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## The Sale of Law Practice in Texas: The Need for a Rule

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# COMMENT

*Ryan Hagens\**

The Sale of Law Practice in Texas: The Need for a Rule

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## I. INTRODUCTION

As with all things in life, everything must come to an end. This fact not only holds true with the life of an individual, but also with the life of a business. The need to close a small business can arise for many reasons, but the most common is the owner’s retirement or death.<sup>1</sup> When people decide to retire and sell a small business, they often try to find a like-minded, enthusiastic person or company to continue their business and serve their clients. Ideally, this person or company would have the same enthusiasm and competence as the seller. Retirees typically liquidate assets that they have built up over their career to make up for the income they will no longer be acquiring. For most industries and professions, this is nothing extraordinary. Most professions see this as standard practice and do not blink an eye. The legal profession, however, continues not only to prohibit the small business owner from selling their business, but brands it a significant ethical violation.<sup>2</sup>

The legal profession is a self-regulated profession, with rules and codes voted on and enacted by the state’s highest court.<sup>3</sup> Upon graduating from law school and passing the bar examination, most jurisdictions have compulsory requirements to join and maintain membership with the state bar association.<sup>4</sup> These jurisdictional bar associations have committees that

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1. See Betty M. Shaw, *Winding down Closing up or Selling out*, 61 BENCH & B. MINN. 12, 12 (2004) (explaining the reasons lawyers choose to close up and sell their practices).

2. Dennis A. Rendleman, *The Evolving Ethics of Selling a Law Practice*, 29 GPSOLO 10, 11 (2012) (stating until 1990 there was no rule that allowed the sale of law practice, but that an ethical opinion from 1945 essentially prohibited a sale because the selling of clients was thought to be unethical).

3. See CONCISE RESTATEMENT OF THE LAW GOVERNING LAWYERS: REGULATION OF THE LEGAL PROFESSION (AM. L. INST. 2007) (“[P]rofessional discipline of a lawyer in the United States is conducted pursuant to regulations contained in regulatory codes that have been approved in most states by the highest court in the jurisdiction in which the lawyer has been admitted.”).

4. *Id.* at 5 (noting membership requirements for admission to the bar in most jurisdictions).

will recommend rules and submit them to the highest court for vote and ratification.<sup>5</sup> Although it may sound straightforward, state bar associations' self-governance has left the legal profession with a hodgepodge of rules that vary from state to state, creating an unpredictable disciplinary landscape for lawyers practicing in multiple states.<sup>6</sup> Nonetheless, the American Bar Association has sought to bring some consistency through standardization.<sup>7</sup> Comprised of lawyers and scholars, the American Bar Association is not a regulatory body for any single jurisdiction, but rather creates rules that serve as models for the many states. While some states hold out and refuse adoption or adopt their own version of the model rules, most jurisdictions adopt the rules outright or a slight variation thereof.<sup>8</sup>

As such, most states have adopted a rule that allows a solo practitioner, their beneficiaries, or their estate to sell their law practice, including client goodwill, when it comes time for them to retire or pass away.<sup>9</sup> As of 2018, only two states, Texas and Alabama, have chosen not to address the issue through adoption of a rule.<sup>10</sup> Texas has not only ignored the issue, but has refused multiple requests from committees to consider adopting one over the past two decades.<sup>11</sup> Why has Texas chosen to snub the opportunity to

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5. *Id.* at 4 (detailing the duty of the jurisdictional bar association to implement and enforce the regulations of lawyers and maintain the system of law).

6. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. d (AM. L. INST. 2000) (“Beginning in the early . . . 20th century, bar associations have played an increasingly active role in regulating the conduct of lawyers. Together with lawyers who work on disciplinary and similar committees within state- and federal-court systems, bar associations have become the chief embodiment of the concept that lawyers are a self-regulated profession.”).

7. *See ABA House of Delegates*, AM. BAR ASS'N, [https://www.americanbar.org/groups/leadership/house\\_of\\_delegates/](https://www.americanbar.org/groups/leadership/house_of_delegates/) [<https://perma.cc/SCW9-6UW3>] (detailing the duty of the House of Delegates to adopt the model rules and resolution to the rules).

8. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (AM. L. INST. 2000) (explaining most regulatory codes are “more or less patterned on model codes published by the American Bar Association, but only the version of the code officially adopted and in force in a jurisdiction regulates the activities of lawyers subject to it”). Between 1990 and 2016, forty-nine jurisdictions have adopted a version of Rule 1.17. Two states have refused to adopt a version. Louisiana was the last state to adopt a version in 2016. *See* ABA Comm. on CPR Policy Implementation, Report on Variations of the ABA Model R. of Prof'l Conduct, Rule 1.17: Sale of Law Practice (Dec. 11, 2018); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 (AM. L. INST. 2000).

9. *See* ABA Comm. on CPR Policy Implementation, *supra* note 8 (comparing the different version of the rule implemented by the forty-nine jurisdictions that have adopted since 1990). Many states have added or excluded provisions of the rule and the committee identifies each of the jurisdiction's modifications. *Id.*

10. *Id.*

11. *See Proposed Annual Meeting Resolutions*, 79 TEX. B.J. 384, 384 (2016).

guide or protect their attorneys and instead remained silent on the issue? It appears Texas is holding on to the old and outdated notion that “[i]t is unethical for a member to purchase, to sell[,] or to advertise for sale a law practice with ‘established clientele,’” which comes from ABA Opinion 266 in 1963.<sup>12</sup> Alternatively, it could be that Texas has resisted addressing the issue because no rule directly prohibits it. Theoretically, a lawyer may try to sell a law practice alongside its goodwill and not directly violate a rule. However, this may be an illusion because the lawyer would indirectly violate one of the many conflicting rules that keep them from accomplishing the sale.<sup>13</sup>

There is no reason why Texas should not adopt rule 1.17 which was approved by the 1990 ABA and the majority of jurisdictions which have reached the same conclusion. In passing such rule, these states have ensured that lawyers and clients are financially protected throughout their retirement by facilitating an ethical sale of a law practice and its goodwill.<sup>14</sup> Additionally, states that have adopted a version of the rule have shown the sale of a law practice, and its goodwill, can benefit both the clients and the seller.<sup>15</sup> With an estimated 18,627 solo practitioners in the state of Texas as of 2018, this is not an issue that should be overlooked.<sup>16</sup> When Texas

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12. See ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 266 (1963) (“It is unethical for a member to purchase, to sell or to advertise for sale a law practice with ‘established clientele.’”). The opinion was based on Canons 24 and 34. “Canon 24 prohibits solicitation and would, therefore, preclude a lawyer from purchasing a law practice with established clientele because such purchase upon such conditions would unavoidably involve the solicitation of these clients to continue their business with the purchaser. . . . Canon 34 states that ‘the duty to preserve his clients’ confidences outlasts the member’s employment. . . .” *Id.*

13. James E. Brill, *Sale of a Practice: When It’s Time, It’s Time*, 53 HOUS. LAW. 10, 11 (2015) (“The overriding concern that inhibits the outright sale of a law practice is protection of the clients’ confidences, rights, and property. The major issues are confidentiality, solicitation, and fee sharing with non-lawyers.”).

14. See ABA Comm. on CPR Policy Implementation, *supra* note 8 (identifying the very modification of the rule implemented by the jurisdiction that addresses in more detail the ethical concerns lawyers will face when selling a law practice).

