

# CLOSING A LAW PRACTICE – YOURS OR SOMEONE ELSE’S

Written and Presented by:

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## **ESSENTIALS FOR THE GENERAL PRACTITIONER COURSE**

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### **CHAPTER 9**



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Jimmy Brill is a 1957 University of Texas Law School graduate and a solo practitioner from Houston whose practice emphasizes probate, estate planning, and real estate.

He served for 42 years as principal author and project director of the Texas Probate System first published by the State Bar in 1972 and updated six times since then (most recently in 2014) with a the most recent edition covering the transition to the 2014 Estates Code. In the 1970s, he chaired the State Bar CLE and PEER Committees.

In 2007 he was the recipient of the Dan Rugeley Price Memorial Award from the Texas Bar Foundation. In 2009 the Foundation recognized him with its award as one of the five outstanding fifty-year lawyers in Texas.

In 2006, the Real Estate, Probate and Trust Law Section of the State Bar of Texas presented him with its Lifetime Achievement Award as the Distinguished Texas Probate and Trust Attorney. He also received the Distinguished Service Award for 2000 from the Estate Planning, Probate and Trust Law Section of the Houston Bar Association.

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Starting in 1994 he served as mentor to five women lawyers in their first year as solo practitioners and continued the group's monthly meetings for an additional four years. This group became a model for the mentor program of the State Bar of Texas. He has had three other groups, two of which related to probate practice.

He was an organizer and for almost 20 years has led monthly meetings of a Houston group of lawyers known as Solos Supporting Solos. This informal group has met each month since September 1994 and provides solos with an opportunity to meet fellow solo practitioners in an informal setting.

Brill has been designated as a Texas "Super Lawyer" by Texas Monthly in each of its compilations and is listed in Best Lawyers in America, Trusts and Estates. Although a solo practitioner, his firm, James E. Brill, PC, was rated as a Tier One Best Law Firm for 2013, 2014 and 2015 by U.S. News and Best Lawyers.

Brill previously served as a director of TLIE (Texas Lawyers Insurance Exchange), a company that writes malpractice coverage for Texas Lawyers and was a five year member of the State Bar of Texas committee that unsuccessfully proposed revisions to rewriting the Texas Disciplinary Rules of Professional Conduct.

In 2010 he was one of five graduates of Lamar High School (Houston) to be recognized as a Distinguished Alumnus. In an unrelated field, he is recognized as an authority on the stamps and postal history of Pitcairn Island and has served as an officer in the international Pitcairn Island Study Group.



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The author acknowledges with sincere appreciation the assistance of Gisela Bradley in conducting research and in developing the listing of appropriate steps for closing your law practice.

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## CLOSING A LAW PRACTICE

### I. OVERVIEW

**A. Scope of Article.** This paper deals with issues arising due to the voluntary termination of a lawyer's practice with particular emphasis on closing the office of a solo practitioner. Considerable discussion, including proposals to amend the Disciplinary Rules, is included to emphasize issues arising at the death of a solo practitioner. To some extent, many of the same considerations apply if the solo was disabled, disbarred, suspended, or simply abandoned the practice.

**B. Potential Effect.** According to a 1995 report of the American Bar Foundation, almost 47% of all lawyers in private practice were solo practitioners. In 2012, approximately 37% of all Texas lawyers in private practice were solos, virtually unchanged from 36% in 2000.

**C. Potential Conflicts.** In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interests. Section 7, Preamble to Texas Rules of Professional Conduct (Article 10, §9 of the State Bar Rules).

**D. Delicate Balance.** As will be seen, some of the Texas Disciplinary Rules of Professional Conduct ("DR") tend to complicate things involving clients, leave many open issues for the lawyer's family, and raise serious potential problems for attorneys who are involved in winding down or trying to dispose of their own practices or the practices of others.

**E. Civil Liability.** These rules do not undertake to define standards of civil liability of lawyers for unprofessional conduct. Section 14, Preamble to Texas Rules of Professional Conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. Section 15, Preamble to Texas Rules of Professional Conduct. *See also Wright v. Sydow*, 173 S.W.3d 534, 549 (Tex. App.—Houston [14th Dist.] 2004, no pet.). However, the Disciplinary Rules of Professional Conduct (DR) are quasi-statutory, highly persuasive, and are given the utmost consideration because they evidence the public policy of this State. *Bond v. Crill*, 906 S.W.2d 103, 106 (Tex. App.—Dallas 1995, no writ); *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 743 n.6 (Tex. App.—Austin 1995, writ denied); *State ex rel. Chan-*

*der v. Baker*, 539 S.W.2d 367, 372 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.). Courts routinely apply them when interpreting an attorney-client contract or determining whether a lawyer's fiduciary duty has been breached. *See, e.g., Burnett v. Sharp*, 328 S.W.3d 594, 602 (Tex. App.—Houston [14th Dist.] 2010, no pet.). *Shields v. Texas Scottish Rite Hospital for Crippled Children*, 11 S.W.3d 457, 459 (Tex. App.—Eastland 2000, pet. denied); *see, e.g., Bond v. Crill*, 906 S.W.2d at 106; *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229-30 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 400 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

**F. Primary Consideration.** The overriding consideration should be to protect the client's best interests and to do so as promptly, efficiently, and inexpensively as reasonably possible.

**G. What's Not Included.** No attempt is made to discuss retirement plans, government benefits, insurance, long-term care, investments, or tax issues.

### II. AFTER ALL THE EFFORT TO START AND BUILD YOUR PRACTICE, WHY CLOSE IT?

Everything has a life cycle. Remember lava lamps, mood rings, and pet rocks? Add your law practice to that list.

**A. Focus of this Paper.** Although this paper focuses on closing the office (and likely, the practice) of a solo practitioner, most of the ideas can be applied to a lawyer leaving a law firm. Closing the office of a deceased lawyer, particularly that of a solo practitioner, is considerably more complicated and has been covered in greater detail in another of the author's papers entitled "Dealing With The Death of a Solo Practitioner", originally presented at the State Bar of Texas 2000 Advanced Estate Planning And Probate Course. Section XVI of this paper provides an overview of those issues.

**B. There Are Many Circumstances that Lead to Closing Your Own Office.** Probably the number one reason is retirement, but you could be elected to public office, become disabled, join the faculty at a law school, or simply decide on another career.

### III. THE REGULATORY FRAMEWORK

**A. Misconduct by Failure to Give Notice of Cessation of Practice.** DR 8.04(a)10) explicitly

provides that a lawyer commits misconduct (and therefore is subject to discipline) by failing to comply with Section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(10).

**B. Notice of Attorney's Cessation of Practice.** Prior to March 31, 2007, Texas Rule of Disciplinary Procedure 13.01 provided that when a Texas lawyer becomes inactive 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 (*together with information identifying the matter*) shall be mailed to all clients, former 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.

**C. Making Rule 13.01 More Realistic.** The Texas Supreme Court used its inherent power to implement an amendment to that Rule effective March 21, 2007. As amended, the Rule only requires written notice to be given to those clients and others having reason to be informed of the cessation of practice. It is no longer necessary to include information identifying the matter. The text of new Rule 13.01 appears in *Appendix A*. Since the Rule focuses on pending matters that no other attorney has assumed with the client's consent, an attorney pre-planning retirement might simply slowly wind down practice by completing on-going matters while refusing to take new matters or accepting only matters that can be completed in a short time (e.g., transactional matters rather than litigation), thereby reducing the workload until there are no pending cases or matters. Alternatively, the number of pending cases can be reduced to just a few for which the required notice can easily be handled.

But, while the Rule focuses on notice to clients regarding active matters, lawyers must devise a plan to notify clients whose files they continue to hold. Section V of this paper goes into great detail regarding those files and Appendix I contains a proposal to amend current applicable Rules.

#### D. Selected Compliance Problems.

1. *State of Client Files and Records.* Rule 13.01 (See Appendix A for text of Rule 13.01) assumes that we all maintain meticulous records, have well-organized files, and have a current address for every client that was ever represented during our careers. This may not always be the case.

2. *Personalized Written Notice.* Since notice under Rule 13.01 no longer must include "information identifying the matter", a generic or boilerplate type notice could now comply with the requirement, thereby eliminating efforts in locating and describing all matters in each notice—even those handled decades ago. This unnecessary burden and expense of the prior rule is no longer imposed on the lawyer and the lawyer's staff.

3. *Content of Notice.* The notice should state that the practice is being closed, advise of the location of the client's files, and recommend that the client obtain other counsel.

4. *Mailing.* The envelope should include a legend such as "Address Service Requested" and certified mail should be considered. Undoubtedly some notices will be returned as undeliverable.

**E. Communicating with Your Clients.** Once you have established an attorney client relationship, open communication with the client by a lawyer is not only authorized, it is actively encouraged.

1. There is no prohibition against a lawyer recommending another lawyer to a client or referring a client to another lawyer.

2. However, there are many restrictions on non-affiliated lawyers who want to "take over" your practice or selected matters. These include barratry which is a penal code violation in addition to being a violation of DR 8.04(a)(9), certain in-person or telephone contacts (DR 7.03(a)), certain written "solicitations" (DR 7.05(a)), and compliance with the advertising rules (DR 7.04 and 7.05). See Appendix B for text of these Rules.

**F. Funds or Other Property Held for Clients.** This is the so-called five year retention rule. Every attorney licensed to practice law in Texas who maintains, or is required to maintain, a separate client trust account or accounts, designated as such, into which funds of clients or other fiduciary funds must be deposited, shall further maintain and preserve for a period of five years after final disposition of the underlying matter, the records of such accounts, including checkbooks, canceled, checks, check stubs, check registers, bank statements, vouchers, deposit slips, ledgers, journals, closing statements, accountings, and other statements of receipts and disbursements rendered to clients or other parties with regard to client trust funds or other similar records clearly reflecting the date, amount, source and disbursements of the funds or other property of a client. Rule 15.10 of the Texas Rules of Disciplinary Procedure. In addition, DR 1.14 provides for the five-year rule but is not as detailed. See Appendix C for current text of these

Rules, but note that bold face additions are proposed amendments.

#### IV. HANDLING CLIENT MATTERS

**A. New or Prospective Matters.** If you are attempting to close your practice, do not accept new work no matter how interesting or lucrative.

**B. Review Client Files.** Ensure that you have provided all agreed services. Provide clients with all original documents and the opportunity to review and copy the contents of their files. But see Section V. Record Retention or Whose File Is It Any way?

**C. Incomplete Matters.** Review these files and do the work necessary to conclude the representation. If that is not practical, arrange for a referral to another lawyer.

1. *When Client Desires Referral to Other Counsel.*

- a. Is there a duty to recommend a lawyer?
- b. Should more than one be recommended?
- c. What about recommending the bar association referral service?
- d. Is there liability for a negligent referral?

2. *When Client Has Obtained New Counsel.*

- a. Obtain written authorization from client to deliver files to new counsel.
- b. Consider making copies of original documents that are returned to clients. It's too easy for the client to put the lawyer on the spot by claiming the document was not received and no copy was retained.
- c. Deliver and obtain receipt for each file.

**D. Withdraw as Attorney of Record.** If matters are to be taken over by other lawyers, be sure that you withdraw as attorney of record and that the client consents for the other lawyer being substituted, and arrange for substitution of counsel in litigated matters. Be certain of filing and approval by the court with a signed order.

**E. Review Calendar and To Do Lists.** Be sure to note pending actions, some of which may impact the timing of closing your office, and all of which may relate to services that must be performed for the client.

**F. Send Final Bills.** The value of unbilled time and expenses will deteriorate even more rapidly if you wait to bill until you no longer have an office.

#### **G. Return Unearned Fees and Deposits.**

Pay earned fees and accrued expenses as authorized from client deposits and return the unearned and unused deposits to clients.

**H. Registered Agent and Registered Address.** If you are the registered agent and/or your office is the registered address for a business, make sure to update filings with a new agent and address. Many transactional lawyers maintain possession of corporate minute books. First, search your name on the web site of the Secretary of State to determine if your name is listed as agent for any corporation or other business entity. Second, review minute books and client files to make sure you identify the entities that need to update their registered offices and agents. Third, arrange for substitution, prepare and file appropriate documents, and return any minute books in your possession to the client.

