Committee on Disciplinary Rules and Referenda

Supplement for October 7, 2020, Meeting

- **Memo from Chief Disciplinary Counsel Seana Willing Regarding the Sale of a Law Practice**

- **Public Comment Received from Roy Leatherberry Regarding Proposed Rules 1.00 and 1.18, TDRPC**

MEMO

TO: M. Lewis Kinard, Chair of Committee on Disciplinary Rules & Referenda
FROM: Seana Willing, Chief Disciplinary Counsel
DATE: October 6, 2020
SUBJECT: Summary of CDC Comments/Observations Regarding Proposed Sale of Law Practice Rule

---

Chair Kinard and Members of the Committee:

In response to your request from the September 17, 2020 CDRR meeting, I have compiled and summarized some of the comments and observations of several CDC staff members related to ABA Model Rule 1.17.

The current method of selling a law firm in order to comply with the Texas Disciplinary Rules of Professional Conduct is to bring the purchasing lawyer on board for some period while transitioning the law practice over to the new owner. This can be, and is, accomplished without a rule change. This has the same advantages as ABA Model Rule 1.17, but is only feasible when the selling lawyer is alive, not suddenly disabled, and can assist with the transition of the purchasing lawyer into the firm. This also works under Rule 1.05(c)(3) regarding confidentiality. The legacy continues under Rule 7.01(a), because the sale-purchase agreement is a retirement agreement under Rule 1.04(h). That is how a retiring lawyer can ethically sell a law practice in Texas under the current set of rules.

The 2015 article in the *Houston Lawyer* cited by Professor Johnson (https://issuu.com/leosur/docs/thl_novdec15/12), provides a better understanding of what is considered in the valuation of a law practice if being sold. In some respects, the adoption of ABA Model Rule 1.17 could be beneficial to the public rather than just to the lawyers involved in the transaction, assuming the selling lawyer wants to continue a legacy of quality legal services being available to the public. Does this imparts additional responsibility on the selling lawyer? What if (s)he insists on only selling to the highest bidder and the highest bidder is an incompetent and/or unethical lawyer. If the new lawyer owner is presented to the public as having the same reputation and good will as the seller, is that unethical? Is it a misrepresentation to the public? Should there be a mechanism to hold the seller accountable, at least for a period of time, for that misrepresentation? Or is it a better practice to require a period of transition before the sale is complete and before the seller retires or relocates wherein the buyer joins the firm to be sold and the seller can supervise the seller and the transition?

Questions of this type are not infrequent. In a recent call to the Ethics Helpline, a retired attorney was looking for Texas-specific information related to the sale of a law firm. He was inquiring on behalf of his former partner who was ready to retire and wanted to turn over his small-town practice to someone who would carry on its legacy. In another call, an attorney whose husband (also an attorney and sole owner of a law firm) recently died, wanted information about selling the firm as she was not interested in continuing her law practice. The question that could not be easily answered under current Texas rules is whether and how to assess or assign the value, if any, of a law firm's "good will."

This is the big question: what exactly is being transferred in the sale of a law firm? What is meant by "good will" when the lawyer(s) who developed the reputation in the community and established the good name of the law firm will no longer be part of the firm? They can sell the equipment, real estate, and the fixtures, but they can't "sell" the clients. Nor can they sell a reputation. Is a law firm a "brand" that has value solely in its name? How does one "value" the practice until one has reviewed the worthiness of the cases that are being transferred? Must the seller ask permission of the clients to reveal their confidential information to someone interested in buying the practice? What, then, if the sale does not go through? Is the potential former purchaser conflicted because they reviewed, or had a chance to review, the former selling firm's client files?

Another question under ABA Model Rule 1.17 is how long must you not practice law or not practice in that geographical area? Is 6 months a sufficient period? A year? Thirty days? Quitting practice in the "geographical region" is not realistic, especially in Texas. Sell your practice in Corpus Christi and move to El Paso to start another? If a rule like this is adopted, it should apply only to lawyers going out of business in the state, or who have died and the estate is handling the sale of the practice. Perhaps the rule should require the seller notify the Bar that s/he is going on inactive status or going to work for a governmental entity.

