THE SALE OF A LAW PRACTICE

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Recently some members of the Bar have received notices from self-proclaimed "professional practice brokers" offering their services in arranging the purchase or sale of a law practice. Carefully worded circulars advise potential sellers that they can sell not only the assets of the practice, including the law library, office furniture and equipment, and accounts receivable, but also any work in process, contingent fee cases, custody of records, and good will. Prospective buyers are asked to consider the "immediate high income" that can follow the purchase of someone else's practice. Attorneys are advised that a good reason for using the brokerage services is that "all negotiations are conducted with a maximum of discretion and lack of publicity." This is important, the circulars state, because "[i]t is almost impossible for an owner to sell his own practice without identifying himself to all prospective buyers. This usually results in the information reaching the employees and clients, resulting in some damage to the practice before it can be sold or transferred." Furthermore, the brokers claim their expertise is needed to best "transfer the practice successfully" and handle "letters of introduction."

The advertisements do not mention that the sale or purchase of a law practice, if not carefully structured to avoid any attempt to transfer client relationships, will violate ethical tenets of the legal profession and corresponding fiduciary obligations imposed by law. A party to such a transaction not only might be subject to severe sanction by a disciplinary board, but also may find, after performing his part of the bargain, that the sale agreement is not judicially enforceable against the other party. The seller may additionally be liable to his former clients for all profits made in the sale not allocable to the accretion in value of the practice's tangible assets.

This Article will first outline briefly the method in which a practice is sold. The second section will analyze the ethical and fidu-

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1 A typical flyer is set forth in an appendix to this Article.
SALE OF A LAW PRACTICE

I. THE TYPICAL SALE

An attorney's practice cannot literally be sold. Although chairs, desks, office furnishings, lease, and library can be sold outright, clients and their loyalties cannot be. An individual is free to select whomever he desires to represent him and may "discharge the lawyer at any time for any reason." Nevertheless, attorneys are occasionally willing to pay substantial amounts to purchase the "good will" of an established lawyer's practice, because with the departing lawyer's cooperation client relationships can be transferred almost as readily as chairs and desks.

A purchase is usually accomplished in the following manner. An individual desires to retire or to move to another part of the country, or a practice is sold because of a lawyer's death or disability. The retiring practitioner or his representative turns over both his tangible assets, such as chairs and law books, and his intangible assets (files and client lists). A retiring practitioner then contacts his clients, either by printed notices or telephone calls, informing them that the purchaser is now handling their affairs and any pending cases they may have, thereby introducing them to the successor. If the death or disability of a lawyer precipitates the sale, a representative of the estate or the successor himself will indicate to the clients that, if they desire, the successor will represent them. In a subtle manner, the retiring

3 Interview with Daniel J. Cantor, Management Consultant to the Legal Profession, in Philadelphia, Apr. 12, 1972.

In this Article reference to the sale of a partnership interest is limited to those situations in which a withdrawing or deceased partner's interest is sold to a previously unassociated attorney with the amount of the sale consideration determined by bargaining between the purchaser and the withdrawing partner (or the deceased partner's estate) with the consideration being paid to such seller. Excluded are those situations in which an entering partner, whether a newcomer or a former associate, pays a capital contribution to the firm. Also excluded from consideration are law firm mergers involving the payment of compensation and those in which a solo practitioner merges his practice with a firm and remains as a partner of the new firm.
attorney or the representative suggests that the clients "continue" with the successor, praising the successor's professional talents and recommending his services. No disclosure is made that the practice is being sold or that the successor is in effect paying for the recommendation. The sale is usually accompanied by restrictive covenants in which the seller promises not to practice in the local vicinity; such covenants are especially common if the retiring attorney has a strong personal following. In other situations, the practice is sold by a deceased attorney's estate with the executor or widow similarly recommending the successor to the clients of the deceased. Most sales are made by sole practitioners, but occasionally partnership interests are sold by a retiring partner to a previously unassociated attorney.

Sometimes a more gradual method of succession is used to permit new attorneys to establish firmer relationships with the clients and to allow the clients to become accustomed to the successor's handling of their affairs. To accomplish this the practice may acquire a new name, "Old Practitioner and Successor," which is often retained after the senior's departure. The period in which the two lawyers associate may be less than one year. During this period of time, the buyer and seller may actually operate as a partnership, sharing the profits of their association and arranging that at the time of the senior's departure he will be compensated both for his participation in any remaining cases and for his origination of business. On occasion, however, the buyer pays a flat salary to the seller.

Purchasers generally pay for the practice in one of two ways. The simpler is a sum certain, paid either upon succession or in installments. The other is to split a portion of the gross or net revenues with the seller or the estate for a specified period of years following the transfer.

II. ETHICAL AND FIDUCIARY CONSIDERATIONS

The American Bar Association's Code of Professional Responsibility⁴ (the Code), and its predecessor, the Canons of Professional

⁴ The Code of Professional Responsibility was adopted by the American Bar Association House of Delegates on August 12, 1969 and became effective January 1, 1970. It replaced the Canons of Professional Ethics which were originally promulgated in 1908. See generally Symposium, American Bar Association Code of Professional Responsibility, 48 Tex. L. Rev. 255 (1970).

The Code consists of Canons, Ethical Considerations, and Disciplinary Rules. The nine canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." ABA Code of Professional Responsibility, Preliminary Statement 1 (1969) [hereinafter cited as ABA Code]. Ethical Considerations [hereinafter cited as EC] embody the highest conduct to which the profession is to aspire; Disciplinary Rules [hereinafter cited as DR] are mandatory in nature and set forth the minimum standards of conduct. Id. See also Wright, The Code of Professional Responsibility: Its History and Objectives, 24 Ariz. L. Rev. 1, 10-11 (1970).
Ethics (the Canons), do not contain a disciplinary rule or canon that is specifically directed at the sale of a law practice. Moreover, few reported cases have considered the propriety of such transactions. This paucity of specific proscriptions may be responsible for the willingness of some attorneys to engage in such transactions and explains the existence of brokers who encourage them. Nevertheless several ethical tenets and fiduciary duties may be breached by an attorney selling his practice, because the purchase price will necessarily include a value assigned to the expectation of future business, or good will. This means that the selling attorney will be compensated for transferring his clients' loyalties. Like other fiduciaries, an attorney cannot profit from the sale of his position of trust and confidence. All funds received in excess of the value of the alienable tangible assets and accounts receivable must be paid over to the beneficiaries of the fiduciary relationship—the lawyer's clients.

