the word out about you and what you do," he says.

Getting the word out is what Herrick is trying to do now. "I've let my clients know I'm looking toward retirement." But the buyer eligibility pool can be shallow for lawyers looking to sell because of the rules governing the sale.

"A lawyer's fiduciary duties play a big part in who a firm can be sold to," says Dennis A. Rendleman, ethics counsel for the ABA's Center for Professional Responsibility. "And that means a seller can obviously only look at buyers who are lawyers with the appropriate education, bar admission and skills to take over a seller's clients and cases.

"However, a seller should first learn whether the state where you practice has adopted Rule 1.17 (http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_17_sale_of_law_practice.html) of the ABA's Model Rules of Professional Conduct, titled Sale of a Law Practice. Most states have adopted the rule, which allows for the sale of an entire firm or just a particular area of practice, though some states have variations."

ABA Model Rule 1.17: Sale of a Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including goodwill, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale,

(2) the client's right to retain other counsel or to take possession of the file,

(3) and the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within 90 days of receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

The center provides an online comparison (http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_17.authcheckdam.pdf) (PDF) of the applicable state laws adopting Rule 1.17. (For more on Rule 1.17, see "Set Sale (http://www.abajournal.com/magazine/article/ethics_opinion_its_ok_to_practice_after_selling_a_law_practice_to_assist).")

Familiar with Wisconsin's adoption of Rule 1.17, Herrick dipped his toes in the pool by posting the following ad in the Wisconsin Bar Journal: "I placed the ad with the Journal because the ideal situation for me is that I'd like to find someone who is admitted in Wisconsin, wants a rural practice, and is capable of handling real estate law, probate matters and some litigation," he says. "I'd stay on for about six months on a part-time basis. … I'm willing to mentor to make sure that the transition is a good one, and then the goal would be that I'd have the new lawyer take over the practice."

Herrick understands that his ad appeals to specific tastes. "I've enjoyed it, but a rural area isn't what many lawyers want," he says. "We'll see who responds to the ad."

But not all lawyers may find themselves in circumstances in which publicizing their intentions is in their best interests.

"I deal with lawyers who are in all kinds of circumstances, and especially those when discretion is needed," Poll says. "It's still a business, and sometimes it doesn't pay to advertise that you're wanting to close your doors."

Indeed, sellers in more lawyer-populated areas where the experienced-lawyer demand outweighs the client supply may find that instead of eligible buyer nibbles, their selling intentions may tee up staff or clients as potential targets for poaching competitors. That's one reason Poll created an online attorney marketplace, LawBiz Registry.

Photo of David Herrick by Sara Stathas

SEEKING TO BUY

Jim Cunningham is a California lawyer who placed an ad on LawBiz looking to expand in the greater Sacramento area, Truckee-Incline Village and Ventura County. "I would be completely open to talking to an attorney who says I want to retire in 18 months," says Cunningham, an estate planner of more than 20 years.Cunningham's firm has a presence in Southern and Northern California due to five acquisitions that expanded his practice.

"My first acquisition actually started out of necessity of helping someone else's clients in 2003," says Cunningham. "I ended up with a lawyer's practice because I was working in an area where there was a lawyer who had died without a succession plan. I ended up hiring his wife, taking control of the files, and helping out the firm's clients—who were people who would have been ships without rudders because the lawyer had not put a succession plan in place where another lawyer would be ready to step in.

"The second acquisition was from a lawyer who was leaving his practice to become a judge. Another acquisition was from an attorney who was moving to Colorado, and then 2013's acquisition was from a well-regarded retiring California lawyer. She had made referrals to me during her career.

I knew what she did. She knew what I did. That acquisition of her firm—it just made good strategic sense since she was based in Auburn, and I moved into Northern California."

In addition to Poll's registry, bar ads and consultants, law school placement directors are another resource for potential buyers. But be prepared that after the initial attraction, the chemistry may not be there.

"Before you ever get to the conflict checking and due diligence phase, the seller and buyer have to talk," says Poll. "They need to feel each other out, kind of like a first date."

Indeed, Cunningham's experience has been that not everyone he approaches is a match. "The ideal seller is going to have an existing client structure which doesn't present conflicts, yet has business development opportunities for future work," he says. "Those are the kind of factors for me as a buyer that are probably common to most buyers."

Cunningham also takes into account a selling attorney's personality and philosophy of work and clients. "Discussions may end because something is just off," he says.

PREPARING FOR SALE


Photo of Ed Poll by Jonah Light

All practices have value. Maximizing value means making sure the financial house is in order. "From a seller's perspective, there are things you should be doing before you decide to sell to maximize value—and keep doing once you decide to sell," Poll says.

They include:

• **Increase the profit margin.** "Increasing billable hours is the obvious way to boost profits," says Poll. Consider investing in technology designed to free up time for additional billable work.

• **Diversify the revenue stream.** "Diversification decreases adverse risk to your financial bottom line if a client leaves," says Bill Brennan, the president of Brennan Strategy, a West Chester, Pennsylvania-based consultancy on law firm financial matters. He is a former principal of Altman Weil who has worked with Am Law 200 firms. Realization rates for accounts receivable are key. "Stay on top of collections," adds Poll.

• **Continue business development and branding practices.** "The feedback a buyer receives when conducting due diligence should be that the seller is known as the 'go to' attorney for the seller's practice area in that locale serviced," Poll says.

• **Streamline operations.** "Good management sells," says Poll. Low overhead, current and up-to-date data for clients, proper case management procedures: These are things that are attractive to an eligible buyer, according to both Brennan and Poll, and that can boost the seller's asking price.

VALUING A PRACTICE

Fixed and intangible assets are the subjects of a valuation, though there is no one-size-fits-all method for measuring value to set a firm's price, Brennan and Poll agree.

"Valuation is important, but it's not necessarily a buyer's deciding factor in whether a deal moves forward," Brennan says. "For example, when a law firm is looking to buy because its partners want to add another specialty to their list of current practice areas and services, I've recommended against buyers doing valuations in the early stages. It wastes money and time during a phase


Photo of Bill Brennan by David Fonda

when a prospective buyer should focus on whether a seller's practice areas present synergies and minimal financial headaches in terms of conflicts clearances."

Expect to hire a CPA or experienced consultant to assess the assets being sold. "Fixed assets—equipment, furniture—those are relatively easy to value," says Dale Lash, partner-in-charge of RubinBrown's Business Valuation Services Group in Denver. "Goodwill—that is the intangible asset that you're really looking at because that is what a lawyer or professional services firm is transferring." Goodwill is the combination of the lawyer's knowledge, skill, judgment and reputation, he says. "That list shows you why goodwill itself is more difficult to measure than, say, a desk. Goodwill is unique to that individual or firm."

How do you put a price on a lawyer's reputation? An earnings multiplier is a common method for goodwill valuation; deriving it, however, is a subjective process. "Goodwill, if there is value in it, flows from the ability of the seller to successfully transfer a book of business to the buyer," Lash says.

For the valuation experts to value goodwill, they evaluate the future income stream's components. Those components calculate a number used for an earnings multiplier.

"Goodwill for a group in a professional services firm is valued differently than an individual practice," says Lash. "The factors for evaluating the income and revenue streams differ."

Brennan and Poll describe valuation as an art, not a science, because of the subjective factors. However, common factors for a solo practitioner's earnings multiplier calculations include earnings history, geographic location, the practice's marketing plan and the seller's competition.

"Each practice is unique, just like each lawyer," Poll says. "That being said, a general rule of thumb for a standardized multiple range is one-half to three times the gross revenues."

Analyzing the subjective factors may increase or decrease the multiplier. "For example, assume the buyer can't make the clients comfortable for some reason—that may result in a lower multiple. Ultimately, you want to know what kind of repeat business to expect a buyer to have."

For small to medium-size firms, partner earnings and withdrawal rates are evaluated. "What's important is to learn meaningful information about the firm, its lawyers, client base and operations," Brennan says. "Questions such as: Are the nonretiring partners too dependent on the retiring partner? Is the region or practice struggling from a sluggish economy?" This information allows for benchmarks.

