

DEALING WITH THE DEATH OF A SOLO PRACTITIONER

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Chapter 8

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

He currently serves as principal author and project director of the Texas Probate System first published by the State Bar in 1972 and updated five times since then and has chaired the State Bar CLE and PEER Committees.

The State Bar honored him with its Presidents' Award in 1978 as the outstanding lawyer in Texas and the Gene Cavin Award For Excellence In Continuing Legal Education in 1994.

He chaired the Law Practice Management Section of the American Bar Association and for two and one-half years wrote a monthly column for solo practitioners in the ABA Journal. He was inducted into the first class and elected as an initial trustee of the College of Law Practice Management and currently serves as its treasurer.

The College of the State Bar presented him with its 1999 Professionalism Award and he received the Distinguished Service Award for 2000 from the Estate Planning, Probate, and Trust Law Section of the Houston Bar Association. The General Practice, Solo and Small Firm Section of the American Bar Association presented him with its Donald C. Rikli Lifetime Achievement Award in 2000.

He served as mentor to five women lawyers in their first year as solo practitioners and continued the group's monthly meetings for an additional four years. This group became a model for the mentor program of the State Bar.

He was an organizer and continues to lead monthly meetings of a Houston group of lawyers now in its seventh year known as Solos Supporting Solos. This informal group provides solos with an opportunity to meet fellow solo practitioners in an informal setting.

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CHAPTER 8
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DEALING WITH THE DEATH OF A SOLO PRACTITIONER

I. OVERVIEW

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

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

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

D. Civil Liability. These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Section 14, Preamble to Texas Rules of Professional Conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. Section 15, Preamble to Texas Rules of Professional Conduct.

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

F. Delicate Balance. As will be seen, some of the Texas Disciplinary Rules of Professional Conduct ("DR") tend to complicate things involving clients, leave many open issues for the lawyer's family, and raise serious potential problems for attorneys who are involved in winding down the practice of a deceased solo practitioner.

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

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

1. What can a solo do to protect the interests of the solo's clients?

2. What can a solo do to enhance the value of the solo's practice?

3. What guidance and instructions can the solo provide to the solo's executor and family?

4. What changes could or should be made to remove the uncertainties inherent in existing Rules?

II. JURISDICTION.

A. In General. At first glance, it would appear that a probate or county court would have exclusive jurisdiction in dealing with issues relating to the winding up of the practice of a deceased solo practitioner (Probate Code, Section 4).

B. District Court Jurisdiction. However, under Section 13.02 of the Rules of Disciplinary Procedure [Reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, App. A-1 (Vernon 1998)], when an attorney has died, any "interested person may petition a district court in the county of the attorney's residence to assume jurisdiction over the attorney's law practice."

Section 13.03 provides that following the filing of the petition, the court shall set a hearing and issue an order to show cause, directing the attorney or his or her personal representative, or if none exists, the person having custody of the attorney's files, to show cause why the court should not assume jurisdiction of the attorney's law practice. If the court finds that the attorney has died and that supervision of the court is required, the court shall assume jurisdiction and appoint one or more attorneys to examine files, contact clients and others who are affected by the death of the attorney, apply for extensions of time, and deliver files and other property to clients. No bond is required of the appointed lawyers and they are not to incur any liability except for intentional misconduct or gross negligence. See also Appendix B for text of Sections

13.02 and 13.03. Notice that these Rules do not address compensation for the appointees or the responsibility for its payment.

C. Statutory Courts Exercising Probate Jurisdiction.

In counties where there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding probate and administrations shall be filed and heard in such courts rather than in the district courts, unless otherwise provided by the legislature. Probate Code, Section 5 (c).

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

1. Query. Can a statutory probate court hear a petition that follows Section 13.02 of the Rules of Disciplinary Procedure and if so, can it act on that petition in such a way as to provide the same protection to the appointed attorneys?