Ethics committees' opinions consistently have rejected the notion that good will is a salable asset of a law practice on the theory that the practice of law is a profession and not a commercial enterprise. Courts
have agreed with this reasoning and have refused to permit attorneys to receive compensation for good will. Their rationale seems to have been that if any good will exists it is incapable of valuation and non-transferable because it was personal and attached to an individual. This reasoning does not answer the question whether it is ethically desirable to permit attorneys to engage in such sales. An examination of specific applications of both a lawyer's duty to his clients and his duty to the public will demonstrate that it would be ethically improper to do so.

A. Duty to the Client

As a fiduciary of the highest order, an attorney's loyalty to the interests of his clients is paramount and should not be potentially compromised by a sale to the highest bidder. In the sale of a law practice, there may be three threats to the clients' interests. Receiving money for the endorsement of another places the lawyer in an irreconcilable conflict of interest. An attorney may reveal the confidences and secrets of his clients to his buyer. After the sale, the purchasing attorney may increase his clients' costs by splitting fees with his predecessor otherwise than on the basis of work actually performed or responsibilities assumed.

1. Conflicts of Interest

The most convincing reason for the proscription of the sale of a law practice is that a lawyer's recommendation should not be bought by an interested third party. The sale of a law firm's good will inevitably means that the recommendation of the seller in favor of the buyer will not be made solely on the basis of "disinterested and informed" considerations, but rather will be influenced by financial self-interest.

7 O'Rear v. Commissioner, 80 F.2d 473, 474-75 (6th Cir. 1935) (dictum); Little v. Caldwell, 101 Cal. 533, 36 P. 107, 109 (1894); Lyon v. Lyon, 246 Cal. App. 2d 519, 54 Cal. Rptr. 829 (1966); In re Martin's Estate, 178 Misc. 43, 33 N.Y.S.2d 81 (Sur. Ct. 1941).

8 In Lyon v. Lyon, 246 Cal. App. 2d 519, 54 Cal. Rptr. 829 (1966), the plaintiff, after the law firm of which he had been a partner was dissolved, sought to collect his interest in the good will of the firm. The court rejected his demand by noting:

The "good will" which plaintiff claims—the expectation of future business—is personal and confidential and attaches to the individual partners of the firm, thus, no monetary value can be attributed to it and there is nothing to sell.

Id. at 526, 54 Cal. Rptr. at 833.

9 Henry Drinker has assembled an imposing list of cases and eloquent quotations.

H. DRINKER, supra note 4, at 89-96.

10 ABA CODE, EC 5-1, 5-2.

11 ABA CODE, EC 2-8. Cf. Linnick v. State Bar, 62 Cal. 2d 17, 21, 396 P.2d 33, 35,
One commentator has suggested that this concern should no longer be controlling because the profession has developed "more uniform training and quality of practitioners," and therefore, the proscription against the sale of a law practice now may be appropriately reconsidered. Implicit in this proposal is the notion that successful completion of legal licensing requirements makes every lawyer worthy of recommendation regardless of the demands of clients' affairs. Bar examinations and other professional prerequisites, however, are not designed to guarantee expertise in all aspects of legal practice, but to assure a minimal level of understanding of the basic substantive areas of the law. Precisely because attorneys do vary widely in ability, competence, and experience, the recommendation of a lawyer who possesses only the minimal qualifications of the profession to a client whose affairs call for specialized expertise or experienced guidance without an explicit disclosure that the designated attorney may be unable to render the quality of services the client has grown to expect or his affairs require would be unsatisfactory. Indeed, such a recommendation might be of less value than a random selection from a list of members of the bar. If such a degree of care were the standard, the relationship of trust and confidence so necessary between attorney and client would be threatened. A client is entitled to a recommendation of the best successor available.

More fundamentally, this argument does not answer the question whether it is ever ethical, even assuming all potential successors are equally qualified, for a lawyer to receive payment for recommending a successor (thereby representing he is superior to others) without disclosing the financial arrangements and their potential implications to his clients. The Code recognizes that serious conflicts of interest arise when an attorney is paid by a third party and stresses that an attorney should not accept compensation from anyone except his client, unless the attorney receives the consent of the client upon full disclosure. The flyers distributed by professional practice brokers suggest that in the unlikely event of a complete disclosure of the sale price, clients would be less likely to accept the advice urging them to continue with the successor attorney. The attorney who wants to be paid for recom-

41 Cal. Rptr. 1, 3 (1964) ("[A paid solicitor] may not keep the best interests of the clients paramount when he profits from his referrals. He is likely to refer claimants, not to the most competent attorney, but to the one who is compensating him.").

12 Cantor, The Value of a Lawyer's Interest In His Practice, 43 N.Y. St. B.J. 47, 51 (1971).

13 ABA Code, EC 2-21. See also H. Drinker, supra note 4, at 96-99. As a matter of law, disclosure is probably required by general fiduciary principles. See, e.g., Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971); Reilly v. Beekman, 24 F.2d 791 (2d Cir. 1928).

14 See text accompanying note 1 supra & app.
mending a successor and does not wish to undergo the probable embarrassment inherent in such a disclosure has only one proper choice: he can charge the client directly for this advice.

2. Confidentiality

By selling his practice an attorney may also violate a cardinal rule of the attorney-client relationship—his duty to preserve the confidences and secrets of his clients. An attorney who wants to have another assume the responsibility of his practice cannot simply sell the matters pending and the clients' files because such a sale would breach the confidentiality of their relationship. As a legal matter, substitution of attorneys can only be made with the consent of the client. Likewise, a lawyer cannot dispose of his clients' property without specific authorization. If an attorney were to turn over the clients' files to a chosen successor without the consent of his clients, the attorney would be breaching fiduciary duties.

