South Carolina Law Review

Volume 50
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 12

Summer 1999

Professional Responsibility

Nina Fields

THE SALE OF A LAW PRACTICE IN SOUTH CAROLINA: THE IMPACT OF MODEL RULE 1.17 ON SOLE PRACTITIONERS AND THEIR CLIENTS

I. INTRODUCTION

Historically, most jurisdictions considered the sale of a law practice by a sole practitioner a violation of ethical standards.[1] Although no one rule found in the American Bar Association's Model Rules of Professional Conduct ("Model Rules") specifically stated that a law practice's goodwill could not be sold, several provisions indirectly made such a sale impermissible. For example, Model Rule 7.2(c) prohibited a lawyer from giving "anything of value to a person for recommending the lawyer's services,"[2] and Model Rule 5.4(a) forbade lawyers from sharing legal fees with nonlawyers (making it unethical to purchase a law practice from the estate of a deceased attorney).[3] A major reason for the prohibition concerns a lawyer's duty of confidentiality to his clients.[4] In conjunction with the sale of a law practice, there is the fear of potential sales of client secrets to outside lawyers, resulting in serious ethical problems.[5] A general premise of legal ethics was, and still is, that "[t]he practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will."[6] Rule 1.17, adopted in South Carolina in 1998, allows the sale of a law practice while addressing these ethical dilemmas and preserves the integrity of the attorney-client relationship.

The practical application of the pre-Rule 1.17 ethical requirements resulted in hardship for many lawyers, particularly sole practitioners, who make up approximately forty to fifty percent of the legal community in South Carolina.[7] Unlike retiring partners or shareholders of law firms with co-owners,

---

1. *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 91:801 (1991) [hereinafter ABA/BNA MANUAL].

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(c) (1983) (amended 1990) [hereinafter FORMER MODEL RULES]. The Model Rules originally were adopted in 1983 by the House of Delegates of the American Bar Association. MODEL RULES OF PROFESSIONAL CONDUCT viii (1998) [hereinafter CURRENT MODEL RULES]. Since the adoption of Model Rule 1.17 in 1990, the American Bar Association (ABA) amended Model Rule 7.2(c) to exclude the prohibition of giving something of value in connection with the sale of a law practice. *See id.* Rule 7.2(c).

3. FORMER MODEL RULES Rule 5.4(a) (1983) (amended 1990). Model Rule 5.4(a)(2) now provides that a lawyer may share fees with a nonlawyer pursuant to the sale of a law practice. CURRENT MODEL RULES Rule 5.4(a)(2) (1998).

4. *See* FORMER MODEL RULES Rule 1.6 (1983); CURRENT MODEL RULES Rule 1.6 (1998).

5. ABA/BNA MANUAL, *supra* note 1, at 91:805.

6. CURRENT MODEL RULES Rule 1.17 cmt. 1 (1998).

7. Interview with J. Steedley Bogan, Director of the South Carolina Bar Law Office Management Assistance Program, in Columbia, S.C. (Sept. 15, 1998).

each of whom can benefit by receiving an allocation of goodwill,[8] ethical standards limited the sole practitioner to selling only the tangible assets of the office.[9] Unfortunately, in order to avoid the rule's parameters, some sole practitioners resorted to unethical methods. Unscrupulous lawyers often received goodwill payments by inflating the value of tangible assets or by forming "quickie" or "sham" partnerships.[10] In addition to harming sole practitioners, the prohibition on sales of law practices harmed clients. The sudden death or retirement of a lawyer forced clients to search for representation on their own.[11] By permitting the sale of a practice, clients are protected during a "transitional period."[12]

In response to these problems, California was the first to amend its rules of professional responsibility to allow, with certain safeguards, the sale of a law practice.[13] The American Bar Association quickly followed with Model Rule 1.17, and a growing number of states now permit the sale of law practices.[14] The Professional Responsibility Committee of the South Carolina Bar Association proposed an amendment to its Rules of Professional Conduct allowing sole practitioners to enjoy the same advantages as lawyers practicing in firms, such as the value of goodwill.[15] Ultimately the South Carolina Supreme Court approved Rule 1.17, and it became effective on January 8, 1998.[16]

This Note analyzes the language and impact of Model Rule 1.17 in South Carolina. The Model Rule's requirements are evaluated from the perspective of fairness to clients as well as to sole practitioners whose financial

---

8. *See infra* Part IV.A.2.

9. Tangible assets include, for example, the building, books, equipment, and possibly accounts receivable. Leslie A. Minkus, *The Sale of a Law Practice: Toward a Professionally Responsible Approach*, 12 GOLDEN GATE U. L. REV. 353, 355 (1982).

10. *See* Stephen E. Kalish, *The Sale of a Law Practice: The Model Rules of Professional Conduct Point in a New Direction*, 39 U. MIAMI L. REV. 471, 476 (1985); Minkus, *supra* note 9, at 357; Alice Neece Moseley et al., *An Overview of the Revised North Carolina Rules of Professional Conduct: An Examination of the Interests Promoted and Subordinated*, 32 WAKE FOREST L. REV. 939, 955 (1997); James K. Sterrett, II, *The Sale of a Law Practice*, 121 U. PA. L. REV. 306, 308 (1972); Barton T. Crawford, Comment, *The Sale of a Legal Practice in North Carolina: Goodwill and Discrimination Against the Sole Practitioner*, 32 WAKE FOREST L. REV. 993, 1000 (1997); Interview with J. Steedley Bogan, *supra* note 7.

11. *See* Joanne Pelton Pitulla, *When a Solo Takes Down the Shingle*, *in* AMERICAN BAR ASSOCIATION, SOLO & SMALL FIRM MODEL OFFICE PROJECT INFORMATIONAL PACKET: THE RIGHT OF A SOLO PRACTITIONER TO SELL A LAW PRACTICE 191, 195 (1995).

12. *See id.* at 191.

13. ABA/BNA MANUAL, *supra* note 1, at 91:801. The Model Rule is not identical to California's Rule 2-300; however, both contain safeguards such as notification of the sale to clients and restrictions on the increase of fees pursuant to the sale. *Id. Compare* CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-300 (1996), *with* CURRENT MODEL RULES Rule 1.17 (1998).

14. The following states are among those with rules similar to Model Rule 1.17: Alaska, California, Florida, Hawaii, Michigan, Missouri, New Jersey, and Wisconsin. *See* Pitulla, *supra* note 11, at 194.

15. Interview with J. Steedley Bogan, *supra* note 7.

16. S.C. APP. CT. R. 407, R. 1.17.

interests formerly were prejudiced by prior practices. This Note also discusses the concept of goodwill and how it is valued. Finally, various criticisms of Rule 1.17 are evaluated.