2. Query. Is a temporary administration a workable alternative?

III. RULE 13.01 OF RULES OF DISCIPLINARY PROCEDURE.

A. Notice of Attorney's Cessation of Practice. As an alternative to filing a petition in the district court, Rule 13.01 spells out certain notification requirements when an attorney dies and no other attorney, with client consent, has agreed to assume responsibility. See Appendix B for complete text.

This Rule states that written notice of death (together with information identifying the matter) shall be mailed to all clients, former clients, opposing counsel, courts, agencies with which the attorney has matters pending, malpractice insurers, and any other person or

entity having reason to be informed of the death of the attorney. The notice is to be given by the personal representatives or by any person having lawful custody of the attorney's files and records.

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

C. Selected Compliance Problems.

1. State of Decedent's Files. Rule 13.01 assumes that the deceased lawyer maintains meticulous records, has well-organized files, and has a current address for every client that was ever represented during the lawyer's career. This may not always be the case.

2. Personalized Written Notice. Since notice under Rule 13.01 must include "information identifying the matter", a generic or boiler plate type notice would not comply with the requirement and thus much effort must be expended in locating and describing all matters in each notice, even those handled decades ago. This appears to be an unnecessary burden and expense to impose on the deceased lawyer's family, staff, and personal representatives.

3. Content of Notice. The notice should identify the deceased attorney, indicate the date of death, state that the attorney-client relationship ended with that death, identify all matters that had been handled by the attorney, advise of the location of the files, and recommend that the client obtain other counsel.

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

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

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

A professional who knowingly accepts employment within the scope of the person's license also

commits the offense of barratry if the employment is the result of personal or telephone solicitation. Texas Penal Code §38.12(b).

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

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

7. Query. Is specific authorization in the Rules required or is it enough if it is not prohibited?

8. Barratry Issues Arising Out Of Written Communications. An attorney commits the offense of barratry if, with the intent to obtain professional employment for himself or for another, sends a written communication that concerns a lawsuit of any kind, including an action for divorce, in which the person to whom the communication is addressed is a defendant or a relative of that person, unless the lawsuit has been on file for more than 31 days before the date on which the communication was mailed. Texas Penal Code §38.12(a).

An offense under this provision is a Class A misdemeanor (a fine not to exceed \$4,000, confinement in jail for a term not to exceed one year, or both). Texas Penal Code §12.21.

9. Texas Penal Code §38.12 is reproduced in its entirety in Appendix E.

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

IV. RESTRICTIONS ON ATTORNEY WHO WANTS TO "TAKE OVER THE FILE".

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

B. Prohibited Written Solicitations. DR 705 (a) prohibits certain written communications while DR 7.05 (b) sets forth certain other requirements for the content of this "solicitation" including compliance with DR 7.04 (a) through (c) relating to advertisements in the public media.

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

2. Special Marking. The solicitation shall be plainly marked "ADVERTISEMENT" on the first page and on the envelope. DR 7.05 (b) (2).

3. Retaining Copies. A copy of each written solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name and address to which each such communication was sent; and the means by which each such communication was sent shall be kept by the lawyer or firm for four years after its dissemination. DR 7.04 (d).

4. Additional Requirements. See Appendix C for excerpt from Rule 7.05.

C. Filing Requirements For Public Advertisements and Written Solicitations. A copy of the written solicitation being sent, together with a representative sample of the envelopes and the fee (\$50 as of April 27, 2000) must be filed with the Lawyer Advertisement and Solicitation Review Committee of the State Bar of Texas, either before or concurrently with the mailing. DR 7.05 (b) and 7.07 (a). See Appendix C for excerpts of these Rules. The State Bar has a form for this purpose. See Appendix D.

D. Prohibited Employment. A lawyer shall not accept or continue employment when the lawyer knows or reasonably should know that the person who seeks the lawyer's services does so as a result of conduct prohibited by these rules. DR 7.06.

