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THE SALE OF A LAW PRACTICE:
TOWARD A PROFESSIONALLY RESPONSIBLE APPROACH

Leslie A. Minkus*

I. INTRODUCTION

Consider the following hypothetical situation: Lawyer A has been practicing in the same community for over thirty years. He is competent, respected, and trusted. At the age of sixty he decides to retire. As a responsible lawyer, he wishes to assure that his clients' matters are handled competently in the future. For the past few years he has been impressed with the quality of work of Lawyer B, age 42, who has had a sole practice for fifteen years, the last three in the local community. Because of A's experience, he knows which attorneys in town are competent and responsible. Largely because of B's newness in the community, A believes it likely that many of his clients, if left to their own devices, would select from among several more established but, in his view, less competent attorneys. With the dual purpose of providing for his own financial security, and providing competent representation for his present clients, A suggests to B the following arrangement: A agrees that he will, in writing, inform his clients that (1) he intends to retire, (2) they are entirely free to select any attorney they wish to represent them, (3) he recommends that they retain Attorney B (and the reasons for the recommendation), and (4) he will receive compensation from Attorney B which is based in part on the gross income earned by B. B agrees that he will pay to A, over several years, certain amounts, contingent in part upon the gross income of B.

Despite the full disclosure, and the fact that A's clients are...

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likely to receive better representation than they would otherwise receive, the agreement is invalid to the extent that the sale price exceed the value of the tangible assets of A's practice. Yet, if A entered into the same financial agreement with B, brought in B as a "partner", sent out announcements of the partnership, and three months later retired from practice, the financial agreement would be valid. This, even though the clients would not have had the benefits of disclosure as to the nature of the arrangement, the reasons why A has associated B, or indeed of their right to retain other counsel. That the second arrangement is consistent with the American Bar Association's Code of Professional Responsibility, and the first is not, suggests it is time to reconsider the rules governing the sale of a law practice.

Why should a sole practitioner be precluded from entering into an objectively sensible agreement which will provide benefits to him on retirement and to his heirs upon his death? Perhaps the most quoted (though hardly the most persuasive) explanation is contained in an opinion issued by the New York County Lawyer's Association: "Clients are not merchandise, Lawyers are not Tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status."

2. See Model Code of Professional Responsibility [hereinafter cited as ABA Code] DR 2-107; EC 4-3. References to the ABA Code are to the existing Code which was adopted in 1969, amended on several occasions, and has been enacted, substantially in toto, in all states except California. For the specific provisions of each state's code, see ABA Committee on Ethics and Professional Responsibility, Code of Professional Responsibility by State (1977). All references to Disciplinary Rules ("DRs") and Ethical Considerations ("ECs") are to the existing ABA Model Code of Professional Responsibility. For the most part, the Proposed Model Rules of Professional Conduct (the "Kutak Commission Report") are not significantly different with respect to the problems discussed in this article. But see note 37, infra.
3. "Sale of a law practice" means the sale of a practice as a going concern, frequently described as the sale of "good will". Although this article deals with the sale of a practice as a unit, the same considerations are involved if only a portion of a practice is sold, or if certain portions are sold to different lawyers.
In this article I shall set out the bases for the prohibition of the sale of a law practice, examine those bases, suggest that the legitimate criticisms which have been raised are overbroad, and propose that, in at least some situations, sales should be allowed and, when necessary, appropriate amendments to the Code of Professional Responsibility be enacted.

II. THE OBJECTIONS TO THE SALE OF A LAW PRACTICE

A lawyer can, of course, sell tangible assets—e.g., library books, furniture, office equipment, and the like. He can also sell his accounts receivable provided that the sale price reflects only the amount owed the lawyer for services performed up to the time of sale. But he is prohibited from selling what has generally been referred to as “good will.” In other words, the lawyer can realize only “liquidation” value and not “going concern” value for his practice.

Interestingly enough, despite the obvious importance of the matter to the practicing bar, there is no specific disciplinary rule in the ABA Code which precludes the sale of good will. None-

Cardozo’s admonition that “[m]etaphors . . . starting as devices to liberate thought . . . end often by enslaving it.” Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).


7. Geffen v. Moss, 53 Cal. App. 3d 215, 125 Cal. Rptr. 687 (1975). Geffen is the only case in which a court squarely held invalid a contractual provision for the sale of good will. In Geffen, the selling lawyer, (Geffen), had been appointed a U.S. Magistrate. The agreement provided that Geffen would encourage his former clients to retain Moss, and attributed $15,000 of the $27,500 sales price to the value of the physical assets. The court concluded that, despite the fact that the contract made no reference to good will, Moss' expectation of future business from Geffen's present clients was a principal motivating factor. This attempted sale of good will was held invalid as contrary to public policy and against the spirit and intent of Rules 2 and 3 (dealing with solicitation and payment for recommendations) of the former California Rules of Professional Conduct. Moss was held not liable for the payment of the $12,500 presumably attributable to the good will factor.

8. The ABA Code has a tripartite organization. There are 9 canons—statements of general principles—each of which includes Disciplinary Rules and Ethical Considerations. The Ethical Considerations are aspirational only; violation of a Disciplinary Rule, however, may result in disciplinary sanctions. The only specific mention of the sale of a law practice is contained in EC 4-6, which states that “[a] lawyer should not attempt to sell a law practice as a going business because, among other things, to do so would involve the disclosure of confidences and secrets.” California has not adopted the ABA Code, and the California Rules of Professional Conduct do not contain Ethical Consider-
The authorities are unanimous that such a sale by a sole practitioner is improper. This position is based upon the view that the sale would necessarily involve the violation of some or all of the following proscriptions:

1. To turn over the selling lawyer's files to the purchasing lawyer would, in virtually all cases, constitute a violation of the selling lawyer's duty of confidentiality.