"Comparable-sized law firms may be researched when possible," says Brennan. "Factors that go into measuring value include the ability of the lawyers to perpetuate business, the level of their name recognition, and their respective expertise in the specialties or practice areas.

"Take a founder and rainmaker of a 20-attorney firm, for example, who wants to retire. "That founder may explore selling and merging into a bigger firm, which could create value for the founder of the firm compared to seeing if, logically, the younger partners buy the retiring partner's ownership interest. The underlying philosophy of valuing a practice goes back to doing what a seller can do to boost profitability," Brennan says.

DOING YOUR DUE DILIGENCE


Photo of Jim Cunningham by Tony Avelar

Scrutinizing balance sheets and liabilities and determining the status of credit lines along with other types of debt is done during the financial analysis.

Potential buyer Cunningham says, “In addition to client relationships and future referrals that offer the future stream of income from them, I’m looking at business operations.”

The kind of infrastructure a seller offers becomes important. For example, an acquisition can bring additional costs for a buyer to integrate a seller’s technology (or lack of it) for operational management.

“I run an efficient business. Not all solo practitioners do,” says Cunningham. “I may want discounts to the price for inconsistencies or operational weaknesses that increase my acquisition costs.”

Anticipate scrutiny. “I recommend buyers review categories and amounts for expenses,” Brennan says. “Are there uncharacteristic expenses? Do high client entertainment expenses evidence a client relationship or indicate a problem? Is someone exceptionally profitable or unprofitable?”

Both seller and buyer should address professional liability concerns. “The professional standards for conflicts clearance and appropriate administrative records management procedures need to have been in place to avoid professional liability,” Poll says.

Sellers must verify that the buyer’s expertise, credentials and reputation are intact in order to minimize potential liability. “Inquire of the bar associations regarding disciplinary actions or complaints,” Poll advises. “Inquire about the availability of ‘tail’ insurance coverage,” as well.

WAITING THE MANDATED TIME

At a minimum, a seller and buyer should plan for 90 or more days before consummating a sale. Professionals say that from start to finish, a law firm sale could take as long as 12 to 24 months.

Photo of Dale Lash by McCrory James

“It depends on the condition of the seller’s practice, and sometimes even the seller’s condition—say, if the seller is a solo whose health is the reason for the sale,” Poll says. “A sale can’t happen overnight because the rules dictate a time period for client notification about the deal.

“Generally, the attorney selling has to obtain the consent of the client to transfer the file or, depending on the state’s law, not receive an objection from the client to the notification during the rule’s prescribed time limit that gives a client time to object to turning over the client’s file,” Poll says. “If it turns out a client doesn’t want the file information turned over to the buyer, the confidentiality rules prohibit the disclosure. Not waiting for your state law’s time period for consent to expire can get a seller into real trouble.”

Also ABA Model Rule 1.16(c)
(http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.htm
provides that a lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating a representation.

"In practice, that means you may have a timing issue for the settlement or closing," says Poll. "A lawyer who is selling a litigation practice, for example, should be prepared for the possibility that he or she may not be able to withdraw from the representation. If a jury has already been empaneled, that could be a situation where the seller couldn't withdraw, so you couldn't have a closing date until after the trial."

Buyers looking to expand into new markets present additional opportunities for a seller, but also time delays. "Take an out-of-town buyer that has sufficient kinds of clients and work that the seller does so that the buyer has the abilities and capacities to take on the seller's practice with few conflicts. Strategically, scale-wise, sometimes that buyer may need to spread out the costs of the acquisition within its existing operations," Brennan says. "Planning and structuring that takes time."

Cunningham says of his experience that even an arm's-length transaction takes time. "Take the due diligence I did with retiring lawyer Ann Armstrong.

Our process, from start to finish, was about seven months. I had already known her, and she knew something about my practice to know that I was a good fit for what she needed for her clients. I knew she had about six staff [members]. But I still had to sit down and review the client files for conflicts, and then sit down with her clients to meet them and learn what they needed. That was an organized firm with client information readily available." Brennan, Cunningham and Poll concur that additional time should be anticipated for due diligence needs where outdated client data exists.

Photo of Dennis Rendleman by Wayne Slezak

MAKING TIME FOR CLIENTS

It is in the financial best interests of both the seller and buyer to allocate time to make the seller's clients comfortable with the sale process. The number of clients a buyer can reasonably count on to stay represents the future income stream.

"Yet law firms are unique because, unlike other businesses, you can't really tie down the client base such as with noncompete agreements as with other types of business sales and mergers," Lash says. Neither the seller nor the buyer can force a client to stay if the client doesn't want to.

The good news is that the rules encourage a seller's continued involvement after signing the purchase agreement. "ABA Formal Opinion 468
(http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_468.authcheckdam.pdf)
addresses what a seller can do when facilitating a law firm sale done under Rule 1.17," says Rendleman. "Basically, the opinion provides that a selling lawyer can assist the buyer in the transition period for a reasonable time after the official date of the sale, so long as there is no additional cost to the client."

Poll and Brennan both say parties should expect transitioning to take time after they sign the sales agreement. "The parties to a sale need to understand that integration isn't automatic for staff, operations and sometimes even clients," Brennan says.

DOCUMENTING AND NEGOTIATING

The sale of a law practice involves documentation, due diligence and negotiations over price and payment structures.

“The sale of a law firm happens in a complicated market,” says Brennan. “Before you ever start negotiations, you want to make sure you’re identifying only serious targets and have accurate information about your options to achieve the best deal.”

Transactional lawyers will understand that an offering memorandum, letter of intent, nondisclosure agreement and (eventual) purchase agreement routinely document the sale process. “The firm’s legal structure, ownership, management, governance, along with client breakdown, go in the materials,” Brennan says.

The letter of intent specifies the buyer is buying the practice. “Ethically, a buyer cannot select individual cases or clients to purchase,” Poll says. After the letter of intent is signed, due diligence starts. And with it sellers should prepare for a buyer’s shifting perspective of scrutinizing inconsistencies to beef up negotiating power.

“Remember, the practice of law is personal,” says Poll. A seller reminiscing about building a practice with a buyer nitpicking over details brings emotionally charged negotiations. “Heated discussions between the buyer and seller could kill a deal that otherwise makes sense,” he adds. “Hiring an experienced professional for handling those negotiations may keep a deal from washing out.”

Deal structures vary for law firm transactions. “With the factors that go into sizing up firms as prospects, don’t assume that the sale structure that worked for one firm automatically works for another,” Brennan cautions. “After all, a person entering into an important business transaction without a lawyer is foolish. It makes sense that a lawyer without experienced representation when entering a transaction could experience the same fate.”

One common deal structure is an earn-out, which ties the purchase price to the amount of business done over a certain number of months post-sale, or a percentage of clients remaining with the practice determined as of a date post-sale.

Poll doesn’t favor earn-outs for retiring lawyers. “It doesn’t work for many sellers because if you’re retiring, you need to know with certainty how much money you’re going to have to live on.

“One thing I always do: The sell number is fixed. If you need flexibility, you can have a payment schedule that is flexible. But the seller needs to go to sleep at night knowing how much he can spend, and you can’t do that without the sell number being certain.” Also with a fixed price, the buyer’s sale terms can build in protections. “For example, if the seller’s health is an issue such that the seller’s presale performance doesn’t involve making clients comfortable during transition, that can result in a decrease of business for the buyer,” Poll says. “A buyer would want to make sure that there’s a term covering that precaution before closing.”

Cunningham says of the structures of his five acquisitions, “it really came down to the sellers’ particular circumstances and how I made that work with what I needed as a buyer. That dictated how the payment structures would be.”

SMOOTHING THE TRANSITION

Brennan says that “buyers should make sure a plan exists about what is going to be done to integrate the staff, the operations, the clients.” Given that Rule 1.17 requires all clients to be informed about the sale, Poll advocates face-to-face meetings and similar letters of introduction.

