LAW PRACTICE MANAGEMENT

# The Succession Planning Toolkit

## 2nd Edition

**September 2024**

## THE SUCCESSION PLANNING TOOLKIT LIMITED WARRANTY AND LIMITED LIABILITY

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## Introduction

This Succession Planning Toolkit provides the information lawyers need to successfully plan an easy transition from the practice of law. It is divided into four chapters, or steps, from simple to more complex. Although the Toolkit is designed so that information can be obtained at the point in which it is needed, it helps to approach the steps sequentially if you are just beginning to plan.



## I. Designating a Custodian Attorney

Designating a custodian attorney is a great place to start. It is quick, easy, and immediately provides for transition if you suddenly cease practice before your planned succession is completed.

If you take only one transition planning step, designating a custodian is the step to complete.

### A. Texas Rule of Disciplinary Procedure 13.04

Texas Rule of Disciplinary Procedure (TRDP) 13.04 is a relatively new rule that allows attorneys to designate a Texas licensed attorney in good standing to act as a custodian in the closure of the attorney's practice by examining client matters, notifying clients and others of the cessation of the attorney's practice, asking courts or administrative bodies for an extension of time, filing motions and pleadings on behalf of the client with the client's consent, giving appropriate notice to affected people or entities, and making arrangements for disposition of the client's file and property. Under this rule, custodian attorneys are protected from liability, except for intentional misconduct or gross negligence.

Importantly, the custodian does not become the new lawyer for the clients. The custodian's role is to wind down the lawyer's practice. If the custodian steps into representation of a client, "the lawyer's role as custodian terminates, and the lawyer's actions are subject to the Texas Disciplinary Rules of Professional Conduct (TDRPC) regarding the client-lawyer relationship."

### B. The Role of a Custodian Attorney

A custodian attorney helps wind down a lawyer's practice, as needed, easing the burden that typically falls to family and friends. A custodian attorney does *not* assume representation of the lawyer's clients or law practice but does have practical authority to act in a manner consistent with closing an attorney's practice, helping to ensure that the client is not harmed by the closure of the law practice. Recognizing that some of these acts, such as reviewing the attorney's client

files, would implicate some important rules of professional responsibility, such as confidentiality and conflicts of interest, this toolkit provides checklists and practice tips to help avoid running afoul of those and other implicated rules.

The main objectives of a custodian include:

1. Accessing client files.

2. Notifying clients and others that the lawyer has ceased practice.

3. Obtaining the clients' instructions on what to do with their files.

4. Returning any client property.

See chapter 4, "Sudden Cessation of Practice and Custodianships," for more information on what to do when serving as a custodian.

## C. How to Designate a Custodian Attorney

### 1. Designating a Custodian Attorney via the Online Portal

Attorneys can designate a custodian attorney through the State Bar of Texas online portal by completing an electronic designation form. The process is simple and takes less than five minutes:

a. Click here to complete the custodian designation form online.

b. Click on the "Designate Custodian Now" button at the bottom of the page.

c. Log in to your MyBarPage with your bar number and your password for that page.

d. Type in the name of the colleague you wish to serve as your custodian, who must be licensed in Texas and in good standing. An email will be sent to the designated attorney, who can accept or decline to serve as your custodian.

e. You can designate alternate custodians if you wish.

### 2. Designating a Custodian Attorney by Agreement

If you prefer, you can appoint an attorney licensed in Texas and in good standing to act as your custodian by written agreement signed and acknowledged by you and the custodian attorney. It is advisable to use the custodian appointment portal even if you have a separate agreement, so the State Bar knows who to contact if your clients call seeking a way to obtain their files. See section F., "Forms and Resources for Designating a Custodian," below for a sample custodian agreement.

## D. Estate Planning Documents

It is a good idea to address closing your law practice in your estate planning documents even if you have designated a custodian through the State Bar's portal or signed a custodian agreement

with a colleague. It can be helpful to authorize your power of attorney or personal representative to enter into a custodian agreement with a Texas licensed attorney in good standing in case your designated custodian or alternates are unable to do so, access bank and trust accounts for the law practice, and provide them with any passwords to computers and digital files.

**1. Sample Will Language Regarding a Custodian**

> Any Executor designated under this Will shall have and possess any power and authority necessary to apply to a court to take jurisdiction of my law practice and appoint a custodian in compliance with Texas Rules of Disciplinary Procedure 13.01 through 13.03; to collaborate with any successor attorney, any Custodian Attorney, or any other person having lawful custody of the files and records of my law practice; and to facilitate the transition of any client matters to other counsel or otherwise terminate my services pursuant to part XIII of the Texas Rules of Disciplinary Procedure. For the purposes of this provision, "Custodian Attorney" means any attorney or alternate attorney who has been appointed by a court, whom I have designated as my custodian with the State Bar of Texas, or with whom I have signed a custodian agreement for the purpose of accessing any computers or digital files maintained by my law practice; notifying my clients of my ceasing to practice and assisting them in finding other attorneys; notifying courts and other parties of my ceasing to practice; examining files and returning client property, documents, and files; accessing any Trust Accounts and providing trust accounting and issuing unused trust balances owing to my clients or other parties as described in section 456.002 of the Texas Estates Code; and/or other activities pursuant to part XIII of the Texas Rules of Disciplinary Procedure.

**2. Sample Power of Attorney Language**

**Note:** Client consent is required for any third-party to access confidential client files. This power-of-attorney language should be used only if prior consent has been given by clients through client engagement letters or other communication.

> With respect to my law practice, my agent under power of attorney is expressly authorized and directed to carry out the terms of the Agreement to Close Law Practice [or Custodian Agreement] dated [**date**] and to coordinate any actions as my agent with those of the custodian then serving. If that Agreement is not in effect, my agent is authorized to enter into a similar agreement with another attorney that my agent, in my agent's sole discretion, may deem necessary or desirable to protect the interests of my clients and dispose of my practice.
>
> **OR**
>
> In the absence of an appointed custodian for my law practice, my agent under power of attorney, who is a lawyer, is expressly authorized to act as a custodian of my practice and in that role is directed to take any steps deemed necessary or desirable, in my agent's sole discretion, to protect the interests of the clients of my law practice and to wind down or dispose of that practice, including, but not limited to, selling that practice, collecting accounts receivable, paying expenses relating to

the practice, accessing or directing another lawyer as custodian in accordance with section 13.04 of the Texas Rules of Disciplinary Procedure, accessing or directing such custodian to access any computers or digital files maintained by my law practice; notify my clients of my ceasing to practice and assist them in finding other attorneys; notify courts and other parties of my ceasing to practice; examining files and returning client property, documents, and files; accessing or directing such custodian to access any Trust Accounts and providing trust accounting and issuing unused trust balances owing to my clients or other parties as described in section 456.002 of the Texas Estates Code; and/or other activities pursuant to part XIII of the Texas Rules of Disciplinary Procedure. If my agent is not a lawyer qualified to act as custodian for my practice under part XIII of the Texas Rules of Disciplinary Procedure, I authorize my agent to employ or appoint an attorney or attorneys as custodian or custodians to perform the acts of a custodian under such rules, including the acts listed above.

### 3. Sample Instructions for a Solo Practitioner's Will

The following language is modified from James E. Brill, *Dealing with the Death of a Solo Practitioner*, State Bar of Tex. Prof. Dev. Program, Advanced Drafting: Estate Planning and Probate Course (2000)[1]:

> I currently practice law as a solo practitioner. 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, in compliance with the Texas Rules of Disciplinary Procedure and other applicable provisions of law, to sell all or part of my practice, including negotiating the price and terms of sales, provided such sale is in accordance with the requirements of the Texas Disciplinary Rules of Professional Conduct, and where necessary, appointing a custodian attorney to manage the transition of my client files. If a sale is possible, I believe that it will provide maximum benefits for my clients as well as for my employees and family.
>
> [**Optional:**] 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

[1] Jimmy Brill pioneered many works out of concern for Texas lawyers. He organized Solos Supporting Solos and authored the standard, "Dealing with the Death of a Solo Practitioner." Jimmy was the principal author, editor, and project director of the *Texas Probate System* from 1971 until his retirement in 2019. He also received two lifetime achievement awards from the American Bar Association: one for law practice management and one for service to solo and small firm lawyers. Jimmy practiced primarily as a solo for more than sixty years. He left this world in 2021, but not without leaving instructions for Texas lawyers. He wrote to us about how to say goodbye to practice in a lawyer's will.

Note that Jimmy did not wait to die to leave the practice of law. There is a lesson there, something to be said for following the leader. The notion of glory in dying at the end of final argument is illusory. It may seem romantic to the orator, but the legacy unfolds as a look back to lost opportunities. The time to realize value in practice is in life. Know when to say goodbye to practice. Jimmy wrote about it in another standard, "Considerations When Closing Your Law Practice," Tex. Bar J., Feb. 2013 at 143.

(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.

## E. Designating a Custodian Checklist

1. **Recognize the Need** for a custodian to close your practice in the event of an unexpected, sudden cessation.

2. **Choose a Custodian:** Choose one or more potential custodians and talk with them about their role, duties, and willingness to serve. Consider agreeing to reciprocate as appointed custodians for each other.

3. **Designate the Custodian** through the State Bar of Texas online portal.

4. **Custodian Agreement:** Consider drafting a custodian agreement for signature by you and your custodian. While it is not necessary if you named a custodian through the State Bar portal, it is helpful to clarify the specifics of what you'd like the custodian to do, especially if you have more than one custodian. See section F., "Forms and Resources for Designating a Custodian," below for a sample custodian agreement.

5. **Estate Planning Documents:** Consider authorizing your agent under power of attorney or personal representative to make a custodian agreement with a qualified lawyer if there is no custodian named or able to serve as custodian for the practice files and to access and handle computers, digital files, bank accounts, and trust accounts. See section F., "Forms and Resources for Designating a Custodian," below for sample will and power of attorney language.

6. **Notify Clients:** Notify clients in your initial engagement letter of the need for appointment of a custodian and request consent for the custodian to access client files in the event of sudden cessation. Notify existing clients of the intent to name a custodian with a letter similarly requesting consent. See section F., "Forms and Resources for Designating a Custodian," below for a sample engagement letter and notice letter language.

7. **Client Files:** Maintain a client list and keep files organized for a smooth transition. Consider digitizing active files. See chapter 2, "File Management and Ensuring Password Access," for more Information, checklists, and sample file management policy and procedures.

8. **Passwords:** Read chapter 2, section C, "Ensuring Password Access Practice Tips," to determine to determine the best way to maintain passwords. Give log-in information or where to find it to your custodian for access to your client file records, firm financial records, and other practice-related databases so it is accessible when later needed.

### F. Forms and Resources for Designating a Custodian

#### 1. Forms

a. Sample Custodian Agreement

b. Sample Will Language

c. Sample Power of Attorney Language

d. Sample Instructions for a Solo Practitioner's Will

e. Sample Engagement or Notice Letter Language on File Retention and Custodian

f. Sample Closing Letter Language on File Retention and Custodian

#### 2. Resources

a. State Bar of Texas online custodian designation portal

b. Succession Planning on State Bar's Law Practice Management website

## II. File Management and Ensuring Password Access

Managing accrued closed files can be a daunting task if an attorney has not employed file management or file retention and destruction policies. These practice tips, along with a review of the applicable rules and ethics opinions, can help ease the burden by outlining the implicated rules and ways to design file management policies that comply with the rules.

### A. Applicable Rules and Ethics Opinions

Although no rule gives specific requirements for client file retention and destruction, the Texas Disciplinary Rules of Professional Conduct (TDRPC) and a few ethics opinions provide guidance, as does common sense.

#### 1. Texas Disciplinary Rules of Professional Conduct

a. **Rule 1.05** prohibits disclosure of confidential information of current or former clients except in certain circumstances set forth in the rule. This rule highlights the need to protect access to a client file from anyone who is not authorized to have access by client consent.

b. **Rules 1.09 and 1.10** prohibit a lawyer from taking adverse action against a former client related to the matter in which the lawyer represented the client. This emphasizes that former client files be tracked to determine if new matters might be adverse.

c. **Rule 1.16(d):** A lawyer must take reasonable steps to protect a client's interest when representation ends, including giving reasonable notice to the client, allowing time for the client to hire another attorney, returning documents or property to the client, and

refunding any unearned fees. A lawyer may retain documents related to the client if permitted by law, provided it does not prejudice the client in the subject matter of the representation.

d. **Note Regarding Rule 1.14 and Rule 1.15:** Rule 1.14 relates to how a lawyer should handle funds or other property that belongs to a client or third party. Ethics Opinion 627 clarifies that "other property" refers to property that is "similar to cash (such as bonds and stock certificates)." Every file should be culled to determine if any client property, which may include original documents, should be protected or returned to the client.