Any entity which fails to update its registered office (or agent) is negligent as a matter of law, and a plaintiff has no obligation to see out the new agent or office or even the actual, new business office. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 436 S.W.3d 415 (Tex. App. – Dallas 2014, pet. Filed, No. 14-0629) (\$820,000 default judgment affirmed); *see also BLS Dev., LLC v. Lopez*, 359 S.W.3d 824, 827 (Tex. App. – Eastland 2012, no pet.); *Ingram Indus., Inc. v. U.S. Bolt Mfg., Inc.*, 121 S.W.3d 31, 35 (Tex. App. – Houston [1st Dist.] 2003, no pet.). Since the entity is negligent, it stands to reason that you, as counsel, would be negligent as well and potentially liable for failing to update the registered agent or office when you cease practicing.

**I. Holding Original Will For Client.** See Appendix K for Selected Issues in Retaining Original Wills.

1. *Handling Requests for Delivery of Original Will and Other Documents.*

a. Request by Testator. This is the easy one. Deliver in the manner requested. If personal delivery, get a written receipt. If request was by mail, the testator's letter should be sufficient in most cases.

b. Request by Someone Else. Here the decision becomes more complicated unless your safekeeping agreement provides for delivery to a third party. Absent the "appropriate language" in your agreement, there is no totally safe procedure other than to refuse to answer any inquiry or deliver any documents. That refusal could ensure that you are the former lawyer for the family.

If you do choose to respond, there is no right answer but your response could lead to a grievance, a malpractice claim, or a suit for damages.

For purposes of the following questions, assume that you prepared wills for both husband and wife and both are alive.

Query. If one spouse requests delivery of wills for both husband and wife, should you (a) comply with the request, (b) deliver only the will of the requesting spouse pending "proper" authorization from the other spouse, or (c) do something else?

Query. If an adult child requests delivery of the will of either or both parents, should you (a) comply with the request if you know the child, (b) comply with the request even if you do not know the child, (c) require "proper" authorization from the parents(s), or (d) do something else?

Query. If the request comes from someone acting as an agent under a statutory durable power of attorney, should you (a) comply with the request only if you know the agent, (b) comply with the request even if you do not know the agent, (c) require verification from the testator(s), (d) refuse to deliver the will(s), or (e) do something else?

Query. If you know the testator is disabled, do you follow a different procedure?

Query. Do you follow a different procedure if the request is for a medical power of attorney or a directive to physicians?

c. Estates Code Sections 752.101 and 752.103 (formerly Probate Code §§ 491 and 493) concern the powers granted in a statutory durable power of attorney. Consider their provisions. Does that change your answer?

**J. Handling Third Party Requests for Information.** If you receive a request as to whether you prepared a will for a particular client, you are faced with a dilemma. Probably the only "safe" answer is to refuse to answer without authorization from the client, but consider the following:

Query. If the inquiring person is a spouse or an adult child, will you (a) state whether or not you prepared a will, (b) refuse to answer even if you have represented that family member, (c) refuse to answer if you know the identity of but have not represented that family member, (d) refuse to answer regardless of the identity and relationship of the family member?

Query. If the inquiring person is another lawyer, will you (a) state whether or not you prepared the will, or (b) refuse to answer?

Query. If the inquiring person is neither a family member nor another lawyer, will you (a) state whether or not you prepared the will, or (b) refuse to answer?

Query. If you learn or already know of the testator's death, will your response be different?

### K. What to Do with the Original Will When You Learn of Testator's Death.

1. *The Rubber Hits The Road.* Presumably one reason for holding the original will was the expectation (anticipation?) (hope?) that you would be hired to probate the will and "handle the estate."

2. *The Testator Has Died. Now What?* When you learn about Testator's death, which of the following do you do?

a. Wait to be contacted and hope to be hired? If so, how long do you wait?

b. Write or call a member of the family to advise that you are holding the will for safekeeping? If so, will you deliver the original will to that person?

c. Write or call the first named executor to advise that you are holding the will for safekeeping? If so, will you deliver the original will to that person?

d. If you will not be engaged to handle the probate matters, do you deliver the original will and an explanatory letter to the county clerk as contemplated by Estates Code §§ 252.201-252.204 (formerly Probate Code Section 75)?

Even with the imposition of electronic filing, the Harris County procedure is for the original will to be delivered to the clerk. No docket number will be assigned and no filing fee is required at that time.

The probate process is begun by obtaining a certified copy of that original will and filing it electronically together with the cover sheet and application. It is at this point where the docket number will be assigned and the filing fee will be paid.

e. When you have been engaged as the lawyer, you will electronically file the cover sheet, the will, and the application for its probate. Within three days after filing has been accepted, the original will is to be delivered to the clerk.

**L. Winston Churchill's Advice Regarding Wills.** I believe that Winston Churchill had the answer. In his famous commencement speech dealing with perseverance, Churchill is quoted as saying "Never give up. Never give up. Never. Never. Never." That is advice worth heeding when it comes to retaining a client's original will. Never retain. Never retain. Never. Never. Never!

### V. RECORD RETENTION OR WHOSE FILE IS IT ANYWAY?

**A. Background.** The most frequently asked question to the State Bar law practice management consultants is "What do I do with all the files?"

The lawyer who wants to develop a policy covering file retention, disposition, and destruction must grasp and deal with the swirling mix of property



rights, the client's right to confidentiality, other ethical considerations, and practical practice management.

The reality is that with the advent of word processing and high-speed, office-copying machines, there has been an unprecedented proliferation of paper with which every lawyer must deal. This has led to problems for storage of all of that paper as well as issues relating to access of stored paper and even to electronic media. Even inexpensive electronic storage has its problems. Changing technology has not helped. Remember 5-inch floppy discs?

Practical issues aside, the current approaches seem to exhibit an overwhelming, if not somewhat unrealistic, desire to "protect" the clients. Nevertheless, at some point, ethical rules, professionalism, property law concepts, and good old fashioned common sense must come together to recognize that a lawyer cannot keep everything forever.

### B. Restatement (Third) of the Law Governing Lawyers.

1. *Section 44. Safeguarding and Segregating Property.* A lawyer who converts the property of another is liable as is one who negligently fails to safeguard against the conversion or loss of entrusted property. The lawyer is to use "reasonable measures for safekeeping" objects belonging to clients such as a safe deposit box or office safe. The lawyer clearly is a bailee and probably could be regarded as a constructive trustee.

A lawyer's duty to safeguard client documents does not end with the representation. It continues while there is a reasonable likelihood that the client will need the documents, unless the client has adequate copies and originals, or declines to receive such copies and originals from the lawyer, or consents to disposal of the documents.

2. *Section 46. Documents Relating To Representation.* The lawyer must deliver to the client or former client, at an appropriate time and in any event, promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs. Agency law mandates that the lawyer supply the documents requested by the lawyer's principal.

A lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation unless substantial grounds exist to refuse.

Ordinarily, what will be useful to the client is for the client to decide. A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another or if a court's protective order had forbidden

copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime. Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Under the conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report.

### C. File Ownership.

1. *The Starting Point.* File ownership is the starting point for records retention and making a decision but there is no uniform rule throughout the states.

2. *Entire File Rule.* Some states have adopted the entire file rule where all file material belongs to the client.

3. *Typical Contents of A Lawyer's File.* What might be found in "the client's file".

- a. Documents entrusted to lawyer by client
- b. Original documents obtained from others
- c. Original documents prepared by the lawyer
- d. Photocopies of signed documents
- e. Unsigned copies of documents
- f. Prior drafts of documents
- g. Correspondence
- h. Receipts for expenditures made for clients
- i. Research materials
- j. Briefs
- k. Legal memoranda
- l. Copies of cases, statutes, articles
- m. Lawyer's notes and other legal pad items
- n. Billing, time keeping, and service records.
- o. Prebills that summarize the services and/or reflect time spent
- p. Paper on which initial entries were recorded
- q. Multiple copies of any of the foregoing.
- r. Electronic versions of any or all of the foregoing

4. *Entire File Rule Carried to the Extreme.* "When a former client asks for its file, a law firm must include any electronic documents or components of the file as well as whatever may be on paper. The cost of locating and compiling the electronic records has no bearing on the law firm's duty in this regard." See New Hampshire Bar Association Ethics Opinion 2005-06/-03.

5. *End Product Rule.* Other states take the exact opposite position that except for client owned property, the entire file belongs to the lawyer subject to the client's right to make copies. This is referred to as the "end product" or "work product" model of file ownership.

6. *The Fuzzy Middle Ground.* The file, or at least most of the contents belong to the client and the client has the reasonable expectation that the lawyer will maintain the file so that it is available when the client needs it. The client's interest in the file has often been described as a property right and thus, the file is said to belong to the client.

7. *Resolution Trust Corp. v H\_\_\_, P.C.*, 128 F.R.D 647 (N.D. Tex. 1989) held that all files maintained by the attorneys belonged to the client and that the attorney has "no right or ability to unilaterally cull or strip from the files created or amassed during his representation of that client". See *Thomson v. Findlater Hardware Co.*, 205 S.W. 831 (Tex. 1918) (client owns the file).

8. *Another Real Case.* Estate of Robert Daniel Eichenour, Deceased, Probate Court Number 4, Harris County, Texas, Docket Number 264,493-402.

Client died. Administrators demanded lawyer deliver legal files that were "owned" by the Decedent. Lawyer files for declaratory judgment and claims attorney-client privilege and confidentiality of client information and turns over original papers or documents owned by the client but denied that Decedent "owned" files maintained by his attorney. Administrators were Decedent's children, who had been involved in litigation with Decedent. Lawyer asserted that Decedent-client had given to Lawyer confidential information under the reasonable expectation that the information and communications would remain confidential. Lawyer asked Court to determine (a) what portion of legal files other than original client papers were "owned" by Decedent and therefore property which Administrators have a right to possess, and (b) whether Administrators have legal right to compel Decedent's attorney to reveal confidential information and privileged communications with Decedent.

On February 2, 1995, Judge William C. McCullough found that all files and the entire contents thereof maintained by the lawyer, which are in his possession or under his control, were the property of Decedent during his lifetime and that the Independent Administrators are entitled to possession of them and ordered the lawyer to deliver the files to the Administrators.

9. *Kristin Terk Belt et al v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 SW 3d 780 (Tex. 2006). The Supreme Court of Texas held that there is no legal bar preventing an estate's personal repre-

sentative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners. It would not be much of a stretch to believe that the personal representatives could require lawyers to produce client files and their contents.

10. *Court of Criminal Appeals. In re McCann*, 422 S.W.3d 701, 705 (Tex. Crim. App. 2013, orig. proceeding), a death penalty case, holds that the client owns the file.

11. *Texas Professional Ethics Committee Opinion 570* (May 2006) opined that the work product doctrine does not permit a lawyer to assert a privilege to thwart his own client's request for the lawyer's notes.. The opinion did not address "the issue with respect to other types of documents or information contained in a lawyer's file".

12. *Texas and the Entire File Rule.* Based on the foregoing, it appears that Texas either has adopted or is leaning strongly to the "entire file" rule. The client is entitled to the entire file, including a lawyer's notes that constitute work product and relate to the client and the lawyer's representation of the client, except: (1) where the lawyer is required to withhold portions by court order; (2) the lawyer is entitled to assert a lawyer's lien; and (3) when it would violate a duty owed to a third person or risk causing serious harm to the client. Texas Ethics Opinion 570 (May 2006); *In re George*, 28 S.W.3d 511 (Tex. 2000) (disqualification of prior counsel due to prior representation confidences, and attack on prior work).

The cases usually cited in support of the client owning the entire file relate to active matters when the lawyer is resisting a demand to deliver the entire file and its contents. Several include ongoing proceedings and in those cases, it is difficult to justify a decision not to provide anything of value or of use to a client.

No reported Texas case has been located to support the proposition that the lawyer may not ethically destroy a client's file many years after the representation has been concluded.

