DEALING WITH THE DEATH OF A SOLO PRACTITIONER
(Including Sale of a Law Practice)

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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 currently serves 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 2010) and he previously 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.

The State Bar honored him with its Presidents’ Award in 1978 as the outstanding lawyer in Texas, with the Gene Cavin Award For Excellence In Continuing Legal Education in 1994, and with a Presidential Citation in 2005 for chairing the State Bar Task Force On Starting Practice.

The College of the State Bar recognized him with its 1999 Professionalism Award and in 2000 recognized his article “Dealing With The Death Of A Solo Practitioner” as that year’s best article from a State Bar course.

He chaired the Law Practice Management Section of the American Bar Association in 1982 and in 2004 was honored by that Section with its Samuel S. Smith Award For Excellence In Law Practice Management. He was inducted into the first class and elected as an initial trustee of the College of Law Practice Management and served as its treasurer.

For two and one-half years, Brill wrote a monthly column for solo practitioners in the ABA Journal. He received The General Practice, Solo and Small Firm Section of the American Bar Association Donald C. Rikli Lifetime Achievement Award in 2000.

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. In 2004, he started a second group of five.

He was an organizer and continues to lead 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 is listed in Best Lawyers In America, Trusts and Estates and has been designated as a Texas “Super Lawyer” by Texas Monthly in each of its compilations.

Brill is 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.
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DEALING WITH THE DEATH OF A SOLO PRACTITIONER

I. OVERVIEW

A. Scope of Article. This paper deals exclusively with issues arising due to the unexpected and unplanned death of a solo practitioner. To some extent, many of the same considerations could apply if the solo was disabled, disbarred, suspended, simply abandoned the practice or retired.

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 April 2000, approximately 36% of Texas lawyers in private practice were solos. See “Has The Parade Passed Us By?”, at Appendix A..

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. Civil Liability. These rules do not undertake to define standards of civil liability of lawyers for professional 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. But it can have a devastating effect in the eyes of a jury.

E. Primary Focus. The overriding consideration should be to protect the client’s best interests and to do so as promptly, efficiently, and inexpensively as reasonably possible.

F. 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 the practice of a deceased solo practitioner.

G. The Existing Situation. Few lawyers have actually handled the estates of solo practitioners and portions of this paper are based on anecdotal remarks from those few who could be located and interviewed.

H. The Most Significant Issues. When it all sorts out there are four main questions.

1. What can a solo do to protect the interests of the solo’s clients?
2. What can a solo do to enhance the value of the solo’s practice?
3. What guidance and instructions can the solo provide to the solo’s executor and family?
4. What changes could or should be made to remove the uncertainties inherent in existing Rules?

II. JUDICIAL PROCESS

Rules 13.02 and 13.03 provide a judicial procedure for taking over and closing a lawyer’s practice. Few lawyers and judges are familiar with these procedures and for that reason alone most lawyers shy away from the courthouse. In doing so they find themselves in the briar patch of conflicting ethical and disciplinary rules.

III. THE BLACKEST OF THE BLACK LETTER RULES.

Misconduct. A lawyer shall not fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney’s cessation of practice. DR 8.04 (a) (10).

IV. RULE 13.01 OF RULES OF DISCIPLINARY PROCEDURE

A. Notice of Attorney’s Cessation of Practice, Rule 13.01 provides an alternative to requesting
a court to assume jurisdiction over the practice of a lawyer. Rule 13.01 spells out certain notification requirements when an attorney dies or ceases to practice and no other attorney, with client consent, has agreed to assume responsibility.

This Rule states that 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 is to be given by the personal representative of the estate or by any person having lawful custody of the attorney’s files and records including those persons who had been employed by the deceased attorney. See Appendix B for complete text.

B. Application of the Rule. Although this rule does not apply to non-lawyers, a lawyer serving as an executor or administrator seemingly would be required to comply with its provisions even when dealing with the probate of another lawyer.

C. Selected Compliance Problems.
   1. State of Decedent’s Files. Rule 13.01 assumes that the deceased lawyer maintained meticulous records, had well-organized files, and had a current address for every one to whom notice will be given. This may not always be the case.
   2. Notice Prior to April 1, 2007. Since notice under old Rule 13.01 required “information identifying the matter”, a generic or boiler plate type notice would not comply with the requirement and thus much effort was required to locate and describe all matters in each notice, even those handled decades ago. This was to be an unnecessary burden and expense to impose on the deceased lawyer’s family, staff, and personal representatives.
   3. Content of Notice. The notice should identify the deceased attorney, indicate the date of death, state that the attorney-client relationship ended with that death, advise of the location of the 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.

5. Forbidden Conduct. A lawyer shall not engage in conduct that constitutes barratry as defined by the law of this state. DR 8.04(a)(9).

6. Barratry Issues Arising Out Of Personal Or Telephone Contact. The criminal offense of barratry is committed when a person, with intent to obtain an economic benefit, solicits employment, either in person or by telephone, for himself or for another. Texas Penal Code §38.12(a).

A professional who knowingly accepts employment within the scope of the person’s license also commits the offense of barratry if the employment is the result of someone else’s personal or telephone solicitation. Texas Penal Code §38.12(b).

An offense under either of these provisions is a felony of the third degree (imprisonment for a term of not more than 10 years or less than 2 years with a possible fine not to exceed $10,000). Texas Penal Code §12.34.

It is an exception to prosecution under the foregoing paragraphs if such conduct is authorized by the Texas Disciplinary Rules of Professional Conduct or any rule of court. Texas Penal Code §38.12(c).

7. Query. Is specific authorization in the Rules required? Or is it enough if it is not prohibited? Do the Rules actually authorize such contact?