**2. Opinions of the Professional Ethics Committee of the Supreme Court of Texas**

a. **Ethics Opinion 570:** The client is entitled to obtain the contents of the file, including attorney notes and other work product related to the lawyer's representation of the client, unless the lawyer is permitted or required to retain documents and can do so without prejudicing the interests of the former client in the subject matter of the representation.

b. **Ethics Opinion 627:** While the TDRPC do not provide specific guidance regarding the disposition of client files, they do provide basic principles and values, such as not disclosing confidential information of current and former clients and not destroying a client's file if there's a reasonable likelihood that the client's interest would be harmed. The opinion also clarifies that the attorney is responsible for the cost of storing the file, except the attorney can charge the client for storage if the client wants the file to be stored longer than required.

c. **Ethics Opinion 657:** Generally, a lawyer can provide the file to the former client as it has been maintained or, at the lawyer's expense, convert some or all of it to paper or to an electronic format. The file contents must be reasonably accessible to the ordinary client. If any information is kept in a special format that is not reasonably accessible to the ordinary client, the lawyer must bear the cost of converting the information to a reasonably accessible format or print the information in a format that can be read by the client. If the file contains anything with unique or significant value in its original form, it should be returned to the client in its original form.

## B. File Management Practice Tips

### 1. General Tips

a. **Name a Custodian:** A custodian can assist if you are temporarily or permanently unable to practice law and is protected from liability. You can designate a custodian via the State Bar of Texas online portal in less than five minutes. See chapter 1, "Designating a Custodian Attorney," for more information.

b. **Passwords:** Provide the location of passwords to computers, digital client file records, firm financial records, and other practice-related databases to your custodian. See section C., "Ensuring Password Access Practice Tips," below for more information.

c. **Go Digital:** Consider maintaining digital files and eliminating or minimizing paper files.

d. **File Procedure:** Determine procedures for opening and closing client files, handling documents and correspondence, reviewing file contents, returning files to clients, and storing and destroying client files. Also see practice tip 3 below.

e. **Client List:** Maintain a separate list of all clients, accessible by staff, with critical information, such as:

   i. The file number or identifier with the location of the file (paper and electronic).

   ii. Whether the file is currently open or closed.

   iii. The client's name, latest address, phone number, and email address.

   iv. A brief description of the matter and relevant court information.

   v. The attorney(s) and staff, if any, working on the file.

   vi. A list of client property, items of intrinsic value, or original documents, such as estate planning documents, in the file and their locations.

   vii. A record of funds held in your IOLTA account or any trust accounts.

**2. Create a File Retention Policy Appropriate for Your Practice**

a. At a minimum, your file retention policy should include the following information:

   i. How the client will be notified of your file retention policy. See practice tip 4 below.

   ii. How the client can obtain their file once the case is closed. Address the cost of postage if the client cannot pick it up. Consider a policy of offering to return the client file at the close of representation and retaining an electronic copy.

   iii. How and where the file will be stored.

   iv. How long the file will be stored before destruction.

   v. Whether the client will be notified before destruction or only provided notice in the engagement letter and termination letter.

   vi. What, if anything, the client will be charged for storage beyond the destruction date. See Ethics Opinion 657.

   vii. What will be done if the client cannot be located to return the file or their property, or to consent to destroy the file. Consider the following options:

      (a) Making a report to the Texas comptroller regarding funds in the lawyer's trust account when the lawyer has not been able to locate or identify the owner for

longer than three years. See Ethics Opinion 602 and chapter 74 of the Texas Property Code.

(b) Depositing original wills with the applicable county or probate clerk. See chapter 252 of the Texas Estates Code.

(c) Petitioning the district court or, if the client has died, in statutory probate court in the county of residence for authority to destroy the file.

b. Ask your professional liability carrier for file retention guidance. Some carriers have sample file retention policies that you can customize for your practice.

**3. Develop Procedures for Execution of the File Retention Policy Regarding:**

a. Opening and closing a client file, including:

i. Assigning a unique file number or identifier for each client matter,

ii. Keeping a copy of the client's consent to destroy their file (e.g., engagement letter) separate from the main file to avoid inadvertent destruction of the consent,

iii. Determining when a file can be closed, and

iv. Developing a file closing checklist.

b. Handling documents and correspondence during representation, including:

i. Indexing physical files that involve a lot of physical documents and records,

ii. Securing physical files at the close of the business day,

iii. Scanning and filing any files or documents received within a specific number of business days, and

iv. Preserving email correspondence related to the case and archiving email accounts for departing employees.

c. Reviewing and culling file contents, including:

i. Reviewing the client file within a specific number of days of the conclusion of the client matter,

ii. Recording the date that the file was reviewed and culled,

iii. Culling any protected information from the client file,

iv. Keeping a copy of the client's consent to destroy the file,

v. Returning original documents and valuables to the client within a specific number of days along with a summary of the document retention policy and keeping a written record of what was returned, and

vi. Reviewing and culling closed files in storage that have not yet been reviewed.

d. Notifying clients to retrieve their files or authorize file destruction in accordance with the rules.

e. Determining how long to store the file if the client does not want it.

f. Storing the file securely.

g. Destroying the file in a way that protects all confidential information.

**4. Include File Retention Policy (and Custodian) Language in Your Retainer Agreement or Notice Letter and Termination Letter**

a. Sample file retention policy and custodian language for your engagement or notice letter:

> You agree that it is your responsibility to obtain your file upon termination of representation. We will notify you when it is available after your matter has concluded or will make it available to you within a reasonable time after your request. If your file is not picked up within [**number**] days after we notify you that it is available, we can assume that you do not want it. In that case, we will retain the file for [**number**] years and then destroy it in accordance with our file retention policy and procedures and the Texas rules of professional responsibility for lawyers. If you want us to retain your file beyond [**number**] years, you agree to pay the reasonable costs of storage. If you do not seek the return of your file when we notify you that it is available, you may request it at any time before its destruction. Other than the initial notification that your file is available, we will not send any further notices reminding you that it is available to be picked up or regarding when the file will be destroyed or that destruction has taken place.
>
> If [I am/we are] temporarily or permanently unable to practice law due to unforeseen circumstances, you consent to a named custodian, a successor attorney in my practice, or an attorney licensed in Texas and in good standing with the State Bar of Texas acting as a custodian to review your client file, including confidential information, and determine what steps, if any, are needed to preserve any rights you may have in your case or to notify you and return your file to you or another attorney at your direction.

b. Sample file retention policy and custodian language for your closing letter:

> Your file is ready to be picked up. If it is not picked up within [**number**] days, we will assume you do not want it. We will keep your file for [**number**] years, after which we will destroy it without further notice to you in accordance with our file

retention policy and procedures and the Texas rules of professional responsibility for lawyers. If you want us to keep your file longer than [**number**] years, we are happy to do so but will need to charge you the reasonable cost for storage. If you don't want your file at this time but later decide you want it, you can request it at any time before it is destroyed.

If you choose for us to store your file and [I/we] become temporarily or permanently unable to practice law due to unforeseen circumstances, you consent to a named custodian, a successor attorney, a personal representative of my estate, or an attorney licensed in Texas and in good standing with the State Bar of Texas reviewing your client file, including confidential information, to determine what steps, if any, are needed to preserve any rights you may have in your case, to notify you and return your file to you or another attorney at your direction, or to take action authorized under part XIII of the Texas Rules of Disciplinary Procedure.

**5. When a Client Relationship Terminates, Follow the Established File Retention Policy and:**

a. Review the file.

   i. Cull any protected information from the client file.

   ii. Keep the client's consent to destroy their file, which may be in the fee agreement.

   iii. Return original documents and valuables to the client along with a summary of the document retention policy.

   iv. Send the client a closing letter informing them that the attorney-client relationship is terminated and of their right to the file with deadlines to obtain it. If client funds are held in an IOLTA Account, account for the expended portion and return any excess to which the client is entitled.

b. Return the file to the client when the representation ends or after an agreed time.

   i. If the file is completely electronic, returning it will be relatively easy. If paper, encourage the client to come get it or mail it at the client's expense. You may want to make a copy at your own expense.

   ii. If you keep the original file, ensure all valuables are returned to the client without delay. Tell the client when the file will be destroyed. If they wish for you to store the file beyond the date it can properly be destroyed, let the client know what amount, if any, will be billed to them for the extended storage.

c. Storage

   i. Store in a fireproof, waterproof location that prevents an unauthorized person from accessing the contents of the file.

ii. Per Ethics Opinion 627, the cost of storing the file until it can be destroyed is borne by the attorney unless otherwise agreed by the client. However, if the client asks for the file to be stored longer than required, the cost of storage may be charged to the client.

d. Destroy file only after:

i. You remove all valuable property and original documents and return them to the client (including excess IOLTA funds).

ii. You confirm that the destruction of the file will not prejudice the client. If destruction will do so, preserve the file, or return it to the client (subject to limitations protecting the interests of other people or, in some situations, the interests of the client).

iii. The expiration of:

(a) All applicable statutes of limitation for claims against the client and the lawyer, including malpractice claims. Do not ask a client permission to destroy the file before these limitation periods run.

(b) All rules, regulations, court orders, and laws requiring a retention period longer than the applicable statutes of limitation.

(c) In criminal matters, in addition to statute of limitation issues, a convicted client's sentence and all appeals.

e. **Consider maintaining electronic files.** They minimize the need for a paper file, reduce storage costs, and can be easily transferred to the client at the close of the case.

## C. Ensuring Password Access Practice Tips

Whether through a sale of practice, custodianship, or other disposition, a person with interest in a law practice (referred to collectively as "Authorized User") may require password access for logging into electronic devices or digital resources, such as:

- Computers
- Email
- Banking and financial accounts
- Cloud data storage
- Cell phone and other electronic devices
- Online libraries and research services

- Social media
- Online case filing service
- Client and case management system, client-related data
- Financial management services and other software (whether local or cloud-based)

There is no simple solution for efficiently and safely ensuring digital access to the necessary devices, digital services, or other electronic resources. This password access discussion addresses some alternatives, presents pros and cons, and offers a few best practice recommendations.

For information on how to access computers and digital files of a deceased or incapacitated attorney, see chapter 4, section C., "Accessing and Disposition of Client Files."

**1. Electronic Password List: Not Recommended**

a. Compiling a current list of passwords in a MS Word or Excel file or similar electronic format is fraught with problems. Anyone will struggle to keep the list updated with the most current passwords. For example:

   i. Passwords change frequently. Vendors require users to periodically update stale passwords, and users frequently change passwords because they forget their log-in credentials.

   ii. New accounts or services would also need to be captured on the password list.

b. Although you might be able to store an electronic list locally in a secure, encrypted location, each of the following potential data storage formats have significant drawbacks:

   i. Secure cloud storage may not be as secure as desired.

   ii. Information stored online may be subject to data breaches, even if encryption reduces the risk.

   iii. The cloud storage password must also be shared between the attorney and the Authorized User, whether before the need arises or contingently on an incapacitating event.

   iv. Emailing the list to the Authorized User may be unsafe from threat actors or phishing.

   v. Physical storage media, such as a USB drive or portable data disk, can be misplaced, lost, or stolen. Other logistical impediments may make it difficult to access the media or update passwords and services.

2. **Paper List: Not Recommended**

   a. While potentially more secure than an electronic password list in some respects, as the list is not directly hackable, this practice is not an optimal solution:

      i. Basic password protection protocols strongly advise against writing down passwords (but see https://tiptopsecurity.com/is-it-okay-to-write-down-my-passwords-how-to-do-it-right/ for contrary advice).

      ii. Exercising due diligence to maintain the most current passwords and services is equally challenging for all the reasons listed in section C.1.a. above.

   b. If you elect to use this dubious practice, options for storing the list include:

      i. Giving it to the Authorized User (with the added risk of the list being lost or stolen).

      ii. Keeping it in your personal safe.

      iii. Placing it in a safe-deposit box, giving contemporaneous or contingent future access to the authorized representative.

3. **Password Manager: Much Better Option**

   a. **A password manager** (a.k.a. password management app or digital wallet) is an online service or application that encrypts and securely stores a user's passwords and other log-in information so that the user needs to remember only one master password to access all their other log-in credentials. It is probably the most recommended go-to solution by tech security experts in recent years. To begin using a password manager, a user commonly:

      i. Exports the passwords and credentials into a file from the user's browser or other location.

      ii. Imports that file's contents into the password manager app on the web in encrypted cloud storage (a.k.a. vault).

      iii. Only needs to memorize, or otherwise preserve, one master password (a.k.a. "single sign-on" or SSO) thereafter, grant the password manager app access to the vault, and automatically complete passwords and credentials.

   b. **Practice Tip:** Store log-in credentials to the attorney's computer and/or laptop on the password manager to ensure access to files that are on the attorney's physical computers but not available in the cloud.

   c. **Password Manager Vendors:** For information on several potential vendors, with helpful pros and cons for each, see https://www.pcmag.com/picks/the-best-password-managers. Prices vary. At present 1Password charges about $35 a year. Various major

platform providers also provide this service, which you might already be using without knowing it, such as Apple's iCloud Keychain or the free Google Password Manager.

