NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1168 (05/13/2019)

Topic: Sale of Law Practice; Use of Firm Name after Sale

Digest: A lawyer affiliated with firm wholly owned by another lawyer may purchase the firm consistent with Rule 1.17 and may use the name of the seller's firm provided that doing so is not misleading. The meaning of "retired" for purpose of such a sale is as set out in Rule 1.17.

Rules: 1.5(h), 1.17(a), 7.5(b), 7.5(c), 8.4(c)

Overrules N.Y. State 148 (1970) and modifies N.Y. State 850 (2011)

FACTS

1. The inquirer is a New York lawyer affiliated with a firm wholly owned by another New York lawyer (here, "Owner"), which currently operates under the name of the [Owner] Group, P.L.L.C.. The firm has offices located in New York City metropolitan area. The Owner has decided to leave the firm, to cease practicing law there, and to move to a location in New York State distant from the metropolitan area, where the Owner intends to start a new practice. The inquirer wishes to purchase the Owner's law practice in the metropolitan area, and to continue to use the Owner's name in conducting the practice as [Owner] Group, P.L.L.C.

QUESTIONS

2. May a lawyer purchase another lawyer's wholly owned law practice, notwithstanding the seller's continuing in law practice?

3. May the buying lawyer continue to use the name of the selling lawyer's practice?

OPINION

4. Standards governing the sale of law practices are of comparatively recent origin. Before the 1996 adoption of DR 2-111 of the N.Y. Code of Professional Responsibility (the "Code") – the predecessor to Rule 1.17(a) of the New York Rules of Professional Conduct (the "Rules") – a lawyer in New York could not sell a law practice. *See* EC 4-6 (as in effect prior to 1996); N.Y. State 707 (1998). The theory, still reflected in Comment [1] to Rule 1.17, was that "[c]lients are not commodities that can be purchased and sold at will."

5. According to the Report and Recommendations approved by the New York State Bar Association's House of Delegates on January 26, 1996, the provision that became Rule 1.17(a) was designed to "address the disparate treatment of sole practitioners and members of law firms with

respect to the 'good will' of their respective practices". *See also* EC 2-34 of the Code. That is, before the adoption of this rule, a member of a law firm could retire from the practice of law and receive payments from the firm under a separation or retirement agreement under what became Rule 1.5(h). But a solo practitioner could not sell a law practice or divide fees from legal business except in very restricted circumstances. DR 2-111 and its successor Rule 1.17(a) were intended to address this disparity.

6. Rule 1.17 now provides in pertinent part:

> A lawyer retiring from a private practice of law … may sell a law practice, including good will, to one or more lawyers or law firms, who may purchase the practice. … Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

7. Here, the Owner is "retiring" within the meaning of Rule 1.17 because the Owner will cease practicing law in geographic areas where the Owner once practiced. The owner intends to practice, if at all, in counties not contiguous to but distant from the New York City metropolitan area where the Owner's offices once were. Consequently, as long as the purchase complies with the other requirements of Rule 1.17, the inquirer may purchase the Owner's law practice.

8. The use of the Owner's name in the purchased entity presents a closer question owing to a tension between Rule 1.17 and Rule 7.5(b).

9. This Committee has long recognized, as the Rules do and their predecessors did, that a law firm may continue to use the names of partners who once practiced there in the names of their law firms. For instance, in N.Y. State 622 (1991), we recognized the practice of continuing to use the names of retired or deceased partners in firm names:

> Many firms, large and small alike, continue to practice under firm names -- essentially trade names -- that include the names of their founders or other former partners, often long after those lawyers have passed away. They do so to perpetuate the good will associated with their institutional names, as well as to honor lawyers whose efforts and skills laid the foundation for their practice. . . . The justification for sanctioning this practice, in the absence of danger of deception, is that all of the partners contribute to the good will attached to a firm name, and that surviving partners should not be deprived of their right to a benefit to which they contributed their time, skill and labor. N.Y. State 279 (1973).

10. Yet nothing in Rule 1.17 restricts prospective purchasers to persons having a prior affiliation with the purchased firm; "one or more lawyers or law firms may purchase the practice," and the Rule authorizes the sale not only of the practice, but also its "good will." Good will "is an intangible asset of an enterprise that arises from the reputation of a business and its relationship with its customers." N.Y. State 961 ¶ 2 (2013). We have long recognized that the name of a law firm is central to its good will. N.Y. State 45 (1967). Branding and reputation are precious commodities in any profession, including the legal profession. We cannot ignore that, in today's rapidly changing legal market, the constant merger or acquisition of law firms has engendered combinations in which the nexus between or among the combined firms and their predecessors is

at times attenuated or opaque. To say that today's legal profession does not trade in the goodwill of storied names would require blinders on reality. Rule 1.17 is alone no obstacle to this commerce.