15. See Edward Poll, *Law Firms For Sale . . . Everyone Benefits*, 17 GPSOLO 61, 61–62 (2000) (discussing how a sale of a law practice benefits all parties involved through taxes, expenses, and representation). The author argues, “[w]ho better to help clients than someone who has paid for the privilege to serve them? Who better to assure that the needs of the client are conveyed to the new lawyer so that the attorney-client relationship is protected than someone who has received money for his or her practice?” *Id.*

16. *State Bar of Texas Membership: Attorney Statistical Profile (2018–19)*, STATE BAR OF TEX., [https://www.texasbar.com/AM/Template.cfm?Section=Content\\_Folders&Template=/CM/ContentDisplay.cfm&ContentID=43800](https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=43800) [https://perma.cc/XZ6A-2G5C] [hereinafter *State Bar of Texas Membership*].

refuses to address a lawyer's sale of their practice, it punishes attorneys who will be unable to realize the value of their hard work by retiring comfortably and reaping the rewards of a business they built.<sup>17</sup>

Furthermore, Texas' aversion to a rule on the sale of a law practice adversely affects the clients of these attorneys.<sup>18</sup> It is essential to give clients peace of mind knowing that solo attorneys have guidance on how to sell a practice ethically and are not skirting the law.<sup>19</sup> Texas must address this issue so that solo practitioners and clients alike in the state of Texas can ethically sell a law practice. A lack of guidance or the adoption of rules that limit the sale of a law practice will not benefit Texas' legal system and will instead cause more unnecessary grievances.<sup>20</sup>

This Comment will discuss the evolution of the sale of a law practice in Texas and throughout the United States. It will examine the ethical and professional concerns that solo practitioners face when selling a law practice and its goodwill without a rule to guide them. The Comment will also explore how a rule can resolve these issues and benefit clients, attorneys, and the institution of law in Texas. Finally, it will present a proposal of the law that Texas should adopt and why it would meet this state's lawyers' and clients' needs.

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17. See Brill, *supra* note 13, at 13 (explaining the rule allowing the sale of law practice does not exist in the Texas Disciplinary Rules of Professional Conduct, and Texas must “join the majority and adopt a workable and practical rule for the benefit of not only the lawyers, and their families, but also for the benefit of the clients that Texas lawyers are privileged to serve”).

18. The ability to sell a law practice is beneficial not only to the buying and selling attorneys but also to their clients because they will not have to seek new representation and the selling attorney will disclose the qualification and be responsible for the purchaser. See Poll, *supra* note 15, at 61–62.

19. See Charles S. Winner & Norman L. Smith, *Sale and Transfer of Law Practice Prohibitions*, 31 MD. B.J. 14, 17 (1998) (explaining a jurisdiction without a rule is detrimental to the legal system as whole because lawyers will look to find way to sell their practice, and “the loopholes through which sole practitioners effect the sale of their practices may create greater ethical problems than the sales themselves”).

20. KENWORTHY BILZ & JANICE NADLER, OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS & THE LAW 241 (Eyal Zamir & Doron Teichman eds., 2014) (discussing how regulations can change people's behaviors and actions, but also recognizing that law can be used as a guide to promote desired behaviors).

## II. WHY THE ADOPTION OF A RULE IS IMPORTANT TO THE STATE OF TEXAS

As of 2018, there were an estimated 103,342 attorneys practicing in Texas, of which 91,244 actually reside in Texas, and of those, 18% are solo practitioners.<sup>21</sup> Thus, with over 18,000 solo practitioners practicing in the state of Texas, the ability for them to sell their business—as most business owners do in Texas—is not a small-scale issue that the state should effectively ignore.<sup>22</sup> Attorneys must regularly comply with a litany of rules to represent their clients ethically and competently.<sup>23</sup> These rules are not only in place to discourage legal professionals from acting unethically or wrongfully, they are designed to guide attorneys on how to perform their duties as legal professionals, which promotes the profession's integrity.<sup>24</sup>

Attorneys are trained from the beginning of their legal studies to think critically and problem-solve.<sup>25</sup> Due to this training, many attorneys have found creative ways to circumvent the prohibition against selling a law practice and its goodwill.<sup>26</sup> For example, some lawyers have tried to sell their tangible assets for inflated prices with a promise to promote the services of the attorney purchasing the firm.<sup>27</sup> This type of sale is invalid, however, because it violates solicitation rules and creates a conflict of

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21. *State Bar of Texas Membership*, *supra* note 16.

22. *Attorney Grievance System*, STATE BAR OF TEX. (2020), <https://www.texasbar.com/Content/NavigationMenu/NewsandPublications/FortheMedia2/GrievanceandEthicsInformation/GrievanceChart.pdf> [<https://perma.cc/GUK8-D4AD>].

23. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G, app. A (governing lawyers' behavior in Texas).

24. *See id.* at pmb1. (acknowledging the responsibility of the state bar to establish standards for the profession).

25. *See* Nat Wasserstein, *Buying or Selling a Small or Solo Practice—Part 1*, 86 N.Y. STATE BAR J. 41, 41 (2014) (inferring “[l]awyers have been trained to strategize creative solutions for their clients' dilemmas, so certainly the same thinking was applied to the sale of their own assets.”). This will lead to more unnecessary grievances being filed because there are proven methods to allow the sale of a law practice ethically for the benefit of everyone involved in the transaction. *Id.*

26. Rendleman, *supra* note 2, at 11 (detailing the creative ways that attorneys in solo practice used to exit practice and sell their law practice and goodwill, such as selling their assets for a inflated price and taking on a perceived partner only for the purpose of transferring the law practice after retirement).

27. *Id.* at 11–12 (indicating that lawyers have tried to sell their tangible assets for inflated price with a promise to refer their clients to the purchaser, which would be invalid and cause the parties involved to be subject to discipline).

interest with both past and present clients.<sup>28</sup> Nonetheless, this scenario is interesting because partners in law firms conduct this type of transaction with frequency and with far less disclosure to the client than would be required of the solo practitioner.<sup>29</sup> This example is not the only way attorneys have tried to find ways around the barrier Texas has created through inaction,<sup>30</sup> and they will undoubtedly think of additional ways to beat the system, potentially causing more grievances with clients and reflecting poorly on the legal profession.

#### A. *Texas Grievance and Sanctions*

In 2020, the Texas State Bar reported 7,505 grievances filed against attorneys.<sup>31</sup> Of those 7,505 grievances, 600 were for terminating representation, 154 for conflict of interest, 115 for fees, 46 for confidentiality, and 13 for solicitation.<sup>32</sup> Ultimately, 403 of those complaints resulted in sanctions.<sup>33</sup> Sanctions are brought by the chief disciplinary counsel and can range from restitution, fines, suspension, disbarment, or even resignation in lieu of discipline.<sup>34</sup> The specific areas of violations noted encompass the areas where solo practitioners looking to

28. See Leslie A. Minkus, *The Sale of a Law Practice: Toward a Professionally Responsible Approach*, 12 GOLDEN GATE U. L. REV. 353, 353–54 (1982) (outlining a situation in which a sale would be conducted without a rule, and why it would be invalid). The late Professor Minkus explains:

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 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.

*Id.*

29. See *id.* at 358–59 (discussing the inconsistent treatment of solo practitioners compared to partners in law firms when retiring and receiving compensation for their transfer of their clients).

30. Rendleman, *supra* note 2, at 11 (revealing methods attorneys have used to sell their law practice such as taking on a partner and subterfuge).

31. *Attorney Grievance System*, *supra* note 22.

32. See *id.* (categorizing the grievances filed against Texas attorneys between 2015 and 2020).

33. See *id.* (designating the number of sanctions distributed).

34. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03(f), *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G, app. A; *id.* at R. 1.06(e).



sell their firm would most likely become ensnared.<sup>35</sup> It is not clear how many of those were by solo practitioners.<sup>36</sup> However, with the vast number of solo practitioners in Texas, it is likely that a substantial percentage of these grievances were due to solo practitioners' inability to sell their law firms ethically and with the guidance of the disciplinary and professional responsibility rules.<sup>37</sup>

#### B. *Value of a Law Practice*

For many solo practitioners, their firm's value can be the primary income source for retirement, with the goodwill of the practice as the most valuable component.<sup>38</sup> According to the data issued by Benjamin Barton, a professor at the University of Tennessee Law School, solo practitioners' salaries have sharply declined over the past twenty-five years.<sup>39</sup> The decline in earnings, he argues, is due to the increased number of graduates coming out of law school and saturating the market.<sup>40</sup> Over one third of those new attorneys will likely become solo practitioners and create a personal law practice.<sup>41</sup> However, under Texas's current rules, the business they create has no real value other than the service they render and their office's tangible assets.<sup>42</sup>

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35. See Brill, *supra* note 13, at 10 ("Disciplinary Rules tend to complicate matters involving clients, leave many open issues for the lawyer's family, and raise serious potential problems for lawyers who are involved in winding down or disposing of their practices.").

36. *Attorney Grievance System*, *supra* note 22.