The duty is a continuing one which does not expire with the termination of the attorney-client relationship. The Code specifically acknowledges this by stating that "a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets." Clearly, the claim of the law practice peddlers that "work in process" and "custody of records" are items that may be considered alienable assets of a lawyer's practice is of questionable merit.

This does not mean, however, that it would never be appropriate to transfer the records, papers, and files to another attorney. A lawyer should make arrangements in advance of retirement, disability, or death for the protection of his clients' interests, but the desires of each client should prevail. If the records are given to another attorney, instead of directly returned to the client, the recipient must understand

15 ABA Code, DR 4-101; see CALEF, BUS. & PROP. CODE § 6068(e) (West 1962) ("It is the duty of an attorney: . . . [t]o maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his clients.").


17 Cf. ABA Code, DR 9-102(B)(4).


19 ABA Code, EC 4-6.

20 Id. (footnote omitted); see ABA, Opinions, No. 266 (1945); Ill. State Bar Ass'n, Opinions, No. 180 (1960); Katten, Sale of a Law Practice—Federal Tax and Ethical Aspects, 54 Ill. B.J. 686, 691 (1966).

21 ABA Code, EC 4-6.
that he may hold them only as a custodian. Because it would be unethical for the recipient/custodian to inspect or see them, it has been suggested that the files and documents be encased and sealed prior to delivery. The client, in any event, must be told by the custodian that he is free to engage the attorney of his choice.

3. Fee Splitting

The Code, retaining the principles of canon 34 of the Canons, recognizes that fee splitting can present substantial ethical problems. Consequently, an attorney is forbidden from sharing fees with a non-lawyer or with a lawyer, unless the division of fees is made in proportion to services performed or responsibility assumed. This proscription has been applied to the sale of a law practice.

Canon 34 was used repeatedly to prevent arrangements in which a previously unassociated attorney agreed to share a percentage of the legal fees from a deceased lawyer’s practice over a term of years with the deceased lawyer’s widow, heirs, or estate. The theory behind this reading of the canon was that the estate would become in effect an unauthorized partner in the practice, interfering with the lawyer’s ability to exercise independent judgment.

The requirement that attorneys share fees only on the basis of services or responsibility was directed initially at a long standing practice whereby one lawyer would forward a case to another, or recommend an attorney to a client, and receive one-third of the fee earned by the recipient. But the rationale of the prohibition, barring excessive

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22 ILLINOIS STATE BAR ASS’N, OPINIONS, No. 180 (1960).
23 Id.
24 ABA, OPINIONS, No. 266 (1945).
25 See generally ABA CODE, CANONS 2, 3.
26 Id., DR 3-102(A) (footnote omitted) provides that:
A lawyer or a law firm shall not share legal fees with a non-lawyer, except...
[three non-relevant exceptions].
27 Id., DR 2-107(A) (footnotes omitted) requires the following:
A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
(2) The division is made in proportion to the services performed and responsibility assumed by each.
(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.
28 ABA, OPINIONS, No. 266 (1945); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 550 (1962) [hereinafter cited as ABA, INFORMAL OPINIONS]; N.Y. CITY BAR ASS’N, OPINIONS, No. 646 (1943); see N.Y. CITY BAR ASS’N, OPINIONS, Nos. 633 (1943), 272 (1933), 100 (1928-1929).
29 H. DRINKER, supra note 4, at 186. The ethical prohibition against fee splitting between attorneys has received widespread acceptance by bar association ethics committees. E.g., ABA, OPINIONS, Nos. 265 (1945), 204 (1940), 153 (1936), 73 (1932); ABA, INFORMAL OPINIONS, No. 932 (1966); LOS ANGELES BAR ASS’N, OPINIONS, No. 232, 31 L.A.B. BULL, 339 (1956); FLORIDA BAR ASS’N, OPINIONS, No. 62-10, 37 FLA, B.J. 244
charges to clients, covers more than just "referral fees." An attorney has a duty not to charge more than a reasonable fee, which requires consideration of the interests of both client and lawyer.\(^{30}\) If an attorney must pay a portion of his fee to another, there may be pressure to charge more than the services rendered would otherwise merit.\(^{81}\) Thus, one purpose of prohibiting fee splitting is the "avoidance of arrangements which unnecessarily inflate the client's cost.\(^{32}\) Moreover, if the servicing attorney must pay a portion of his fee to another, the client is likely to receive lower quality services, since the attorney will be tempted to do a hurried or incomplete job in order to make that piece of business profitable.\(^{38}\)

It has been suggested that the lawyer who recommends another has a grave responsibility and should be compensated for this "service.\(^{34}\) This argument overlooks, however, the fact that recommending an attorney can scarcely be considered a legal service. In fact, several courts have specifically held that it is not and have refused to uphold fee splitting agreements between attorneys.\(^{35}\) As Henry Drinker has succinctly stated, "selling a man a client is not a legal service."\(^{36}\)

Not all purchases of a law firm are financed by splitting the fees of

\(^{30}\) ABA Code, EC 2-17.

\(^{31}\) E.g., McFarland v. George, 316 S.W.2d 662, 671-72 (Mo. App. 1958), noted in 24 Mo. L. Rev. 577 (1959).

\(^{32}\) Emmons, Williams, Mires & Leech v. State Bar, 6 Cal. App. 3d 565, 574, 86 Cal. Rptr. 367, 373 (1970); see Reilly v. Beekman, 24 F.2d 791, 794 (2d Cir. 1928) ("[T]he client was entitled to have him recommend an attorney, the amount of whose fees would depend on the services he had to perform, and would not be affected by what he had to pay out to the plaintiff for an introduction to the client."); Alpers v. Hunt, 86 Cal. 78, 88, 24 P. 846, 849 (1890); cf. Comment, A Critical Analysis of Rules against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674, 683-84 (1958).

\(^{33}\) Sometimes, however, a specialist can be so much more efficient than the general practitioner at a given job that he can pay a referral fee and come out with approximately the same net profit per hour of input. If he can be that efficient, however, it would seem that either the lawyer who does the work or the client should have the economic benefit, rather than the lawyer who merely makes the referral.