V. DEALING WITH A CLIENT'S FILE AND OTHER PROPERTY.

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

law. Section 3, Preamble to Texas Rules of Professional Conduct.

1. “Confidential information” includes both “privileged information” and “unprivileged client information”. “Privileged information” refers to the information of a client protected by the lawyer-client or attorney-client privilege. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client. DR 1.05 (a).

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

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

B. Safekeeping Property. A lawyer shall hold funds and other property belonging in whole or in part to clients or third persons that are in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Such funds shall be kept in a separate account, designated as a “trust” or “escrow” account, maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation. DR 1.14 (a).

C. Funds Or Other Property Held For Clients. Every attorney licensed to practice law in Texas who maintains, or is required to maintain, a separate client trust account or accounts, designated as such, into which funds of clients or other fiduciary funds must be deposited, shall further maintain and preserve for a period of five years after final disposition of the underlying matter, the records of such

accounts, including checkbooks, canceled checks, check stubs, check registers, bank statements, vouchers, deposit slips, ledgers, journals, closing statements, accountings, and other statements of receipts and disbursements rendered to clients or other parties with regard to client trust funds or other similar records clearly reflecting the date, amount, source and disbursements of the funds or other property of a client. Rules of Disciplinary Procedure 15.12.

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

1. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation. DR 1.15 (d).

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

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

Note: The Professional Ethics Committee of the Supreme Court is, a statutorily created committee, charged with the task of issuing written opinions on ethical

questions raised by Texas attorneys. The full text of all of the opinions is available at www.txethics.org.

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

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

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

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

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

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

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

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

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

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

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

VI. HANDLING PROBATE OF DECEASED LAWYER'S ESTATE.

A. General Problems.

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

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

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

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

5. Personal representative should notify the deceased lawyer's malpractice carrier to obtain extended reporting period endorsement (commonly known as "tail policy"). This is not a new malpractice policy. It simply extends the time to report a claim under the existing policy with its existing restrictions, limits, and deductibles. The tail policy should cover applicable statutes of limitation that

are typically two years. Texas Civil Practice & Remedies Code §16.003.

7. However, the Texas Supreme Court has held that the statute of limitations relating to an attorney's malpractice does not begin to run until the discovery of the act or omission. Willis v. Maverick, 760 S.W.2d 642 (Tex. 1988).

B. Standard Operating Procedures For All Estates Of All Lawyers.

1. The first priority is to check calendar and active files to determine deadlines and due dates.
2. Open and review all unopened mail.
3. Review all unfiled documents and match to appropriate files.
4. Contact clients to advise of situation and need for prompt action.
5. Contact courts and opposing counsel for matters involving pressing deadlines.
6. Review files to determine which files are open and which are closed and the extent to which copies or other materials should be retained.
7. Maintain detailed records of disposition of all client files and get receipts.
8. Review all undeposited checks and either return them to payor or deposit them.
9. Send final bills to clients.
10. Analyze funds in trust account and return unearned portion to clients.
11. Notify bar associations of attorney's death.
12. Notify malpractice carrier and consider "tail coverage".

C. When Client Desires Referral To Other Counsel.

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

D. When Client Has Obtained New Counsel.

1. Obtain written authorization from client to deliver files to new counsel.
2. Make copies of original documents returned to clients.
3. Arrange for substitution of counsel in litigated matters and be sure of filing and approval.
4. Deliver files and obtain receipt for each.

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

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

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

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

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

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

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

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

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

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

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

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

L. Client Lists. Create and maintain a current listing of all present and past clients, their addresses, and a description of all matters handled for them.

