APPENDICES
ETHICS OF LAW FIRM SUCCESSION PLANNING MADE EASY

State Bar of Texas
Estate Planning and Probate Drafting Course
Houston – October 24, 2019

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APPENDIX NO.

FILE MANAGEMENT

1. Engagement and Termination Letter Provisions for File Retention and Destruction (Samples)
2. Draft of Practice Tips on File Retention and Destruction – Texas Disciplinary Rules of Professional Conduct Committee 2017
3. Texas Ethics Opinion 627
4. Texas Lawyers Insurance Exchange (TLIE) Blog on File Management – When (and How) Can You Destroy Client Files, Jett Hanna

CESSATION OF PRACTICE

5. Designation of Custodian Form (Draft)
6. Engagement Letter Provisions for Appointment of Custodian (Draft)
7. Notice Letter to Clients upon Cessation of Practice (Draft)
8. Custodian Agreement (Draft, Derived from Oregon Sample Form)
9. Closing a Law Office Custodian Guide, Law Practice Management Program Website
10. Petition for Assumption of Practice under Disciplinary Rules of Procedure (DRP) Part XIII
11. Show Cause Order, DRP Part XIII
12. Waiver by Respondent, DRP Part XIII
13. Order Appointing Custodian, DRP Part XIII
14. Report of Custodian and Request to Dissolve Custodianship, DRP Part XIII
15. Order to Dissolve Custodianship, Release Custodian and for Destruction of Files, DRP Part XIII
16. Estates Code Chapter 456, Disbursement and Closing of Lawyer Trust or Escrow Accounts
17. Texas Disciplinary Rules of Procedure, Part XIII

SALE OF A LAW PRACTICE

18. ABA Model Rule 1.17, Sale of Law Practice (with Comments)
19. Notice to Clients of Intent to Close or Sell and Request for Consent (Sample – Arizona); and Engagement Letter for Client Consent (Brill)
20. Draft of Practice Tips on Sale of a Law Practice - Texas Disciplinary Rules of Professional Conduct Committee 2017
21. Will Provisions for Transition of Law Firm (Samples from (1) Jimmy Brill, Dealing With the Death of a Solo Practitioner, Appendix F, Nuts & Bolts of Estate Planning Probate Course, 2009; and (2) Arizona Form)

Appendix 1.1

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)

Appendix 1.2

SAMPLE FILE MANAGEMENT PROVISION OF ENGAGEMENT LETTER

Lawyer shall return all documents provided by Client as well as all original documents generated in connection with the representation. Lawyer may retain copies of all such documents as well as all other materials.

Lawyer may destroy any of Client's files at any time with Client's written consent and in any event, after five years from the conclusion of the representation. During that five year period, Lawyer shall make such files available to Client for copying. No further notice to client will be required prior to such destruction.

(James Brill, Dealing With the Death Of A Solo Practitioner, Nuts and Bolts of Estate Planning and Probate Course, 2009, Page 8)

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)

Appendix 2

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
Prof. Fred C. Moss, Dallas, Texas
Lillian B. Hardwick, Austin, Texas
(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.
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> 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 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.
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> (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.
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> (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

TEXAS LAWYERS INSURANCE EXCHANGE (TLIE) BLOG – ARTICLE

WHEN (AND HOW) CAN YOU DESTROY CLIENT FILES?

Firm Management

2013 Texas Ethics Opinion 627 indicates that lawyers can eventually dispose of client files, but provides no indication of what period of time constitutes a proper "passage of time." The opinion is based on assumed facts that a law firm uses a 5 year retention period. Two recent opinions in other states do suggest a minimum time to keep files.

A Tennessee opinion released in December suggests a minimum of 5 years. A Kansas opinion released in September suggests a minimum of 10 years.

Don't like those time frames? New Jersey suggested 7 years in a 2002 opinion unless the client had consented to a shorter time frame. Many firms have adopted a 7 year time frame, as this coincides with limitations on certain tax claims that IRS could pursue.

Texas Requirements

The length of time a lawyer uses to retain files might not be as important as having other components of a file retention policy. Texas Opinion 627 provides the following as the primary principles for ethical file destruction:

1. Protection of confidential information.
2. Turning over the file to the client if requested.
3. Taking reasonable steps to avoid destruction of items that might harm client material interests.

Destruction of files should be done in a manner to assure that client confidences, and confidence of non-clients protected by law, will not be violated. Failure to do so risks not only ethical sanctions, but also statutory penalties.

Many lawyers consider file notes to be their property, but Texas and most other states have taken a whole file approach that includes attorney note to what must be turned over to a client on request. Keep this in mind when deciding what notes to generate and keep in firm files.

Files may contain items such as original documents that are still valuable to a client, even if details regarding representation are no longer necessary. The Texas opinion requires some

review of files to find items such as notes and original documents that could have continuing value to clients.

Rule 15.10 of the Texas Rules of Disciplinary Procedure requires that trust account records must be retained for 5 years, and Texas Rule of Civil Procedure 76a considers certain settlement agreements and discovery materials to be court records that must not be destroyed.

Other considerations

The Texas opinion states that other law may address issues that are not within the realm of ethical concerns. These issues may include the length of time that files should be stored, whether lawyers must give notice to clients of their file retention policies, and whether files may be converted to electronic media or copied.

A systematic file retention and destruction policy is superior to either no policy or random destruction of files in the event of a claim. If files are destroyed only as a lawyer runs out of room or when there is time to do so, failure to have a file could be viewed as spoliation of evidence in some circumstances. Also keep in mind that electronic documents should be addressed in any policy.