Features and services for a password manager service, depending on the vendor, may include:

i. Generating strong, complex passwords (rather than using the exact same password—or similar variations—across multiple websites, which we all know you do).

ii. Capturing passwords for desktop applications.

iii. Creating more than one vault (for example, different vaults for business, family, and personal purposes).

iv. Filling out forms automatically.

v. Secure encrypted data storage for your files and other data (apart from just your passwords).

vi. Access to a personal virtual private network (VPN).

d. Multifactor Authentication

For added security, password management services typically offer multifactor authentication (MFA) to provide extra layers against hacking and phishing. MFA is sometimes referred to as two-factor authentication (2FA) when two steps are involved. An MFA or 2FA protocol requires one or more extra steps you can choose from to verify your identity, in addition to the master password (first step/factor), such as:

- Entering a personal identification number (PIN).
- Clicking a link sent to your email address.
- Using thumbprint or facial recognition tools, or providing another biometric identifier.
- Accessing a push notification on your phone.
- Using a physical object in your possession, like a hardware security key (see practice tip 5 below).

e. Password Manager Pros and Cons:

i. Pros:

(a) **Emergency access:** Crucially, many services (but not all!) offer the option to designate authorized users for emergency access to your password manager,

which can be an efficient way to provide this access. For example, **1password** has an "Emergency Kit," which is a PDF file for storing in a safe place that contains your "secret key" and a space to record your master password for accessing this service. You have the same options (and drawbacks) as a paper password list for ensuring emergency access to this kit, including:

(1) Giving it to the Authorized User.

(2) Storing it in your personal safe.

(3) Placing it in a safe-deposit box.

(b) **Court order:** If the person does *not* have such emergency access to the password manager after an attorney's incapacitating event, they might be able to obtain emergency access to the service by court order. For example, a custodian attorney may obtain an order for custodianship and court supervision under Texas Rule of Disciplinary Procedure (TRDP) 13.03 so that the custodian may "examine the client matters, including files and records of the attorney's practice, and obtain information about any matters that may require attention." Alternatively, a probate court can similarly provide an order for such access in a probate proceeding. However, some platforms and services expressly disclaim any obligation to provide a user's passwords or log-in details. For example, see Google, "Submit a Request Regarding a Deceased User's Account," (last visited June 14, 2023) https://support.google.com/accounts/troubleshooter/6357590.

**Note:** Including language in your will or durable power of attorney is another option for ensuring access to client files. See "Sample Will Language" and "Sample Durable Power of Attorney Language" in chapter 1, section F., "Forms and Resources for Designating a Custodian."

ii. Cons:

(a) **Compatibility:** Before jumping in with the first service you find, verify whether the password manager service is compatible with your default browser, your specific devices, and any essential websites.

(b) **Single point of failure:** Requiring only a single master password for accessing all of your online accounts and credentials creates the concomitant problem of a potential single point of failure causing a lack of access if the master password is lost or stolen. When this happens, password manager apps often do *not* have recovery protocols to retrieve or reset the master password (to eliminate the risk that it is phished by someone posing as you).

(c) **Security:** While these services frequently offer some of the best-in-class encrypted cloud protection for password credentials, they are not flawless. At least one password manager company infamously sustained a serious breach in which customers' encrypted vaults were stolen (https://www.theverge.com/2022/12/22/23523322/lastpass-data-breach-cloud-encrypted-password-vault-hackers), with an engineer's employer vault hacked

(https://arstechnica.com/information-technology/2023/02/lastpass-hackers-infected-employees-home-computer-and-stole-corporate-vault/) a few months later.

**4. Passkeys: Possibly a Great Option but Too Soon to Tell**

Passkeys purportedly offer a more convenient and safer alternative to passwords. A passkey is based on a user's trusted devices and allows the user to sign in by unlocking their computer or mobile device with their fingerprint, facial recognition, a local PIN, or a hardware security key (see section C.5. below) instead of a password. Each of the user's trusted devices will have its own passkey, and platforms should sync passkeys across multiple devices. Passkeys use a FIDO2 authentication protocol (Fast ID Online). Since there is no password to hack, it is resistant to phishing, and it is almost impossible for threat actors to hijack credentials, messages, or emails to log in, unless they have one of your devices in their possession already logged in.

Keep an eye on this emerging technology. Passkeys may become the next gold standard for security and electronic authentication, revolutionizing access to devices and credentialed websites by eliminating the need to recall passwords. Passkeys should soon work on most major platforms and browsers.

Finally, passkeys and password managers are not mutually exclusive, as current password manager vendors, such as 1Password and Dashlane have publicly announced they are going to support passkeys, meaning these services can work in tandem to provide multiple layers of password and device security.

For more information on passkeys see these resources:

a. FIDO Alliance, "Passkeys," https://fidoalliance.org/passkeys/ (last visited June 14, 2023).

b. Google, "The Beginning of the End of the Password" (May 3, 2023), https://blog.google/technology/safety-security/the-beginning-of-the-end-of-the-password/.

**5. Hardware Security Key**

A hardware security key contains a private key code for authentication purposes that communicates with a device when the key is plugged into the device's USB port. It may also (or instead) have the ability to connect with the device through near-field communication (NFC) protocol, so that a user needs only to bring the key near the device or tap the device.

A hardware security key (like the Yubikey and the Google Titan) can complement authentication for a password manager and other services, or even serve as the primary security for your devices. A hardware security key may also be referred to as a token, fob, dongle, FIDO key, physical security key, or universal 2nd factor (U2F) key. Purchasing a key directly from a manufacturer or on Amazon is relatively inexpensive, costing approximately $25 to $50.

As noted above, a hardware security key can either:

a. **Offer an extra layer or factor of security** to protect passwords or ensure secure access (as part of MFA or 2FA), for example, in conjunction with a password manager or a passkey.

b. **Be used as a stand-alone tool** for authentication to access hardware or certain services without the need to enter a password.

**Hardware Security Key Downside:** The primary disadvantage for a physical security device is that it might be lost, stolen, or damaged. If there is no duplicate or alternate hardware key and you no longer possess the original U2F hardware key, it may be impossible to regain access. To alleviate this issue, you might consider obtaining two duplicate keys, one for yourself and another for the successor or in a secure place.

If you use a hardware key in conjunction with a password manager, confirm that security protocols for each are compatible (for example, that the key and the password manager both support FIDO2 authentication for ease of use and up-to-date protection).

**6. Recommendations**

What are the best options for securing your passwords for easy access? Each attorney's situation varies, and one solution may not fit all users, but the following framework offers a launching point:

a. **Use a password manager:** Set up a password manager (see section C.3. above).

b. **Ensure emergency access:** Take the steps necessary to ensure that your Authorized User has emergency access. If the password manager offers an emergency access kit or similar feature, make it **securely accessible** by your Authorized User, whether (a) kept digitally and encrypted in the cloud or (b) stored on paper form in a safe or a safe-deposit box for better security.

c. **Hardware security keys:** For maximum security (according to one leading security expert), especially to protect sensitive client information and preserve confidentiality, consider obtaining one or more hardware security keys compatible with the password manager (see section C.5. above) to provide comprehensive access to your passwords, software, services, and devices—in conjunction with, or in lieu of, an emergency access kit. Keep this key in a safe, securely accessible location for the Authorized User. For the ultimate protection, consider storing the key in a safe or safe-deposit box.

d. **Consult an IT professional** to determine the best security measures for your current technological configuration and anticipated needs. In appropriate circumstances, consider adding an IT expert as a crucial member of your succession planning team.

### D. Forms and Resources for File Management

#### 1. Forms

a. Sample Engagement Letter Language Regarding File Retention and Custodian

b. Sample Closing Letter Language Regarding File Retention and Custodian

c. Sample File Retention Policy

#### 2. Resources

a. File Retention Policy Practice Tips Checklist

b. File Retention Policies from Other States (may not be compliant with the TDRPC):

i. Lawyers Mutual Liability Insurance Company of North Carolina

ii. California Lawyers Association sample policy

c. Sample Best Practices from Other States:

i. Washington State Bar Association—best practices and WSBA checklist

ii. State Bar of Michigan File Retention Toolkit guidance

## III. Transition Planning

The goal of transition planning is to enable you to achieve what you perceive to be the best possible conclusion of your law practice. Do you hope to practice until it's no longer possible, or do you hope to retire at some point before then? Do you see yourself practicing as a sole practitioner or with other lawyers? Do you hope to transition your practice to a successor lawyer or firm? Would you like to sell all or part of your practice? Perhaps you would prefer to simply wind down the practice when the time is right. These are just a few things to consider when determining what is needed to achieve the transition you envision, whether it's related to succession planning, selling your practice, or closing your office.

### A. Overview of Transition Planning

#### 1. Succession Planning

Succession planning anticipates the ultimate transfer of a legal practice from a predecessor to a successor lawyer. The objective is to transfer future responsibility and revenue from all or part of the practice to another lawyer or law firm, whether by sale or another method of transfer, where all sides receive value and client representation is seamless.

Ideally, the planning is done years in advance of a target exit date. A longer time frame enables the planning lawyer to optimize the value of the practice and find the best form of

succession for an easy transition with the timing that works best for the exiting attorney and their clients.

Unfortunately, planning is commonly not done timely, and a sudden cessation of practice occurs that often becomes a disaster for clients and family members attempting to close the practice. It also tends to result in little or no compensation for the practice to the attorney or their family. Designating a custodian, at a minimum, should be the first step on a lawyer's succession planning journey. See chapter 1, "Designating a Custodian Attorney," for a quick and easy way do so.

Fortunately, it's never too late to engage in planning if there is still a practice for the lawyer to exit. Some planning is always better than no planning.

Like all succession planning, the plan begins with identifying what the exiting lawyer wants to accomplish and over what period. Identifying objectives creates an outline of a plan and can help develop the appropriate timeline. Identifying the needs of the clients and features of the practice the lawyer wants in place for the exit also helps identify potential successor lawyers.

### 2. Cessation Without a Successor

Many lawyers choose to wind down their practices without a successor. As with succession planning, it is best to formulate a plan for transitioning out of the practice of law and closing the practice, especially if you have clients that will need to find a new attorney and staff who will need to find new employment.

This "Transition Planning" chapter begins with a discussion of the traditional succession methods used by lawyers to retire from practice for value without a sale, then addresses how a lawyer may sell a practice in compliance with the applicable rules of professional responsibility, and concludes with guidance on closing your own practice without a successor, including closing the professional entity for a sole practitioner.

**Note:** While no rule prohibits a lawyer from selling all or part of their law practice, any sale must comply with all rules of professional responsibility. Some methods of selling a practice present more challenges to satisfying all applicable rules. When an attorney transfers their client matters to a successor lawyer in the firm or merges with a firm in exchange for compensation, compliance with many rules is less complicated. Some ethics lawyers believe an outright sale is too fraught with potential rule violations to be worth attempting. This chapter provides information about the most relevant rules for any method of sale so each lawyer can make their own determination about how to structure the sale of their practice in a way that meets their clients' best interests and satisfies the rules.

## B. Traditional Succession Methods Involving Compensation Without a Sale

1. Traditional methods of transferring client matters to a successor lawyer or firm for compensation short of selling the practice include:

    a. Hiring a younger lawyer and transferring client matters over time with client consent and arranging departure compensation for the senior lawyer at the proper time.

b. Joining or merging with another firm, introducing clients to the new firm's lawyers, arranging compensation according to the value of the work or "book of business" brought to the firm, and arranging origination and departure compensation accordingly.

c. Engaging outside cocounsel with client consent and entering into a permissible fee sharing arrangement based on work performed or responsibility shared.

2. Consider the following when transitioning through affiliation with other lawyers or law firms:

   a. Consider forming a professional entity. The entering attorney joins the entity, and all files and assets need no further transfer. The new lawyer simply takes over the firm when the time is right.

   b. If enough funds will not be available for a full buyout upon exit, consider developing a retirement or other deferred compensation arrangement or funding an existing one to compensate the exiting attorney.

   c. Consider keyman insurance or disability insurance to safeguard against an untimely death or disability of either lawyer causing an earlier exit than planned.

   d. Agree in advance on how to unwind the deal in case the transition does not work for any reason.

   e. Each lawyer should consult their malpractice insurer for tail coverage or other arrangements to ensure that they will not be liable for the other lawyers' prior acts.

   f. For affiliation with a younger lawyer, make plans to ensure adequate mentoring and development of client relationships over time.

   g. For mergers of firms, be aware of and carefully address any entity dissolution or combination rules and properly document for state entity and tax law purposes.

