



Standing Committee on Professional Ethics

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Informal Opinion 15-08

SALE OF A LAW PRACTICE

In two separate inquiries involving two different factual scenarios, the Committee has been presented with a number of questions about the ethical sale of a law practice in Connecticut. The first scenario involves a law firm that seeks to purchase another law firm and operate the two firms simultaneously with one another, with the selling lawyer remaining as “of counsel” in the purchased firm. The second scenario involves a sole owner of a law firm who will soon retire conveying the firm to a non-equity partner. Because the issues these inquiries raise overlap, the Committee has elected to address the two inquiries together.

Rule 1.17 governs the sale of a law practice. It outlines the requirements a lawyer or law firm must fulfill in order to sell or purchase a law practice or area of practice, including good will. Rule 1.17 provides that an attorney may sell or purchase a law practice or practice area, including the related good will, but only under the following conditions:

- a) The Seller must cease to engage in the practice of law, or in the practice area sold, in Connecticut;
- b) The entire practice or practice area must be sold to one or more lawyers or law firms;
- c) The Selling Lawyer must provide notice to the affected clients; and
- d) The fees charged to the clients may not be increased because of the sale.

According to the ABA sponsors of the related Model Rule, the Rule permitting the sale of a law practice was designed to: (1) allow for continuity of representation for clients of solo practitioners comparable to that afforded to clients of law firms when an attorney leaves practice; and (2) put solo practitioners in a position similar to that of partners of law firms concerning the attachment of value to the good will of their practices. *See* ABA 2014 Formal Opinion No. 468, *Facilitating the Sale of a Law Practice*, for a detailed discussion of the core elements that a seller or buyer of a law practice must meet to satisfy the Rules of Professional Conduct.

As of the 1990 passage of the Model Rule by the ABA House of Delegates, most jurisdictions had limited a solo practitioner's valuation of his practice to the value of its physical assets upon retirement or cessation of practice. *See* ABA Formal Opinion No. 468, pg. 2 and references cited therein. Currently, the sale of tangible assets of a practice is specifically defined *not* to be a sale or purchase governed by Rule 1.17. Also exempted from the Rule are admission to, or retirement from, a law practice or legal association and transfers of legal representation between attorneys when unrelated to the sale of a practice or an area of practice. *See* Commentary to Rule 1.17 (Applicability of the Rule).

An attorney who is selling or buying a practice or practice area must also consider other relevant obligations imposed by the Rules of Professional Conduct.

Termination of Practice by Selling Attorney

The Selling Attorney must cease to engage in the private practice of law, or in the area of practice that has been sold, in Connecticut. Rule 1.17(a). The Rule does not specify when the Selling Attorney must cease practice. Though the Rule does not require that the Selling Attorney cease practicing abruptly when the sale takes place, the Selling Attorney's activities must be limited to those reasonably necessary for the transition of active matters to the Buying Attorney.

The Selling Attorney is responsible for ensuring a smooth transition for clients, and that may include legal work on existing matters reasonably necessary for the transition, not only administrative work. The Selling Attorney should not, however, accept new matters for the sold practice nor in the sold area of practice, as that is not transitional work, but rather, the continued – and prohibited – practice of law in the jurisdiction. If the Selling Attorney sells a practice area, the Attorney may not accept any new matters or be co-counsel in a matter in that practice area, and may not divide a fee by taking ongoing joint responsibility for a matter in the area of practice that has been sold. ABA 2014 Formal Opinion No. 468, p. 4.

A Selling Attorney should be afforded a reasonable opportunity, after the closing of the sale, to aid in the transition of work to the Buying Attorney, just as retiring attorneys from law firms are allowed to transition work to his or her partners. *Id.* This opportunity permits the Selling Attorney to fulfill the requirements of Rule 1.16(d) concerning the termination of representation, that he or she “tak[e] steps reasonably practicable to protect a client's interests” The Selling Attorney must fulfill these requirements by, *inter alia*, “identifying a purchaser qualified to assume the practice” and avoiding disqualifying conflicts of interest. The Buying Attorney is obligated “to undertake the representation competently.” *See* Commentary to Rule 1.17 (Other Applicable Ethics/Standards).

Sale of Entire Practice or Entire Practice Area/Notice Requirements

The Selling Attorney may not just sell the best, most lucrative clientele, but, rather, must attempt to service all of the existing remaining clients in locating a Buying Attorney to represent them all competently. The Buying Attorney must undertake representation of all of the practice (or practice area) clients. If, however, a purchaser is unable to take on a client matter due to a

conflict of interest, this requirement is satisfied, nonetheless. Rule 1.17, Official Commentary (Sale of Entire Practice or Entire Area of Practice).

The Selling Attorney is responsible for securing the informed consent of the clients to the new representation and is permitted to share information in order to detect potential conflicts and attempt to resolve them. See Rule 1.6(c)(5). If a client cannot be given notice, a court of competent jurisdiction must sanction the transfer of his or her case(s) to the Buying Attorney. Rule 1.17(c)(3). A lawyer or law firm cannot be required to remain in practice, however, because some clients cannot be given actual notice of the purchase. Rule 1.17, Official Commentary (Client Confidences, Consent and Notice). Fulfillment of the Rule's notice provisions should suffice to allow an orderly withdrawal from practice.