The Kansas opinion alludes to another an interest law firms have in file retention. Firms should take into account possible statutes of limitation. In general, lawyers are better off having the file if sued for malpractice. Occasionally the file proves malpractice, but more frequently it helps explain exactly what action the lawyer took and why.

In Texas, the statute of limitations for legal malpractice is a two year discovery rule, but breach of fiduciary duty is a four year rule. Discovery rules mean that the limitation period is counted from the time that a client knew or should have known that the legal services provided were improper, rather than from the time when the lawyer made a mistake. Other tolling issues can arise, such as minority of a client, or tolling while appeals are in progress. There is no statute of repose, a maximum time for bringing a claim when tolling applies. In one case, a Texas court did not apply limitations to a claim brought almost 20 years after provision of legal services.

Ideally, lawyers can evaluate files at the time they close for reasons that a default retention period should not apply. With some types of practice, a firm may want to choose a longer default time for some kinds of representation, and shorter for others. For example, matters in which a judgment was obtained in favor of the client, but not collected, might warrant keeping the file longer in the event that the client wishes to renew the judgment or pursue new collection efforts. Some types of transactions could take a long time for problems to manifest, such as patent and estate planning matters.

All of the opinions indicate that the lawyer and client can agree about file retention and destruction. We suggest that you consider including minimum retention time in your engagement and end of representation documentation that meets your needs to retain the file. Valuable documents can be returned to the client for safekeeping at the conclusion of representation to help with ultimate disposition of the file. Also, lawyers may want to consider destroying documents that are retained in public records or easily obtainable from other sources to reduce storage space. If you are beginning a file retention and destruction policy after accumulating documents, you may need to contact clients regarding your intention to destroy files and offer them an opportunity to retrieve the files.

File retention and destruction is not a glamorous aspect of law practice, but one which deserves attention from all lawyers. Creating a policy and following it is both ethical and practical, as indefinite long term storage and maintenance of records is expensive.

BY JETT HANNA
JANUARY 18, 2016

Appendix 5

DESIGNATION OF CUSTODIAN ATTORNEY

Part XIII of the Texas Rules of Disciplinary Procedure provides:

> *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.*

In the interest of client protection, all members of the State Bar of Texas are encouraged to designate a custodian attorney. Decide ahead of time who your Custodian Attorney will be and the Bar will keep it on file.

By completing and filing this form, you are not designating an attorney to take over your practice and represent your clients. Instead, you are designating an attorney to be a custodian who can contact your clients, encourage them to obtain legal counsel, and see that their files and property are returned.

COMPLETE THE FOLLOWING FORM, PRINT IT OUT AND SEND IT TO THE BAR'S MEMBERSHIP DEPARTMENT BY EMAIL AT memmail@texasbar.com OR BY FAX AT (512) 427-4424.

NOTICE OF DESIGNATION OF CUSTODIAN ATTORNEY

Pursuant to Texas Rules of Disciplinary Procedure Part XIII, I, _____, Bar Card Number _____, ("Designating Attorney") have authorized the following attorneys as "Custodian Attorney" and "Alternate Custodian Attorney" to protect the interests of my clients in the event of my death, disability, or other circumstance that renders me unable to handle the legal matters of my clients.

Name of Custodian Attorney: _____
Bar Card Number: _____
Address: _____
_____
_____

Phone Number: _____

Alternate Custodian Attorney Name: _____
Bar Card Number: _____
Address: _____
_____
_____

Phone Number: _____

_____ _____
Designating Attorney Date

_____ _____
Custodian Attorney Date

_____ _____
Alternate Custodian Attorney Date

Appendix 6.1

DRAFT 05-24-2019

Sample Engagement Letter / Fee Agreement paragraph re custodian attorney and consent

For new clients:

"In order to protect your interests in the event that I am unable to continue the practice of law for any reason, such as death or disability, it may be necessary for a staff member, personal representative, or another lawyer I may appoint as custodian attorney to contact you, have access to your files, return your files and property, and assist with the closure of my law practice.

By signing this letter, you consent to allow my staff member, personal representative, or custodian attorney to access and view your files for the purpose of contacting you and returning your property and files to you."

For existing clients:

"In order to protect your interests in the event that I am unable to continue the practice of law for any reason, such as death or disability, it may be necessary for a staff member, personal representative, or another lawyer I may appoint as custodian attorney to contact you, have access to your files, return your files and property, and assist with the closure of my law practice.

By signing this letter, you consent to allow my staff member, personal representative, or custodian attorney to access and view your files for the purpose of contacting you and returning your property and files to you.

Please indicate your consent by signing below and returning a copy of this letter to me by <date>."

Appendix 6.2

Appointment of Custodian for Files for engagement letter:

Client understands that in order to protect Client's interests in the event of the unexpected death, disability, impairment, or incapacity of Lawyer, it may be necessary or appropriate for a staff member, a personal representative (including someone acting under a power of attorney) who is or retains another lawyer or another lawyer selected by Lawyer to act as custodian of Client's files with 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. Presently the lawyer selected as custodian by Lawyer is: _____, subject to later selection of another custodian in Lawyer's discretion. Client grants permission and waives all confidentiality or privileges to the extent necessary or appropriate for such purposes with respect to any such custodian.

[Optional additional clause for fees: Furthermore, in the event of Lawyer's unexpected death, disability, impairment, or incapacity, 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.]

NOTE: These samples require some defined terms, such as "Client", "Lawyer", "Firm" and perhaps others.

