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Donald R. Lundberg & Caitlin S. Schroeder, *An Ethical Exit from the Practice of Law*, 61 RES GESTAE 36 (2017).

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Donald R. Lundberg & Caitlin S. Schroeder, *An Ethical Exit from the Practice of Law*, 61 Res Gestae 36 (2017).

APA 7th ed.

Lundberg, D. R., & Schroeder, C. S. (2017). *An ethical exit from the practice of law*. Res Gestae, 61(4), 36-42.

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MLA 9th ed.

Lundberg, Donald R., and Caitlin S. Schroeder. "An Ethical Exit from the Practice of Law." Res Gestae, vol. 61, no. 4, November 2017, pp. 36-42. HeinOnline.

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An ethical exit from the practice of law

By Donald R. Lundberg and Caitlin S. Schroeder

There's a saying that old lawyers never die, they just lose their appeal. This column is about the ethics of winding down or selling a law practice before losing your appeal. Schroeder insists it is not her polite way of telling Lundberg it is time to hang it up. Although these questions most often arise as a lawyer approaches retirement age, the sale of a law practice could come up in any number of other situations, such as the lawyer's election to judicial office, changing careers or disability.

An ounce of prevention

As an initial matter, as part of their fiduciary duties, lawyers should have adequate safeguards in place to protect their clients' interests in the event of the lawyer's sudden death or disability. The duty of diligence may require that a solo practitioner prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Rule 1.3, Comment [5]. To that end, Admission & Discipline Rule 23, Section 27, provides for designating an attorney surrogate to act as custodian of the law practice if a lawyer has died, disappeared, become disabled, or been disbarred or suspended. Lawyers practicing in a firm or other fiduciary entity need not designate a surrogate because of the ongoing responsibility of the firm as a whole to clients of the lawyer. Solo practitioners, on the other hand, may either designate a specific surrogate, or they will be deemed to have designated a senior judge or other suitable member of the bar, appointed by a court, to serve as surrogate. If called to act, the surrogate may take possession of and examine files and records of the law practice, as well as take necessary action to protect the lawyer's clients.

Prevention also includes making sure that a surrogate can access files necessary to protect client interests. Passwords for client files or databases should be documented and maintained in a secure location. Trust fund accounting should be kept up to date and likewise maintained in a secure location that can be accessed by the surrogate if needed. Consider designating an alternate signatory on the trust account so that client funds remain available on request.

Licensure

What you plan to do after winding down your law practice determines how you maintain your law license. If you will still be practicing law, perhaps in a different capacity, such as in-house or as a judge or even giving some occasional legal advice to others, you should maintain an active license. Admis. & Disc. R. 2(b).

However, if you will neither hold judicial office nor engage in the practice of law, you have three options. All of these options require that you are otherwise in good standing – so changing your license status is not a get-out-of-jail-free card if you haven't paid your annual fees or are facing disciplinary action.

First, you could register as inactive, in which case you pay half of the normal registration fee for every year you register as inactive. Admis. & Disc. R. 2(c). An inactive lawyer can return to active status and begin practicing law again by paying the full registration fee for the current year.

Second, if you do not plan to return to the practice of law, you could register as a retired lawyer. Admis. & Disc. R. 2(d). You must be at least 65 years old to take retired status. Retired status is really intended for older lawyers who have no plans to resume law practice. An affidavit of retirement, once filed, is effective for

each succeeding year or until the retired lawyer is reinstated. No registration fee is owed when on retired status, but there is a big deterrent to regaining active status. If your plans change and you wish to return to active status, you must first pay registration fees, including delinquent fees, for every year you were retired, as well as an administrative reinstatement fee of \$200.

Both inactive and retired lawyers are exempted from CLE requirements. Admis. & Disc. Rule 29(8)(c). However, a lawyer who has been inactive for less than a year and desires to return to active status must complete any remaining CLE requirements as of the date of the inactive status.

An inactive lawyer must still report her pro bono hours, which should be zero because she may not engage in the practice of law, as well as qualifying financial contributions as part of her annual registration under Rule 6.7. A retired lawyer does not submit annual registrations, so a retired lawyer does not need to report his or her pro bono hours (which should still be zero!) or financial contributions. Of course, retired lawyers, like all lawyers, are encouraged to give back to the profession that has been good to them by continuing to contribute to the worthy organizations that provide legal services to the poor.

You should be absolutely certain you will not return to the practice of law if you choose the third option, permanent withdrawal. Permanent withdrawal requires tendering an Affidavit of Permanent Withdrawal to the executive director of the Disciplinary Commission, who then verifies your eligibility to withdraw. If you are eligible, the executive director then forwards your withdrawal to the Clerk of the Supreme Court, who enters your withdrawal on the Roll of

Attorneys. A lawyer who is at least 65 years old should never resort to this option, since permanent withdrawal, unlike retirement status, is a one-way street out of the profession.