8. Barratry Issues Arising Out Of Written Communications. An attorney commits the offense of barratry if, with the intent to obtain professional employment for himself or for another, sends a written communication that concerns a lawsuit of any kind, including an action for divorce, in which the person to whom the communication is addressed is a defendant or a relative of that person, unless the lawsuit has been on file for more than 31 days before the date on which the communication was mailed. Texas Penal Code §38.12(d).
An offense under §38.12(d) is a Class A misdemeanor (a fine not to exceed $4,000, confinement in jail for a term not to exceed one year, or both). Texas Penal Code §12.21, but if the attorney has been previously convicted under this Subsection (d), it is a felony of the third degree. Texas Penal Code §38.12(h).


10. Is relief possible?

V. JURISDICTION.

A. In 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 (Probate Code, Section 4).

B. District Court Jurisdiction. However, under Section 13.02 of the Rules of Disciplinary Procedure [Available in paperback edition of West Publishing Co. “Texas Rules of Court - State”], 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.” When an attorney has died, the petition may be filed in a statutory probate court in the county of the attorney’s residence.

Section 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 also Appendix B 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.

C. 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. Probate Code, Section 5 (c).

Notwithstanding other provisions of the Probate 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, Section 5A (b).

A statutory probate court can hear a petition that follows Section 13.02 of the Rules of Disciplinary Procedure and it can act on that petition in such a way as to provide the same protection to the appointed attorney.

Query. Is a temporary administration a workable alternative?

VI. RESTRICTIONS ON ATTORNEY WHO WANTS TO “TAKE OVER THE FILE”.

A. In-Person or Telephone Contact. In addition to penalties under the Barratry Statutes DR 7.03 (a) prohibits an attorney who seeks professional employment from instituting in-person or telephone contact with the deceased attorney’s former clients when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.

B. Advertising. DR 7.05 (a) prohibits certain written communications while DR 7.05 (b) sets forth certain other requirements for the content
of this “solicitation” including compliance with DR 7.04 (a) through (c) relating to advertisements in the public media.

1. Contingent fees. DR 7.04 (h) applies if services are to be rendered on a contingent fee basis and DR 7.04 (i) through (r) may also apply.

2. Retaining Copies. A copy of each written solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name and address to which each such 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. DR 7.04 (d).

3. Special Marking. The solicitation shall be plainly marked “ADVERTISEMENT” on the first page and on the envelope. DR 7.05 (b) (1).

4. Additional Requirements. See Rule 7.05.

C. Filing Requirements For Public Advertisements and Written Solicitations. A copy of the written solicitation being sent, together with a representative sample of the envelopes and the payment of the required fee ($75 as of April 25, 2011) must be filed with the Lawyer Advertisement and Solicitation Review Committee of the State Bar of Texas, either before or concurrently with the mailing. DR 7.05 (b) and 7.07 (a). The State Bar has a form for this purpose. See Appendix C for excerpts of these Rules.

D. Prohibited Employment. A lawyer shall not accept or continue employment when the lawyer knows or reasonably should know that the person who seeks the lawyer’s services does so as a result of conduct prohibited by these rules. DR 7.06. If the criminal law doesn’t get you for barratry, the grievance committee might.

E. An Exception? See Appendix D for Interpretative Comment 23.

VII. DEALING WITH A CLIENT’S FILE AND OTHER PROPERTY.

A. Confidentiality. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law. Section 3, Preamble to Texas Rules of Professional Conduct.

1. “Confidential information” includes both “privileged information” and “unprivileged client information”. “Privileged information” refers to the information of a client protected by the lawyer-client or attorney-client privilege. “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. DR 1.05 (a).

2. A lawyer shall not knowingly reveal confidential information of a client or former client to anyone other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm. DR 1.05 (b) (ii).

3. A lawyer may reveal confidential information when the lawyer has been expressly authorized to do so in order to carry out the representation; when the client consents after consultation; or to the client, the client’s representatives, or the members, associates, and employees of the lawyer’s firm, except when otherwise instructed by the client, or to the extent necessary to enforce a claim. DR 1.05 (c) (1), (2), (3), (5)

B. Safekeeping Property. 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. DR 1.14 (a).
C. Funds Or Other Property Held For Clients. Every attorney licensed to practice law in Texas who maintains, or is required to maintain, a separate client trust account or account, 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. Rules of Disciplinary Procedure 15.10.

D. Attorney’s Lien. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may acquire a lien granted by law to secure the lawyer’s fee or expenses. DR 1.08 (h).

1. 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 the fee that have 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. DR 1.15 (d).

2. There is no statutory attorney’s lien in Texas. To the extent that the lien exists, it is a passive, common law, possessory lien. Burnett v. State, Tex. Cr. App., 642 S.W. 2d 765. A demand for payment is a pre requisite to the lien. Smith v. The State of Texas, Tex Civ. App., Corpus Christi, 490 S.W. 2d 902 (1972) rehearing denied.

3. Ethics Opinion 118, September 1955. An attorney should not be required to deliver his entire set of files to his client upon termination of the professional relationship. An attorney should retain within his files all matters purely personal to him and should turn over to the client only those papers which would affect either the rights or the exercise of the rights of the client. This is known as the “end product rule”. An attorney is privileged to delay delivering items to the client until he has had an opportunity to make an inventory of his files and determine what should be turned over to the client.

Note: The Professional Ethics Committee of the Supreme Court is, a statutorily created committee, charged with the task of issuing written opinions on ethical questions raised by Texas attorneys. The full text of all of the opinions is available at www.txethics.org.