“The language used by the seller is obviously going to be specific to the practice area, but conveying a message of trust and confidence in the buyer’s skills and the seller’s value of the client relationships is the purpose,” Poll says.

From a buyer’s standpoint, the seller’s confidence level in the buyer’s ability to provide continuity of services is key. “We had a letter from the seller to the client explaining the situation: ‘I’m retiring; here’s the new attorney,’ ” says Cunningham. “There’s a 90-day limbo period in the rules, of course, where I waited. To give you an idea of how much time I put in transitioning the seller's clients, last year I had about 700 meetings with the clients I took over from the retiring lawyer in Auburn. I'd do the whole review of the clients' files, then meet and confirm with the clients of the seller whose files I'm taking over to walk through with them the existing estate plans that they currently have.

"In estate planning, we've had changes in the law; so you go over that they understand the changes, and it's a long process of asking the same kind of questions you would as if someone new walked in the door for help. I'd recommend other buyers who want a smooth transition allow for time to do the same because the clients need to get to know you, and you need to know them—that is, if you're expecting them to stay after the seller leaves."

Another marker for the transaction timeline is when to buy or sell. "When a geographic legal market lacks a presence for a specialty that your firm has, expansion may be worthy of the partners' consideration," Brennan says. Likewise, Poll says, "when your practice area is hot, that's obviously of greater value. If you're contemplating retirement, you have to consider that while you may want to stay engaged in the practice of law, sometimes circumstances don't allow you to do it. Your health or a loved one's health issues can turn you from lawyer into caregiver."

Procrastination is costly. "Nearly every week a lawyer in his 60s or 70s, wanting to sell and retire, calls me," Poll says. "It's usually the wife of the lawyer, I know, that is making that lawyer call me because she can't get him to make a plan, and she sees what he doesn't: He's not immortal.

"My message is simple. Make a plan while you are able. Start the process early, the earlier the better." That's the best way to maximize value and be sure clients get uninterrupted service.

This article originally appeared in the March 2015 issue of the ABA Journal with this headline: "For Sale: LwFrm—GrtDeal: Valuing and selling a firm takes time, matchmaker skills."

Sidebar

Buyer's Due Diligence Checklist

The checklist below also coincides with a seller's preparation to ensure documentation is organized for anticipated buyer review.

• Filed federal income tax returns for the previous three to five years.
• Payroll tax returns.
• Accounts receivable.
• Lines of credit or other debt agreements.
• Third-party/vendor agreements (equipment, leases, subscriptions).
• Professional liability insurance policy (and applications) with focus on prior acts and "tail" coverage terms.
• Staff/employee benefits.
• Staff/employee evaluations.
• Conflicts checks/clearance system.
• File management (open, pending, closed cataloging and storage of matters).
• Readily accessible policy manual or operations protocol for passwords of computer system.
• Up-to-date chart of all files for transitioning and closure.
• Updated information for contacts (employees, clients, vendors, suppliers, memberships).
• State bar's client file retention rules.

Seller's 'Due Diligence of Buyer' Checklist

- Researching buyer's expertise and skill.
- Verification of bar admission, license and certifications (if applicable).
- Researching buyer's reputation.
- Existence of any malpractice claims (professional liability insurance carrier, bar and court records, if applicable).
- Buyer's philosophy toward practice of law.
- Buyer's philosophy toward clients.
- Availability of "tail" insurance coverage.

Susan A. Berson, author of several finance and tax books for lawyers, is a partner with the Berson Law Group of Overland Park, Kansas.

Ethically Closing or Selling a Law Practice

Greg Sampson
Gray Reed & McGraw LLP

Dallas Bar Association Senior Lawyers Committee – September 17, 2018

Greg Sampson

Gray Reed
- Senior Counsel, Trusts & Estates

Education
- B.A., Southern Methodist University
- J.D., Southern Methodist University

BOARD CERTIFIED Texas Board of Legal Specialization ESTATE PLANNING AND PROBATE LAW

RATED BY Super Lawyers 2018 THOMSON REUTERS

Gray Reed & McGraw

- Over 130 attorneys
- Full-service, commercial law firm
- Offices in Dallas & Houston
- Opened in 1985

Ethically Closing or Selling a Law Practice

- Why is this topic getting so much attention now?

- One answer: Demographics
  - Texas lawyers over age 55 in 2017/2018 = 37%
  - Texas lawyers over age 65 in 2017/2018 = 17%
  - Over 65 lawyers nearly doubled in the last 10 years (9% in 2007/2008)

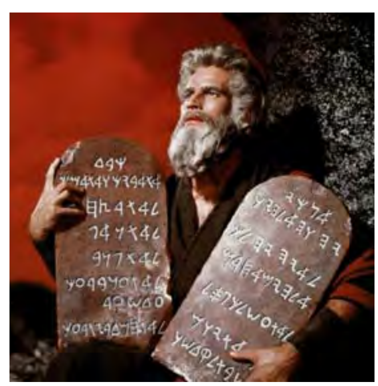
Ethically Closing or Selling a Law Practice

- Why is this topic getting so much attention now?

- Another Answer: Practice Changes
  - Lawyers changing/creating new firms more frequently
  - Lawyers changing type of practice or specializing

History and Nature of Current Disciplinary Rules of Professional Conduct

1990 – Texas Disciplinary Rules of Professional Conduct replaced Canons of Ethics and Code of Professional Responsibility



"A Lawyer Shall…"

"A Lawyer Shall Not..."

Navigating these mandates is the lawyer's responsibility.

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Greatest Commandment?

Is there a golden rule to follow when complying with the "Shall" or "Shall Not" Disciplinary Rules in the practice transition context?

If so…

Greatest Commandment Comparability?

1. Give client notice and get client consent to objectively fair procedures aimed at compliance.

2. Design objectively reasonable procedures aimed at compliance and implement with client's best interest at its center.

Resources for Navigating the Rules

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Resources for Navigating the Rules

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Toll-Free Ethics Helpline for Lawyers

- What to expect when you call the Hotline
  - Not an ethics opinion
  - Analysis of the Rules that Apply
  - Historical knowledge of ethics, opinion and rules

Navigating File Retention and Destruction

Navigating File Retention and Destruction

Inadequate file management among lawyers.

What we Lack:

- Firm file retention and destruction policies, or no training and little consistency of implementation.
- Advance consent to file destruction policies in engagement and termination letters.
- System or procedure for returning closed client files upon termination and assuring all originals and client property are delivered timely.
- Effort and procedure for culling old files for proper disposition of contents and determining what can be destroyed and when.

Navigating File Retention and Destruction

Perhaps the greatest failure is…

- Ignoring the problem and hoping it goes away or becomes someone else's problem.

The Questions

1. Can I destroy old, closed client files?
2. When?
3. What must I do before destroying a file?
4. What must I give the client?
5. How must I destroy it?

Pertinent Duties to Former Clients

- Protect confidential information of former clients (Rule 1.05)
- Protect and return "property" of former clients (Rules 1.14 & 1.15)
- Not harm former clients' interests in matters on which the lawyer provided legal services (Rules 1.05, 1.09, 1.10, 1.15)

Ethical File Destruction: Summary

DO NOT destroy a closed client file if:

1. There are reasonable grounds to believe
   a. a related proceeding is ongoing or in reasonable likelihood will occur, and
   b. destruction of the file may harm the client's interests.
2. The Statutes of Limitations have not yet expired (4 years, minimum).
3. Some other law, regulation, or tribunal requires it to be preserved.

Ethical File Destruction: Summary

Before destroying a file, check it for "valuable" client property

1. If valuable client property is found, contact the client for disposition instructions or
2. If the client cannot be found or refuses to take it, turn it over to the Texas Unclaimed property Division of the State Comptroller (if acceptable property), see Texas Property Code, Ch. 72).
3. Or segregate and preserve it until the client claims it or it becomes no longer valuable.
4. Original Wills can be deposited with the County Clerk per Estates Code 252.