Are there some anti-trust/anti- competitive issues here? Changing practice areas (closing a family law practice to do bankruptcy law for example) as a reason for the sale seems problematic. How can we restrict the lawyer's right to practice law to only certain fields? Rule 5.06 does not appear to apply to sales of practice, only to employment and partnership terminations, but this may be because there is no sale of practice provision. The policy behind Rule 5.06 would still argue against these types of restrictions. Regarding compliance, how would we know when the lawyer has crossed the line and resumed the previous nature of practice after a sale?

Another concern is what if the client doesn't respond? Is the default assumption that they agree? What if the client is out of the country, or hospitalized, or doesn't receive the notice? Does the client in that circumstance not have a say in the representation? Arguably, the presumption of consent by the client puts the burden on the wrong side. The presumption should be that the client does not consent unless they show otherwise.

If it is left to a court of jurisdiction to decide that the buyer will represent the client, is this so even when the client doesn't have a case in litigation? Who goes to court to get a ruling? What kind of notice do you have to give to satisfy the notification to the client of the sale or of the case being filed in court to determine who represents the unlocatable or absent client? How would the rule protect the buyer or the seller in a situation where the buyer fails to do any work on the client's case – is the seller absolved of that responsibility if there's a question as to notice to the absent/missing client? Another source of potential complaints may surround the accounting and transfer of trust account funds between the seller and buyer. Is it worth examining whether a sale with the missing/absent client(s) would need to be approved by the Bar?

Additional concerns include the perception that this is another step toward treating clients as fungible goods/inventory that can be sold or transferred at will. The CDC often hears complaints from clients, often unsophisticated consumers of legal services, that his/her lawyer "gave the case" to somebody else. Arguably, the sale of a practice should be restricted to the office,

fixtures, etc. Unless and until the client affirmatively consents, transferring the files to someone else is likely a Rule 1.05 violation. The ABA Model Rule 1.17 makes no hard provision for conflicts checks, so if the practice is sold to another attorney in the same practice specialty or field, it is likely the buyer has been on the other side in some of the cases.

Finally, under ABA Model Rule 1.17, what would stop some huge firm from buying up smaller firms and practices all over the state, making offers that can't be refused, then forcing those lawyers out of the business? Or, how about offering the oil and gas lawyer a family law practice you bought elsewhere in partial exchange for their O & G practice in Big Spring, for example? "Will trade busy [Big City] Personal Injury practice for a quiet rural probate and estate practice plus cash. Serious inquiries only." There might even be a new business model for law practice "flippers." "We buy ugly law practices, fix-em-up and sell for quick profit."

To: Texas State Bar CDRR
From: Roy Leatherberry (TSB# 00789441)
Re: Proposed Amendments to Rule 1.00 and New Rule 1.18
Date: October 6, 2020

I am writing the Committee to encourage the Committee to decline to press forward with the proposals regarding these rules.

ABA Model Rule 1.18 was initially proposed as part of the Ethics 2000 Commission of the ABA with the intent of incorporating the Restatement of the Law Governing Lawyers. However, as is often the case, the "Restatement" was not a restatement of law at all but, rather, the expression of a desire as to what the law ought to be.

Beginning in 2005 various states began adopting the Rule in one form or another.

Texas did not.

Multiple referendums have occurred in Texas and the consistent opinion of the Texas legal community is that this rule is not only not necessary, it is not desirable.

In a 2010 article[1], Kenno L. Peterson summarized what had occurred through that date and provided a nice chart comparing the ABA rule to the rule as proposed at that time (which was numbered 1.17). There were numerous differences that had been incorporated, which recognize the problems associated with the ABA Model Rule. Mr. Peterson stated:

> Both proposed Rule 1.17 and ABA Rule 1.18 recognize that, while it is important to protect a prospective client's interests, the protections afforded to a prospective client generally should not be as extensive as the protections afforded to an actual client to whom a lawyer owes the full range of fiduciary duties. But these rules, as well as other related rules, approach this balancing act in fairly divergent ways.