11. Thus, Rule 1.17 suggests that any lawyer, whether or not previously affiliated with the acquired firm, is free to adopt some or all of the acquired firm's name as its own. Therein lies the rub with Rule 7.5(b), which says:

> A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

12. "The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." N.Y. State 869 (2011). *See* N.Y. State 1152 (2018) (lawyer's first name alone); N.Y. State 1138 (2017) (English translation of lawyer's name); N.Y. State 948 (2012) (the phrase "The Business Dispute Clinic"); N.Y. State 869 (2011) (an area of law in which the lawyer practices); N.Y. State 740 (2001) (using a name that is not the legal name of one or more partners or former partners in the law firm). This broad interpretation is consistent with the purpose of Rule 7.5(b). It serves to protect the public from being deceived about the identity, responsibility, or status of those who use the firm name. *See* N.Y. State 920 (2012) (citing N.Y. State 732 (2000)). *See also* Rule 8.4(c) (a lawyer shall not engage in conduct involving misrepresentation).

13. We think it is important to address a potential tension between Rules 1.17 and 7.5(b), because we can envision circumstances in which, without full disclosure, the entry of a stranger to a firm, operating under the firm's name, could generate the public confusion that Rule 7.5(b) (as well as Rules 7.1 and 8.4(c), among others) is intended to prevent. Rule 7.5(b) is explicitly addressed to firm names, whereas Rule 1.17 is intended to facilitate the sale of a law business. "As a general rule of statutory construction, the specific governs over the general." N.Y. State 669 (1994). Whether here the drafters of the Rules intended the inclusion of "good will" in Rule 1.17 to temper Rule 7.5(b) is an issue we need not resolve in this inquiry because of the pre-existing, and we presume *bona fide*, relationship between the Owner and the inquirer in the conduct of the Owner's New York City metropolitan area practice. We believe that a lawyer with a pre-existing and *bona fide* affiliation with a law firm – reflective of a continuation of the practice – may acquire that law firm and use its name provided that all the other requirements of Rule 1.17, including notice to clients and maintenance of client confidences, are respected. Our sole caveat is that the use of the word "Group" in the name of the firm implies that the inquirer is not the only lawyer in the firm; assuming that other lawyers are engaged in the practice, then we see no ethical obstacle to the inquirer's continued use of the firm name.

14. Our conclusion here requires us to revisit two prior opinions of this Committee which we now modify or overrule.

15. First, in N.Y. State 148 (1970), this Committee concluded that a former associate may not continue the use of a firm name containing the name of a deceased partner because to do so implies that the surviving associate was a partner. We no longer hold this view, especially in light of the changing nomenclature common in the legal profession today. In 1970, non-equity legal personnel were never called partners; today, it is commonplace. Moreover, in N.Y. City 725 (1948), the City Bar Ethics Committee took a broader view of when a firm is a *bona fide* successor to another firm, looking to substantial continuity of partners or other lawyers from the predecessor firm, as well as continuity of clientele and professional practice. Even without the change in labels, we now consider the City Bar's view more persuasive.

16. Second, in N.Y. State 850 (2011), we were asked whether a law firm could use the name of a former partner in its firm name if the former partner continued to practice law as general counsel to a corporation. Citing N.Y. State 266 (1972), an opinion decided under the Code, we said the former partner "is still engaged in the practice of law as the general counsel to a corporation." Partly depending on EC 2-11, N.Y. State 266 did not require the "retired" partner to stop practicing completely, as long as the lawyer did not practice law except with the former firm. When we issued our opinion in N.Y. State 850, the Rules had eliminated the Ethical Considerations, including EC 2-11. But the Committee still believed that "retired" for purposes of Rule 7.5(b) should mean "not practicing law," despite the fact that Rule 1.17 contained a less restrictive definition. In support of this broader definition, we cited the definition of "retired" in the court rules governing registration of lawyers. *See* 22 NYCRR § 118.1(g) (providing, then as now, that an "attorney is 'retired' from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law"). Upon reconsideration, we believe that Rule 1.17 should recognize that a partner may retire from a law firm without entirely retiring from the practice of law. N.Y. State 622 (to the same effect). The Court Rule on the registration of lawyers has a different purpose from Rules 7.5(b) and 1.17. The Court Rule determines when a lawyer is required to pay registration fees to the Office of Court Administration and when a lawyer must comply with the rules on continuing legal education – not when a law firm name should be considered misleading or a trade name. For these reasons, we believe that N.Y. State 850 is distinguishable and to the extent inconsistent with this opinion is modified.

CONCLUSION

17. A lawyer affiliated with firm wholly owned by another lawyer may purchase the firm consistent with Rule 1.17 and may use the name of the seller's firm provided that doing so is not misleading. The meaning of "retired" for purpose of such a sale is as set out in Rule 1.17.

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