2. To the extent that the purchase price is a function of fees earned by the purchasing lawyer, the agreement violates the proscription of sharing fees without sharing the effort and/or responsibility.

3. To the extent that some or all of the purchase price is paid, not to the selling lawyer, but to his estate, the agreement violates the proscription against sharing of fees with laypersons.

4. The fact that the value of the lawyer's practice will depend largely on the number of clients who follow his recommendation and retain the purchasing lawyer puts the selling lawyer in a position of direct conflict with his clients.

5. The sale would almost inevitably involve the recommendation of employment of the purchaser in violation of the prohibition against the payment of money by a lawyer for the recommendation of him by another. Such recommendation might also be considered improper solicitation.

6. Because most sales will include a covenant not to compete with the purchasing lawyer, the agreement arguably violates the prohibition against such covenants.

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11. Id. DR 2-107.

12. Id. DR 3-102.

13. See Id. Canon 5.

14. Id. DR 2-103(B) ("A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client . . . .").

15. See id. DR 2-103(A); EC 2-3.
except as a condition to payment of retirement benefits by a lawyer's former firm.\textsuperscript{16}

To the extent that some or all of these objections have merit, their force cannot be mitigated by the rather transparent device of forming a "partnership" for a brief period of time prior to the retirement (or, if the attorney is somewhat prescient, the death) of the selling lawyer.\textsuperscript{17}

Let us then consider the substance of each of the arguments which has been advanced in support of the prohibition against the sale of a law practice.

A. Confidentiality

One major objection to the sale of a law practice is that it would violate the lawyer's obligation to refrain from disclosing confidences or secrets of the client. Ethical Consideration (EC) 4-6 of the ABA Code of Professional Responsibility provides:

> The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of the employment. Thus 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 . . . ."

"Confidences" and "secrets" are defined in DR 4-101 in the following way:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

\textsuperscript{16} \textit{Id.} DR 2-108(A) ("A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.").

Payments made by a purchasing attorney are functionally equivalent to retirement benefits and should be so treated for purposes of this rule. Nonetheless, one commentator has justified the general prohibition in part on the basis of this rule. \textit{See Sterrett, supra} note 3, at 316-18.

\textsuperscript{17} \textit{See Sterrett, supra} note 3, at 324-25.
If the model contemplated by EC 4-6 is the sale through advertisement to the highest bidder, then the concern expressed is well founded. Many, if not most, attorneys’ files will contain “secrets” if not “confidences” of the client. Most purchasers would doubtless want to know a good deal more about the clients and the matters being handled than a file would reveal. But the attempted sale of a practice in such a manner is so professionally irresponsible as to be indefensible, wholly apart from the potential violations of Canon 4.18

Suppose, though, the situation posed in the introduction. Lawyer wishes to retire and, in the course of his practice, has had occasion to work with and against most of the other lawyers in the area. One in particular has impressed him as competent, honest, and sensitive to the needs of his clients. After discussing the possibility of having the second lawyer take over the business of as many of his clients as agree to retain him, retiring lawyer writes to his clients informing them of his impending retirement, his desire that their affairs be handled by a competent successor, his belief that he has found such a person, the reasons for that belief and the eventual need to disclose privileged material to such person. The letter would also make unmistakably clear the client’s right to refuse to allow disclosure, to select another lawyer and, at any time, to discharge the recommended lawyer if the client is dissatisfied.19 Presumably, if the letter were clear, an affirmative response by the client would satisfy Disciplinary Rule 4-101(C), which provides that “[a] lawyer may reveal . . . confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.”

When a client retains a lawyer who is not a sole practitioner, the relationship is perceived as one between the client and the firm of which the lawyer is a member. Hence, for purposes of the proscription against disclosure of confidences and secrets, the attorney is, collectively, the law firm.20 It follows

18. The existence and practices of brokers who specialize in such sales was a matter of justifiable concern to one commentator. Sterrett, supra note 3, at 316.
19. Sterrett suggests that those lawyers who sell their practices believe that full disclosure would reduce the likelihood of their clients retaining the purchasing attorney. Sterrett, supra note 3, at 311, but he presents no persuasive data to support such conjecture.
20. See ABA Code EC 4-2 (1981) (unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm.”).
that if the lawyer primarily responsible for a client retires or
dies, his replacement by another lawyer in the firm involves no
violation of Canon 4.21 This may seem self-evident to lawyers,
but it is worth considering whether it is always as self-evident to
clients, or whether it corresponds to a client’s reasonable
expectations.

If a major corporate client retains a large firm, it is clear to
everyone that it is the firm that is being retained. Often, of
course, one or two members of the firm have primary responsi­
bility for the coordination of the firm’s representation, and one
member may be the “contact” lawyer for the client, but it is well
understood that the client’s work will be handled by a number
of lawyers, all of whom will have access to the client’s file.22

In a small firm the legal relationship is the same, but the
understanding of the client—or at least his reasonable expecta­
tions—may be entirely different. Suppose, for example, that
after a number of years as a successful domestic relations sole
practitioner, a lawyer retains a young associate to handle his in­
creasing work load. It may be true that at least some clients who
employ the firm after the new lawyer is associated do not expect
that the older lawyer will handle all, or even any, of their mat­
ters. But those clients who have been represented by the older
lawyer for some time are in an entirely different position. Not
only did they not retain the new lawyer, they (unlike the major
corporate clients) never retained a “firm” at all. In effect, their
confidences and secrets are now theoretically freely available to
a lawyer they never selected, and only because he is a member of
a “firm” which had never before existed.23

I am not suggesting that there is anything improper in what
I have just described. I am, however, suggesting that in terms of
the clients’ reasonable expectations of nondisclosure of confi­
dences, the situation is not appreciably different from one in

CONDUCT 2-112, discussed at note 65, infra.
23. It seems to me highly unlikely that many clients would be aware of their right
under EC 4-2 to prohibit disclosure, and even more unlikely that lawyers would direct
their attention to it. Moreover, as a practical matter, it might be extremely difficult to
prevent the disclosure of any but oral communications.
which the lawyer simply sold his practice to a successor and agreed to consult when needed. In other words, in the context of confidentiality, should it make a difference that an associate is "employed" by a sole practitioner rather than being "sold" a practice?