M. Don't Hold Original Documents. Refrain from serving as the repository of clients' original wills and other documents.

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

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

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

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

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

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

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

3. Suggested language to include in agreement.

Client understands that in order to protect Client's interests in the event of disability or death of Lawyer, it may be necessary or appropriate for a staff member, a personal representative (including someone acting under a power of attorney), or another lawyer who is retained by any such person or by Lawyer to have access to Client's files and records in order to contact Client, to determine appropriate handling of Client's matters and of Client's files, and to make referrals with Client's subsequent approval to counsel for future handling. Client grants permission and waives all privileges to the extent necessary or appropriate for such purposes.

Furthermore, in the event of Lawyer's death or disability, if further services are required in connection with Client's representation and another lawyer is subsequently engaged by Client, Client expressly authorizes a division of fees based on the proportion of work done or the responsibilities assumed by each. Such division specifically authorizes the payment of fees and expenses to Lawyer's estate, personal representatives, and heirs.

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

documents as well as all other materials.

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

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

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

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

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

4. Suggested language to include.

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

It is our firm policy to destroy files when we no longer need

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

IX. SALE OF A LAW PRACTICE.

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

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

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

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

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

Consent of the client based on informed communication is the only permissible basis for the disclosure of confidential information. That consent can be

a part of the engagement letter as a condition to the lawyer's accepting employment.

3. Ethics Opinion 479, August 1991. DR 1.05 prohibits the disclosure of the names of the firm's clients and the amounts owed by each client.

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

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

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

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

6. Solicitation.

a. For more details, refer to Sections III and IV of this paper.

b. Advertising "Established Clientele". In Ethics Opinion 266, October 1963 (Texas), a widow proposed to advertise in the Texas Bar Journal: For sale: library, furniture, good lease, and established clientele. The opinion concluded that it was unethical for a lawyer to purchase, to sell, or to advertise for sale a law practice with "established clientele". The Committee concluded that while a non-lawyer heir is not bound by these ethical restraints, no Texas lawyer could purchase or accept advertisement for publication in the Bar Journal. Although it was proper to advertise for sale the library, office equipment, and unexpired lease, it was a violation of old Canon 24 to solicit "established clientele" to continue their business with the purchaser.

c. Listing In Yellow Pages. Ethical Opinion 185, October 1958, regarded it as a violation for any attorney to list in the yellow pages of the telephone directory the name of a deceased attorney.

d. Query. Does this restriction protect or harm the clients who are searching for their

documents previously entrusted to their now deceased solo practitioner?

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

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

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

7. Fee Sharing With Non-Lawyers. Here, the debate rages, not only with respect to barratry, ambulance chasers, runners, and the like, but also regarding the key barriers to multi-disciplinary practice – confidentiality, conflicts of interest, and control and encouraging non-lawyers to engage in the unauthorized practice of law.

Lost in the shuffle are the concerns of the families of deceased lawyers and their need to realize value from the practice of their now deceased solo practitioner.

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

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

Note that DR 1.04 (f) emphasizes that the division of fees between lawyers not in the same firm shall not be made unless the division is in proportion to the professional services performed by each lawyer.

The evil to avoid is not the collecting of funds by the solo's estate or heirs, but rather the payment by the purchasing lawyer. Atkins v. Tinning, 965 S.W.2d 533 (Tex Civ App 1993)

C. ABA MODEL RULE 1.17.

1. This rule permits the sale of a law practice, including its goodwill. This Rule, or some variation, has been adopted in at least 28 jurisdictions (Alaska, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virgin Islands, Virginia, West Virginia, and Wisconsin). Three others (Kansas, Tennessee, and Washington) have allowed the sale of law practice by other means.

2. The supreme court of Illinois has considered but rejected the sale of an attorney's goodwill. O'Hara v. Ahlgren, Blumenfeld and Kempster et al. 537 N.E. 2nd 730 (Ill. 1989).

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

D. Other Arguments Against Permitting Sale of Law Practice.

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

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

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

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

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

E. Arguments In Favor Of Permitting Sale Of Law Practice.

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

2. There are two elements being transferred - the hard assets of the practice and a system for generating future revenues.