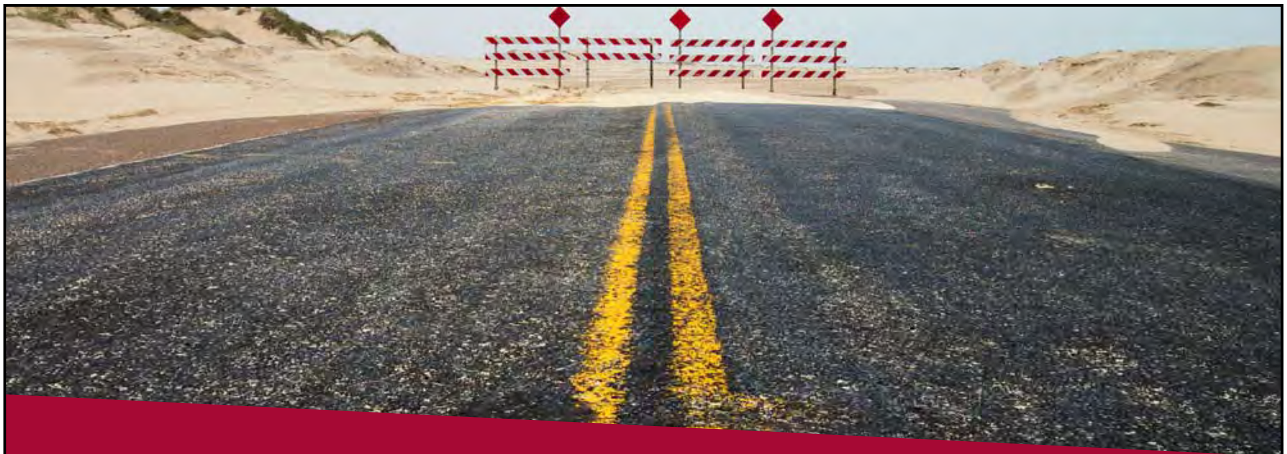
Solutions to the Problem

- Have a firm-wide file retention policy with procedure for regularly culling old files for destruction and train all firm personnel on the policy.
  - Guidance can be obtained from your malpractice carrier or simply google – "lawyer file retention policy."
- Establish a systematic procedure for reviewing and returning client files or property when the matter is closed.
- Destruction process should be overseen by a lawyer.
- Keep a record of all file dispositions.
- Place closed-file destruction provision in the retainer agreement & termination letter.

See examples in Appendix.

Valuable Available Resources

- Law Practice Management Program (TexasBarLPM.com)
- Texas Bar CLE Online Library (Search: Author – Brill, James)
- Texas Lawyer's Insurance Exchange (TLIE) and your own malpractice insurer
- Texas Ethics Hotline (CDC) 800-532-3947
- Texas Ethics Commission Opinions
- Google: (Texas) Lawyer File Retention Policies



Navigating the Cessation of a Practice

Navigating the Cessation of a Practice

- We are an aging bar.
  - 37% of members are "baby boomers" or older (up from 28% 10 years ago)
  - Lawyers over age 70 increased 131% in last 10 years.

Navigating the Cessation of a Practice

Statistics on Dementia:

- 10% of the population over age 65 have a form of Alzheimer's
- Alzheimer's risk increases with age:
  - 3% of those age 65-74
  - 17% of those age 75-84
  - 32% of those over age 85
- Projection for 2025 (in 7 years) – Texan's with Alzheimer's will increase by nearly 30% (28.9%)

Navigating the Cessation of a Practice

- Not only are we an aging bar, we are also a bar at high risk of losing our fitness to practice due to:
  - Stress
  - Alcohol and substance abuse
  - Mental illness and
  - Diminished capacity or dementia

Duty to Report Lack of Fitness to Practice

As lawyers, we are our brother's keeper, with an obligation to protect clients and the public.

- **Rule 8.03(a):** Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or **fitness** as a lawyer in other respects, shall inform the appropriate disciplinary authority.

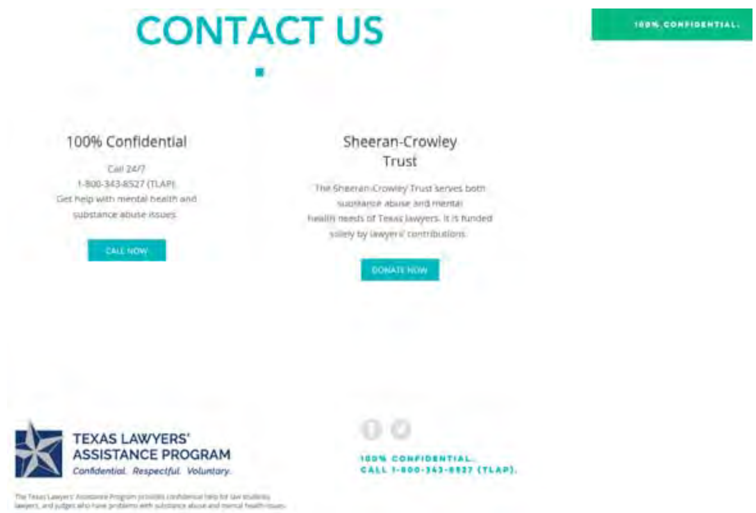
Duty to Report Lack of Fitness to Practice

Alternative Reporting Option:

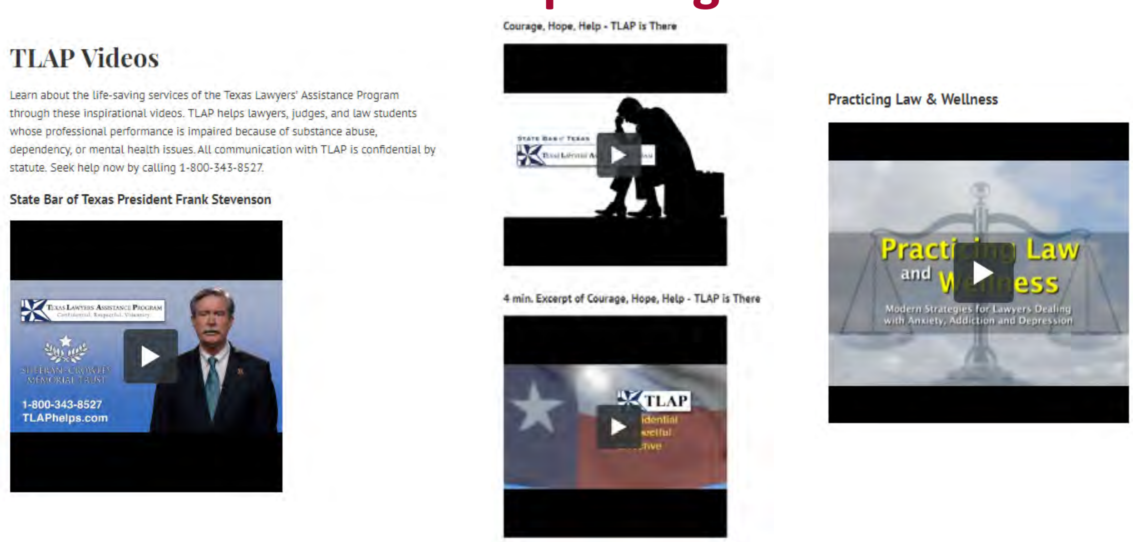
- **Rule 8.03(c):** A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is **impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority.** If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