#### **D. Suggested Language to Allocate Rights to Contents of Client Files**

"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.

“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.”

#### E. How Long, Oh Lord, How Long?

1. *Protecting the Interests of the Client.* How helpful is vague language such as “client documents must be retained as long as may be necessary to protect the interests of the client”? Is the retention period until you run out of space? What about outside storage? Your garage?

Do you hold client files for the period of time equal to the law regarding abandonment of property? If the files are owned by the client, they must be property, and if unclaimed by the client, do they escheat to the state (as though unclaimed client funds)?

2. *Retention Policy.* In search of a bright line rule. Due to their importance, the existing so-called five year Rules relating to trust and IOLTA accounts are reproduced on Appendix A and also are repeated from Section III, F, of this paper

a.) Rule 1.14(a) of TEX. DISCIPLINARY R. PROF’L CONDUCT requires lawyers to retain for five years after termination of representation records of client’s funds and other property that came into the hands of the lawyer.

b.) Rule 15.10 of Texas Rules of Disciplinary Procedure enumerates the records that must be retained. “Every attorney licensed to practice law in Texas who maintains, or is required to maintain, a separate client trust account or accounts, designated

as such, into which funds of clients or other fiduciary funds must be deposited, shall further maintain and preserve for a period of five years after final disposition of the underlying matter, the records of such accounts, including checkbooks, canceled checks, check stubs, check registers, bank statements, vouchers, deposit slips, ledgers, journals, closing statements, accountings, and other statements of receipts and disbursements rendered to clients or other parties with regard to client trust funds or other similar records clearly reflecting the date, amount, source and disbursements of the funds or other property of a client”. TEX. R. DISCIPLINARY PROC. 15.10

Query. Should the lawyer be required to retain closed and inactive client files? For at least five years? Even longer?

F. **A Texas Standard?** According to Texas Business & Commerce Code § 35.48, a business record required to be kept by state law may be destroyed at any time after the third anniversary of the date the record was created unless a law or regulation applicable to the business record prescribes a different retention period or procedure for disposal.

#### G. Federal Mandates.

1. *ERISA.* Employee Retirement Income Security Act requires retention of many records relating to employees, especially as to those that participate in a retirement plan subject to its provisions.

2. *OSHA.* Occupational Health and Safety Act requires preservation of medical records regarding exposure to toxic or hazardous substances through current employment and for 30 years thereafter.

H. **Attempts at Specific Guidance.** Note: This is not one size fits all. Different matters have different life cycles. Multi-state firms must retain for longest interval prescribed by any state in which it practices.

1. *Criminal Matters*—Retain as long as client is incarcerated or case is on appeal. California and New Jersey as long as client is alive.

2. *Minors*—Retain until 4 years following attainment of majority.

3. *Adverse Possession*—At least 25 years after the possession commences.

4. *Estate Planning Files*—Until client’s death plus 4 years.

5. *Probate Files*—Until estate is settled and all audit periods have expired (E.g., 3 years and 9 months for estates without closing letters). Inventories and Affidavits in Lieu Thereof. If the affidavit is filed in lieu of an inventory, the inventory should be

retained indefinitely. Otherwise, it will be difficult to obtain basis information.

6. *Signed Original Documents*—Until they are out of date and no longer of consequence.

7. *Income Tax Returns*—6 years from later of due date or date actually filed and longer if there are carry over losses or other items.

8. *Estate and Gift Tax Returns*—Indefinitely.

9. *Trusts*—Until final distribution and final account plus applicable statute of limitations.

10. *Wills*—Until client has died plus 4 years.

### I. Help under the Probate Code? Depositing original will with clerk of court.

1. *During Testator's Lifetime*. TEX ESTATES CODE § 252.001 (formerly Texas Probate Code §71(a)-(b)).

a. *Deposit of Will*. A will may be deposited by the person making it, or by another person for him, with the county clerk of the county of the testator's residence. Before accepting any will for deposit, the clerk may require such proof as shall be satisfactory to him concerning the testator's identity and residence. The clerk, on being paid a fee of Five Dollars therefor, shall receive and keep the will, and shall give a certificate of deposit for it. All wills so filed shall be numbered by the clerk in consecutive order, and all certificates of deposit shall bear like numbers respectively.

b. *How Will Shall Be Enclosed*. Every will intended to be deposited with a county clerk shall be enclosed in a sealed wrapper, which shall have indorsed thereon "Will of," followed by the name, address and signature of the testator. The wrapper must also be indorsed with the name and current address of each person who shall be notified of the deposit of the will after the death of testator.

2. *After Testator Has Died*. TEX. ESTATES CODE § 252.201 (formerly Probate Code § 75). Upon receiving notice of the death of a testator, the person having custody of the testator's will shall deliver it to the clerk of the court which has jurisdiction of the estate.

### J. Destroying the File.

1. Destroying paper is the easy part.

2. Electronic data is nearly indestructible. Hitting the delete key merely deletes the link to the document (actually the first bite in the file), but the document remains unless it is overwritten. Even that may not be enough to deter a determined computer forensic specialist.

a. U.S. Department of Defense Standard 5220.22-M specifies how to overwrite computer discs. DoD 5220.22-M is a software based data sanitization method used in various file shredder and data

destruction programs to overwrite existing information on a hard drive or other storage device. The DoD 5220.22-M data sanitization method is usually implemented in the following way:

Pass 1: Writes a zero and verifies the write

Pass 2: Writes a one and verifies the write

Pass 3: Writes random characters, such as "97", and verifies the write

b. *Fair and Accurate Credit Transaction Act Disposal Rule*. The Fair Credit Transaction Act is an amendment to the Fair Credit Reporting Act. The FTC passed the FACTA Disposal Rule, effective June 1, 2005. The Rule requires any person who maintains or possesses "consumer information" for a business purpose to properly dispose of such information by taking "reasonable measures" to protect against unauthorized access to or use of the information in connection with its disposal. The Rule defines "consumer information" as any information about an individual that is in or derived from a consumer report. "Reasonable measures" for disposal under the Rules are 1) burning, pulverizing, or shredding; 2) erasing or physically destroying electronic media; and 3) entering into a contract with a document disposal service. According to the FTC, the Rule applies to debt collectors, attorneys, and those who obtain a credit report on prospective nannies, contractors, or tenants. Penalties for violating the rule include actual damages, statutory damages up to \$1,000 punitive damages per violation (with no cap on class action damages), attorneys' fees, and civil penalties up to \$2,500. *See generally* 16 C.F.R. Part 682.

c. *Graham-Leach-Bliley Act Safeguards Rule* requires most financial institutions to have their security programs incorporate practices dealing with proper disposal of consumer information. 15 U.S.C. § 6801 et seq. The FTC adopted a rule requiring attorneys to comply with the Act, but in *New York State Bar Association v Federal Trade Comm'n*, 276 F. Supp. 2d 110 (D.D.C. 2003), *aff'd sub nom.*, *American Bar Ass'n v. Federal Trade Comm'n*, 430 F.3d 457 (D.C. Cir. 2005), the court held that the Act exempted lawyers and that the FTC's attempt to apply the Act to attorneys was arbitrary, capricious and in violation of the Administrative Procedures Act

d. *Sarbanes-Oxley Act* imposes significant criminal penalties on anyone who knowingly destroys documents "with the intent to impede, obstruct, or influence an investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1519.

e. *HIPAA*. The Health Insurance Portability and Accountability Act of 1996 imposes penalties for disclosure of protected medical information.

**K. Progeny of Enron.**

Although Arthur Andersen had an extensive document retention policy in place prior to the problems at Enron, an e-mail instructing employees to comply with a valid document retention policy was the smoking gun leading to that firm's criminal conviction. However, that conviction was overturned and the firm's document retention policies were at least impliedly approved. *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005). It was a Pyrrhic Victory! The firm no longer exists.

**L. Storage.**

1. Paper files must be protected from water, wind, fire, sunlight, insects, rodents, mold, and curious parties.

2. Paperless media must be maintained in retrievable format in a secure location away from the paper documents they are intended to duplicate. Many of us are painfully aware that we cannot be certain as to the life expectancy of media.

3. Maintain master index of files showing location and tentative destruction dates.

**M. Delivering the File to the Client.** Obtain a descriptive receipt, dated and signed by the client. Consider superimposing a copy of the client's driver's license on that receipt.

**N. Firm Copies.** Consider making copies for the firm, especially if there is reason to believe that the client is dissatisfied. If in doubt, make a complete copy of the file before delivering to client. If client did not pick up file, consider retaining that file until statute of limitations has run on malpractice claim against the firm. To be safe, scan the entire file to a pdf file and keep the pdf file in a safe place for your protection. Indeed, if you have a sheet-feeder, it is easy to scan the contents of each file folder, naming the digital file with the same name as the folder as it was originally maintained. As a result, the contents of the paper files as they previously existed can be reproduced to provide protection against the client removing a document and claiming it was not delivered.

**O. Notice Prior to Destruction.** Notify clients prior to destroying their files, particularly if client had not signed off on your firm's destruction policy.

**P. Good File Retention Policies Include Proper File Destruction Policies.**

1. Have a written plan and follow it routinely.

2. No one size fits all. Files for different clients and different areas of practice call for different destruction schedules.

3. Consider statutes of limitations.

a. Malpractice claims are to be brought within two years from the date the client discovers or should have discovered an error.

b. Statutes of limitation are tolled for minors.

c. Absent fraud, income tax claims can be brought within six years.

4. Do not use files as research banks. Have separate research and form files.

5. Give clients original documents.

6. Coordinate law firm's retention policies with those of its corporate clients.

7. When delivering file, advise client regarding client's need to retain materials pursuant to tax or other federal, state, or local regulations.

8. Enclose a copy of file retention policy with all final bills.

9. Reference. The most comprehensive source for further study is Lee R. Nemchik, "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools" 93 LAW LIBRARY J. 7 (2001).

[http://www.aallnet.org/main-menu/Publications/llj/LLJ-Archives/Vol-93/pub\\_llj\\_v93n01/2001-01.pdf](http://www.aallnet.org/main-menu/Publications/llj/LLJ-Archives/Vol-93/pub_llj_v93n01/2001-01.pdf)

**Q. Special Circumstances.**

1. *Lawyer, Insured, Insurer.* Consider the relationship of lawyer who represents an insured and is retained and paid by an insurance company. Does the insured own the file? Or does the insurer? Are the insured's medical records "property of the client"? Can the attorney deliver the entire file to the insurer without the consent of the insured? Does any of this involve HIPAA issues?

2. *Solo Practitioner.* What about when a sole practitioner dies? Must the widow(er) or the estate store those files indefinitely? Is there a different duty with regard to active files and inactive files? What duties befall the lawyer who represents the personal representative of the estate?

**R. The Search for an Answer.**

1. See Appendix D "*An Urgent Appeal for Practicality*" for an overview of the problem.

2. See Appendix C for proposed amendments to Rules (suggested language in bold face).

**S. The ABA Speaks.**

All lawyers are aware of the continuing economic burden of storing retired and inactive files. A lawyer does not have a general duty to preserve all of

his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

1. Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, the return or which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records).

2. A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired.

3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer.

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

5. In disposing of a file, remember that since the fiduciary duty to protect client confidences continues, a lawyer must protect the confidentiality of the contents.

6. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.

7. A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

**T. Recommendation for Rule Change.** The current system is based largely on an impractical idealism that might have worked in another era. Lawyers simply cannot be expected to maintain client files in perpetuity. They and their families need guidance as to how long and what portion of the client files must be kept.

Texas should reconsider its current position and adopt the "end product" rule. The lawyer should return original documents and other documents required by the client and should provide information of special interest to the client that may not be readily available through another source. Everything else

should belong to the lawyer. The client should have access to the file to determine if the client desires other items. Once the client has had this opportunity, the lawyer should be free to dispose of the remainder of the file at any time and without any further notice. See bold face text in Appendix C for a proposal to amend Disciplinary Rule 1.14 and Rule 15.10 of the Rules of Disciplinary Procedure.