From the standpoint of the lawyer, of course, it would be burdensome to solicit the approval of each present client before allowing a new associate access to a client's file. Presumably, this burden can legitimately be placed on the lawyer who sells his practice because, in the situation where a new lawyer is hired, the original lawyer is, at a minimum, equally responsible for any financial damage done the client, and his continuing association provides some assurance of his belief in the competence and trustworthiness of his associate. But a belief in another lawyer's abilities and discretion plainly does not in itself allow the revealing of confidences. In short, despite the fact that many clients who retain firms implicitly or explicitly accept the fact that their confidences will be shared by a number of attorneys, many others have no such understanding, and may be unaware of their theoretical right to prevent any disclosure. If that is true (or to the extent that it is true) the importance of confidentiality as a factor in determining the propriety of the sale of a law practice is diminished.24

Once again, this does not mean that confidentiality is unimportant, or that lawyers should be required to obtain advance approval before allowing a new associate access to a client's files. However, the employment of an associate may be similar to the association of another lawyer for a particular matter and has much in common with the case of a retiring sole practitioner who sells his practice. And, as has been made clear, before turning over any matters to a successor, the lawyer should be required to disclose fully all aspects of the transaction and to explain clearly the client's right to obtain his file and to decline employing the successor. In short, with appropriate advance notice to a client, the issue of confidentiality disappears. Either the client consents to the new representation or he receives all of his

24. If the selling lawyer is responsible, at least to some extent, for the malpractice of the purchasing lawyer, many of the real concerns can be eliminated. See text accompanying notes 33-39, infra.
papers without their having been seen by a third party.

Such a procedure should not pose severe practical problems. The selling attorney could easily describe to the successor, in general terms, the nature of his existing practice, its income potential, and the proposed terms of the sale without disclosing specific information about individual clients. It should not take clients more than a couple of weeks to respond to the selling lawyer's letter. In addition, of course, the selling lawyer would be available to discuss the change with his clients and to advise them accordingly.25 The conclusion seems obvious that if the prohibition against the sale of a practice rested solely on the confidentiality rationale, it would be plainly unjustified.26

B. IMPROPER SHARING OF FEES WITH ANOTHER LAWYER

A second objection to an agreement for the sale of a law practice is that it would violate Disciplinary Rule 2-107, which provides:

(A) 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 compen-

25. It is also possible that the retiring lawyer may consult with the client or the successor lawyer, whenever this is desirable.

26. ABA Code EC 4-6 (1981) states:
A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement . . . . In determining the method of disposition of the papers of both lawyer and client the instructions and wishes of the client should be a dominant consideration.

Not only is the procedure I have suggested consistent with the thrust of the rule, it is certainly arguable that a lawyer who makes no effort to determine how a client would want his files disposed of is acting in a professionally irresponsible manner. See text accompanying note 65, infra.
There is no inherent reason why an agreement for the sale of a law practice would necessarily violate either subsection (A)(1) or (A)(3) of the rule. Subsection (A)(1) can easily be complied with, and (A)(3) appears to allow some increase in fees. Even under a rule like California Rule of Professional Conduct 2-108, which prohibits any fee increase solely because of the division of fees, it is likely that the purchasing lawyer would still be in a better economic position than he would without the benefit of a significant in-place clientele.

Subsection (A)(2), though, presents a problem. The selling lawyer is not likely to perform future services for his former clients. Whether he will share responsibility depends upon what the agreement provides and what the concept of shared responsibility means. In ABA Formal Opinion 204, the Committee on Professional Ethics made it clear that a division of service or responsibility could serve as the basis for a division of fees. The Committee, though, was less than clear about the proper application of that rule, stating that “[s]ervices . . . may apply to the selection and retainer of associate counsel.” The extent of client participation in the process of advice given the client, and of supervision and/or control by the referring lawyer were considered factors in determining whether “services” had been performed, and whether a division of fees was proper.

27. A member of the State Bar shall not divide a fee for legal services with another person licensed to practice law who is not a partner or associate in the member's law firm or law office, unless (1) The client consents in writing to employment of the other person licensed to practice law after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and (2) the total fee charged by all persons licensed to practice law is not increased solely by reason of the provision for division of fees and does not exceed reasonable compensation for all services they render to the client.


This provision legitimates the so-called “referral fee” if its specific requirements are complied with. See text accompanying note 65, infra.

28. But see note 25, supra.


30. Id.
Under the ABA Code, the specific division of fees must correspond to a division of services or responsibility, a measurement that the ABA Committee found virtually impossible to make. As the Committee stated in Opinion 204:

"Inasmuch as the amount of a lawyer's fee presents no ethical questions unless it is flagrantly excessive, . . . it is not the province of this committee to measure the services rendered or responsibility assumed or incurred by the respective lawyers who become so associated or to apportion a fee charged therefore."

What strikes one about this opinion is its apparent willingness to approve (or at least not disapprove) any fee sharing arrangement short of a "no strings attached" referral fee, without regard to the cost to the client save for the "flagrantly excessive" fee. And, in fact there is a suggestion in ABA Opinion 26531 that a mildly disguised forwarding fee would not be disapproved if there was an advance agreement between the two lawyers. In short, the reality appears to be that the ABA "rule" is virtually a dead letter, gutted in substance by the inability to apply it in any specific case. Moreover, as written and interpreted, it provides at best minimal protection against excessive fees being charged the clients.