Besides cost, there is another reason to make sure you register under the correct status. An Indiana lawyer on inactive status who practices law in this or another jurisdiction could be engaging in the unauthorized practice of law under Rule 5.5. Rule 5.5 permits lawyers "admitted" to practice to engage in the practice of law, but lawyers who are on inactive status are not "admitted" as that term is used in the Rule. Rule 5.5, Comment [5]. If you have any plans to continue practicing law after winding down your practice, you should register as an active lawyer.

Law practice for sale

An alternative to winding down a practice completely is selling the practice to another lawyer. Although the Rules recognize that clients cannot be bought and sold at will, since 1998 lawyers in Indiana have been able to sell their practices, or parts of their practices, including goodwill, pursuant to Rule 1.17.

Rule 1.17 provides: "A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including goodwill, 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 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 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.

Under Rule 1.17, a lawyer may sell his or her practice, subject to several specific conditions. First, the selling

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lawyer must cease to engage in the private practice of law, or in the area of practice that is sold, in the geographic area in which the practice was conducted. Effectively a rule-imposed non-compete, this is a unique exception to the prohibition on restricting a lawyer's right to practice under Rule 5.6. What a lawyer's geographic area of practice encompasses can be an interesting question, given modern technology. While in the past this limitation may have permitted a lawyer who moved cross country to practice in the same area that had been sold, the question becomes more complicated today and could depend heavily on the practice area – immigration law may have a more national reach than divorce law, for example.

Second, the lawyer must sell the entire practice, or the entire area of practice, to one or more lawyers or law firms. This requirement prevents a lawyer from selling off certain client matters that have perhaps become undesirable, while keeping other more desirable matters. Likewise, the purchasers are required to undertake all client matters in the practice or practice area, subject to other requirements posed under the Rules,

most notably the conflict-of-interest rules. Rule 1.17, Comment [5].

Third, the seller must give written notice to each of the seller's clients regarding the proposed sale. The seller must inform the client of his right to retain other counsel or to take possession of the file, and the client must be notified 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 receipt of the notice. If a client cannot be given notice, the representation of the client may be transferred only upon entry of an appropriate order by a court having jurisdiction.

Fourth, the fees charged to the clients may not be increased by reason of the sale. This means that the sale may not be financed by increases in fees charged to clients of the practice, and the purchaser must honor existing arrangements between the seller and client.

Transfer of the 'file'

It's worth noting that the Rule talks in terms of transferring the client's "file" as opposed to transferring the "representation." Clients are not

commodities that can be bought and sold, so the sale and purchase requirements are subject to client consent and conflict-of-interest considerations. Ultimately, whether the representation is transferred is a matter between the client and the new lawyer. Either before or after the file transfer, the client may decide she does not wish to be represented by the new lawyer, in which case the client takes her matter elsewhere. With one limited exception, the selling lawyer may not agree to continue representing that client – this would violate the requirement that the seller cease to engage in the practice of law in the area sold and would circumvent the protection afforded clients with "undesirable" matters. As for the exception, the selling lawyer must comply with Rule 1.16 regarding withdrawal of representation, including seeking permission of a tribunal. If the tribunal denies the selling lawyer's motion to withdraw – probably a rare occurrence – the selling lawyer must continue representing the client. Rule 1.17, Comment [11].

Further, a purchaser is still bound by all conflict-of-interest rules. The selling lawyer has a duty to exercise competence in identifying a purchaser, and the purchaser is likely to be someone that practices in the same area as the seller. Rule 1.17, Comment [10]. In this situation, conflicts could arise. As part of their due diligence, the seller and purchaser must identify any matters that cannot be sold due to a conflict of interest, or those involving conflicts requiring advance client consent. This process should be handled before the 90-day notice goes out. Imagine how a client would feel, if she opened a letter advising that her file was going to be transferred to a lawyer adverse to her in another matter? In addition, the number of files that may be transferred surely impacts the purchase price.

But what information can be disclosed? The confidentiality requirements of Rule 1.6 apply to the

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sale of a law practice. The Comments provide some guidance regarding what information can be disclosed: "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 Rule 1.6 than do preliminary discussions concerning the possible association of any lawyer or mergers between firms, with respect to which client consent is not required." Comment [6]. So, negotiations regarding the general nature of the practice to be sold do not violate Rule 1.6, but that information may be insufficient to permit the purchasing lawyer to run a conflicts check. No other exception under Rule 1.6 seems to fit the situation, but obtaining client consent is largely impractical.

Recognizing this problem, the ABA has issued a formal opinion on a related topic, the disclosure of conflicts

information when lawyers move between firms. *See* ABA Formal Op. 09-455 (Oct. 8, 2009). The ABA ultimately concluded that, because the Rules are rules of reason, *see* Scope, Paragraph [14], Rule 1.6 must be interpreted to permit disclosure of information necessary to detect conflicts of interest, as the alternative would render compliance with Rules 1.7, 1.9 and 1.10 impossible. How much must be disclosed to identify whether any conflicts exist, of course, depends on the situation. In some cases, the names of clients may be enough; in others, additional information may be needed. Ultimately, however, the "disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest." ABA Formal Op. 09-455 at 6. Even then, however, there may be situations where the representation is so sensitive that client consent in advance of the disclosure should be obtained.