37. See *State Bar of Texas Membership*, *supra* note 16 (indicating there are over 37,000 solo practitioners in the state of Texas).

38. See, e.g., Winner & Smith, *supra* note 19, at 16–17 (acknowledging that the goodwill is the most valuable assets that law practice has, and attorneys are not allowed to realize that value for retirement). "Sole practitioners also have value in the goodwill of their practices. As one commentator has noted: 'the suggestion that there is nothing of value to be bought and sold [from the reputation of a lawyer] contradicts reality. . . . The simple fact that lawyers are willing to pay for this potential suggests that such value exists.'" *Id.* (quoting 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, 475 (1985)).

39. Paul Campos, *The Collapsing Economics of Solo Legal Practice*, LAWS, GUNS & MONEY (May 25, 2015, 1:44 PM), <https://www.lawyersgunsmoneyblog.com/2015/05/the-collapsing-economics-of-solo-legal-practice> [<https://perma.cc/9REL-FE6E>].

40. *Id.*

41. *Id.*

42. Brill, *supra* note 13, at 12–13 (discussing the value of a law practice and how lawyers should be able obtain that value which is indirectly prohibited by Texas).

Understandably, this is not the truth, and there is immense value in the goodwill and reputation that practitioners have created over their career.<sup>43</sup> In fact, most prospective buyers of law practices are looking to cash in on the goodwill over any of their other assets.<sup>44</sup> They want the chance to be able to continue working with these clients in the future.<sup>45</sup> An opportunity to gain clients is an asset that will bring much more value to the practitioners than a tangible asset.

When valuing a firm, the standard practice is to look at the firm's gross revenue generated over the past three years, determine the average, and multiply that amount by .5 to 1.5 (or 50% to 150%, respectively).<sup>46</sup> For example, a solo practice bringing in \$200,000 a year of revenue has a potential value of 1.5 to 3 times that of the purchase price.<sup>47</sup> This valuation method means that upon the attorney's retirement or death, their law practice could be worth between \$300,000 to \$600,000. It is thus plain to see that the sale would generate a significant amount of money potentially benefitting the attorney, their beneficiaries, or both.<sup>48</sup>

In summary, Texas has an obligation to legal professionals and their clients to adopt a rule that will guide lawyers in selling their business, a routine practice in almost every other state. Texas sees its fair share of ethical issues committed by attorneys every year, so there is no reason for it to sit idly when there is an affirmative way to ensure unnecessary grievances are avoided.

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43. Thomas E. Spahn, *The Ethics of Selling One's Law Practice*, 23 EXPERIENCE 48, 48 (2013) (indicating reputation and client relationship that solo practitioners have built over their careers hold great value).

44. See *Valuing a Law Practice*, L. PRAC. EXCH., <https://thelawpracticeexchange.com/valuing-your-practice/> [<https://perma.cc/YY6R-ZLPN>] (“[T]he biggest impact on value that you and your law practice can offer is the ongoing and future access to contacts, referral sources[,] and clients along with the trust and comfort they have with you, your team[,] and your overall practice.”).

45. *Id.*

46. See *id.* (outlining various methods of valuing a law practice, including the rule of thumb revenue method); see also Wasserstein, *supra* note 25, at 28 (surveying the various methods for valuing a law practice, which includes multiplying the revenue by a .5–1.0, and one third of the revenue over a five-year period).

47. See *Valuing a Law Practice*, *supra* note 44; see also James D. Cotterman, *Valuation of a Law Practice*, 17 GPSOLO 27, 27 (2000) (explaining the multi-factor valuing system similar to the scenario described in the text).

48. *Valuing a Law Practice*, *supra* note 44.

## III. HISTORY OF RULE 1.17 SALE OF LAW PRACTICE

When small business owners retire or suddenly pass away, the owner or beneficiaries will look to receive the benefits of the business's value to provide for their loved ones.<sup>49</sup> The process of selling a business usually involves a determination of the value of its various assets.<sup>50</sup> Assets that comprise a law firm include both physical and intangible assets.<sup>51</sup> Physical assets could include furniture or technology such as desks, printers, or computers. At present, they are the only items that solo attorneys in the state of Texas can sell without fear of violating the disciplinary rules and receiving sanctions.<sup>52</sup> On the other hand, intangible assets, commonly referred to as goodwill, consist of the law practice's reputation, clientele list, and future business potential.<sup>53</sup> When asking buyers of law practices what asset is the most valuable, they commonly will point to goodwill, where the bulk of the value in law practice lies.<sup>54</sup> Most Texas businesses, including law partnerships and various professional services—with similar duties to attorneys—are free to sell their assets, including intangible assets, such as goodwill.<sup>55</sup> Other Texas professional regulatory bodies have set

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49. See Brian H. Cole, *Practice for Sale: Selling a Practice*, 29 GPSOLO 16, 16, 19 (2012) (stating the most common reason why lawyers are looking to realize the value of their firms is for retirement).

50. See *id.* at 20 (discussing most law firms' value from physical assets to intangible assets such as goodwill).

51. See *id.* at 19–20 (determining the value of a law firm through the tangible assets and potential for future business).

52. See Terry Brown, *The Selling of a Lawyer's Practice*, 2 J. LEGAL PRO. 147, 148 (1977) (declaring the sale of tangible assets has always been expressly allowed).

53. See Cole, *supra* note 49, at 20 (“[T]he major asset being sold is goodwill—the lawyer’s reputation and the tendency of clients to continue to call the same telephone number . . .”).

54. See Winner & Smith, *supra* note 19, at 16 (“[T]he real value of his law practice, as with any service business, is in the goodwill associated with his practice—the existing clients and the ability to attract clients.”); see also Frederick C. Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601, 602 (1986) (indicating a “lawyer’s good reputation should be the primary source of his business,” strengthening the argument that there is significant value in goodwill of a law practice).

55. See Rendleman, *supra* note 2, at 11 (expanding on previous methods used to sell law practices). In explaining the norms in the industry, the author writes:

[T]he sale of a lawyer’s practice [has] happened regularly. First, it has always been the normal course of business for lawyers in a firm to buy out a partner, shareholder, or any of the other myriad ownership interests utilized by law firms. And through mergers and acquisitions, law firms managed to ‘sell’ themselves to each other.

*Id.*; see 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, 994–95 (1997) (arguing solo practitioners have been treated unfairly because law partnerships and most other professional service

prerequisites to sale to ensure their professionals' and clients' interests are protected.<sup>56</sup> However, the legal profession has treated solo practitioners disparately and allowed only law partnerships to take part in the transfer of goodwill; Texas has failed to provide attorneys who are solo practitioners and their clients with any such rules or regulations.<sup>57</sup> But does the lack of a rule governing the sale of a law practice mean the practice is outright prohibited? An attorney in Texas may be under that impression, but that is not necessarily true.<sup>58</sup> Texas neither has a law that allows the sale of law practice nor explicitly prohibits it from occurring.<sup>59</sup> Theoretically, a solo practitioner in Texas could sell their law practice, including its goodwill, but in doing so they are likely to break many rules which *indirectly* prohibit the sale.<sup>60</sup> Thus, in effect, and due to fear of potential violation, many solo practitioners in Texas do not sell their practice's goodwill and instead, merely sell tangible assets such as property, furniture, and other objects located in the office.<sup>61</sup>

The perceived prohibition does not mean that attorneys have never tried to sell their business's goodwill. Before the ABA's adoption of the model rule, it was common practice to sell tangible assets for a premium and with a promise to recommend the buyer's services to their clients.<sup>62</sup> This practice was essentially subterfuge and created additional ethical issues; it is

can sell or transfer goodwill leading many jurisdictions to look at the treatment of solo practitioners and adopt a rule to allow them to sell their law practice).

56. See *Closing a Healthcare Practice: Strategies and Risk Management Considerations*, MEDPRO GROUP INC. 6–7 (2019), [https://www.medpro.com/documents/10502/2837997/Guideline\\_Closing+the+Practice.pdf](https://www.medpro.com/documents/10502/2837997/Guideline_Closing+the+Practice.pdf) [https://perma.cc/6UTJ-B8AB] (discussing how doctors may not be aware of the HIPAA regulations involved when transferring patients' PHI to the purchasing physician); see also 22 TEX. ADMIN. CODE § 165.5 (Tex. Med. Board., Transfer and Disposal of Medical Records).

