



Succession Planning Made Easy: Navigating the Ethical Rules via Sudden Cessation or Planned Sale

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Succession Planning Made Easy

Why is this topic getting so much attention now?

- Demographics
 - Texas lawyers over age 55 in 2017/2018 = 37%
 - Texas lawyers over age 65 in 2017/2018 = 17%
 - Over 65 lawyers nearly doubled in the last 10 years (9% in 2007/2008)
- Lawyers Unable to Manage Stress and/or Practice Requirements
- Lawyers Changing Practice Areas

Succession Planning Made Easy

- Three Topics We'll Cover:
 - File Management and Destruction Policies (briefly)
 - Planning for a Sudden or Unexpected Cessation of Practice Under Rule 13.02 and Under New Rule 13.04 of the RDP
 - Planning for a Smooth Transition and Exit – Proposed Rule 1.17 on Sale of a Practice

Golden Rule

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

If so...



Golden Rules to Comply with TDRPC

1. Give client notice and get client consent to objectively fair procedures aimed at compliance.
2. Design objectively reasonable procedures aimed at compliance and implement with client's best interest at its center.



Navigating File Retention and Destruction

The Questions

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



Pertinent Duties to Former Clients

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

See Texas Ethics Opinion 627 at Appendix 3.

Ethical File Destruction: Summary

(See Appendices 2 and 4)

DO NOT destroy a closed client file if:

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

Ethical File Destruction: Summary

(See Appendices 2 and 4)

Before destroying a file, check it for “valuable” client property

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

Solutions to the Problem

(See Appendices 2 and 4)

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

Solutions to the Problem

Include file destruction provisions in the retainer agreement & termination letter. *See examples in Appendix 1.*

- Client consents to destruction on stated timeline
- Notify Client when file ready for pick up at conclusion of representation
- Fix the amount of time Client has to pick up the file
- Duty of Client to obtain physical possession of file
- Consequences of Client failure to retrieve file (subject to destruction)
- Option to pay for storage – forever ?? (whose rights after the client dies?)

Solutions to the Problem

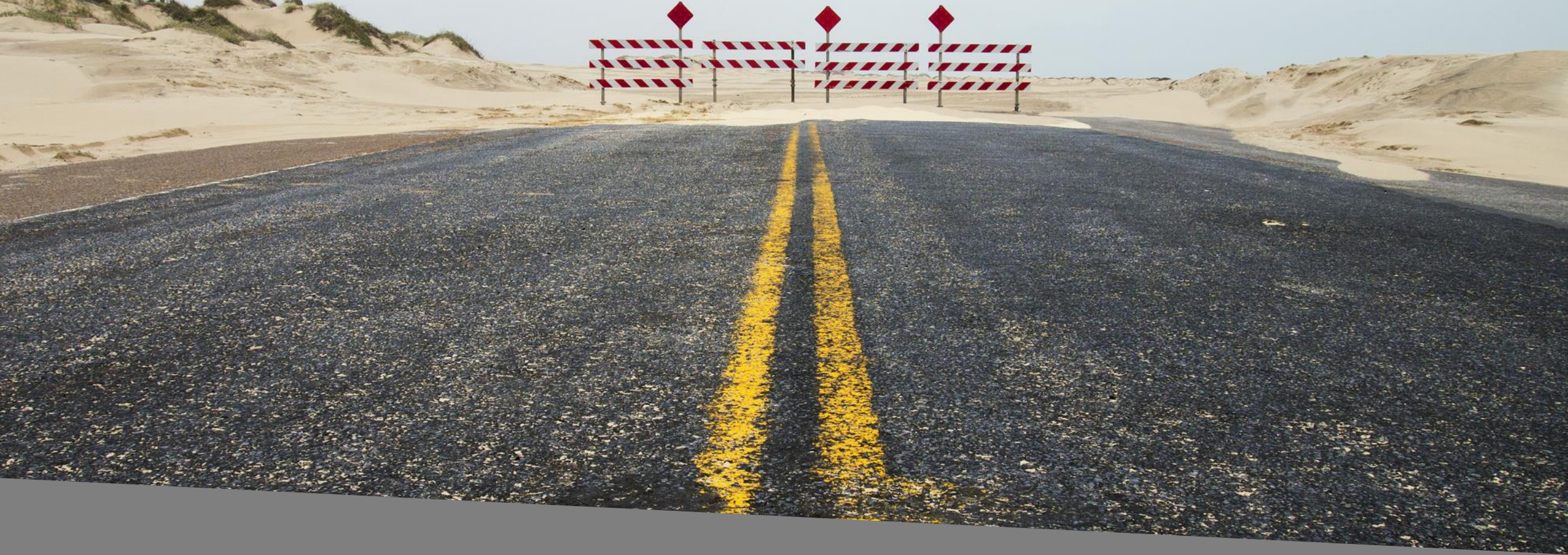
Exit Letters and “Late Notice”