Appendix 7.1

CUSTODIAN ATTORNEY, as Custodian of
The Legal Files and Records of DECEASED ATTORNEY

P.O. Box 1234
ANY TOWN, Texas 77777
Telephone (999) 999-9999
Telecopier (999) 888-8888

Date

Client Name _____
Client Address _____
City/State _____
_____

CM\RRR No. _____

Re: NAME OF DECEASED ATTORNEY, and your following files (the "Files"):

{a} File No. _____ regarding _____

{b} File No. _____ regarding _____

{c} File No. _____ regarding _____

NOTICE OF DEATH AND CESSATION OF LAW PRACTICE

Dear _____;

As you probably know already, DECEASED ATTORNEY died on _____, 2019. Your attorney-client relationship with DECEASED ATTORNEY ended at this death.

I have been designated as the Custodian Attorney to take such actions as may be necessary to close DECEASED ATTORNEY'S law practice. A copy of the document naming me as the Custodian Attorney is attached to this letter.

Under the rules which govern me, I AM NOT YOUR ATTORNEY, I DO NOT REPRESENT YOU AS YOUR ATTORNEY, AND I CANNOT BE YOUR ATTORNEY. **YOU ARE STRONLY URGED TO IMMEDIATELY OBTAIN OTHER LEGAL COUNSEL TO REPRESENT YOU AND PROTECT YOUR LEGAL INTERESTS AND RIGHTS.**

To the best of my present knowledge, all of the matters which DECEASED ATTORNEY has handled for you in the past or was handling for you at the time of his/her death are listed above. The Files are presently stored at the following location (but you are advised I may elect to relocate the files at any time):_____.

You have the right to have possession of your Files (or any portion thereof) if you want. In that regard:

[a] If you want to make arrangements to pick up your files, you should contact me at the phone number set out in the letterhead of this letter **within 30 days of the date of this letter.**

[b] If you do not want your files delivered to you, please sign the enclosed form for *"Request for Destruction of Files"* and deliver or mail it to me NOT LATER THAN 30 DAYS AFTER THE DATE OF THIS LETTER. Upon receipt of your signed Request for Destruction of Files form, I will make arrangements for the destruction of your files.

PLEASE NOTE that if you fail to respond to me within 30 days of the date of this letter, I will have no choice but to seek a Court Order to determine what happens to your files.

PLEASE GIVE THIS MATTER YOUR PROMPT ATTENTION.

If you have any questions regarding this Notice, please contact me and I will be happy to respond to your questions.

Very truly yours,

ESTATE OF DECEASED ATTORNEY, Deceased

_____

CUSTODIAN ATTORNEY, as Custodian of The Legal Files and Records of DECEASED ATTORNEY

Appendix 7.2

CUSTODIAN ATTORNEY, as Custodian of
The Legal Files and Records of DECEASED ATTORNEY
P.O. Box 1234
ANY TOWN, Texas 77777
Telephone (999) 999-9999
Telecopier (999) 888-8888

****

RECEIPT FOR FILE RETURNED TO CLIENT & CONSENT TO DESTRUCTION OF OTHER FILES

Date: _____

Client Name _____ ("Client")

Client Address _____

City/State _____

_____

Phone: _____ _____

MATTERS/FILES RETURNED TO CLIENT (the "Files"):

1. **File No. _____ regarding _____**
2. **File No. _____ regarding _____**
3. **File No. _____ regarding _____**
4. **File No. _____ regarding _____**
5. **Copy of this Receipt**
6. **Notice of Cessation of Practice**

I, the undersigned Client, hereby acknowledge receipt of the above described Files which were fully returned to me by the Custodian on the Date set out above. My correct contact information is set out above.

Since Mr. DECEASED ATTORNEY has passed away, **I understand that I MUST IMMEDIATELY OBTAIN other legal counsel of my choice to represent me and to complete my legal work.**

Client Initials:_____

I further acknowledge that my above listed files are the only files I am requesting to be returned to me from the Estate of DECEASED ATTORNEY, deceased.

I hereby GIVE MY PERMISSION to the Custodian and the Personal Representative of Deceased Attorney's Estate **TO DESTROY ANY AND ALL FILES AND MATERIALS PERTAINING TO ME which may be or have been in the offices of DECEASED ATTORNEY**. **I understand that (except for the above listed files) any and all other files and materials pertaining to or related to me (Client") will be destroyed on or after _____, 20_____; and I consent to such destruction.**

_____
Client

Date Signed: _____

OTHER NOTES/THOUGHTS:

1. Client consent to Delivery of Files directly to new lawyer.

2. Return to Client of any unearned IOLTA/Client Trust funds (and acknowledgment of receipt thereof).

3. Acknowledgment by Client that all IOLTA/Client Trust funds have been earned, and no partial or total refund is due to Client.

4. Involvement of Estate Executor/Guardian

Appendix 7.3

NOTICE TO ALL FORMER CLIENTS OF DECEASED ATTORNEY, DECEASED

DECEASED ATTORNEY died on _____, 20__, at which time all attorney-client relationships with DECEASED ATTORNEY ended. **If you were a client of DECEASED ATTORNEY, YOU SHOULD IMMEDIATELY OBTAIN OTHER LEGAL COUNSEL TO REPRESENT YOU AND PROTECT YOUR LEGAL INTERESTS AND RIGHTS.**

You are further hereby notified that the files of DECEASED ATTORNEY are presently stored in the possession of the following Custodian Attorney:

CUSTODIAN ATTORNEY, as Custodian of
The Legal Files and Records of DECEASED ATTORNEY

P.O. Box 1234
ANY TOWN, Texas 77777
Telephone (999) 999-9999
Telecopier (999) 888-8888
Email: _____

Inquiries regarding the legal files of DECEASED ATTORNEY should be directed to Custodian Attorney at the address and phone number set out above.