II. HISTORY OF THE SALE OF A LAW PRACTICE'S GOODWILL

Despite the perceived prohibition on the sale of a law practice's goodwill, the Model Rules of Professional Conduct contained no express provision prohibiting such a sale.[17] Instead, the prohibition was based on the potential violation of several ethical rules.[18] In an unpublished opinion, the North Carolina Bar Ethics Committee concluded that while the sale of a law practice was forbidden, no specific rules were violated. Rather, it concluded that such a sale impinged on the "essence of the professional relationship between a lawyer and his clients."[19] Specifically, the Committee believed that the sale of a law practice, including goodwill, would violate the duty of confidentiality, the proscription against giving something of value to another in exchange for a recommendation, and the rule prohibiting the splitting of fees between lawyers and nonlawyers.[20]

Considering the potential violation of ethical standards, one might wonder why a sole practitioner would not simply sell the tangible assets of the business without worrying about goodwill. The answer is that goodwill is possibly the most important asset of a lawyer's practice.[21] Model Rule 1.17 recognizes that client loyalty is an "asset of value"[22] and permits attorneys selling their practices to be compensated for that asset as they are for any other.

---

17. Kalish, *supra* note 10, at 478; Minkus, *supra* note 9, at 355; Crawford, *supra* note 10, at 1009. Professor Minkus noted that the only specific reference to the sale of a law practice was in Ethical Consideration 4-6, which provides: "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." Minkus, *supra* note 9, at 355 n.8 (quoting ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1979)). Like the Model Rules, South Carolina did not make any explicit mention of the sale of a law practice prior to Rule 1.17.

18. *See, e.g.*, FORMER MODEL RULES Rule 1.6 (1983) (prohibiting disclosure of client confidences); *id.* Rule 5.4(a) (1983) (amended 1990) (prohibiting a lawyer from sharing fees with a nonlawyer); *id.* RULE 5.6 (1983) (amended 1990) (prohibiting covenants not to compete among lawyers); *id.* RULE 7.2(c) (1983) (amended 1990) (prohibiting lawyer referrals in return for something of value). Model Rules 5.4(a), 5.6, and 7.2(c) were amended in 1990 to eliminate the prohibition on the sale of a law practice. *See* CURRENT MODEL RULES app. a at 113 (1998).

19. Crawford, *supra* note 10, at 1009 (quoting North Carolina Comm. on Ethics and Grievances, Ethics Decision 234 (1993) (unpublished manuscript, on file with *South Carolina Law Review*)).

20. *Id.* at 1010-11; *see also* Moseley et al., *supra* note 10, at 955.

21. *See* Scott M. Schoenwald, Model Rule *1.17 and the Ethical Sale of Law Practices: A Critical Analysis*, 7 GEO. J. LEGAL ETHICS 395, 407 (1993); Demetrios Dimitriou, *Purchase or Sale of a Solo Practice: What Should Be Your Concerns?*, LAW PRAC. MGMT., Nov.-Dec. 1993, at 44, 44.

22. ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING 44 (Supp. 1993).

A. *Goodwill Defined*

Goodwill has numerous definitions. Generally, it is an intangible asset that has been interpreted broadly.[23] For example, goodwill is the "'going concern' value of a business"[24] or the "tendency of satisfied clients to give the lawyer their future legal business."[25] More specifically, goodwill is defined as "the expectation of continued public patronage, and a client base that can hopefully be transferred to the purchasing attorney"[26] or something that is "evidenced by general public patronage and is reflected in the increase in profits beyond those that may be expected from the mere use of capital."[27] Model Rule 1.17 allows the sale of goodwill, but does not define it. The varying definitions of goodwill indicate a common element—its connection with future patronage of the business.

B. *Attempts to Circumvent the Prohibition on the Sale of Goodwill*

Sole practitioners attempted to avoid the prohibition on the sale of law practices (including goodwill) by utilizing two mechanisms enabling them to receive compensation for goodwill without directly violating the rules.[28] A lawyer could realize the value of goodwill by inflating the prices for tangible assets such as the building, the library, and the office equipment. Generally accompanying these inflated prices was a promise by the seller to refer the seller's clients to the purchaser's practice.[29] Inflating the price of tangible assets essentially resulted in a secret transfer of goodwill.[30]

A second mechanism lawyers employed to dilute the prohibition's impact was to enter "quickie" or "sham" partnerships.[31] This tactic, used by lawyers planning to retire, usually resulted in short-lived partnerships and agreements to compensate for goodwill upon the seller's retirement.[32] Under

---

23. *See* Schoenwald, *supra* note 21, at 406.

24. ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY 2:96 (2d ed. Aspen Law & Business 1998) (footnote omitted).

25. ABA/BNA MANUAL, *supra* note 1, at 91:803.

26. Dimitriou, *supra* note 21, at 44.

27. Swann v. Mitchell, 435 So. 2d 797, 799 (Fla. 1983); *see also In re* Brown, 150 N.E. 581, 582 (N.Y. 1926) (Cardozo, J.) ("Men will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers. It is then known as goodwill.") (citations omitted); Sterrett, *supra* note 10, at 309 (stating that goodwill is recognized by compensation for transferring client loyalties).

28. *See* Kalish, *supra* note 10, at 476; Moseley et al., *supra* note 10, at 955; Crawford, *supra* note 10, at 1000; Interview with J. Steedley Bogan, *supra* note 7.

29. *See* Pitulla, *supra* note 11, at 191-92.

30. *See* Kalish, *supra* note 10, at 476.

31. *See id.*; Moseley et al., *supra* note 10, at 955; Sterrett, *supra* note 10, at 308.

32. *See* Pitulla, *supra* note 11, at 191.

the auspice of a "partnership," an attorney could introduce her clients to the "partner" (in reality, the potential buyer), so they could develop a relationship, resulting in a greater likelihood that the seller's clients would remain with the buyer.[33] This type of partnership is potentially a violation of Rule 7.5(d)[34] because the parties' arrangement is not really to carry on a business together. As discussed below, this method of "quickie" partnerships potentially provides less protection for client confidences than does a transfer of ownership under Rule 1.17. Both of these methods—inflation of tangible asset price and pretend partnerships—are theoretically misrepresentations and deceptions designed to disguise goodwill.[35]

C. *Judicial Treatment of Goodwill and Potential Ethical Violations Prior to Rule 1.17*

Only a small number of reported cases deal with the sale of a law practice including goodwill. One commentator has suggested that the reasons for this is that courts "tacitly condone the practice" or that the two mechanisms for avoiding the prohibition are "so common that cases do not arise."[36] The cases in which courts have considered the sale of a law practice's goodwill indicate that such attempts were unsuccessful. In *Geffen v. Moss*[37] a California court declared invalid and unenforceable an agreement purporting to transfer the future patronage of a law practice because it was an attempt to transfer goodwill.[38] Similarly, a New York court in *Raphael v. Shapiro*[39] refused to uphold a contract for the sale of the goodwill of an attorney's practice.[40] In reaching this conclusion, the *Raphael* court pointed to the "unique" attorney-client relationship[41]—a "fiduciary relationship built on confidences and secrets."[42] In *Ryman v. Kennedy*[43] the Georgia Supreme Court invalidated an attempt to transfer goodwill for lack of consideration.[44] The court reasoned that goodwill could not survive a lawyer and that a promised referral was valueless and, therefore, could not constitute consideration.[45] In these cases, the courts

---

33. Interview with J. Steedley Bogan, *supra* note 7.

34. CURRENT MODEL RULES Rule 7.5(d) (1998) (allowing lawyers to "state or imply that they practice in a partnership . . . only when that is a fact").