- **Add file destruction notice in Client Exit/Termination Letter**
- “Cleaning House” Letter to Client months/years later
- What is effective notice to deceased client (or dissolved entity)?
- Fix the amount of time Client has to pick up the file
- Can you destroy unclaimed file absent written client consent?
Yes, in some circumstances – *See Texas Ethics Opinion 602*

See Appendix 1.

Valuable Available Resources

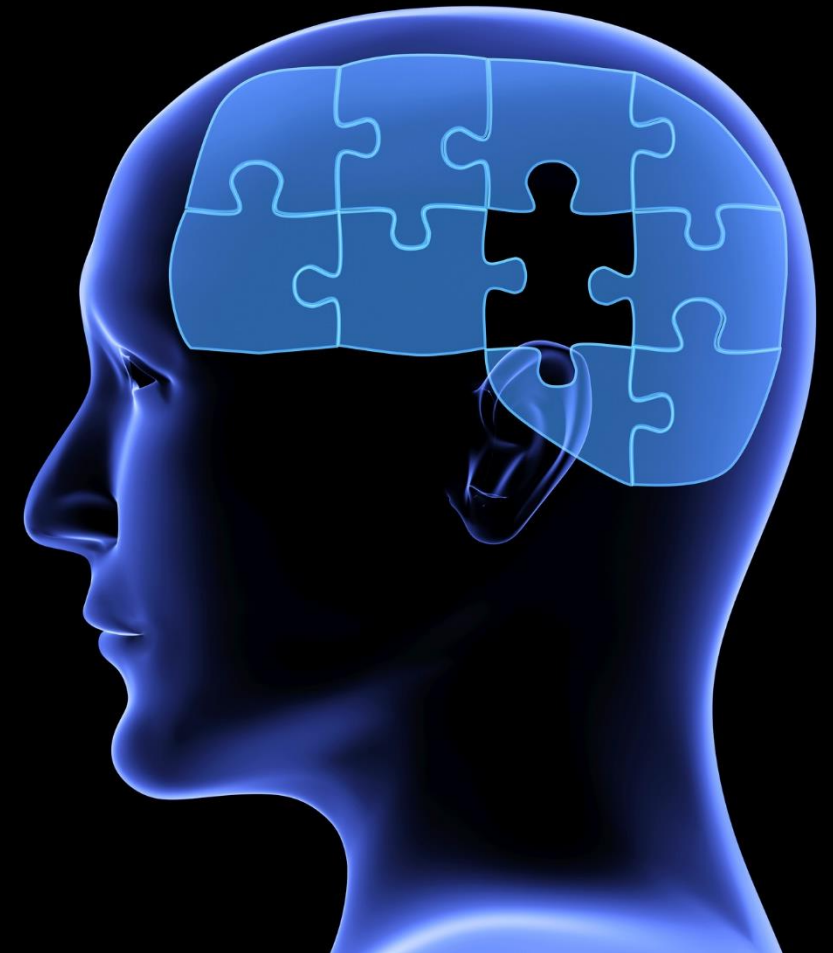
- **Law Practice Management Program**
(<https://www.texasbarpractice.com/law-practice-management/>)
- Texas Bar CLE Online Library (Search: Author – Brill, James)
- **Texas Lawyer’s Insurance Exchange (TLIE) and your own malpractice insurer**
- Texas Ethics Hotline (CDC) **800-532-3947**
- Texas Ethics Commission Opinions – Opinion 602
- Google: (Texas) Lawyer File Retention Policies



Navigating the Cessation of a Practice

Navigating the Cessation of a Practice

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



Duty to Report Lack of Fitness to Practice

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

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

Duty to Report Lack of Fitness to Practice

Alternative Reporting Option:

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

Alternative Reporting to TLAP

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Resources for Navigating the Rules



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**THE ARC OF A LAWYER'S
LAW PRACTICE**