   Exiting a practice by joining with other lawyers or law firms has the advantage of avoiding ethical concerns raised when selling a practice, such as those related to transferring files to outside lawyers and impermissible fee-splitting arrangements.

## C. Sale of Practice

When planning an exit to the practice of law, lawyers should consider whether their practice has the kind of value and type of client matters that would interest other lawyers in purchasing the practice. While several ethical rules must be navigated when selling a practice, there is no prohibition on doing so in Texas, and other lawyers and firms have done so successfully. Carefully adhering to all relevant professional responsibility rules is imperative, and failing to do so in a manner that is in the best interest of the client can jeopardize an otherwise successful transition.

Lawyers spend decades building successful practices and client relationships, which should translate into real value for the lawyer and/or their family when it's time to exit the practice. If properly managed, transferring that goodwill to a successor lawyer who can use it to enhance or jump-start their own practice could result in a satisfactory purchase price.

The sale of practice discussion begins with an overview of opportunities for selling and acquiring attorneys, proceeds to the pertinent rules and practice tips, and concludes with checklists for the selling attorney and acquiring attorney, along with sample forms.

## 1. Opportunities for the Selling Attorney

There are numerous ways to prepare for the sale of a law practice. The priority should become the creation of a detailed succession plan that allows for ample transition time. A transition period is vital for allowing key client relationships to be transferred and preserved. It also assists in preserving the value of the organization and the prospect of profits and aids the buyer's expectation in purchasing the practice. Consider your ethical responsibilities, build a team of professionals, and create a succession plan.

### An Overview of Where to Start

- ✓ Review section C.3., "Frequently Asked Questions," below regarding buyers, valuation, structuring the deal, preliminary stages of a sale, purchase agreement terms, and continued practice.
- ✓ Review your ethical responsibilities and practice tips in section C.4., "Rules and Practice Tips," below.
- ✓ Review section C.5., "Checklist When Selling a Practice," below.
- ✓ Put a team together.
  - Transactional attorney to help you through the legal side
  - CPA for tax considerations
  - Financial advisor to help you plan through the next steps
  - Insurance advisor for malpractice and other insurance needs
  - Valuation expert to aid in setting the sale price
  - Law practice broker to navigate confidential communications and the best option for your exit from the practice
- ✓ Survey your practice to consider the following transaction structure options.
  - Groom a successor and build from within
  - Outright sale

- Merger
- Assumption agreements with certain buy-sell events
- Partner equity transfer or sale to junior associate

**2. Opportunities for the Acquiring Attorney**

When an attorney decides it is time to grow or start their own practice, the attorney will spend time and money effectuating its growth. If an acquisition is planned and executed properly, it can be an easier means of practice development.

**An Overview of Where to Start**

✓ Review section C.3., "Frequently Asked Questions," below regarding structuring the deal, preliminary stages of a sale, and purchase agreement terms.

✓ Review your ethical responsibilities and practice tips in section C.4., "Rules and Practice Tips," below.

✓ Review section C.6., "Checklist When Acquiring Another Attorney's Practice," below.

✓ Put a team together.

- Law firm management consultants
- Business opportunity brokers
- Accountants
- Marketing consultants
- Executive search consultants
- Lawyers

✓ Business profile

- Are you comfortable with the Seller's areas of practice?
- Do you plan on adding other areas of practice?
- Do you plan on ceasing areas of practice?
- Do you plan on adding geographic locations or moving to a new geographic location?

- ✓ Personnel
  - Will the seller stay on as "of counsel" to introduce you to the community?
  - Will the staff stay and continue to work with new leadership?
  - What are the salaries of the staff you will need to pay? Benefits? Bonuses?
- ✓ Asset purchase agreement
  - Be specific in listing what is being purchased.
  - Specify what liabilities will be assumed (generally, they are not assumed). Consider tail coverage for the selling attorney to minimize risk.
  - Purchase price and funding terms can be listed here.

**3. Frequently Asked Questions**

**a. Who Are My Potential Buyers?**

One of the best sources for a buyer is the exiting lawyer's associates and partners working at the same firm, if any. They know the practice, the clients, and the value of your files.

Also consider competitors in your practice area who you know and believe will be good lawyers to take care of your clients. Make sure to consider young lawyers who may be hanging out their shingles as solos after law school. They are likely to be hungry for clients like yours and an opportunity to be mentored by you during transition.

Out-of-state law firms have been expanding into Texas and certain local markets. Firms already in Texas have also been expanding. Many are looking to expand certain profitable practice areas, especially those with a desired expertise.

**b. How Do I Find Buyers?**

Use existing relationships and network to find attorneys who may be looking to enhance their practices with clients like yours. But be cautious about telegraphing your intent to sell with competitors, to minimize clients being poached by your competitors or clients learning prematurely that you are planning to exit.

Consider contacting lawyer consultants who advise on how to enhance practices, as they may be a resource for potential buyers.

Consider using business brokers to help you market and prepare your firm for a sale, but be careful to inquire about their experience with selling law practices, as there are ethical and other issues unique to selling a law practice.

You can advertise the sale of your firm in legal publications, with caution not to reveal any protected client information.

**c. How Do I Value the Business to Set the Price?**

Valuation is practice-specific and depends largely on the practice area, types of clients, and expected revenue stream. A formula for valuing one practice may not work for another. Items key in setting a value or purchase price include:

i. The nature and consistency of the client base and predictive collections for clients that are expected to remain with the firm

ii. Referral network transferability

iii. Systems and operations (include the condition of your files and your file management system)

iv. Name and reputation attached to the firm

v. Phone number, website domain, social media account, blogs, etc.

vi. Office space, furnishings, and equipment that might be of interest

vii. Availability of existing employees that may remain with the practice to help transition and maintain client relationships

**d. How Should the Deal Be Structured?**

Decide if you intend to sell your entire practice or just a particular practice area or geographic area.

The agreed purchase price can be fixed, typically paid either as a lump sum or in agreed installments over a set period.

Another method is to pay the agreed purchase price on an earn-out arrangement, which pays a percentage of revenue earned over time. With this method, however, it is difficult and critical not to structure the payments as a fee split, which is impermissible. Rather, the timing and size of installments for the fixed purchase price might be based on an affordable portion of new fees as they are earned. The details of such an arrangement should be posed to ethics professionals or to the Texas Ethics Helpline to be sure impermissible fee splitting is not occurring. See Texas Disciplinary Rule of Professional Conduct (TDRPC) 1.04.

If you join or merge with the purchasing firm, your compensation might be structured pursuant to a compensation plan or retirement plan. An exiting lawyer may take any title that works but is often listed flexibly as “of counsel.”

**e. Can I Continue to Practice After Sale?**

The deal may include a period for transitioning your clients and expertise to the purchasing firm or lawyer, often required by the buyer to solidify their new client relationships. Your role can be anything that fits, ranging from full- or part-time employee to "of counsel" or simply as a client relationship manager.

When less experienced lawyers are assuming your practice, it is recommended that you continue to play some role as a mentor.

A sale of an entire geographic area or a defined type of practice should be carefully described in the purchase agreement. You must then be careful not to practice geographically or by type in violation of those restrictions and, if you refer business, not to allow compensation that might violate the fee-sharing rules.

**f. What Are the Preliminary Stages of a Sale Transaction? What Documents Are Involved?**

i. Identify what is being sold, whether the entire practice, some practice areas, or some practice locations.

ii. Decide whether the seller will continue to practice with or separate from the buyer.

iii. Determine expected future revenues and related value of the practice being sold.

iv. Prepare notice letters to clients and authorizing consent to review of their files by the prospective buyer.

v. Enter a nondisclosure and confidentiality agreement with the prospective purchaser to protect the confidentiality of client files and firm financial information.

vi. Arrange for a preliminary limited review of primary client names, types of matters for confidentiality and competence determinations, and overview of firm financials. It is best to share only nonspecific revenue, billing practices, client concentrations, and major expenses to protect client confidentiality in this initial stage.

vii. Prepare and sign a letter of intent with a nonsolicitation agreement with respect to employees and clients.

viii. Arrange and oversee a due diligence review of your client files and more careful analysis of potential conflicts. Likewise arrange and supervise a due diligence review of detailed financials of the firm.

ix. Determine whether there will be a transfer of office space, equipment, phone number, website, and existing relationships. If so, identify the transfer documents necessary for those assets.

x. Determine how clients with closed files will be notified and how their files will be properly returned or destroyed. Similarly, determine how clients with active files that are not part of the sale will be notified and how their files will be retained or transferred to other counsel.

xi. Prepare a detailed term sheet for drafting the purchase agreement.

**g. What Terms Should Be Included in a Law Practice Purchase Agreement?**

i. Warranties of key facts:

(a) Revenue produced

(b) Absence of malpractice claims

(c) Valid licenses

(d) Level of experience

ii. Structure of purchase price (e.g., lump sum, installment, or other payout that does not violate impermissible fee-splitting rules) and any adjustments for actual receipts.

iii. Legal malpractice insurance coverage for pre- and postrepresentation (e.g., tail coverage).

iv. Indemnification provisions.

v. Noncompete and nonsolicitation provisions compliant with ethics rules. See TDRPC 7.04, "Filing Requirements for Advertisements and Solicitation Communications," and TDRPC 7.05, "Communications Exempt from Filing Requirements."

vi. How to handle prior closed files and notices to clients.

vii. How to handle IOLTA accounts.

viii. Consider alternative dispute resolution clauses.

**4. Rules and Practice Tips**

When selling or buying a law practice or an entire practice area of a law practice, it is important to review your ethical responsibilities under the TDRPC and the guidelines of the ABA Model Rules of Professional Conduct. Again, no rule prohibits an attorney from selling all or part of their practice. That said, ethical concerns impact the sale of a law practice. For purposes of discussing the applicable rules below, "sale of a law practice" refers to the conveyance of client matters from a selling attorney, who has an attorney-client relationship with clients, to an acquiring attorney.

**a. Six Major Ethical Concerns in the Sale of a Practice Under TDRPC**

i. Rule 1.01: Competence of the successor attorney to handle the matters.

ii. Rule 1.03: Communication with clients about the process and their rights.

iii. Rule 1.04(f): Impermissible fee splitting and "sham sales."

iv. Rule 1.05(b)(1)(ii): Confidentiality and access to client files by unauthorized persons.

v. Rules 1.06 and 1.09: Conflict of interest with the acquiring attorney(s).

vi. Rule 7.03 and 8.04(a)(9): Solicitation or barratry regarding the acquiring attorney.

**b. Relevant Texas Disciplinary Rules of Professional Conduct**

i. **Rule 1.01**, "Competent and Diligent Representation," prohibits lawyers from accepting or continuing employment in a legal matter that the lawyer knows or should know is beyond the lawyer's competence, unless it's reasonably required in an emergency and the assistance is limited to what is reasonably necessary in the circumstances, or, with prior consent of the client, another lawyer with competence in the area assists.

**Sale of Practice Tip:** The acquiring attorney needs to have competence to provide legal services and represent the clients in the specific matters handled by the selling attorney. This can be challenging to determine if the selling attorney does not know enough about the acquiring attorney's scope of knowledge or if the acquiring attorney does not know enough about the selling attorney's particular matters to determine their own competence to represent the selling attorney's clients.

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

**Sale of Practice Tip:** If the acquiring attorney intends to change the scope, objectives, or general methods of representation of a client from those of the selling attorney, the acquiring attorney should seek to clarify those changes with the client within a reasonable time and enter into a new representation agreement before engagement.

iii. **Rule 1.03**, "Communication," states that a lawyer must keep a client reasonably informed about the matter's status, promptly comply with reasonable requests for information, and explain a matter to the extent reasonably necessary to allow the client to make informed decisions regarding the representation.

**Sale of Practice Tip:** The selling attorney must provide notice to affected clients. It should contain the following information, tailored to what the specific circumstances dictate is objectively reasonable to meet the client's needs:

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

(b) The client's right to retain other counsel;

(c) The identity of the acquiring attorney and the location where the acquiring attorney intends to practice;

(d) The client's right to take possession of the client file, its location, when it will be available for retrieval, that a written receipt will be required, and that the selling attorney is entitled to make and retain copies of the file at the selling attorney's expense;

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

(f) Whether the acquiring attorney intends to represent the client on the same basis as agreed between the selling attorney and the client or intends to alter the terms of the engagement in the future; and

(g) The selling attorney's and acquiring attorney's intent to presume the client's consent to the transfer of the client's file if the client does not take any action or does not otherwise object within ninety days of the receipt of the notice.[2] **Note:** The assumption of client consent after a period of forty-five days is allowed under ABA Model Rule 1.17. A ninety-day period may be more reasonable and is provided here with the caution that there is no Texas rule or ethics opinion stating that an attorney may presume client consent if reasonable notice is provided and the client fails to timely respond.

iv. **Rule 1.04**, "Fees," paragraph (c), states that when a 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.