Perhaps because of both of those reasons, California in 1979 amended Rule 2-108 of the Rules of Professional Conduct32 (the analogue of DR 2-107) and eliminated the prohibition against referral fees provided that two requirements are met. First, the client must consent in writing after full disclosure by the attorney of the fact and terms of a proposed division of fees; second, the total fee charged by both (or all) attorneys must not be increased solely by reason of the division and, in any event, may not exceed reasonable compensation for all services rendered. California, then, by legitimating referral fees, has ironically provided more protection to the client than the more "restrictive" Code of Professional Responsibility.

If a client gives informed consent to a fee sharing arrangement, and is assured that he will not pay more solely because of

32. For the text of Rule 2-108 see note 27, supra.
such an arrangement, is there nonetheless a valid reason for prohibiting fee-splitting except in cases where services and/or responsibility are shared? Certainly one argument in favor of the present rule is that it may prevent the sale of a client to the highest bidder. If the selling lawyer will neither work with the purchasing lawyer, nor assume responsibility for his actions, a “worst case” scenario would have the selling lawyer getting the best price he could, regardless of his personal opinion of the competence or sense of responsibility of the purchasing lawyer. Even if the purchasing lawyer were competent, he might be tempted to recoup his payments by treating the clients’ matters less thoroughly than he should. In other words, if an increase in fees is prohibited, a decrease in quantity and quality of work must be considered a real possibility.

There is no doubt that such a possibility exists, but it is not serious enough to justify a complete prohibition on the sale of a practice. In the first place, it should strike one as odd that a rule that discourages the accomplishment of a socially useful end—the orderly transition of clients’ affairs—is justified by the profession on the ground that it will protect a few clients from a few unethical practitioners. Second, such an overinclusive rule is even more peculiar when it is demonstrably ineffective. By the simple device of associating the purchasing lawyer for a decent interval, the seller can avoid complying with any of the relevant disciplinary rules. Third, it is not clear that a client, even under the “worst case” scenario is remediless. Presumably, the selling lawyer owed a duty to his former clients to exercise reasonable care in recommending a new lawyer. If that duty was breached, and the client suffered damage by the negligence of the purchasing lawyer, the client should have an action against both the purchasing and selling lawyer. Moreover, if this duty were clearly expressed in a Rule of Professional Conduct, it would provide disciplinary sanctions against the selling attorney and, perhaps more significantly, might be viewed by a court as establishing a standard for liability in a civil action.

33. The case is analogous to the corporate “looting” cases in which directors have been held liable when they sold a corporation without adequate investigation of the purchaser who proceeded to loot the corporation. See, e.g., Gerdes v. Reynolds, 28 N.Y.S. 2d 622 (Sup. Ct. 1941).
34. E.g., EC 4-6, set forth at note 26, supra.
35. See Minkus, Lawyer Advertising and Solicitation: The Client As Consumer, 11
That the real concern may be the necessity for joint responsibility was expressed, at least implicitly, in ABA Formal Opinion 316 which dealt with the practice of law across state lines. In that Opinion, the Committee declared that fee-splitting among lawyers who are associated, but are not licensed to practice in specific jurisdictions, would be acceptable as long as the lawyer who was not licensed to practice nevertheless shared responsibility for any malpractice liability incurred by the lawyer actually performing the services.

If this focus on protection of the client is really the major concern, then it can be dealt with by requiring the selling lawyer to maintain, for a reasonable period of time, insurance that would cover liability that arose because of the malpractice of the purchasing lawyer. Moreover, such a requirement can be applied equally to agreements between sole practitioners and agreements among members of a firm. That is, whether the payments to a retiring lawyer are payments from the sale of a practice, or retirement benefits from a partnership, the agreement would include provisions for insuring the selling or retiring sole practitioner or partner.

In summary, while present Disciplinary Rule 2-107 does appear to prevent the sale of a practice, it is not clear that it actually does so—at least as it has been interpreted. In any event, it


37. This suggests that the focus of the inquiry ought to be placed more on the means of assuring that the selection of a successor will be at least as carefully considered as the selection of a partner or associate. Professor Morgan makes essentially the same point in his perceptive criticism of Rule 2-103. Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 702, 719-21 (1977).
38. The so-called “tail” insurance, which covers the selling attorney for future claims based on malpractice while he was in practice would not cover this derivative liability though it is probably important to require that such a policy be maintained. Typically the cost to the selling lawyer of tail insurance is approximately 225% of the annual premium to provide a policy that will cover indefinitely all claims based upon the selling lawyer’s conduct up to the date of retirement. Rule 1.5 of the Proposed Model Rules of Professional Conduct would allow fee sharing if all attorneys remain liable for any malpractice.
39. To my knowledge, there is no policy specifically tailored to cover only derivative liability. Hence, at the present time the selling lawyer would have to obtain standard malpractice insurance. However, it certainly seems possible that if a demand for this type of insurance existed, insurers could establish a significantly less costly policy. At a minimum, such a possibility ought to be explored.
is a demonstrably ineffective rule with form ruling over sub-
stance. While purporting to be client-protecting, it provides
minimal protection to a client’s interests and impedes a socially
desirable goal, all because a few unethical lawyers might abuse
the privilege of selling the good will they have built up over the
years—the value of which their colleagues in partnerships may
realize. A lawyer, in all likelihood, will choose a “real” partner or
associate with care, and the selection of a purchaser for a prac-
tice or a “quickie” partner or associate may not be as carefully
selected. But, in the case of a truly responsible practitioner, due
care will be given to the selection of a successor, and in the case
of the irresponsible or unethical practitioner, the rule is of dubi-
ous effectiveness anyway. The California approach of full writ-
ten disclosure and approval together with protection against fee
increases, is a much more straightforward approach and will, as
well as any rule can, eliminate (or at least minimize) some of the
evils conjured up by defenders of the status quo. Furthermore, if
approval of a sale were conditioned on the continuing liability of
the selling lawyer (at least for some specified period), there is no
legitimate DR 2-107 objection to the sale.