**HOW TO PROTECT YOUR
CLIENTS AND FIRM IN THE
EVENT OF DEATH, DISABIL-
ITY, IMPAIRMENT, OR
INCAPACITY**

**CHECKLIST FOR AN ATTOR-
NEY WHO CLOSES AN-
OTHER ATTORNEY'S OFFICE**

**WHAT TO DO IF YOUR AT-
TORNEY DIES, DISAPPEARS,
BECOMES DISABLED, OR IS
SUSPENDED OR DISBARRED**

**BEST PRACTICES WHEN
SELLING A PRACTICE**

**WHAT TO DO WHEN YOUR
BOSS OR RELATIVE IS NO
LONGER ABLE TO PRAC-
TICE LAW**

**A LETTER TO TEXAS ATTOR-
NEYS CLOSING A
PRACTICE**

**SAFETY SYSTEMS - AD-
VANCE DESIGNATION OF
CUSTODIAN ATTORNEY**

**ETHICS OF LAW FIRM SUC-
CESSION PLANNING MADE
EASY**

**CREATING A DISASTER
READINESS PLAN**

Navigating the Cessation of a Practice

Procedures under Rules of Disciplinary Procedure (RDP) Part XIII:

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

Written notice required to:

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

Navigating the Cessation of a Practice

CESSATION OF PRACTICE PROCEDURE – NOTICE:

Persons who may give required notice:

- The attorney
- Personal Representative of a deceased attorney
- Employees of the attorney (extremely helpful)
- Person authorized by the attorney
- Cessation of Practice Program of the Chief Disciplinary Council's Office.

Navigating the Cessation of a Practice

Procedures under RDP Part XIII *(See Appendix 17):*

1. Petition for Assumption of Jurisdiction *(App. 10)*
2. Show Cause Order to Person in Possession *(App. 11)*
3. Hearing and Order Appointing Custodian *(App.13)*
4. Custodian gives notice, takes emergency actions with consent and transfers files.
5. Report of Custodian and request to close *(App. 14)*
6. Order dissolving custodianship and releasing Custodian with file destruction authority *(Appendix 15)*



Navigating the Cessation of a Practice

Petition for Assumption of Jurisdiction Form *(See Appendix 10)*

- File in District or Probate Court
- Identify Attorney, office and location of files and “Respondent” in custody
- Explain reason for lawyer’s inability to handle client matters (e.g. death, disability, disappearance, etc.)
- Show no other attorney to assume practice and need for assumption by court to protect clients
- Identify Custodian willing to serve
- Request Order to Show Cause to Respondent why Court should not assume jurisdiction of files
- Request Order for Court to assume jurisdiction and appoint proposed Custodian

Navigating the Cessation of a Practice

Order Appointing Custodian and Assuming Jurisdiction *(See App. 13)*

- Follows Show Cause Order and Hearing *(See Appendix 11)*
- Identifies Attorney and Office and who is in custody of files, who may waive service *(See Appendix 12)*
- Finds that attorney unable to manage client files and Custodian needed to protect clients
- Petition Granted and Custodian Appointed under Court supervision
- Lists duties and responsibilities of Custodian

Navigating the Cessation of a Practice

List of Duties and Responsibilities of Custodian

- **Examine client files** for client property and matters requiring attention
- **Notify clients** of assumption of practice and need to hire new lawyer
- **Apply for extensions** pending appointment of new lawyer
- With client consent, **file motions or pleadings necessary** to avoid prejudice to client
- **Notify others affected** by the assumption of practice (e.g. Court, opposing parties, witnesses, etc.)

Navigating the Cessation of a Practice

List of Duties and Responsibilities of Custodian (Cont'd)

- Arrange for **delivery of files and property** to clients and identify closed files needing destruction
- Upon conclusion of transition of files, **report to Court** disposition of all files/property and request order to destroy unclaimed files, dissolve custodianship and release Custodian *(See Appendix 14)*
- Need to request specific **permission to return any client funds** in IOLTA accounts

Navigating the Cessation of a Practice

Procedures under RDP Part XIII:

Order appointing one or more custodians can provide:

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



Cessation of a Practice “Made Easy”

Procedures under RDP Part XIII: Client consent is the key.

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

New RDP Rule 13.04 - Attorney-appointed Custodian can conduct a custodianship without Court supervision if clients consent. Custodian appointment available online through SBOT Website.



New Rule 13.04 of the Texas RDP

Voluntary Appointment of Custodian Attorney for Cessation of Practice

Texas Rules of Disciplinary Procedure

13.04. Voluntary Appointment of Custodian Attorney for Cessation of Practice: In lieu of the procedures set forth in Rules 13.02 and 13.03, an attorney ceasing practice or planning for the cessation of practice (“appointing attorney” for purposes of this Rule) may voluntarily designate a Texas attorney licensed and in good standing to act as custodian (“custodian attorney” for purposes of this Rule) to assist in the final resolution and closure of the attorney’s practice. The terms of the appointing documents, which shall be signed and acknowledged by the appointing attorney and custodian attorney, may include any of the following duties assumed:

- A. Examine the client matters, including files and records of the appointing 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 appointing attorney of the cessation 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.

