



Ethics of Law Firm Succession Planning Made Easy

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Golden Rules to Comply with TDRPC

1. Give client notice and get client consent to objectively fair procedures aimed at compliance.
2. Design objectively reasonable procedures aimed at compliance and implement with client's best interest at its center.



Navigating File Retention and Destruction

Pertinent Duties to Former Clients

- Protect confidential information of former clients (Rule 1.05)
- Protect and return “property” of former clients (Rules 1.14 & 1.15)
- Not harm former clients’ interests in matters on which the lawyer provided legal services (Rules 1.05, 1.09, 1.10, 1.15)

See Texas Ethics Opinion 627.

Solutions to the Problem

- Have a firm-wide file retention policy with procedure for regularly culling old files for destruction and train all firm personnel on the policy.
 - Guidance can be obtained from your malpractice carrier or simply google – “lawyer file retention policy.”
- Establish a systematic procedure for reviewing and returning client files or property when the matter is closed.
- Destruction process should be overseen by a lawyer.
- Keep a record of all file dispositions.

Solutions to the Problem

Include file destruction provisions in the retainer agreement & termination letter. *See examples at LPM Succession Planning Tab*

- Client consents to destruction on stated timeline
- Notify Client when file ready for pick up at conclusion of representation
- Fix the amount of time Client has to pick up the file
- Duty of Client to obtain physical possession of file
- Consequences of Client failure to retrieve file (subject to destruction)
- Option to pay for storage – forever ?? (whose rights after the client dies?)



Navigating Succession of Your Law Practice

Navigating Succession of a Law Practice

Traditional methods of transferring client matters with compensation:

- Hire a younger lawyer into the firm and transfer client matters over time with client consent, then arrange departure compensation for the senior lawyer at the proper time.
- Join or merge with another firm and introduce clients to the new firm attorneys and arrange compensation according to the value of the work or “book of business” brought to the firm and arrange origination and departure compensation accordingly.
- Engage outside co-counsel with client consent and enter into a permissible fee sharing arrangement based on work performed or shared.

Myth About Prohibition of Sale

Ethics Opinion 266 and Canons of Ethics Pre-1990

- Opinion 266 (1963)
 - Concluded sale of a practice would violate Canons that prohibited attorney solicitation and confidentiality
 - “Clients are not merchandise. Lawyers are not Tradesmen.”
- No Canon prohibited sales per se then.
- No Disciplinary Rule expressly prohibits sales now either. *But any sale of a practice must follow applicable Disciplinary Rules.*

The Questions

1. To whom might I sell?
2. How do I find buyers?
3. How do I value the business to set the price?
4. How should the deal be structured?
5. Can I continue to practice after sale?



Factors to Consider in Sale of a Practice

- How do I structure the sale?
 - Sale of entire practice v. sale of a particular practice area
 - Fixed price method (usually a multiple of collections)
 - Lump sum payment up front
 - Installment payments
 - Earn-out method (paying a % of revenue earned over set time)
 - Merger with purchasing firm – often “of counsel” arrangement
 - may be a compensation or retirement payment plan

ABA Model Rule 1.17 - Sale of a Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, 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 the jurisdiction] (a jurisdiction may elect either version) 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 ninety (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.

Preliminary Sale Stages and Documents

1. Identify what is being sold (all, some practice areas, some practice locations)
2. Whether the seller will continue to practice with or separate from Buyer
3. Determine expected future revenues and value of the practice being sold
4. Notices to clients and consent to review of files by buyer (*See Appendix 19*)
5. Enter Non-disclosure and Confidentiality Agreement
6. Preliminary limited review of primary client names, types of matters for confidentiality and competence concerns and overview of firm financials (non-specific revenue, billing practices, client concentrations and major expenses)

Preliminary Sale Stages and Documents (Cont'd)

7. Letter of intent with non-solicitation agreement on employees and clients
8. Due diligence review of files and more careful analysis of potential conflicts and due diligence review of detailed financials
9. Determine transfer or use of office space, equipment, phone number, website and existing relationships
10. Determine disposition of closed files and active client files not being sold
11. Prepare term sheet and Draft Purchase Agreement

Features of Law Practice Purchase Agreement

Source: Selling a Law Practice under ABA Model Rule 1.17, Michael Downey, February 28, 2017

- Warranties of key facts
 - Revenue produced
 - Absence of malpractice claims
 - Valid licenses
 - Level of experience
- Structure of purchase price (e.g. lump sum installment or portion of fees generated) and any adjustments for actual receipts.