Alternative Reporting to TLAP

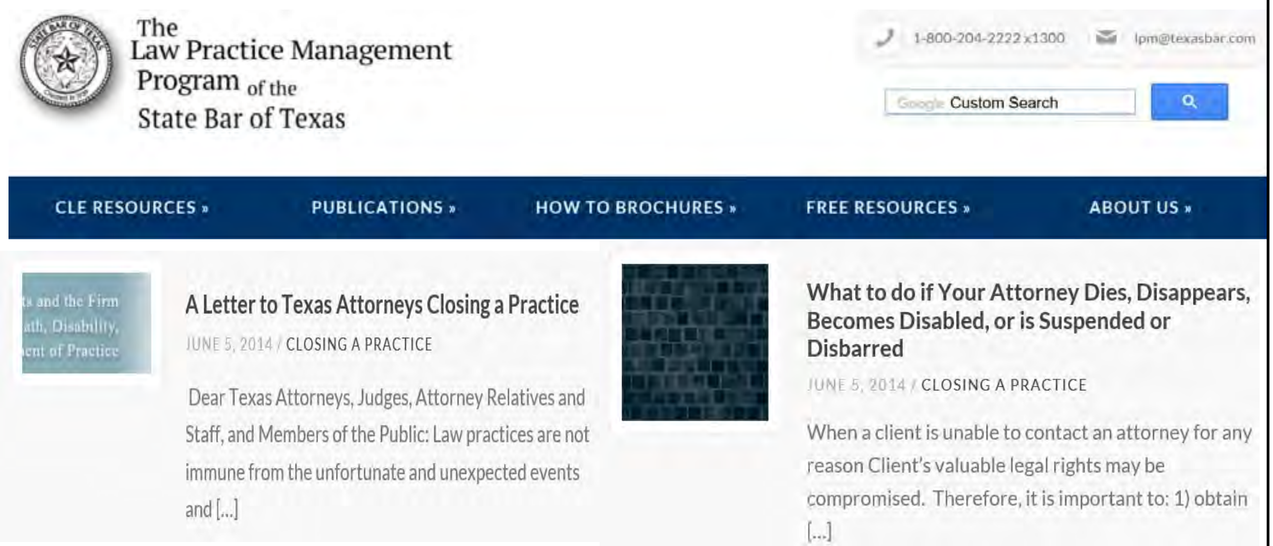
www.texasbar.com/TLAP/



Alternative Reporting to TLAP



Resources for Navigating the Rules



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Navigating the Cessation of a Practice

CESSATION OF PRACTICE PROCEDURE – DRP Chapter 13:

- When a lawyer learns of a cessation of practice, Chapter 13 of the DRP provides the procedure for transitioning the practice
- The Cessation of Practice Program of the Chief Disciplinary Council's Office is usually involved.

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Navigating the Cessation of a Practice

Five major ethical concerns in the cessation and transition of a practice:

1. Maintain client **confidentiality** by preventing access by unauthorized persons to client files. 1.05(b)(1)(ii). A lawyer cannot reveal confidential information to "…anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm."

Navigating the Cessation of a Practice

Five major ethical concerns in the cessation and transition of a practice:

2. **Conflict of interest** with the successor lawyer(s). Rules 1.06 and 1.09.

Navigating the Cessation of a Practice

Five major ethical concerns in the cessation and transition of a practice:

3. **Communication** with the client with full disclosure of all material information about the process and their rights. Rule 1.03.

Navigating the Cessation of a Practice

Five major ethical concerns in the cessation and transition of a practice:

4. **Competence** of the successor attorney to handle the matters. Rule 1.01

Navigating the Cessation of a Practice

Five major ethical concerns in the cessation and transition of a practice:

5. **Solicitation or barratry** in contacting clients to accept the successor lawyer. Rule 7.03.

Navigating the Cessation of a Practice

Procedures under DRP Part XIII:

13.01 - Duty to notify when an attorney dies, resigns, becomes inactive is disbarred or suspended leaving an active client matter with no attorney to handle by agreement with the client.

Navigating the Cessation of a Practice

Procedures under DRP Part XIII:

Written notice required to:

- Clients
- Opposing counsel
- Court or agency where matter is pending
- Malpractice insurers
- Others with reason to be informed

Navigating the Cessation of a Practice

Procedures under DRP Part XIII:

Notice may be given by a personal representative or person with custody of the files (i.e. employee of the firm) or by Chief Disciplinary Counsel

Navigating the Cessation of a Practice

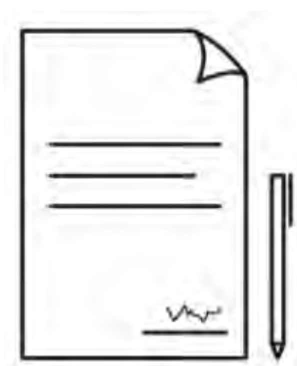
Procedures under DRP Part XIII:

Client consent is the key. 13.01 – Client consent to assumption of responsibility by another attorney obviates the need for court procedures and court appointment of custodian under 13.02 and 13.03.

Navigating the Cessation of a Practice

Procedures under DRP Part XIII: Client Consent Solution

- Engagement and/or termination letters with clients should include a clause for assumption of the practice, naming the succeeding attorney in the event of an unplanned exit from practice.
- Include specific consent of client to access to confidential file information by the successor attorney.
- Include restatement of client's right to hire another attorney and take their file.



This will avoid court proceedings and delays.

See examples in Appendix.

Navigating the Cessation of a Practice

Procedures under DRP Part XIII:

13.02 – Petition for Assumption of Practice by District Court or Probate Court (in connection with deceased attorney's estate)

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Navigating the Cessation of a Practice

Procedures under DRP Part XIII:

Petition must state:

- Attorney cannot provide services to protect clients because of death, disappearance, resignation, inactive status, disbarment or suspension, or became physically, mentally or emotionally disabled.
- Court supervision necessary because client matters were left with no attorney agreeing to assume responsibility with client consent.
- Interest of client(s) will be prejudiced if the proceedings are not maintained.

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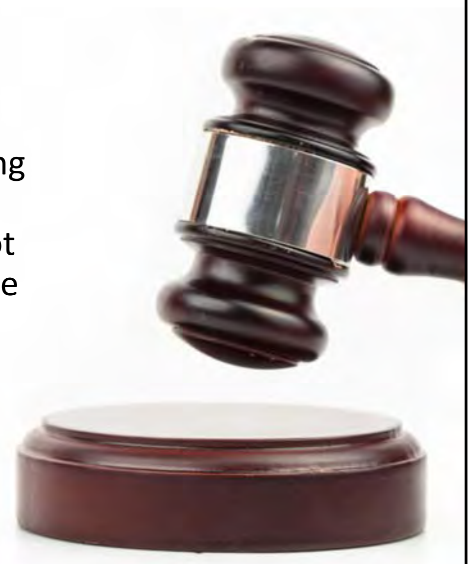
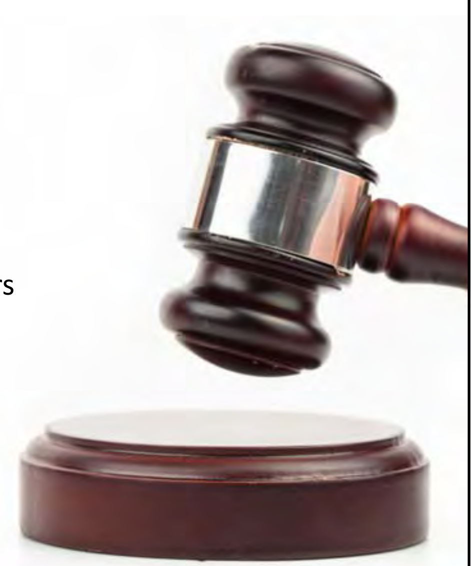
Navigating the Cessation of a Practice



Procedures under DRP Part XIII:

13.03 – Order appointing custodian after hearing (may include show cause order to current attorney or PR) upon finding that attorney is not able to serve client, supervision needed because client is without an attorney or client interests are prejudiced as stated in 13.02.

Navigating the Cessation of a Practice



Procedures under DRP Part XIII:

Order appointing one or more custodians can provide:

- Examine matters of the practice to determine what actions are needed
- Give notices to clients, courts, counsel and others of the assumption of the practice.
- Confer with clients and file necessary extension and other pleadings with consent.
- Arrange for surrender or delivery of client property and files. Note Estates Code 456.002 allows appointment of attorney to return client funds in trust

Navigating the Cessation of a Practice

Client consent alternative to DRP Part XIII:
All powers granted to a custodian by Court order can be given to a succeeding attorney by advance client consent in an engagement letter.