## VI. EMPLOYEE RELATIONS.

**A. Inform Employees and Keep Them Informed.** If you are planning to close your office, your employees "know" that something is going on. Give them straight facts so that you do not prematurely lose the one(s) who have "shut-down skills", who you need until the lights go off and so that others can have an opportunity to seek other employment.

**B. Calculate and Arrange to Pay Accrued Benefits.** Examples include unused vacation and sick leave allowances, cafeteria plans, severance pay, bonuses, contributions to retirement plans, and COBRA.

## VII. FURNITURE, FIXTURES, LIBRARY, EQUIPMENT, ETC.

**A. Take Inventory.** List what you have including model numbers and software (including the version). Decide whether to sell, donate, or take things home.

**B. Software Licenses.** Determine if they are transferrable. Remember: There are special problems with deleting hard drives.

**C. Cancel subscriptions.** Cancel subscriptions to WestLaw, Lexis, including any supplements, updates, new volumes, etc. and other subscription services, including newsletters and magazines.

**D. Consider Getting Appraisals.**

**E. Determine What Is Leased and What Is Owned.** If leased, what can be done to return the item or to buy out the lease?

**F. Law Books.** The reality is that they have little, if any, market value anymore and most of the law schools have what you have. However, if your books are in better condition than those that a law school owns, they will keep yours and sell copies in lesser condition.

**G. Telephone and Advertising Services.**

1. Cancel Yellow Page advertising.
2. Get and maintain forwarding number.
3. Change greeting on incoming calls.
4. Cancel internet and other advertising.
5. Simplify firm websites to include only contact information and a notice of the closing of the practice.

**VIII. PREMISES.**

**A. Terminate, Assign, Sublease.** Review office lease to determine rights, responsibilities, expiration date, notification requirements, and rights to assign or sublease.

**B. Separately Metered Utilities.** Arrange to terminate service and obtain refund of deposits.

**C. Security System.** Arrange to terminate service.

**IX. INSURANCE.****A. Notify Agents, Brokers, and Carriers.****B. Terminate Coverages.**

1. Premises liability
2. Tenant policies
3. Group health coverages (N.B. Possible COBRA coverage issues).
4. Workers Compensation

**C. Professional Liability; Obtain an Extended Reporting Period Endorsement.** Malpractice policies in this state are "claims made" policies. Notify the malpractice carrier to obtain an extended reporting period endorsement (commonly known as "tail policy"). This is not a new malpractice policy. It simply extends the time to report a claim under the existing policy which continues along with its existing restrictions, limits, and deductibles. Malpractice insurers typically will only issue extended reporting for an existing policy. Therefore, if you are considering retiring in the next few years and have not had coverage, you should consider securing malpractice coverage now, because you will not be able to get it when you retire if you are not covered at the time you close or sell your practice.

The tail policy should at least cover applicable statutes of limitations for malpractice claims, which is two years. TEX. CIV. PRAC. & REM. CODE § 16.003; *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). The Supreme Court has held that the statute of limitations relating to an attorney's malpractice does not begin to run until the discovery of

the act or omission. *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). Lawyers involved in estate planning may be subject to claims many years later (e.g., *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786 (Tex. 2006) (estate's personal representative may maintain a legal malpractice claim on behalf of the estate against the decedent's estate planners), so you may need to extend coverage for a longer period of time. Furthermore, when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on a malpractice claim against the attorney is tolled until all appeals on the underlying claims are exhausted or the litigation is otherwise concluded. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 119 (Tex. 2001); *Hughes v. Mahaney & Higgens*, 821 S.W.2d 154, 157 (Tex. 1991). Accordingly, if any lawsuits you handled are still on appeal, you should keep extending coverage annually until at least two years have expired after the appeal has concluded.

**X. FINANCIAL.**

- A. Send Final Bills.
- B. Collect Outstanding Receivables.
- C. Obtain Refunds for Deposits and Prepaid Items.
- D. Pay Outstanding Bills and Close Accounts.
- E. Cancel Business Credit Cards.
- F. Safe Deposit Boxes. Remove and properly dispose of client documents. Consider closing box.
- G. Change Signature Authority at Banks.
- H. Trust Accounts.
  1. Return deposits and unearned fees to clients.
  2. Clients who cannot be located.
    - a. IOLTA
    - b. Escheat
  3. Retain records for at least five years. (DR 1.14 and RDP 15.10)
    - I. Update Books of Account.
    - J. Operating Account. Keep this account open for future receipts and expenditures.

**XI. TAXES AND OTHER GOVERNMENTAL TASKS.****A. Prepare and File Final Forms.**

1. Form W-2 for employees
2. Form 1099 to appropriate payees
3. Form 941
4. Federal unemployment
5. Texas unemployment

## XII. NOTIFICATION.

**A. Comply with Rule 13.01 of the Rules of Disciplinary Procedure. See also Section III and Appendix A of this paper.**

**B. Specific Notifications.**

1. Clients
2. Opposing Counsel
3. Employees
4. Suppliers and vendors
5. Professional advisors
6. Internal Revenue Service (Form 8822 for Change of Address)
7. Building management
8. Adjoining offices
9. Bar associations and other member organizations
10. Insurance carriers

**C. Post Office.**

1. File change of address with post office. It is possible to do this on-line for fee of \$1.00.
2. Close post office box.

**D. Compose Automatic Response on E-mail.**

**E. Post Notices on Website.**

## XIII. SALE OF A LAW PRACTICE.

**A. Overriding Concern.** The overriding concern that inhibits the sale of a law practice is protection of the clients' confidences, rights, and property. One of the concerns relating to the issue of multidisciplinary practice ("MDP") was the sale of a law practice. In that context, the issue involves the sale to a non-lawyer. This paper does not deal with that issue.

**B. The Major Issues: Confidentiality, Solicitation, and Fee Sharing with Non-Lawyers.**

1. *Confidentiality.* Every lawyer's files contain confidential information from clients which neither he nor his heirs or personal representatives may properly disclose without the clients express permission.

2. *Texas Comm. on Professional Ethics Opinion 464* (August 1989). A lawyer may not sell accounts receivable to a third party factoring company unless each client involved has previously given consent, after consultation with the lawyer, to the disclosure of confidential information incident to such sale.

In some cases, the fact that the lawyer was engaged by the client may be confidential; in many cases, the nature of the legal services resulting in the fee statement would be confidential; in most cases, the amount of the fee owing and the fact that the fee has not been paid would be confidential.

Under DR 1.05(c)(5) a lawyer may disclose confidential client information to the extent reasonably necessary in a legal proceeding that is brought by the lawyer to collect a fee. Sale of accounts receivable is not a lawsuit by the lawyer. Consent of the client based on informed communication is the only permissible basis for the disclosure of confidential information for a sale of accounts of the client. That consent can be a part of the engagement letter as a condition to the lawyer's accepting employment. Obtaining consent after the representation has begun—although permissible—could be interpreted as coercive.

3. *Texas Comm. on Professional Ethics Opinion 479* (Aug. 1991). A bank that had provided the law firm a loan secured by the accounts receivable requested client names and the amounts owed. DR 1.05 prohibits the disclosure of the names of the firm's clients and the amounts owed by each client.

An attorney is an agent for the client and an agent may not disclose or use information relating to the principal where such information is obtained during the course of the agent's employment. The protections afforded under agency law exceed those which arise solely from an attorney-client privilege.

Confidential information includes both privileged information as well as unprivileged client information, and both types are confidential in nature. DR 1.05(a) states in pertinent part that a lawyer shall not knowingly reveal confidential information of a client or a former client to anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyers law firm.

Query. How could a practice be described, valued, or sold in light of that restriction?

Query. How can lawyers determine if conflicts of interest would impede their practicing together if the rule of strict confidentiality is literally followed?

Query. How can a firm determine whether conflicts of interest would prevent a lateral hire from another firm?

Query. Can lawyers who intend to form a new firm mutually disclose identities of their clients? What about services they have provided to their clients? Fees charged to those clients?

Query. Are the foregoing exchanges between multiple lawyers permitted exceptions to requirements of strict confidentiality? Does that favor one



class of lawyers (those in firms) over another class of lawyers (solo practitioners)?

Query. Does that restriction result in unequal protection of the law as to solo practitioners?

#### 4. Solicitation.

a. Advertising “Established Clientele”. In Texas Ethics Opinion 266 (Oct. 1963), a widow proposed to advertise in the Texas Bar Journal: For sale: library, furniture, good lease, and established clientele. The Opinion concluded that it was unethical for a lawyer to purchase, to sell, or to advertise for sale a law practice with “established clientele”. The Committee concluded that while a non-lawyer heir is not bound by these ethical restraints, no Texas lawyer could purchase or accept advertisement for publication in the Bar Journal. However, it was proper to advertise for sale the library, office equipment, and unexpired lease without “established clientele”.

b. Yellow Pages Listing. Texas Ethics Opinion 185 (Oct. 1958), regarded it as a violation for any attorney to list in the yellow pages of the telephone directory the name of a deceased attorney.

Query. Does this restriction harm—rather than protect—the clients who are searching for their documents previously entrusted to their now deceased solo practitioner?

c. Firm Names and Letterhead. Texas Comm. on Professional Ethics Opinion 375 (Oct. 1974) referred to then applicable DR 2-102(A)(4) providing that a letterhead or a law firm may also give the names of members and associate and names and date relating to deceased and retired members.

This conclusion was formalized into the current Disciplinary Rules which provide that a lawyer in private practice shall not practice under a trade name, or a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more lawyers in the firm and if otherwise lawful, a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. DR 7.01(a).

Query. Are clients misled or are they properly protected by permitting larger firms to operate under what in essence is a trade name while prohibiting it for solos?

Query. Does that restriction result in unequal protection of the law as to small firms and especially as to solo practitioners?

5. *Fee Sharing with Non-Lawyers*. Here, the debate rages, not only with respect to barratry, ambulance chasers, runners, and the like, but also regard-

ing the key barriers to multi-disciplinary practice—confidentiality, conflicts of interest, control, and encouraging non-lawyers to engage in the unauthorized practice of law. Lost in the shuffle are the concerns of the families of deceased lawyers and their need to realize value from the practice of their now deceased solo practitioner.

DR 5.04 presents an obstacle course that must be navigated in order to obtain the permitted benefits. The Rule provides, in part, that a lawyer or law firm shall not share or promise to share legal fees with a non-lawyer, except that a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of a deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer. DR 5.04(a).

The foregoing is in addition to DR 1.04(f) relating to requirements for division of fees between living lawyers who are not in the same firm. DR 1.04(g) expands that rule by stating that it does not prohibit payments to a former partner or associate pursuant to a separation or retirement agreement.

Note that DR 1.04(f) emphasizes that the division of fees between lawyers not in the same firm shall not be made unless the division is in proportion to the professional services performed by each lawyer. The principal reasons for the limitations are to prevent solicitation by lay persons for lawyers and to avoid encouraging or assisting non-lawyers in the practice of law.

The evil to avoid is not the collecting of funds by the solo's estate or heirs but rather the payment by the purchasing lawyer. *Atkins v. Tinning*, 865 S.W.2d 533, 536 (Tex. App.—Corpus Christi 1993, no writ).

#### C. Arguments Against Permitting Sales of Law Practices.

1. Clients are not commodities that can be purchased and sold at will.

2. The clients have no control over the selection of the purchaser.

3. The seller would be motivated to point clients to the firms that pay the highest referral fees rather than to the best lawyers.

4. Purchasers would pay less attention to files where they had to split fees.

5. If a value can be placed on goodwill, for this purpose, it would be an additional asset subject to death taxes.

#### D. Arguments in Favor of Permitting Sales of Law Practices.

1. A clear and practical rule would continue to protect confidential information without impeding the formation of law firms, affiliations with different firms, or the orderly transition of the practice of a solo practitioner.

2. The current necessity of breaching the Rules of confidentiality provides “justification” for ignoring or short-cutting other professional obligations and tends to instill the concept of “being above the law”.