PLEASE NOTE that if you fail to contact the Custodian Attorney regarding your files, the Custodian Attorney will likely seek a Court Order to determine what happens to your files (including whether or not your files should be destroyed).

ESTATE OF DECEASED ATTORNEY, deceased

By:_____
AAA BBB, as the Independent Executor
of said estate

PUBLISHER'S AFFIDAVIT

I solemnly swear that the above notice was published once in the NEWSPAPER NAME, a newspaper printed in _____ County, Texas, and of general circulation in said county, by publication of said notice; and the date that the issue of said newspaper bore in which said Notice was published on the following days:

_____, 2019 _____, 2019.

_____, 2019 & _____, 2019

A copy of the notice as published, clipped from the newspaper, is attached hereto.

_____
PUBLISHER NAME, Publisher

SWORN TO AND SUBSCRIBED BEFORE ME, by the said PUBLISHER NAME on this ____ day of _____, 2019, to certify which witness my hand and seal of office.

_____

Notary Public within and for
The State of Texas

[SEAL]

My commission expires:_____

****

OTHER THOUGHTS FOR DISCUSSION:

1. Name and Contact info for Estate Executor/Guardian
1. Name and Contact info for Attorney for the Estate Executor/Guardian
3. Info on IOLTA account refunds/disposition/etc.
4.

Appendix 8

CUSTODIAN ATTORNEY AGREEMENT

This Consent to Close Office (hereinafter "this Consent") is entered into between _____, hereinafter referred to as "Planning Attorney," and _____, hereinafter referred to as "Custodian Attorney," and _____, hereinafter referred to as "Alternate Custodian Attorney."

References to "Custodian Attorney" shall include Custodian Attorney and Alternate Custodian Attorney.

1. I, (*insert name of Planning Attorney*), authorize Custodian Attorney, and any attorney or agent acting on my behalf, to take all actions necessary to close my law practice upon my death or such disability, impairment, or incapacity as to render me mentally or physically unable to provide representation of my clients. These actions include, but are not limited to:

- Entering my office and using my equipment and supplies, as needed, to close my practice;
- Opening and processing my mail;
- Taking possession and control of all property comprising my law office, including client files and records;
- Examining client files and records of my law practice and obtaining information about any pending matters that may require attention;
- Notifying clients, potential clients, and others who appear to be clients that I have given this authorization and that it is in their best interest to obtain other legal counsel;
- Copying my files;
- Obtaining client consent to transfer files and client property to new attorneys;
- Transferring client files and property to clients or their new attorneys;
- Obtaining client consent to obtain extensions of time and contacting opposing counsel and courts/administrative agencies to obtain extensions of time;
- Applying for extensions of time pending employment of other counsel by my clients;
- Filing notices, motions, and pleadings on behalf of my clients when their interests must be immediately protected and other legal counsel has not yet been retained;
- Contacting all appropriate persons and entities who may be affected and informing them that I have given this authorization;
- Winding down the business affairs of my practice;
- Informing the State Bar of Texas Chief Disciplinary Counsel's Office where closed files will be stored and the name, address, and phone number of the contact person for retrieving the files; and
- Contacting the Planning Attorney's professional liability insurance carrier concerning claims and potential claims.

2. Custodian Attorney shall not serve as my attorney or the attorney of my clients. Custodian Attorney's duties and responsibilities are limited to the services provided under this agreement. It is understood and agreed that Custodian Attorney may have an ethical duty under the Texas Disciplinary Rules of Professional Conduct to notify my clients if Custodian Attorney finds evidence of malpractice or violation of the Texas Disciplinary Rules of Professional Conduct.

3. For the purpose of this Consent, Custodian Attorney may rely upon credible third-party evidence to determine my death, incapacity, or disability, including, but not limited to, communications with my family members or representative or a written opinion of one or more medical doctors duly licensed to practice medicine. Upon such evidence, the Custodian Attorney is relieved from any responsibility or liability for acting in good faith in carrying out any and all of the provisions of this Consent.

4. Custodian Attorney agrees to preserve client confidences and secrets and the attorney client privilege of my clients and to make disclosure only to the extent reasonably necessary to carry out the purpose of this Consent. Custodian Attorney are appointed as my agents for purposes of preserving my clients' confidences and secrets, the attorney client privilege, and the work product privilege. This authorization does not waive any attorney client privilege.

5. I agree to indemnify Custodian Attorney against any claims, loss, or damage arising out of any act or omission by Custodian Attorney under this Consent, provided the actions or omissions of Custodian Attorney were in good faith and in a manner reasonably believed to be in my best interest. Custodian Attorney shall be responsible for all acts and omissions of gross negligence and willful misconduct.

6. In carrying out the provisions of this Consent, Custodian Attorney may, in his or her discretion, commence a proceeding under Texas Rules of Disciplinary Procedure Part XIII.

7. My authorization and consent to allow Custodian Attorney to perform these and other services necessary for the closure of my law office do not require Custodian Attorney to perform these services. If at any time Custodian Attorney revokes this acceptance or is unable to assume his or her duties and obligations of this agreement, the Alternate Custodian Attorney shall act as primary Custodian Attorney. If, prior to my death, incapacity, or disability, my Alternate Custodian Attorney revokes this acceptance, Alternate Custodian Attorney shall promptly notify me. If, following my death or declaration of incapacity or disability, both Custodian Attorney and Alternate Custodian Attorney revoke this acceptance or are unable to assume duties and obligations under this agreement, my family, estate, or guardian should notify the Office of Chief Disciplinary Counsel.