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

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

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

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

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

8. All elements of client autonomy survive the sale.

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

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

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

G. Is Sale Permitted If Not Specifically Prohibited?

1. Washington State Bar Association Rules of Professional Conduct Committee, Formal Opinion 192, May 1996. This opinion concluded that in the absence of a specific prohibition in the Rules, a sale was permitted though the seller could not affirmatively recommend the purchasing lawyer.

2. Texas rule is not clear. Even if permitted, there are many hurdles to jump and some serious ethical risks are imposed on the purchaser.

X. THE FUTURE. This paper has attempted to describe the current situation and to stimulate discussion of the issues. Some changes should be made in our rules to facilitate the disposition of the practice of a solo practitioner. Whether a sale of an ongoing law practice should be permitted is an issue for another presentation. However, if multi-disciplinary practice is permitted *de jure* as well as *de facto*, a thorough examination of our rules and some major revisions will be necessary.

APPENDIX A**HAS THE PARADE PASSED US BY?**

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

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

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

For years the prognosticators have said that it was just a matter of time before solo practitioners would be a relic of the past.

But an American Bar Foundation demographic study indicates otherwise. It shows that in 1988, approximately 46 percent of all practicing lawyers were solo practitioners. As Mark Twain once said, "The news of my death is somewhat exaggerated."

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

Whatever a solo practitioner may be, the lawyer who chooses this life quickly learns that a solo is in charge of planning, business development, administration, marketing, managing, accounting, and yes, production. Among lawyers, the solo must emulate the qualities of the

renaissance man and be all things to all people at all times while remaining omni-competent.

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

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

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

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

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

APPENDIX B**RULES OF DISCIPLINARY PROCEDURE****T.2, Subt.G, App.A-1****PART XII. CESSATION OF PRACTICE****13.01 Notice of Attorney's Cessation of Practice**

When an attorney licensed to practice law in Texas dies, resigns, becomes inactive, is disbarred, or is suspended, leaving an active client matter for which no other attorney licensed to practice in Texas, with the consent of the client, has agreed to assume responsibility, written notice of such cessation of practice (together with information identifying the matter) shall be mailed to all clients, former clients, opposing counsel, courts, agencies with which the attorney has matters pending, malpractice insurers, and any other person or entity having reason to be informed of the cessation of practice. If the attorney dies, or has a mental or emotional Disability, the notice shall be given by the personal representatives of the attorney or by any person having lawful custody of the files and records of the attorney. In all other cases, notice shall be given by the attorney, a person authorized by the attorney, a person having lawful custody of the files of the attorney, or by Chief Disciplinary Counsel.

13.02 Assumption of Jurisdiction

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

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

B. That cause exists to believe that court supervision is necessary because the attorney has left client matters for which no other attorney licensed to

practice law in Texas has, with the consent of the client, agreed to assume responsibility.

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

13.03 Hearing and Order on Application to Assume Jurisdiction

The court shall set the petition for hearing and issue an order to show cause, directing the attorney or his or her personal representative, or if none exists, the person having custody of the attorney's files, to show cause why the court should not assume jurisdiction of the attorney's law practice. If the court finds that one or more of the events stated in Section 13.02 has occurred and that the supervision of the court is required, the court shall assume jurisdiction and appoint one or more attorneys licensed to practice law in Texas do one or more of the following as specified in the court's written order:

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

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

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

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

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

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

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

APPENDIX C
EXCERPTS FROM TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

7.05. Prohibited Written Solicitations

(b) [A] written solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall conform to the provisions of Rule 7.04 (a) through (c) [relating to Advertisements in the Public Media].

These provisions include the requirement that the lawyer may include a statement relating to Board certification in the practice area in question, and in each other area, shall state "Not Certified by the Texas Board of Legal Specialization" or if in an area not covered by certification, the lawyer may also state "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area."