Features of Law Practice Purchase Agreement (Cont'd)

Source: Selling a Law Practice under ABA Model Rule 1.17, Michael Downey, February 28, 2017

- Legal Malpractice insurance coverage for pre- and post-representation (e.g. tail coverage)
- Indemnification provisions
- Non-compete and non-solicitation provisions compliant with ethics rules
- How to handle prior closed files and notices to clients
- How to handle IOLTA accounts
- Consider alternative dispute resolution clauses

Rules of the Road in Sale of a Law Practice

Review of LPM Sale of a Practice Website Guidance

See Appendix 20 – Practice Tips



Navigating the Closing or Sale of a Practice

Five major ethical concerns in the sale of closing of a practice:

1. **Confidentiality** - preventing access by unauthorized persons to client files. 1.05(b)(1)(ii).
2. **Conflict of interest** with the successor lawyer(s). Rules 1.06 and 1.09
3. **Communication** with the client with full disclosure of all material information about the process and their rights. Rule 1.03.
4. **Competence** of the successor attorney to handle the matters. Rule 1.01
5. **Solicitation or barratry** in contacting clients to accept the successor lawyer. Rule 7.03.

Rules Implicated in Sale of a Law Practice

Rule 1.01 Competent and Diligent Representation

LPM Practice Tip:

The acquiring lawyer needs to have the competence to render legal services and represent the clients in the particular matters previously handled by the selling lawyer. This presents a challenge when the acquiring lawyer may not know enough about the matters in the files to determine competence to represent particular clients. See Rule 1.05 below, “Confidentiality of Information.”

Rules Implicated in Sale of a Law Practice

Rule 1.02 Scope and Objectives of Representation

LPM Practice Tip:

If the acquiring lawyer intends to change the scope, objectives, or general methods of representation from those agreed upon with the selling lawyer, the acquiring lawyer should seek to clarify with the client within a reasonable time and enter into a new representation agreement.

Rules Implicated in Sale of a Law Practice

Rule 1.03 Communication

LPM Practice Tip: The selling lawyer should provide notice to affected clients. The notice should include the following information, [but should always be tailored to what the circumstances dictate is objectively reasonable information the client needs]:

1. What the selling lawyer intends to sell;
2. The client's right to retain other counsel;
3. The identity and location of the acquiring lawyer;
4. Client's right to the file and how it will be made available;

Rules Implicated in Sale of a Law Practice

Rule 1.03 Communication

LPM Practice Tip (continued):

5. How the selling lawyer intends to handle client funds and property held;
6. Scope and terms of ongoing representation;
7. Intent to presume the client's consent to the transfer absent a response after some time.

In addition, the acquiring lawyer should consider that the client may have communication expectations based on the selling lawyer and attempt to adjust those expectations as needed.

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees

LPM Practice Tip:

The acquiring lawyer should establish the basis or rate of fees with the new clients, preferably in writing, before or within a reasonable time after taking over the representation.

Rules Implicated in Sale of a Law Practice

Rule 1.04 Fees – Sham Sales or Impermissible Fee Sharing

LPM Practice Tip:

In addition, the selling lawyer is not permitted to sell individual client matters. The sale price for an individual client matter is effectively a referral fee earned for simply turning the matter over to another lawyer while retaining no responsibility for the matter. Whether a selling lawyer is engaged in a “sham sale” in violation of Rule 1.04 depends on the specific facts and circumstances of the transaction. See Rule 5.06 below, “Restrictions on Right to Practice.”

Rules Implicated in Sale of a Law Practice

Rule 1.05: Confidentiality of Information

LPM Practice Tip:

Before disclosure of information relating to a specific representation of an identifiable client, the selling lawyer should secure consent from the client and an agreement to maintain client confidences from the acquiring lawyer.

Rules Implicated in Sale of a Law Practice

Rule 1.09: Conflict of Interest: Former Client

LPM Practice Tip:

An acquiring lawyer who ultimately decides not to purchase all or a part of the selling lawyer's practice must consider conflicts of interest. Specifically, the information learned during review of the selling lawyer's client matters may prohibit future representation and require withdrawal from current representation if adverse to clients in the matters being sold.

Rules Implicated in Sale of a Law Practice

Rule 5.06: Restrictions on Right to Practice

LPM Practice Tip:

The selling lawyer and the acquiring lawyer may enter a negotiated non-compete agreement pursuant to the sale of all or part of a law practice. In fact, the sale may be conditioned on the selling lawyer ceasing to engage in the private practice of law or some particular subject area of practice for a specified period within the geographic area in which the practice has been conducted (or within some other geographic area agreed to by the selling and acquiring lawyers). This type of agreement is not within the scope of Rule 5.06 and may provide evidence that the transaction is not a “sham sale” under Rule 1.04.

Rules Implicated in Sale of a Law Practice

Another Rule implicated in negotiating and drafting the terms of the sale agreement and in communications with the clients by any of the lawyers involved is Rule 8.04:

Rule 8.04. Misconduct

(a) A lawyer shall not:

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Resources for Navigating the Rules



The
Law Practice Management
Program of the
State Bar of Texas



1-800-204-2222 x1300



lpm@texasbar.com

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