4. Ethics Opinion 395, May 1979. The existence and enforceability of an attorney’s lien with respect to a client’s property, papers and files is a question of law. In Texas, an attorney’s lien is recognized by the common law under certain circumstances. The Code of Professional Responsibility (the “Code”), however, does place restrictions upon the lawyer’s right to assert a possessory lien with respect to the client’s property, papers and files.

The Code [former DR 2-110 (A) (2)] provides that a lawyer must take reasonable steps to avoid foreseeable prejudice to the rights of his client, including delivering to the client all the papers and property which the client is “entitled”. Thus, a lawyer ethically may assert his attorney’s lien with respect to a client’s papers and property only where the attorney’s lien is enforceable under the law and, in any event, may not refuse to deliver the client’s papers and property to the client if retention of the file would prejudice the rights of the client.

Common law possessory attorney’s lien has been held to be unenforceable if the lawyer voluntarily withdraws, is justifiably discharged because of misconduct, relinquishes possession of the client’s property, or has not demanded payment of the debt.

EC 2-32 requires a lawyer “to minimize the possibility of harm”.

While the Code does not expressly prohibit the assertion of an attorney’s lien where recognized under applicable law, it places
severe ethical restrictions on an attorney’s right to assert his lien where the client’s legal rights would be jeopardized.

The assertion of an attorney’s lien will present both ethical and legal questions which must be decided under the facts and circumstances of each case.

Any lawyer who contemplates retaining possession of the client’s property and papers should be aware of the possibility that this action may be determined to be unethical because the attorney’s lien is legally unenforceable or enforcement of the lien resulted in damage or prejudice to his client’s rights. A jury could find that the attorney was not trying to establish a possessory lien but was willfully and wrongfully refusing to relinquish a client’s documents. Thus, an attorney who refuses to relinquish the client’s files does so at his peril.

5. Ethics Opinion 411, January 1984. Having first made demand for payment and in the absence of limiting circumstances, an attorney may withhold the papers, money or property of a client until the outstanding fees and disbursements have been paid.

Actual, foreseeable prejudice of a client’s rights, as distinguished from mere inconvenience or annoyance, creates an ethical violation in contravention of the Disciplinary Rules. An attorney who has once been retained to represent a client’s rights may not later precipitate actual harm to those rights merely to collect a fee. The retaining lien does not constitute an absolute shield against the charge of unethical conduct.

6. Query. Is the possessory nature of the lien extinguished when a solo practitioner dies?

7. Query. Does the non-lawyer executor or heir have the right to the lien?

8. Query. Is it smart to admit such a lien?

VIII. HANDLING PROBATE OF DECEASED LAWYER’S ESTATE.

A. General Problems.
1. The lawyer’s will does not provide adequate guidance for closing or selling the practice. See Appendix E for possible provisions for an attorney’s will.
2. All of the other probate procedures are applicable to a lawyer’s estate. These are just a few of the “extras”.
3. Deceased lawyer practiced in areas where probating lawyer lacks expertise.
4. Deceased lawyer’s records may be disorganized making it extremely difficult to determine status, critical dates, and responsibilities.
5. 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?
6. Personal representative should notify the 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 the entirety of the time remaining under applicable statutes of limitation that are typically two years. Texas Civil Practice & Remedies Code §16.003.
7. However, the Texas 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).

B. Standard Operating Procedures For All 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. But see Section IV.C regarding barratry.
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.
12. Notify malpractice carrier and consider “tail coverage”.
13. Determine ownership of client files and their contents and take appropriate action.
   See Appendix F “File Documentation, Retention, and Destruction”.

C. When Client Desires Referral To Other Counsel.
   1. Is there a duty to recommend a lawyer?
   2. Should more than one be recommended?
   3. What about recommending the bar association referral service?
   4. Is there liability for negligent referral?
   5. What if a review of the file contains clear evidence of malpractice or malfeasance? Is there a duty for a non-lawyer executor to make a disclosure? What about the lawyer/executor?

D. When Client Has Obtained New Counsel.
   1. Obtain written authorization from client to deliver files to new counsel.
   2. Make copies of original documents returned to clients.
   3. Arrange for substitution of counsel in litigated matters and be sure of filing and approval by the Court.
   4. Deliver files and obtain receipt for each.

IX. GOOD OFFICE PROCEDURES THAT PROVIDE INCREASED PROTECTION FOR OUR CLIENTS.

A. Fee Agreements. Have written engagement agreement for all client matters. See Section X.A. of this paper.

B. Docket Control. Maintain current calendaring system with built in redundancies and enter all deadlines into calendaring system.

C. Separate Files. Create a separate file for each client matter.

D. Action Plan. Create a plan of action for each client matter and keep it updated.

E. Current Filing. Maintain filing on a current basis.

F. Trust Account. Maintain separate trust account with subsidiary ledger for each client whose funds you hold.

G. Time Records. Maintain current time and service records.

H. Billing And Receivables. Bill regularly and maintain records of aged accounts receivable.

I. Keep Up With Workload. Complete work promptly and try to close as many files as possible.

J. File Review. Review each file when closing it to return original documents to the client, destroy extraneous material, note any unusual circumstance or problems, and set a destruction date for the file.

K. Closure Letter. Send client a closure letter and return all original documents. See Section X. B. of this paper.

L. Client Lists. Create and maintain a current listing of all present and past clients, their addresses, and a description of all matters handled for them.
M. Don’t Hold Original Documents. Refrain from serving as the repository of clients’ original wills and other documents. See Appendix G for “Selected Issues In Retaining Original Wills”.

N. Don’t Take On Non-Lawyer Responsibilities. Refrain from serving as registered agent of a corporation or as an executor or trustee for a client.