One of the additions to the proposed rule was the inclusion of a "good faith" requirement on the part of the prospective client.

> As explained in comment 3 to the proposed rule, "[t]he requirement in paragraph (a) that a lawyer's services be sought 'in good faith' is intended to preclude the tactical disclosure of confidential information to a lawyer so as to prevent the individual lawyer or the lawyer's firm from representing an adverse party."

Another point of deviation between the Model rule and the proposed rule was noted:

> In addition, proposed Rule 1.17(c), like other proposed rules, does not follow the ABA in referring to a "disqualified" lawyer. The concepts of discipline and disqualification, while related, are not the same. In that regard, paragraph 13 of the

[1] 23 App. Advoc. 268.

> preamble to the proposed rules provides that "these Rules are not designed to be standards for procedural decisions, such as disqualification." And paragraph 20 of the preamble to the ABA rules provides similarly that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." To avoid any unintended blurring of the standards of disqualification and discipline, the proposed rules simply do not refer to disqualified lawyers or disqualification.

The rules proposed in 2020, tracking more closely the Model rule, do not seem to have considered the work that had been undertaken prior to the 2010 proposals.

Nevertheless, during the 2011 Referendum, as recognized in the March 2011 edition of the Texas Bar Journal, the proposed amendments "went down in flames."[2] More than 77% of the votes were *against* this rule.[3]

It is not clear why, under the circumstances, why anyone thinks that this rule should rise from those flames, especially in a format that was not even acceptable to the committee members and the Supreme Court in 2010, prior to the referendum.

This ABA Model Rule is and has always been an attempt to impose, on the legal community, *policy* concerns by an obvious *minority* in a manner that rejects the entirety of the common law in Texas.

In *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*,[4] the Texas Supreme Court observed: "It is by now axiomatic that legislative enactments generally establish public policy."[5]

The Legislature has *not* however, expressed any public policy suggesting an extension of a lawyer's duty to a non-client beyond that as already exists and which is well-reflected in the Formal Ethics opinions.

It is, and always has been the policy in Texas that the duty of an attorney is to the *client* and not some third party.[6] Texas Rule of Evidence 503(a)(1), of course, defines "client" as "a person … who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer."[7]

This is reflected in Opinion 651 by the Professional Ethics Committee for the State Bar of Texas in 2015.[8] The hypothetical presented involves a lawyer who invites the prospective client to send information and, despite warnings that the information would not be treated as confidential, the

---

[2] 74 Tex. B.J. 192 (2010).
[3] 74 Tex. B.J. 195 (2010).
[4] *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015).
[5] *Id.* at 504.
[6] *See e.g., Barcelo v. Elliot*, 923 S.W.2d 575, 577 (Tex. 1996).
[7] There seems to be a split of authority as to whether there is a presumption, including a conclusive presumption, as to whether confidential information was imparted. Compare *In re Gerry*, 173 S.W.3d 901 (Tex. App.—Tyler 2005, no pet.) and *In re Z.N.H.*, 280 S.W.3d 481 (Tex. App.—Eastland 2009, no pet.).
[8] 79 Tex. B.J. 44 (2016)

prospective client transmits such confidential information. Receipt of the information results in a determination that taking on of that prospective client would conflict with representation of a current client.

The Ethics opinion is that the individual submitting the information is *not* a client, although there may be a duty of confidentiality imposed that "may" create a conflict of interest with a current client.

The Ethics opinion then explicitly recognizes that *existing* Rules are sufficient to address the situation.

Under those rules, because the lawyer had previously provided notification to the prospective client that any communication would *not* be treated as confidential. Thus the committee concluded:

> [T]he law firm and its lawyers will not have an obligation to protect or refrain from using information received.