_____ _____

Planning Attorney Date

_____ _____

Custodian Attorney Date

_____ _____

Alternate Custodian Attorney Date

Appendix 9

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.

Appendix 10

CAUSE NO. _____

IN THE MATTER OF	§	**IN THE DISTRICT COURT OF**
	§	
THE LAW PRACTICE OF	§	**_____ COUNTY, TEXAS**
	§	
_____	§	**_____ JUDICIAL DISTRICT**

PETITION FOR ASSUMPTION OF JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

_____, Petitioner, applies to the Court for assumption of jurisdiction over the law practice and client files of _____, Respondent, located in his [home **OR** office] at _____, and in storage unit number _____ located at [name of storage facility], [address for storage facility], pursuant to Part XIII, Sections 13.01, 13.02, and 13.03 of the Texas Rules of Disciplinary Procedure and in support of its petition would show the Court as follows:

I.

Respondent, Texas Bar No. _____, was an attorney licensed to practice law in the State of Texas. Respondent most recently maintained an office for the practice of law in _____ County, Texas, and he most recently leased a storage unit in _____ County, Texas. It is necessary for the court to assume jurisdiction over Respondent's client files and appoint a custodian over Respondent's law office files located in his [home **OR** office] and within the storage unit.

II.

The Assumption of Jurisdiction and appointment of custodian pursuant to Part XIII, Sections 13.01, 13.02 and 13.03 of the Texas Rules of Disciplinary Procedure is warranted because Respondent [is deceased **OR** has become physically, mentally or emotionally disabled and cannot provide legal services necessary to protect the interests of clients]. Respondent has active client matters for which no other attorney licensed by the State Bar of Texas has agreed, with the consent of the clients, to assume responsibility.

III.

The following facts show cause to believe that the assumption of jurisdiction of Respondent's files is required:

A) [Respondent passed away on _____ **OR** Respondent has become physically, mentally or emotionally disabled and cannot provide legal services necessary to protect the interests of clients.]

B) Court supervision is necessary because Respondent 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) Cause exists to believe that the interests of one or more clients of Respondent or one or more interested persons or entities will be prejudiced if these proceedings are not maintained.

IV.

_____, Respondent's [attorney-in-fact, former law partner, spouse, etc.], has custody and control over Respondent's files which are located at _____. Service of process may be had upon [attorney-in-fact] at [attorney-in-fact's address].

V.

[Proposed custodian], Texas Bar No. _____, [proposed custodian's address], has agreed to serve as custodian and review the files of Respondent and to take the necessary actions to preserve the interests of those clients.

WHEREFORE, PREMISES CONSIDERED, Petitioner requests that, pursuant to Sections 13.01, 13.02 and 13.03 of the Texas Rules of Disciplinary Procedure, the Court order Respondent's [attorney-in-fact, former law partner, spouse, etc.] to show cause why the Court should not assume jurisdiction over client files of _____. Petitioner further requests that the Court, upon the hearing of this petition, enter an order assuming jurisdiction over Respondent's client files and appointing [proposed custodian] to act under the Court's direction in preserving the interests of Respondent's clients. Petitioner further prays for such other relief as may be necessary or to which it may be entitled.

Respectfully submitted,

_____
[Petitioner's Name]
[State Bar Card No.]
[Address]
[Telephone Number]
[Fax number]

ATTORNEY FOR PETITIONER

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF _____ §

Before me, the undersigned notary, on this day, personally appeared _____, who being by me duly sworn on his oath deposed and said that he is the attorney of record for Petitioner, _____, that he has read the above and foregoing and that, based on the information provided to and available to the undersigned attorney, every statement contained therein is true and correct.

_____
Attorney of Record

SUBSCRIBED AND SWORN TO on this _____day of _____, 20___, by witness my hand and official seal.

_____
Notary Public in and for the State of Texas

Appendix 11

CAUSE NO. _____

IN THE MATTER OF	§	**IN THE DISTRICT COURT OF**
	§	
THE LAW PRACTICE OF	§	**_____ COUNTY, TEXAS**
	§	
_____	§	**_____ JUDICIAL DISTRICT**

ORDER TO SHOW CAUSE

On this day, the Court considered the foregoing Petition for Assumption of Jurisdiction filed by Petitioner, _____.

IT IS THEREFORE ORDERED that [person in possession of files] appear before the court at _____ __.m. on the _____ day of _____, 20___, to show cause why the Court should not assume jurisdiction of the law practice of _____.

IT IF FURTHER ORDERED that the Clerk of the Court issue a general notice pursuant to T.R.C.P. 21a to be personally served on _____ together with a copy of the foregoing petition and this order by any sheriff and requiring _____ to appear in the courtroom of the _____ District Court of _____ County, at the courthouse in _____, _____ County, Texas, at _____ __.m. on the _____ day of _____, 20___, then and there to show why the Court should not assume jurisdiction of the client files of _____.

SIGNED this the _____ day of _____, 20___.