**Sale of Practice Tip:** The acquiring attorney should establish the basis or rate of fees with the new clients, preferably in writing, before or within a reasonable time after taking over the representation.

Rule 1.04(f) and (g) relate to impermissible fee sharing and sham sales. It states in relevant part:

[2] SALE OF ALL OR PART OF A LAW PRACTICE, prepared by the Texas Disciplinary Rules of Professional Conduct Committee of the State Bar of Texas, 2017. Also see, BEST PRACTICES WHEN SELLING A PRACTICE, https://www.texasbarpractice.com/law-practice-management/article/best-practices-when-selling-a-practice/ (last visited Mar 26, 2024).

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

(1) the division is:

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

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

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

(3) the aggregate fee does not violate paragraph (a) [the total fee must not be unconscionable.]

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

**Sale of Practice Tip:** The selling attorney is not permitted to sell individual client matters. The sale price for an individual client matter is effectively a referral fee earned simply for turning the matter over to another lawyer while retaining no responsibility for the matter. Whether a selling attorney is engaged in a "sham sale" in violation of Rule 1.04 depends on the specific facts and circumstances of the transaction. See section C.4.b.x., "Rule 5.06, 'Restrictions on Right to Practice,'" below.

Indications of a sham sale include:

(a) A sale of less than an entire practice area, with particular scrutiny on a sale of individual client matters or a small number of client matters relative to the total number of clients the selling attorney has in a specific practice area.

(b) A sale agreement that does not include the selling attorney's cessation of practice if the entire practice is sold or cessation of practice in the practice area sold.

(c) Repeat sales by the selling attorney of the same or substantially similar areas of practice.

(d) The motivation for the sale. The fact that a seller returns to practice in the sold subject area does not itself indicate a sham sale, as a lawyer who sells his practice to accept appointment to judicial office but later resumes private practice has not necessarily acted in a way contrary to a legitimate sale.

However, if the selling attorney represents an intent to cease practice in an area (the motivation for the sale) and continues to practice in that area, the selling attorney and the acquiring attorney may be in violation of Rule 1.04(f) and (g) as well as Rule 8.04(a)(3) (see section C.4.b.xiii., "Rule 8.04, 'Misconduct,' below).

v. **Rule 1.05**, "Confidentiality of Information," paragraph (c), states that a lawyer may reveal confidential information when a lawyer has been expressly authorized to do so to carry out the representation or when the client consents after consultation.

**Sale of Practice Tip:** The selling attorney should secure consent from the client and an agreement to maintain client confidences from the acquiring attorney before disclosing information related to a specific representation of an identifiable client.

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

**Sale of Practice Tip:** An acquiring attorney who ultimately decides not to purchase all or part of a practice must consider whether the information learned in review of the selling attorney's client matters would prohibit future representation adverse to those matters or require the acquiring attorney to withdraw from current representation if adverse to the clients in the matters being sold.

vii. **Rule 1.14**, "Safekeeping Property," comment 1, states that a lawyer should hold the property of others with the care of a professional fiduciary. Securities should be kept in a safe-deposit box, except when some other form of safekeeping is warranted by special circumstances. All property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. Paragraph (a) requires that complete records of the funds and other property be maintained.

**Sale of Practice Tip:** The acquiring attorney should verify with the clients and other interested parties the nature of any property that the lawyer will be safekeeping and the means of doing so.

viii. **Rule 1.15**, "Declining or Terminating Representation," paragraph (d), states that 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 payment of fees that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.

**Sale of Practice Tip:** The selling attorney should provide notice to affected clients regarding the termination of their representation. See section C.4.b.iii., "Rule 1.03," above.

ix. **Rule 5.04**, "Professional Independence of a Lawyer," prohibits lawyers from sharing fees with nonlawyers, forming partnerships with nonlawyers, or practicing law in an entity in which a nonlawyer owns an interest or where a nonlawyer has the right to direct or control the judgment of the lawyer. Rule 5.04 ensures that lawyers keep autonomy and can exercise professional judgment on behalf of clients.

**Sale of Practice Tip:** Texas prohibits the sale of any part of a law practice to a nonlawyer.

x. **Rule 5.06**, "Restrictions on Right to Practice," prohibits a lawyer from participating in offering or making (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning retirement benefits, or (b) an agreement that restricts a lawyer's right to practice in settlement of a suit or controversy, except that an agreement restricting a lawyer's right to practice may be made in settlement of a disciplinary proceeding against that lawyer.

Rule 5.06 applies to the specific situations it addresses. It is not implicated in a negotiated noncompete agreement with a condition of sale that restricts the selling attorney's continued practice.

**Sale of Practice Tip:** The selling attorney and acquiring attorney may enter a negotiated noncompete agreement pursuant to the sale of all or part of a law practice. In fact, the sale may be conditioned on the selling lawyer ceasing to engage in the private practice of law or a specific subject area of practice for a specific period within the geographic area in which the practice has been conducted (or within some other geographic area agreed to by the selling and acquiring attorneys). This type of agreement is not within the scope of Rule 5.06 and may provide evidence that the transaction is not a "sham sale."

xi. **Rule 7.03**, "Solicitation and Other Prohibited Communications," states that a lawyer shall not "solicit" employment by making a "solicitation communication," defined as a communication substantially motivated by pecuniary gain made by or on behalf of a lawyer to a specific person who has not sought the lawyer's advice or services, which can reasonably be understood as offering legal services the lawyer knows or reasonably should know the person needs in a particular matter.

**Sale of Practice Tip:** The selling attorney should provide notice to affected clients under Rule 1.03 regarding the sale, including the identity and location of the acquiring attorney as indicated in the "Six Major Ethical Concerns in the Sale of a Practice Under TDRPC" listed in section C.4.a. above. Client consent should be obtained before the acquiring attorney communicates with them.

xii. **Rule 7.04 and Rule 7.05** regarding advertising and solicitation communications and exemptions from communications.

**Sale of Practice Tip:** Marketing and solicitation communications may change and need approval, depending on how the sale is structured.

xiii. **Rule 8.04**, "Misconduct" paragraph (a) states, among several things, that—

> [A] lawyer shall not . . .
>
> . . .
>
> (3) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
>
> . . .
>
> (9) engage in conduct that constitutes barratry as defined by the laws of this state; [or]
>
> (10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice[.]

**Sale of Practice Tip:** The selling and acquiring attorneys should be mindful of Rule 8.04 when drafting the terms of the sale agreement and in communicating with clients and other parties affected by the sale and cessation of practice.

**Note:** Although a Texas lawyer may be disciplined for an act that also constitutes an offense under the Penal Code, the Texas Disciplinary Rules—not the Penal Code—provide the basis for discipline.

**c. ABA Model Rules of Professional Conduct**

Guidelines of the ABA Model Rules of Professional Conduct are helpful in forming a transaction in an ethical manner and should be referred to when planning a sale. Although Texas has not adopted ABA Model Rule 1.17, "Sale of Law Practice," Texas attorneys who sell or purchase a law practice in compliance with Rule 1.17 will satisfy many of the TDRPC implicated in the sale or purchase of a law practice in Texas, but the details of the sale may still include elements not permitted in Texas.

**Rule 1.17 states the following:**

> A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:
>
> (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a

jurisdiction may elect either version) in which the practice has been conducted;

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

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

(1) the proposed sale;

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

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

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

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

**5. Checklist When Selling a Practice**

**a. Screen the Acquiring Attorney**

i. Screen the acquiring attorney for skills, knowledge, and expertise. Ask for a resume, as well as personal and professional references. Connect with the staff and other lawyers with whom the acquiring attorney has worked. See section C.4.b.i., "Rule 1.01, 'Competent and Diligent Representation,'" and its practice tip above.

ii. Confirm the acquiring attorney's bar admission.

iii. Research the acquiring attorney's reputation. Communicate with personal and professional references provided to you by the acquiring attorney.

iv. Research the acquiring attorney's discipline history on the State Bar of Texas website. Ask the acquiring attorney to request a list of their legal malpractice claims history. Professionally, the odds are that every lawyer will have one or more malpractice claims during their career.

v. Discuss the following issues with the acquiring attorney:

(a) Why does the acquiring attorney want to purchase this law practice?

(b) What is the acquiring attorney's experience?

(c) What are the acquiring attorney's professional goals?

(d) What is the acquiring attorney's philosophy toward clients and the practice of law?

vi. Look into the scope and objectives of representation. See section C.4.b.ii., "Rule 1.02, 'Scope and Objectives of Representation,'" above if the acquiring attorney intends to change the scope, objectives, or general methods of representation from those agreed on with the selling attorney.

**b. Understand Your Obligations as a Seller Under the Texas Disciplinary Rules of Professional Conduct**

Make sure you are familiar with all applicable TDRPC rules, ABA Model Rule 1.17, and TRDP 13.01 relating to notification of an attorney's cessation of practice. See section C.4., "Rules and Practice Tips," above.

Obtain client consent to the prospective acquiring attorney's access to client files and communicate with full disclosure all material facts affecting the client. Remember your fiduciary duty to do what is in the best interest of the client.

In Texas, no disciplinary rule expressly prohibits sales. But any sale of a practice must follow applicable disciplinary rules. See section C.4., "Rules and Practice Tips," above; Ethics Opinion 266; and Canons of Ethics Pre-1990.

**c. Preparing for and Selling Your Law Practice**

i. Consider hiring a business attorney and a business valuation expert who can assist you in the valuation of your business.

ii. Determine sales price and terms.

(a) Terms of payment

(b) Geography

(c) Nature of the practice

(d) Whether the client base will remain with the acquiring attorney for a designated period

(e) If office furniture, equipment, or library materials are not included in the sale of your practice, place a separate ad for these items

iii. Prepare a sales timeline. Possibly advertise the sale of your practice in the Texas State Bar Bulletin and other sites as desired.

**6. Checklist When Acquiring Another Attorney's Practice**

a. **Check the Rules.** Make sure you are familiar with all applicable TDRPC rules and ABA Model Rule 1.17. In Texas, no disciplinary rule expressly prohibits sales. But any sale of a practice must follow applicable disciplinary rules. See Ethics Opinion 266 and Canons of Ethics Pre-1990. If the practice is being sold, whether by the selling attorney or the selling attorney's estate, ABA Model Rule 1.17 must be fully reviewed and understood. There are critical notice and time requirements which must be followed.

b. **Status of Files.** If possible, the acquiring attorney and the selling attorney should discuss the status of open files: what has been completed, what has not, what has been billed, what has been paid, etc.

c. **Overhead Costs.** Consider the overhead costs involved in acquiring a practice or the responsibility for a practice for an interim period.

d. **Referring Client Matters to Another Practitioner**

i. When the acquiring attorney does not have expertise in one or more of the areas in which the selling attorney practiced, the acquiring attorney may refer such matters to other practitioners.

ii. Reflect on referring a client to another attorney. Know your limitations, both with time and expertise. You need not assume all clients as an acquiring attorney.

e. **IOLTA Accounts.** Immediately determine responsibility or the lack of responsibility for the IOLTA and attorney escrow accounts. Rights and obligations of the acquiring attorney must be known—potential liability is significant.

f. **Client Expectations.** Consider and recognize the personality and practice habits of the selling attorney and acquiring attorney. For example, if the selling attorney met with clients in their homes or places of business, or if the staff was actively involved in the selling attorney's client relations, etc., the acquiring attorney should consider continuing in this same manner or advising the clients of the acquiring attorney's practices.

g. **Fee Agreements.** Consider whether to maintain the same fee policy as the selling attorney. If possible, determine in advance whether hourly rates or set fees will be used, at what amounts, and whether to use retainer agreements. Disclosure of these items is required under the rules governing the sale of a law practice (ABA Model Rule 1.17).

h. **Staff and Referral Sources.** If possible, the selling attorney should introduce the acquiring attorney to nonlawyer staff members and referral sources, such as insurance agents, bankers, realtors, and accountants with whom the selling attorney worked. If the selling attorney is not available to assist in this capacity, the acquiring attorney should make immediate contact with those individuals, not only for purposes of preserving client relations, but to determine the locations of any missing clients, histories of clients, etc. Many clients work with a team of advisors, and with the client's

consent, the acquiring attorney should have discussions with each of these other professionals.

i. **Tech Systems.** Review and analyze the selling attorney's technology systems for compatibility with the acquiring attorney's systems. Because of the constant change in technology, the selling attorney or their staff should not only participate in transferring current technology in use, but also provide access to systems that historically have been used by the selling attorney, but which are not kept current. A significant amount of client information is in old files and systems.

j. **Accounting.** Immediately notify the selling attorney's accountant and/or bookkeeper and schedule a meeting to fully understand the financial reporting policy and habits of the selling attorney. If the selling attorney did their own accounting and tax preparation, the acquiring attorney's accountant should be given immediate access to those books and records that may be available to determine tax and financial liabilities of the selling attorney and the acquiring attorney.