While the ABA Formal Opinion seems reasonable, we think there is a risk it would be rejected in Indiana. Specifically, Comment [6] to Rule 1.17 says, "Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent." This Comment seems to undermine the ABA's proposal.

So where does that leave us? There is a third option. Rule 1.6(b)(4) permits disclosure "to secure legal advice about the lawyer's compliance with these Rules." Under this rule, the seller and purchaser could employ a third lawyer as an intermediary who collects the conflicts information from each side and provides legal advice regarding whether there are conflicts precluding representation by the purchaser. In the absence of clearer guidance under the Rules, this seems like the safest option.

The ABA recently institutionalized Formal Op. 09-455 by adding a new confidentiality exception to Model Rule 1.6(b). The new exception states:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Since the Indiana Rules of Professional Conduct closely track the ABA Model Rules, maybe it's time for our Supreme Court to consider adding a similar exception to Indiana's Rule 1.6.

Handling fees

Of course, both the client and the lawyer will be especially concerned with how to handle fees when a lawyer dies, becomes disabled, or sells his or her law practice. The unearned portion of prepaid fees must be returned to the client (or transferred to a successor lawyer with client consent), regardless of fee type.



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What constitutes the “unearned portion” depends on the fee type and what the client purchased from the lawyer. We have addressed the refundability of fees in this column several times and refer you to those articles for more information. Lundberg and Schroeder, “How to Handle Fixed Fees,” 59 *Res Gestae* 24 (May 2016); Lundberg, “O Canada: The Limited Duty to Refund Fixed Fees,” 56 *Res Gestae* 29 (May 2013); Lundberg, “Fun with Refundability: When Lawyers Owe Their Clients Money,” 54 *Res Gestae* 24 (March 2011); Lundberg, “Refunding Fees to Clients,” 53 *Res Gestae* 36 (Dec. 2009). As to contingency fees, the analysis at the time of separation is easy, as nothing has been paid to the lawyer. If another lawyer takes the case on contingency, however, the analysis of how much each lawyer is entitled to receive from the fee portion of the client’s recovery gets a lot more complicated. See *Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind. 1999).

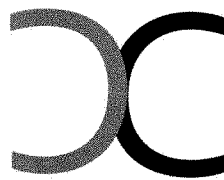
Another issue that comes up frequently is fee sharing between a retiring lawyer and a referred or purchasing lawyer or firm. Sometimes a retiring lawyer will join a firm and slowly work into retirement from there. But, if the retiring lawyer does not become a member of a firm, a division of fees between the retiring lawyer and the referred or purchasing firm triggers Rule 1.5(e). That rule prohibits fee sharing between lawyers in different firms unless: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation, (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

Yet another issue to consider is an agreement for post-retirement or post-sale payments that are contingent on the percentage of fees earned in certain

matters. Rule 1.5(e) does not prohibit or regulate a division of fees received in the future for work done in the past when lawyers were previously associated in a law firm. Comment [8]. However, lawyers may try to structure a retirement plan or sale where a portion of the total payment is calculated and paid based on fees earned in the future for work done in the future. This may arise where the retiring or selling lawyer originated the work and wishes to continue to receive credit for that work. But payments based on future work might cause problems, as a lawyer who registers as inactive or retired, or who permanently withdraws, is essentially a nonlawyer, and fee sharing with nonlawyers is prohibited under Rule 5.4.

Even if a retiring or selling lawyer registers as active, there are other issues that arise from post-retirement or post-

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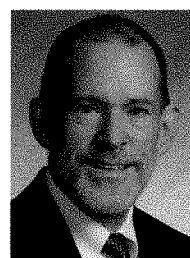
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sale payments. Even if the retiring or selling lawyer remained in active status, payments tied to fees earned for work done after the retirement or sale could be seen as a division of fee, triggering the requirements of 1.5(e). In connection with a sale, the requirement that a lawyer cease practicing also prohibits serving as co-counsel or assuming joint responsibility for a matter in connection with a division of a fee under Rule 1.5(e). Comment [4] to Rule 1.17. There might be ways to structure a sale or retirement plan to avoid these problems, but there is a lot of gray area around how closely tied a client fee and a payment to a retiring or selling lawyer can be before triggering "fee sharing."

Conclusion

Some lawyers never say die; others may retire to spend some time in their gardens. Yet there comes a time for each lawyer when her practice must be wrapped up – if not by the lawyer, then by her estate or attorney surrogate. Whether designating a surrogate, joining a law firm, or selling a practice, lawyers should pay attention to the Rules of Professional Conduct when they transition out of the practice of law, just as when they were actively practicing. ☞



Donald R. Lundberg
Lundberg Legal
Indianapolis, Ind.
don@lundberglegal.com



Caitlin S. Schroeder
Barnes & Thornburg LLP
Indianapolis, Ind.
caitlin.schroeder@btlaw.com