57. See generally TEX. DISCIPLINARY RULES PROF'L CONDUCT, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. (lacking a rule governing the sale of a law practice in Texas).

58. See Nina Fields, *The Sale of a Law Practice in South Carolina: The Impact of Model Rule 1.17 on Sole Practitioners and Their Clients*, 50 S.C. L. REV. 1029, 1029 (1999) (“[N]o 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 . . .”).

59. See generally TEX. DISCIPLINARY RULES PROF'L CONDUCT (providing no rule on the sale of a law practice).

60. See Fields, *supra* note 58, at 1029 (discussing, even though no rule explicitly prohibits the sale of goodwill, there are “several provisions [that] indirectly made such a sale impermissible”).

61. See Gayle L. Coy, *Permitting the Sale of a Law Practice: Furthering the Interests of Both Attorneys and Their Clients*, 22 HOFSTRA L. REV. 969, 969 (1994) (“[P]ractitioners may sell the tangible assets of their practice, such as books or office equipment, practitioners are prohibited from selling their client lists, files, phone numbers, capital assets[,] and goodwill.” (footnote omitted)).

62. See Winner & Smith, *supra* note 19, at 16 (discussing the various ways that attorneys tried to sell goodwill before the sale of law practice was allowed in most jurisdictions).

unnecessary to rely on such an archaic tradition in Texas when there is a straightforward solution.<sup>63</sup>

Historically, Texas was not alone in not addressing this issue or holding the belief that the selling of law practice was unethical;<sup>64</sup> all fifty-one jurisdictions held this belief.<sup>65</sup> These convictions were based upon various ethical opinions that addressed the issue from 1943 to 1963.<sup>66</sup> The New York County Lawyers Association Ethics Opinion 109, issued in 1943, states: “Clients are not merchandise. Lawyers are not tradesmen.”<sup>67</sup> This opinion was reiterated in the ABA Ethics Opinion 266 in 1963,<sup>68</sup> which addressed the ethical concerns of selling a law practice after an attorney’s death.<sup>69</sup> It states: “[t]he goodwill of the practice of a lawyer is not, however, of itself an asset, which either he or his estate can sell . . . . They have nothing to sell but personal service.”<sup>70</sup> These two ethics opinions set the standard for many years and kept solo practitioners from realizing the value of their labor as a result. Then, in 1989, California adopted Rule 2-300, becoming the first state to allow the sale of a practice,<sup>71</sup> and shortly thereafter, in 1990, the ABA adopted Rule 1.17.<sup>72</sup> Subsequent the ABA model rule adoption, 47 jurisdictions adopted a similar rule; only Texas, Louisiana, and Alabama refused to adopt a version of the ABA’s rule.<sup>73</sup>

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63. *See id.* at 16–18 (noting possible violations with overstating competence and fee splitting when recommending competent counsel upon retirement, and recommending Model Rule 1.17 as a possible solution).

64. ABA Comm. on CPR Policy Implementation, *supra* note 8 (recounting provisions of the sale of a law practice rules in various jurisdictions).

65. *See id.* (indicating the nonexistence of a state rule allowing the sale of law practice before 1989).

66. *See* N.Y. Cnty. Lawyers Ass’n, Ethics Op. 109 (1943) (disapproving of the sale of law practices); *see also* ABA Comm. on Prof’l Ethics & Grievances, *supra* note 12 (expressing ethical concerns about the sale of a law practice).

67. N.Y. Cnty Lawyers Ass’n, *supra* note 66.

68. ABA Comm. on Prof’l Ethics & Grievances, *supra* note 12.

69. *Id.*

70. *Id.* (internal quotations marks omitted).

71. *See* CAL. RULES OF PROF’L CONDUCT R. 2-300 (Sale or Purchase of a Law Practice of a Member, Living or Deceased) *superseded by* CAL. RULES OF PROF’L CONDUCT R. 1.17 (Sale of a Law Practice) (2018).

72. MODEL RULES OF PROF’L CONDUCT R. 1.17 (Am. Bar Ass’n 1990) (Sale of a Law Practice); *see also* Rendleman, *supra* note 2, at 11 (“Prior to the 1990 ABA Model Rules of Professional Conduct, there was no statutory provision governing the sale of a lawyer’s law practice.”).

73. ABA Comm. on CPR Policy Implementation, *supra* note 8.

However, in 2016, Louisiana joined the majority and adopted an individualized rule to facilitate the practice of selling one's practice.<sup>74</sup>

As it currently stands, Texas and Alabama are the only jurisdictions that have not adopted a version of the rule.<sup>75</sup> Interestingly, Texas has avoided doing so despite multiple attempts by committees to submit a rule to the Texas Supreme Court for adoption, but every attempt has failed.<sup>76</sup> Now, it is time that Texas faces the music, addresses the issue, and joins the majority of jurisdictions that have adopted such a regulation.

#### IV. INHERENT ETHICAL ISSUES ARISING FROM THE SALE OF GOODWILL

Though there is no direct prohibition on the sale of law practice and its goodwill in Texas, many ethical issues arise when contemplating a sale of a law practice's intangible assets, such as attorney goodwill.<sup>77</sup> These issues make it ethically impossible for a solo attorney to sell the law practice's goodwill.<sup>78</sup> These indirect barriers leave the sellers out to dry—with the lone option to sell off the tangible assets. This dilemma creates a significant problem for thousands of attorneys in Texas because goodwill attracts buyers, creating the majority of value in their practice.<sup>79</sup> Many of the arguments against the sale of a law practice are legitimate concerns. Despite this, other jurisdictions have successfully implemented the sale of a firm as standard practice without significant ethical disruption.<sup>80</sup> There should be no reason why a lawyer with a solo practice in Texas cannot ethically sell their law practice if Texas provides them with conditions similar to what has been practiced by their colleagues in other jurisdictions. The list of concerns is not exhaustive; this Comment will address the main concerns: conflict of interest, confidentiality, client fees, naming interest, and solicitation.<sup>81</sup>

74. *Id.*

75. *Id.*

76. *Committee on Disciplinary Rules and Referenda*, STATE BAR OF TEX., <https://www.texasbar.com/AM/Template.cfm?Section=cdr&Template=/cdr/home.cfm>. [<https://perma.cc/SB2-4LRP>].

77. Wasserstein, *supra* note 25 (“Attorneys who attempted to sell their practices were chided, or worse, disciplined, and reminded that their clients were not chattel to be bought and sold.”).

78. *Id.* (explaining lawyers were forced to come up with creative ideas to get around the barriers that prohibited the sale of goodwill).

79. *See Winner & Smith, supra* note 19, at 16 (“[T]he real value of his law practice, as with any service business, is in the goodwill associated with his practice—the existing clients and the ability to attract clients.”).

80. *See* discussion *infra* note 159 and accompanying text.

81. *See generally* Coy, *supra* note 61, at 972–83 (1994) (discussing the primary and inherent issues apparent with advertising and selling a law firm).

### A. Confidentiality

When attempting to sell a law practice in Texas, an attorney will inevitably confront the issue of client confidentiality.<sup>82</sup> According to the Texas Disciplinary Rules Professional Conduct Rule 1.05(b), a lawyer may not reveal a client's confidential information to anyone other than the client and other lawyers in the same firm.<sup>83</sup> The ABA's Model Rules of Professional Conduct reiterate the prohibition on disclosing the client's confidential information.<sup>84</sup> It is easy to see why this could become a problem if a solo practitioner in Texas attempted to sell their law practice. To sell a law practice, the seller will need to divulge information to the potential buyer to calculate the value of the practice's tangible and intangible assets.<sup>85</sup> The seller and buyer will also need to screen the list of clientele for potential conflicts.<sup>86</sup> However, disclosure of confidential information is allowed in both rules after informing the client of the purpose and reason for the disclosure and receiving consent for such disclosure.<sup>87</sup> Surprisingly, the Texas rule provides additional permission than that of the ABA.<sup>88</sup> It allows additional flexibility in the use of client confidential information.<sup>89</sup>

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82. *Id.* at 976 (discussing confidentiality as an issue that one will face when selling a law practice, but noting the same issues are faced by other professional service industries, who are permitted to sell their practices).

83. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. ("[A] lawyer shall not knowingly: (1) Reveal confidential information of a client or a former client to: (i) a person that the client has instructed is not to receive the information; or (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.").

84. MODEL RULES OF PROF'L CONDUCT R. 1.6 (Am. Bar Ass'n 1990).

85. Wasserstein, *supra* note 25, at 44 (discussing the problem of what confidential information should be divulged in order to complete the sale of the law practice).

86. See Marcia L. Proctor, *Conflict Screening and Former Clients*, 70 MICH. BAR J. 440, 440–41 (1991) (discussing circumstances warranting a screen of potential clients for conflicts). Because buyers will have to screen the clients of the firm they are acquiring, it is essential that buyers have access to this information before purchasing the law practice. See *id.* (considering elements that would lead to conflicts and how those conflicts might be addressed).

87. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05; see also MODEL RULES OF PROF'L CONDUCT R. 1.6 (prescribing the method for making consensual disclosures).

88. Compare TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(4) (bestowing attorneys with more discretion in making disclosures), with MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (imposing more strict guidelines on attorneys with respect to disclosures of confidential information).

89. Compare TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(4) ("[A] lawyer shall not knowingly: [u]se privileged information of a client for the *advantage of the lawyer* or of a third person, unless the client consents after consultation.") (emphasis added), with MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (implying the use of client information for a lawyer's benefit is permitted when defending oneself against "any proceeding concerning the lawyer's representation of the client").

For example, the Texas rules allow the lawyer to use the client's confidential information for the lawyer's advantage if the lawyer has disclosed to the client the reason and the client consents.<sup>90</sup> The ABA's model rule contains implicit language permitting use for lawyer's benefit only to defend against allegations regarding representation.<sup>91</sup> Texas's language suggests that client information confidentiality is not an impermeable barrier when it comes to selling a law practice.<sup>92</sup>

Sharing confidential information is not a new concept in the legal profession.<sup>93</sup> Law firms routinely share confidential client information between lawyers within the firm, even amongst lawyers that may not be directly working on the case.<sup>94</sup> Applying this same reasoning, why should a solo practitioner be barred from transferring their interest in a client's business to another attorney because they cannot divulge confidential information when lawyers in medium to large firms have done so freely without limitation?<sup>95</sup> The issue of confidentiality is not as complex of an issue as it seems. Many states have addressed this issue in their versions of the rule.<sup>96</sup> Some have incorporated a provision to the rule that allows the parties to the sale to sign a non-disclosure agreement before discussing the law practice's sale.<sup>97</sup> Of course, this provision is an exception to those rules requiring disclosure and consent of the client.<sup>98</sup> Such a requirement would allow a seller to ensure the client's confidential information is secure and

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90. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(4).

91. MODEL RULES OF PROF'L CONDUCT R. 1.6 (defending against allegations of representation may constitute a benefit to the lawyer because the loyalty to the client shifts to protecting the lawyer).

92. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(b)(4).

93. See generally Spahn, *supra* note 43 (discussing prohibitions and permissions regarding sharing a client's confidential information).

94. See *id.* (discussing the disparate treatment between lawyers in big law firms and solo practitioners and the reasoning behind the rule).

95. See Fields, *supra* note 58, at 1042–43 (discussing the disparate treatment of solo practitioners regarding access to client's confidential information with other attorneys).

96. *Supra* note 8 and accompanying text.

97. *Exhibit One Proposed Disciplinary Rule Permitting Sale of a Law Practice*, STATE BAR OF TEX. 1, [https://www.texasbar.com/Content/NavigationMenu/NewsandPublications/TexasBar/Journal1/OnlineMaterial/SaleofLawPractice\\_ExhibitOne.pdf](https://www.texasbar.com/Content/NavigationMenu/NewsandPublications/TexasBar/Journal1/OnlineMaterial/SaleofLawPractice_ExhibitOne.pdf) [<https://perma.cc/HBS5-ZP5S>] [hereinafter *Proposed Disciplinary Rule*]; see OHIO R. PROF'L CONDUCT R. 1.17(c) (Sale of Law Practice).

98. *Proposed Disciplinary Rule*, *supra* note 97 (explaining this is an exception “to the traditional requirements of strict confidentiality and, as so limited, are not violations of this or other Rules”).



choose between potential buyers, deciding on the best-suited attorney to take over the practice.<sup>99</sup>

In summary, the confidentiality of clients' affairs should not prohibit the sale of law practice by a solo practitioner. The rules of both the ABA and Texas permit the attorney to use a client's confidential information if the reason for the disclosure is first discussed fully with the client and the client consents.<sup>100</sup> In addition to client disclosure, requiring the parties involved in the transaction to sign non-disclosure agreements would provide further safeguards for the client.

### B. *Conflict of Interest*

Another significant issue solo practitioners face when selling their practice is a conflict of interest.<sup>101</sup> The conflict of interest stems from the inherent need for the selling attorney to obtain the best price for their law practice.<sup>102</sup> The selling attorney or the attorney's estate will have an interest in the value of the business that appears to be in direct conflict with the client's interest of getting the best representation.<sup>103</sup> Texas Disciplinary Rules of Professional Conduct Rule 1.06(b)(2) states that an attorney should not represent a client when representation "reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests."<sup>104</sup> One theory as to why a conflict of interest will arise is that the selling attorney or their estate will try to maximize their return on the

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99. See Eugene P. Whetzel, *Buying or Selling a Law Practice*, 17 OHIO LAW. 24, 24 (2003) (discussing the use of a confidentiality agreement to allow the selling attorney to maintain the confidence of their clients).

100. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05, *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G, app. A; MODEL RULES OF PROF'L CONDUCT R. 1.6 (Am. Bar Ass'n 1990); Whetzel, *supra* note 99, at 24.

101. See Minkus, *supra* note 28, at 368 (explaining a lawyer selling a law practice has the potential for a conflict of interest); see also Coy, *supra* note 61, at 972-73 ("[I]here are two separate conflicts which can arise as the result of a sale: one on the part of the seller and the other on the part of the buyer.").

102. See Minkus, *supra* note 28, at 368 (identifying conflicts of interest as a primary issue in the sale of a law practice).

103. See *id.* at 356 ("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.") (quoting MODEL CODE OF PROF'L RESP. Canon 5 (AM. BAR ASS'N 1981)); see also Ann E. Simpson, *The Lawyer's Business Dealings with Clients*, 2 J. LEGAL PROF. 213, 213 (1977) (discussing how an attorney acting adversely towards his clients' interests creates a conflict of interest with the client and subjects the lawyer to disciplinary action).

104. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(b)(2).

sale.<sup>105</sup> The greed inherent in most people means the seller will be more apt to sell the law practice to the highest bidder.<sup>106</sup> Of course, at the same time, the selling attorney or estate is obligated to put the client's needs first and find the most competent representation.<sup>107</sup> Selling to the highest bidder will not ensure the seller chooses the best attorney to take over the law firm and serve its clients.<sup>108</sup> Typically, the risk of a conflict of interest of this nature is relatively small when an attorney personally sells the law firm because they want to perpetuate their good reputation even into retirement.<sup>109</sup> However, when the estate is selling to the law firm, this type of conflict of interest risk is more significant because the estate does not have as much at stake in the deceased attorney's name and reputation, and a representative or estate attorney is a fiduciary who must get the greatest value for the attorney's estate.<sup>110</sup>

Notwithstanding this potential for conflict, the Texas Disciplinary Rules of Professional Conduct do not explicitly prohibit an attorney from representing their clients when there is a conflict of interest.<sup>111</sup> The rule only requires a lawyer to fully disclose the conflict's nature to clients and, should the client consent to such conflict, have the client authorize the continued representation.<sup>112</sup> This rule stipulation should not be applied

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105. See *Coy*, *supra* note 61, at 973 (“A conflict may arise between the concern for the client’s interests (in which case the seller would want the most competent buyer) versus the seller’s financial interest in selling the practice (in which case the seller would want the highest bidder, regardless of competence).”).

106. See *Minkus*, *supra* note 28, at 368 (“[T]here 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.”).

107. See generally TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.06, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A. (guiding lawyers in approaching conflicts of interest).