O. Create Referral Lists. Create a list of competent attorneys in all practice areas to whom referrals can be made.

P. Back-Up Attorney. Make an effort to locate one or more lawyers who can back you up in emergencies. Courts are beginning to require lawyers to designate at least one attorney who has consented to act while the original lawyer is on vacation. Eg. Rule 9.1 of Trial Division of Family District Courts of Harris County, Texas. That rule requires client consent to that representation and the designated attorney’s participation is limited to emergencies.

X. GOOD PROCEDURES THAT INCREASE PROTECTION FOR YOURSELF AND YOUR FAMILY.

A. Written Employment Agreements. A proper employment agreement or engagement agreement can go a long way in avoiding many problems.

1. A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation. DR 1.02 (b).

2. When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. DR 1.04 (c). In addition to other requirements, a contingent fee agreement shall be in writing. DR 1.04 (d).

3. Suggested language to include in agreement.

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 files, and with Client’s subsequent approval, to make referrals to counsel for future handling. Client grants permission and waives all privileges to the extent reasonably 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 even though some or all of them may not be lawyers.

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. Lawyer shall own all other materials and documents.

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 examination and copying. No further
notice to client will be required prior to such destruction.

B. Conclude Representation. Upon conclusion of the lawyer’s responsibility with respect to a particular matter, it is a good idea to send a “termination letter”.

1. The letter should state that the lawyer’s services have been completed and should specify any actions to be taken by the client. Original documents and other materials furnished by the client should be returned.

2. Suggested language to include.

During our representation of you, we have created one or more files containing notes and documents relating to this matter. All original documents and other materials furnished by you have been returned to you previously, sent to other appropriate parties, or are enclosed with this letter.

It is our firm policy to destroy files when we no longer need them. We invite you to examine your files during our normal office hours to determine if you would like copies of any of their contents. Please consider doing so as soon as possible while this is fresh in our minds. We remind you that it is our policy to destroy most files after five years following the conclusion of our services and that our initial agreement confirmed this procedure. No further notice will be given to you prior to such destruction.

3. This may have the effect of identifying the commencement of an applicable limitations period. The general rule is that malpractice claims must be brought not later than two years after the day the cause of action accrues. Texas Civil Practice and Remedies Code §16.003. But note that Texas has adopted the rule that the limitations period commences upon discovery of the attorney’s actions or omissions. Willis v Maverick, 760 S.W.2d 642 (Tex. 1988).

4. This is a good time to review the file to determine if there are any items that should be disposed of.

XI. 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 multi-disciplinary 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 the lawyer nor the lawyer’s heirs or personal representatives may properly disclose without the clients express permission.


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.


DR 1.05 prohibits the disclosure of the names of the firm’s clients and the amounts owed by each client.

   Consent of the client based on informed communication is the only permissible basis for the disclosure of confidential information. That consent can be a part of the engagement letter as a condition to the lawyer’s accepting employment.


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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.

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

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

6. What about using a confidentially agreement?

7. Solicitation.
   a. For more details, refer to Sections IV and V of this paper.
   b. Advertising “Established Clientele”. In Ethics Opinion 266, October 1963 (Texas), 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. Although it was proper to advertise for sale the library, office equipment, and unexpired lease, it was a violation of old Canon 24 to solicit “established clientele” to continue their business with the purchaser.

   The times they are a changing. See Appendix H for copies of actual ads published in the Texas Bar Journal since 2006 offering law practices for sale.

   c. Listing In Yellow Pages. Ethical Opinion 185, October 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.

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

   e. Firm Names And Letterhead. Ethics Opinion 375, October 1974, referred to then applicable DR 2-102 (A) (4) providing that a letterhead of a law firm may also give the names of members and associates and names and dates 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).

   f. If practicing in any manner other than as a sole proprietor, special attention must be paid to the entirety of DR 7.01(a).

   g. Query. Are clients properly protected by permitting larger firms to operate under what in essence is a trade name while prohibiting it for solos? Does this deny equal treatment to solos?

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

   There is an obstacle course in DR 5.04 that must be traversed in order to obtain the permitted benefits. That 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). Note that this Rule does not recognize responsibility assumed as a basis for division.

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 (h) 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 or when the division is made between lawyers who assume joint responsibility for the matter.

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. 965 S.W.2d 533 (Tex Civ App 1993)

C. CLOSING A PRACTICE.
1. If closing a practice, see Appendix I.
2. Query. What if deceased attorney was sole shareholder of a professional corporation?

D. ABA MODEL RULE 1.17.
1. This rule permits the sale of a law practice, including its goodwill. This Rule, or some variation, has been adopted in all but four states with Texas being one of the four. The other states are Alabama, Louisiana, and Kansas.
2. The full text of the rule together with explanations and rationale is set forth in Appendix J.

E. Arguments Against Permitting Sale of Law Practice.
1. Clients are not commodities that can be purchased and sold at will.
2. 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 could be an additional asset subject to death taxes.

F. Arguments In Favor Of Permitting Sale Of Law Practice.
1. Although clients cannot be bought and sold, what is valuable to a purchaser is the potential opportunity to handle their affairs.
2. There are two elements being transferred - the hard assets of the practice and a system for generating future revenues.
3. The purchaser, seller, and client all have mutually beneficial interests. The purchaser 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.
4. 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?
5. 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.
6. Negotiations between the purchaser 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”.

7. 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.

8. All elements of client autonomy survive the sale.

G. Valuation And Payment. The valuation of the practice presents many challenges. The computer, library, and other tangible assets are of rapidly depreciating value. What is of value is the potential for keeping the practice alive.

