AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 468 **October 8, 2014**
Facilitating the Sale of a Law Practice

When a lawyer or law firm sells a law practice or an area of law practice under Rule 1.17, the seller must cease to engage in the private practice of law, or in the area of practice that has been sold, in the relevant jurisdiction or geographic area. But the selling lawyer or law firm may assist the buyer or buyers in the orderly transition of active client matters for a reasonable period after the closing of the sale. Neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent only on the transition of matters.

Until 1990, lawyers were unable to sell any part of a law practice except for the physical assets such as furniture, office equipment, and books. Rule 1.17, first adopted in 1990, rejected the traditional prohibition on the sale of a law practice and permitted such transactions under certain conditions, including the condition that the selling lawyer or law firm "ceases to engage in the private practice of law, or in the area of practice" that was sold, in the relevant jurisdiction or geographic area. A question has arisen as to whether a selling lawyer or law firm may nevertheless continue to "practice" to assist the buyer or buyers in the orderly transition of active client matters.

Traditional Prohibition on Sale of a Law Practice

Various reasons were typically given for the traditional prohibition on the sale of a law practice. First, the uniform position of the courts and bar associations was that there was no legally or ethically recognized "good will" in a law practice that a lawyer might sell, pledge, assign, or even give away.[1] This position was reflected in ABA Formal Opinion 266 (June 2, 1945), which stated that the "good will," or intangible going-concern value, of a lawyer's practice was not an asset that either the lawyer or the lawyer's estate could sell because "… clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status."

A second reason was concern that the sale of a law practice, whether by the estate or the survivor of a deceased sole practitioner to a lawyer or by a lawyer or law firm to another lawyer or law firm, would constitute an impermissible sharing or division of legal fees. With regard to a sale of a practice by the estate or survivor of a deceased sole practitioner, the pre-1990 provisions of Rule 5.4(a), as well as DR 3-102(A) of the 1969 Model Code of Professional Responsibility, generally prohibited lawyers or law firms from sharing legal fees with nonlawyers, with certain limited exceptions including payments made to the survivors or estates of deceased law firm partners and law firm compensation and retirement plans. Thus, compensation for the "good will" of a sole

1. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.2, at 879 (1986).

practitioner's law practice, paid by the purchasing lawyer or law firm to the estate or survivor of the sole practitioner and derived from fees paid by the clients of that practice, was considered an improper sharing of a legal fee with a nonlawyer.[2] With regard to a sale of a practice by a lawyer or law firm to another lawyer or firm, both Rule 1.5(e) and DR 2-107(A) of the Code prohibited the division of legal fees between lawyers who are not in the same firm, with limited exceptions not applicable to the sale of the "good will" of a law practice.

A third reason was the long-established ban on payments by a lawyer to anyone for recommending the lawyer's services, as expressed in DR 2-103(B) of the Code and Rule 7.2(b). When a lawyer sells a practice, the lawyer presumably recommends the buyer to the clients of the practice, and thereby receives payment for those recommendations.

A fourth reason was concern that confidential client information might be disclosed as the result of the sale of a law practice. The 1983 version of the Model Rules did not address this issue. However, EC 4-6 of the Code explained: "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus 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."

Whatever the reason or reasons given in any particular situation, it was generally held prior to 1990 that a law practice could not be sold, either by a sole practitioner or a law firm or by the survivor or the estate of a deceased sole practitioner.

New Model Rule 1.17

In 1990, the ABA House of Delegates adopted new Model Rule 1.17 that permits the sale of a law practice, including the "good will" of the practice, if the detailed requirements of the rule are followed. According to its sponsors, the new rule was designed to accomplish two goals. The first was to address the disparity of treatment of clients of sole practitioners and clients of law firms when a lawyer responsible for a client matter leaves the practice, by ensuring that client matters handled by sole practitioners are attended to when the sole practitioner leaves practice. Formerly, clients of sole practitioners were left to fend for themselves after their lawyer left the practice because the lawyer had no legal way to sell the practice. Second, the new rule put sole practitioners in a financial position equal to partners of law firms regarding the value of the "good will" of their practice because most jurisdictions had limited a sole practitioner's ability to value his or her practice upon retirement or other cessation of practice to physical assets.[3]

Comment [1] to Rule 1.17 reaffirms the traditional notion that the "… practice of law is a profession, not merely a business. Clients are not commodities that can be

2. *See, e.g.*, O'Hara v. Ahlgren, Blumenfield & Kempster, 537 N.E.2d 730 (Ill. 1989) (contract with widow to sell practice of deceased sole practitioner violated public policy against fee sharing and would not be enforced).

3. *See* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 383 (Art Garwin ed., 2013).

purchased and sold at will." However, the black letter of the rule and the remaining comments outline and explain the conditions for the sale of a practice or area of practice, including requirements that the entire practice or an entire area of practice must be sold;[4] that the seller give written notice of the proposed sale to each client;[5] and that the fees charged to the client shall not be increased by reason of the sale.[6]

Another key requirement of Rule 1.17, expressed in paragraph (a) of the black letter and Comments [2] and [3], is that the seller must cease to engage in the private practice of law, or in the area of practice that has been sold, in the relevant geographic area or jurisdiction. Comment [5] explains that if an area of practice is sold and the lawyer otherwise remains in the active practice of law, then "the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e)."