k. **Client Files**

   i. Contact firms or practices associated with the selling attorney to determine if any files remain with those practices. This will save the acquiring attorney a significant amount of time "searching" for files demanded by clients for past representation by the selling attorney. Also determine who bears the cost and the responsibility for acquiring or copying those files: the acquiring attorney or the selling attorney.

   ii. Consider file storage. The older the practice, the more time and expense will be involved in file review and management. This can be an expensive and cumbersome long-term solution. Bear in mind that, eventually, someone will have to review stored files and make sure they are returned to clients or disposed of in a manner that protects client confidentiality.

   iii. Determine whether "closed" files contain valuable or original documents—wills, agreements, etc. Practices differ. One attorney's "closed" files may be considered another attorney's "open and continuing" files. For example, an attorney may habitually notify clients following every service that the representation has ceased and close a file. Others may never take this step and always assume that the client may be coming back for further representation.

   iv. In returning files, ensure that you are returning files to the client. Obtain appropriate written consent from the client or an authorized personal representative before returning files to a client's spouse or other family members.

   v. When returning files to clients who have requested them, decide what you are returning. Will it be everything in the file? Are you responsible for anything in the file for which you will want to retain copies for your own liability protection? Are there documents that, under the rules, can and should be retained? Clients are entitled to original copies of their files (assuming they have paid their bills), but

copies of the files may be retained by the selling attorney so that the attorney or the selling attorney's estate can defend any claims against them. Proceed with caution.

l. **Vendors.** Review relationships with the selling attorney's vendors to determine whether prepayments were made for services or products that are not going to be used and whether bills are due for storage of files, stationery, other supplies, etc.

m. **Review Open Estate Files.** Determine whether the selling attorney's practices are consistent with the acquiring attorney's practices with respect to what services are covered on a quoted fee. For example, is a fee for probate limited to just the probate of the will or does it cover estate tax return preparation, will contests, etc.? Carefully review retainer letters and send modifications if necessary. Note that ABA Model Rule 1.17 requires notice on whether the acquiring attorney is going to honor the selling attorney's engagement agreements and arrangements. Arrangements differ, and any differences must be disclosed to clients in advance. As the acquiring attorney, make sure you know what you agree to before stating that you are honoring "all" the arrangements with all clients.

n. **Accounts Receivable.** Review accounts receivable when you are purchasing an attorney's practice. You may need to take steps with clients who have a poor payment history.

o. **Liability Insurance.** If the attorney has died or retired from practice, reporting endorsement coverage or "tail coverage" should be obtained. In the event of death, the policy may provide reporting endorsement coverage for a period at no additional cost.

## D. Closing Your Own Practice Without a Successor

As with succession planning, it is important to create a transition plan with a timeline for closing your practice when you do not intend to sell your practice or transfer it to a successor attorney or firm. The checklist below outlines some of the issues to address when creating your plan and to protect the interests of your clients. Below are a series of rules of which you should be aware that may be implicated when you close your practice.

If you formed an entity through the Texas Secretary of State's Office, such as a professional corporation or a limited liability company, you must also dissolve the entity. See section E., "Dissolving the Professional Entity of a Sole Practitioner," below.

### 1. Choose an Exit Date

It is best to choose a target date for when you want to stop practicing and create a plan of action. Some attorneys prefer to slowly transition by wrapping up cases and not accepting any new matters with the intention that there will be few, if any, client matters in need of closure or transition to a new attorney by the planned retirement date. Those who intend to practice up to that date must give notice to clients and interested parties of their intent to retire that allows reasonably enough time for their clients, interested parties, and themselves to get their affairs in order.

## 2. Review Rules and Ethics Opinions

### a. Texas Disciplinary Rules of Professional Conduct

i. **Rule 1.03**, "Communication": A lawyer must keep a client reasonably informed of issues affecting the client's matter, including the closure of the lawyer's practice.

ii. **Rule 1.05**, "Confidentiality of Information," prohibits disclosure of confidential information of current or former clients except in certain circumstances set forth in the rule. File disposition must be handled in a way that prevents disclosure of confidential information. See chapter 2, "File Management and Ensuring Password Access," on how to properly handle files when the client relationship ends.

iii. **Rule 1.09 and Rule 1.10** provide rules for avoiding conflicts, protecting former clients after attorney-client relationships end, and prohibiting a lawyer from taking adverse action against a former client related to the matter in which the lawyer represented the client.

iv. **Rule 1.14**, "Safekeeping Property," relates to how a lawyer should handle funds or other property that belongs to a client or third party and how long financial records must be maintained.

v. **Rule 1.15**, "Declining or Terminating Representation," paragraph (d): A lawyer must take reasonable steps to protect a client's interest when representation ends, including giving reasonable notice to the client, allowing time for the client to hire another attorney, returning documents or property to the client, and refunding any unearned fees. An attorney should encourage the client to pick up their file or have the attorney transfer it to another attorney. A lawyer may retain documents related to the client if permitted by law provided it does not prejudice the client in the subject matter of the representation.

b. **TRDP 13.01**, "Notice of Attorney's Cessation of Practice": When an attorney becomes inactive or resigns from the practice of law and leaves one or more active client matters that no other attorney has agreed to handle with the consent of those clients, written notice of the cessation of practice must be mailed to those clients, opposing counsel, courts, agencies with which the attorney has matters pending, malpractice insurers, and any other person or entity that has a reason to be informed of the cessation of practice. If a client has secured other counsel or consented to the assumption of responsibility by another attorney, the above notices are not required, and no further action is needed. Under TRDP 13.04, the formal procedure for court-supervised custodianship under TRDP 13.01–13.03 can be bypassed by an attorney's self-appointment of a custodian who can conduct a custodianship with the same notices to clients, the courts, and other counsel without court action.

c. **Opinions of the Professional Ethics Committee of the Supreme Court of Texas**

i. **Ethics Opinion 570:** The client is entitled to obtain the contents of the file, including attorney notes and other work product related to the lawyer's representation of the client, unless the lawyer is permitted or required to retain documents and can do so without prejudicing the interests of the former client in the subject matter of the representation.

ii. **Ethics Opinion 627:** While the TDRPC do not provide specific guidance regarding the disposition of client files, they do provide basic principles and values, such as not disclosing confidential information of current and former clients and not destroying a client's file if there's a reasonable likelihood that the client's interest would be harmed. The opinion also clarifies that the attorney is responsible for the cost of storing the file but may charge the client for storage if the client wants the file to be stored longer than required is allowed.

iii. **Ethics Opinion 657:** Generally, a lawyer can provide the file to the former client as it's maintained or, at the lawyer's expense, convert some or all of it to paper or to an electronic format. The file contents must be reasonably accessible to the ordinary client. If any information is kept in a special format that is not reasonably accessible to the ordinary client, the lawyer must bear the cost of converting the information to a reasonably accessible format or print the information in a format that can be read by the client. If the file contains anything with unique or significant value in its original form, it should be returned to the client in its original form.

**3. Notification to Clients and Other Interested Parties**

a. **Clients:** Clients must be notified that you will be closing your practice. The notice should include:

i. The date you intend to close your practice.

ii. If applicable, the client's need to retain other counsel.

iii. The client's right to obtain their client file and a request of whether the client would like to retrieve it, have it transferred to new counsel, or have it destroyed in accordance with the Texas Rules of professional responsibility. It is prudent to include a statement informing them that if they do not respond within a specified reasonable period, you will assume they wish for you to destroy it in accordance with the rules.

(a) The general rule is that the file belongs to the client, although there may be contents in the file that do not belong to the client. It is best if the file is returned to the client. You are allowed to make a copy. A digital copy is best in terms of low-cost storage.

(b) All client property, including original wills, signed contracts, property deeds, birth certificates, and the like must be safeguarded and returned to the client. For guidance on what contents belong to the client and which should not be given to the client, see the above ethics opinions and sections B.16. and B.17. in chapter 4, "Secure Content with Intrinsic Value or That May Give Rise to Significant Property Rights" and "Be Alert to Lawful Restrictions on the Client's Access to Contents in the File," respectively.

(c) If the client wants to retrieve their file, promptly arrange how it will be made available to them, and have the client sign an acknowledgment of receipt. See section F., "Forms and Resources for Transition Planning," below for a sample client acknowledgment of receipt of the client file.

(d) If the client asks you to transfer the file to new counsel, have the client sign an authorization to transfer the file, and promptly do so. See section F., "Forms and Resources for Transition Planning," below for a sample client authorization to transfer the file.

(e) If the client asks you to destroy the file, have the client sign an authorization to destroy the file, and do so in accordance with the rules and any file maintenance policy you have. In case of future dispute, keep the client's authorization separate from the client's file or it may inadvertently get destroyed along with the file. See section F., "Forms and Resources for Transition Planning," below for a sample client authorization to destroy the client file.

iv. How final invoices, accounts receivable, and the return of any unearned fees will be handled.

v. Any other information that is relevant to how the closing of your practice affects the client and the client's matter.

b. **Courts or Agencies:** Courts and agencies where you have any pending matters should be notified of the date that you will cease to practice.

i. **Current cases:** Make sure to withdraw as counsel from any case in which there will not be a substitution of counsel. If there will be a substitution of counsel, it is always prudent to do a joint motion for withdrawal of counsel and substitution of counsel releasing you from any future obligations and liability related to the case. See section D.2.b., "TRDP 13.01," above, and see section F., "Forms and Resources for Transition Planning," below for a sample motion for substitution and withdrawal of counsel.

ii. **Court appointments:** Make sure to notify the court with ample time for the court to appoint new counsel.

c. **Opposing Counsel:** See section D.2.b., "TRDP 13.01," above.

4. **Staff**

   Inform any staff of your intention to close your practice, the date you plan to close, and any severance package you plan to provide. If you are winding down your practice, staff may be happy to stay and assist until the client load is one that you can handle closing on your own.

5. **Final Invoices and Return of Funds**

   Prepare and send clients a final billing statement showing any outstanding fees due or any refund of unearned fees being held in an IOLTA, escrow, or other trust account.

6. **Destruction and Storage of Client Files**

   Review all files to determine if they can be destroyed or, if not, how long they must be stored before destruction. See practice tips 3 through 5 in chapter 2, section B., "File Management Practice Tips," of this Toolkit for more information on properly closing, storing, and destroying client files.

7. **Accounts**

   a. **IOTLA, Trust, and Escrow Accounts:** Return any unearned attorney's fees from your IOLTA account or any client funds held in trust or escrow accounts. Remember to notify the Texas Access to Justice Foundation within thirty days of any IOLTA account closure. The Texas Access to Justice Foundation's website has an IOLTA Bank Account Closure Form that you can complete and return to them.

   b. **Bank Accounts:** Close out any business accounts as needed. If a professional entity is involved, see information on closing the entity's accounts under section E., "Dissolving the Professional Entity of a Sole Practitioner," below.

8. **Vendors and Other Contractual Matters**

   Notify vendors and others that you will be closing your practice and the date of cessation. It's important to notify your landlord; phone carriers; the post office; insurance carriers; vendors for case management software, billing software, copiers, and other office equipment; etc.

9. **Websites and Social Media**

   It is important to shut down any websites and social media presence and indicate the law practice has closed.

10. **Office Furniture**

    Arrange to sell or donate any office furniture, filing cabinets, or other equipment.

## E. Dissolving the Professional Entity of a Sole Practitioner[3]

If a solo practitioner formed a professional corporation or limited liability company to practice law, review this checklist of considerations and statutory procedures for the entity's dissolution (referred to as "termination" in the Texas Business Organizations Code (TBOC)) and practice tips.

### 1. Information Gathering

a. When preparing for the winding up and termination of a professional entity, you should identify the status of the following about the entity and consider how to reconcile or comply with relevant rules.

i. Recent financial statements, balance sheets, and other accounting records.

ii. Federal, state, and local tax returns.

iii. A list of all actual and potential creditors. Run a credit report on the entity to identify possible undisclosed creditors.

iv. A list of all litigation to which the corporation is party.

v. An inventory, with appraised or estimated values, of all entity assets.

b. **Practice Tip:** Review any provisions in the entity's organizational documents that address termination (corporate bylaws, an LLC's company agreement, buy-sell agreement). For example, the organizational documents sometimes have provisions that:

i. Name the person responsible for winding up the entity; or

ii. Set out termination distributions (after the entity has discharged its liabilities).

### 2. Professional Limited Liability Company

For a professional LLC, the legal representative or successor of the sole member is charged with the entity's winding up if the LLC's company agreement does not otherwise specify. See TBOC § 101.551(2).

### 3. Professional Corporation

A professional corporation continues after the death, incompetency, bankruptcy, resignation, withdrawal, or retirement of its sole shareholder until the corporation's winding up and termination. See TBOC § 303.005(1).

