

SUCCESSION PLANNING: SELLING THE PRACTICE

By Don Hopper



Many Indiana attorneys consider law practice succession planning as one of their greatest challenges. In 2015, the *Indiana Lawyer* conducted the Practicing Law in Indiana Survey and found that “38% of the respondents listed transition or succession planning as the greatest challenge to their organization’s viability. Only the issue of managing costs while protecting quality of legal services topped this concern.”¹

The reasons why succession planning is such a challenge are many—denial, procrastination, declining faculties, lives that are too busy, lack of savings, or a reluctance to call it quits. But, just like other “end of life” issues, we, as attorneys, must face reality. Both as a pastor and as an estate planning attorney, I have helped people face lives that are unpredictable, hard, and always finite. The end of our legal careers is an inevitable reality. We can prepare for that reality by planning.

Law succession planning is the development and implementation of a plan to protect your clients and continue your legal legacy. While succession planning is generally thought of as an ending or transition of ownership, many of the elements that go into a successful plan are developed and cultivated during the lifetime of a law practice, even before the day it opens its doors to clients. The goal is to have an orderly transition that protects clients and transfers the ownership interest to another attorney or law firm. My colleagues in other parts of this series have discussed some of these options and the steps involved in a successful plan. In

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these materials, I will discuss the particulars of selling the practice.

UNDERSTANDING YOUR ETHICAL REQUIREMENTS

While there are good reasons for regulating the sale of a law practice—including our duty to put our clients' interests before our own—no other profession faces the same kind of restrictions as attorneys under Rules of Professional Conduct 1.17.

Prior to 1990, an attorney couldn't sell or buy a law practice from another attorney anywhere in the country. Law firms didn't have "good will." An attorney could only sell tangible assets—e.g., buildings, books, furniture, filing cabinets, and equipment. However, in 1990, the American Bar Association adopted Model Rule of Professional Conduct 1.17. This new rule rejected the prior prohibition on the sale of a law practice and allowed attorneys and law firms to sell or purchase a law practice or portion of a practice, including its "good will," if certain conditions are met. Indiana did not adopt a version of Model Rule 1.17 until 1998.

Under Rule 1.17, Indiana attorneys and/or law firms must meet a series of set conditions to sell their practice.

1. The selling attorney or law firm must cease to engage in private practice in the geographic area in which the practice has been

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conducted. If only a portion of the practice is being sold, the attorney or law firm must cease to engage in that area of law in the geographic area in which the practice has been conducted.

2. The entirety or a portion of the law practice must be sold to one or more lawyers/law firms. It may not be sold to nonlawyers or businesses that are not law firms governed by Indiana's Rules of Professional Conduct.
3. The selling attorney or law firm must give written notice to each client of the proposed sale that includes an explanation of the client's right to retain other counsel or take possession of their file. The client has 90 days to object to his or her files being transferred to the

acquiring attorney or law firm, or their consent to the transfer is presumed.

4. The fees charged to the acquired clients shall not be increased by reason of the sale.

These requirements are understandable and were instituted to protect our clients. However, two might pose obstacles to your succession plan.

For one, attorneys are required to give notice to their clients and invite them to seek other counsel if they choose. This can be confusing and an administrative burden. Do you only give notice to current clients or to all former clients? The rule and the accompanying comments are silent on determining which clients need to be notified. Additionally, the potential of clients choosing to

employ other counsel (as opposed to being transferred to the purchasing attorney or firm) could lessen the value of your practice.

The restriction on increasing fees because of the sale of a practice can also be an obstacle. For example, many senior attorneys often stop increasing their rates with the market during their later years of practice. Their clients' fees may be drastically below market rate. A potential acquiring attorney may not want to be required to charge these discounted rates (as compared to what they may normally charge their own clients for the same service).

Attorneys interested in selling their practice should keep these considerations in mind. There are succession planning options that can work around these requirements but still embody the spirit of Rule 1.17's protections. Instead of an outright sale, for example, an attorney might consider merging their practice or moving to an "of counsel" role with another attorney or firm. This preserves Rule 1.17's requirement for open communication with clients while allowing for a slower transition where the clients' needs can be adequately serviced over time.

If your plan involves the outright sale of practice, however, carefully examine Rule 1.17 and its comments, and keep an eye out for new updates and opinions. Questions have been raised about the rule in recent years. For example, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 468—Facilitating the Sale of a Law Practice—addressing the rule's impact on solo practitioners and the transition of client matters.²



IDENTIFYING A BUYER

When building your succession plan, you should first ask yourself the following questions to help identify your options and/or a potential buyer.