1. 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 purchaser, and that the seller is paid by the purchaser.

2. The purchaser 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 all of this when, as, and if fees are collected.

H. Is Sale Permitted If Not Specifically Prohibited?

Texas does not have a rule comparable to ABA Rule 1.17 and thus the Texas rule is not clear. Even if permitted, there are many hurdles to jump and some serious ethical risks are imposed on the purchaser.

XII. THE FUTURE. This paper has attempted to describe the current situation and to stimulate discussion of the issues. Some changes should be made in our rules to facilitate the disposition of the practice of a solo practitioner. Whether a sale of an ongoing law practice should be permitted is an issue for another presentation.
APPENDIX A
HAS THE PARADE PASSED US BY?

It's a familiar story. There is a parade. The band is playing. The soldiers are marching. Suddenly, a lady cries out, "They're all out of step except for Johnny."

Like Johnny, most solo practitioners march to a different drummer. Are we out of step with the rest of the profession? Is the parade passing us by? Can a lawyer singlehandedly cope with the demands of law practice in the late 20th century?

Will the shrapnel from the information explosion be the ultimate weapon that will bring about the demise of the solo practitioner?

For years the prognosticators have said that it was just a matter of time before solo practitioners would be a relic of the past. But an American Bar Foundation demographic study indicates otherwise. It shows that in 1988, approximately 46 percent of all practicing lawyers were solo practitioners. As Mark Twain once said, "The news of my death is somewhat exaggerated."

There is confusion among the troops. Just what is a solo practitioner? Is it the same thing as a sole proprietor? What if the solo employs other lawyers? Or is it the sole shareholder of a professional corporation? And what about those quasi-solo practitioners who parade in partners' clothing? Does any of it matter? Perhaps Proverbs 23:7 provided the answer with "For as a man thinketh in his heart, so is he."

Whatever a solo practitioner may be, the lawyer who chooses this life quickly learns that a solo is in charge of planning, business development, administration, marketing, managing, accounting, and yes, production. Among lawyers, the solo must emulate the qualities of the renaissance man and be all things to all people at all times while remaining omni-competent.

Viewed from this angle, it is any wonder that most people predict the disappearance of solo practitioners? Even Darwin might have expected natural selection to have favored group practice and the extinction of the solo.

But wait a minute. There is an independent spirit of self-confidence that runs so deep and is so strong in most solos that you sense that these people will be able to withstand the winds of change that batter the profession. That confidence is combined with a burning need for personal involvement with their clients, the desire to make a difference in the lives of others, and the firm belief that this can be done best in the entrepreneurial ambience of solo practice.

The fabric of solo practice is woven in ingenuity, independence, flexibility and strong self-images. Here and there, snags made by misgivings and loneliness can be found, but the solo practitioner presents a dashing figure when clothed in the uniform made of this fabric.

Imagine a giant army of lawyers. Solo practitioners, corporate counsel, government lawyers, and the partners and associates form firms of all sizes line up, close ranks, and wait for their marching orders. The drums begin to roll and the band begins to play. Here they come now. As they parade before you, look again. Is Johnny really out of step?

This article first appeared in Flying Solo, a 1984 publication of the Law Practice Management Section of the American Bar Association and was reprinted in the January 1992 issue of the Journal of the American Bar Association as the first of the author's Solo Network articles.
APPENDIX B

EXCERPT FROM CURRENT RULES OF DISCIPLINARY PROCEDURE
PART 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.

13.02 Assumption of Jurisdiction

A client of the attorney, Chief Disciplinary Counsel, or any other interested person may petition a district court in the county of the attorney’s residence to assume jurisdiction over the attorney’s law practice. If the attorney has died, such petition may be filed in a statutory probate court. The petition must be verified and must state the facts necessary to show cause to believe that notice of cessation is required under this part. It must state the following:

A. That an attorney licensed to practice law in Texas has died, disappeared, resigned, become inactive, been disbarred or suspended, or become physically, mentally or emotionally disabled and cannot provide legal services necessary to protect the interests of clients.

B. That cause exists to believe that court supervision is necessary because the attorney has left client matters for which no other attorney licensed to practice law in Texas has, with the consent of the client, agreed to assume responsibility.

C. That there is cause to believe that the interests of one or more clients of the attorney or one or more interested persons or entities will be prejudiced if these proceedings are not maintained.

13.03 Hearing and Order on Application to Assume Jurisdiction

The court shall set the petition for hearing and 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 Section 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 of the court including, but not limited to, one or more of the following:
A. Examine the client matters, including files and records of the attorney’s practice, and obtain information about any matters that may require attention.

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

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

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

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

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

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

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 non-electronically 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.
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 E
SPECIAL PROVISIONS FOR ATTORNEY’S WILL

INSTRUCTIONS REGARDING MY LAW PRACTICE

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

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

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

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

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

(a) Enter my office and utilize my equipment and supplies as helpful in closing my practice.
(b) Obtain access to my safe deposit boxes and obtain possession of items belonging to clients.
(c) Take possession and control of all assets of my law practice including client files and records.
(d) Open and process my mail.
(e) Examine my calendar, files, and records to obtain information about pending matters that may require attention.
(f) Notify clients and those who appear to be clients of my death and that it is in their best interests to obtain other counsel.
(g) Obtain client consent to transfer client property and assets to other counsel.
(h) Provide clients with their property and assets and copies of material in their files and return unearned retainers and deposits.
(i) Notify courts, agencies, opposing counsel, and other appropriate entities of my death and, with client consent, seek and obtain extensions of time.
(j) File notices, motions, and pleadings on behalf of clients who cannot be contacted prior to immediately required action.
(k) Contact my malpractice carrier concerning claims or potential claims, to notify of my death, and to obtain extended reporting or “tail” coverage.
(l) Dispose of closed and inactive files by delivery to clients, storage, and arranging for destruction, remembering that records of my trust account are to be preserved for at least five years after my death as required by Texas Disciplinary Rule of Professional Conduct 1.14 and Rule 15.10 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 was serving as registered agent for any corporations and, if so, notify the corporation of the need to designate a new registered agent (and perhaps registered address).