Fees May Not Be Increased Due to the Sale and Purchase.

The original terms of engagement must be maintained, including both the fee arrangement and the scope of work to which the Selling Attorney and client agree. It is impermissible to charge the client for the transitional work. Such charges would violate the prohibitions of Rule 1.17(d), disallowing an increase in fees charged to clients because of the sale. Transitional work is required only because of the sale and does not advance clients' causes. As such, it is an improper upcharge. 2014 ABA Formal Opinion No. 468

Communications Concerning a Lawyer's Services; Advertising and Firm Names and Letterhead

Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. "A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

In communications and in advertising during the transition, the Selling Attorney must differentiate him or herself from the firm's actively practicing attorneys. The term "Of Counsel" is commonly used to describe the Selling Attorney's position with the firm not as an associate, a partner or member of the firm. While the designation of "Of Counsel" has not been clearly defined in the Connecticut Rules of Professional Conduct, it signifies a "close, continuing and personal" relationship with the firm other than as a partner or associate. ABA Formal Opinion 90-357. During the transition, the Buying Attorney is the new owner of the law firm and should be held out to the public and existing clients as such. See Rule 7.1; Rule 7.5(a) (firm name, letterhead or other professional designation may not be misleading); and Rule 7.5(d) (lawyers may state or imply that they practice as partners or as an organization only if that is the case).

Rule 7.5(a) permits the use of a trade name by a lawyer in private practice if it does not imply a connection with a governmental agency or legal services organization and is not otherwise misleading under Rule 7.1. If the Selling Attorney is a solo practitioner, the "trade name" and the individual's identity may be enmeshed. Selling and Buying Attorneys should take care that the continued use of the firm name does not "state or imply that they practice in a partnership or other organization" together when that is not a fact.

Listing the Selling Attorney as “Of Counsel” during the transition and as “Retired” thereafter could resolve this obligation if the Selling Attorney actually ends his or her practice of law.

A retiring attorney’s name may be included in the name of a firm when a partner retires “as long as the retiring partner is not practicing elsewhere in Connecticut,” the retiring attorney does not object and his name does not appear in the list of attorneys practicing in the firm. Connecticut Informal Opinions 87-16 and 03-12. A designation that the attorney has retired from the practice of law in Connecticut could fulfill ethical requirements should the Selling Attorney retire to another jurisdiction. A more creative but clear designation will be required if the Selling Attorney’s name remains as the firm name when the Selling Attorney continues to practice in another practice area.

The Committee has been asked whether a non-equity partner may use the name of a retired partner in a firm name, if the partner is deceased. Use of the deceased partner’s name may be used in a firm name as long as there has been a continuing succession of the firm’s identity or a trade name has been used. Rule 7.5, Official Commentary. Since an estate or heir of a deceased attorney may receive money for the sale of a law practice, see Rule 5.4(a)(2), and that sale may include a charge for good will, it is logical to conclude that a deceased partner’s name may be used even if the Buying Attorney was not in practice with the deceased partner, as long as there has been a succession from the Selling Attorney to the Buying Attorney.¹ The deceased attorney’s name should not appear in the list of firm attorneys as that would be misleading.

Proposed letterhead for two firms were sent for review. Our review of the letterhead is limited to the discussion of the use of Buyer’s Law Office and Seller’s Law Office names and references to a common website URL. We will not comment on other specifics of the letterhead.

In the samples presented to the Committee, each law firm operates under a distinct firm name. However, the website URL’s on both samples direct potential clients only to the website for Buyer’s Law Offices. Rule 7.5(d) provides that “Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.” The facts presented are of two separate firms that operate one website in the name of one of the two firms, but include the website URL on each firm’s letterhead. The Committee finds the firms’ use of a single website is not a per se violation, provided that the content of the website explains why two different firms share the same URL and there are specific and appropriate disclaimers of a partnership or other relationships. Absent such disclaimers, use of the same website for both firms implies a partnership between the firms, which the requester has clearly intended to operate as separate and distinct firms. That use would be misleading, and thus prohibited under Rule 7.1. If the URL identifies Firm A then any use by Firm B must include the disclaimers referenced above.

¹ The Buying Attorney’s right to use the Selling Attorney’s name is a matter of substantive law on which we do not opine.

Practice in More than One Firm

The Committee also has been asked if an attorney may ethically practice in more than one firm. A lawyer may practice in more than one firm, but practice in multiple firms will require careful attention to compliance with a number of provisions of the Rules, including the obligation to avoid conflicts of interest, under Rules 1.7 and 1.9, and imputed conflicts under Rules 1.10, 1.18(c) and 1.8(k); the duty of confidentiality under Rules 1.6 and 1.18; avoiding false and misleading communications under Rules 7.1 and 7.5; the duty to supervise others and ensure compliance with the Connecticut Rules of Professional Conduct under Rules 5.1 and 5.3; the duty to prevent the unauthorized practice of law under Rule 5.5; and duties with respect to safekeeping of client's funds under Rule 1.15(b). See Informal Opinion 15-06 (Whether a Lawyer May Practice Law Simultaneously in More than One Law Firm).

THE COMMITTEE ON PROFESSIONAL ETHICS

BY 

Marcy Tench Stovall, Chair