Comment [11] notes that lawyers participating in the sale of a practice or practice area remain subject to the ethical standards applicable to the involvement of another lawyer in the representation of a client, including, 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;[7] the obligation to avoid disqualifying conflicts of interest and to secure informed consent where appropriate;[8] and the obligation to protect information relating to the representation.[9] Comment [12] also explains if approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of a tribunal, that approval must be obtained before the matter can be included in the sale.

Other provisions of the Model Rules have been amended to reflect the changes made by Rule 1.17. For example, with respect to the prohibition of the sharing of legal fees with a nonlawyer, Rule 5.4(a)(2) now permits a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer to pay, pursuant to the provisions of Rule 1.17, the agreed-upon purchase price to the estate or other representative of that lawyer. An exception to the general ban expressed in Rule 7.2(b) on payments for recommending a lawyer to clients was adopted that permits a lawyer to "pay for a law practice in accordance with Rule 1.17." Comment [13] to Rule 1.6 now recognizes that lawyers may need to disclose limited information to each other to detect and resolve conflicts of interest in various situations, including when considering the purchase of a law practice. And Comment [3] to Rule 5.6, which generally prohibits agreements that restrict the right of a lawyer to practice, explains that the rule does not apply to "restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17."

4. ABA MODEL R. 1.17(b) & cmt. [6] (2014).
5. ABA MODEL R. 1.17(c) & cmt. [7] (2014).
6. ABA MODEL R. 1.17(d) & cmt. [10] (2014).
7. ABA MODEL R. 1.1 (2014).
8. ABA MODEL R. 1.7 & 1.0(e) (2014).
9. ABA MODEL R. 1.6 & 1.9 (2014).

Transition of Client Matters

Neither the black letter nor the comments to Rule 1.17 address the timing of when a seller "ceases to engage" in the private practice of law for purposes of the rule. In particular, there is no discussion of whether a selling lawyer may continue to be involved in the practice to assist in the orderly transition of active client matters. It is clear from Comment [5] that the selling lawyer may no longer accept new matters in the relevant practice or area of practice, and that prohibition should logically take effect immediately upon the closing of the sale. However, given the history and purpose of the rule, as well as the black letter provisions and comments to the rule, it seems reasonable to conclude that the transition of pending or active client matters from a selling lawyer or firm to a purchasing lawyer or firm need not be immediate or abrupt.

For example, one of the purposes stated by the sponsors of new Rule 1.17 was to address the disparity of treatment of clients of sole practitioners and law firms. Lawyers retiring or withdrawing from law firms are not precluded from assisting their former colleagues in the transition of responsibility for pending matters from the retiring or withdrawing lawyer to another firm lawyer. Where appropriate, a selling lawyer or firm should be given a similar opportunity, for a reasonable period of time after the closing of the sale, to assist in the transition of active client matters.

This conclusion is consistent with Comment [12] to Rule 1.17, which notes that if "… approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale…." The drafters of this comment anticipated situations where the selling lawyer or firm would need to stay involved to accomplish the transition of a pending matter.

This conclusion is also consistent with Rule 1.16(d), which provides that upon termination of representation, a lawyer "shall take steps to the extent reasonably practicable to protect a client's interests…." The duty to protect the client's interests appears to apply regardless of the reason for the termination of the representation, and should therefore include any steps reasonably necessary to protect the interests of the client, even if those steps must be taken after the sale of a lawyer's practice or area of practice has closed.[10]

The period of time required for the selling lawyer to comply with Comment [12] to Rule 1.17 or Rule 1.16(d) in any particular client representation will necessarily depend on the circumstances, including the rules and rulings of courts or other tribunals in pending matters. It is therefore impractical to propose any prescriptive time limitation for when the selling lawyer "ceases to engage" in the private practice of law in the relevant practice area or jurisdiction following the sale of a law practice or area of law practice, as long as the selling lawyer stops accepting new matters in the practice or area

10. *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) § 33(1) (in terminating representation, lawyer must take steps to extent reasonably practicable to protect client's interests).

of practice that has been sold and also limits his or her activities to acts reasonably necessary to accomplish the orderly transition of active client matters.

Charging Clients for Time Spent on Transitioning Matters

Finally, neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent on transition activity that does not advance the representation or directly benefit the client. The clear intent of the black letter and the comment of Rule 1.17 is that clients should not experience any adverse economic impact from the sale of a practice or area of practice. As noted above, Rule 1.17(d) unequivocally states: "The fees charged clients shall not be increased by reason of the sale." And Comment [10] further explains: "The sale may not be financed by increases in fees charged clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser."

The need to spend time on transition activity arises only because of the sale of a practice or area of practice. Charging clients for time spent implementing the sale, activity that would not have been undertaken but for the sale, constitutes an "increase" in the original fee arrangement between the seller and the client "by reason of the sale." Even if the hourly rate is unchanged, billing for the additional time spent on transitioning matters will necessarily increase the fee otherwise due for the representation.[11] Thus, time spent implementing the sale may not be billed to clients.

The compensation, if any, to the selling lawyer or law firm for time spent on transitioning matters should be a matter of negotiation between the seller and the buyer in determining the consideration for the sale.

Conclusion

The requirement of Rule 1.17(a) that the seller of a law practice or area of practice must cease to engage in the private practice of law, or in the area of practice that has been sold, does not preclude the seller from assisting the buyer or buyers in the orderly transition of active client matters for a reasonable period of time after the closing of the sale. However, neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent only on the transition of matters.

11. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (1993) (client should only be charged for legal services performed).