Proposed New Rule for Referendum February 2021

Voluntary Appointment of Custodian Attorney for Cessation of Practice

Rule 13.04 (cont'd)

- 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 attorney 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 Rule. **Except for intentional misconduct or gross negligence, no person acting as custodian attorney under this Rule shall incur any liability by reason of the actions taken pursuant to this Rule.**

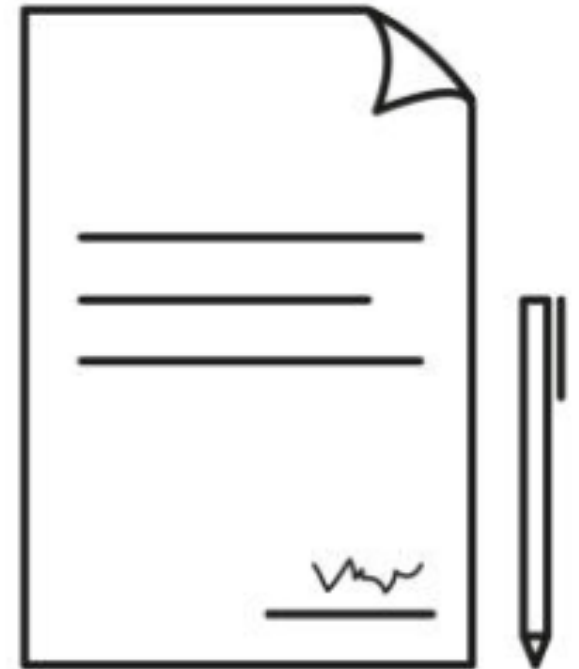
The privileges and limitations of liability contained herein shall not apply to any legal representation taken over by the custodian attorney.

Navigating the Cessation of a Practice

SBOT Work Group Developing Standardized Custodian Appointment and Succession Documents

- Designation of Custodian Attorney Form with Instructions. *See Appendix 5*
- Custodian Agreement Forms. *See Appendix 8*
- Client notice and consent letters. *See Appendix 7*
- Suggested Will Provisions. *See Appendix 21*

New RDP Rule 13.04 protects Lawyer-appointed Custodians from liability similar to Court-appointed Custodians.



Cessation of a Practice “Made Easy”

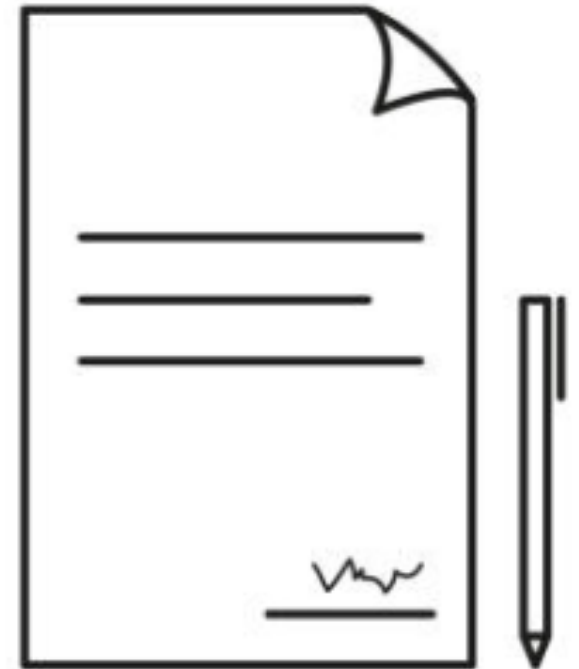
Procedures under RDP Part XIII: Client Consent Solution

Engagement and/or termination letters with clients.

See Appendix 6.

Include a clause for assumption of the practice, ***naming the custodian or succeeding attorney*** in the event of an unplanned exit from practice.

- Include specific consent of client to access to confidential file information by the custodian or successor attorney.
- Include restatement of client’s right to hire another attorney and take their file.