35. Kalish, *supra* note 10, at 476.

36. *Id.* at 480.

37. 125 Cal. Rptr. 687 (Ct. App. 1975).

38. *Id.* at 693.

39. 587 N.Y.S.2d 68 (Sup. Ct. 1992).

40. *Id.* at 72.

41. *Id.* at 70.

42. *Id.*

43. 80 S.E. 551 (Ga. 1913).

44. *Id.* at 552.

45. *Id.* Essentially, the court found that there was only a chance that the seller's clients would agree to representation by the purchaser. Consequently, the referral would have had no value. *Id.*

directly prohibited the transfer of goodwill due to a general violation of public policy or to an attempt to protect lawyers' clients.

Furthermore, courts considering goodwill as it relates to law practices disagree on its existence.[46] In *Prahinski v. Prahinski*[47] the Maryland Supreme Court was not persuaded that the goodwill of a sole practice could be "separated from the reputation of the attorney. . . . [Moreover], goodwill generated by the attorney is personal to him and is not the kind of asset which can be divided."[48] The *Prahinski* court reasoned further that because "goodwill is not a saleable asset, it has no commercial value."[49] On the other hand, the court in *Geffen* concluded that goodwill existed but that its sale was against public policy at that time in California.[50] In a case involving a partner withdrawing from his law firm, the Ohio Supreme Court announced that although goodwill existed and could be ascertained, a withdrawing partner could not be compensated for it where the partnership agreement was silent regarding distribution of goodwill.[51] Prior to adopting Model Rule 1.17, the North Carolina Supreme Court cautiously allowed a practice's goodwill to be valued and equitably distributed in a divorce action.[52]

Prior to the adoption of Model Rule 1.17, courts considered other ethical factors relating to the sale of law practices aside from goodwill. In *O'Hara v. Ahlgren, Blumenfeld & Kempster*[53] the Illinois Supreme Court invalidated a contract for the sale of a law practice by the widow of a sole practitioner on the basis that the fee-sharing agreement violated public policy.[54] The court expressed its concern that fee agreements between lawyers and the representatives of deceased lawyers potentially allowed laypersons to influence clients' cases.[55] In contrast, an Illinois court in *Hicklin v. O'Brien*[56] enforced a covenant not to compete relating to the sale of a law practice and upheld the

---

46. Despite judicial uncertainty, other groups do express certainty as to the existence of goodwill. The ABA recognized the existence of a law practice's goodwill and the need for change regarding the prohibition of its sale by acknowledging the following: (1) that law firms have goodwill that can be calculated and transferred, (2) that only sole practitioners have been harmed by the inability to sell goodwill, and (3) that courts have recognized the existence of goodwill for the purpose of equitable distribution in divorce actions. *See* Schoenwald, *supra* note 21, at 409. Additional arguments for the existence of goodwill in a law practice include lawyers' claims that their clients "belong[ ] to them" and the fact that lawyers are willing to pay for goodwill. Kalish, *supra* note 10, at 475. "[T]he IRS has recognized that there can be goodwill associated with a solo law practice." *Id.* (footnote omitted).

47. 582 A.2d 784 (Md. 1990).

48. *Id.* at 790.

49. *Id.*

50. 125 Cal. Rptr. 687, 693 (Ct. App. 1975).

51. Spayd v. Turner, Granzow & Hollenkamp, 482 N.E.2d 1232, 1240 (Ohio 1985).

52. McLean v. McLean, 374 S.E.2d 376, 385 (N.C. 1988).

53. 537 N.E.2d 730 (Ill. 1989).

54. *Id.* at 734.

55. *Id.*; *see also* CURRENT MODEL RULES Rule 5.4(a) (1998) (prohibiting a lawyer from sharing fees with a nonlawyer and outlining certain exceptions).

56. 138 N.E.2d 47 (Ill. App. Ct. 1956).

sale.[57] Similarly, the Kansas Supreme Court upheld a contract for the sale of law practice between a law student and an attorney, including a covenant not to compete, in *Thorn v. Dinsmoor*.[58] Focusing on a different ethical aspect of the sale, a Washington court refused to enforce the contract for sale of a law practice because the court inferred a duty to refer clients as part of the consideration for sale of the practice, a violation of Washington's Rules of Professional Conduct.[59]

Virtually all of the cases addressing the sale of a law practice's goodwill prior to the adoption of Model Rule 1.17 declared that such a sale was invalid and unenforceable. Sole practitioners simply could not sell their practices and realize the value of the goodwill they had created in years of practice.

D. Valuing Goodwill in a Law Practice

With the adoption of Rule 1.17, lawyers can realize the value of the goodwill of their practices, but they are also confronted with the necessity of finding a way to value it accurately. Although computing the value of tangible assets such as the building, the library, and office equipment can be relatively simple, computing the value of a law practice's goodwill is difficult for law firms. The value of goodwill is based on expected future earnings, which is hard to predict because of their attributes such as the "unique relationship between the current attorney and his or her clients; the attorney's work habits; how the law practice is managed; and the transactional nature of many types of practices."[60] While the buyer wants the highest rate of return, the seller wants the highest purchase price. Through negotiations, they will meet somewhere in between.

One method for placing a value on a law practice is capitalization of earnings.[61] Also referred to as capitalization of normalized earnings, this method requires a normalized year to appraise future earnings.[62] In order to establish a normalized year, the last several years should be considered. However, if the practice is mainly concentrated in a particular area that has

57. *Id.* at 52.
58. 178 P. 445 (Kan. 1919).
59. Walsh v. Brousseau, 815 P.2d 828, 832 (Wash. Ct. App. 1991).
60. Carl E. Schultz, *Valuing a Law Practice*, WIS. LAW., Dec. 1991, at 11, 12.
61. Carl Kleinman, *Valuation of a Law Firm*, COMPLEAT LAW., Fall 1997, at 52.
62. Frederic E. Lieber, *Primer on the Valuation of Law Practices*, *in* VALUING PROFESSIONAL PRACTICES AND LICENSES: A GUIDE FOR THE MATRIMONIAL PRACTITIONER 10-1, 10-7 (Ronald L. Brown ed., 2d ed. Supp. 1997).

been or will be affected by changes in the law[63] or changes in the market,[64] the past several years may not be a good indication of what the future holds. In these circumstances, years that reflect similar conditions as the years to come with regard to laws or to the market should be evaluated. To determine the base or normalized year, the individual valuing the goodwill should average the past years.[65] Next, this base year is divided by a capitalization rate,[66] and the result is the law practice's value. In summary, this method involves placing a value on future cash flow based on expected future earnings and multiplying it by a desired rate of return.[67]

Another method, the excess earnings method, values goodwill by subtracting the value of a return on tangible items from the practice's total earnings.[68] Setting a value for the law practice using this method requires several steps. First, the fair market value of the tangible assets (the building, equipment, accounts receivable, etc.) should be determined.[69] A rate of return on the tangible assets should also be determined.[70] Next, as with the capitalization of earnings method, a normalized or base year must be established.[71] The fair market value of the tangible assets is multiplied by the rate of return on tangible assets, and the result is subtracted from the normalized year earnings. The remainder is excess earnings which are earnings that exceed the return on the tangible assets.[72] The excess earnings are divided by an appropriate capitalization rate "to arrive at the value of the intangible asset—goodwill."[73] The value of the goodwill plus the fair market value of the tangible assets equals the law practice's value.[74]