- **What are your goals for your retirement/succession plan, and how do you plan to achieve them? What is your timetable?**

It can be difficult for some of us to sit down and think about how we plan to exit from our practice. But just as in estate planning, we need to face these issues. Developing a timetable is essential. If health issues are not involved, a period of one to two years is common.

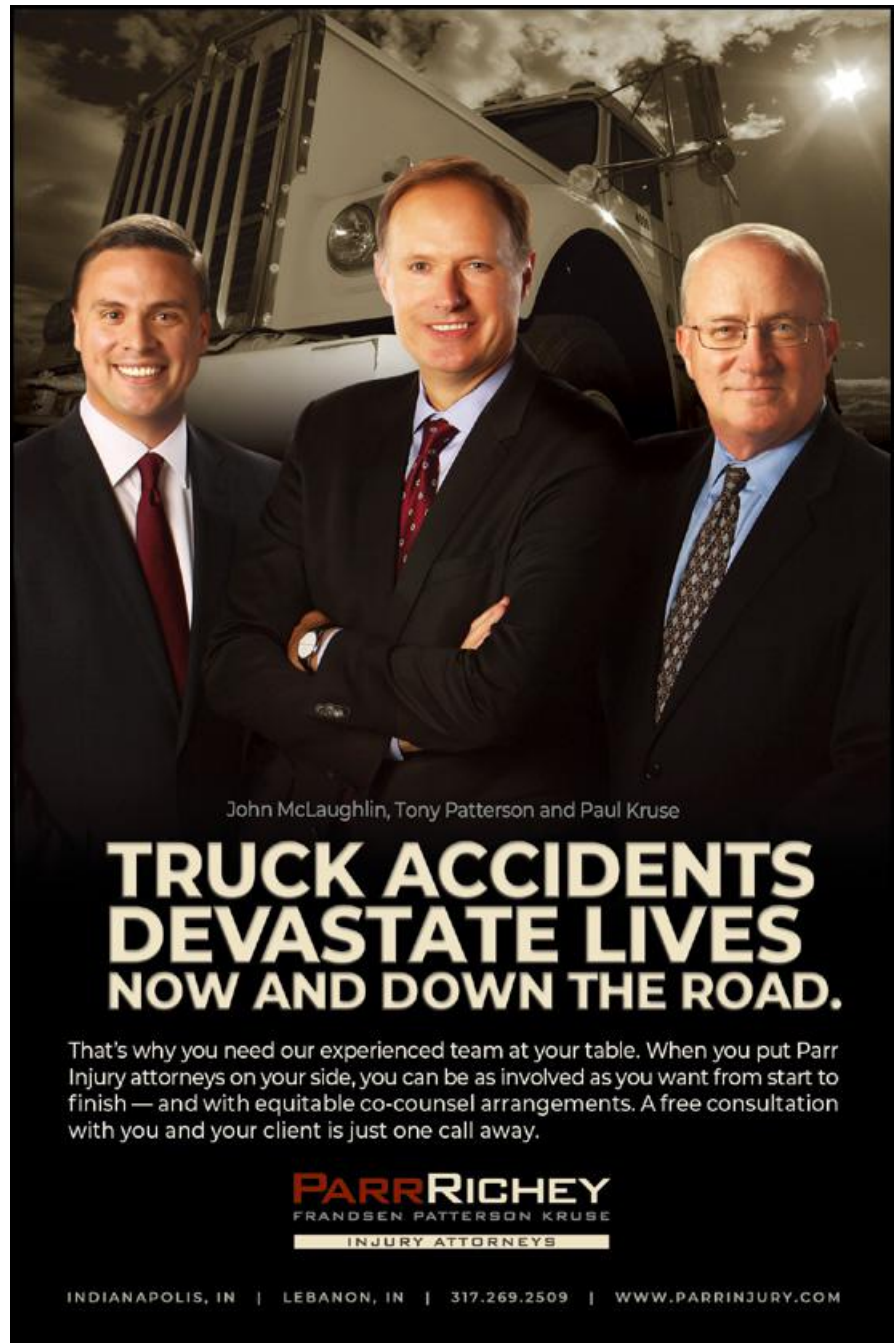
- **What are the important values in your law practice? Why do you practice law?** We want to pass our practices on to people with compatible values and practice cultures. Possible values include how we treat and communicate with our clients, how we treat and develop our staff, how we respect our fellow attorneys, and how we maintain high ethical standards.
- **What is the ideal profile of the person or firm taking over the practice?** List out their age, experience level, and/or practice specialty. Identifying characteristics like these will make your succession plan more successful in the end.
- **What do you have to offer that person or firm?** Having a recurring client base, will vault, and proprietary systems or software would be very attractive to another attorney or law firm. We can't sell our clients, but we can aid in the transition of our practice by introducing and recommending the acquiring

attorney or law firm to our clients. It's all about relationships and transitioning those relationships with our clients' cooperation and consent.