[3] Section E, "Dissolving the Professional Entity of a Sole Practitioner," was written by Matthew Eilers, former member of the Law Practice Management Committee of the State Bar of Texas.

**4. Sole Practitioner's Ownership Interest**

If the sole practitioner of a professional entity dies or otherwise ceases to be authorized to practice law, see TBOC §§ 301.008(b)–(e), 301.009.

a. The sole practitioner's ownership interest (e.g., shares of a corporation or membership interest of an LLC) must be promptly relinquished. See TBOC § 301.008(b).

b. The legal successor can continue the practice only if the successor is also licensed to practice law. If not, the legal successor must also relinquish the interest. See TBOC § 301.008(c).

c. The ownership interest in a professional entity may be transferred to only an owner, the entity, or another licensed attorney. See TBOC § 301.009.

d. If relinquished, the professional entity must purchase the ownership interest (or cause it to be purchased), which may be provided for by the entity's governing documents or other agreement (such as buy-sell agreement). See TBOC § 301.008(d).

e. The successor can act as a managerial official or owner of the entity only for the purpose of winding up the entity's affairs, including selling the entity's assets. See TBOC § 301.008(e).

**5. Court Orders During Termination**

a. Under TBOC § 11.054, the sole owner's legal representative or successor for a professional entity that is terminating its affairs can apply to a court to:

   i. Supervise the winding up;

   ii. Appoint a person to carry out the winding up; and

   iii. Make any other order, direction, or inquiry that the circumstances may require.

b. **Practice Tip:** Depending on the circumstances, the successor (or other liquidator charged with winding up the entity) could seek orders under this TBOC provision to:

   i. Coordinate with the custodian attorney or the sole practitioner's executor.

   ii. Seek to combine an action for court-supervised custodianship under TRDP 13.03.

   iii. Seek to appoint the custodian attorney or another person to wind up the entity.

   iv. Obtain a court order granting or facilitating access to the entity's files, assets, accounts, digital resources, etc.

**6. Winding Up Procedures Under TBOC, Chapter 11**

a. Per TBOC § 11.052, when winding up a professional entity, the entity (by and through its liquidator):

i. May no longer carry on any business, except to the extent necessary to wind up its business.

ii. Must send a written notice of the winding up to each of its known claimants.

iii. Must collect and sell its property to the extent any assets-in-kind will not to be distributed to the successor of the ownership interest.

iv. May perform any other act required to wind up its business and affairs.

v. May prosecute or defend a civil, criminal, or administrative action.

b. TBOC § 11.053(a), (b) says that the entity must apply and distribute its property to discharge (or make adequate provision for the discharge of) all its liabilities and obligations. If there is insufficient property to do so, it must either:

i. Apply the property, to the extent possible, to the just and equitable discharge of the liabilities and obligations (including any owed to owners or members, other than for distributions).

ii. Make adequate provision for the application of the property to the liabilities and obligations.

The entity may delay paying a debt if it would result in an unreasonable loss of value to the assets to be liquidated. See TBOC § 11.053(d).

The entity may set aside or reserve funds to cover any debt or liability owed to members or creditors that cannot be located or are unknown by depositing the amounts owed in a special account with the Texas comptroller, which will protect the liquidator from any further liability if the statutory procedures are followed. See TBOC §§ 11.352(c), 11.353.

**7. Optional Claims Procedures**

a. A terminating entity can use the TBOC's optional claims procedures to shorten the period for asserting a claim against the entity by sending notice to claimants by certified mail. See TBOC § 11.358.

b. **Practice Tip:** To take advantage of these optional procedures, the entity is *not* required to send notice to all potential claimants. It can deliver the notice to only a few selected creditors. See TBOC § 11.359(b).

Under these procedures, a claim is extinguished by operation of law if the claimant fails to either:

i. Timely present a written claim or

ii. Timely bring an action if, after the claimant presents a claim in response to the notice, the entity subsequently delivers a notice of rejection.

If the entity does not use this procedure, a claim otherwise expires if the claimant does not begin a proceeding within three years of the entity's termination. See TBOC § 11.359(a).

**8. After Discharging Liabilities**

a. Any remaining property, whether in cash or in kind, is distributed to the owners of the ownership interests (TBOC § 11.054(c)).

b. Consult with the entity's accountant or another tax professional to complete any federal tax and recordkeeping responsibilities such as:

i. Filing final tax returns.

ii. Fulfilling any employee obligations.

iii. Reporting payments to contract workers.

See IRS, "Closing a Business" (Feb. 2, 2023), https://www.irs.gov/businesses/small-businesses-self-employed/closing-a-business.

c. After completing winding up, the entity must:

i. Request a certificate of account status from the Texas comptroller (https://comptroller.texas.gov/taxes/franchise/certificate-letter-request.php).

ii. File a certificate of termination with the Texas Secretary of State's Office that attaches the certificate from the Texas comptroller (see https://www.sos.state.tx.us/corp/termreinfaqs.shtml).

## F. Forms and Resources for Transition Planning

### 1. Forms

a. Sale of Practice Letter to Active Clients

b. Sale of Practice Letter to Closed Clients

c. Client's Acknowledgment of Receipt of Client File

d. Client's Authorization to Transfer File

e. Client's Authorization to Destroy File

f. Entry of Appearance and Substitution of Counsel

g. Motion for Substitution and Withdrawal of Counsel

h. IOLTA Bank Account Closure Form

**2. Resources**

a. "Closing a Practice" on the State Bar of Texas Law Practice Management website.

b. "Succession Planning" on the State Bar of Texas Law Practice Management website.

c. Confidentiality and NDA form in New York State Bar Association's Planning Ahead Guide.

## IV. Sudden Cessation of Practice and Custodianships

### A. The Mechanics of the Texas Rules of Disciplinary Procedure, Part XIII

Cessation of practice procedure rests primarily on Texas Rules of Disciplinary Procedure (TRDP), part XIII.

1. **Rule 13.01** states that the lawyer, or a qualified stand-in, must give written notice that the attorney ceased practice. However, 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."

2. **Rule 13.02** provides that in extraordinary circumstances—with active matters pending and no lawyer handling them with client consent—any interested person may request that a court assume jurisdiction over the lawyer's practice. The petition may be filed in district court or, if the attorney has died, in statutory probate court or other court with probate jurisdiction. Venue rests in the county of the attorney's residence.

   The petition must be verified, stating that:

   a. An attorney licensed to practice in Texas (i) has died, disappeared, resigned; become inactive; been disbarred or suspended; or become physically, mentally, or emotionally disabled and (ii) cannot provide legal services necessary to protect the interests of clients.

   b. Cause exists to believe court supervision is necessary because the attorney left client matters for which no other attorney licensed in Texas has, with consent of the client, agreed to assume responsibility.

   c. Cause exists 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 the proceeding is not maintained.

The court will review the petition and determine whether to issue a show cause order. A show cause order directs the lawyer at issue, the lawyer's personal representative, or those with access to client files to appear and show cause why the court should not assume jurisdiction.

At the hearing, the court determines whether one or more of the events stated in Rule 13.02 has occurred. If court supervision is necessary, the court assumes jurisdiction and appoints one or more Texas-licensed attorneys to serve as custodians of the practice. The appointment order states powers and responsibilities of the custodians under Rule 13.03.

3. Pursuant to **Rule 13.03**, the court's order will authorize the custodian to perform certain acts in the custodianship toward disposition of client files and closing the practice. A custodian does not assume the role of a successor attorney for the client; rather, the custodian performs the assigned tasks to enable a client to find new counsel. Still, in the performance of these duties, "[t]he custodian shall observe the attorney-client relationship and privilege as if the custodian were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of [TRDP, part XIII]." The rule also provides liability protection: "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."

4. **Rule 13.04** allows for voluntary appointment of custodian attorneys, with similar liability protection. A 13.04 custodian does not become the new lawyer for the clients. Indeed, if the custodian steps into representation of a client, "the lawyer's role as custodian terminates, and the lawyer's actions are subject to the Texas Disciplinary Rules of Professional Conduct regarding the client-lawyer relationship."

5. A new rule effective October 1, 2024, **Rule 13.05**, states that a custodianship conducted by a custodian who was voluntarily appointed by an attorney ceasing practice or planning for the cessation of practice under Rule 13.04 ends when one or more of the following events happens:

    A. The transfer of all active files and other client property in the possession of the custodian in accordance with the Texas Disciplinary Rules of Professional Conduct, in one or more of the following means:

        (1) To attorneys assuming the responsibility for ongoing matters; or

        (2) To the client or client's authorized representative, to the extent that the client is lawfully entitled to such materials."

    B. Entry of an order terminating the custodianship from a court with jurisdiction over the practice under Rules 13.02 and 13.03.

    C. The return of the appointing attorney to his or her practice prior to completion of the custodianship and resumption of representation of active client matters with the competence to conduct such representation. In the event there is disagreement about whether the appointing attorney is competent to resume representation of a client matter upon return to the practice, either the

appointed custodian or the appointing attorney may petition for a determination and order of a court under Rules 13.02 and 13.03 concerning the resumption of the practice by the appointing attorney and termination of the custodianship. An appointed custodian may also petition the court for an order concerning the proper disposition of dormant or closed client files, distribution of active files for which a client is nonresponsive or cannot be located, and for proper distribution of any client property or other property being held pursuant to a representation by the appointing attorney, including client funds held in an IOLTA account.

## B. General Guidance for Custodians

Each cessation of practice is unique. If you serve as a court-appointed custodian, keep in mind the language of the appointment order. If conditions change, seek guidance from the court. Likewise, TRDP 13.04 custodians may encounter situations in which court supervision is needed. Do not hesitate to seek guidance in court.

### 1. Verify Attorney Unable to Practice

Confirm that the attorney is deceased, missing, disabled, or otherwise unable to practice law.

### 2. Contact State Bar of Texas Regarding Custodian Designation

Contact the State Bar of Texas at (512) 427-1300 or lpm@texasbar.com to see if the attorney designated a custodian attorney through the State Bar's online portal.

### 3. Determine If a Court Supervision is Required Under TRDP 13.01–13.03

If court supervision is needed, file the necessary pleadings to invoke jurisdiction and seek appointment as custodian. See section A.2., "Rule 13.02," above and the pleadings in section G., "Forms and Resources for Sudden Cessation of Practice and Custodianships," below.

Keep a record from the start. A report to the court will be needed to end the custodianship. Track hours and expenses and keep receipts, which will be useful in preparing your report.

### 4. Issues Requiring Special or Urgent Attention

a. **Conflicts of Interest:** Be careful to avoid matters that may pose a conflict of interest for you or your clients. If a conflict exists, defer to another custodian attorney, or seek guidance from the court.

b. **Check Calendar for Upcoming Hearings and Deadlines:** Check the attorney's calendar for any upcoming hearing, trial, mediation dates, or discovery deadlines. Notify the court and the parties' counsel of the cessation and the need for continuance as appropriate.

c. **Check Voicemail and Email:** Log voicemail, if possible. If passwords are not available, disconnect all voicemails and consider using a simple answering machine instead. Check emails to screen for urgent issues. At some point, it may be possible to reject or answer all emails with a notice instructing the sender whom to contact.

d. **Uncompleted Tasks:** Check uncompleted tasks that need immediate attention.

e. **Access to Accounts:** Identify any need to access firm bank and trust accounts and methods to attain access.

f. **Client Property:** Identify any client property or valuables to be secured or returned to the client.

**5. Find People with Knowledge of the Law Practice**

Staff often have the most knowledge of the law practice. If the lawyer had no staff, search for officemates, close colleagues, and relatives for a person with knowledge of the law practice.

**6. Obtain Access to Files**

Locate keys, access codes, log-in credentials and passwords. Find file cabinets, electronic storage, and digital files. There may be boxes in storage. Keep looking until you are satisfied that you have located all the files. If you are unable to locate the credentials to access computers and digital files, see section C., "Accessing and Disposition of Client Files," below.

**7. Insurance Policies**

The lawyer may have insurance coverage relating to interruption or cessation of practice. Contact the lawyer's insurance agent, if any. Search for professional liability policies, business liability policies, and any other policies that may apply.

**8. Organizational Documents of Business Entities**

The documents that created the business entity (professional corporation, professional limited liability company, etc.) through which the lawyer practices or practiced may touch on interruption or cessation of practice.

**9. Authorized Agents for the Attorney**

Contact the lawyer's spouse, children, or relatives to see if the lawyer had any authorized agents to act on the attorney's behalf, such as a power of attorney with the authority to designate a custodian and/or access firm bank accounts (including an ILOTA account), access to records (including digital records), or other estate planning documents indicating that the lawyer named a custodian to handle matters.

**10. Preserve Confidentiality**

Maintain confidentiality and protect the attorney-client privilege per Texas Disciplinary Rule of Professional Conduct (TDRPC) 1.05.