Aside from the values needed for the above methods, other factors are relevant to the sale price of a law practice. Riskiness of the business is an

---

63. Interview with John P. Freeman, Professor of Law, University of South Carolina School of Law, in Columbia, S.C. (Sept. 28, 1998). For example, if the practice being sold is largely a plaintiff's practice, looming tort reform should be considered. *Id.*

64. Lieber, *supra* note 62, at 10-9. For example, in a real estate practice, if there are drastic changes in the market or in interest rates, the past several years are not likely to be indicative of the next several years. *Id.*

65. *Id.* at 10-10. It may be helpful to compute a weighted average. *Id.*

66. *Id.* at 10-11. Capitalization rates usually range from a "high of .20 (multiple of 5) to a low of 1 (multiple of 1)." *Id.*

67. Kleinman, *supra* note 61, at 52.

68. *See* Lieber, *supra* note 62, at 10-11 to 10-14.

69. *Id.* at 10-12.

70. *Id.* at 10-12 to 10-13. Setting the rate of return on the tangible assets can be accomplished in the following ways: "consider[] rates that commercial lenders require on accounts receivable, rates finance companies or leasing companies require on equipment, and rates sought in real estate investments for properties similar to that which houses the practice." *Id.* at 10-13.

71. *Id.* at 10-12.

72. *Id.*

73. *Id.*

74. *Id.*

important factor in determining what the buyer is willing to pay.[75] For example the buyer will consider whether the particular type of practice is likely to become obsolete because of a change in the law. Another important consideration for buyers is what an average firm in the same community is making.[76] Other factors include competition in the area, the age of the law practice, and specialization of the practice.[77]

III. THE EFFECT OF MODEL RULE 1.17

A. The Language of Rule 1.17

Rule 1.17[78] significantly changes the Rules of Professional Conduct. The Rule serves as a great step forward, especially for sole practitioners. The Rule's general premise is that "[c]lients cannot be sold, but the opportunity to represent those clients, with their consent, can be sold to a lawyer competent to represent them under the new Rule."[79] The Rule allows a sole practitioner or firm to sell the practice, including its goodwill, to another sole practitioner, law partnership, law professional corporation, or law limited liability company.

The Rule mandates that such a sale be conditioned on several criteria. First, the seller is prohibited from continuing to practice law in the same geographical area.[80] In other words, the Rule allows lawyers to enter into valid agreements not to compete. Historically, covenants not to compete have not been allowed for lawyers because of the principle that clients should be able to select any lawyer to represent them.[81] However, Rule 1.17 allows the selling lawyer to work for a public agency which "provides legal services to the poor, or as in-house counsel to a business even in the geographic area in which the private practice was located."[82] Furthermore, returning to private practice in the same geographical area due to an "unanticipated change in circumstances" is

---

75. Interview with John P. Freeman, *supra* note 63.

76. *Id.*

77. Lieber, *supra* note 62, at 10-10 to 10-11.

78. S.C. APP. CT. R. 407, R. 1.17. Hereafter, references in the text to rules of professional conduct apply to South Carolina's version of the rules. Any differences between the Model Rules and the South Carolina rules are noted.

79. Pitulla, *supra* note 11, at 191.

80. Model Rule 1.17(a) provides jurisdictions with the option to elect either the language "in the geographic area" or "in the jurisdiction" for the restriction on the seller's ability to practice after a sale. CURRENT MODEL RULES Rule 1.17 (1998). Promoters of the South Carolina Rule wanted lawyers to be able to move to another area of the state and resume practice instead of imposing a blanket prohibition from practicing within the state again. Interview with J. Steedley Bogan, *supra* note 7. Consequently, the drafters of the rule chose "geographical area" instead of "in the jurisdiction." *See* S.C. APP. CT. R. 407, R. 1.17(a)(1).

81. *But see* Hicklin v. O'Brien, 138 N.E.2d 47, 52 (Ill. App. Ct. 1956) (enforcing covenant not to compete pursuant to sale of law practice).

82. S.C. APP. CT. R. 407, R. 1.17 cmt.

not a violation of the Rule.[83] Although returning to practice in this way does not violate Rule 1.17, a sales contract containing a covenant not to compete between the seller and purchaser may be breached if the seller does in fact resume practice in the same area.[84]

Secondly, the law practice must be "sold as an entirety."[85] The comments to Rule 1.17 indicate that this condition is not violated if the purchaser cannot take certain clients because of conflicts of interest or the clients' refusal to pay the purchaser's legal fees.[86] The entirety requirement is designed to protect clients "whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters."[87] This requirement prohibits purchasers from picking and choosing clients because of higher fees or more desirable cases.[88] An advocate of piecemeal sales of law practices criticizes this aspect of the Rule, suggesting that a seller whose practice encompasses many fields may have a difficult time locating a buyer that is competent in each area of the practice.[89] However, the problems with piecemeal sales far outweigh their benefits because a buyer not competent in a particular field (in order to protect his reputation and the well-being of clients) should become reasonably competent through study or associate someone who is competent.[90] It is doubtful that a purchaser would be charged with violating Rule 1.17 by choosing not to represent a particular client because of a serious deficiency of knowledge in the subject matter of the case. However, clients with less profitable cases will likely be overlooked by purchasers who are allowed to buy piecemeal.[91]

The third requirement imposed pursuant to the sale of a law practice under Rule 1.17 is notice to clients.[92] Active clients must be given written notice of the sale regarding:

> (i) the proposed sale[,] (ii) the terms of any proposed change in the fee arrangement . . .[,] (iii) the client's right to retain other counsel or to take possession of the client's file [, and] (iv) the fact that the client's

83. *Id.* The comments to the Rule provide the example of an attorney who sells his practice to become a judge and then desires to return to private practice upon retirement, resignation, electoral defeat, etc. *Id.*

84. *See* Moseley et al., *supra* note 10, at 957.

85. S.C. APP. CT. R. 407, R.1.17(a)(2).

86. *Id.* R. 1.17 cmt.

87. *Id.*

88. Moseley et al., *supra* note 10, at 956.

89. Schoenwald, *supra* note 21, at 417.

90. *See* S.C. APP. CT. R. 407, R. 1.1 (requiring that lawyers be competent or able to become competent when representing clients).

91. *See id.* R. 1.17 cmt.

92. *Id.* R. 1.17(a)(3).

> consent to the sale will be presumed[93] if the client does not take any action or does not otherwise object within forty-five (45) days[94] of the date of the mailing of the notice. . . .[95]

The Rule does not address whether a client's only opportunity to object to the sale is to "retain other counsel" or to "take possession of the . . . file."[96] However, it seems intuitive that if a majority of clients object to the proposed sale, a purchaser will not likely want to go through with it. For the purchaser, the potential profitability will not exist if its source, the former clients, is not part of the transaction.