This will avoid court proceedings and delays while protecting client interests

Navigating the Cessation of a Practice

Designating a Custodian Online

- Voluntary Appointment via SBOT Succession Planning Webpage
https://www.texasbar.com/AM/Template.cfm?Section=Succession_Planning&Template=/Succession/vendor/Custodian.cfm
- May Appoint Custodian and Alternate Custodian
- Appointee gets SBOT email to accept or decline appointment
- Appointment kept confidential on SBOT Attorney profile
- Custodian can be appointed under 13.01 (Court Supervised) OR
- By Client Consent per 13.04 (Unsupervised complying w/ TDRPC)

Navigating the Cessation of a Practice

ELECTRONIC DESIGNATION FORM

Electronic Designation Form

Succession planning fosters order and emergency preparedness. The Texas Supreme Court regulates cessation of practice, consistent with these principles.

For emergency management and client protection, the State Bar of Texas urges members to designate in advance one or more custodian-attorneys. A custodian-attorney assists in winding down the lawyer's law practice in the event need arises under Part XIII of the Texas Rules of Disciplinary Procedure.

Use the link below to begin the process of designating a custodian-attorney.

The State Bar will retain a record of each designation. To review information on your designation please login to MyBarPage.

[DESIGNATE CUSTODIAN NOW](#)

Navigating the Cessation of a Practice


Don't know your Custodian's contact information?
Click **Search For Custodian** to find them

SEARCH FOR CUSTODIAN

Name of Custodian Attorney:



[Don't know their email?](#)

Email Address where we can send you updates: 

By making this designation, I certify that the designated custodian attorney indicates current willingness to serve as custodian attorney in the event need arises under Part XIII of the Texas Rules of Disciplinary Procedure.

NO THANKS

SUBMIT

Navigating the Cessation of a Practice

Three hands are raised in the air, symbolizing volunteerism or support. The hands are positioned on the right side of the slide, with the leftmost hand being the most blurred and the rightmost hand being the most in focus. The background is a soft, warm gradient.

“Emergency Response Teams”

LPM and SBOT are coordinating those willing to help into various District teams. Please volunteer.

See custodian’s guide in materials at Succession Planning Web Page related link for online access to checklists, and forms for client letters, pleadings, etc.

Navigating the Cessation of a Practice

Practical objectives of custodianship include:

- Access to client files;
- Notice to the lawyer's clients and others that the lawyer has ceased practice;
- Direction from the client on where the client wants the client file to go; and
- Return of client property.

Attorneys in firms with competent attorneys to transfer their files or to succeed representation of clients (when the firm is employed) need not appoint a custodian.

Navigating the Cessation of a Practice

Custodian Agreement Form (*Appendix 8*)

- Identify Custodian and alternate or successor
- Custodian authorized to infer your inability to continue practice upon reasonable evidence
- Custodian agrees to serve when called upon and to contact a successor
- Contact CDC, LPM or Malpractice Carrier as necessary
- Agrees to maintain client confidences and attorney-client privilege
- Consider special power of attorney for handling IOLTA account
- Consider indemnification for acts as Custodian

Navigating the Cessation of a Practice

Custodian Agreement Form (Cont'd)

- List authority and duties of the Custodian to close your office, including:
 - Take control of premises and files
 - Manage any remaining employees and wind down practice
 - Notify clients about custodianship, advise them to hire a replacement attorney and take file
 - Review files for emergency action to take and file necessary extensions or pleadings with client consent
 - Contact courts, opposing counsel and other necessary parties of the custodianship
 - Secure or return client property and dispose of closed files with client consent

See Disciplinary Rules of Procedure Rule 13.04

Navigating the Cessation of a Practice

Engagement Letter Form (*Appendix 6*)

- Get effective consent as to custodian
- Assure file privilege is maintained
- Letter to existing clients – need for signature and return to amend engagement letter
- Effect of no signed engagement letter
- Effect on Designation of Custodian if client fails to sign & return “amendment to engagement letter”

Navigating the Cessation of a Practice

Notice Letter Upon Cessation (*Appendix 7*)

- Prompt notice to existing clients (and follow up) to avoid harm
- Must be clear on procedure, timeline and communication methods (phone, email, etc.)
- Custodian's right/power to set a binding "deadline" for file pick up (what's possible/ what's reasonable?)
- IOLTA issues: partially earned fees, access to account, etc.
- Signed written receipt from client a must
- Effect of Notice as to closed files/non-responsive clients, etc.

Navigating the Cessation of a Practice

Chapter 456 of Estates Code – Disbursing IOLTA Accounts

- Provides statutory guidance and empowerment regarding access to IOLTA accounts to:
 - non-attorney executor
 - Attorney Executor
- Protections for financial institutions who comply (456.003)
- Remedies against non-compliant financial institutions (456.004)
- Provides direct standing to a “person aggrieved” to bring cause of action vs. the financial institution (456.0045)

Navigating the Cessation of a Practice

Chapter 456 of Estates Code – Disbursing IOLTA Accounts (Cont'd)

- Expressly contemplates further rule making by the Texas Supreme Court “regarding the administration of funds in a trust or escrow account subject to this chapter.” (456.005)
- Effect on this Chapter of Assumption of Jurisdiction action under TRDP Chapter 13

See Appendix 16.