3. Although clients cannot be bought and sold, what is valuable is the potential opportunity to handle their affairs.

4. There are two elements being transferred—the business assets (hard assets) of the practice and a system for generating future revenues. In many instances, good will is a third element.

5. The buyer, seller, and clients all have mutually beneficial interests. The buyer wants an ongoing stream of income from an established client base and referral source. The seller wants to benefit from a reputation built over a lifetime of serving clients, contacts, referral sources, current files, and an infrastructure for delivering legal services. Clients want solutions to problems and issues, consistent advice and counsel, and the convenience of not having to shop for another lawyer.

6. Clients benefit because someone with a vested interest takes over the practice. Who is better to help the clients than someone who has paid for the privilege of serving them?

7. When one lawyer takes over the practice of another lawyer, the selling lawyer (or the estate or heirs) should be able to obtain compensation for the reasonable value of the practice just as withdrawing partners of law firms may do.

8. Negotiations between the buyer and seller relating to specific representation of identifiable clients no more violates confidentiality than do discussions concerning firm mergers, lateral hires, or admission of new partners and their respective “books of business”.

9. Sale to a lawyer who was not pre-approved by the clients is no different for the clients than a law firm hiring new associates or admitting new partners who were not pre-approved by the clients.

10. All elements of client autonomy survive the sale.

#### E. Valuation and Payment.

1. *Value is the Potential.* Valuation of the practice presents many challenges. The computer, library, and other tangible assets are of rapidly depre-

ciating value. What is of value is the potential for keeping the practice alive.

2. *Seller’s Wants.* The seller wants to be assured that the clients have access to quality legal services, that the risk of seller’s malpractice is minimized, that seller receives a fair price for the opportunity being afforded to the buyer, and that the seller is paid by the buyer.

3. *Buyer’s Wants.* The buyer wants a ready-made opportunity, an established clientele, the existing telephone number and perhaps an office building or favorable lease, and the ability to pay for this when, as, and if fees are collected.

F. **ABA Model Rule 1.17.** The Model Rule permits the sale of a law practice. This rule not only permits the sale of a law practice, but also its goodwill. This rule, or some variation, has been adopted (as of 2014), in all states except Alabama, Louisiana, and Texas.

1. *Applicability of the Model Rule.* The ABA model rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer, but it does not apply to admission to or retirement from a law partnership of professional association, retirement plans and similar arrangements, or a sale of tangible assets of a law practice. ABA Model Rule of Prof’l Conduct 1.17, Cmts. 13-14. The sale may be made by a non-lawyer representative, such as an executor or guardian.

The full text of the rule together with explanations and rationale, is set forth in Appendix F.

2. *Variations Adopted in the States.* Some of the states require the law practice to have been in operation for a minimum period of time, such as 6 months or 5 years. Some require sale of the entire practice or sale to a single lawyer or law firm. The rationale for requiring sale of an entire practice is intended to prevent the purchaser from cherry picking the clients and thus ensure continued representation of the smaller or less profitable clients or cases.

#### G. Current Texas Law on Selling a Law Practice

1. *Texas rule is not clear.* While Texas does not specifically prohibit the sale of a practice, it does not expressly permit such a sale. Even if not prohibited, there are many hurdles to jump and some serious ethical risks are imposed on the purchaser and seller alike.

2. *Form over Substance.* The traditional way to maneuver the minefields in Texas is to bring new lawyers into a law practice as partners or “junior” partners.

It is often in the best interest of both buyer and seller to have a period of transition. A longer,

more active transition provides an opportunity to introduce and assist the buyer with establishing relationships with clients and staff. It is also one way to make a small or personal practice “marketable”.

Introduce the new lawyer-partner to the clients and have the new lawyer take on more responsibility so that, over time, the clients become familiar with their new counsel. Consider changing the firm name by adding the new lawyer’s name.

For the buyer, it provides an opportunity to tailor the practice while benefitting from the seller’s knowledge of the practice. This type of “mentoring” would be important for a new graduate just starting a career. Some manner of financing, which may be a variant of “sweat equity,” is also more likely achieved with a period of transition.

Law firm payments to retiring lawyers are accepted transactions and exempt from the sale of practice or fee-splitting rules. As such, if the law practice purchaser is brought into the practice as a partner, most of the problems can be avoided. When the time comes to withdraw completely from the practice, the retiring lawyer can be paid pursuant to a permissible retirement agreement.

#### H. Conclusion: The Supreme Court Should Adopt a Rule Permitting Sales of Law Practices.

A Texas Rule permitting the Sale of a Law Practice is not only desirable, it is a necessity. See Appendix G for Brill’s Proposed Rule for Sale of a Law Practice. The Board of Directors of the State Bar of Texas should approve the “Brill Rule” and submit it to the Texas Supreme Court for adoption pursuant to its inherent power. The Supreme Court of Texas should adopt and promulgate that Rule. See Appendix H for proposed Resolutions in support of Brill Rule.

Query. Is there at least a need for a Rule covering the practice of a lawyer who suffers a stroke or suddenly drops dead?

### XIV. PERSONAL PLANNING.

#### A. Have the Basic Documents and Be Sure They Are Current.

1. Will (See Appendix J for suggestions for a lawyer’s will)
2. Living Will
3. Medical Power of Attorney
4. HIPAA Release
5. Durable Power of Attorney

#### B. Planning for Death.

1. Consider preplanned and prepaid funeral.
2. Write your own obituary.

3. Plan your funeral to include pall bearers, scriptural and other readings, and music.

### XV. RETIREMENT ISSUES.

**A. Retirement Is Not The End Point.** It is a journey and not a destination. It is the threshold to the rest of your life.

1. Plan to wear out rather than rust out.
2. Learn to thrive and not just survive.
3. Fill your life with purpose and meaning.

#### B. Is 65 Really Over the Hill?

1. The Young Old 65-74.
2. The Old 75-84.
3. The Old Old 85-94.
4. The Frail Old 95+.

#### C. A Different “Job”.

1. Learn to organize your life without full time work.
2. You had an interesting career. Now it is time for an interesting retirement.
3. Pursue your dreams and your own goals rather than using your skills to help others reach theirs.
4. The vast majority of retirees will work again for pleasure, mental stimulation, and personal fulfillment.

**D. Specific Suggestions**—Try some of the ideas contained in Robert P. Wilkins’ book “50 Things to Do with the Rest of Your Life”.

### XVI. DEATH OF A SOLO PRACTITIONER

#### A. What Court Has Jurisdiction in Texas.

1. *General.* At first glance, it would appear that a probate or county court would have exclusive jurisdiction in dealing with issues relating to the winding up of the practice of a deceased solo practitioner. See TEX ESTATES CODE §§ 32.001-32.004 (formerly Probate Code §§ 4A-4F).

2. *District Court and Statutory Probate Court Jurisdiction.* Under Section 13.02 of the Rules of Disciplinary Procedure, when an attorney has died, any “interested person may petition a district court in the county of the attorney’s residence to assume jurisdiction over the attorney’s law practice.” However, the Rule also provides that in counties with a statutory probate court, the petition may be filed in the statutory probate court.

Rule 13.03 provides that following the filing of the petition, the court shall set a hearing and 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 the attorney has died and that supervision of the court is required, the court shall assume jurisdiction and appoint one or more attorneys to examine files, contact clients and others who are affected by the death of the attorney, apply for extensions of time, and deliver files and other property to clients. No bond is required of the appointed lawyers and they are not to incur any liability except for intentional misconduct or gross negligence. *See Appendix A* for text of Sections 13.02 and 13.03. Notice that these Rules do not address compensation for the appointees or the responsibility for its payment.

3. *Statutory Courts Exercising Probate Jurisdiction.* In counties where there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding probate and administrations shall be filed and heard in such courts rather than in the district courts, unless otherwise provided by the legislature. TEX. ESTATES CODE §§ 32.005, 34.001 (formerly Probate Code §§ 4F, 5B). Under section 34.001, the statutory probate court is authorized to transfer cases from the district court.

Notwithstanding other provisions of the Estates Code, statutory probate courts may hear all applications filed against or on behalf of any decedent's estate, including estates administered by an independent executor. All statutory probate courts shall have the same powers over independent executors that are exercisable by the district courts. In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court. Probate Code § 5A(b) [repealed]; *see* TEX. ESTATES CODE § 32.005 (formerly TEX. PROB. CODE. § 4F).

Query. Is a temporary administration a workable alternative?

### **B. Two Ways to Terminate the Law Practice of a Deceased Lawyer Pursuant to Disciplinary Rules of Procedure.**

1. *Rule 13.01.* Most practices will be closed down by following the procedure in this Rule as well as the many additional steps contained in this paper.

2. *Rules 13.02 and 13.03.* Although the procedures of these Rules are more formal and not widely known by lawyers or even by the sitting judges,

they can offer far more flexibility and protection for the lawyer who is in charge of closing the practice.

a. The powers that are enumerated in Section 13.02 are not the only ones available and should be expanded, supplemented, and tailored to the actual practice situation of the deceased lawyer.

b. Even prior to filing the application under Rule 13.02, it is good practice to alert the Court concerning the situation and to discuss the need for the various powers.

NOTE: This is an in rem proceeding and is not a prohibited ex parte communication with the Court.

c. File the appropriate application and obtain an order from the Court prior to even filing an application to probate the decedent's will or to request the appointment of an administrator.

NOTE: Once the Court has granted an independent administration and the independent executor has qualified, the Court ordinarily loses jurisdiction for all matters except as specifically provided in the Estates Code. It is not clear whether the Court can effectively isolate the law practice from other assets even by appointing an independent executor to take charge of the practice pursuant to Rules 13.02 and 13.03.

d. The State Bar of Texas has adapted material from the State Bar of Oregon and has provided written procedures entitled "How to Protect Clients and the Firm In The Event of Death, Disability, or Abandonment of Practice". This can be found at:

<http://texaslawpracticemanagement.com/free-resources/closing-practice/closing-practice/protect-clients-firm-event-death-disability-impairment-incapacity/>

### **C. Handling Probate of Estate of a Deceased Lawyer.**

#### *1. General Problems.*

a. All of the other probate procedures are applicable to a lawyer's estate. These are just a few of the "extras".

b. Deceased lawyer practiced in areas where probating lawyer lacks expertise.

c. Deceased lawyer's records may be disorganized making it extremely difficult to determine critical dates and responsibilities.

d. Someone, presumably a lawyer, must take time to review files, contact clients, and meet with clients to answer their questions. Where clients have obtained other counsel, arrangements must be made to transfer their files. Should the client pay or be expected to pay for these services? Can the probating attorney afford to do this at a reduced rate? Can the estate afford to pay for these services?

e. Be aware that notification made by anyone other than the original lawyer to the deceased lawyer's clients may be subject to the advertising rules. The Advertising Review Committee has opined that a written communication notifying the clients of a solo practitioner of the practitioner's death **may** be exempt from the provisions of Disciplinary Rules 7.05 and 7.07 if the communication provides nothing more than notification of the death, the relationship between the author of the letter and the deceased practitioner, and the location and availability of the deceased practitioner's files. See TEX. DISCIPLINARY R. PROF'L CONDUCT 7.05, 7.07; see Appendix B.

However, if the written communication also contains content designed to communicate the qualifications or the availability of legal services of any lawyer or law firm, then Part VII, Texas Disciplinary Rules of Professional Conduct may apply. See Appendix I for text of Tex. Advertising Review Interp. Cmt. 23 (Feb. 2004).

f. Personal representative should notify a deceased lawyer's malpractice carrier to obtain extended reporting period endorsement (commonly known as "tail policy"). This is not a new malpractice policy. It simply extends the time to report a claim under the existing policy with its existing restrictions, limits, and deductibles. The tail policy should cover applicable statutes of limitation that are typically two years. TEX. CIV. PRAC. & REM. CODE § 16.003. However, the Supreme Court has held that the statute of limitations relating to an attorney's malpractice does not begin to run until the discovery of the act or omission. *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). See Section IX, C, above.