Brizius, Advice to the Young Lawyer on Building a Practice, 17 Frac. Law., Feb. 1971, at 13, 32. But see L. Patterson & E. Cheatham, supra note 2, at 276-77.

\(^{34}\) The Determination of Professional Fees from the Ethical Viewpoint, A Panel Discussion, 7 U. Fla. L. Rev. 433, 434 (1954).


\(^{36}\) The Determination of Professional Fees from the Ethical Viewpoint, A Panel Discussion, 7 U. Fla. L. Rev. 433, 434 (1954).
the successor over time; some practices are bought for a predetermined amount. A distinction between the two types of payment might be drawn by reasoning that the seller who receives a sum certain will have no continuing interest in influencing his former clients to remain with the purchaser, because the amount received does not depend upon the buyer's success. This justification ignores the fact that in most cases the amount of a fixed sum would be based on revenues a successor anticipated receiving from the seller's former clients. Furthermore, the agreement between attorneys most probably would require that the seller recommend the buyer to his clients and otherwise assist him in securing their business and may even make payment contingent upon the purchaser's reaching a predetermined level of gross revenue within a specified period following the transfer. Only to the extent that payment, whether a sum certain or a portion of the future fees, for a law practice represents compensation to the retiring attorney for services actually rendered or responsibilities assumed, is it ethically proper.  

**B. Duty to the Public**

Every individual should have the maximum opportunity to freely choose his own lawyer, and attorneys should assist in making legal counsel available. Although this two-part proposition is tied to a lawyer's duty to his individual clients and to the profession's responsibility to maintain ethical norms, it has broader significance. The public has an interest in ensuring that attorneys will practice independently and that an individual will not be misled when selecting an attorney. These interests are threatened when the selling attorney solicits clients for his successor, when he agrees to adhere to a restrictive covenant as part of the sales agreement, or when the purchasing attorney practices under a misleading name.

1. Solicitation

When a retiring attorney recommends a successor for a fee, he becomes in effect a paid solicitor of business for that attorney. By the

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Several courts have refused to hold either that fee-splitting agreements between attorneys and former partners or former partners' estates are ethically proper or that subsequent fees are a partnership asset to which a deceased partner's estate is entitled to an accounting. Stuart v. Murray, 70 Colo. 449, 202 P. 179 (1921); Justice v. Lairy, 19 Ind. App. 272, 49 N.E. 459 (1898); Isenhart v. Hazen, 10 Kan. App. 577, 63 P. 451 (1901); Moffat v. Crescap, 33 App. Div. 54, 304 N.Y.S.2d 719 (1969), aff'd, 29 N.Y.2d 856, 277 N.E.2d 926, 338 N.Y.S.2d 6 (1971); In re Martin's Estate, 178 Misc. 43, 33 N.Y.S.2d 81 (Sur. Ct. 1941); Puffer v. Merton, 66 Utah 418, 243 P. 377 (1926); Schulder v. Dickson, 168 Wis. 366, 170 N.W. 369 (1919).

38 See generally ABA CODE, CANON 2.
same token, the buyer is purchasing that recommendation. Although the original reasons for proscribing solicitation by lawyers were more concerned with preserving the dignity of the profession,\textsuperscript{39} the Code has retained the proscription on the fundamental notion that the selection of an attorney should be based on the earned reputation of the lawyer. If a recommendation is sought by or given to a layman, the recommendation should be free of influence from the designated attorney.\textsuperscript{40} Thus, an attorney is forbidden from requesting recommendations,\textsuperscript{41} assisting\textsuperscript{42} or rewarding\textsuperscript{43} one who recommends his services, recommending himself or others in whom he has a financial interest unless specifically asked for advice,\textsuperscript{44} or accepting employment when he knows it was a result of such unethical conduct.\textsuperscript{45}

By condemning both the solicitor and the buyer of the recommendation, the Code reaches the sale of a deceased attorney’s practice accomplished through the recommendations of the widow or heirs. The ABA Committee on Professional Ethics, prior to the adoption of the Code, similarly concluded that a purchaser is precluded “from soliciting by arrangement with the estate of a deceased lawyer the latter’s clients to continue their business with him, or from permitting the widow or heirs of the deceased to urge such clients to continue their business with him.”\textsuperscript{46}

2. Restrictive Covenants

It is customary for sales of a retiring practitioner’s law practice to be accompanied by the promise of the seller that he will not engage in the practice of law in the immediate vicinity. The effective transfer

\textsuperscript{39} H. DRINKER, supra note 4, at 210-12.

\textsuperscript{40} ABA CODE, EC 2-3, 2-4, 2-6, 2-7, 2-8. Other policies are summarized in L. PATTERSON & E. CHEATAM, supra note 2, at 357-58.

\textsuperscript{41} ABA CODE, DR 2-103(C).

\textsuperscript{42} Id., DR 2-103(D).

\textsuperscript{43} Id., DR 2-103(B).

\textsuperscript{44} Id., DR 2-103(A).

\textsuperscript{45} Id., DR 2-103(E).

California, which has not adopted the Code as its official guide, has created an exception to these rules. California’s Rules of Professional Conduct, promulgated under CAL. BUS. & PROF. CODE § 6076 (West 1962), generally prohibit a lawyer from employing or remunerating others for soliciting professional employment. CAL. RULES OF PROFESSIONAL CONDUCT, No. 3. It excludes, however, situations in which an attorney, leaving practice to enter the armed forces, arranges with another to handle the business of his regular clients. Id., No. 2(c). The exception permits the attorney entering the armed services to notify his clients personally or by mail and to state that “Mr. Successor has my entire confidence, and I believe can handle your affairs during my absence.” He may additionally apprise his clients of the successor’s experience. Id. A division of fees between the departing lawyer and his successor is also allowed. Id. See N.Y. CITY BAR ASS’N, OPINIONS, No. 602 (1942). The rule is silent whether the clients are entitled to full disclosure of the arrangement, but generally ethical and fiduciary principles would seem to require it. See note 13 supra & accompanying text.