C. DIVISION OF FEES WITH LAY PERSONS

A third objection is that in the case of a deceased lawyer, or
in the case of an agreement that is to continue after the death of
the selling lawyer, the agreement would violate the proscription
against sharing fees with lay persons.40

Disciplinary Rule 3-102 prohibits sharing of fees with a non-
lawyer except in three specific instances: Employees may be in-
cluded in a compensation or retirement plan even though it is
based on profit sharing; a lawyer, completing the work of a de-
ceased lawyer, may pay to the decedant’s estate the portion of
the fee attributable to the decedant’s work; and, most relevant
for our purposes, “an agreement by a lawyer with his firm, part-
nner, or associate may provide for the payment of money, over a
reasonable period of time after his death, to his estate or to one
or more specified persons.”41

It should first be noted that this proscription is included not

41. Id. DR 3-102(A)(1).
in Canon 2, which deals with fees, but in Canon 3, which states: "A Lawyer Should Assist In Preventing the Unauthorized Practice of Law." The "justification" for the placement of the rule (and, perhaps, for the rule itself) is found in Ethical Consideration 3-8:

Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law. (emphasis added)

Although I do not believe that the justification for the general fee sharing prohibition can withstand serious analysis, it is not my purpose to advocate the repeal of DR 3-102. But to the extent that the specific exceptions are justified because they do not aid or encourage the practice of law, that is equally true of the payment to the estate, or heirs or a deceased sole practitioner. The spouse of a deceased lawyer is no more encouraged to practice law if payments are made by a successor lawyer than if they are made by the deceased lawyer's former firm, partner or associate, and DR 3-102 should clearly recognize that fact. In other words, I concede that DR 3-102, read literally, prohibits payments to the estate or heirs by a successor lawyer. But the distinction between a firm, partner or associate on the one hand, and a successor lawyer on the other, bears no rational relationship to the perceived evil—the assisting in the unauthorized practice of law—and such distinction should be abolished in Canon 3.

There are, to be sure, significant differences between the sale of a practice by means of a pre-retirement agreement with appropriate safeguards negotiated by a selling attorney, and a post-death sale of a practice by a representative of the estate.
Those differences will be considered later, but whatever different treatment may be justified or required, DR 3-102 and EC 3-8 plainly provide no basis for any rational distinction between payments by a former firm and payments by a successor lawyer.

D. Conflict of Interest

Although it is arguable that none of the provisions of Canon 5 ("A Lawyer Should Exercise Independent Judgment on Behalf of A Client") apply directly to a lawyer who is selling his practice, it seems reasonably clear that such a lawyer has a potential conflict of interest. On the one hand, he is concerned with providing his former clients the most adequate representation possible, and will be looking for the lawyer best suited in terms of competence, integrity, and style to take over the particular practice. This desire is strengthened by the lawyer's concern for his own reputation (and perhaps his potential liability). It is quite unlikely that a lawyer who has spent his entire working life establishing a reputation for competence and honesty would risk the loss of that reputation for the sake of a marginally better financial arrangement.

On the other hand, there is no doubt a danger that the selling lawyer's willingness to recommend the purchaser to his clients may be affected by his self-interest in selling the practice, or in selling the practice to a specific individual. The nature of the conflict may depend upon the specific financial arrangements. For example, a contract which provides for gradually decreasing payments over a long period of time based on fees received from the seller's present clients, would create a relatively minor conflict. It is plainly in the self-interest of the lawyer to recommend a successor who will enjoy the confidence of the former clients, since each client who defects costs the seller money. In contrast, an outright sale for a fixed price presents an obvious case of conflict. The seller has no economic inducement to assure that the purchaser is appropriate. A sale on those terms more easily lends itself to the danger that the highest bidder, rather than the most appropriate attorney, will take over the practice. This danger is most acute when the seller is not the attorney (who has a reputation to protect) but rather the estate, which

42. See sections Sale by a Lawyer and Sale by the Estate, infra.
43. See text accompanying notes 33-39, supra.
may have fewer (or no) informal constraints on its behavior. Because the sale by the lawyer and the sale by his estate raise different problems and may require different rules, I shall discuss them separately.

(1) Sale by a Lawyer

A sale negotiated by a lawyer who is still practicing does not raise any unique problems of conflict of interest. The thrust of Canon 5 is not that there can be no conflict of interest between attorney and client, but rather that any conflict must be fully disclosed to the client, who then may choose to continue the relationship. That principle obviously applies to the sale of a practice. The selling lawyer has an obligation to his present clients which would require him to fully disclose all aspects of the proposed arrangement with the successor lawyer when recommending that the clients retain the successor. But, beyond that, the situation does not seem markedly different from any other in which there is a conflict and which, under the ABA Code, can be cured by full disclosure and informed consent. If the disclosure and client consent allow a lawyer to enter into a business transaction with his own client when their interests are in direct conflict, surely such disclosure and consent will cure any taint on a selling lawyer's recommendation of his successor. In short, unless we are to reconsider all of Canon 5, whatever conflict of interest problems are raised by the sale of a practice are easily solvable, at least in the case of the sale by the lawyer. If the lawyer has died without having provided for the disposition of his practice, the problems are more serious.

(2) Sale by the Estate

Sale of a practice by an estate would be accomplished by the personal representative, with court approval, and presumably with the informed approval of the heirs of the decedent.