#### D. Standard Operating Procedure for Estates of All Lawyers.

1. The first priority is to check calendar and active files to determine deadlines and due dates.
2. Open and review all unopened mail.
3. Review all unfiled documents and match to appropriate files.
4. Contact clients to advise of situation and need for prompt action.
5. Contact courts and opposing counsel for matters involving pressing deadlines.
6. Review files to determine which files are open and which are closed and the extent to which copies or other materials should be retained.
7. Maintain detailed records of disposition of all client files and get receipts.
8. Review all undeposited checks and either return them to payor or deposit them.
9. Send final bills to clients.

10. Analyze funds in trust account and return unearned portion to clients.

11. Notify bar associations of attorney's death.

12. Notify malpractice carrier and consider "tail coverage".

13. If the attorney was also a Notary Public, deliver the notarial book to the County Clerk pursuant to TEX. GOV'T CODE § 406.022.

## XVII. CONCLUSION

**A. Best Interests of Our Clients.** Death and disability or retirement of a lawyer creates a real gap in services to a client. Most clients seek continuity and convenience in addition to competency. Clients always have a right to terminate representation and engage other counsel and thus they retain a veto over the sale of their work. Their individual objections should not affect the lawyer's relationship with other clients.

**B. Lawyers Should Not be Forced Into the Storage Business.** The current, open ended and idealistic view that the client owns the entire file into perpetuity defies common sense. Destroying a client file at any time is at the lawyer's peril for malpractice claims. The proposal to permit (not require) a lawyer to dispose of most files after five years is clearly intended to remove disposition from the purview of the Disciplinary Rules and could provide a bright line if Texas should adopt the end product rule.

At some point, someone will need to deal with or dispose of client files. Isn't it far superior for this to be done by the lawyer who sells a practice than for a non-lawyer family member to do? If the files are to be reviewed, returned, or destroyed, the lawyer is the best person to do it.

**C. Confidentiality.** Literal interpretation of black letter rules of confidentiality such as comparing client lists to avoid conflicts of interest.

The concept of confidentiality is ingrained in lawyers, but most practicing lawyers believe there is an implied exception when they identify clients and their matters in the context of forming a partnership or hiring another lawyer for the firm. While in those cases, the rule is observed the breach, the rule becomes absolute when dealing with the sale of a solo's practice.

**D. Sharing Fees.** The barratry rules should not apply to payments to the families of deceased or disabled lawyers. They did not create the situation and should not be denied fair compensation for the sale or transfer of the lawyer's practice. They should

not be treated as “runners” or penalized because the lawyer did not practice with a firm.

E. **Sales are Commonplace.** Look at the classified ads in most issues of the Texas Bar Journal and you will see offers for the sale of a practice. These and other prospective sellers and buyers should have a bright pathway through the maze of rules and regulations in order to effect the sale of a practice.

F. **Bottom Line.** Realistic rules that permit the sale of a practice must be adopted that will be beneficial not only to the seller and the buyer, but also that is in the best interest of our clients.

## APPENDIX A

Excerpts Texas Rules of Disciplinary Procedure

## Art. XIII. CESSATION OF PRACTICE

**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. TEX. DISCIPLINARY R. PROC. 13.01.

**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. TEX. DISCIPLINARY R. PROC. 13.02

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

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

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

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

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

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

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

The custodian shall observe the attorney-client relationship and privilege as if the custodians were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this part. Ex-

cept 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. TEX. DISCIPLINARY R. PROC. 13.03

## APPENDIX B

### Excerpts from Texas Disciplinary Rules of Professional Conduct

#### **Rule 1.05 Confidentiality of Information**

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

- 1) Reveal confidential information of a client or a former client to:
  - (i) a person that the client has instructed is not to receive the information; or
  - (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
- 2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.
- (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
- (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(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.
- (3) To the client, the client's representatives, or the members, associates, and employees of the lawyers firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
- (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
- (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
- (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
- (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer also may reveal unprivileged client information.

- (1) When impliedly authorized to do so in order to carry out the representation.
- (2) When the lawyer has reason to believe it is necessary to do so in order to:
  - (i) carry out the representation effectively;



- (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
- (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client;
- or
- (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act. (f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

#### **Rule 1.14 Safekeeping Property**

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a trust or escrow account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another 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 separate by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

#### **Rule 1.15 Declining or Terminating 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.

#### **Rule 7.03 Prohibited Solicitations & Payments**

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02(a); or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(f) As used in paragraph (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

#### **Rule 7.01 Firm Names and Letterhead**

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain "P.C.," "P.A.," "L.L.P.," "P.L.L.C.," or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.

#### **7.05 Prohibited Written Solicitations**

(b) ... written .... communication to a prospective client for the purpose of obtaining professional employment:

(1) shall, in the case of a nonelectronically transmitted written communication, be plainly marked "ADVERTISEMENT" on its first page, and on the face of the envelope or other packaging used to transmit the communication....

(5) shall disclose how the lawyer obtained the information prompting the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication, or a family member of such person(s)....

(d) All written .... communications made to a prospective client for the purpose of obtaining professional employment of a lawyer or law firm must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.

(e) A copy of each written ... solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, address, telephone number, or electronic address to which each communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination.

(f) The provisions of paragraphs (b) and (c) of the Rule do not apply to a written solicitation communication ...

(3) if the lawyer's use of the communication to obtain professional employment was not significantly motivated by a desire for, or by the possibility of obtaining pecuniary gain.

#### **Rule 7.07 Filing Requirements for Public Advertisements and Written Solicitations**

(a) ... a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, no later than the mailing or sending by any means of a written solicitation communication:

(1) a copy of the written ... solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes or other packaging in which the communications are enclosed;

(2) a completed lawyer advertising and solicitation communication application form; and

(3) payment of the fee set by the Board of Directors.

(e) The filing requirements of paragraph (a) ... do not extend ...

(7) if the lawyer's use of the communication to obtain professional employment was not significantly motivated by a desire for, or by the possibility of obtaining pecuniary gain.

### **APPENDIX C**

#### **Proposal to Adopt the "End Product" Rule with Respect to File Ownership by Amending Texas Rule of Professional Conduct 1.14 and Texas Disciplinary Rule of Procedure 15.10**

##### **Rule 1.14 Safekeeping Property**

(a) A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property. Such funds shall be kept in a separate account, designated as a trust or escrow account, maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and another 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 separate by the lawyer until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

**(d) In the absence of a contractual provision, a client request or an ongoing dispute, the files, funds, and other property belonging to a client will be presumed to be abandoned five (5) years after termination of the representation and maintenance and preservation will no longer be required under these Rules.**

##### **15.10. Maintenance of Funds or Other Property Held for Clients and Others**

Every attorney licensed to practice law in Texas who maintains, or is required to maintain, a separate client trust account or accounts, designated as such, into which funds of clients or other fiduciary funds must be deposited, shall further maintain and preserve for a period of five years after final disposition of the underlying matter, the records of such accounts, including checkbooks, canceled checks, check stubs, check registers, bank statements, vouchers, deposit slips, ledgers, journals, closing statements, accountings, and other statements of receipts and disbursements rendered to clients or other parties with regard to client trust funds or other similar records clearly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries, and disbursements of the funds or other property of a client.

**In the absence of a client request or an ongoing or actual threatened dispute, the files, documents, and other items belonging to a client will be presumed to be abandoned five (5) years after termination of the representation and maintenance and preservation will no longer required under these Rules.**

## APPENDIX D

### AN URGENT APPEAL FOR PRACTICALITY

Like many of you, I am surrounded by paper. Paper mail. Paper documents. Paper pads. Paper publications. Paper scraps with indecipherable notes. Paper files.

At one time the flow of paper was more manageable. Enter the plain paper copy machine and then, automatic typewriters and word processing. The blizzard begins in earnest. Your clients generate paper. You produce paper. Third parties generate paper. When all of that paper finds its way into your office, you're lucky if it finds its way into files for your clients. Files overwhelm your desk, your credenza, your file cabinets, storage units, and now your floor. Soon it will be on your side of the garage but when it affects the other side, it's long since time for a solution.

To many, the solution is the shredder, the recycling bins, the garbage cans, or simply the waste basket. But are those real life solutions? Maybe for your files and other papers, but what about client files?

OK. So you gave your clients a CD with copies of the contents of their file or at least most (some?) of the contents. You don't have written consent from your client authorizing you to destroy that file. You believe that CD should satisfy your obligation to them, but that assumes that your client has the technology to print or at least read the content. And, it assumes that the technology will not become obsolete or be superseded. Think mag cards, eight track tapes, and microfilm

Who owns the file? The client. What part? All of it. Who says so? The Bankruptcy Court of the Northern District of Texas, the Court of Criminal Appeals, and the Supreme Court of Texas. Why shouldn't Texas have the "end product" rule? Too practical.

How can that be? As a lawyer, you are the agent for the client and an agent owes a fiduciary duty to the principal. Not yet convinced? You are a bailee for hire and your client is the bailor and you have a duty of preserving and of safekeeping the file and accounting to your client on demand.

But, you say, the client never asked for the file and it's been a long time and there is nothing of significance in that file. Who defines significance? Does the passage of time change ownership or modify or eliminate your duties to your client and to your client's property? I don't think so, either.

You say that you have an engagement agreement that permits you to destroy that file? Have you read it lately? Are you first required to provide notice and the opportunity to retrieve the file and its contents? Have you given the notice? Can you give the required notice? Can you locate the client? Do you even remember the client?

Do you have agreements with all of your clients? If you do, you haven't been in practice as long as some of us. And what about those files not covered by a good agreement?

Almost all lawyers will agree that our duties to our clients override our own self interest. But is it practical to impose a lifelong obligation on lawyers to adhere to those rules of ownership? Is it realistic? What can be expected of the beneficiaries of the deceased lawyers who themselves are not lawyers? Do they have the same obligations? Will they preserve those files and attempt to locate the clients? Will they proceed directly to the landfill?

If destruction is to be the ultimate fate of files belonging to clients, it is in the best interests of our clients for that destruction to be performed or supervised by a lawyer in order to protect the confidences of our clients.

The following Resolutions are submitted in an effort to provide a realistic and workable procedure for the benefit of both lawyer and client.

## APPENDIX E

### RESOLUTIONS ADOPTED BY GENERAL PRACTICE, SOLO AND SMALL FIRM SECTION OF THE STATE BAR OF TEXAS

WHEREAS, the Supreme Court of Texas has the constitutional and statutory responsibility within the State for the lawyer discipline and disability system, and has inherent power to maintain appropriate standards of professional conduct.

WHEREAS, in order to carry out this responsibility, the Supreme Court of Texas promulgated rules (“the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure”) for lawyer discipline and disability proceedings and these Rules regulate the conduct of lawyers.

WHEREAS, Item 10 of the Preamble to the Texas Disciplinary Rules of Professional Conduct states that they are “rules of reason”.

WHEREAS, the Supreme Court of Texas and the State Bar of Texas share the responsibility for regulating the conduct of lawyers who are licensed to practice in Texas. Subject to the inherent power of the Supreme Court of Texas, the responsibility for administering and supervising lawyer discipline and disability as specifically delegated to the Board of Directors of the State Bar of Texas.

WHEREAS, the Supreme Court of Texas has approved, adopted, or promulgated the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure in order to provide guidelines for the regulation of the practice of law in the State of Texas.

WHEREAS, the Board of Directors is vested with the authority to adopt rules of procedure and administration not inconsistent with the Texas Rules of Disciplinary Procedure, the responsibility for the enforcement of those Rules, and as the duty to seek clarification and modifications when appropriate.

WHEREAS, Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct and Rule 15.10 of the Texas Rules of Disciplinary Procedure require a five year retention of certain records relating to funds and other property belonging to clients.

WHEREAS, without a comparable Rule relating to the maintenance and preservation of the files, documents, and other items belonging to a client, a lawyer has a never-ending obligation for their maintenance and preservation.

WHEREAS, the current never-ending obligations of lawyers to store indefinitely all files of all clients is of no real benefit to clients but at the same time, it is an unreasonable burden on the lawyer and ultimately on the family of the lawyer.