108. See *Minkus*, *supra* note 28, at 368 (“A sale [for an outright fixed price] more easily lends itself to the danger that the highest bidder, rather than the most appropriate attorney, will take over the practice.”).

109. See *id.* at 370 (“[I]f 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 . . .”).

110. See *id.* at 371 (explaining a conflict issue is much more “substantial” in a situation with a deceased attorney over a retiring attorney).

111. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.06 (c)(1)–(2) (stating that a lawyer may continue to represent a client if they reasonably believe their representation “will not be materially affected,” and if they disclose to the client all the material facts of the conflict and the client provides consent).

112. *Id.* (allowing client consent to some technical conflicts of interest).

any differently when applied to the sale of a law practice. The disclosure will include the full details of the sale to all clients.<sup>113</sup>

Another situation in which a conflict of interest can arise is the relationship between the purchasing attorney's current and past clients.<sup>114</sup> In an effort to identify potential conflicts, a substantial vetting of all clients will be required before the purchasing attorney may take on the seller's clients.<sup>115</sup> Disclosing the selling attorney's client list as a means to investigate whether there will be any conflicts of interest also creates a confidentiality problem, as discussed previously.<sup>116</sup> However, the inclusion of a non-disclosure or confidentiality agreement will alleviate the risk to client confidentiality because the purchasing attorney will be required to treat the information as if they were in an attorney-client relationship.<sup>117</sup> Although a non-disclosure agreement alleviates the client's risk of lost confidence, the purchasing attorney could be at risk of creating a conflict of interest by seeing client files that are in direct opposition to their current or past clients.<sup>118</sup> For example, if the selling attorney represents a client involved in a case with a current client of the purchaser, the purchaser might see the selling client's case details. Depending on the amount of information mistakenly obtained by the purchasing attorney, this scenario potentially creates a need for the purchasing attorney to withdraw from representing both the current client and the prospective client.<sup>119</sup> Nevertheless, as long as the disclosure of client lists to the purchasing attorney is kept to general discussions, such as names and past and present cases, the purchasing

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113. See, e.g., *id.* (requiring a detailed description when disclosing a conflict of interest to a client).

114. See Coy, *supra* note 61, at 974, 978 (noting possible conflicts of interest that both the selling and buying attorneys encounter in the sale of a law practice).

115. E.g., Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 809–10 (1977) (discussing the need to screen new clients for conflicts of interest, to avoid disciplinary sanctions and withdrawal from representation).

116. See TEX. DISCIPLINARY RULES PROF'L. CONDUCT R. 1.06(a) ("A lawyer shall not represent opposing parties to the same litigation.").

117. Whetzel, *supra* note 99, at 24 ("This agreement must bind the prospective purchaser to preserve the prior confidence and secrets of the clients of the seller as fully as if those individuals were clients of the prospective purchaser.").

118. Aronson, *supra* note 115, at 809.

119. See *id.* ("When a conflict or potential conflict of interest arises, a conscientious attorney usually faces three possible courses of action: (1) inform all interested parties of the present or potential conflict, inform them of all possible and probable consequences of the conflict should the attorney continue to represent both parties, and continue dual representation with their express, informed consent; (2) after informing the interested parties of the conflict, withdraw from the representation of one of the parties; (3) withdraw from the representation of both parties.").

attorney may continue to represent clients with conflicts, while waiving control of other affairs.<sup>120</sup>

One way to resolve conflicting interests between seller and client is through a structured payment plan that ensures the buyer will continue to have a relationship and see the cases and client affairs through to the end.<sup>121</sup> Another avenue would be requiring the selling attorney to maintain malpractice insurance until the remainder of the clients' current affairs are resolved.<sup>122</sup> These provisions aim to deter the seller from choosing an incompetent buyer and only focusing on receiving the most significant compensation for the practice.<sup>123</sup> They hold the selling attorney liable to the clients for a period after the sale, which will ensure the best purchasing attorney for the clients.<sup>124</sup>

These provisions are adequate for the attorney when selling a law practice in the event of retirement, but would they be useful for the estate, which is not itself the attorney and is disassociated from the obligation to ensure the client is cared for after representation transfer? The precautionary provisions discussed earlier could easily apply to an estate, and an added protection of requiring the court's approval for the sale would also ensure that the disassociated estate seller is acting in the clients' best interest.<sup>125</sup>

120. Coy, *supra* note 61, at 974 ("Perhaps the transaction itself should include a full list of clients and some acknowledgement by both the seller and the buyer that there are no conflicts of interest, or to the extent that a conflict exists, the buyer waives control of those matters."); see TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 (discussing the rule on conflicts of interest between lawyer and clients).

121. Minkus, *supra* note 28, at 368. 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. *Id.*

122. See Coy, *supra* note 61, at 975 n. 25 (indicating a possible solution to reconciling a conflict of interest with the needs of their client is to make "[t]he seller . . . maintain insurance to cover liability for a reasonable period").

123. *Id.*

124. See *id.* at 975 ("A possible solution would be to hold the seller liable for damage caused by negligence on the buyer's part due to a breach of the duty to exercise reasonable care in recommending a new lawyer, and additionally, the seller should remain responsible for active cases.").

125. See Coy, *supra* note 61, at 974 ("To avoid situations where potential hardship for the client may arise; it is suggested that the sale should be approved by court order."); see also Minkus, *supra* note 28, at 372.

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

In short, a conflict of interest is an issue that can create problems for the sale of a law practice for a retiring attorney, and especially, for the estate of the deceased attorney. However, the issue should not preclude the sale of a law practice for either type of seller. Texas should address this issue with a rule to ensure that all parties are protected and are following the best practices in order to achieve the ethical sale of their law practices.

### C. *Client Fees*

The fees charged by an attorney are always a concern for the client and likely are the client's most significant concern. Client apprehension could be a significant roadblock for selling a practice and client affairs to another attorney. Texas Disciplinary Rules of Professional Conduct Rule 1.04(f) does not permit fee sharing unless the attorneys are from the same firm or there is full disclosure of the fee-sharing agreement to the client and the client's consent in writing.<sup>126</sup>

- (f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:
  - (1) the division is:
    - (i) in proportion to the professional services performed by each lawyer; or
    - (ii) made between lawyers who assume joint responsibility for the representation; and
  - (2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:
    - (i) the identity of all lawyers or law firms who will participate in the fee-sharing agreement,and
    - (ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

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and negotiations conducted with the purchaser, as well as the efforts to find other purchasers, would suffice.

*Id.* at 372.

126. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04(f), *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G, app. A.

- (iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made. . . .<sup>127</sup>

However, none of these provisions should bar the sale of a law practice, especially for fees charged by the selling attorney in a contingent fee. For example, if the selling attorney is referring clients with contingent fee agreements, the buyer could pay the selling attorney based on the selling attorney's previous work and those outcomes. This fee agreement would help strengthen the provision that the selling attorney and buyer agree to a payment plan sale, encouraging the seller to find the best and most competent buyer.<sup>128</sup>

When selling a firm, another fee concern is the need for the buying attorney to increase the fees agreed to by the seller. However, ABA Rule 1.17(d) and jurisdictions that have adopted similar rules do not allow the buyer to increase the fee based on the sale of the practice.<sup>129</sup> If the buying attorney wants to increase the hourly fees for a particular client, they must address the increase with the client, and the client will have the option to consent to the new fee and stay or seek new representation.<sup>130</sup> When a new attorney takes over the client's affairs, the purchasing attorney will want to spend a considerable amount of time getting up to speed on the current client's case.<sup>131</sup> Depending how complicated the cases are, the amount of time a lawyer spend familiarizing himself with the case would need to be charged to the client. This extra work causes clients to be charged twice for work that has already been performed by the previous attorney.<sup>132</sup> This

127. *Id.*

128. *See* Minkus, *supra* note 28, at 368 (explaining how a structured payment plan encourages a seller to find the most competent buyer).

129. MODEL RULES OF PROF'L CONDUCT R. 1.17(d) (Am. Bar Ass'n 2021). All jurisdictions that have adopted a rule forbid fee-changing due to the sale. However, some states include in the rule's language an exception so that if the client is informed and consents to an increase in the fee then it is allowed. *See generally* ABA Comm. on CPR Policy Implementation, *supra* note 8 (outlining the variations of each state in relation to Rule 1.17).