Navigating the Cessation of a Practice

Disposition of the IOLTA Account – Texas Legal Ethics Opinion No. 602:

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is permitted to deliver to the Texas Comptroller of Public Accounts, and to file required reports concerning, funds or other property held in the lawyer's trust account for which the lawyer is unable to locate or to identify the owner, provided the lawyer reasonably believes that such action is required by applicable provisions of Texas law on abandoned property.

Navigating the Cessation of a Practice

Consider Provisions in a Last Will to Address Disposition of Your Law Practice

- Directing the Executor to engage a previously named Lawyer-Custodian or naming a lawyer as custodian to wind down the practice
- Providing funds for staff and the custodian to perform the work and pay expenses and handle proper disposal of files
- Granting authority to the Executor to manage non-lawyer tasks for a proprietorship and authority to manage a practice entity
- Empowering disposition of IOLTA funds under EC Chap. 456

Navigating the Cessation of a Practice

Five major ethical concerns in the cessation of a practice:

1. **Confidentiality** - preventing access by unauthorized persons to client files. 1.05(b)(1)(ii).
2. **Conflict of interest** with the successor lawyer(s). Rules 1.06 and 1.09
3. **Communication** with the client with full disclosure of all material information about the process and their rights. Rule 1.03.
4. **Competence** of the successor attorney to handle the matters. Rule 1.01
5. **Solicitation or barratry** in contacting clients to accept the successor lawyer. Rule 7.03.



Navigating Succession of Your Law Practice

Navigating Succession of a Law Practice

Traditional methods of transferring client matters with compensation:

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

(Likely) Safe Harbor

Hire an associate

- Consider using an entity – PC or PLLC
 - No authority, but it may be smoother if the entity is the custodian of files
- Associate becomes an owner of the entity
 - Risks
 - Skill & Personality of the Associate - having to unwind a bad match
 - Mentoring process can be expensive & lengthy
 - *Respondeat Superior*

Myth About Prohibition of Sale

Ethics Opinion 266 and Canons of Ethics Pre-1990

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

Resources for Sales/Succession “Made Easy”

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

Resources for Navigating the Rules



The
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State Bar of Texas



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lpm@texasbar.com

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Best Practices When Selling a Practice

SEPTEMBER 20, 2017 / CLOSING A PRACTICE

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

The Questions

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



Factors to Consider in Sale of a Practice

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



Factors to Consider in Sale of a Practice

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

Factors to Consider in Sale of a Practice

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

Factors to Consider in Sale of a Practice

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

Factors to Consider in Sale of a Practice

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

New Proposed Rule 1.17 - Sale of a Law Practice

(Based on ABA Model Rule 1.17)

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

- (a) The **seller ceases to engage in the private practice of law, or in the area of practice that has been sold**, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;
 - (b) **The entire practice, or the entire area of practice, is sold** to one or more lawyers or law firms;
 - (c) The **seller gives written notice** to each of the seller's clients regarding:
 - (1) the **proposed sale**;
 - (2) the **client's right to retain other counsel** or to take possession of the file; and
 - (3) the fact that the client's **consent to the transfer of the client's files will be presumed** if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.
- If a client cannot be given notice**, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to **obtain an order authorizing the transfer of a file**.
- (d) The **fees charged clients shall not be increased** by reason of the sale.

Preliminary Sale Stages and Documents

1. Identify what is being sold (all, some practice areas, some practice locations)
2. Whether the seller will continue to practice with or separate from Buyer
3. Determine expected future revenues and value of the practice being sold
4. Notices to clients and consent to review of files by buyer (*See Appendix 19*)
5. Enter Non-disclosure and Confidentiality Agreement
6. Preliminary limited review of primary client names, types of matters for confidentiality and competence concerns and overview of firm financials (non-specific revenue, billing practices, client concentrations and major expenses)

Preliminary Sale Stages and Documents (Cont'd)

7. Letter of intent with non-solicitation agreement on employees and clients
8. Due diligence review of files and more careful analysis of potential conflicts and due diligence review of detailed financials
9. Determine transfer or use of office space, equipment, phone number, website and existing relationships
10. Determine disposition of closed files and active client files not being sold
11. Prepare term sheet for Purchase Agreement

Features of Law Practice Purchase Agreement

Source: Selling a Law Practice under ABA Model Rule 1.17, Michael Downey, February 28, 2017

- Warranties of key facts
 - Revenue produced
 - Absence of malpractice claims
 - Valid licenses
 - Level of experience
- Structure of purchase price (e.g. lump sum installment or portion of fees generated) and any adjustments for actual receipts.