In addition to written notice to active clients, notice must also be published in a "newspaper of general circulation in the geographical area in which the practice has been conducted"[97] so as to alert both active and inactive clients of the proposed sale. Along with the information provided by the written notice, the newspaper notice must inform clients that the seller will not transfer the file of an inactive client to the purchaser without the client's authorization.[98] The notice requirement is designed to protect lawyers' duty of confidentiality to their clients.[99] The Rule's comments suggest that general discussions during the purchase negotiations will not violate Rule 1.6's duty of confidentiality any more than would a lawyer's inquiry into associating another attorney on a particular case or merging with another law firm—two situations in which "client consent is not required."[100] Only when client-specific discussions arise is consent required.[101]

Finally, in order to satisfy Rule 1.17, the fees charged by the purchaser cannot be increased solely by reason of the sale.[102] The Rule requires that the purchaser charge fees no higher than those charged for "substantially similar services prior to the initiation of the purchase negotiations."[103] Essentially, this

---

93. If a client cannot be given notice, the Model Rule requires a court order to transfer the client's file to the new purchaser. CURRENT MODEL RULES Rule 1.17(c) (1998). South Carolina's procedure promotes a smoother transition and does not require the added time or expense of a court order. Interview with J. Steedley Bogan, *supra* note 7.

94. The Model Rule allows a client to object to the sale on or before the expiration of 90 days from the date the client receives notice. Advocates of the South Carolina Rule believed that 45 days was sufficient and allowed the transaction to proceed more quickly. Interview with J. Steedley Bogan, *supra* note 7.

95. S.C. APP. CT. R. 407, R. 1.17(a)(3).

96. *Id.* R. 1.17(a)(3)(iii).

97. *Id.* R. 1.17(a)(4).

98. *Id.*

99. *See id.* R. 1.6.

100. *Id.* R. 1.17 cmt.

101. *Id.*

102. *Id.* R. 1.17(b).

103. *Id.*

provision prohibits the purchaser from increasing fees in order to finance the sale. Thus, Rule 1.17 protects clients from being surprised with unexpected fees and ensures stability of fees. This part of the Rule in particular protects clients who have already invested substantial time in their cases and would experience hardship from an inability to pay the purchaser's fees.

In addition to the requirements of Rule 1.17, the comments to the Rule make clear that attorneys involved in the sale of a law practice are subject to the same ethical rules that apply when associating another attorney in a client matter.[104] For example, the seller must find a competent purchaser,[105] both the seller and purchaser must identify and remedy conflict of interest problems,[106] and they both must protect confidential information obtained during the course of representation.[107]

Rule 1.17 is silent on how payment may be made to the seller.[108] For example, must a buyer pay a lump sum or may the buyer pay the seller a percentage of the revenues during a specified number of years?[109] It is possible that anything other than a lump sum payment could violate fee-splitting prohibitions.[110] By not addressing the issue of payment, the Rule permits courts to allow the parties to set their own method of payment provided that general ethical standards are maintained.

B. Modification of Other Rules of Professional Responsibility Pursuant to Model Rule 1.17

The adoption of Model Rule 1.17 triggered the need to make changes to other Rules of Professional Conduct. First, Rule 5.6, which prohibits covenants not to compete among lawyers, was modified by Comment 3 to exclude the restriction on such covenants within the context of a sale of a law practice.[111] Secondly, Rule 5.4 provides that a "lawyer or law firm shall not share legal fees with a nonlawyer, except that . . . a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer

---

104. *Id.* R. 1.17 cmt.
105. *See id.* R. 1.1.
106. *See id.* R. 1.7, 1.9.
107. *See id.* R. 1.6, 1.9.
108. Schoenwald, *supra* note 21, at 423.
109. *See* Philadelphia Bar Ass'n Professional Guidance Committee, Op. 96-1 (May 1996), *in* NAT'L. REP. ON LEGAL ETHICS & PROF. RESP. 55 (1996) (suggesting that an attorney could sell a law practice for a percentage of revenues generated by former clients as long as the arrangement was included in the seller's notice to clients).
110. Schoenwald, *supra* note 21, at 424.
111. CURRENT MODEL RULES Rule 5.6 cmt. 3 (1998). Because this is a general discussion of the Rule and its effect on other rules, the Model Rules are referenced in this section instead of the South Carolina Rules. South Carolina did not specifically amend Rule 5.6. Instead, Rule 1.17(c) provides that Rule 5.6 is not violated by restrictions on practicing pursuant to the sale of a law practice. *See* S.C. APP. CT. R. 407, R. 1.17(c).

the agreed-upon purchase price."[112] Third, Rule 7.2, which prohibits a lawyer from paying for a referral, was revised to allow a lawyer to "pay for a law practice in accordance with Rule 1.17."[113]

IV. CRITICAL ANALYSIS OF MODEL RULE 1.17

A. The Need for Change in the Rules of Professional Responsibility

1. Client Protection

The need to protect sole practitioners and their clients prompted a necessary change in the old rules making the sale of goodwill possible. Permitting the sale of law practices can be considered a "consumer protection measure."[114] The Rule provides an effective mechanism for handling client matters when lawyers retire. Advocates for the Rule describe it as "protecting clients during a transitional period"[115] and as an improvement over the old rules which "discourage[d] the organized transfer of client matters."[116] In theory, if a lawyer were to die or suddenly retire, clients in a jurisdiction that has not adopted Rule 1.17 (or its equivalent) are at risk that their files will not be handled appropriately or that they will be on their own to seek out new representation. Clients with less knowledge about the legal community may have difficulty finding an attorney with the expertise to handle their particular matter or finding competent representation at all. Rule 1.17 provides a medium through which the selling attorney (or the seller's estate) can locate competent representation for clients and can ensure that pending matters are handled properly.

In addition to professional standards concerning competent representation and protection of client confidences, lawyers should not withdraw from a case unless extenuating circumstances exist.[117] The less scrupulous, however, frustrated with an inability to recognize the practice's goodwill in a sale, may be tempted to retire from the practice suddenly without handling client matters as thoroughly as required. Similarly, if the estate of a deceased attorney must sell the practice, meticulous attention to client matters

---

112. CURRENT MODEL RULES Rule 5.4(a), (a)(2) (1998). In South Carolina Rule 5.4 was not amended. However, the comments to Rule 1.17 imply that Rule 5.4 will not be violated pursuant to the sale of a law practice. *See* S.C. APP. CT. R. 407, R. 1.17 cmt.

113. CURRENT MODEL RULES Rule 7.2(c)(3) (1998). South Carolina did not modify Rule 7.2 when it adopted Rule 1.17. This may present a problem because client referrals will be sought by the purchaser in connection with the sale of the practice. Without a referral, is the purchaser really getting the practice's goodwill?

114. ABA/BNA MANUAL, *supra* note 1, at 91:806 (citation omitted).

115. Pitulla, *supra* note 11, at 191.

116. Moseley et al., *supra* note 10, at 955.

117. *See* S.C. APP. CT. R. 407, R. 1.16.

may fall by the wayside if the beneficiaries can be compensated only for the practice's tangible assets. By allowing the sale of law practices including goodwill, Rule 1.17 provides a substantial monetary incentive for sellers to treat their client files with care.