**11. Who to Notify That the Attorney Ceased Practice**

Send written notice to clients, cocounsel, opposing counsel, courts, insurance carriers, landlords, and any other person or entity having reason to be informed of the cessation of practice. Confirm oral communications in a follow-up writing. It is also a good idea to notify office neighbors and provide them with contact information in case a client stops by, finds the office closed, and wanders into their office.

In the notification to clients, instruct them to retain new counsel and pick up their files or request that they be sent to new counsel. If a client picks up their file, have them sign for it. If the client wishes to send the file to new counsel, have the client sign a transfer authorization. Provide written notice to each client with a closed file that they may collect it or authorize its destruction. Obtain the client's signature to confirm release of the file and written authorization if the client wants the file destroyed.

See section G., "Forms and Resources for Sudden Cessation of Practice and Custodianships," below for the following forms:

a. Custodian's Letter to Active Clients

b. Custodian's Letter to Closed Clients

c. Client Acknowledgment of Receipt of Client File

d. Client's Authorization to Transfer File

e. Client's Authorization to Destroy File

**12. Client Access and Referrals for Legal Services**

Alert clients to the custodianship. Provide contact information so clients can actively communicate with you. Urge clients to obtain new counsel.

If cessation is sudden and unexpected, local colleagues may be willing to step in as new counsel at reduced rates. Keep in mind antisolicitation rules under TDRPC 7.03, which is especially important to adhere to if the client inquires if you, as custodian, can take over representation.

You may refer clients to certified lawyer referral services, including the State Bar of Texas Lawyer Referral and Information Service. You may also refer low-income clients to legal service programs, such as those summarized at Affordable Legal Services. Many self-help resources are available at TexasCourtHelp.gov and TexasLawHelp.org.

**13. Straying into the Role of New Counsel**

Do address scheduling, extensions of time, and continuances. Consider with caution whether court filings may be required to prevent prejudice to the client's rights. Review the custodian agreement or court order creating the custodianship, and always keep in mind that the role of custodian does not encompass the function of new counsel. Observe closely the antisolicitation rules. If you do step in (or stumble into) the role of new counsel, liability protection under TRDP 13.03 and 13.04 may be forfeited.

**14. Retain Copies of Substitution Orders**

Retain copies of substitution orders, including appointment orders that reassign court-appointed cases to new counsel.

**15. Inventory and Review Client Files**

The general rule in Texas is that the file belongs to the client, but there is no encompassing rule for how long a lawyer must keep the file. See Ethics Opinion 627 and section C., "Accessing and Disposition of Client Files," below.

Locate and inventory all files, including all physical and electronic files. Note that closed files may be stored in more than one location. Physical files may be stored in public warehouses, at the attorney's home, or even with a client. Electronic files may be stored on servers, hard drives, laptops, home computers, and/or removable media, such as jump drives or disks. Ask staff, relatives, and close friends about off-site locations, passwords, and keys.

Update files with any new mail. Document status, actions you have taken, and action contemplated. Subject to privilege for confidential information, include a summary in the custodian's report.

**16. Secure Content with Intrinsic Value or That May Give Rise to Significant Property Rights**

Files may contain original wills, signed contracts, stock certificates, promissory notes, property deeds, trust instruments, or other original documents like birth and marriage certificates and passports. Such items must be safeguarded, returned to the client, or disposed of, if at all, by court order. Special attention should be paid to open files and closed files in which it appears the client's or the attorney's interest may be ongoing, including files that contain corporate books and records, intellectual property files, documents pertaining to minors (such as custody and support judgments and adoption records), or other matters of ongoing interest.

**17. Be Alert to Lawful Restrictions on the Client's Access to Contents in the File**

Specific content in the file may be reviewable by the custodian but restricted from disclosure to the client. Be watchful for protective orders and markings that limit disclosure to "Attorney's Eyes Only." Other restrictions may apply by statute, rule, or standing orders. Examples of restricted access include:

a. **Criminal case discovery obtained from the prosecution** may be restricted from the client. Tex. Code Crim. Proc. art. 39.14(f), (g) and Ethics Opinion 657.

b. **Trade secret and proprietary information discovery** may be restricted from the client. Misc. Order 62, ¶22 and Ex. A (N.D. Tex. Nov. 17, 2009) (standing protective order applicable to patent cases in the Northern District of Texas); Local Rules for the United States Court for the Eastern District of Texas, app. B, P. R. 2-2 (local rule applicable to patent cases in the Eastern District of Texas).

c. **National security information discovery** may be restricted from the client. Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3; *see U.S. v. Bin Laden*, 2001 WL 66393 *2 (S.D. New York 2001) ("defense counsel have been cleared to review a category of classified documents that they may not share with their clients").

**Note:** The custodian may be restricted from disclosing information concerning the whereabouts or identifying information of children, crime victims, confidential informants, undercover officers, jurors, and others. This is not an exhaustive list. Other restrictions may apply.

## C. Accessing and Disposition of Client Files

### 1. Guidelines for Custodians Attempting to Access Client Files

a. If you are unable to locate the credentials to access the attorney's computers and digital client files, ask staff, family members, friends, and relatives if they know the user IDs and passwords for the attorney's computers, digital files, case management software, etc.

b. See if the attorney had a power of attorney who has the information or if the issue was addressed in the attorney's will or estate planning documents. If the agent under power of attorney or executor has authority to access the attorney's digital files under the provisions of the power of attorney or will (as applicable), those persons may be able to contact a computer service company or other digital provider to obtain access.

c. If you are still unable to locate the credentials to access the attorney's files, you will need to obtain a court order to do so.

i. Court-Ordered Custodianship

If you have been appointed as a custodian under a court-ordered custodianship, file a motion to gain access to the attorney's digital files. The court order should specify that you have been authorized to access the computer and digital files. Take the signed order to a computer service company that can reset the computer log-in information so you can gain access to the files. You may need to contact any case management or billing software companies to determine log-in information as well.

ii. Designated Custodians

If you were designated as the lawyer's custodian by agreement or through the State Bar of Texas designation portal and were not provided specific authority to access the attorney's digital files, check to see if the attorney appointed an agent under power of attorney or executor in a will that has those powers whom you could request to use that authority to help you gain access through the computer service company or digital service provider. If no such authority has been granted, you may need to file an application for custodianship in district court or a probate court (as applicable) in the attorney's county of residence and a motion to gain access to the attorney's digital files as indicated above.

**2. Guidelines for Disposition of Client Files**

**a. Promptly Return Client Files Upon Request**

Screen files for content that may be restricted from disclosure to the client. Subject to screening, return the file promptly, even if the client has an outstanding balance. It is advisable to designate a single pickup location for all client files. Coordinate with the client on time and location. Ask for identification, and absent written consent from the client, limit release of the file to the client. Have the client sign an acknowledgement of receipt. Alternatively, with written consent from the client, the file may be returned by certified mail; be sure to get proof of delivery.

**b. Transfer Files to Third Parties Promptly Upon Client Request**

Be sure to obtain a transfer authorization signed by the client. Obtain a written acknowledgement of receipt from the third-party recipient. See section G., "Forms and Resources for Sudden Cessation of Practice and Custodianships," below for sample forms.

**c. Properly Store Client Files**

Some clients will not be able to be reached to retrieve their files, and other client files may not yet be able to be destroyed. Maintain a record of the location of stored files and whom to contact to arrange retrieval. Consider publishing a non–client-specific notice in a local newspaper. Do notify the State Bar's Law Practice Management Department at lpm@texasbar.com of where closed files will be stored until destroyed and the name(s), address(es), and phone number(s) of the contact person(s) who will be able to retrieve each file, as clients who could not be reached often contact the LPM Department for assistance with retrieving their files. Then, when the time is right, the custodian should arrange to destroy closed files. If any client property cannot be returned because a client cannot be reached, consider depositing the property with the Texas comptroller.

**d. Destroy Client Files Only If Authorized**

Methods of authorization to destroy client files include (i) the client's written authorization; (ii) court order obtained through a motion for authorization to destroy

files; or (iii) if applicable, authority set forth in a file-retention provision of the client's engagement agreement. Once authorization is obtained and a requisite time has passed, destroy the file. It is best to shred the file or have it shredded by a company that provides professional shredding services. Prepare a list of client files destroyed with dates of destruction. Subject to confidentiality precautions, a list may be included in the custodian's report.

**Note:** The two-year statute of limitations for malpractice or four-year statute for contract or breach of fiduciary duty claims may determine a minimum period for holding a client file to avoid harm to the client due to earlier destruction.

### D. IOLTA, Escrow, and Other Trust Accounts

In court-appointed custodianship, the court may or may not empower the custodian to close out the lawyer's trust and escrow accounts. These accounts may be subject to handling by an entity, if any, out of which the lawyer practiced. Additionally, final reconciliation of the IOLTA may be a task for the lawyer's estate or a Texas lawyer appointed by the estate. See Texas Estates Code Chapter 456.

If the custodian is tasked to close the IOLTA, bear in mind that there may be more claims on the IOLTA than there are funds in the IOLTA. It is advisable to seek guidance from the court on how to report and distribute funds anytime it is not clear to whom the funds belong or there is a shortage of funds for all claims.

Additionally, TDRPC 1.14, "Safekeeping Property," paragraph (a) provides, in part, that "Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation."

Remember to notify the Texas Access to Justice Foundation within thirty days of any IOLTA account closure. The Texas Access to Justice Foundation's website has an IOLTA Bank Account Closure Form that you can print and return to them.

### E. A Word on Temporary Cessation of Practice

As indicated in section A.5., "TRDP 13.05," above, some cessations of practice may prove temporary. The lawyer may be in a coma, then wake up. A missing attorney might reappear. It can become tricky if the lawyer wishes to return to practice and you are concerned that they may not be fully capable of doing so.

If the practice is in a court-ordered custodianship, keep in mind that the court appointed *you*. If you are unclear on how to handle the potential return of the attorney or have concerns about the attorney's return, review the court order, and do not hesitate to seek guidance from the court if further guidance is needed. The court may decide to revisit the order for custodianship.

If the custodianship is by agreement under TRDP 13.04, review the custodian agreement. Ideally, the agreement will have terms for what to do if the lawyer reappears. If the agreement is unclear or if the circumstances of the lawyer's return or capacity warrant concern, consider seeking guidance from a court.

## F. Wrapping Up

### 1. Closing Documents

To close a court-appointed custodianship, submit the custodian's report and move to dissolve the custodianship. Address disposition of client files, expenses incurred, and other details, while still preserving confidentiality. Submit a proposed order to dissolve the custodianship.

Custodian agreements under TRDP 13.04 should include a process for terminating the custodianship. Review the agreement, comply with the terms, and if unclear or no procedure is provided, consider seeking guidance from the court. Under Rule 13.05, a custodianship can be terminated by court order, by return of the attorney who is competent and willing to resume representation, and by completing distribution of all active files to the client, a designated representative, or the new attorney assuming representation. Documentation should be made and kept of the conditions under which the custodianship is terminated and evidencing those factors are satisfied.

### 2. Compensation for the Custodian

TRDP, part XIII, does not address compensation for custodial services. No rule requires or precludes payment. If custodianship is by agreement under 13.04, be sure that the written agreement addresses compensation. In all other instances, consider how you might address it in court.

The expense of custodianship is sometimes borne by agreement with the lawyer's family or the lawyer's estate. If the lawyer practiced out of an entity, the entity may be a resource. If the entity is in receivership, the receivership court may be a forum to request costs.

If the cessation is sudden and unexpected, the local bar may be needed to recruit a team of volunteers who share the burden and are willing to serve without compensation.

## G. Forms and Resources for Sudden Cessation of Practice and Custodianships

### 1. Forms

a. Sample Pleadings for Court-Appointed Custodianship

i. Application for Court to Assume Jurisdiction

ii. Attorney's Waiver and Consent for Court to Assume Jurisdiction

iii. Show Cause Order

iv. Proposed Order on Application

v. Custodian Report and Motion to Dissolve

vi. Order Dissolving Custodianship

b. Custodian's Letter to Active Clients

c. Custodian's Letter to Closed Clients

d. Client Acknowledgment of Receipt of Client File

e. Client's Authorization to Transfer File

f. Client's Authorization to Destroy File

g. Motion to Access Digital Files

h. Motion to Access IOLTA Account

i. Motion for Forensic Accounting

**2. Resources**

a. Closing a Practice on the State Bar of Texas Law Practice Management website

b. Succession Planning on the State Bar of Texas Law Practice Management website

## Conclusion

Transition planning is something more than a transaction. By pausing now to consider your wishes for the arc of your practice, it sets the stage for attaining the graduation you hoped to achieve. The best graduation is a sign of accomplishment, a time to reflect, and a time to celebrate. It's a journey, and it's okay to have a good time.