

## **Proposal 04-10 (P.R. 0117)**

### **Proposal #1**

#### **Offered by the Illinois State Bar Association**

#### **New Rule of Professional Conduct 1.17 - Transfer of Law Practice**

A lawyer, the estate of a deceased lawyer, or the guardian or authorized representative of a disabled lawyer may transfer or sell, and a lawyer or a law firm may accept or purchase a law practice if the following conditions are satisfied:

(a) The lawyer whose practice is transferred or sold ceases to engage in the private practice of law in Illinois due to:

- (1) death or disability;
- (2) retirement;
- (3) declaration of inactive status with the ARDC;
- (4) becoming a member of the judiciary;
- (5) full-time governmental employment; or
- (6) moving to an in-house counsel or other position of employment not involving the private practice of law;

(b) The entire practice is transferred to one or more lawyers or law firms, so long as the receiving lawyers or law firms are currently licensed and authorized to practice law in Illinois and in good standing;

(c) Written notice shall be given to each of the seller's current clients via certified mail regarding:

- (1) the proposed sale;
- (2) the terms of any proposed change in the fee arrangement authorized by paragraph (e);
- (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 transfer of representation will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice.

(d) In addition to individual notice under paragraph (c), notice in substantially the following form shall be made by publication in appropriate local media once a week for a period of not less than

three weeks:

Notice: to clients of John Smith, lawyer: You are hereby notified that I, John Smith, practicing law at 100 South Main Street, Smallville, Illinois, am selling my law practice to Mary Jones. The fees charged by Mary Jones after the sale will not be increased solely by reason of the sale. However, Mary Jones may refuse to undertake your representation unless you agree to pay her fees at her current rate. That rate cannot exceed the amount charged by her for rendering substantially similar services prior to her offer to purchase my practice. She will contact you after the transfer of representation if she will request a change of fees. You have the right to retain other counsel or to take possession of your file. Your consent to the transfer of representation will be presumed if you do not take any action or do not otherwise object within 60 days of \_\_\_\_\_ (date of first publication).

Signed, John Smith, Attorney at Law.

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

(f) The deceased lawyer's estate representative or disabled lawyer or his/her authorized representative shall have the same obligation and authority as a receiver under Rule 776(b). A lawyer may retain substitute or additional counsel to protect and represent the lawyer's estate, the interests of existing clients and receive compensation for services pursuant to existing fee agreements with the deceased or disabled lawyer, pending the sale of the law practice of the deceased or disabled lawyer.

(g) A lawyer who uses or exercises this rule shall not be authorized to re-engage in the private practice of law as a private practitioner for a period of at least two-years from the date of final closing of transfer.

### **Comment**

"Practice of law," as that term is used in Supreme Court Rule 705, is broader than the "private practice of law" in this rule. Attorneys in the practice of law in the employ of government agencies, including all levels and branches of government are not engaged in the *private* practice of law under this rule.

A "retired" attorney may choose to offer pro bono legal representation through an organized pro bono program without engaging in practice in violation of this rule.

The Rule contemplates the issue of valuation with numerous aspects of a lawyer's practice, including but not limited to the physical attributes, forms and operating systems that may have been developed, and the general operations of the business. This may also include a recognition that ongoing businesses have intangible value. In the case of *In re Marriage of Zells*, 143 Ill.2d 251, 572 N.E.2d 944, 157 Ill.Dec. 480 (1991), the Supreme Court noted that "the goodwill of a professional business is not marital property subject to division." 157 Ill.Dec. at 482. Rather, "[g]oodwill represents merely the ability to acquire future income." 157 Ill.Dec. 481. Consequently, while "goodwill" is not a "divisible marital asset" in a dissolution of marriage, whether there is a value in the transfer of a law

practice under this Rule is a matter for negotiation between the parties and is not prohibited hereinunder.

Subsection (a)(4) shall be construed in accordance with the Illinois Code of Judicial Conduct.

Subsection (b) contemplates that a purchasing attorney or firm, which is structured under Supreme Court Rule 721 will be in compliance therewith or, if otherwise structured, with other Supreme Court Rules, which may be adopted.

Subsection (c) is intended to define current client as it would be determined by Rule 1.7 of the Rules of Professional Conduct, and subsection (d) is intended to define former client, as it would be determined by Rule 1.9 of the Rules of Professional Conduct.

Subsection (d) is intended to define notice and publication, similar to that necessitated by a default or probate action, e.g., once a week for a period of three weeks.

### **ISBA proposed changes to other Rules of Professional Conduct:**

#### **Rule 5.4 (a)(2)**

##### **Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; ~~and~~ or may make payments in accordance with Rule 1.17; and

#### **Rule 5.6(a)**

##### **Restrictions on the Right to Practice**

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning either benefits upon retirement; ~~or~~ or an agreement pursuant to the provisions of Rule 1.17; or

#### **Rule 7.2(b)**

##### **Advertising**

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay the reasonable cost of advertising or written communication permitted by Rules 7.1 and 7.2 (including fees of personnel preparing such advertising or communication), ~~and~~ may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization; or, may pay for a law practice in accordance with Rule 1.17.

## **Proposal #2**

### **ABA Model Rule 1.17: SALE OF LAW PRACTICE**

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

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

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

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

(1) the proposed sale;

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

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

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

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

### **Comment**

[1] 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, or ceases to practice in an area of law, and other lawyers or firms take 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**

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale

to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily 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 or resigns from a judiciary position.

[3] 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 that provides legal services to the poor, or as in-house counsel to a business.

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

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, 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). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

### **Sale of Entire Practice or Entire Area of Practice**

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area 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 purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

### **Client Confidences, Consent and Notice**

[7] 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 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.

[8] 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 confidences 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 jurisdictions in which it presently does not exist).

[9] 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 or area of practice.

### **Fee Arrangements Between Client and Purchaser**

[10] The sale may not be financed by increases in fees charged the 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.

### **Other Applicable Ethical Standards**

[11] Lawyers participating in the sale of a law practice or a practice area 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 the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] 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 (see Rule 1.16).

## **Applicability of the Rule**

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer 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.

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

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.