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

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

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

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

I. 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.

II. FILE OWNERSHIP.

A. 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.

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

C. End Product Rule. Other states take the exact opposite position that except for client owned property, the entire file belongs to the lawyer. This is referred to as the “end product” and “work product” models of file ownership.

D. Typical Contents Of A Lawyer’s File. What might be found in “the client’s file”.

1. Documents entrusted to lawyer by client.
2. Original documents obtained from others.
3. Original documents prepared by the lawyer.
4. Photocopies of signed documents.
5. Unsigned copies of documents.
7. Correspondence.
8. Receipts for expenditures made for clients.
9. Research materials
   a. Briefs
   b. Legal memoranda
   c. Copies of cases, statutes, articles
10. Lawyer’s notes and other legal pad items.
11. Billing, time keeping, and service records.
   a. Prebills that summarize the services and/or reflect time spent
   b. Paper on which initial entries were recorded
12. Multiple copies of any of the foregoing.
13. Electronic versions of any or all of the foregoing.

E. 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 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.
F. The Fuzzy Middle Ground. The file, or at least most of it, belongs 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 belongs to the client.

III. WHO OWNS WHAT?

A. Resolution Trust Corp. v. H ---, P.C., 128 FRD 647 (N.D. Tex. 1989) is usually cited for the proposition that the client owns every scrap of paper in the file and stating 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 . . .”

B. 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 to 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 stated that Decedent gave confidential information to his attorney with 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 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.

C. Stop The Presses. In a more current development, the Supreme Court of Texas holds that there is no legal bar preventing an estate’s personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent’s estate planners. Kristin Terk Belt et al v. Oppenheimer, Blend, Harrison & Tate, Inc., et al., 192 SW 3rd 780 (TX 2006)

It would not be much of a stretch to believe that the personal representatives could require lawyers to produce client files and their contents.

D. Ethics Opinion 570 (2006) decided that the work product doctrine does not protect the lawyer from the lawyer’s own client with respect to notes created by the lawyer. The opinion “does not address the issue with respect to other types of documents or information contained in a lawyer’s file” and that “withholding such notes from a client denies the client the full benefit of the services the lawyer agreed to provide to the client”.

E. Based on the foregoing, it appears that Texas either has adopted or is leaning strongly to the entire file rule.

F. Suggested Language For Access To 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.

IV. PARTING IS SUCH SWEET SORROW

A lawyer who leaves a firm may leave with that firm the documents of those clients that the lawyer represented while with the firm, but that lawyer must ensure that the lawyer reasonably believes that the firm has appropriate safeguarding arrangements. So long as a lawyer has custody of client’s documents, the lawyer must take reasonable steps in arrangements for storing, using, destroying, or transferring them. If the jurisdiction allows a lawyer’s practice to be sold to another lawyer, the lawyer must comply with the rules governing the sale. If a firm dissolves, its members must take reasonable steps to safeguard documents continuing to require confidentiality, for example by entrusting them to a person or depository bound by appropriate restrictions.

1. Duties of attorneys in possession of the inactive client files of deceased attorneys.
   a. Is notice to last known address adequate?
   b. How long should clients have to retrieve their records?

2. A law firm has responsibilities to a client who was not represented by the firm but whose files are in possession of the law firm.

3. Responsibility to the client and for the files is a joint and several obligation of the lawyer who represented the client and the lawyer in possession of the files.

4. Frequency is exasperated when lawyers leave the firm (and leave the files with the firm), a lateral hire joins the firm, or when a firm dissolves.

V. SPECIAL CIRCUMSTANCES.

A. 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?” Does HIPAA apply? Can the attorney deliver the entire file to the insurer without the consent of the insured?

B. Solo Practitioner. What about the situation where 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 settles the estate?
VI. ALTERNATIVE PROVISIONS FOR EMPLOYMENT AGREEMENT

A. Possible Alternative Language.

Client is entitled upon written request to any files in the Firm’s possession that relate to legal services performed by the Firm for the Client, subject to the Firm’s right to make copies of any files withdrawn by Client.

All client supplied materials and all attorney end product (collectively “client material”) are the property of Client. Examples of attorney end product include finalized contracts or estate planning documents, deeds, and corporate records.

Attorney work product is the property of the Firm. Examples include photocopies of client materials, drafts, notes, internal memoranda, administration materials, attorney-client correspondence, and electronic versions of both client material and attorney work product.

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

VII. WHY CAN’T WE HAVE BRIGHT LINE RULES LIKE THE DOCTORS?

The rules for the custodianship, transfer, and disposal of medical records are cited in Title 22, Part 9, Chapter 165 of the Texas Administrative Code.

Rule Section 165.1(a) defines in great detail the content of “adequate medical record”.

Pursuant to Rule Section 165.1(b), Texas physicians are required to maintain a patient’s records for at least 7 years from the last date of treatment, or in the case of a patient younger than 18 years old, until the patient is 21 years old or 7 years from the last treatment, whichever is longer.