130. *See* ABA Comm. on CPR Policy Implementation, *supra* note 8 (providing how each state allows a buyer attorney to increase fees so long as the client consents to such).

131. *See* James K. Sterett II, *The Sale of a Law Practice*, 121 U. PA. L. REV. 306, 313–14 (1973) (discussing how fees can become a substantial ethical problem in the sale of law practice, but attorneys have obligation not to charge excess fees unnecessarily).

132. *See* Coy, *supra* note 61, at 975 ("Since the buyer must split a portion of her fees received with the selling attorney, there may be pressure to charge more than the services rendered would otherwise merit.").

scenario is a concern, and the reality is that the attorney will need to charge the time, but this will not affect the client with contingency fee agreements. Additionally, the ABA recently released an opinion that allows a selling attorney to stay on board to help the practice transition smoothly and help them get up to speed with their cases with minimal additional charges.<sup>133</sup> The selling attorney can advise the purchasing attorneys to allow for a smoother transition.<sup>134</sup>

The fee issues discussed involve a retiring attorney and not the deceased attorney's estate. Texas Disciplinary Rules of Professional Conduct Rule 5.04(a) does not allow lawyers to share fees with laypersons:

- (a) A lawyer or law firm shall not share or promise to share legal fees with a non-lawyer, except that:
  - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate, or a lawful court order, may provide for the payment of money, over a reasonable period of time, to the lawyer's estate to or for the benefit of the lawyer's heirs or personal representatives, beneficiaries, or former spouse, after the lawyer's death or as otherwise provided by law or court order.
  - (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and
  - (3) a lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.<sup>135</sup>

Again, none of the provisions in the rule should prohibit the sale by the deceased attorney's estate. In fact, (a)(1) suggests that with court approval and a structured payment plan, the estate could accept the deceased

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133. See James Podgers, *Ethics Opinion: It's OK To 'Practice' After Selling a Law Practice to Assist in the Transition*, A.B.A. J. (Mar. 16, 2015, 6:16 AM), [https://www.abajournal.com/magazine/article/ethics\\_opinion\\_its\\_ok\\_to\\_practice\\_after\\_selling\\_a\\_law\\_practice\\_to\\_assist](https://www.abajournal.com/magazine/article/ethics_opinion_its_ok_to_practice_after_selling_a_law_practice_to_assist) [https://perma.cc/4K5J-AMAF] (discussing how lawyers are allowed to stay after the sale and help clients transition).

134. See Will Knight, *Ethics Opinion Clarifies Inconsistency in Sale-of-Law Practice Rules*, 8 ETHICS & PROF. 6, 6 (2015) (clarifying ABA Ethics Opinion 468 and whether lawyers who sell a practice can continue to practice and help the buyers).

135. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.04(a), *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G, app. A (West 2013).

attorney's interest in the practice's sale.<sup>136</sup> Therefore, the provisions that we have discussed could apply to the attorney's estate. Additionally, partners in large firms have been routinely paying deceased attorneys' estates their respective interest in law firms. With a well-crafted rule, there should be no reason that solo practitioners' estates should not realize the value of their decedent's hard work and interest in a law firm.

In conclusion, fee and fee sharing of the retiring attorney and an estate of the deceased is an issue that can create a significant problem in the sale of a law practice. However, because large law firms have been doing it and will continue to do it, solo practitioners must be treated equally and have the opportunity to do the same. With a well-crafted rule to guide the attorneys and protect their clients' interests, this can be achieved and should be addressed immediately by the Texas bar.

#### D. *Solicitation*

The advertisement and solicitation of clients have long been sensitive issues within the legal profession.<sup>137</sup> Until the late 1970s, lawyers were not allowed to advertise their services, much less advertise their law practice for sale.<sup>138</sup> However, in 1977, the United States Supreme Court in *Bates v State Bar of Arizona*<sup>139</sup> upheld lawyers' right to advertise their services through truthful, non-misleading methods.<sup>140</sup> While there is little case law—and none in Texas—addressing advertising the sale of one's law practice, a few cases have addressed tangential issues and sided with the notion that one cannot sell or advertise their law practice.<sup>141</sup> It should be noted, however,

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136. *See id.* at R. 5.04(a)(1).

[A]n agreement by a lawyer with the lawyer's firm, partner, or associate, or a lawful court order, may provide for the payment of money, over a reasonable period of time, to the lawyer's estate to or for the benefit of the lawyer's heirs or personal representatives, beneficiaries, or former spouse, after the lawyer's death or as otherwise provided by law or court order.

*Id.*

137. *See* Monica R. Richey, *Modern Trends of Restrictions on Lawyer Solicitation Laws*, 29 J. LEGAL PRO. 281, 281 (2004–05) (indicating that “advertising has always been [a] topic of intense controversy” and over the last several decades, has become more popular than ever).

138. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) (holding an Arizona law restricting attorney advertising in violation of the First and Fourteenth Amendments).

139. *Id.*

140. *See id.* at 384 (holding the use of truthful advertisements by attorneys cannot be restrained, and the disciplinary rule against truthful advertisements was “[a] violat[ion] of the First Amendment[]”).

141. *See* Prahinski v. Prahinski, 321 Md. 227, 236 (1990) (citing *Dugan v. Dugan*, 457 A.2d 1, 8 (1983)) (“New Jersey and Maryland both place the [ ] limitation[ ] on the practice of law [that] sole



such decisions were decided before the approval of a rule for the sale of a law practice, and as such have been superseded.

Texas Disciplinary Rules of Professional Conduct rule 7.03 addresses the issue of solicitation of clients:

- (c) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a communication that involves coercion, duress, overreaching, intimidation, or undue influence.
- (d) A lawyer shall not send, deliver, or transmit, or knowingly permit or cause another person to send, deliver, or transmit, a solicitation communication to a prospective client, if:
  - (1) the communication is misleadingly designed to resemble a legal pleading or other legal document; or
  - (2) the communication is not plainly marked or clearly designated an “ADVERTISEMENT” ...<sup>142</sup>

This rule does not address or prohibit attorneys who are retiring from recommending the client to another attorney for representation. In fact, the rule is more targeted to prohibiting attorneys from actively seeking out clients that they know have cases that they would like to represent them.<sup>143</sup> The rule against antisolicitation targets “campers and runners,” which are laypeople that attorneys employ to coerce clients into accepting a particular attorney for employment.<sup>144</sup> The rule does not in itself prohibit a retiring attorney who is selling his law practice to refrain from recommending the purchasing attorney to their clients.<sup>145</sup> The rule merely restricts lawyers

practitioners cannot sell their law practices.”); *see also* Winner & Smith, *supra* note 19, at 16 (“The Maryland Court of Appeals . . . noted the following limitations on a sale: (1) sole practitioners cannot sell their law practices; (2) restrictive covenants prohibiting competition by the transferor of the practice are not allowed; and (3) clients may not be sold between practices.”).

142. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.03(c), (d)(1–2), *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G, app. A.

143. *See* Coy, *supra* note 61, at 978 n. 46 (“[A]nti-solicitation rule[s] [are] primarily concerned with preventing the employment of ‘campers and runners’ compensated on a per capita basis and/or preventing violations of the fee-splitting provisions.”).

144. *Id.*

145. If an attorney makes a referral on behalf of another attorney as long as there is no fraud and misleading information, the referral is allowed. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.03(a) (“A lawyer ‘solicits’ employment by making a ‘solicitation communication.’”).

from making a recommendation if made with fraud, coercion, or undue influence.<sup>146</sup>

Antisolicitation rules will also apply to purchasing attorneys after the sale of the law practice. One of the primary concerns is that the purchasing attorney will continue to use the seller's name to attract clients and take advantage of the seller's beneficial reputation.<sup>147</sup> However, this practice has long been prohibited, and there is no need to address this issue because selling a law practice's goodwill will be mainly to ensure that the established clientele will continue to use the purchasing attorney's services and not to attract new clientele by using the name of the seller.<sup>148</sup> There is a proposed rule change to Texas' rule 7.01, which would allow law practices to use tradenames, leading to complications in applying this rule.<sup>149</sup> However, the rule has not been passed to date, perhaps for this reason.