Features of Law Practice Purchase Agreement (Cont'd)

Source: Selling a Law Practice under ABA Model Rule 1.17, Michael Downey, February 28, 2017

- Legal Malpractice insurance coverage for pre- and post-representation (e.g. tail coverage)
- Indemnification provisions
- Non-compete and non-solicitation provisions compliant with ethics rules
- How to handle prior closed files and notices to clients
- How to handle IOLTA accounts
- Consider alternative dispute resolution clauses

Will Provisions for Solo/Small Firm Attorneys

Jimmy Brill Will Provision (24th Annual Estate Planning Course)

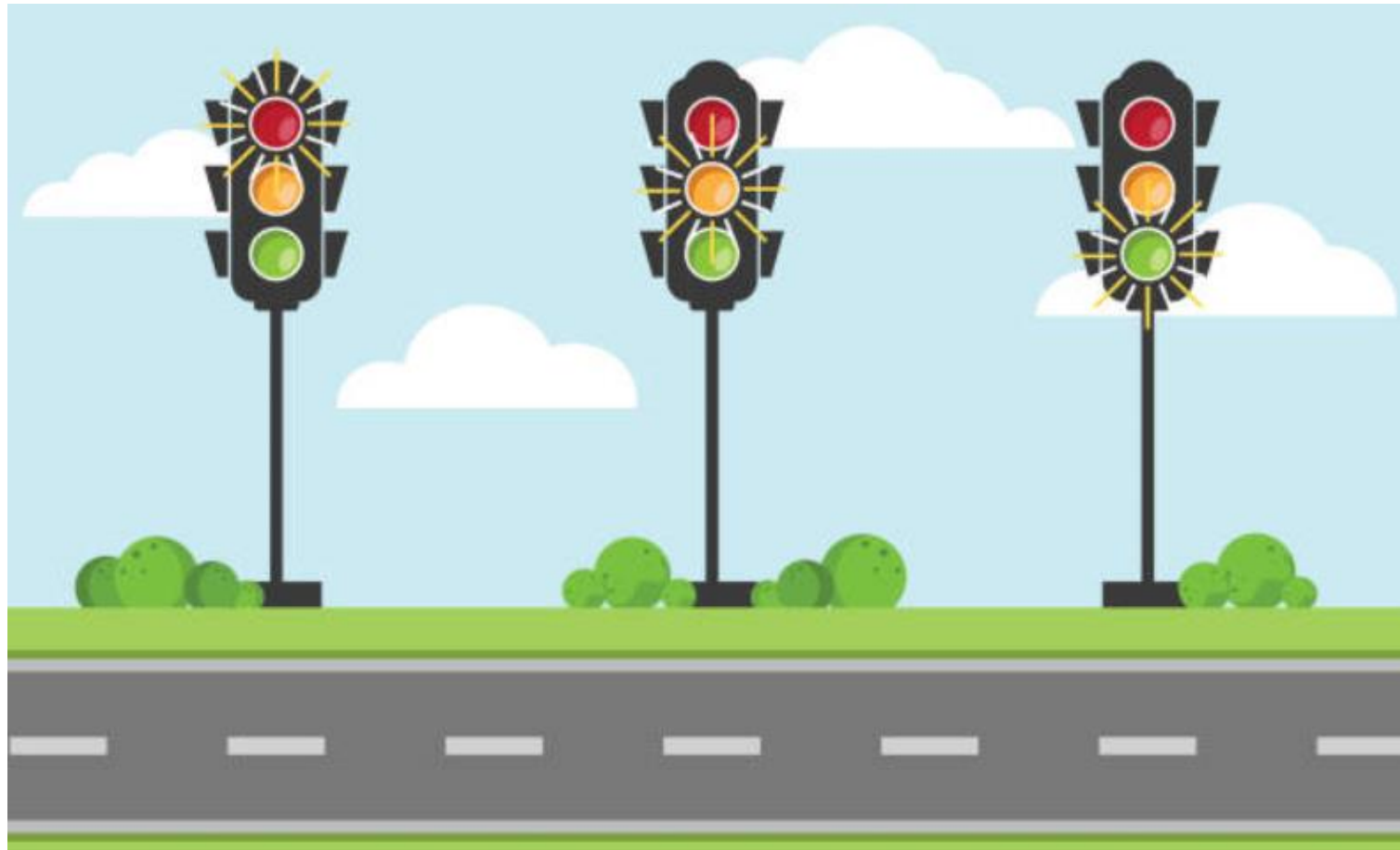
See Appendix 21.