VIII. CONCLUSION.

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

Texas should adopt the end product rule. The lawyer should return original documents and other documents needed 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.
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.accurint.com, www.switchboard.com, and 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 can not 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, Section 71. The fee currently is $5.00 per will. Many lawyers believe this provides the answer when the client cannot be located.

Although Section 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 Section 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. The full text of Section 71 appears at Attachment I.

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. 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. 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. Flay. 499 P 2d 161. 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 circumstances 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.”

V. 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. 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?

VI. 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 or another lawyer, will you (a) state whether or note you prepare the will, or (b) refuse to answer?

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

VII. WHAT TO DO WITH THE ORIGINAL WILL WHEN YOU LEARN OF TESTATOR’S DEATH

A. 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.”

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

1. Wait to be contacted and hope to be hired? If so, how long do you wait?
2. 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?
3. 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?
4. Deliver the original will to the county clerk as contemplated by Probate Code Section 71?

VIII. CONCLUSION.

CLOSING A LAW PRACTICE
APPENDIX I

I. OVERVIEW

A. Potential Effect. According to a 1995 report of the American Bar Foundation, almost 47% of all lawyers in private practice were solo practitioners. In April 2007, approximately 28% of Texas lawyers in private practice were solos.

B. 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).

C. 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 practices.

II. COMMUNICATING WITH YOUR OWN 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. There are many restrictions on non-affiliated lawyers who want to “take over” your practice or selected matters. These include barratry [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].

III. 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. 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 negligent referral?

2. When Client Has Obtained New Counsel.
   a. Obtain written authorization from client to deliver files to a new counsel.
   b. Consider making copies of original documents returned to clients.
   c. Arrange for substitution of counsel in litigated matters and be sure of filing and approval.
   d. Deliver files and obtain receipt for each.

C. 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 in your place.

D. 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 Anyway?

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 clients.
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. Withdraw as Registered Agent. If you are the registered agent and/or your office is the registered address for a business, arrange for substitution and prepare and sign appropriate documents.

V. EMPLOYEE RELATIONS.

A. Inform Employees And Keep Them Informed. 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, COBRA.

VI. FURNITURE, FIXTURES, LIBRARY, EQUIPMENT.

A. Take Inventory. List what you have including model numbers and software (including the version).

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

C. Consider Getting Appraisals.

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

E. Law Books. The reality is that they have little, if any, market value and most of the law schools have what you have.

F. Sell, Donate, Or Take Home. Cancel subscriptions to supplements, updates, new volumes, etc. and to newsletters and magazines. Decide what to do with what you have.

G. Telephone Service.
   1. Cancel Yellow Page advertising.
   2. Get and maintain forwarding number.
   3. Change greeting on incoming calls.

VI. 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.

VII. 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. Notify the malpractice carrier to obtain extended 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 limitations that are typically two years.
VIII. **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.


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.

I. Update Books of Account.

J. Operating Account. Keep this account open for future receipts and expenditures.

IX. **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

B. Opposing Counsel

C. Employees

D. Suppliers and vendors

E. Professional advisors

F. Internal Revenue Service (Form 8822 For Change of Address).

G. Building management

H. Adjoining offices

I. Bar Associations and other member organizations

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. Automatic Response On Email.

E. Post Notices On Website.

X. **NOTIFICATION.**


B. Specific Notifications.
   1. Clients
SALE OF LAW PRACTICE

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

I. The seller ceases to engage in the private practice of law [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;
   (a) The practice is sold as an entirety to another lawyer or law firm;
   (b) Actual written notice is given to each of the seller’s clients regarding:
       (1) the proposed sale;
       (2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);
       (3) the client’s right to retain other counsel or to take possession of the file; and
       (4) the fact that the client’s consent to the sale 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.

(c) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

COMMENT

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 and another lawyer or firm takes 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

The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller’s clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances 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.

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 which provides legal services to the poor, or as in-house counsel to a business.

The Rule permits a sale attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon 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 geographic area rather than the jurisdiction. The alternative desired should be indicated by
selecting one of the two provided for in Rule 1.17(a).

SINGLE PURCHASER

The Rule requires a single purchaser. The prohibition against piecemeal sale of a practice 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 purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there is a single purchaser is nevertheless satisfied.

CLIENT CONFIDENCES, CONSENT AND NOTICE

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 any proposed change in the terms of future representation, 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.

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 confidence 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 jurisdiction in which it presently does not exist.)

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.

FEE ARRANGEMENT BETWEEN CLIENT AND PURCHASER

The sale may be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.

OTHER APPLICABLE ETHICAL STANDARDS

Lawyers participating in the sale of a law
practice 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 client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

If approval of the substitution of the purchasing attorney for the selling attorney 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

This Rule applies to the sale of law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer 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.

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

This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of the practice.

MODEL CODE COMPARISON

There is no counterpart to this Rule in the Model Code.

LEGAL BACKGROUND

Rule 1.17 recognizes the potential existence of and market for the good will of a law practice and establishes guidelines to protect clients when a law practice is sold.

Goodwill, long recognized in the sale of other business assets, first gained official recognition and acceptance in the context of a law practice in divorce proceedings. See, e.g., Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (N.J. 1983) (concluding that goodwill exists in a law practice, but cannot be sold because of the Model Code prohibition, thereby diminishing its value; that payments to a retiring partner representing goodwill are acceptable under the Code; and that therefore good will can be equitably distributed as an intangible asset of the marital estate).


INDIRECT METHODS OF TRANSFERRING GOOD WILL

Unofficially, goodwill has been part of the business of law for some time. Two common methods of transferring good will existed before Rule 1.17.

