



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4, 1.17, 7.1, & 7.5(d). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 07-02
July 2007

TOPIC: Sale of Legal Practice.

DIGEST: Lawyer may not sell legal practice and continue to practice on a fee representation basis in the same geographic area.

Lawyer may sell tangible assets of law practice and continue to practice subject to proper procedures being followed.

REF.: Illinois Rules of Professional Conduct 1.4, 1.17, 7.1, 7.5(d).

O'Hara v. Ahlgren, Blumenfeld & Kempster, 127 Ill.2d 333, 537
N.E.2d 730 (1989)

ISBA Opinion No. 03-02

FACTS

The sole owner of a law practice has decided to “retire” and to “sell the assets of his practice to one of his associates.” The associate contemplates starting his own firm, to which the retiring lawyer will be “of counsel” for the next two years. Retiring lawyer will continue to use his name in the letterhead during this time and will be compensated as “of counsel” by separate agreement.

QUESTIONS

Retiring lawyer makes the following inquiries:

1. Since he and the associate are, in his terms, “switching hats”, must retiring lawyer notify his current clients of the change in his status? If so, are there published guidelines?
2. Must the retiring lawyer substitute the new firm for his old firm in pending litigation matters?

OPINION

The inquiring lawyer may not sell his law practice to his associate and remain “of counsel” to the associate’s new firm in the same geographic area where he previously practiced. The lawyer must either sell the practice and cease from engaging in private practice in the geographic area or, if he merely sells the tangible assets of his firm and remains “of counsel” to the associate’s new firm, notify clients and take other steps that are consistent with his new status.

In order to determine the Rules which are applicable to the contemplated transaction, it must first be clarified what form the transaction is to take.

Initially, it is clear what the transaction does *not* contemplate. It does not foresee the continuation of the existing firm by means of a transfer of interests between partners or shareholders of the firm. To the contrary, the retiring lawyer’s inquiry states that the sale taking place is between he and his associate, who will then practice in a firm to be newly formed by the associate, with the inquiring lawyer to be “of counsel” to the associate’s firm for at least two years.

However, the nature of the sale which is contemplated is less clear. The retiring lawyer’s inquiry states that he is to “sell the assets of his practice” to the associate. While we deem it likely that what is meant by such language is that he will be selling the entirety of his legal practice, including its goodwill, to the associate, it is possible that what is intended is merely a sale of the tangible assets of the practice. Different considerations apply depending of which of these is contemplated. We shall discuss each such possibility separately.

Sale of Legal Practice

While the ABA Model Rules of Professional Conduct have provided for the sale of a law practice since 1990, no such provision was included in the Illinois Rules adopted in the same year. Accordingly, the law in Illinois has long been that a sole practitioner such as the inquiring attorney could not sell the goodwill of his practice. *See O’Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill.2d 333, 537 N.E.2d 730 (1989).

However, effective May 23, 2005, Rule 1.17 of the Illinois Rules of Professional Conduct was adopted setting forth circumstances in which the sale of a legal practice, including its goodwill, may be effected, and the guidelines to be followed in doing so. It is such Rule which would govern the present inquiry if the purportedly “retiring” lawyer intends to sell his legal practice, including goodwill, rather than merely selling the tangible assets of his practice. However, application of such Rule to the present circumstances would preclude the sale from taking place in the manner contemplated by the lawyer’s inquiry.

To this effect, subsection (a) of Rule 1.17 provides that for the sale of a law practice to be permissible, it must be incident to one of the following conditions:

The lawyer whose practice is to be transferred or sold ceases to engage in the private practice of law in all or part of 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 government employment;
- (6) moving to an in-house counsel or other position of employment not involving the private practice of law; or
- (7) a decision to no longer be actively engaged in the private practice of law on a fee representation basis in the geographic area in which the practice has been conducted.

As is clear from such subsection, a lawyer seeking to sell his practice must, if not fully retiring from practice, at the least discontinue being actively engaged in the private practice of law on a fee representation basis in the geographic area where his practice was conducted. To the contrary, what is contemplated here is that the selling lawyer intends to continue in private practice for a least two years as “of counsel” to his former associate’s new firm, presumably in the same location where the practice was previously conducted. Under such circumstances, he is not, as is required by Rule 1.17(a), ceasing to actively engage in the private practice of law on a fee representation basis in the relevant geographic area. Accordingly, Rule 1.17 would not permit the sale of his practice to his associate, or to anyone else for that matter, if the attorney is to continue practicing in the manner contemplated.

This being so, the attorney’s further inquiries are rendered moot should the sale of the practice be what is contemplated here. However, to provide guidance to the Bar inasmuch as Rule 1.17 is only newly enacted and has not been the subject of prior ISBA Opinions, we note that, if the selling attorney was retiring in such a manner as to allow a sale of the practice consistent with the Rule, various procedures must be followed pursuant to the Rule, including the giving of notice to clients. To this effect, subsection (c) of the Rule provides as follows:

- (c) No less than 90 days prior to the expected date of closing or transfer, written notice shall be given to each of the seller’s current clients via certified mail regarding:
 - (1) the proposed sale;

- (2) the client's right to retain other counsel or to take possession of the file;
- (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 90 days of the receipt of the notice; and
- (4) the expected date of the final closing or transfer.

Subsection (c) further provides that 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. Moreover, the Rule provides, among other things, that the fees charged to clients shall not be increased by reason of the sale (subsection (a)), and that a lawyer selling a practice is subject to additional ethical standards as are set forth in various other of the Rules of Professional Conduct (subsection (f)). We therefore recommend that any attorney contemplating the selling or transferring of a practice review the new Rule in its entirety.

In summary, in light of the retiring attorney's intention to continue in practice, no sale of his practice to his associate is appropriate under Rule 1.17.

Sale of Tangible Assets

We turn next to the questions raised by the inquiring lawyer when viewed in the context of only a sale of tangible assets of the practice taking place rather than a sale of the legal practice in its entirety. In such circumstances, subsection (e) of Rule 1.17 makes clear that the Rule has no application, stating:

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. (Emphasis added).

Accordingly, if only a sale of tangible assets of the attorney's firm is to take place, no prohibition exists as to the seller attorney continuing in practice and becoming "of counsel" to the associate's new firm.

In such case, however, the attorney would be obligated pursuant to Rule 1.4 to notify his clients of his change of status, of his becoming "of counsel" to his former associate's new firm, and of the need for the clients to retain that firm should they desire him to continue working on their matters. Such new firm, if retained to go forward, would also have to be substituted for the attorney's defunct firm in litigation matters that remain pending.

Finally, although not asked by the attorney, we note that the attorney's inquiry states that his name will be used in the new firm's letterhead, the context of such usage being unclear. If it is intended that the attorney's name would be part of the name of the new firm, such would be

misleading under Rules 7.1 and 7.5(d), the latter of which recites that “[l]awyers may state or imply that they practice in partnership or other organization only when that is the fact.” See also ISBA Opinion No. 03-02, to the effect that a law firm’s name may not imply the existence of a partnership when no such relationship exists. However, if his name is merely to appear as part of the new firm’s letterhead, such would not be prohibited if his status as “of counsel” to the firm is accurately reflected.