_____
JUDGE PRESIDING

Appendix 12

CAUSE NO. _____

IN THE MATTER OF	§	**IN THE DISTRICT COURT OF**
	§	
THE LAW PRACTICE OF	§	**_____ COUNTY, TEXAS**
	§	
_____	§	**_____ JUDICIAL DISTRICT**

WAIVER

STATE OF TEXAS	§
	§
COUNTY OF _____	§

BEFORE ME, the undersigned notary, on this day, personally appeared _____, known to me to be the person whose name is subscribed hereto, and, after being duly sworn, deposes and says the following:

"My name is _____, and I am named as the person having custody and control of the client files of _____, located at _____, in the above-entitled and numbered cause. I have received a copy of the Petition for Assumption of Jurisdiction represented as having been filed in said cause, the receipt of which is hereby expressly acknowledged. I hereby enter appearance in said cause, waiving the issuance, service, and return of citation and agreeing that said cause may be heard and determined by the Court without further notice. I further disclaim any ownership of possessory interest in the client files and records of _____, located at _____."

_____
[Temporary custodian]

SUBSCRIBED AND SWORN TO on this _____ day of _____, 20___, by witness my hand and official seal.

_____
Notary Public in and for the State of Texas

Appendix 13

CAUSE NO. _____

IN THE MATTER OF	§	**IN THE DISTRICT COURT OF**
	§	
THE LAW PRACTICE OF	§	**_____ COUNTY, TEXAS**
	§	
_____	§	**_____ JUDICIAL DISTRICT**

ORDER FOR ASSUMPTION OF JURISIDICTION OVER THE LAW PRACTICE OF [DEACEASED/INCAPICTATED ATTOREY]

On the _____ day of _____, 20___, the Court heard the Petition for Assumption of Jurisdiction filed by the Petitioner, _____, pursuant to the Part XIII, Sections 13.01, 13.02, and 13.03 of the Texas Rules of Disciplinary Procedure. Petitioner appeared by counsel. After examining the Petition, the court is of the opinion that the Petitioner's request that this Court assume jurisdiction over the law practice and client files of _____ should be granted.

Based upon the evidence, the Court makes the following findings of fact:

1) _____, [was **OR** is] was an attorney licensed to practice law in the State of Texas.

2) _____ [previously maintained **OR** maintains] an office for the practice of law at [address].

3) Cause exists to believe that Court Supervision is necessary because _____ [passed away on _____ **OR** has become physically, mentally or emotionally disabled] and 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.

4) There is cause to believe that the interests of one or more clients of _____ or one or more interested persons or entities will be prejudiced if these proceedings are not maintained.

5) _____ presently has custody and control of _____'s client files and records.

Based on the findings of fact, the Court makes the following conclusions of law:

1) Supervision of the Court over the law practice of _____ is warranted and necessary.

2) The Court should enter an order assuming jurisdiction over _____'s client matters and appointing _____, Bar Card No. _____, to act under its direction as custodian of the client files and records of _____.

IT IS, THEREFORE, ORDERED that the Court shall henceforth assume jurisdiction over the law practice and client matters of _____.

IT IS FURTHER ORDERED that _____, Bar Card No. _____, be appointed custodian of the client files and records of _____.

IT IS FURTHER ORDERED that the Custodian _____, shall, in the exercise of her responsibility hereunder, do one or more of the following:

1) Examine the client matters, including files and records of _____'s practice, and obtain information as to any matters which may require attention.

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

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

4) 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 legal rights;

5) Give appropriate notice to persons or entities that may be affected other than the client by this proceeding.

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

7) Destroy all files and client information not claimed or retrieved by clients within one (1) year of the date of this Order.

8) Do such other acts as the Court may direct or as the custodian deems appropriate.

IT IS FURTHER ORDERED that the Custodian shall serve without bond or other security.

SIGNED this _____ day of _____, 20___.

_____
JUDGE PRESIDING

Appendix 14

CAUSE NO. _____

IN THE MATTER OF	§	**IN THE DISTRICT COURT OF**
	§	
THE LAW PRACTICE OF	§	**_____ COUNTY, TEXAS**
	§	
_____	§	**_____ JUDICIAL DISTRICT**

REPORT OF CUSTODIAN AND
MOTION FOR DISSOLUTION OF CUSTODIANSHIP

On _____, the Court signed an [Agreed Order Assuming Jurisdiction over the Law Practice of _____ **OR** Order for Assumption of Jurisdiction over the Law Practice of _____] pursuant to a petition filed by [Petitioner]. At that time, the Court appointed the undersigned, _____, as Custodian of the client files and records of _____.

In accordance with the Order of the Court, the Custodian has undertaken and accomplished the following:

1) The client matter files and records of _____ were obtained by Custodian. All files have been kept in Custodian's possession and the Custodian and her staff conducted the following exhaustive procedures on behalf of the clients involved: all of the files were reviewed, some of the files were returned to clients, and the files that were not claimed still remain in Custodian's possession.

2) Appropriate actions, as necessary, to protect the interest of any client were taken. Each file was examined to determine whether any pending actions required attention. There were no files/clients with upcoming court dates.

3) Custodian's personnel notified _____'s clients that the undersigned had been appointed Custodian of their files; advised them that unless they had obtained another lawyer, they were not currently represented; and advised them that it might be necessary for them to obtain another attorney. They were also given the information necessary to arrange to pick up their file(s). Custodian's personnel were available to answer questions.

4) In those instances where the last known address of the client was no longer valid, attempts were made to locate the client to pick up their file(s).

5) In each and every case where requested and where files were available, files have been returned to clients.

6) Those clients who made a request for a file that had not been turned over to the Custodian were advised on other remedies that could be taken.

The Custodian does not anticipate any further activity in these matters. The files will be kept in Custodian's office at _____ until [one year from date of Order for Assumption]. Therefore, any client requesting their file in the future may do so before [one year from date of Order of Assumption].