The rules currently proposed, however, would likely result in a very different conclusion which, thus, is not a conclusion that reflects *current* law but is, instead, reflective of a *policy* choice that has been rejected time and time again by the Texas legal community.

In drafting these comments I have done extensive multi-state research (both cases[9] and Ethics opinions[10]) into the situations involving this rule and it is clear that in those states where the Model Rule has been adopted, the rule is being used as a sword to prevent a party from having the representation that the party desires.

Thus, my major concern is that the rule will be interpreted in such a way as to deprive the *existing* client of the right to choose the attorney it desires. Attorneys are not fungible and the right to counsel of one's choice rests with the individual. It is, indeed, the constitutional right of an individual to have the attorney of its choice unless there are very strong reasons to not permit such.

---

[9] *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark. 2006); *ADP, Inc. v. PMJ Enterprises, LLC*., 2007 WL 836658 ((D.N.J. Mar. 14, 2007); *Phase II Chin, LLC v. Forum Shops, LLC*, 2009 WL 10709796, D.Nev. (Feb. 19, 2009); *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, Cal.App. 2 Dist., Apr. 07, 2010, as modified (May 06, 2010), review denied (Jun 23, 2010); *O Builders & Assoc. v. Yuna Corp.*, 19A3d 966 (N.J. 2011); *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390 (Mo.App. E.D. 2011); *In re Marriage of Perry*, 293 P.3d 170 (Mont. 2013); *In re Carpenter*, 863 N.W.2d 223 (N.D. 2015); *Keuffer v. O.F. Mossberg & Sons, Inc.*, 373 P.3d 14 (Mont. 2016); *Xiao Hong Liu v. VMC East Coast LLC*, No. 16 CV 5184 (AMD)(RML), 2017 WL 4564744 (E.D.N.Y. Oct. 11, 2017); *Mt. Hebron District Missionary Baptist Association of AL, Inc. v. Sentinel Insurance Company, Limited*, 2017 WL 3928269, M.D.Ala. (Sep. 07, 2017); *Kidd v. Kidd*, 219 So.3d 1021 (Fla.App. 5 Dist 2017); *Lopez v. Flores*, 223 So.3d 1033 (Fla.App. 3 Dist 2017); *Skybell Tech., Inc. v. Ring Inc.*, No. SACV 18-00014 JVS (JDEx), 2018 WL 6016156 (C.D. Cal. Sept. 18, 2018); *Dahleh v. Mustafa*, 2018 WL 1167675, (N.D.Ill. Mar. 05, 2018); *In re Onejet, Inc*., 614 B.R. 522 (Bkrtcy.W.D.Pa. 2020); *Zalewski v. Shelroc Homes, LLC*, 856 F.Supp.2d 426 (N.D.N.Y 2020); *Ocean Thermal Energy Corp. v. Coe*, 2020 WL 5237276, C.D.Cal. (July 29, 2020).

[10] Formal Opinion 2006-2 (The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics); Iowa State Barr Association Opinion 07-02 (2007); Wisconsin Formal Ethics Opinion EF-10-03 (2010); Formal Opinion 2013-1 (The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics); ABA Formal Opinion 492 (June 9, 2020)

As explained by the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*,[11] even if there were a legitimate state interest in a particular policy, a rule that has "the effect of placing a substantial obstacle in the path" of the consumer of the constitutionally protected service "cannot be considered a permissible means of serving its legitimate ends."

But, given that two decades has passed since the Model Rule was proposed, and given the overwhelming rejection of the rule by the legal community in Texas in 2011, it is clear that no legitimate state interest in passing this rule exists. If it did, then we would already have it.

In short, in light of the rule having already been rejected by the legal community in Texas, and in the absence of a clearly public policy rationale articulated by the legislature, there is simply no sound basis for proposing this rule at all.

Thank you for your attention to these comments.

[11] *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016)