\textsuperscript{46} ABA, OPINIONS, No. 266 (1945). See opinions cited in note 28 supra.
SALE OF A LAW PRACTICE

of a practice often requires that loyal former clients of the vendor do not have the opportunity to continue to employ him. If the community in which the seller practices has few or no other attorneys, the successor can effectively succeed to the practice by simply paying the seller not to practice there. Such covenants can deprive the former and potential clients of the ability to engage the counsel of their choice and make the lawyer-client relationship a marketable piece of merchandise.

In an analogous situation, an ethics opinion,⁴⁷ since codified and extended by the Code,⁴⁸ proscribed such clauses in employment contracts. The opinion rested primarily on the grounds that restrictive covenants unjustifiably constrained a lawyer's right to decide where he will practice and were inconsistent with his professional status. In response to the argument that restrictive covenants were necessary to prevent client stealing by former employees, the opinion noted that the Canons sufficiently guarded against this evil by prohibiting solicitation and any efforts to obtain the clients of a former employer. Moreover, a client's right "to decide who shall represent him"⁴⁹ is a superior consideration. The result should be the same for restrictive covenants as part of a sale agreement.⁵⁰ Should a seller have a change of heart and desire to practice in the same area again, he may send formal notices to his former clients, but will be otherwise prohibited by the Code from advertising his return to practice.⁵¹ The desires of loyal clients should not be impaired by any other restrictions on the lawyer's practice.

Some American decisions hold that such covenants, despite their ethical impropriety, are enforceable and that either damages⁵² or an injunction⁵³ would lie in event of their breach. One court upholding such a covenant, took the position that "[i]t is not necessary for us to determine whether the contract violates some canon of professional ethics."⁵⁴ These decisions, antedating the Code, followed the much

⁴⁸ABA Code, DR 2-108.
⁵⁰British law allows solicitors to use restrictive covenants appurtenant to sales agreements, but not to employment contracts. The distinction is made on the ground that in an employment contract such a covenant "does not protect the employer's existing interests, but confers on him a new benefit." A. CORDEY, SOLICITORS 481 (6th ed. 1968). For further discussion, see note 55 infra.
⁵¹ABA Code, DR 2-102(A)(2); ABA, Opinions, No. 301 (1961).
⁵²Smalley v. Greene, 52 Iowa 241, 3 N.W. 78 (1879).
regretted British practice permitting solicitors, but not barristers, to sell their practice. Furthermore, the lawsuits all arose after a seller had received his consideration and returned to practice in the same area. The sellers defended on the theory that the contracts violated public policy and should not be judicially enforced, but the courts, unduly emphasizing the seller's ability to reap the benefits of the bargain without bearing its burdens, upheld the contracts. A successor attorney's desire to be free from future competition should be subordinate to the interest of the public in having an unfettered right to select legal counsel. Courts would best serve this aim by refusing to enforce restrictive covenants between attorneys, thereby discouraging their use.

3. Misleading Name

A purchaser of a law firm often desires to begin practicing under a new firm name consisting of his and the selling attorney's. The purpose is, of course, to benefit from the good will or recognition factor of the seller's name. Also, the new name gives the impression that the seller has enough confidence and trust in his successor to make him a partner—perhaps the strongest possible endorsement. Both because the attorney-client relationship is personal and based upon trust and because the name under which one practices materially affects the volume of business of the practice, using the name of another attorney with whom one has never practiced may mislead a prospective client, and therefore, should be avoided. The Code requires that "a lawyer in private practice should practice only under his own name, 

 Illinois State Bar Association Professional Ethics Committee later followed Hicklin and rejected the argument "that having been licensed by the State, the licensee cannot deprive the public of his services by bargaining away his license privileges," and held that a covenant not to compete was ethical, even though recognizing that the sale of a practice was not. Illinois State Bar Ass'n, Opinions, No. 148 (1958).


The English judiciary has expressed doubts about the advisability of their practice. As early as 1821 Lord Eldon stated:

It has happened to me to know, that it is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity payable out of the future profits. I have thought that, consistently with the policy of the law, agreements could not be made by which they contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. Candler v. Candler, 37 Eng. Rep. 834, 836 (Ch. 1821); accord, Whittaker v. Howe, 49 Eng. Rep. 150, 153 (1841). Nevertheless, the practice has been sanctioned since 1803. For an early American case questioning Bunn v. Guy, see Alpers v. Hunt, 86 Cal. 78, 88-90, 24 P. 846, 849-50 (1890). See generally Cantor, The Value of a Lawyer's Interest In His Practice, 43 N.Y. St. B.J. 47, 47-48 (1971); Note, The Death of a Lawyer, 56 Colum. L. Rev. 606, 617-18 (1956).

56 ABA Code, EC 2-9.

57 Cf. Id., EC 2-11.
the name of a lawyer employing him, or a partnership name composed of the name of one or more of the lawyers practicing in a partnership. Similarly, many opinions of ethics committees have held it improper for a lawyer to practice under a firm name where the individuals whose names are used have never truly been partners or no partnership exists.

An argument can be made that the use of a selling attorney’s name by his successor is justified when they share in the profits. Holding aside the general objection to fee splitting, the mere division of the successor’s future profits is insufficient to create a relationship possessing enough attributes of a partnership to entitle the successor to use the seller’s name. In one case considered by the ABA Professional Ethics Committee, two lawyers practicing in different cities sought to associate for the sole purpose of splitting fees from specialized business one referred to the other. The referring attorney wanted to use the other’s name in his practice. The arrangement was held to be unethical because the referring attorney would be nothing more than a paid solicitor for the other; therefore no true partnership would exist in which both attorneys shared work and responsibility. The same rationale applies to the relationship existing between a purchaser and seller of a law practice.

III. Justification of the Practical Discrimination Between Sole Practitioners and Partners

A. The Practical Discrimination

The Code specifically allows payment pursuant to a prior agreement to be made to a retired partner or to a deceased partner’s estate. Ethical Consideration 3-8 states that the pecuniary interest of

68 ABA Code, EC 2-11. EC 2-11 also permits attorneys to practice “if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.” See also ABA Code, DR 2-102(C).