WHEREFORE, PREMISES CONSIDERED, the Custodian requests that the Court release the Custodian from any and all obligations as Custodian pursuant to the terms of the [Agreed Order Assuming Jurisdiction over the Law Practice of _____ **OR** Order for Assumption of Jurisdiction over the Law Practice of _____] entered by this Court on _____, 20___.

Respectfully submitted,

_____
[Custodian's Name]
[State Bar Card No.]
[Address]
[Telephone Number]
[Fax number]

EXHIBIT A

List of Clients to Whom Letter Requesting Pick Up of File Were Sent

Name	**Date**
[Client A]	[date letter sent]
[Client B]	[date letter sent]

EXHIBIT B

List of Files Distributed to Clients of Attorney

Name	File Number	Date Client Obtained File
[Client A]	[file no.]	[date]
[Client B]	[file no.]	[date]

EXHIBIT C

List of Client Files Stored on [Date]

Name	File Number	Where Stored
[Client A]	[file no.]	
[Client B]	[file no.]	

EXHIBIT D

List of Client Files Destroyed

Name	File Number	Date Destroyed
[Client A]	[file no.]	[date]
[Client B]	[file no.]	[date]

Appendix 15

CAUSE NO. _____

IN THE MATTER OF	§	**IN THE DISTRICT COURT OF**
	§	
THE LAW PRACTICE OF	§	**_____ COUNTY, TEXAS**
	§	
_____	§	**_____ JUDICIAL DISTRICT**

ORDER DISSOLVING CUSTODIANSHIP

On the _____ day of _____ 20___, this Court accepted and approved the Report of _____, the appointed Custodian of the client files and records of _____.

IT IS ORDERED that the Custodian, _____, is hereby released from any and all obligations as Custodian pursuant to the terms of the [Agreed Order Assuming Jurisdiction over the Law Practice of _____ **OR** Order for Assumption of Jurisdiction over the Law Practice of _____] entered by this Court on _____, 20___.

IT IS FURTHER ORDERED that all of _____'s files currently in the possession of the Custodian shall be destroyed in accordance with the terms of the [Agreed Order Assuming Jurisdiction over the Law Practice of _____ **OR** Order for Assumption of Jurisdiction over the Law Practice of _____].

All further relief not expressly granted herein is denied.

SIGNED the _____ day of _____, 20___.

_____
JUDGE PRESIDING

Appendix 16

TEXAS ESTATES CODE – CHAPTER 456
Disbursement and Closing of Lawyer Trust or Escrow Accounts

§ 456.001. Definition
In this chapter, "eligible institution" means a financial institution or investment company in which a lawyer has established an escrow or trust account for purposes of holding client funds or the funds of third persons that are in the lawyer's possession in connection with representation as required by the Texas Disciplinary Rules of Professional Conduct.

[Added by Acts 2015, 84th Leg., ch. 949 (S.B. 995), § 45, eff. Sept. 1, 2015.]

§ 456.002. Authority to Designate Lawyer on Certain Trust or Escrow Accounts
(a) When administering the estate of a deceased lawyer who established one or more trust or escrow accounts for client funds or the funds of third persons that are in the lawyer's possession in connection with representation as required by the Texas Disciplinary Rules of Professional Conduct, the personal representative may hire through written agreement a lawyer authorized to practice in this state to:

(1) be the authorized signer on the trust or escrow account;
(2) determine who is entitled to receive the funds in the account;
(3) disburse the funds to the appropriate persons or to the decedent's estate; and
(4) close the account.

(b) If the personal representative is a lawyer authorized to practice in this state, the personal representative may state that fact and disburse the trust or escrow account funds of a deceased lawyer in accordance with Subsection (a).

(c) An agreement under Subsection (a) or a statement under Subsection (b) must be made in writing, and a copy of the agreement or statement must be delivered to each eligible institution in which the trust or escrow accounts were established.

[Added by Acts 2015, 84th Leg., ch. 949 (S.B. 995), § 45, eff. Sept. 1, 2015]

§ 456.003. Duty of Eligible Institutions
Not later than the seventh business day after the date an eligible institution receives a copy of a written agreement under Section 456.002(a) or a statement from a personal representative under Section 456.002(b) and instructions from the lawyer identified in the agreement or statement, as

applicable, regarding how to disburse the funds or close a trust or escrow account, the eligible institution shall disburse the funds and close the account in compliance with the instructions.

[Added by Acts 2015, 84th Leg., ch. 949 (S.B. 995), § 45, eff. Sept. 1, 2015. Amended by Acts 2017, 85th Leg., ch. 844 (H.B. 2271), § 35, eff. Sept. 1, 2017]

§ 456.004. Liability of Eligible Institutions

An eligible institution is not liable for any act respecting an account taken in compliance with this chapter.

[Added by Acts 2015, 84th Leg., ch. 949 (S.B. 995), § 45, eff. Sept. 1, 2015]

§ 456.0045. Private Cause of Action

(a) If an eligible institution violates Section 456.003, a person aggrieved by the violation may bring an action against the eligible institution to:

(1) obtain declaratory or injunctive relief to enforce the section; and

(2) recover damages to the same extent the person would be entitled to damages had the eligible institution acted in the same manner with respect to the deceased lawyer before the lawyer's death.

(b) A person who prevails in an action under this section may recover court costs and reasonable attorney's fees.