Rule 7.04 (h) applies if services are to be rendered on a contingent fee basis. Subsections (i) through (o) may also apply.

(2) shall be plainly marked "ADVERTISEMENT" on the first page and on the envelope.

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

Rule 7.07. Filing Requirements for Public Advertisements and Written Solicitations

(a) [A] lawyer shall file with the Lawyer Advertisement and Solicitation Review Committee of the State Bar of Texas, either before or concurrently with the mailing or sending of a written solicitation communication:

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

(2) payment of the fee set by the Board of Directors [\$50.00 as of April 26, 2000].

APPENDIX E
TEXAS PENAL CODE §38.12
Barratry and Solicitation of Professional Employment

(a) A person commits an offense if, with intent to obtain an economic benefit the person:

(2) solicits employment, either in person or by telephone, for himself or for another;

(b) A person commits an offense if the person:

(1) knowingly finances the commission of an offense under Subsection (a);

(3) is a professional who knowingly accepts employment within the scope of the person's license, registration, or certification that results from the solicitation of employment in violation of Subsection (a).

(c) It is an exception to prosecution under Subsections (a) or (b) that the person's conduct is authorized by the Texas Disciplinary Rules of Professional Conduct or any rule of court.

(d) A person commits an offense if the person:

(1) is an attorney, chiropractor, physician, surgeon, or private investigator licensed to practice in this state or any person licensed, certified, or registered by a health care regulatory agency of this state;

(2) with the intent to obtain professional employment for himself or for another, sends or knowingly permits to be sent to an individual who has not sought the person's employment, legal representation, advice, or care a written communication that:

(A) concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person and that was mailed before the 31st day after the date on which the accident or disaster occurred;

(B) concerns a specific matter and relates to legal representation and the person knows or reasonably

should know that the person to whom the communication is directed is represented by a lawyer in the matter;

(C) concerns an arrest of or issuance of a summons to the person to whom the communication is addressed or a relative of that person and that was mailed before the 31st day after the date on which the arrest or issuance of the summons occurred;

(D) concerns a lawsuit of any kind, including an action for divorce, in which the person to whom the communication is addressed is a defendant or a relative of that person, unless the lawsuit in which the person is named as a defendant has been on file for more than 31 days before the date on which the communication was mailed;

(f) An offense under Subsection (a) or (b) is a felony of the third degree

(g) Except as provided by Subsection(h), an offense under Subsection(d) is a Class A misdemeanor. [A fine not to exceed \$4,000; confinement in jail for a term not to exceed one year; or both such fine and confinement. Texas Penal Code §12.21].

(h) An offense under Subsection (d) is a felony of the third degree if it is shown on the trial of the offense that the defendant has previously been convicted under Subsection (d). [Imprisonment for a term of not more than 10 years or less than 2 years. In addition, a fine not to exceed \$10,000 may be imposed. Texas Penal Code §12.34].

APPENDIX F SPECIAL PROVISIONS FOR ATTORNEY'S WILL

INSTRUCTIONS REGARDING MY LAW PRACTICE

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

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

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

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

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

- (a) Enter my office and utilize my equipment and supplies as helpful in closing my practice.
- (b) Obtain access to my safe deposit boxes and obtain possession of items belonging to clients.
- (c) Take possession and control of all assets of my law practice including client files and records.
- (d) Open and process my mail.
- (e) Examine my calendar, files, and records to obtain information about pending matters that may require attention.
- (f) Notify clients and those who appear to be clients of my death and that it is in their best interests to obtain other counsel.
- (g) Obtain client consent to transfer client property and assets to other counsel.

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

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

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

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

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

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

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

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

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

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

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

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

In performing the foregoing, my Executor is to preserve client confidences and secrets and the attorney-

client privilege and to make disclosure only to the extent necessary for such purposes.