- **In 25 words or less, what is your "sales pitch?"** Essentially, this is a statement of your answers to these questions,

coupled with a statement as to how you envision the successor or buyer helping to accomplish your goals.

Once you've answered these questions, the next step is to identify possible buyers. Who would be compatible with your values? You may have identified potential



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candidates throughout your years of practice. You could also talk with trusted colleagues about possible buyers or enlist help from legal and professional search firms.

Once possible buyers and/or successors have been identified, sit down with them and talk through your plans. Preface that these conversations will be highly confidential. Share your "sales pitch" and the reasons you think they will help you accomplish your goals. This may lead to more conversations over the next few weeks or months. When you are ready to seriously pursue the option, consider providing the prospective buyer with a letter of intent or confidentiality agreement. This provides for the protection of confidential financial and

client information and allows due diligence to proceed.

You will also need to establish the value of your law practice. There are two primary ways to establish value:

1. **What would a willing and informed buyer/seller be willing to pay and accept for your law practice?** This involves a "give and take" negotiation between you and the possible buyer. I know attorneys who have greatly undervalued their practice and others who have overvalued their practice. Law practices are unique, so beware using the "rules of thumb" involved in other types of business valuations.

2. **Obtain an impartial business valuation.** This determines a fair value for both buyer and seller. I'd recommend using this option.

ESSENTIAL LEGAL DOCUMENTS

If you plan to sell all or part of your law practice, you will need both a letter of intent (LOI) and a purchase agreement.

The LOI allows both the seller and buyer to do due diligence under the protection of mutual confidentiality. The seller must provide financial information about their practice, giving the buyer the chance to learn more about the firm. And the seller in turn will learn more about the competence, credibility, and creditworthiness of the buyer. Besides confidentiality, the LOI should also contain provisions that:

- The prospective buyer will not use any information they obtain to compete with the seller if their agreement falls through;
- The prospective buyer will not recruit or solicit employees of the seller;
- The seller will not solicit any proposals from other prospective buyers until the parties have entered into an agreement to purchase the law practice or have terminated the LOI;
- Any public announcement or press releases relating to the purchase will be agreed to and prepared jointly by the seller and purchaser; and
- The seller or prospective buyer may terminate the non-binding provisions of the LOI at any time with a written termination delivered to the other party.

Rule 1.17 prevents you from providing client-specific information and files to a prospective purchaser without client consent. A few years ago, I assisted an attorney who was trying to sell his practice. The prospective buyer told me, in no uncertain terms, “Do you think I’m going to buy this practice without knowing who his clients are? You’re crazy.” While Rule 1.17 deterred that prospective purchaser, it did not deter others and we were ultimately able to find a buyer for his practice. Successful succession planning takes time and patience, but it’s worth it.

Once the buyer and seller agree to move forward with the sale, you will also need a purchase agreement. The purchase agreement includes the purchase price, method of purchase (e.g., outright sale or financing), and the plan for the transfer of ownership. The purchase price is determined either through

negotiations or an impartial law practice valuation.

CONCLUSION

Over the past few years, I have had many conversations with lawyers around Indiana about their succession plans. So far, I have found only a few who have a plan—let alone implemented one. Why is that? I’ve had several attorneys point to their desk and say, “That’s my succession plan right there. My plan is to die at my desk.” Many of us are in some form of denial about our law practices and the brevity of life. Living in a state of denial prevents us from planning our futures away from law.

The primary responsibility for developing and implementing a

successful law practice succession plan rests with each senior attorney. We each need to “step up to the plate” and face the reality that our lives and legal careers are finite; set aside denial, procrastination, and our “die with our boots on” mentality for the sake of our clients, families, communities, and ourselves. ☯

ENDNOTES

1. “Survey: Succession Planning a Top Concern for Organizations,” *Indiana Lawyer* (December 1, 2015), <https://www.theindianalawyer.com/articles/38837-survey-succession-planning-a-top-concern-for-organizations>.
2. ABA Formal Opinion 468: Facilitating the Sale of a Law Practice, https://www.abajournal.com/files/Formal_Opinion_468.pdf.

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