61 ABA Opinions, No. 277 (1948).

61 One exception to the general rule, which the Code permits and which is widely employed, is the continued use of the name of one or more deceased partners. ABA Code, DR 2-102(B). That exception, however, only applies when the attorney or attorneys using the name of the deceased were actually members of the deceased’s firm. Thus, it would be improper for a lawyer to attempt to buy the use of a deceased attorney’s name from his estate. New Jersey State Bar Ass’n, Opinions, No. 25, 87 N.J.L.J. 19 (1964); N.Y. City Bar Ass’n, Opinions, No. 760 (1951); see H. Drinker, supra note 4, at 208.


8 Id., DR 3-102(A)(1).
a deceased partner's interest in his firm may be paid to the estate. Recently ABA Opinion 327\(^6\) held that it was permissible under the Code for a law firm to "make payments to a retired partner or for a fixed period to the estate of a deceased partner in accordance with a preexisting retirement plan, the amount of those payments being measured by subsequent earnings of the firm."\(^6\) Thus upon retirement the partner (but not the sole practitioner) can share future earnings with his successor.

When a partnership is dissolved, either by the death or retirement of a partner, the survivors or the retiring partner may attempt to persuade the partner's clients to continue with the firm, because the clients have presumably contracted with the partnership.\(^6\) Indeed the survivors have a duty to take care of the affairs of these clients.\(^6\) Thus, those attorneys who practiced in a partnership can actively woo old clients, while a sole practitioner and his successor cannot.

Partners may disclose the affairs of clients among themselves and their associates, unless a client directs otherwise.\(^6\) Thus, upon the retirement or death of a member, they do not need to take special precautions with client's files, or send notices to clients informing them of their right to recover their files. Sole practitioners and their successors, however, must do so.

The Code permits partners of a firm to restrict the right of a retiring member to practice law as a condition to the payment of retirement benefits.\(^6\) A sole practitioner's successor, as we have seen, cannot so restrict his predecessor, even if similar payments could be made.

Finally, partners may retain the name of a former partner in the firm, if he does not continue to practice elsewhere.\(^6\) On the other hand, the sole practitioner cannot lend, nor can the successor use, his name to aid the practice of the successor.

B. A Justification

Treating sole practitioners, comprising the largest single practice classification of the profession,\(^7\) differently from attorneys practicing in partnership, generally the more successful members of the legal

\(^6\) ABA, OPINIONS, No. 327 (Supp. 1971).
\(^6\) Id.
\(^6\) E.g., Little v. Caldwell, 101 Cal. 553, 36 P. 107 (1894).
\(^6\) ABA CODE, EC 4-2.
\(^6\) Id., DR 2-108(A).
\(^6\) Id., EC 2-11.
\(^7\) AMERICAN BAR FOUNDATION, 1971 LAWYER STATISTICAL REPORT 10-11 (1972).
community,\textsuperscript{22} can be justified only if we decide that the interests of a firm's clients, actual and potential, are furthered.\textsuperscript{78} Although, as the following discussion will demonstrate, neither conclusion is certain, on balance it appears that the present distinction produces a fundamentally sound result.

The distinction can be justified on the basis of the quality of legal services a client may receive. There is a real danger that the seller of a one-man practice may be more interested in obtaining a successor who is willing to pay the highest price, rather than one who is the best suited to his clients. The clients of a lawyer who has practiced with partners, however, are not imperiled by the payment of retirement or death benefits. Their interests are protected for two interrelated reasons. First, a partnership's process of choosing a new member ensures that in most cases points of view other than those of the retiring partner (or of the deceased partner's estate) will be represented. Unlike the situation with a sole practitioner, the death or retirement of a partner does not immediately occasion the selection of a successor with the bargaining inherent in such a procedure. Retirement or death benefits are determined by the partnership long before there is an actual need to pay them.

Secondly, the interests of a partnership welcoming a new member are generally coextensive with its clients because the senior partners' financial success and reputations will depend on the performance of their new partner with whom they must practice for a number of years. Where the departing partner's firm operates as a true partnership and other members and associates have at least occasionally handled his clients' affairs "[t]he interests of the client would not seem to be endangered . . . since it is probable that the client was not only acquainted with the partner's work but also fully aware of the qualifications of the firm as a whole."\textsuperscript{74}

There are limits, however, to the manner in which partners are able to capitalize upon their "good will" and client relationships. When a partner sells his partnership interest to a previously unassociated lawyer, his concerns parallel those of the seller of a solo practice. The clients may be afforded a modicum of protection if the seller's partners

\textsuperscript{22}Lawyers practicing in partnerships earn approximately two to three times more than sole practitioners. Smith & Clifton, Income of Lawyers 1963-1964, 54 A.B.A.J. 51, 52 (1968).


\textsuperscript{74}Note, The Death of a Lawyer, 56 Colum. L. Rev. 606, 617 (1956).
are in a position to play a meaningful role in the selection process. Nevertheless, if the departing partner is withdrawing a large interest, his partners may be unprepared to meet his financial demands, or if he has the power to take important clients with him, they may be unable to be as exacting as they would otherwise desire. For these reasons the sale of a partnership interest to a newcomer is prohibited.\textsuperscript{75}

The public will not be misled by permitting partnerships to retain the name of deceased or retired partners who no longer practice. A client might bring business to a law office carrying the name of a retired or deceased practitioner and believe that his services were still available or that the remaining attorneys had been associated with the practitioner. If a firm were a partnership, the client could justifiably rely on the reputation of the attorney named in the letterhead, and be reasonably assured that his associates and successor had been carefully chosen. Furthermore, the continued use of the practitioner's name makes clear that the partnership itself is a continuing organization and not simply a group of identified individual lawyers. Typically, the reputation and prestige attached to the partnership name is a product of the efforts of all the members, named or not, "and the loss of identification and good will with changes in firm membership would be harmful to the remaining partners without public gain."\textsuperscript{76}

On the other hand, these expectations are not justified if a law practice is sold by a sole practitioner desiring to retire or move to another community, by the widow of a deceased practitioner, by his heirs who reside elsewhere, or even by the attorney who possesses a commonplace surname and lives in an urban area. They may have little concern for the competence of the attorney to whom the name is sold, and any reservations remaining may be squelched by the right price. Thus, the client who contacts the successor because he practices using the name of his predecessor is in jeopardy of being misled.