One way coupled an inflated value for the physical assets of a law practice with the seller’s agreement to refer clients to the purchaser. See, e.g., Geffen v. Moss, 125 Cal. Rptr. 687, 53 Cal. App. 3d 215, 78 A.L.R.3d 1232 (1975) (sales contract terms, though not mentioning good will, expressed seller’s intention to encourage clients to use buyer’s services in the future and called by payments to the seller in excess of the stated value of the physical assets; the court invalidated contract terms for those payments).

The second method was the formation of a “quickie” partnership from which one partner would soon retire and receive compensation, leaving the remaining partner with the client base. Some lawyers who attempted to use variations of this method faced sanctions for violations of related ethical considerations. See e.g., In re Laubenheimer, 113 Wis. 2d 680, 3354 N.W.2d 624 (1983) (a supposed employer-employee contract providing for the transfer of files without prior client notification held to be a
breach of some duty of confidentiality).

Some commentators questioned whether a proscription against the sale of goodwill survived the adoption of the Model Rules. See Kalish, The Sale of a Law Practice: The Model Rules of Professional Conduct Point in a New Direction, 39 U. Miami L. Rev. 471 (1985) (arguing that although judicial decisions indicated such a proscription existed, cases were infrequent and unless a problem arose between the seller and purchaser, there was no great concern about the use of one of the indirect methods described above). But see also G.C. Hazard, Jr., & W.W. Hodes, The Law of Lawyering 1:17:102 at 489 (2d ed. 1990) identifying a “rule of tradition”) against the sale of law practice on the basis of the “public interest” and the fact that law is a profession that deals with people, not merchandise).

Passage of Rule 1.17 removed any doubt, negated the need for the indirect methods, and helped to ensure that procedures to protect clients would be created and followed.

HISTORICAL JUSTIFICATIONS FOR PROHIBITING SALE OF GOODWILL

EC 4-6 of the ABA Model Code of Professional Responsibility stated that “a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets.” However, no disciplinary rule directly addressed this issue.

Further justification for the prohibition was found in DR 2-108, stating “a lawyer shall not be party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.”

The underlying public policy considerations for the prohibition found in DR 3-102(A) against sharing fees with nonlawyers have also been used as a basis for striking down attempted sale of good will of deceased lawyers. See, e.g., O’Hara v. Ahlgren, Blumenfeld & Kempster, 158 Ill. App. 3d 562, 511 N.E.2d 879, aff’d, 127 Ill.2d 333, 537 N.E.2d 730 (1989).

RELATED ETHICAL OBLIGATIONS

The seller of a law practice must comply with Rule 1.6 by not revealing any client confidences when discussing the practice with the prospective purchaser.

With the adoption of Rule 1.17, Rule 5.4(a)(2) was amended to allow the purchaser of a law practice to pay a deceased lawyer’s estate an amount that does not necessarily represent the same proportion to the total fees as that of the services rendered, thereby allowing for the concept of good will.

Rule 7.2(c) was also amended to allow payment to the seller of a law practice in return for client referrals to the practice purchaser.

The Comment to Rule 5.6 was expanded to make it clear that right-to-practice restrictions are permissible when a practice is sold.

The seller must act competently in accordance with Rule 1.1 in selecting a qualified purchaser.

Though Rule 7.3 was not amended, it is implicit that clients who are notified pursuant to Rule 1.17(c) and do not object or take any action are not “prospective clients” within the context of Rule 7.3, and that the law practice purchaser who contacts these clients is not engaged in prohibited solicitation.

BASIS OF REGULATION

Two justifications were initially advanced for permitting a lawyer to sell a law practice that included good will.

• Client Protection: The first justification was client protection. See Report to the ABA House of Delegates No. 8A, at 204 (1990 Midyear Meeting). Some commentators suggested a disparity existed between the treatment afforded clients of retiring sole practitioners and that afforded clients of law firms when the individual attorney handling the client matter leaves the firm. The new rule reflects solicitude for the clients of a retiring sole practitioner.

Between the time that Rule 1.17 was first proposed to the House of Delegates at the 1988 Annual Meeting and its adoption at the 1990 Midyear Meeting, the Rule was revised so that
not only individual lawyers but also law firms were allowed to sell a law practice. If an entire firm ceases to practice, its clients are left without representation just as if they has been represented by a single lawyer. Though neither Rule 1.17 nor its Comment specifically states it, the logical reading of the rule in this context is that each individual member of the firm must cease to engage in the private practice of law in that jurisdiction or geographical area, not just the firm as an entity. Under this reading, the justification for the rule premised upon client protection would survive the change in wording before passage.

**Sole Practitioners in Unfair Financial Position:** Retiring members of law firms and estates of deceased lawyers have been able to receive benefits including an allotment for that lawyer’s share of the firm’s good will. Before the passage of Rule 1.17, sole practitioners and their estates could not ethically obtain the same benefit. The rule eliminated this inequality, although at least one commentator had suggested that valid reasons existed for treating sole practitioners differently from partnerships.


**FURTHER SUGGESTIONS**

It has been suggested that the sale of a law practice by an estate be treated differently from the sale by a lawyer leaving private practice. See Minkus, The Sale of a Law Practice: Toward a Professionally Responsible Approach, 12 Golden Gate U. L. Rev. 353 (1982) (suggesting that estate representative may have a duty to obtain the best price for the practice regardless of the quality of the successor counsel, thereby creating a potential conflict with the duty of competence under Rule 1.1).

It has also been suggested that the purchase price for the law practice should not be in the form of a lump sum. See Minkus, supra (reasoning that if the sale is based upon a percentage of fees, the seller will be encouraged to find a purchaser who will do the quality of work that will result in the retention of the clients).
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:


“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 republished, 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).