This will avoid court proceedings and delays.

Navigating the Cessation of a Practice

The need for attorneys to volunteer as custodians is great. Please volunteer.

See custodian's guide in materials at LPM website related link for online access to checklists, and forms for client letters, pleadings, etc.

Navigating the Sale of a Law Practice

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Navigating the Sale of a Law Practice

Traditional methods of transferring client matters with compensation:

- Hire a younger lawyer into the firm and transfer client matters over time with client consent, then arrange departure compensation for the senior lawyer at the proper time.
- Join or merge with another firm and introduce clients to the new firm attorneys and arrange compensation according to the value of the work or “book of business” brought to the firm and arrange origination and departure compensation accordingly.
- Engage outside co-counsel with client consent and enter into a permissible fee sharing arrangement based on work performed or shared.

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Myth About Prohibition of Sale

Ethics Opinion 266 and Canons of Ethics Pre-1990

- Opinion 266 (1963)
  Concluded sale of a practice would violate Canons that prohibited attorney solicitation and confidentiality
  "Clients are not merchandise. Lawyers are not Tradesmen."
- No Canon prohibited sales per se then.
- No Disciplinary Rule expressly prohibits sales now either. But any sale of a practice must follow applicable Disciplinary Rules.

Resources

- "Best Practices When Selling a Practice" http://texaslawpracticemanagement.com/best-practices-selling-practice/
- Sale of Part or All of a Practice, draft prepared for the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar, 2017.
- John W. Olmstead, "The Lawyer's Guide to Succession Planning: A Project Management Approach for Successful Law Firm Transitions and Exits." https://shop.americanbar.org/
- Roy Ginsburg Lawyer Consultant Website and Blog. https://www.sellyourlawpractice.com/blog/
- ABA Model Rule 1.17

Resources for Navigating the Rules

The Law Practice Management Program of the State Bar of Texas

1-800-204-2222 x1300 lpm@texasbar.com

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Best Practices When Selling a Practice

SEPTEMBER 20, 2017 / CLOSING A PRACTICE

One of the most misunderstood "non-rules" in the Texas Disciplinary Rules of Professional Conduct (TDRPC) is the so-called ban on selling a legal practice. There [...]

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The Questions

1. To whom might I sell?
2. How do I find buyers?
3. How do I value the business to set the price?
4. How should the deal be structured?
5. Can I continue to practice after sale?

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Factors to Consider in Sale of a Practice

- To whom might I sell?
  - Associates and partners
  - Competitors
  - Firms expanding their practices
    - Geographically
    - Specialized practice areas

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Factors to Consider in Sale of a Practice

- How do I find buyers?
  - Use existing relationships – Networking
    - Caution in announcing sale intentions to avoid client poaching
  - Use Lawyer Consultants
  - Use Business Brokers
    - Be sure they have experience and understand the nuances of legal practice sales.
  - Advertise

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Factors to Consider in Sale of a Practice

- How do I value my practice?
  - Not a "one size fits all" approach – each case is different.
  - Items key in setting value/purchase price:
    - Nature and consistency of client base and predictive collections
    - Referral network transferability
    - Systems and operations (includes file management issues)
    - Name and reputation affixed to the firm
    - Phone number and website domain

Factors to Consider in Sale of a Practice

- How do I structure the sale?
  - Sale of entire practice v. sale of a particular practice area
  - Fixed price method (usually a multiple of collections)
    - Lump sum payment up front
    - Installment payments
  - Earn-out method (paying a % of revenue earned over set time)
  - Merger with purchasing firm – often "of counsel" arrangement
    - may be a compensation or retirement payment plan

Factors to Consider in Sale of a Practice

- What if I want to continue to work after the sale?
  - Transition period firm member
    - Full time
    - Part time
    - "Of Counsel"
    - Client relationship manager
  - Mentor role
  - Continuation in specialized practice or geographic area
    - Caution concerning impermissible fee sharing

Rules of the Road in Sale of a Law Practice

Review of LPM Sale of a Practice Website Guidance

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Rules Implicated in Sale of a Law Practice

Rule 1.01 Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence . . .

Rules Implicated in Sale of a Law Practice

Rule 1.01 Competent and Diligent Representation

LPM Practice Tip:

The acquiring lawyer needs to have the competence to render legal services and represent the clients in the particular matters previously handled by the selling lawyer. This presents a challenge when the acquiring lawyer may not know enough about the matters in the files to determine competence to represent particular clients. See Rule 1.05 below, "Confidentiality of Information."

Rules Implicated in Sale of a Law Practice

Rule 1.02 Scope and Objectives of Representation

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

Rules Implicated in Sale of a Law Practice

Rule 1.02 Scope and Objectives of Representation

LPM Practice Tip:

If the acquiring lawyer intends to change the scope, objectives, or general methods of representation from those agreed upon with the selling lawyer, the acquiring lawyer should seek to clarify with the client within a reasonable time and enter into a new representation agreement.

Rules Implicated in Sale of a Law Practice

Rule 1.03 Communication

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rules Implicated in Sale of a Law Practice

Rule 1.03 Communication

LPM Practice Tip: The selling lawyer should provide notice to affected clients. The notice should include the following information, [but should always be tailored to what the circumstances dictate is objectively reasonable information the client needs]:

1. What the selling lawyer intends to sell;
2. The client's right to retain other counsel;
3. The identity and location of the acquiring lawyer;
4. Client's right to the file and how it will be made available;

Rules Implicated in Sale of a Law Practice

Rule 1.03 Communication

LPM Practice Tip (continued):

5. How the selling lawyer intends to handle client funds and property held;
6. Scope and terms of ongoing representation;
7. Intent to presume the client's consent to the transfer absent a response after some time.

In addition, the acquiring lawyer should consider that the client may have communication expectations based on the selling lawyer and attempt to adjust those expectations as needed.

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferable in writing, before or within a reasonable time after commencing the representation.

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees

LPM Practice Tip:

The acquiring lawyer should establish the basis or rate of fees with the new clients, preferably in writing, before or within a reasonable time after taking over the representation.

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees – Sham Sales or Impermissible Fee Sharing

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if . . .

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed…

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees – Sham Sales or Impermissible Fee Sharing

LPM Practice Tip:

In addition, the selling lawyer is not permitted to sell individual client matters. The sale price for an individual client matter is effectively a referral fee earned for simply turning the matter over to another lawyer while retaining no responsibility for the matter. Whether a selling lawyer is engaged in a "sham sale" in violation of Rule 1.04 depends on the specific facts and circumstances of the transaction. See Rule 5.06 below, "Restrictions on Right to Practice."

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees – Sham Sales or Impermissible Fee Sharing

Factors to consider that might suggest a sham sale:

- Motivation for the sale. For example, whether change in practice ensues by seller, such as a judicial or government appointment or other wholesale change
- Sale of less than an entire subject area or relatively small number of client matters.
- Whether agreement permits seller to, or seller continues to, practice in the sold subject area or practice area.
- Frequent sales of a portion of a seller's practice.

Rules Implicated in Sale of a Law Practice

Rule 1.05: Confidentiality of Information

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

Rules Implicated in Sale of a Law Practice

Rule 1.05: Confidentiality of Information

LPM Practice Tip:

Before disclosure of information relating to a specific representation of an identifiable client, the selling lawyer should secure consent from the client and an agreement to maintain client confidences from the acquiring lawyer.

Rules Implicated in Sale of a Law Practice

Rule 1.09: Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client.

Rules Implicated in Sale of a Law Practice

Rule 1.09: Conflict of Interest: Former Client

LPM Practice Tip:

An acquiring lawyer who ultimately decides not to purchase all or a part of the selling lawyer's practice must consider conflicts of interest. Specifically, the information learned during review of the selling lawyer's client matters may prohibit future representation and require withdrawal from current representation if adverse to clients in the matters being sold.