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

APPENDIX G

ABA MODEL RULE 1.17
American Bar Association Rules of Professional Conduct

SALE OF LAW PRACTICE

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

I. The seller ceases to engage in the private practice of law [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(a) The practice is sold as an entirety to another lawyer or law firm;

(b) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

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

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

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

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

COMMENT

The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a

lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

TERMINATION OF PRACTICE BY THE SELLER

The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

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

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

SINGLE PURCHASER

The Rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there is a single purchaser is nevertheless satisfied.

CLIENT CONFIDENCES, CONSENT AND NOTICE

Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidence requires that the petition for a court order be considered *in camera*.

(A procedure by which such an order can be obtained needs to be established in jurisdiction in which it presently does not exist.)

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

FEE ARRANGEMENT BETWEEN CLIENT AND PURCHASER

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

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

OTHER APPLICABLE ETHICAL STANDARDS

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

If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of

any tribunal in which a matter is pending, such approval

must be obtained before the matter can be included in the sale (see Rule 1.16).

APPLICABILITY OF THE RULE

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

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

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

MODEL CODE COMPARISON

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

LEGAL BACKGROUND

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

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

Rule 1.17 is similar to a California rule that took effect in 1989. California Rules of Professional Conduct, Rule 2-300, West's Ann. Cal. 23, Pt. 2, Rule 2-3000 (Supp.

1991)

INDIRECT METHODS OF TRANSFERRING GOOD WILL

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

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

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

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

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

HISTORICAL JUSTIFICATIONS FOR

PROHIBITING SALE OF GOODWILL

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

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

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

RELATED ETHICAL OBLIGATIONS

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

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

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

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

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

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

BASIS OF REGULATION

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

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

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

- **Sole Practitioners in Unfair Financial Position:** Retiring members of law firms and estates of deceased lawyers have been able to receive benefits including an allotment for that lawyer's share of the firm's good will. Before the passage of Rule 1.17, sole practitioners and their estates could not ethically obtain the same benefit. The rule eliminated this inequality, although at least one commentator had suggested that valid reasons existed for treating sole practitioners differently from partnerships. See Sterrett, *The Sale of a Law Practice*, 121 U.Pa.L. Rev. 306 (1972).

FURTHER SUGGESTIONS

It has been suggested that the sale of a law practice by an estate be treated differently from the sale by a lawyer leaving private practice. See Minkus, *The Sale of a Law Practice: Toward a Professionally*

Responsible Approach, 12 Golden Gate U. L. Rev. 353 (1982) (suggesting that estate representative may have a duty to obtain the best price for the practice regardless of the quality of the successor counsel, thereby creating a potential conflict with the duty of competence under Rule 1.1).

It has also been suggested that the purchase price

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

APPENDIX H ACKNOWLEDGMENTS

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

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

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

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

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

“A Solo’s ‘Back-Up Lawyer’: How to Set Up a Relationship That Works” by Michael M. Bowden, *Lawyers Weekly USA*, September 22, 1997.

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

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

“When I Die . . . “ by Ross A Sussman, Chapter 51, *Flying Solo*, Law Practice Management Section, American Bar Association.

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

“Purchase or Sale of a Solo Practice” by Demetrios Dimitriou, *Law Practice Management Magazine*, November/December 1993, Law Practice Management Section, American Bar Association.

“A Death Shuttters A Law Firm” by Mark Hansen, *American Bar Journal*, October 1994

“The Toolkit For Buying or Selling a Law Practice” by Ed Poll, 1995 *LawBiz* Publishing Company.

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

“Planning Ahead: A guide to Protecting Your Clients’ Interests in the Event of your Disability or Death - A Handbook and Forms”, copyright 1999 by Barbara S. Fishleder, Oregon State Bar Professional Liability Fund. NOTE: Certain materials

adapted from that publication have been modified in this paper to conform with Texas practice but have been used with permission. All rights were reserved except that permission is granted for law firms and sole practitioners to use and modify those documents in their own practices. Those documents may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund.

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

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

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

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

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