I have already discussed the problem of sharing fees with a

44. See e.g., ABA Code DR 5-104(A) (1981) ("A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.").

45. Id. DR 5-104(A), ECs 5-2, 5-3. Whether the Code's solution to problems involving conflicts is appropriate is a subject for another day. See generally Morgan, supra note 37, at 727-32.
layperson. For the reasons stated, the prohibition makes no sense in this situation, and the ABA Code should be amended to eliminate any distinction between partnerships and solo practices in the context of payments to an estate.

However, if the sale is made by the estate, there is a more substantial confidentiality issue. Unlike the lawyer who negotiates the sale of his own practice, the personal representative and his attorney are strangers to the clients and, at least theoretically, whatever confidential material is included in the decedent's file and papers should not be revealed to either the personal representative or the attorney for the estate. But as a practical matter, it would be virtually impossible to comply with such a stringent rule. In the first place, the client must be notified of his attorney's death, presumably requiring at least a cursory look at the file to determine the client's whereabouts. Second, it is irresponsible for the estate's attorney not to at least review the file to determine if the client is in need of immediate action to avoid a foreclosure, the running of a statute of limitations, or the like. Third, the estate is, at a minimum, entitled to the fees earned by the decedent up to the time of his death, and it is unlikely that the estate can determine the amount owed to it without some review of the file. Under the circumstances, and particularly with advance court approval, the attorney for the estate should not be precluded from reviewing the file nor should the problem of confidentiality, in itself, preclude the sale of the practice of a deceased attorney.

In fact, although there may be other problems for the lawyer who examines the decedent's files (he may, for example, find himself disqualified from representing someone opposing the individual whose file he reviewed), the confidentiality issue seems

46. See text accompanying notes 40-42, supra.
47. It should be noted that payments to the estate of a deceased partner may be based on earnings of the firm subsequent to the death of the partner. ABA Comm. on Professional Ethics, Formal Op. 327 (1971) (overruling prior opinions). To the extent that a major concern is that the purchasing lawyer will try to recoup payments by raising fees or reducing services, the same concern is present in partnership agreements by which an estate is paid portions of fees which the decedent had no hand in obtaining or earning. See Sterrett, supra note 3, at 313-15.
49. It is arguable that the estate representative would be entitled to review the files under DR 4-101(C)(4), which allows a lawyer to reveal confidences or secrets necessary to collect a fee, or under DR 4-101(C)(2), if a prior court order is obtained.
much overemphasized. To adhere rigidly to it could mean that the decedent’s secretary, who is not a lawyer but is properly aware of confidential information, could review files and inform clients of their options, but a trained lawyer who has no economic interest in the client’s matter could not. Such a rule makes little sense, and for purposes of Canon 4, it would be better to treat the personal representative and his attorney as functionally equivalent to the other non-partners and non-associates who have access to a lawyer’s files. Certainly, if advance court approval is obtained, it is difficult to see why this situation presents more or greater danger to the letter and spirit of Canon 4 than does the revealing of information to secretaries, investigators, paraprofessionals and the like. In summary, although the problems are different from those of the retiring lawyer, it is not clear that the perceived violation of DR 4-101 justifies the preclusion of the sale of a practice by an estate.

The conflict of interest problem, however, is substantially more serious than in the case of a retiring lawyer. First, and perhaps most importantly, the effect of the informal constraints that I posited earlier are substantially lessened. Unlike the retiring lawyer, his personal representative has no obvious interest in the reputational aspect of assuring a sale to an appropriate successor. That does not mean, of course, that a personal representative might not be concerned about the effect of the sale on the reputation of the decedent, but common sense suggests that the strength of that concern is likely to be substantially less than if the decedent were the seller.

Second, there is no possibility of any on-going relationship, however informal, between the former lawyer and his clients or between the former lawyer and his successor.

50. See ABA Code DR 4-101(D); EC 4-2 (1981). The ABA has opined that “[i]t is entirely proper for the professional colleagues of a deceased lawyer, out of regard for him, and with the approval of the widow or personal representative, to take such steps as are necessary to protect the immediate interests of his clients and to advise such clients that they are doing so, making it clear to the clients that the papers of the latter will be turned over promptly to any other attorney whom the client may desire to designate.” ABA Comm. on Professional Ethics and Grievances, Formal Op. 266 (1945).
Third, unlike the decedent, the estate representative stands in a fiduciary relationship to the estate and its beneficiaries. As a result, there is at least some exposure to liability if the sale of the practice did not bring the “best” price. That is, the informal constraints that would prevent improper sales for a relatively small additional amount, are not only lessened, but may be in conflict with a fiduciary duty to obtain the best price possible from a successor attorney.

Fourth, the estate, unlike the retiring lawyer, is much less likely to enter into any long term arrangement. The desirability of closing the estate quickly, and the lack of any obvious interest in the welfare of the decedent’s clients, substantially increase the likelihood of a cash sale of the practice—precisely the situation in which the danger to the clients is the greatest.

It is not completely clear that these added risks should in all cases preclude the sale of a practice by an estate. Perhaps court approval of the sale after full disclosure of the investigations made and negotiations conducted with the purchaser, as well as the efforts to find other purchasers, would suffice. Certainly, a requirement that the estate maintain insurance would significantly minimize the risk to the clients, but such a requirement might be impractical. In any event, the risks and considerations involved are different and approval of a “retirement” sale does not preclude disapproval of an “estate” sale.