2. *Equalizing the Disparity Between Sole Practitioners and Members of Firms*

In addition to serving as a client protection device, Rule 1.17 eliminates the great disparity between sole practitioners and partners or shareholders of law firms.[118] For many years sole practitioners have not enjoyed the same benefits as lawyers in multimember law firms. While courts recognized the inherent business aspect of a law firm and the need to make the practice of law equal to other professions by, for example, upholding noncompete agreements among partners,[119] the recognition of a sole practice as a business was continually ignored. In effect, ethical restrictions punished sole practitioners for their choice of business form. Multimember firms do not necessarily provide more qualified representation than a one-attorney practice; therefore, the old rule favoring firms over sole practitioners appears "unwise and inefficient."[120]

Traditionally, law firms enjoyed an advantage over sole practitioners in several ways. First, at death or retirement, a partner or shareholder (or the estate of the attorney) in a firm could be compensated for a share of the practice, including goodwill. In contrast, sole practitioners could rely only on savings or on the proceeds from the sale of the practice's tangible assets. This disparity had a "chilling effect on retirement planning for the elderly sole practitioner."[121] Moreover, it served as a kind of punishment to the attorney in a sole practice because, while partners could buy each other out upon retirement, the lone attorney could not sell.[122] Second, though a lawyer may have retired or died, the firm is generally allowed to retain that lawyer's name as part of its own name. One justification for allowing this retention (a part of a practice's goodwill) is that such retention conveys the firm's continuity and prestige to the public.[123] Clients realize that by employing a firm, they may not be represented specifically by the attorneys whose names comprise the firm's name. While this justification is understandable, it points to another disparity between sole practices and firms—namely, that a firm can recognize the goodwill of an attorney's name who is no longer practicing. A sole practitioner

118. ABA/BNA MANUAL, *supra* note 1, at 91:806.
119. *See, e.g.*, Howard v. Babcock, 863 P.2d 150, 156 (Cal. 1993).
120. Kalish, *supra* note 10, at 476.
121. Moseley et al., *supra* note 10, at 955.
122. *See* Kenneth L. Covell, *Ethical Considerations in Solo/Small Firm Practice*, COLO. LAW., Feb. 1996, at 19, 21; Crawford, *supra* note 10, at 999.
123. *See* Sterrett, *supra* note 10, at 322.

will never realize this benefit because of ethical requirements regarding firm names.[124] Finally, law firms can merge or add new partners without particular consideration for "client rights and confidentiality of files."[125] Clients of sole practitioners possess the security of knowing who enjoys access to their files—namely, the lawyer they hired. A purchaser of that practice must obtain consent from the client in order to open files. Thus, Rule 1.17 actually provides more protection to clients of sole practitioners because notice to, and consent from, the client are required before prospective buyers can obtain access to client files.

Permitting the sale of a sole practice's goodwill greatly reduces the disparity between law firms and sole practices and provides an incentive for lawyers to handle clients and their cases more effectively.[126] Such sales do a great service to clients by providing smooth transitions when the client's lawyer retires, becomes disabled, or dies. Without Rule 1.17, lawyers may be discouraged from going into sole practice for fear that years of hard work and establishment of a loyal client base will go unrecognized at the end of their career.

B. Protection of Client Confidences

The comment to Rule 1.17 states: "The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will."[127] One of the greatest criticisms of Rule 1.17 is that it "treat[s] clients as a type of merchandise."[128] While Model Rule 1.17 attempts to preserve ethical obligations to clients, adoption of the Rule prompts several concerns.

First, lawyers have a duty of confidentiality to their clients[129] that

---

124. *See* CURRENT MODEL RULES Rule 7.5(a) (1998) (prohibiting attorneys from using a firm name in violation of Model Rule 7.1). Model Rule 7.1 states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." *Id.* Rule 7.1. Thus, the purchasing sole practitioner would not be able to retain the selling attorney's name as part of the new firm's title because such a communication would be false. In turn, this is a benefit for which the seller will not be compensated. Theoretically, a retiring partner in a firm is paid for the continued use of his name through compensation for the goodwill of the practice. The firm, in turn, benefits from the goodwill associated with the continued use of the retiring partner's name.

125. Alan E. DeWoskin, *The Sale of a Law Practice*, COMPLEAT LAW., Fall 1997, at 48, 48.

126. For example, a sole practitioner reaching retirement age may not want to take a case that may take several years to resolve. With the application of Rule 1.17, the lawyer is assured that if she needs to retire before the case is completed, a purchasing lawyer can assume the case and the seller can be compensated for the future earnings from it. Without Rule 1.17, a lawyer may have no incentive to take such a case in the first place.

127. S.C. APP. CT. R. 407, R. 1.17 cmt.

128. ABA/BNA MANUAL, *supra* note 1, at 91:801.

129. S.C. APP. CT. R. 407, R. 1.6.

opponents of Rule 1.17 argue is threatened by the sale of a law practice.[130] Despite the requirement of notice before transferring files, several concerns prevail regarding confidences. First, "less sophisticated clients who receive these notices of pending sale may not fully understand them or their implications for maintaining client confidences."[131] Second, clients without pending legal matters may be unable to be reached within ninety days[132] and their files transferred without their knowledge.[133] Third, a critic of the Rule suggests that "by providing that the presumption of consent takes effect if the client does not object to the sale within ninety days[134] of *receiving* the notice of pending sale, Model Rule 1.17 establishes no certain way for the seller to determine when that period has elapsed."[135]

Proponents of Rule 1.17 suggest that, with the notice requirement, client confidences can be protected because the transfer should not occur until consent is given.[136] Moreover, during preliminary discussions between a purchaser and a seller, the potential purchaser will not have a permissible reason to seek the particulars of a client file.[137] The disclosure of general information about the practice (*e.g.*, kinds of cases and financial matters) should not violate confidentiality requirements.[138] Commentators also suggest that client confidentiality is more likely to be preserved under Rule 1.17 than in the case of a "quickie" partnership, where the client may not have consented to the remaining partner's access to files.[139] Because no formal regulation concerning consent to access of client files in law partnerships exists, if a "quickie" partnership is formed, clients may not know that their files are accessible to someone other than the attorney they hired. The same result occurs when a client hires a sole practitioner who later legitimately hires an associate or forms a partnership.[140] Consequently, sole practitioners who sell

130. *See* Schoenwald, *supra* note 21, at 419.

131. *Id.*

132. *See* CURRENT MODEL RULES Rule 1.17(c)(4) (1998).

133. Schoenwald, *supra* note 21, at 419 (footnote omitted). This situation could arise frequently in the case of clients who travel often or who maintain residences in more than one location during the year.

134. Schoenwald is referring to the Model Rule. In South Carolina, the period is 45 days. *See supra* note 94 and accompanying text.

135. Schoenwald, *supra* note 21, at 419. This problem may be reduced by requiring a mail method in which the client would be required to sign for the notice (*e.g.*, certified mail). *Id.* In South Carolina, this problem is solved because the 45 day period for notice begins on the day of *mailing*. *See* S.C. APP. CT. R. 407, R. 1.17(a)(3)(iv).

