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Committee on Professional Ethics

NYSBA

Opinion 561 - 6/25/84 (7-84)

Topic: Partnership, sale of interest in

Digest: Sale of interest in ongoing law practice is not ethically permissible, except for sale of interest in tangible assets.

Code: DR 2-103(B) and (E), Canon 9

QUESTION

May a lawyer having a partnership interest in a law firm with an active practice and a steady clientele sell to an incoming partner part of that interest, including a share of fees from new matters, in return for a payment to the selling partner based in part on a specified percentage of the firm's average annual fees for the last three years?

OPINION

It is the opinion of the Committee that the lawyer may not with ethical propriety sell an interest in the partnership on the terms proposed.

As structured, the proposed sale divides the partnership interest into two components, one consisting of the firm's tangible assets, the other of its future billings. It is proposed that the purchase price shall reflect the value of each component taken separately. As such, the arrangement contemplates that the right to represent the firm's clients will be transferred in return for a cash payment. This is not ethically permissible.

Although the sale of all or a part of the tangible assets of a law firm presents no ethical problem, the same is not true of the sale of all or a part of a law practice itself, and the latter has consistently been deemed to be professionally improper. See N.Y. State 366 (1974)[1]; N.Y. State 319 (1973); ABA Inf. 550

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1 In misplaced reliance on N.Y. State 366 (1974) and then-recent decisions of the Supreme Court concerning lawyer advertising, Brooklyn 126 (1979) held that "it would not be unethical to sell a practice of law." However, N.Y. State 366 (quoted later in the text) held only that the purchase of an interest in the tangible assets of a firm, if reasonable in amount, presents no ethical problem; it went on to state that the purchase of an interest in future executorships or trusteeships is improper

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(1962); N.Y. City 755 (1950); N.Y. City 633 (1943); N.Y. City 588 (1941); N.Y. City 565 (1941); N.Y. City 272 (1933); H. Drinker, Legal Ethics 161 (1953); J. Sterrett, The Sale of a Law Practice, 121 U. Pa. L. Rev. 306, 308-10 (1972). Indeed, one court, faced with a contract purporting to sell both the tangible assets of a law office and the law practice itself, held that the sale of the practice was against public policy and that the portion of the agreement purporting to sell it was unenforceable. Geffen v. Moss, 53 Cal. App. 3d 215, 226, 125 Cal. Rptr. 687, 693 (Ct. App. 1975).

There are three principal ethical concerns that preclude the sale of part of a partnership interest in an ongoing law practice. The first is simply that given the nature of the attorney-client relationship, it is impossible to avoid the appearance of impropriety when the right to represent a firm's clients, whether existing or prospective, is acquired by sale. This is a violation of Canon 9. The concern was succinctly stated in N.Y. State 366 (1974), quoting N.Y. City 633 (1943):

> 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.

The second concern is embodied in DR 2-103(B) and (E). These precepts caution that the recommendation of a lawyer to represent a client should be free of pecuniary influence. DR 2-103(B) reads:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . .

DR 2-103(E) reads:

> A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks services does so as a result of conduct prohibited under this Disciplinary Rule.

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because, among other things, it has the appearance of the sale of a law practice. Further, in our opinion the traditional ethical rule against the sale of a law practice has not been altered or undermined by Supreme Court decisions concerning lawyer advertising. Accordingly, we respectfully disagree with Brooklyn 126 (1979).

The sale of a partnership interest is inconsistent with these provisions of the Code. Entering into a partnership with a lawyer gives the impression that the pre-existing partners have a high degree of trust and confidence in the incoming partner -- "perhaps the strongest possible endorsement." Sterrett, supra, 121 U. Pa. L. Rev. at 318. Since a "recommendation" within the meaning of these Code provisions implicitly and unavoidably accompanies the making of a partner, the accession to partnership, if accomplished by sale, would violate the Code's requirement that recommendations be disinterested.

The third concern derives from fiduciary considerations. The sale of a partnership interest in return for a price in excess of the value of the corresponding share of the firm's tangible assets is tantamount to compensating the seller for transferring, or attempting to transfer, his clients' loyalties. No fiduciary, including a lawyer, should profit from the sale of his position of trust and confidence. Sterrett, supra, 121 U. Pa. L. Rev. at 309. "The inevitable result of allowing such a transaction would be to give a preferred position to the highest obtainable bidder . . . which is not the basis on which an attorney should be retained." ABA 266 (1945).

Accordingly, the Committee concludes that the proposed transaction, if consummated on the terms proposed, would contravene DR 2-103(B) and (E), Canon 9, and the fiduciary obligations a lawyer owes his clients.

For the reasons stated, the question posed is answered in the negative.