[Added by Acts 2017, 85th Leg., ch. 844 (H.B. 2271), § 36, eff. Sept. 1, 2017]

§ 456.005. Rules

The supreme court may adopt rules regarding the administration of funds in a trust or escrow account subject to this chapter.

[Added by Acts 2015, 84th Leg., ch. 949 (S.B. 995), § 45, eff. Sept. 1, 2015]

Appendix 17

TEXAS RULES OF DISCIPLINARY PROCEDURE

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 actions 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 custodian 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.

Appendix 18

Rule 1.17: Sale of Law Practice

Client-Lawyer Relationship

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.

Comments to Model Rule 1.17

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation.

Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality

provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Appendix 19.1

Sample Engagement Letter Provisions for Appointing Custodian

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).

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

Appendix 19.2

4.7 LETTER ADVISING THAT LAWYER IS CLOSING HIS/HER OFFICE
(*Sample – Modify as appropriate*)

Re: [Name of case]

Dear [Name]:

As of [date], I will be closing my law practice due to [provide reason, if possible]. I will be unable to continue representing you on your legal matters.

I recommend that you immediately hire another attorney to handle your case for you. You can select any attorney you wish, or I would be happy to provide you with another lawyer referral service.

When you select your new attorney, please provide me with written authority to transfer your file to the new attorney. If you prefer, you may come to our office and pick up a copy of your file and deliver it to that attorney yourself.

It is imperative that you obtain a new attorney immediately. [Insert appropriate language regarding time limitations or other critical time lines that client should be aware of.] Please let me know the name of your new attorney or pick up a copy of your file by [date].

I [or insert name of the attorney who will store files] will continue to store my copy of your closed file for the applicable period indicated in the attached grid. After that time, I [or insert name of other attorney, if relevant] will destroy my copy of the file unless you notify me in writing immediately that you do not want me to follow this procedure. [If relevant, add: If you object to (insert name of attorney who will be storing files) storing my copy of your closed file, let me know immediately and I will make alternative arrangements.]

If you or your new attorney need a copy of the closed file, please feel free to contact me. I will be happy to provide you with a copy.

Within the next [fill in number] weeks, I will be providing you with a full accounting of your funds in my trust account and fees you currently owe me.

You will be able to reach me at the address and phone number listed on this letter until [date]. After that time, you or your new attorney can reach me at the following phone number and address:

Name	Address	Phone

Remember, it is imperative to retain a new attorney immediately. This will be the only way that time limitations applicable to your case will be protected and your other legal rights preserved.

I appreciate the opportunity to have provided you with legal services. Please do not hesitate to give me a call if you have any questions or concerns.

Sincerely,

[Attorney]
[Firm]

Appendix 20

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

[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).*

APPENDIX F
SPECIAL PROVISIONS FOR ATTORNEY'S WILL

INSTRUCTIONS REGARDING MY LAW PRACTICE

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:

(a) Enter my office and utilize my equipment and supplies as helpful in closing my practice.

(b) Obtain access to my safe deposit boxes and obtain possession of items belonging to clients.

(c) Take possession and control of all assets of my law practice including client files and records.

(d) Open and process my mail.

(e) Examine my calendar, files, and records to obtain information about pending matters that may require attention.

(f) Notify clients and those who appear to be clients of my death and that it is in their best interests to obtain other counsel.

(g) Obtain client consent to transfer client property and assets to other counsel.

(h) Provide clients with their property and assets and copies of material in their files and return unearned retainers and deposits.

(i) Notify courts, agencies, opposing counsel, and other appropriate entities of my death and, with client consent, seek and obtain extensions of time.

(j) File notices, motions, and pleadings on behalf of clients who cannot be contacted prior to immediately required action.

(k) Contact my malpractice carrier concerning claims or potential claims, to notify of my death, and to obtain extended reporting or "tail" coverage.

(l) Dispose of closed and inactive files by delivery to clients, storage, and arranging for destruction, remembering that records of my trust account are to be preserved for at least five years after my death as required by Texas Disciplinary Rule of Professional Conduct 1.14 and Rule 15.12 of the Texas Rules of Disciplinary Procedure or other provisions of law, and files relating to minors should be kept for five years after the minor's eighteenth birthday.

(m) Engage one or more attorneys to wind up my law practice, make arrangements to complete work on active files and to allocate compensation for past and future services.

(n) Send statements for unbilled services and expenses and assist in collecting receivables.

(o) Continue employment of staff members to assist in closing my practice and arrange for their payment.

(p) Pay current liabilities and expenses of my practice, terminate leases, and discontinue subscriptions, listings, and memberships.

(q) Determine if I was serving as registered agent for any corporations and, if so, notify the corporation of the need to designate a new registered agent (and perhaps registered address).

(r) Determine if I was a notary public and, if so, deliver the notarial record books to the county clerk of the county where I was so appointed in order to comply with Texas Government Code, Section 406.022.

(s) Rent or lease alternative space if a smaller office would serve as well as my present office.

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 wilful 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.

Appendix 21.2

4.4 WILL PROVISIONS

(Sample - Modify as appropriate)

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.

OR

My personal representative is expressly authorized and directed to take such steps as he or she deems necessary or desirable, in my personal representative's sole discretion, to protect the interests of the clients of my law practice and to wind down or dispose of that practice, including, but not limited to, selling that practice, collecting accounts receivable, paying expenses relating to the practice, providing trust accounting and issuing unused trust balances owing to my clients, employing an attorney or attorneys to review my files, completing unfinished work, notifying my clients of my death and assisting them in finding other attorneys, and returning closed files to my clients and/or providing access to my closed files.