136. *See* Kalish, *supra* note 10, at 486; Minkus, *supra* note 9, at 360; Gayle L. Coy, Note, *Permitting the Sale of a Law Practice: Furthering the Interests of Both Attorneys and Their Clients*, 22 HOFSTRA L. REV. 969, 977 (1994).

137. Kalish, *supra* note 10, at 485. Kalish likens a potential buyer's inquiries into the profitability of the practice and its cases to a lawyer applying for a loan. The bank wants to know about the business's earning potential but not about specifics of the clients' cases. *Id.*

138. Dimitriou, *supra* note 21, at 47.

139. Kalish, *supra* note 10, at 487.

140. Minkus, *supra* note 9, at 359.

their practices provide their clients with more protection from breaches of the duty of confidentiality than the clients of law partnerships, legitimate or sham.

C. *Conflicts of Interest*

Another criticism of Rule 1.17 pertains to conflicts of interest.[141] Aside from the possibility that there may be a disqualifying conflict-of-interest problem because of the purchaser's current or former clients, a conflict can arise between the seller and his clients. A selling attorney should remember that the fiduciary duty to clients extends to suggesting other counsel.[142] The "highest bidder" problem is a substantial dilemma from the standpoint of protecting clients' interests.[143] A conflict-of-interest problem can arise when an attorney, in locating a purchaser, is motivated by financial self-interest and looks to the highest bidder rather than to the most competent buyer.[144] Ethical and careful lawyers will want to find the most competent buyer for their practices in order to protect former clients and the practice's reputation.

Although this problem is serious, other ethical rules ensure client protection in several ways. First, the purchaser has a duty to be competent.[145] Therefore, regardless of a seller's self-interest, the purchaser must provide clients with competent representation. Second, former clients harmed by the buyer's inadequate or incompetent representation may have a malpractice claim against the seller for negligently referring or selecting the buyer. If a conflict of interest occurs because of the sale, a seller may also be obligated to reimburse the client for the inconvenience and expense of finding another attorney.[146] Furthermore, the seller may be vicariously liable for cases undertaken before the sale of the practice.[147] Thus, if a seller motivated by financial self-interest sells a law practice to an incapable attorney, former clients possess legal recourse. For this reason, the seller should keep malpractice insurance that covers both himself and the buyer's negligence for a reasonable time after the sale.[148] An indemnity agreement between the purchaser and the seller or seller's estate for malpractice claims provides another means of protection for the selling attorney.[149]

---

141. *See generally* S.C. APP. CT. R. 407, R. 1.7, 1.9.

142. Crawford, *supra* note 10, at 996.

143. *Id.*

144. Sterrett, *supra* note 10, at 310; *see also* Minkus, *supra* note 9, at 368; Coy, *supra* note 136, at 973.

145. S.C. App. Ct. R. 407, R. 1.1. Rule 1.1 states that a lawyer must provide competent representation—not that the lawyer must necessarily be an expert in all fields of law. As long as the lawyer can provide competent representation through study or association with another attorney, the lawyer does not violate the rule.

146. Dimitriou, *supra* note 21, at 47.

147. Kalish, *supra* note 10, at 491. Although the seller remains liable for current cases, there should be no liability for the practice's new cases. *Id.* at 493.

148. Minkus, *supra* note 9, at 364-65.

149. Dimitriou, *supra* note 21, at 48.

Payment for the practice based on a percentage of fees from former clients rather than in a lump sum may reduce the possibility of a conflict-of-interest problem.[150] A seller whose payment depends on a percentage of future earnings from former clients would want to choose a buyer who is both competent and well-accepted by clients.[151] "Because a dissatisfied client will result in a smaller payment to the seller, the normal economics of the transaction suggest that the seller will exercise considerable care in selecting a buyer."[152] On the other hand, the seller who is compensated with one lump sum may have more of an incentive to get the highest price available at the time of sale. As discussed above, Rule 1.17 does not address how payment must be made.[153]

A unique conflict-of-interest problem arises when the estate of a deceased lawyer is the seller. The estate's fiduciary duty is to the family or beneficiaries of the deceased. A conflict arises because, while the highest price (not necessarily the most qualified lawyer) is best for the estate, it may not be best for the clients.[154] Additionally, the personal representative of the deceased attorney has no real concern for the reputation of the purchaser,[155] and there is "no possibility of any on-going relationship."[156] Rule 1.17 recognizes the problem of a practice being sold by a nonlawyer representing the estate who is not bound by Rules of Professional Conduct. Consequently, the Rule suggests that professional standards will be upheld by the *purchaser's* ethical obligations.[157] Despite this assumption, the likelihood that clients will be effectively protected is greater when the attorney is the seller rather than the attorney's estate. However, the benefits of allowing a sale by the estate outweigh the risk to clients. Clients are still protected by the purchaser's duty of competency, by their legal matters being transferred more smoothly than if these clients were left to find representation on their own, and by the estate's having more financial security than if the sale were prohibited. For attorneys who have not saved adequately for retirement, Rule 1.17 provides families of deceased attorneys with a way to gain monetary security despite the death of the provider on which they depended.

D. Solicitation of Client Referrals

Although Model Rule 7.2 was amended in 1990[158] to allow a lawyer

150. Kalish, *supra* note 10, at 489; Minkus, *supra* note 9, at 368.
151. Minkus, *supra* note 9, at 368.
152. Kalish, *supra* note 10, at 489.
153. *See supra* note 108 and accompanying text.
154. Minkus, *supra* note 9, at 372.
155. Coy, *supra* note 136, at 974.
156. Minkus, *supra* note 9, at 371.
157. S.C. APP. CT. R. 407, R. 1.17 cmt. (emphasis added).
158. CURRENT MODEL RULES Rule 7.2(c)(3) (1998). South Carolina's Rule 7.2 has not been amended. *See supra* note 113.

to compensate another person for recommending the lawyer's services in conjunction with the sale of a law practice, some argue that this type of payment is still ethically wrong. As with conflict-of-interest problems, the recommendation may be based on the financial interest of the selling attorney and not on the purchaser's competency.[159] Likewise, how far a seller can go in making recommendations to clients remains unclear. It is safe to assume that the seller may state the buyer's credentials and prior work experience. The seller may even be able to express her own opinions about the buyer's competency or character. However, at some point the seller may cross the line and enter the realm of "puffing" or exaggeration, which would be inappropriate.[160]

Proponents of the Rule suggest that clients possess adequate time to consider and evaluate the referral and to obtain guidance from other sources.[161] With regard to financial self-interest, disclosure that the seller will be compensated for the referral along with other provisions of the sale will increase the likelihood that "financial considerations do not taint the referral."[162] Disclosure of this kind provides two safeguards. First, lawyers will be more cautious in recommending buyers because the lawyers' reputations among clients may be damaged if clients think the lawyers are motivated only by financial interests and have recommended incompetent purchasers. Second, disclosure ensures that clients will make an "informed choice" about retaining the buyer.[163]

E. Fee Sharing with a Nonlawyer

Historically, lawyers could not share fees with a layperson.[164] For example, in *O'Hara v. Ahlgren, Blumenfeld & Kempster*,[165] the widow of an attorney entered into an agreement to sell her late husband's practice for a percentage of the revenues over a period of time derived from his former clients.[166] The court held that the sale violated public policy, stating that such transactions may involve referrals based on the "desire to share a fee" and not on the "legal welfare of the client."[167] Furthermore, the court expressed concern that the attorney would "devote less time and attention" to matters in which

