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**“Gray Area”:
Selling a Law Practice**

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The “graying” of the legal profession as the “Baby Boom” generation moves toward retirement has been much discussed in recent years. One facet of that discussion has been renewed interest in RPC 1.17, which permits the sale of law practices. In this column, we’ll survey that rule and will also look beyond it to other practice transition strategies for lawyers nearing retirement. With both, we’ll focus on solos and small firm lawyers who don’t have the same institutional mechanisms for either transition or retirement available to large firm lawyers.

RPC 1.17

Before 1990, the rule on selling a law practice was simple: you couldn’t do it. Although lawyers could sell physical assets like law books or a reception desk, they could not sell their practice as a going concern. As the ABA put it in 1945 in Formal Opinion 266, quoting a then-recent opinion by the New York County Bar Association:

“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.”

In 1990, however, the ABA amended its influential Model Rules of Professional Conduct to allow the sale of law practices. The legislative history

for Model Rule 1.17 reflects that the change was intended to provide solos and small firm lawyers a method to harvest the economic goodwill built up over a lifetime of practice that would be roughly analogous to transition and retirement plans common in larger firms. Washington followed with an advisory opinion in 1996 permitting law practice sales that was patterned generally on Model Rule 1.17. When our rules were updated in 2006, the changes included a variant of Model Rule 1.17 and the older ethics opinion was withdrawn.

RPC 1.17 permits the sale of either an entire practice or “area of practice.” The ability to sell a portion of an overall practice may be particularly attractive to a lawyer who wants to continue working but at a reduced pace. The sale can include “goodwill,” which the Court of Appeals in *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 163 Wn. App. 912, 918, 262 P.3d 108 (2011), defined in the law firm valuation context as “the monetary value of a reputation.” The sale can include a restrictive covenant that would otherwise be prohibited by RPC 5.6(a). Even if a sale does include a restrictive covenant, a recent ABA ethics opinion (Formal Opinion 468) interpreting the Model Rule counsels that a selling lawyer can remain in practice on an interim basis to facilitate the transition of the practice. RPC 1.17(d) prohibits fee increases “by reason of the sale.” Under

RPC 1.17(c)(2), clients are free to choose whether they will stay with the purchaser or move their work elsewhere.

Comment 6 to RPC 1.17 makes plain that a purchaser cannot “pick and choose” among the selling lawyer’s clients by simply selecting the most lucrative: “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 another legal practitioner if a sale could be limited to substantial fee-generating matters.” Absent a conflict, therefore, a purchaser must take all of the seller’s clients involved who wish to move.

Comment 7 to RPC 1.17 notes that the identity of clients and matters can normally be disclosed during negotiations with a potential purchaser unless the identity of the client in a particular matter is itself confidential. Comment 7 cautions, however, that providing a potential purchaser with access to client files or the equivalent requires client consent. Comment 7 adds in this regard 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[.]”

Comments 17 through 19 to RPC 1.17 were added last year to outline associated requirements under the LLLT RPCs if some of the work for the clients involved is being (or will be) performed by LLLTs. Of particular note, however,

Comment 19 counsels that “[a]n LLLT is not authorized to purchase a law practice that requires provision of legal services outside the scope of the LLLT’s practice.”

The WSBA’s Law Office Management Assistance Program has a wealth of resources available on the LOMAP section of the WSBA web site for lawyers thinking about selling their practices. Private business sale consultants have also expanded their portfolios to include law practice sales.

Other Transition Strategies

In light of the practical constraints with law firm sales, some lawyers are transitioning their practices through the more traditional mechanism of bringing younger lawyers into their firms and then taking the equivalent of “goodwill” out through structured retirement payments. This is, in essence, a truncated version of the approach that larger law firms have traditionally used.

The advantage with this more informal method is that it allows both the older and younger lawyer to gauge whether the particular practice is a good fit for both themselves and their clients. The disadvantage is that this very lack of formality means that, if things don’t work out, there is the possibility that at least some of the clients involved may decide to leave with the younger lawyer. The leading ABA ethics opinion on lawyers changing firms—Formal Opinion 99-414—

emphasizes that clients are always free to choose who they want to represent them. Washington law makes this same general point, with the Supreme Court concluding in *Barr v. Day*, 124 Wn.2d 318, 329, 879 P.2d 912 (1994): “Unlike general contract law, under a contract between an attorney and a client, a client may discharge the attorney at any time with or without cause.”

Moreover, outside the context of formal law firm sales or payment of retirement benefits, RPC 5.6(a) generally prohibits restrictive covenants on departure from a law firm. WSBA Advisory Opinion 2118 (2006), for example, found that a non-compete in a law firm employment agreement would violate RPC 5.6(a). Advisory Opinion 2118 concluded that the rationale advanced in Comment 1 to RPC 5.6 applied because the non-compete involved would limit client choice. Although the opinion did not comment on civil enforceability, the Supreme Court in *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014), observed that “[w]e have previously and repeatedly held that violations of the RPCs or the former Code of Professional Responsibility in the formation of a contract may render that contract unenforceable as violative of public policy.” The Supreme Court in *LK Operating* went on to outline the general factors to be employed in assessing whether a particular violation of the RPCs translates into contractual unenforceability, concluding (at 87) that “[t]he

underlying inquiry in determining whether a contract is unenforceable because it violates public policy is whether the contract itself is injurious to the public.”

Given the rationale outlined by Advisory Opinion 2118 and Comment 1 to RPC 5.6, it would not be surprising to have a non-compete held unenforceable in the law firm employment context. If a firm lawyer leaves who is a partner or shareholder (or the firm dissolves), the respective rights of the departing lawyer and the firm are generally construed under a blend of contract (the partnership, shareholder and/or employment agreements involved) and statutory (the relevant partnership or professional corporation statutes) law (see, e.g., *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 163 Wn. App. 912; *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007)). Again, it would not be surprising to have a non-compete held unenforceable with a departing partner or shareholder either (unless falling under the “retirement” exception to RPC 5.6(a)). In Oregon, for example, similar provisions have been held unenforceable on public policy grounds based on the corresponding professional rule there (see *Gray v. Martin*, 663 P.2d 1285 (Or. App. 1983)).

Summing Up

RPC 1.17 can provide an important vehicle for lawyers with small firm or solo practices to move into full or partial retirement. At the same time, the

practical dynamics may suggest that a more traditional route of bringing a younger lawyer into a practice and then arriving at a suitable retirement plan formula may be a more realistic path in many circumstances.

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