Assuming that estate sales were allowed, if the sale were negotiated by the attorney for the estate, he should be precluded from representing any of the decedent’s former clients. While this proscription may appear overbroad, it is desirable for several reasons. First, the possibility of placing undue pressure on the client to retain the estate’s attorney is strong, particularly if there is a need for immediate action. Second, if the estate attorney were allowed to solicit there would be a strong temptation for him to solicit only the “good” cases or clients, leaving the other clients to fend for themselves with little time and effort being given to assist them. Third, allowing the estate attorney to

52. Again, I am talking only about the sale of goodwill. Obviously, the estate could sell tangible assets, and would be entitled to fees earned by the decedent prior to his death.
purchase some or all of the practice places him in a clear conflict of interest with his client—the estate—since any fee allocation which benefits his client operates to his detriment. Consequently, on balance, it would be best to preclude the acceptance of any client by the attorney for the estate. To deal with situations in which such a rule would create a real hardship to a particular client, court approval for the representation could be sought.

Even if estate sales were treated differently, there is one situation when the sale by an estate should be allowed with court approval. If the decedent entered into an arrangement with another lawyer for the sale of the practice upon death, and the clients were notified in the same way they would have been were the lawyer retiring, the estate should be allowed to complete the transaction. Here, although many of the problems raised do exist, the likelihood of a sale to an improper successor has been greatly diminished. The negotiations were conducted by the decedent, and notice to all clients was sent while the decedent was alive. Consequently, the informal constraints on the seller were present, the agreement was not made “under the gun,” and the clients have had some time to consider whether they wish to retain the successor or another lawyer. Finally, court approval of the transaction would add another level of protection to the interests of the decedent’s clients.

In summary, the sale of a law practice by an estate should be considered separately from the question of the sale by a retiring lawyer. Under some circumstances both might be appropriate, but the considerations discussed justify different safeguards, and may, in some circumstances, arguably justify total prohibition of the sale by an estate.53

E. ANTI-SOLICITATION RULES

Disciplinary Rule 2-103 provides, in relevant part, that

(B) A lawyer shall not compensate or give any-

53. Although this may be thought of as “unfair” to the heirs, it is important to remember that my premise is that the law ought to encourage professionally responsible behavior by lawyers, specifically, the planning for an orderly transition of clients’ affairs. By hypothesis, in the estate sale that has not been done. Under those circumstances, one can reasonably conclude that, on balance, the dangers to the clients inherent in the sale outweigh the benefits to the lawyer’s heirs.
thing of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment . . . .
(C) A lawyer shall not request a person or organization to recommend or promote the use of his services . . . except as authorized in DR 2-101 [regulating the content of advertising].

In light of decisions of the United States Supreme Court invalidating a variety of restrictions on methods by which attorneys obtain business, predictions about the validity of any anti-solicitation rule are somewhat speculative. Nonetheless, it does seem clear after Ohralik v. Ohio State Bar Association that activity which is likely to involve overreaching or undue influence may generally be prohibited and subjected to disciplinary sanctions regardless of whether harm has been demonstrated in a specific case. Yet, it is clear from the Code that the anti-solicitation prohibitions are not intended to apply to an attorney’s communications with his clients. Disciplinary Rule 2-104 allows the lawyer to accept employment obtained through direct solicitation of a former or present client. That, together with the various opinions interpreting Disciplinary Rule 2-103(B) and (C), and its predecessors, Canons 27 and 28 of the Canons

56. See ABA Code DR 2-104(A) (1981) (“A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: (1) A lawyer may accept employment by . . . one whom the lawyer reasonably believes to be a client.”).
57. ABA Code DR 2-103(B) (“A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment. . . . ”).
58. Id. DR 2-103(C) (“A lawyer shall not request a person or organization to recommend or promote the use of his services. . . . ”).
59. AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS Canon 27 (“It is unprofessional to solicit professional employment . . . through touters or by personal communications or interviews not warranted by personal relations . . . .”)
60. Id. Canon 28 provided:
   “It is disreputable . . . to breed litigation by seeking out those with claims . . . in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate [those] who may succeed, under the guise of giving disinterested friendly advice, in influencing [potential clients] to seek his profes-
of Professional Ethics, makes it reasonably clear that the major evils to be prohibited are the employment of cappers and runners compensated on a per capita basis and/or the splitting of fees in violation of Disciplinary Rules 2-107 and 3-102. That does not mean, of course, that payment by a successor is not literally covered by the rule. But if there are legitimate concerns about the latter situation they are certainly of a different nature and magnitude than those which resulted in the enactment of Canons 27 and 28, and Disciplinary Rule 2-103.

For all the reasons already discussed, DR 2-103 should be amended to exclude cases in which the compensation and recommendation were given in the context of the sale of a law practice. Such an amendment would do no violence to the legitimate concerns underlying that Disciplinary Rule and would be a much more satisfactory solution than an opinion “interpreting” DR 2-103, inasmuch as the latter would not preclude a State Bar from rejecting the interpretation and subjecting both the selling and purchasing lawyers to disciplinary proceedings.

In short, I concede the potential violations of Disciplinary Rule 2-103 as it presently exists. I believe, though, that it was not intended to deal with the issue at hand and that it should be amended to clearly state that fact. Even if I am wrong about the intent of the draftsmen of the Canons and the Code, I hope that what I have already said justifies the nonapplication of the rule to the seller and purchaser of a law practice.

F. RESTRICTIONS ON THE RIGHT TO PRACTICE

Disciplinary Rule 2-108(A) provides that “[a] lawyer shall not be a party to or participate in a partnership or employment agreement that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.”

Although the basis for the general prohibition is somewhat unclear, the policy underlying the exception is plainly applica-

62. See ABA Comm. on Professional Ethics, Formal Op. 300 (1971) (covenant im-
ble to the situation in which the price paid to the seller is determined in part by the fees generated by his former practice. Whether a retired lawyer is being compensated by his former firm, or by a successor attorney, a reasonable restrictive covenant serves the same purpose—to prevent the retiree from capitalizing on the good will that he presumably bargained away in the compensation agreement.