159. Coy, *supra* note 136, at 977.
160. ABA/BNA MANUAL, *supra* note 1, at 91:807.
161. Kalish, *supra* note 10, at 501.
162. *Id.* at 490.
163. *Id.*
164. Although Model Rule 5.4 was amended to allow sharing of fees with a nonlawyer pursuant to the sale of a law practice, South Carolina has not amended its rule. The comments to South Carolina's Rule 1.17 imply that such an arrangement will not violate the Rules. *Compare* CURRENT MODEL RULES Rule 5.4 (1998), *with* S.C. APP. CT. R. 407, R. 5.4, *and* S.C. APP. CT. R. 407, R. 1.17 cmt.
165. 537 N.E.2d 730 (Ill. 1989).
166. *Id.* at 732
167. *Id.* at 734.

fees would be shared.[168] Notwithstanding apprehension that fees should not be shared with a nonlawyer, Rule 1.17 protects clients through competency requirements on the part of the buyer and regulation of fees. Just because the estate operates as seller does not necessarily result in control over client cases other than choice of purchaser. As to particularities of cases, the estate will have no control.

F. Fee Increase

Rule 1.17 directly addresses the problem of increased fees. The Rule states that fees cannot be increased to finance the sale nor can the purchaser refuse to take clients unless those clients will not consent to the fees usually charged by the purchaser in similar matters.[169] Nevertheless, the potential that the purchaser's fees will be higher than those charged by the seller remains. Moreover, the unsophisticated client may be more likely to remain with the purchaser even if the purchaser sends notice of the fee increase.[170] In order to prevent this problem, some recommend that the rule be amended to preclude any increase in fees.[171] Thus, as part of the sale, the purchaser would agree to charge the same fees as the seller. Alternatively, despite the buyer's competence, he may try to recover some of the purchase price by spending less time on inherited cases, enabling him to take on more cases.[172] Thus, if the buyer is prohibited from increasing fees, the quality of his work may suffer. However, the buyer has an obligation to manage his workload so that he can handle all obligations satisfactorily.[173] Another advocate of the Rule remarks that, "[a]lthough it may seem unfair from the client's perspective that [the] fee agreement . . . may be altered . . ., the client is in no different position than if the seller retired, moved, or died without the practice being sold."[174] Without the Rule, clients are forced to look for representation elsewhere, without any safeguards for maintaining similar fees.

Despite the protection afforded to the seller's clients by Rule 1.17, the Rule does not address whether the *buyer*'s clients may be subject to fee increases in anticipation of the sale[175] or how long the buyer must wait to raise fees without violating the rule. It is likely that the buyer's clients will enjoy the same protection against fee increases as the seller's clients. Because fees cannot be "increased by reason of the sale,"[176] the buyer should be prohibited from raising client fees prior to the transaction as well. Furthermore, the buyer

168. *Id.* at 735.
169. S.C. APP. CT. R. 407, R. 1.17(b).
170. Schoenwald, *supra* note 21, at 419.
171. *See, e.g., id.* at 422.
172. Minkus, *supra* note 9, at 364.
173. S.C. APP. CT. R. 407, R. 1.3 cmt.
174. DeWoskin, *supra* note 125, at 51.
175. Schoenwald, *supra* note 21, at 422.
176. S.C. APP. CT. R. 407, R. 1.17(b).

should not be permitted to raise fees until enough time has passed so that the increase would not be considered a recoupment of the payment price.

G. Potential to Mislead

Commentators express concern that law practice sales can potentially mislead clients.[177] For example, clients may be misled by the buyer's use of the "seller's office, telephone number, or trade name."[178] This concern appears unwarranted for two reasons. First, former clients will have been notified of the change in the practice's ownership. Second, the use of the seller's name will probably not be permissible under the Rules of Professional Conduct,[179] eliminating the potential that new clients will rely on the seller's presence. It is unlikely that a client would be misled if a lawyer's practice occupies the same space that the seller's practice occupied. If the client has received notification of the sale, seeing an unfamiliar lawyer in the law office will not be terribly surprising. In fact, if the sale meets the Rule's requirements, the client will have no reason to believe the former lawyer is still associated with the practice.

H. Intent of Rule 1.17

The most general criticism of Model Rule 1.17 is that it was intended to serve only lawyers and not their clients.[180] "Close scrutiny reveals . . . that the ABA's client protection rationale lacked substance and that the only viable explanation for authorizing the sale of law practices was that such action guaranteed attorneys economic opportunities that they previously had been denied."[181] Furthermore, allowing sales of law practices "gives unscrupulous attorneys a monetary incentive to fulfill their otherwise existing ethical obligations."[182] These criticisms overlook the advantages that Rule 1.17 provides to clients. Attorneys who invoke the Rule will be more inclined to handle client matters thoroughly and effectively as they are pending transfer to the purchasing attorney. The buyer will expect the seller to stay up to date with legal matters until the transaction has been completed. Clients will also be ensured that another competent lawyer is willing and ready to handle their cases. They will not be left alone to search for new representation. Certainly the Rule is a tremendous benefit to sole practitioners, but the benefit does not come at the client's expense. All of the Rules of Professional Conduct continue to provide protection to clients and integrity to the legal profession. While some

177. Kalish, *supra* note 10, at 477; Sterrett, *supra* note 10, at 318.
178. Kalish, *supra* note 10, at 477.
179. *See* S.C. App. Ct. R. 407, R. 7.1, 7.5.
180. Schoenwald, *supra* note 21, at 404.
181. *Id.* at 402.
182. *Id.* at 404.

of these rules were amended, or have been indirectly modified, pursuant to the adoption of Rule 1.17,[183] not one was eliminated. Client protection has not been overlooked.

V. CONCLUSION

The recent adoption of Rule 1.17 constitutes a dramatic, beneficial change for sole practitioners in South Carolina. The Rule will have a great impact on a large part of the legal profession in South Carolina.[184] In the past, lawyers who chose to practice alone sacrificed their ability to reap the full benefits of a life-long profession at retirement. From a retirement standpoint, a law partnership or multimember firm was more appealing to attorneys because retiring attorneys could be compensated for their share of the practice's goodwill. Rule 1.17 reduces the disparity between sole practices and multimember firms by permitting compensation for goodwill. Although this Rule will prove lucrative for many sole practitioners, client-protection measures ensure that client confidences are not compromised at the expense of financial gain and that client matters are handled more effectively than if the prohibition on the sale of law practices continued. The transition from lawyer to lawyer will be smoother than if the client were to seek out her own new counsel. Clients also have recourse against the selling attorney if the recommended lawyer is negligent in handling their cases. The bottom line, though, is that clients can always refuse to accept the representation of the purchasing attorney. With this in mind, the criticisms of Rule 1.17 fail to overcome the Rule's advantages.

Nina Fields

183. *See* CURRENT MODEL RULES 5.4, 5.6, 7.2 (1998).
184. Interview with J. Steedley Bogan, *supra* note 7.