WHEREAS, a five year period for retaining client files would provide reasonable protection for clients and welcome relief for lawyers.

WHEREAS, the General Practice, Solo and Small Firm Section of the State Bar of Texas has approved the following resolutions and hereby requests the Board of Directors of the State Bar of Texas to adopt the following modifications of Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct and Rule 15.10 of the Texas Rules of Disciplinary Procedure.

BE IT RESOLVED, that the Board of Directors of the State Bar of Texas petition the Supreme Court of Texas to exercise its inherent power to amend Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct by adding the following provision:

(d) In the absence of a contractual provision, a client request, or an ongoing dispute, the files, funds, and other property belonging to a client are presumed to be abandoned five (5) years after termination of the representation and maintenance and preservation will no longer be required under these Rules.

BE IT RESOLVED, that the Board of Directors of the State Bar of Texas petition the Supreme Court of Texas to exercise its inherent power to amend Rule 15.10 of the Texas Rules of Disciplinary Procedure by adding the following provision:

In the absence of a contractual provision, a client request, or an ongoing dispute, the files, documents, and other items belonging to a client are presumed to be abandoned five (5) years after final disposition of the underlying matter and maintenance and preservation will no longer be required under these Rules.

## APPENDIX F

### ABA Model Rule 1.17 Sale of Law Practice

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 firm;

(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 - 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. Providing the purchaser access to client-specific information relating to the representation and to the 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 G

### Proposed Sale of Law Practice Rule

#### Rule XXX Sale of Law Practice

(a) As used in this Rule:

(1) "Buyer" means an individual lawyer or a law firm;

(2) "Seller" means an individual lawyer, the guardian of the estate of a disabled lawyer, the executor, administrator, heir, or beneficiary of a deceased lawyer, a trustee of a trust for the benefit of an individual lawyer, or an agent acting pursuant to a power of attorney from an individual lawyer.



(b) A lawyer or a law firm may sell or purchase all or a portion of a law practice, including goodwill, if the conditions of this Rule are met.

(c) Prior to the exchange of information between buyer and seller, the parties must enter into a non-disclosure agreement to maintain in confidence any information derived from such exchange.

The parties must compare client lists in order to identify conflicts of interest, to determine if any such conflicts are waivable, and to obtain written waivers from affected clients prior to transferring their files to buyer. When conflicts are not or cannot be waived, those matters may not be transferred to buyer.

Buyer and seller may also exchange information regarding the nature and extent of each other's practice, the status of all pending matters and other work in progress, their financial records including IOLTA and other trust accounts, engagement agreements, accounting, tax, and other internal records.

These disclosures by buyer and seller are exceptions to the traditional requirements of strict confidentiality and, as so limited, are not violations of this or other Rules.

(d) If a sale and purchase is agreed upon, written notice is to be given to those of seller's clients:

(1) for whom seller is currently providing a service;

(2) for whom seller reasonably anticipates providing a service within the next 12 months, and

(3) for whom seller has performed a service within the prior 12 months. The notice must state:

(1) whether seller is completely or only partially ceasing to practice or will continue to practice with buyer;

(2) the identity of the buyer along with details regarding buyer's background including bar admissions, qualifications, experience, and practice areas and the location where the buyer intends to maintain seller's practice;

(3) that no change will be made to the fee arrangement without the client's prior consent;

(4) that the client retains the right to retain other counsel at any time and, if the matter involves pending litigation, that written substitution of counsel and approval by the court first must be obtained;

(5) that the client retains the ongoing right to possession of the client's files;

(6) when and where the client's files are and will be available for retrieval, that a written receipt will be required, and that seller and buyer are entitled to make copies at their own expense;

(7) that funds belonging to the client that are on deposit in seller's IOLTA or other client trust account will be transferred to buyer who will be responsible for such funds;

(8) that if the client terminates the attorney-client relationship, the client is entitled to a refund of all the unearned portion of any funds held by seller for the client's benefit;

(9) that client's consent to buyer's having possession of client's files will be presumed if client makes no written objection within 30 days after the giving of the notice; and

(10) that buyer will assume all professional obligations to seller's clients.

A notice from any lawyer to that lawyer's clients, is a permitted communication and is not a violation of these Rules. If such a notice is sent by buyer due to the inability of seller to give the notice, it is not subject to compliance with the Rules regarding advertisements or communications with non-lawyers nor is it an event that constitutes barratry or solicitation.

If notice cannot be given to a client, a district court or a court exercising probate jurisdiction, as applicable, can determine whether or not to permit the transfer of representation to buyer.

(e) The purchase of seller's practice or part thereof carries with it the obligation of buyer to assume the professional obligations of seller's practice and to take possession and preserve all of seller's active, inactive, and closed client files. Buyer shall have access to all of such files and other records relating to seller's practice and shall preserve confidentiality to the same extent as though having been originally retained by each client.

(f) Except for emergencies, due dates, and deadlines requiring immediate response, buyer may not perform and will not be responsible for performing services for seller's clients until the expiration of the 30 day notice period or until receiving specific authorization from the client, whichever occurs first.

The court in which a matter is pending shall determine whether to permit buyer to assume representation of seller's client.

Other proceedings relating to the sale or proposed sale of seller's practice are to be brought in a district court or a court exercising probate jurisdiction, as the case may be and venue is in the county in which seller most recently maintained an office for the practice of law.

(g) Payments for the purchase of the practice of seller

(1) may be made to seller even though other Rules would: (i) require consent of the client, (ii) require the fees to be allocated between the parties based on services rendered or on responsibility assumed, or require buyer and seller to practice in the same firm,

(2) may be paid to a trustee of a trust for the benefit of seller, to the guardian of seller's estate, to seller's agent acting under a power of attorney, and to the executor, administrator, heirs, and beneficiaries of a deceased seller.

Payments to such non-lawyer payees are permitted notwithstanding the fact that other Rules might be regarded as prohibiting such payments.

(h) In addition to satisfying the provisions of this Rule, buyer and seller must comply with the applicable provisions of Rules 13.01, 13.02, and 13.03 of the Texas Rules of Disciplinary Procedure.

## APPENDIX H

### PROPOSED RESOLUTIONS FOR

#### NEW RULE PERMITTING SALE OF A LAW PRACTICE

WHEREAS, approximately 37% of all Texas lawyers in private practice are solo practitioners.

WHEREAS, following the lead of the American Bar Association, forty-seven states and the District of Columbia have all adopted a rule permitting the sale of a law practice, including good will.

WHEREAS, only three states, Alabama, Louisiana, and Texas, have failed to adopt a rule that would provide a safe harbor for the sale of a law practice.

WHEREAS, it is common place and accepted practice for lawyers to form partnerships, to transfer their practices from one firm to another, and to provide benefits to retiring partners, associates, and the families of deceased partners and associates.

WHEREAS, the profession has accepted the foregoing activities as complying with the Disciplinary Rules relating to preservation of client confidences, avoiding barratry and solicitation, the unregulated division of fees within a firm, and paying compensation to non-lawyers (members of the family of deceased lawyers who had been associated with the firm).

WHEREAS, seemingly impenetrable barriers exist to impede, if not to prohibit, the sale of the practice of a solo practitioner based on literal interpretations of Rules requiring strict confidentiality, Rules prohibiting certain divisions of fees, and even defining misconduct so broadly as to restrict or even prohibit payments to the non-lawyer family members for anything beyond the fair market value of the law books, furniture, equipment, and other tangible assets of the a deceased lawyer's practice.

WHEREAS, additional arguments against the sale of a practice have included claims that clients have no control over the selection of the purchasing lawyer, that the selling lawyer would seek to sell to the highest bidder and not necessarily to the best lawyer, and finally, that clients are not commodities that can be bought and sold.

WHEREAS, clients of the larger firms ordinarily have no control over the selection of lawyers who join the practice with those firms; that those clients cannot require a particular lawyer to personally perform the services requested; that the seller, the buyer, and the client have mutually beneficial interests that the client will be well represented by someone who has paid for the privilege of representing that client; that the buyer is acquiring the potential right to earn the practice of the clients of the seller; and that lawyers should not be prohibited from realizing financial benefit accruing from years of their efforts in building and maintaining successful practices; and that buying and selling clients, as commodities or otherwise, is not involved.

WHEREAS, with law firm mergers announced on an almost daily basis, all with the potential of disqualifying conflicts of interest, it is clear, especially for the largest firms, that even the mere comparison of client names necessarily involves the disclosure and exchange of confidential information; that clients have no control over the details of the merger or over personnel decisions, and that when the practices of lawyers in smaller firms are merged into the practice of a much larger firm, those small firm lawyers effectively "monetize" their practices in the form of interests in the surviving partnership and in greatly increased compensation.

WHEREAS, the different standards are so glaring as to amount to discrimination in favor of one group of lawyers (those in firms, particularly large firms) over a significant but different group of other lawyers (solo and small firm practitioners).

WHEREAS, the application of differing standards reinforces the widespread perception that the "big firms control the Bar" and that their lawyers are exempt from the sanctions of the Disciplinary Rules the application of which seemingly appear to be limited to misconduct by solo and small firm lawyers.

WHEREAS, in order to provide equal protection to all lawyers regardless of their practice setting, a new Rule should be added to the Disciplinary Rules to expressly permit the sale of a law practice.

WHEREAS, the \_\_\_\_\_ has approved the following resolutions and hereby requests the Board of Directors of the State Bar of Texas to adopt a new provision, the terms of which are contained on the pages attached and designated as Exhibit One, to be added to the Disciplinary Rules

BE IT RESOLVED, that the Board of Directors of the State Bar of Texas petition the Supreme Court of Texas to exercise its inherent power to amend and add to the Texas Disciplinary Rules of Professional Conduct by adding a new provision, the terms of which are contained on the pages attached and designated as Exhibit One and in doing so, adopt the following resolution.

BE IT RESOLVED, the Board of Directors of the State Bar of Texas has determined that the foregoing resolution has merit and has approved such resolution and hereby submits the same to the Supreme Court of Texas for adoption pursuant to the Court's inherent power.

## APPENDIX I

### Interpretive Comment 23 from Advertising Review Committee

#### 23. Notification of Death Solo Practitioner to Practitioner's Clients (February 2004)

A written communication notifying the clients of a solo practitioner of the practitioner's death may be exempt from the provisions of Rules 7.05 and 7.07 if the communication provides nothing more than notification of the death, the relationship between the author of the letter and the deceased practitioner, and the location and availability of the deceased practitioner's files.

If a written communication notifying the clients of the death of a solo practitioner also contains content designed to communicate the qualifications or the availability of legal services of any lawyer or law firm, then Part VII, Texas Disciplinary Rules of Professional Conduct apply.

## APPENDIX J

### Special Provisions for Attorney's Will

Instructions regarding My Law Practice. The following is a set of provisions that a lawyer might consider including in the last will and testament regarding closing and selling the law practice after death.

"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 15.10 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 were 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 K

### SELECTED ISSUES IN RETAINING ORIGINAL WILLS

#### I. WHY WOULD A LAWYER HOLD A CLIENT'S WILL FOR SAFEKEEPING?

Although more altruistic reasons are frequently given, the historical reason is to obtain an advantage in being hired to probate the will. Other reasons include:

1. Client does not have a safe place for keeping the will.
2. Clients are pleased that someone else will be responsible for safekeeping their wills.
3. Custom of the legal community. "Perhaps the custom varies geographically, but I am not personally familiar with any firm in the New York area that does not routinely hold client wills." (Comment by New York City ACTEC Fellow.)

4. Avoiding inadvertent revocation by client who tries to save legal fees by making changes to the original will.

5. Avoiding presumption of revocation when a will, last in the possession of the client, cannot be produced.

6. Precluding unlawful destruction. If the Lawyer has the will, an unlawful actor will be unable to destroy it, thereby gaining the upper hand.

#### II. THE LAWYER'S OBLIGATION.

The lawyer has an absolute obligation to return the will to the client even without an express agreement to do so and without specific authorization, the lawyer may not deliver it to a third person or otherwise dispose of it.