The disparity in treatment between a sole practitioner and a partnership member cannot be justified by reasoning that it lowers the cost to the clients. It makes little difference whether the successor attorney shares fees with a previously unassociated predecessor or with a former partner, if the successor has paid a sum in excess of the value of tangible assets and of the work the predecessor actually performed. In either case, the inducement to recoup the investment by charging the clients more is the same. It is unfortunate that the ABA's opinion 327 has permitted a former partner or his estate to receive retirement bene-

\textsuperscript{75} \textit{N.Y. City Bar Ass'n, Opinions}, No. 633 (1943).

\textsuperscript{76} \textit{L. Patterson \& E. Cheatham, supra note 2}, at 314.
fits based on the future earnings of the firm. This is the first sanction, although implicit, given to the assignment of value to the good will a lawyer has developed.\textsuperscript{77} Retirement benefits based upon an average of the departed partner's prior earnings, previously the only approved method of calculation, may mean an equal dollar amount in practical terms. This method, however, puts an attorney's partners on notice that part of the fees earned, conceptually at least, will form a fund to meet the future retirement payments. To the extent that the term of the payments can be actuarially determined, the former clients of the partner will have paid for these payments. On the other hand, by shifting the measure to the partnership's subsequent profits or gross fees, the future clients must shoulder this burden and the recipient's welfare is tied to the firm's continued success. In the case of a retired partner this may be beneficial, as he may take a more active interest in the firm, but in the case of a deceased partner's designees, such an interest may be undesirable and unethical.\textsuperscript{78}

If by approving restrictive covenants "as a condition to payment of retirement benefits"\textsuperscript{79} the Code has endorsed court enforcement of such covenants with injunctive relief, it has discriminated without justification between the sole practitioner and the law firm member. It would be inconsistent with canon 2 of the Code,\textsuperscript{80} which imposes a duty upon the legal profession to make counsel available, to prohibit clients from seeking otherwise willing lawyers. No useful social purpose is served by forbidding an attorney, whether formerly a sole practitioner or a member of a partnership, from helping those who seek his legal advice. If, however, the Code has merely stated that a lawyer resuming practice outside of the partnership paying his retirement benefits will not be permitted to gain financially from such practice, then it has produced a fair result. Courts can adequately balance the conflicting interests of the public and of the partnerships whose former partners have practiced in violation of the partnership agreement by crediting fees earned by the former partners against the specified retirement payments.\textsuperscript{81}

\textsuperscript{77} See notes 62-65 supra & accompanying text.
\textsuperscript{78} See text accompanying note 28 supra.
\textsuperscript{79} ABA Code, DR 2-108(A).
\textsuperscript{80} Id., Canon 2.
\textsuperscript{81} If the judiciary were to follow this suggestion, then any discrimination in treatment between sellers of practices and retired partners may well be in favor of the seller. When a seller returns to practice, he will be free from the possibility of a lawsuit brought by the buyer for breach of a restrictive covenant and will be able to retain any consideration previously advanced by the buyer. The retired partner, however, may lose substantial benefits to which his prior efforts had entitled him.
IV. Conclusion

The sole practitioner who not only wants to provide properly for the continuing affairs of his clients, but also wants to maintain his and his family's financial security at his retirement or death, should consider associating with one or more attorneys in partnership before those needs become imminent. Not only will it be proper to receive retirement or death payments from the practice, but his clients will have available to them a lawyer who is familiar with their affairs and will not be subject to the risk that his unexpected disability or death will materially disrupt their legal matters.82

It should not be concluded that this is an endorsement of "quickie" partnerships, where a chosen successor merely practices under the retiring practitioner's roof and name for several months. On the contrary, the lawyer who enters into such an arrangement upon the eve of retirement solely for the purpose of exacting a portion of the future profits as payment for his practice does not serve his clients' interests. Peddling a law practice is improper regardless of how it is staged. Because it might be difficult at times to distinguish "quickie" partnerships from proper ones, courts, disciplinary boards, and ethics committees will have to scrutinize partnerships very carefully.83

The threat of disbarment, suspension, or reprimand84 may not deter an attorney who intends to retire or otherwise leave the profession; nor will such sanctions affect a deceased's estate or heirs. The embarrassment of public rebuke, however, may provide some deterrent effect, as will personal ethical standards. But prospective sellers who disregard these considerations must also consider the advisability of entering into a potentially unenforceable agreement. If the seller is compelled to enforce the sale contract judicially, courts should refuse to do so because the underlying bargain is adverse to the interests of the clients and to the public interest. A buyer who has successfully taken control of the practice may refuse to pay the sale price. Furthermore, the seller whose buyer does pay the agreed price may be liable to the successor's clients for all the profits he receives, since a fiduciary cannot profit from the sale of his fiduciary relationship.85 A successful

82 Other benefits of practicing in partnership result from the sharing of overhead, the combination of different talents and backgrounds, the facilitation of specialization, and the esprit de corps of teamwork. See P. Carrington & W. Sutherland, Articles of Partnership for Law Firms (1967); R. Smith, Law Office Organization (10th ed. 1964).
83 Notes 29-36 supra & accompanying text.
85 See note 5 supra & accompanying text.
class suit by the clients would render such an agreement meaningless to a seller.

On the other hand, buyers will most likely be younger, perhaps recently admitted members of the Bar. The threat of suspension or disbarment is a significant consideration. It would be of little value to secure the seller's former clients, only to be prohibited from serving them. It may take longer and mean fewer material amenities in the beginning years, but a young attorney, his profession, and the public, will be better served if he resists the sales pitch of the professional practice brokers and develops his own practice.

APPENDIX

A typical circular advertising brokerage services for the purchase and sale of a law practice reads as follows:

... things you should know about

Buying or Selling a Professional Practice

questions which are frequently asked ...

CAN THE "GOOD WILL" OF A PROFESSIONAL PRACTICE BE SOLD?

Answer: Yes, in most cases.

HOW WOULD YOU DEFINE "GOOD WILL" AS IT RELATES TO AN ACTIVE PROFESSIONAL PRACTICE?

Answer: The expectation of future profits from an existing practice under the operation of someone other than the present owner.

