

Rule 1.17: Sale of Law Practice

1. Current Kentucky Rule with Official Comments:

The current Kentucky Rules of Professional Conduct do not have a Rule 1.17.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(1.17) Sale of law practice

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

(a) The seller ceases to engage in:

(1) the private practice of law; or

(2) the field(s) of practice sold; or

(3) the practice of law in the geographic area in which the practice has been conducted,

all as the seller and purchaser may agree.

(b) The entire practice, or the entire field 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 the date the notice was sent.

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

(e) If a client with active matters cannot be given notice, the file(s) of that client may be transferred to the purchaser only upon entry of an order by the circuit court in the county of the principal place of business of the seller. 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 the file. Notification of the entry of the order shall be sent to the Kentucky Bar Association.

(f) In the event the sale includes files that are closed matters, and the attorney has mailed notice to the client's last known address, 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 the date the notice was sent.

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 a field 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 a field of practice, or the practice of law in a particular geographic area be sold is satisfied if the seller in good faith makes the entire practice, or the field of practice, or the practice of law in a particular geographic area 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 geographical area. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another geographical area in the state.

[5] This Rule also permits a lawyer or law firm to sell a field of practice. If a field of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the field 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 fields of the practice, thereby preserving the lawyer's right to continue practice in the fields of the practice that were not sold.

Sale of Entire Practice or Entire Field of Practice

[6] The Rule requires that the seller's entire practice, or field(s) of practice or the practice of law in a particular geographic area, be sold. The prohibition against sale of less than an entire field of practice 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, the field of practice, or in the geographic area in which the practice has been conducted, 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 by the circuit court in the county of the principal place of business of the seller 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. See paragraph (f) for guidance on transferring files of former clients that cannot be given actual notice.

[9] All the 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 field 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 agreements 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 field 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 by representatives 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 a field of practice.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) Background: MR 1.17 Sale of Law Practice was first adopted by the ABA in 1990. It was not approved for inclusion in the current KRPC. The clear trend is to permit the sale of a law practice. MR 1.17 has been adopted in some form in at least 36 states. Some of those states that do not have MR 1.17 have ethics opinions approving the sale of a law practice. The Committee concluded that a prohibition against selling law practices is

inequitable for sole practitioners. Law firms are allowed to compensate departing and retiring lawyers in a manner that effectively "buys" their interest in the practice. Moreover, without a Rule, informal arrangements are encouraged that may fail to properly consider the interests of clients.

(2) Proposed KRPC 1.17 provides an orderly procedure for sole practitioners and firms to transition out of the practice of law or adjust the focus of their practice in a manner that fairly compensates them for their sweat equity in building a practice or field of practice. As long as clients are properly notified of their authority in a sale situation, there is no harm to the client or the profession.

(3) Proposed KRPC differs from MR 1.17 as follows:

(a) The options for selling a practice or field of practice in paragraph (a) are restructured to give three options. The MR paragraph (a) provides:

(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) Paragraph (e) provides for transfer of active client files for clients that cannot be given actual notice of the sale by order of the circuit court in the county of the principal place of business of the seller. The Committee concluded that the Supreme Court should grant jurisdiction to a circuit court in this situation to protect client confidentiality and saw no reason why this grant could not be made part of proposed Rule 1.17. The Committee further concluded that additional implementing instructions or rules are required to provide guidance on the procedure for seeking an order from a circuit court to transfer active client files to a purchaser. Such rules or regulations are beyond the Committee's charter. Accordingly, this issue is flagged to the attention of reviewing authorities for further consideration.

(c) Paragraph (e) requires that an order transferring active client files be sent to the Kentucky Bar Association. The purpose of this requirement is to enable the Association to assist a client whose file has been transferred by court order to locate the lawyer now representing them.

(d) Paragraph (f) provides that constructive notice is sufficient for the transfer of former client files when actual notice cannot be given.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

The restructuring of paragraph (a) was done to tailor sale options to better fit current Kentucky practice. Paragraph (e) was added because Kentucky currently does not have a procedure for transfer of a file of an active client that cannot be located that adequately protects client confidentiality. Paragraph (f) was added to cover the transfer of former client files. The MR is silent on this aspect of a sale of a practice or field of practice. Minor modifications were made to the Comments to conform to Rule changes.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.