So What? If client's will is lost, damaged, destroyed, or misdelivered, the lawyer may be liable for damages

#### III. SOME OF THE PROBLEMS

A. No or Insufficient Bailment Agreement. At best, many lawyers merely write a letter stating that the client left the will with the lawyer and that the lawyer will deliver it when requested by the client. It is an easy situation when the client makes a personal request, but what if the request comes from a spouse? A child? A person holding a

power of attorney? A person shown in the client's obituary as the client's only surviving relative? What proof of authority do you require?

"I do not want clients to think I'm attempting to tie them into probate. I do not want to impose the responsibilities of bailment upon myself, especially with regard to powers of attorney." (Comment by board certified Texas lawyer).

**B. Proper Safekeeping.** Many lawyers keep the original will in the file that is stored with all the other files. Some have separate fireproof files and even special rooms with "fire doors." Others use safe deposit boxes at their bank. Query. How do we define "safekeeping" in light of Tropical Storm Allison that flooded safe deposit boxes located in a Houston bank's basement and the Fort Worth tornado that blew papers all the way to Dallas?

**C. Continuing Representation.** By retaining the client's will, the lawyer may owe a continuing duty to the client and the client would have a basis for contending that the engagement never concluded and therefore, the statute of limitations never began to run.

**D. Firm Splits or Dissolves or the Drafting Lawyer Dies.** If the drafting lawyer dies, the responsibility for safekeeping the will passes to the survivors (partners, associates, staff, or family), some or all of whom may not want or be willing to accept that responsibility or may not even be lawyers.

Query. What about confidentiality issues when there is no lawyer involved?

If the testators were clients of the firm of Able, Best, and Capable and that firm dissolves with the lawyers going their own ways, there often are wills that were not prepared by any of the current lawyers. This is another problem.

**E. Trying to Return the Wills.** The lawyer or firm that decides to get out of the safekeeping business will find it difficult. As one ACTEC lawyer wrote, "The process of returning documents is an expensive one because it is time intensive." If the lawyer or firm has encouraged safekeeping of clients' wills, then after a period of ten or more years, there will be wills for clients who no longer can be located.

There are a number of good internet sites for trying to locate people. These include [www.accurant.com](http://www.accurant.com), [www.switchboard.com](http://www.switchboard.com), and [www.worldpages.com](http://www.worldpages.com).

**F. Who Owns the Files?** It seems clear that in Texas, if the client doesn't own all contents of the file, the courts will take that position anyway. The lawyer is generally entitled to make and retain copies.

Query. If the client cannot be found, does this obligate the lawyer to retain an original will for an indefinite time?

**G. Depositing the Wills with County Clerk.** Texas has a statutory procedure for depositing a will with the county clerk of the testator's residence. Probate Code § 71. Many lawyers believe this provides the answer when the client cannot be located. Although § 71(a) permits the testator or someone acting for the testator to deposit the will, the clerk may require proof of the testator's identity and residence and § 71(b) requires the will to be in a sealed wrapper endorsed "Will of," followed by the name, address, and signature of the testator and with the name and current address of each person who shall be notified of the deposit of the will after the death of the testator.

Query. If testator cannot be located or did not sign the envelope, etc., can this provision be the salvation?

Query. If even this procedure does not apply, what must the lawyer do with the original will?

#### IV. THE BIGGEST PROBLEM.

**A Continuing Relationship?** From a client's point of view, the lawyer who holds the original will is that client's lawyer—at least for a while. The big question is what is "a while?"

**B. Trying To Start Limitations To Run.** The lawyer may think that the lawyer-client relationship terminated when the will was signed and the fee was collected. Perhaps the lawyer even sent a "termination" letter to the client. But, if the lawyer holds the client's will, has there been a real termination that would be enough for the statute of limitations to commence?

**C. An Ongoing Duty?** A lawyer who retains an original will may have an affirmative duty to advise the client of changes in the law that could affect the client's estate plan if. A 1969 California case held that the lawyer had

a continuing duty to a client whose will the lawyer had drafted where the attorney-client relationship continued. *Heyer v. Flaig*, 449 P.2d 161, 70 Cal. 2d 223 (1969). This duty is not unlimited and the lawyer is not a guarantor for the client's failure to act on the lawyer's advice.

The issue of a continuing duty to our estate planning clients is a troublesome gray area. It appears that the answer turns on whether or not the client is a "present" client or a "former" client and in all likelihood, that will be decided on whether the client has reasonable expectations that the lawyer will advise the client of future developments. Note here the importance of having something in writing that delineates the lawyer's responsibility or lack thereof for such future advice and services

Query. If there is such a duty to advise of changes, can that duty be satisfied by sending a general summary of changes in the law?

Query. Would there be a greater duty to inform the client of major tax law changes such as the unlimited marital deduction, or the so-called repeal of the estate tax, or the increase of the tax free amount of the exemption equivalent?

Query. Would there be a duty for the lawyer to examine all of the original wills being held to determine if a new law actually affected the plan of each client? If so, how could the lawyer then know about the client's particular circumstances?

D. The Effect of the Passage of Time. Signing the documents might end the active phase, but it does not end the lawyer-client relationship since the lawyer remains bound by the duty of confidentiality. With many clients, no further legal services will be provided. In that instance, the lawyer-client relationship could expire after the passage of an extended period of time. This dormant or inactive phase is of an indeterminate duration and the retention of the original documents suggests that the lawyer-client relationship is continuing.

E. Another Ethical Issue. While retaining original documents may be useful to the client, there are those who believe that it is inappropriate, if not unethical, for the lawyer to do so because of the "advantage" it gives to the lawyer custodian when it is time to select a lawyer to handle the probate.

F. Conflicts of Interest. Still another issue is that as a result of a lawyer holding the client's original will, that lawyer or that lawyer's firm could be disqualified from representing current or prospective clients whose interests may be adverse to the client. At least one law firm's agreement to retain the will is conditioned that the firm would not be so disqualified. A further condition is that the firm is not charged with informing the client or any other person named in the will of any change in tax, probate, trust, or other applicable laws.

G. Risk Management. Estate planning and proper drafting is a highly complex area requiring far greater care due to constantly changing tax laws, the nature and mobility of clients, and various ethical rules.

1. No longer can lawyers realistically view will writing and estate planning as a loss leader. Present economics of law practice no longer permit a lawyer to wait twenty years or longer to attempt to recoup estate planning fees from the client's estate.

2. Although computers are standard helpers in the production of documents, they are of equal use of management of files, capturing information about the clients and details concerning their estate planning documents, and in providing a reliable reminder system.

H. Completion Letter. Once an estate plan is implemented, the lawyer should consider sending the client a "completion letter". This letter could caution the client regarding the effect of changing title to assets or beneficiary designations or reminding the client to review the plan on a regular basis. Sample language follows:

"We have now completed the active phase of our estate planning work for you and have delivered the originals to you. It is your responsibility to safeguard these signed originals. A safe deposit box is a reasonable place to store and safeguard your original documents.

"Please do not write on the originals. This could invalidate your will. We suggest that you contact us if you want to make any changes to ensure that those changes are made legally.

"Our fee for the preparation and supervision of the signing of the documents and the related advice does not include a continuing responsibility by us to ensure that the documents continue to comply with changes in the law as they occur. Frequently these changes are of importance to only a few of our clients and, since individual cir-

cumstances are so unique, it is not possible to contact each of our clients to alert them to changes that could then affect them personally. Because of this difficulty, we are not in a position to undertake an obligation to so notify any of our clients.

“We do recommend that you review your wills and your basic estate plan at least every year or so to ensure that they continue to meet your needs. Some events that would cause you to review your plan at a different interval include deaths of beneficiaries or executors; divorces; mental and physical disabilities of a beneficiary or executor; disaffection with anyone named in your will; a financial disaster affecting the size of your estate or the size of proposed gifts that you would otherwise make; or on the bright side, a windfall such as a large inheritance or winning the lottery. Finally, should you feel uneasy about any aspect of your plan, you should come back for a review.”

## APPENDIX L

### ACKNOWLEDGMENTS

Resources relating to the death of a solo practitioner and to the sale of a law practice are limited but have been drawn upon unashamedly. They include the following:

“Retirement of A Solo Practitioner’s Law Practice” by Thomas G. Bousquet, Houston, Texas, first published in 29 Law Office Economics and Management 428 (1989) and updated in 33 The Houston Lawyer 37, January/February (1996)

“Preparing for Retirement, Disability and Death” by Wesley P. Hackett, Jr., Michigan Lawyer’s Manual, September 1994 Revision, Lawyers Cooperative Publishing.

Articles by Laura Gatland (“Sunsetting A Law practice”), Robert L. Ostertag (“Sale of A Law Practice”), James D. Cotterman (“Valuation of A Law Practice”), GP Solo Magazine January/February 2000, General Practice, Solo and Small Firm Section, American Bar Association.

“What Will Happen to Your Practice If You Die” by Leigh P. Perkins, Lawyers Weekly USA, November 21, 1994.

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“What Happens When A Lawyer Dies” by Stephen N. Maskaleris and Vivienne K. Cooperman, Experience Magazine, Summer 1997, Senior Lawyers Division, American Bar Association.

“Big Shoes to Fill: The Job of the Inventory Attorney” by J. R. Phelps and Terri Olson, Florida Bar Journal, January 1991.

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“Why Shouldn’t Solos Be Able to Sell their Practices” by Barry S. Martin and Frank Babb, American Bar Association Journal, April 1984.

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“Checklist for Closing Another Attorney’s Office”, “Death of a Sole Practitioner: Special Considerations”, “Checklist: Protecting Clients’ Interests in the Event of the Lawyer’s Death, Disability, Impairment, or Incapacity” by Barbara S. Fishleder reprinted in GP Solo Magazine, January/February 2000, General Practice, Solo and Small Firm Section, American Bar Association.

“Planning Ahead: A guide to Protecting Your Clients’ Interests in the Event of your Disability or Death—A Handbook and Forms”, copyright 1999 by Barbara S. Fishleder, Oregon State Bar Professional Liability Fund. NOTE: Certain materials adapted from that publication have been modified in this paper to conform with Texas practice but have been used with permission. All rights were reserved except that permission is granted for law firms and sole practitioners to use and modify those documents in their own practices. Those documents may not be re-published, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund.

The Legal Malpractice Self-Audit from Texas Lawyers’ Insurance Exchange by Jett Hanna and TLIE, 1995

ABA Annual Meeting (1986) materials from General Practice Section Program: Preparing For And Dealing With The Consequences of the Death of a Sole Practitioner.

Rodney C. Koenig, Houston, Texas, provided a memorandum dealing in general with cessation of practice and in particular with the procedures in Texas Rules of Disciplinary Procedure 13.01, 13.02, 13.03 and Texas Disciplinary Rules of Professional Conduct 1.14 (a).

Wesley P. Hackett, Jr., Saranac, Michigan, Steven N. Maskalaris, Morristown, New Jersey, and Robert L. Ostertag, Poughkeepsie, New York, were interviewed regarding the sale of a law practice.

Roy W. Moore, Houston, Texas, was interviewed regarding the valuation of a law practice in the context of a divorce.

“Will Vaults - Profits Center Or Malpractice Trap?” by James E. Brill as part of the course materials for the State Bar of Texas 27th Annual Advanced Estate Planning and Probate Court (2003).

“File Documentation, Retention and Destruction” by James E. Brill as part of the course materials for the State Bar of Texas 18th Annual Advanced Drafting: Estate Planning and Probate Course (2007).

“Closing the Lawyer’s Practice: Your Own or Someone Else’s” by James E. Brill, presentation to Amarillo Area Bar Association (2008).

“The Lawyer’s Guide To Buying, Selling, Merging, And Closing A Law Practice” American Bar Association (2008).

ABA Annual Meeting (2009) materials from Senior Lawyers Division Program: An Ethical Approach To The Sale Or Purchase Of A Law Firm.

“Closing a Solo Practice: A Lawyer’s Exit To-Do List” by Sheila Blackford and Peter Roberts, Law Practice, May/June 2011, Law Practice Management Section, American Bar Association.