WHAT DETERMINES THE VALUE OF "GOOD WILL"?

Answer: About 20 to 25 different factors could influence the value of an existing practice. The following are the most important: The other opportunities available in the same profession, type of practice or specialty, gross receipts, net profit, significant trends, transferability of practice, source of referrals, willingness of seller to assist in transfer, covenant not to compete, location of practice, retention of employees, office lease, equipment and furnishings, fee schedule, collection ratio, reason for sale and type of clientele or patients.

CAN THE "GOOD WILL" OF PROFESSIONAL PRACTICES BE APPRAISED WITH REASONABLE ACCURACY?

Answer: Yes, now that a marketplace has been established and after our exposure to hundreds of practices in many states.
IS THERE A "RULE OF THUMB" FORMULA THAT COULD BE USED TO APPRAISE PROFESSIONAL PRACTICES?

Answer: No, because there are no two practices exactly alike. In addition, there is a great difference in value from one profession to another or from one specialty to another within the same profession.

HOW MUCH TIME DOES IT NORMALLY TAKE TO SELL AN EXISTING PROFESSIONAL PRACTICE?

Answer: To realize the maximum price, about 90 to 180 days. However, in many instances, we have sold practices within a week after they were listed with us. We have hundreds of buyers on our mailing lists. These buyers have been developed through national advertising and direct mail contacts. We have a continuing source of new buyers in each profession.

WHAT IS [BROKER]?

Answer: [Broker] was established in 1966. We are licensed brokers, nationwide, dealing exclusively in the sale, exchange, merger and appraisal of professional practices and related assets. Our main office is in ..., California, with branch offices in many other states.

WHAT SERVICES DO YOU PERFORM FOR SELLERS?

Answer: When a seller elects to list his practice with us, our services would include an evaluation of the practice, appraisal of other assets, analysis of financial records and determination of selling price. We would make recommendations as to various methods of sale, financial arrangements, income tax aspects of sale, transfer of practice, how to handle uncollected accounts receivable, letters of introduction, etc.

WHAT ARE YOUR FEES AND HOW PAID?

Answer: We are usually paid a commission by the seller based upon a percentage of the selling price if we are successful in selling the practice. Payment is made out of proceeds of sale.

DOES A SELLER NEED THE SERVICES OF [BROKER] IF HE HAS FOUND HIS OWN BUYER?

Answer: Yes, because finding a buyer is not our most important service. We offer experience in this highly specialized field that is not available anywhere else. We have been involved in hundreds of transactions and know the following: (1) How to present the opportunity objectively as a third party; (2) how to secure the fair market value; (3) how
practice should be sold and what should be required of both buyer and seller; (4) how to secure any unpaid balance; (5) how to transfer the practice successfully; (6) what should be included in the sales agreement; (7) how to secure financing for the buyer, if needed; (8) how to build in tax advantages for seller.

CAN THE SALE OF A PROFESSIONAL PRACTICE BE KEPT CONFIDENTIAL?

*Answer:* Yes, but only if negotiations are handled by a third party. It is almost impossible for an owner to sell his own practice without identifying himself to all prospective buyers. This usually results in the information reaching the employees and clients, resulting in some damage to the practice before it can be sold or transferred.

WHAT SERVICES DO YOU PROVIDE FOR BUYERS?

*Answer:* (1) We offer buyers a free mailing service to keep them informed of all practices that become available through [broker]; (2) we make practice evaluations for prospective buyers on practices which are not listed by us; (3) we can help secure financing; (4) we assist the buyer in the transfer of the practice and can help him to become successful in the new practice.

CAN ADVANCE ARRANGEMENTS BE MADE FOR THE SALE OF A PRACTICE IN THE EVENT OF A SUDDEN DEATH?

*Answer:* Yes, by completing a form letter of instructions which can be filed with your will. This will permit a quick sale at near the full market value, whereas any delay in placing the practice in our hands might result in a substantial or near total loss in value.

IF I SELL MY PRESENT PRACTICE, CAN [BROKER] HELP ME TO RELOCATE IN THE SAME OR SOME OTHER STATE?

*Answer:* Yes. At the same time that your practice is being offered to prospective buyers, we can present other opportunities to you.

WHAT OTHER SERVICES ARE OFFERED BY [BROKER]?

*Answer:* We make practice appraisals for a fee when no sale is contemplated. We are qualified to appear as expert witnesses in court proceedings where the value of the "good will" is in dispute.

A flyer addressed directly to attorneys accompanies the above circular:
Dear Counselor:

We would like to introduce our firm and the services which we offer to attorneys, accountants, physicians, dentists, and other professionals. [Broker] is a nationwide brokerage firm specializing in acquisitions, sales, mergers or appraisals of professional practices. We are now selling practices from 15 offices in 11 states, serving 8 different professions.

**FOR SELLERS OF LAW OFFICES**—We provide the kind of confidential services for an attorney that has not been available heretofore. If you have been thinking of leaving your practice within the next year or two, contemplating retirement or considering a change in location, we invite you to discuss your plans with us. We have a continuing source of buyers with professional and financial qualifications to fit your practice. In addition, all negotiations are conducted with a maximum of discretion and lack of publicity. Assets considered to be a part of a legal practice might include the following: supply inventory, law library, office furniture, office equipment, office lease or real estate, telephone numbers, accounts receivable, work in process, contingent fee cases, custody of records, future consultation services, or a partnership interest.

**FOR BUYERS OF LAW OFFICES**—We advise you to consider the purchase of an established law office which can provide an immediate high income, or it may be to your advantage to consolidate another office with your own. Let us know if you would like to be placed on our free mailing list to receive information on opportunities for sale now and in the future. Please specify the locations in which you have an interest, when you will be available, and some personal history.

**QUALIFIED EXPERT WITNESS ON VALUE OF GOOD WILL**—If you need to determine the true fair market value of the good will relating to any medical, dental, accounting, legal or other professional practice, one of our experienced practice appraisers can make such an evaluation for you. Our appraisers have qualified as experts in this field in the courts of many counties throughout the state.

Information regarding our services and fees will be furnished upon request. Any inquiry will be kept strictly confidential and there will be no obligation on your part.