- Provision provides “guidelines”
- Subject to client approval, it “designates” specific lawyers to succeed to certain practice areas
- Specifically empowers Executor to perform certain acts & duties
- Article written before current Chap. 456 of the Texas Estates Code
- Can a Will provision really dictate client relationships and the disposition of the file?

Rules of the Road in Sale of a Law Practice

Review of LPM Sale of a Practice Website Guidance

See Appendix 20 – Practice Tips



Rules Implicated in Sale of a Law Practice

Rule 1.01 Competent and Diligent Representation

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

Rules Implicated in Sale of a Law Practice

Rule 1.01 Competent and Diligent Representation

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

Rule 1.02 Scope and Objectives of Representation

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

Rules Implicated in Sale of a Law Practice

Rule 1.02 Scope and Objectives of Representation

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

Rule 1.03 Communication

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

Rules Implicated in Sale of a Law Practice

Rule 1.03 Communication

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

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

Rules Implicated in Sale of a Law Practice

Rule 1.03 Communication

LPM Practice Tip (continued):

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

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

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees

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

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees – Sham Sales or Impermissible Fee Sharing

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

(1) the division is:

- (i) in proportion to the professional services performed by each lawyer; or
- (ii) made between lawyers who assume joint responsibility for the representation; and

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

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees – Sham Sales or Impermissible Fee Sharing

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees – Sham Sales or Impermissible Fee Sharing

Factors to consider that might suggest a sham sale:

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



Rules Implicated in Sale of a Law Practice

Rule 1.05: Confidentiality of Information

(c) A lawyer may reveal confidential information:

- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.

Rules Implicated in Sale of a Law Practice

Rule 1.05: Confidentiality of Information

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

Rule 1.09: Conflict of Interest: Former Client

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

Rules Implicated in Sale of a Law Practice

Rule 1.09: Conflict of Interest: Former Client

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

Rule 1.14: Safekeeping Property

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

Rules Implicated in Sale of a Law Practice

Rule 1.14: Safekeeping Property

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

Rule 1.15: Declining or Termination of Representation

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

Rules Implicated in Sale of a Law Practice

Rule 1.15: Declining or Termination of Representation

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

Rule 5.06: Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a suit or controversy, except that as part of the settlement of a disciplinary proceeding against a lawyer an agreement may be made placing restrictions on the right of that lawyer to practice.

Rules Implicated in Sale of a Law Practice

Rule 5.06: Restrictions on Right to Practice

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

Rules Implicated in Sale of a Law Practice

Rule 5.06: Restrictions on Right to Practice

LPM Practice Tip:

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

Rules Implicated in Sale of a Law Practice

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

Rule 8.04. Misconduct

(a) A lawyer shall not:

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

Takeaways – 7 Cs

FILE MANAGEMENT

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

Takeaways – 7 Cs

DISCIPLINARY RULES OF PROCEDURE

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

Takeaways – 7 Cs

SALE OF PRACTICE

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

Resources for Navigating the Rules



The
Law Practice Management
Program of the
State Bar of Texas



1-800-204-2222 x1300



lpm@texasbar.com

Google Custom Search



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[HOW TO BROCHURES »](#)

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How to Brochures

JANUARY 4, 2018 / FREE RESOURCES

The State Bar of Texas Law Practice Management Committee has carefully prepared documents related to starting a practice, maintaining a practice, and growing a practice, [...]

Resources for Navigating the Rules



STATE BAR *of* TEXAS

Toll-Free Ethics Helpline for Lawyers

(800) 532-3947

8am - 5pm CT

Monday through Friday

If you are a lawyer, call our helpline if you are unsure about your ethical obligations in a particular situation. Our toll free helpline is offered through our Chief Disciplinary Counsel's (CDC) Office. Please note that this service is not confidential and is not binding on any local grievance committee panel. Phone calls are promptly returned in the order they are received by two staff ethics attorneys. Occasionally a large volume of calls or only one attorney on staff may cause a delay in returning your call.

A Final Word - Financing Transition Costs

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

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

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

<https://texasbar.memberbenefits.com/>



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Health



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Term Life



Long Term Care



Long-Term Disability



Medicare Supplement



Supplemental Health



Travel

Thank you!

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