G. THE RELEVANCE OF CANONS 1 AND 6

To this point, I have discussed the rules which collectively have been interpreted to prohibit the sale of a law practice, and have attempted to demonstrate that they either do not, or should not operate as a blanket prohibition. In doing so, I have tried to isolate the appropriate and legitimate concerns that should be specifically addressed by any proposed changes in the Code. But there is another consideration. If the legal profession takes seriously the admonition of Canon 1 that “A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession”, and of Canon 6 that “A Lawyer Should Represent a Client Competently,” then there is an affirmative obligation not only to authorize, but to encourage the orderly transition of a client’s affairs. In the case of a sole practitioner that transition can best be accomplished by an honest and above board transaction between a lawyer and his proposed successor, with full disclosure to all clients and adequate protection of their rights and legitimate expectations.

Ethical Consideration 6-4 tells us that “[h]aving undertaken representation, a lawyer should use proper care to safeguard the interests of his client.” Those interests do not cease to exist when the lawyer retires or dies. To force the client to fend for proper because it will lead to bartering in clients); ABA Comm. on Professional Ethics Informal Op. 1072 (1968); Note, Attorneys Must Not Enter into Partnership Agreements Prohibiting Themselves from Representing Clients Upon Termination of the Partnership, 4 FORDHAM URB. L.J. 195 (1975) (emphasizing the need to determine the actual effect of the agreement on a client’s choice of counsel).

63. It is arguable that the provision contemplates only employment agreements with restrictive covenants and, hence, is inapplicable to sales of law practices. For purposes of discussion I shall assume its applicability to all agreements between lawyers.

64. Ethical Considerations aside, the restrictions must be independently reasonable. See, e.g., CALIF. BUS. & PROF. CODE §§ 16601-16602 (West 1964), limiting the scope of such agreements to the geographic area in which the seller was carrying on his business and to the time that the purchaser or his assignee is carrying on a like business.
himself at such times is professional irresponsibility. Yet the present code, at least as interpreted, precludes the honest and competent lawyer from making an arrangement that would provide the client adequate information to make a decision about a successor, while at the same time allowing such a lawyer the economic security that his colleagues in partnerships are given without restriction. 65

III. CONCLUSION

My perspective has been two-fold. From the standpoint of a sole practitioner, I am troubled by a rule which encourages a sham transaction if I or my heirs are to realize on the good will I have created over my professional life. From the standpoint of a

65. Perhaps because of this, the Standing Committee on Professional Responsibility and Conduct of the State Bar of California has proposed the adoption of a new Rule of Professional Conduct. Proposed Rule 2-112, at the present reads: Rule 2-112. Sale or Purchase of a Law Practice.

(A) A law practice of a member or deceased member of the State Bar or a law firm, including consideration for good will, may be sold to or purchased by another member of the State Bar or law firm. The total fee charged to clients shall not be increased solely by reason of the payment of consideration for the good will or other intangible assets of the practice.

(B) If the sale will involve the transfer of responsibility for the work on behalf of the seller's clients, then notice pursuant to the provisions of this rule must be given in all other sales and purchases.

(C) The seller must notify clients in writing that an interest in the law practice is being sold to the purchaser and that the clients have the right to retain other counsel and to take possession of their files. This notification must comply with the provisions of rule 2-101(A)(1)-(6), Rules of Professional Conduct, and the seller must disclose any conflict of interest.

(D) The purchaser shall take reasonable steps to assure that the seller has complied with subdivision (C) of this rule.

The Committee proposal makes no distinction between sales by an estate and sales by a retiring lawyer, and the Committee report did not consider the possibility of such distinction. The Standing Committee on Professional Responsibility and Conduct, Report and Recommendations Concerning Proposed New Rule 2-112, Rules of Professional Conduct (Attorneys' Sales or Purchases of Law Practices) (August 29, 1981).

In addition, the proposed rule would apparently apply in cases where a retiring partner or his estate received compensation from his former firm. The purpose of including such arrangements was to prevent avoidance of the disclosure provisions of the rule by the formation of "quickie" partnerships. Id. at 8. The Committee recognized the practical difficulties that such inclusion creates for large or medium sized firms in which partnership interests change frequently. Id. Presumably, this will be one of the major issues considered by the State Bar Board of Governors in deciding whether to recommend approval of the rule to the California Supreme Court. (As of this writing, the Board of Governors has not reviewed or considered the Committee's Recommendations.)
client, I am disturbed at the possibility of receiving my file in the mail with a form note suggesting that I seek new counsel because my attorney has been discouraged from spending time planning for the disposition of his practice.

Obviously, I am not asserting that there are no problems if sales of law practices were allowed. Indeed, my whole point is that if we identify the problems specifically enough, we can adopt rules tailored to those problems. Nor do I suggest that there might not be abuses of any relaxation of the present restrictions. As already pointed out, any change in the rules with respect to sales by an estate ought to be very carefully considered, and it may well be that on balance it is wiser to prohibit such sales in most or even all cases.

Finally, I certainly do not want to underestimate the practical difficulties involved in the sale of a practice. How does one value the practice until the confidentiality waiver is given? How does one assure that the successor attorney does not simply skim the cream, but provides service to all of a retiring lawyer's clients? How full must disclosure to clients be to be considered adequate? How much can a lawyer legitimately try to influence his clients? What, if any, liability might the selling lawyer or estate incur, and what is his or its legal duty to former clients? Can insurance be obtained at a reasonable cost? On a different note, what tax or marital property consequences will flow from recognition of the legitimacy of such sales. I am sure other issues will arise, and I do not pretend to have solutions to them. I do believe, though, that the time has come to review in a comprehensive and analytical fashion, the rules governing sales of law practices, and determine how best the profession can serve and accommodate the interests of both clients and lawyers in a professionally responsible manner.

66. See text section on Sale by the Estate.