Rules Implicated in Sale of a Law Practice

Rule 1.14: Safekeeping Property

Current Comment 1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Paragraph (a) requires that complete records of the funds and other property be maintained. …

Rules Implicated in Sale of a Law Practice

Rule 1.14: Safekeeping Property

LPM Practice Tip:

The acquiring lawyer should verify with the clients, and with other interested parties, the nature of any property the lawyer will be safekeeping and the means of doing so.

Rules Implicated in Sale of a Law Practice

Rule 1.15: Declining or Termination of Representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

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Rules Implicated in Sale of a Law Practice

Rule 1.15: Declining or Termination of Representation

LPM Practice Tip:

The selling lawyer should provide notice to affected clients regarding the termination of their representation. See Rule 1.03 above, "Communication."

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Rules Implicated in Sale of a Law Practice

Rule 5.06: Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Rules Implicated in Sale of a Law Practice

Rule 5.06: Restrictions on Right to Practice

Rule 5.06 applies to the specific situations it addresses and should not be implicated in an agreement that restricts further practice in the areas sold or for a specified time in a geographic area as a condition of a sale.

Rules Implicated in Sale of a Law Practice

Rule 5.06: Restrictions on Right to Practice

LPM Practice Tip:

The selling lawyer and the acquiring layer may enter a negotiated non-compete agreement pursuant to the sale of all or part of a law practice. In fact, the sale may be conditioned on the selling lawyer ceasing to engage in the private practice of law or some particular subject area of practice for a specified period within the geographic area in which the practice has been conducted (or within some other geographic area agreed to by the selling and acquiring lawyers). This type of agreement is not within the scope of Rule 5.06 and may provide evidence that the transaction is not a "sham sale" under Rule 1.04.

Rules Implicated in Sale of a Law Practice

Another Rule implicated in negotiating and drafting the terms of the sale agreement and in communications with the clients by any of the lawyers involved is Rule 8.04:

Rule 8.04. Misconduct

(a) A lawyer shall not:

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Takeaways – 7 Cs

FILE MANAGEMENT

1. **Compliant Policies:** Develop a reasonably compliant file retention and destruction policy and implement it consistently.
2. **Consent:** Use engagement letters and termination letters for every client and include advance file destruction and file succession/custodian consents.
3. **Careful review:** Review files at termination (or before destruction) and automatically return all originals and client property, and the file upon request. Determine proper destruction dates and advise client retained files will be destroyed per the policy.
4. **Communicate:** Notify and inform clients you can find, and use unclaimed property procedures and Will registries when clients cannot be found after reasonable time and effort.

Takeaways – 7 Cs

DISCIPLINARY RULES OF PROCEDURE

5. **Custodian:** Get client consent to review by any custodian or proposed purchaser or engage the procedure for appointment of custodian for the practice.

Takeaways – 7 Cs

SALE OF PRACTICE

6. **Caution:** Beware of inadvertent impermissible fee splitting and solicitation. Remind the client it is their file and their choice of lawyer to represent them.
7. **Client first:** Structure and document any sale transaction with an eye to protection of the client and their best interests.

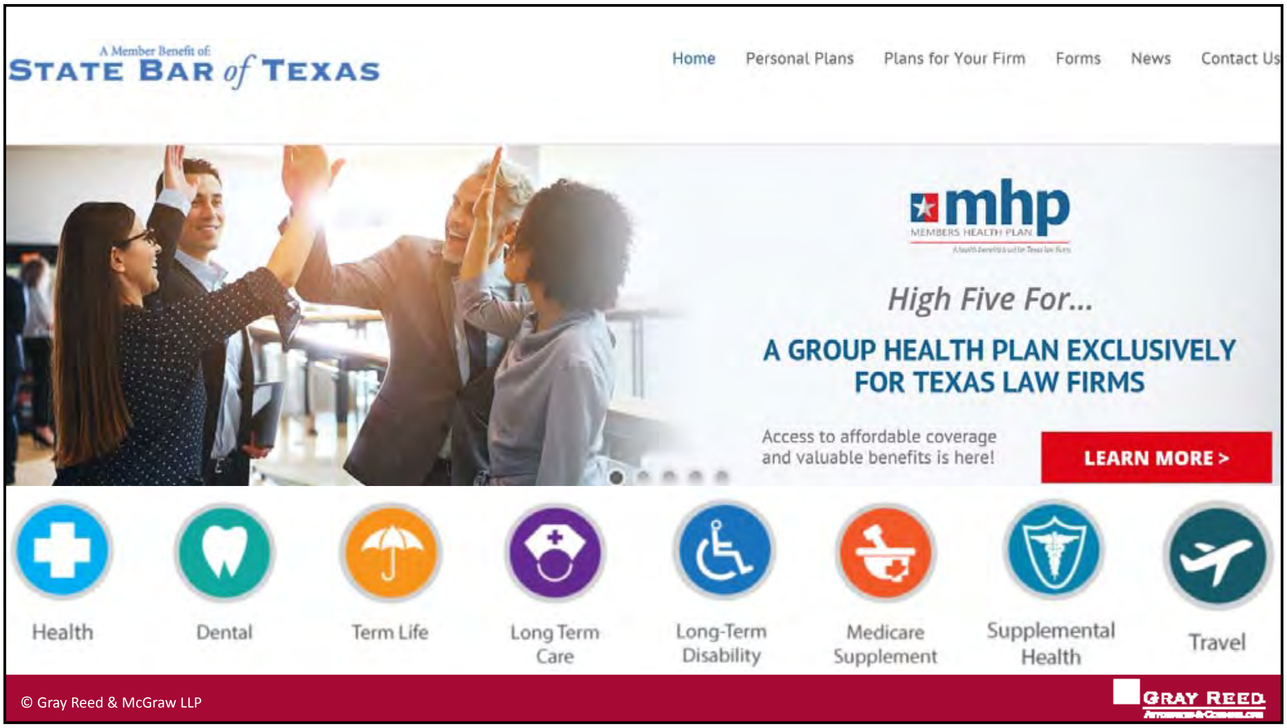
A Final Word - Financing Transition Costs

Are there ways to fund the costs of a custodian, employees and other expenses when a sudden cessation event occurs?

- Setting aside funds from revenue
- Purchasing insurance
  - AD&D Insurance
  - Disability Insurance
  - Life Insurance

Visit the State Bar's Member Benefits / Private Insurance Exchange:

https://texasbar.memberbenefits.com/



Thank you!

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Appendix

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Solution to The File Destruction Problem

SAMPLE RETAINER/TERMINATION LETTER

You agree that it is your responsibility to obtain your file, and that if you fail to return this letter, or if you return it saying you would like your file but you do not pick it up within sixty days after we notify you that it is available, we can assume that you do not want it.

In that case, we will retain the file for [*X*] years and then destroy it in accordance with our file retention policy and procedures and the Texas rules of ethics for lawyers.

If you wish us to retain your file beyond [*X*] years, you agree to pay the reasonable costs of storage.

If you do not seek the return of your file [*now/at the conclusion of representation of you on this matter*], you may request it at any time prior to its destruction, but understand that you will not receive any further notices regarding when the file will be destroyed or that destruction has taken place.

(Ala. Bar Assn's Sample File Retention Procedure)

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Solution to The File Destruction Problem

ANOTHER SAMPLE ENGAGMENT LETTER CONSENT CLAUSE

After completion of the matter, the Firm will notify Client of the existence of client materials that remain in the Firm's possession. Client has as affirmative duty to retrieve those Client materials or to direct the Firm to forward the Client material at Client's expense. If Client fails to retrieve the materials or request the Firm to forward them, this failure shall be regarded as Client's authorization for the Firm to destroy the Client materials without further notice to client.

(James Brill, What can be done With All these Old Files? Page 10)

Solution to The Court Ordered Custodian for Cessation of Practice Problem

SAMPLE ENGAGEMENT LETTER PROVISION APPOINTING A SUCCESSOR ATTORNEY

My goal is to provide you with excellent legal services. I also want to protect your interests in the event of my unexpected death, disability, impairment, or incapacity. In order to accomplish this, I have arranged with another attorney to assist with closing my practice in the event of my death, disability, impairment, or incapacity. In such event, my office staff or the assisting attorney will contact you and provide you with information about how to proceed.

(Arizona Bar Association - http://www.azbar.org/professionaldevelopment)

Solution to The Court Ordered Custodian for Cessation of Practice Problem

SAMPLE ENGAGEMENT LETTER PROVISION APPOINTING A SUCCESSOR ATTORNEY

Client understands that in order to protect Client's interests in the event of disability or death of Lawyer, it may be necessary or appropriate for a staff member, a personal representative (including someone acting under a power of attorney), or another lawyer who is retained by any such person or by Lawyer to have access to Client's files and records in order to contact Client, to determine appropriate handling of Client's matters and of Client's files, and to make referrals with Client's subsequent approval to counsel for future handling. Client grants permission and waives all privileges to the extent necessary or appropriate for such purposes.

Furthermore, in the event of Lawyer's death or disability, if further services are required in connection with Client's representation and another lawyer is subsequently engaged by Client, Client expressly authorizes a division of fees based on the proportion of work done or the responsibilities assumed by each. Such division specifically authorizes the payment of fees and expenses to Lawyer's estate, personal representatives, and heirs.

(James E. Brill, Dealing With the Death of a Solo Practitioner, 24th Annual Advanced Estate Planning and Probate Course, Chap. 8).

Solution to The Court Ordered Custodian for Cessation of Practice Problem

SAMPLE WILL PROVISION APPOINTING A SUCCESSOR ATTORNEY

With respect to my law practice, my personal representative is expressly authorized and directed to carry out the terms of the Agreement to Close Law Practice dated ___; if that Agreement is not in effect, my personal representative is authorized to enter into a similar agreement with another attorney that my personal representative, in his or her sole discretion, may determine to be necessary or desirable to protect the interests of my clients and dispose of my practice.

(Arizona Bar Association - http://www.azbar.org/professionaldevelopment)

Solution to The Court Ordered Custodian for Cessation of Practice Problem

SAMPLE WILL PROVISION APPOINTING A SUCCESSOR ATTORNEY

I currently practice law as a solo practitioner. In order to provide a smooth transition for my clients and to assist my family, I am providing these guidelines to my Executor and any attorney(s) representing my Executor and beneficiaries under this Will.

If my practice can be sold to a competent lawyer, I authorize my Executor to make such sale for such price and upon such terms as my Executor may negotiate, subject, however, to compliance with the Texas Disciplinary Rules of Professional Conduct and other applicable provisions of law. If such sale is possible, I believe that it will provide maximum benefits for my clients as well as for my employees and family.

If my practice cannot be sold and I have client files, I recommend that, subject to consent of my clients, estate planning and probate files be referred to (name); real estate files to (name); corporation, partnership, and limited liability company files to (name); family law matters to (name); and personal injury files to (name).

In either instance, I recognize that my practice has developed because of personal relationships with my clients and that they are free to disregard my suggestions.

Regardless of the method of disposing of my practice, I authorize my Executor to take all actions necessary to close my law practice and dispose of its assets. In doing so and without limiting the foregoing, my Executor may do each of the following:

(James E. Brill, Dealing With the Death of a Solo Practitioner, 24th Annual Advanced Estate Planning and Probate Course, Chap. 8).

Solution to The Court Ordered Custodian for Cessation of Practice Problem

SAMPLE WILL PROVISION APPOINTING A SUCCESSOR ATTORNEY (Cont'd)

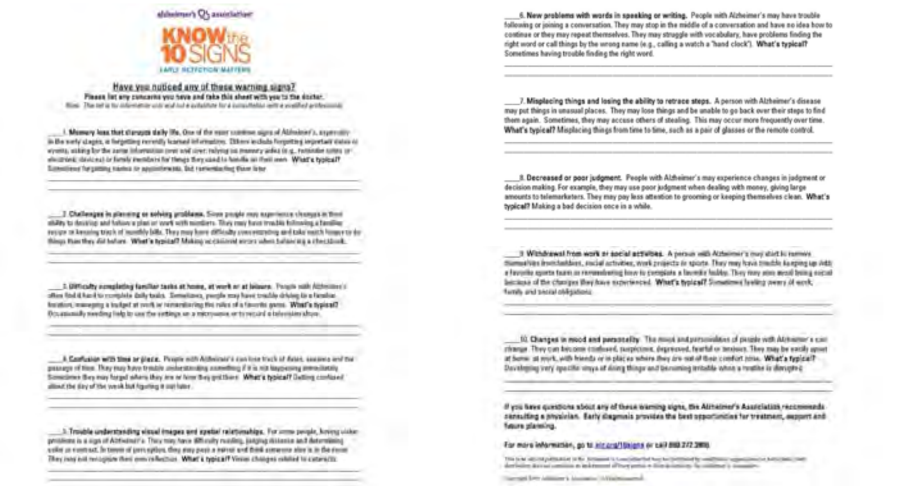
[See list of actions permitted to be taken by the Executor and Successor Attorney in cited article]

In performing the foregoing, my Executor is to preserve client confidences and secrets and the attorney client privilege and to make disclosure only to the extent necessary for such purposes.

My Executor shall be indemnified against claims of loss or damage arising out of any omission where such acts or omissions were in good faith and reasonably believed to be in the best interest of my estate and were not the result of gross negligence or willful misconduct, or, if my Executor is an attorney licensed to practice in Texas, such acts or omissions did not relate to my Executor's representation of clients as an attorney retained by those clients. Any such indemnity shall be satisfied first from assets of my law practice, including my malpractice insurance coverage.

(James E. Brill, Dealing With the Death of a Solo Practitioner, 24th Annual Advanced Estate Planning and Probate Course, Chap. 8).

Capacity Determinations: 10 Signs of Dementia – Alzheimer's Association


KNOW the 10 SIGNS

Have you noticed any of these warning signs?
Please list any concerns you have and take this sheet with you to the doctor.

____1. **Memory loss that disrupts daily life.**

____2. **Challenges in planning or solving problems.** Some people may experience changes in their ability to develop and follow a plan or work with numbers. They may have trouble following a familiar recipe or keeping track of monthly bills. They may have difficulty concentrating and take much longer to do things than they did before. **What's typical?** Making occasional errors when balancing a checkbook.

____3. **Difficulty completing familiar tasks at home, at work or at leisure.**

____4. **Confusion with time or place.**

____5. **Trouble understanding visual images and spatial relationships.**

____6. **New problems with words in speaking or writing.** People with Alzheimer's may have trouble following or joining a conversation. They may stop in the middle of a conversation and have no idea how to continue or they may repeat themselves. They may struggle with vocabulary, have problems finding the right word or call things by the wrong name (e.g., calling a watch a "hand clock"). **What's typical?** Sometimes having trouble finding the right word.

____7. **Misplacing things and losing the ability to retrace steps.** A person with Alzheimer's disease may put things in unusual places. They may lose things and be unable to go back over their steps to find them again. Sometimes, they may accuse others of stealing. This may occur more frequently over time. **What's typical?** Misplacing things from time to time, such as a pair of glasses or the remote control.

____8. **Decreased or poor judgment.** People with Alzheimer's may experience changes in judgment or decision making. For example, they may use poor judgment when dealing with money, giving large amounts to telemarketers. They may pay less attention to grooming or keeping themselves clean. **What's typical?** Making a bad decision once in a while.

____9. **Withdrawal from work or social activities.**

____10. **Changes in mood and personality.**

If you have questions about any of these warning signs, the Alzheimer's Association recommends consulting a physician. Early diagnosis provides the best opportunities for treatment, support and future planning.

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