In summary, Texas needs to address this issue and adopt a rule to ensure that Texas attorneys are not soliciting clients and that these transactions are ethically executed. For the most part, solicitation should not be an issue as a retiring attorney recommending a competent attorney to his clients is in no way undue influence or fraud, but rather a benefit to the client. A seller recommending an attorney to his clients, with full disclosure of his qualifications and reprimands, benefits the client because they are given the opportunity to not look for alternative counsel themselves and save time and stress.<sup>150</sup>

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146. *Id.*

147. See J. Anthony McLain, *Law Firm Name—The Name of a Law Firm May Not Contain the Names of Members of the Law Firm Who Are Not Partners*, 60 ALA. LAW. 341, 341–42 (1999) (explaining the rules against using a name of an attorney that is not a partner and noting that the name is usually the selection criteria of the client; using the name of a non-partner could be misleading or deceptive); see also Brian Close, *Rules Allowing Sale of a Law Practice's Goodwill Is Ill-Conceived*, 24 MONT. LAW. 17, 17 (1998) (“If an attorney is going to disassociate herself completely from her practice, it is not appropriate for the purchasing attorney to imply that the retiring attorney is still associated with the practice.”).

148. See McLain, *supra* note 147, at 341–42 (discussing the prohibition against attorneys using the names of other attorneys if they are not in a partnership).

149. *Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure—Rule 7.01. Communications Concerning a Lawyer's Services*, STATE BAR OF TEX., [https://www.texasbar.com/am/rulesvote/docs/2021\\_Referendum\\_Rules\\_and\\_Comments\\_CleanVersion.pdf](https://www.texasbar.com/am/rulesvote/docs/2021_Referendum_Rules_and_Comments_CleanVersion.pdf) [<https://perma.cc/8RL2-Z8E5>] [hereinafter *Proposed Amendments*]; see also TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A.

150. *Proposed Amendments, supra* note 149.

## V. PROPOSED TEXAS VERSION OF THE RULE 1.17 SALE OF LAW PRACTICE

This section will present a proposal of a version of rule 1.17 sale of law practice that Texas should adopt. This Comment takes aspects of the ABA model rule, previously proposed versions to Texas, and other states' versions of their adopted rule. Undoubtedly, this law will have to be changed as the legal system changes in the future. However, this version of the rule addresses many of the inherent issues discussed in the previous sections.

An excellent place to start when looking to propose a rule for the sale of a law practice in Texas is to look at the ABA's Model Rule 1.17. It is a well-rounded rule, but as discussed, there are more provisions that Texas must address to protect Texas solo practitioners and their clients fully. The ABA Model Rule 1.17 states:

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;
- (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
- (c) The seller gives written notice to each of the seller's clients regarding:
  - (1) the proposed sale;
  - (2) the client's right to retain other counsel or to take possession of the file; and
  - (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

- (d) The fees charged clients shall not be increased by reason of the sale.<sup>151</sup>

The Model Rule omits the buyer and seller provision.<sup>152</sup> In 2016, the Annual Meeting Resolutions Committee of the Texas State Bar heard a proposed disciplinary rule.<sup>153</sup> The Texas Supreme Court never so much as submitted the proposal to the Texas Supreme Court for a vote.<sup>154</sup> It began with the definitions of buyer and seller, which is essential for the proposed rule:

- (a) As used in this Rule:
- (1) “Buyer” means an individual lawyer or a law firm;
  - (2) “Seller” means an individual lawyer, the guardian of the estate of a disabled lawyer, the executor, administrator, heir, or beneficiary of a deceased lawyer, a trustee of a trust for the benefit of an individual lawyer, or an agent acting pursuant to a power of attorney from an individual lawyer.<sup>155</sup>

The ABA’s model rule will again need to be changed because it allows only a “lawyer or law firm” to sell a law practice.<sup>156</sup> As discussed in previous sections, it is essential to enable an attorney’s estate to sell and realize the deceased lawyer’s interest in the practice. Even though the proposed rule includes the estate in the seller’s definition, it is crucial for the proposed rule to outline who can sell and buy a law practice in the rule’s language.<sup>157</sup> For example, in subsection (b), the Illinois rule states, “[a] lawyer or a law firm may sell or purchase, and the estate of a deceased lawyer or the guardian or authorized representative of a disabled lawyer may sell.”<sup>158</sup> The ABA Model Rules are not the only rules that do not include

151. MODEL RULES OF PROF'L CONDUCT R. 1.17 (AM. BAR ASS'N 1990).

152. *See generally id.* (stating a sale should not increase costs for the client).

153. *See Proposed Annual Meeting Resolutions, supra* note 11, at 384–85 (proposing the sale of law practice and its submittal to the Texas Supreme Court for ratification).

154. *Id.* at 384.

155. *Proposed Disciplinary Rule, supra* note 97.

156. MODEL RULES OF PROF'L CONDUCT R. 1.17.

157. *See generally* ABA Comm. on CPR Policy Implementation, *supra* note 8 (comparing different states version of the rule allowing the sale of law practice).

158. *See* ILL. SUP. CT. R. 1.17 (2016) (“A lawyer or a law firm may sell or purchase, and the estate of a deceased lawyer or the guardian or authorized representative of a disabled lawyer may sell, a law practice, including good will.”).

the estate among the authorized sellers; many jurisdictions have adopted rules similar or adopted the ABA rule as a whole.<sup>159</sup> However, as discussed, it is essential to include the estate language because a deceased lawyers' estate should be allowed to realize the value of the decedent's hard work, and it is better to take an affirmative stance on the issue rather than remain silent, leaving attorneys bereft of guidance.

To address the inherent issue of conflict of interest, many states, including the ABA, have included a provision that prohibits the selling attorney from engaging in the field of the practice they are selling or the geographic area or jurisdiction in which they sold the firm.<sup>160</sup> Due to Texas's size, it is reasonable that an attorney selling a firm in one location of the state may be able to practice in another and be free of conflict.<sup>161</sup> The provision included in this rule is similar to other states such as Pennsylvania.<sup>162</sup> The Pennsylvania rule also includes the lawyer's ability to continue to practice with the seller after the sale in an effort to help client and the buyer transition. It states:

- (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in [] [the geographic area in which the practice has been conducted]; however, the seller is not prohibited from assisting the purchaser in the orderly transition of active client matters for a reasonable period after the closing without a fee.<sup>163</sup>

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159. Many states have adopted the exact version of the ABA model rule. The model rule does not allow for estate of a deceased lawyer to sell a law practice. It lists only that a lawyer or a representative of lawyer can sell a law practice if they abide by the condition listed in the rule. Some states have changed the wording for which clients should be notified but kept the rule primarily intact. *See* MODEL RULES OF PROF'L CONDUCT R. 1.17; *see also* WI. SCR. 20: RULES OF PROF'L CONDUCT R. 1.17 (2020); W.VA. RULES OF PROF'L CONDUCT R. 1.17 (2020); WY. RULES OF PROF'L CONDUCT R. 1.17 (2020); ARIZ. R. PROF'L CONDUCT R. 1.17 (2020).

160. *See* MODEL RULES OF PROF'L CONDUCT R. 1.17(a); *see also* Michael Downey, *Selling a Law Practice under ABA Model Rule 1.17* (Feb. 28, 2017), [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2017/february-2017/selling-a-law-practice-under-aba-model-rule-1-17](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2017/february-2017/selling-a-law-practice-under-aba-model-rule-1-17), [<https://perma.cc/7QST-WF7Q>] (explaining the various situation in which the seller could sell part or all of his law firm depending on whether they exclusively practice in one jurisdiction or multiple).

161. *See* MODEL RULES OF PROF'L CONDUCT R. 1.17(a) (requiring an attorney stop practicing in the field sold and in the geographic region or jurisdiction the firm is located).

162. PA. CODE RULES OF PROF'L CONDUCT R. 1.17(a) (2016).

163. *See id.* ("[T]he seller is not prohibited from assisting the purchaser in the orderly transition of active client matters for a reasonable period after the closing without a fee."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. 6 (requiring that an attorney stop practicing in the field sold and in the geographic region or jurisdiction the firm is located).

- (b) The seller sells the entire practice, or the entire area of practice, to one or more lawyers or law firms [authorized to practice law in Texas].<sup>164</sup>

Another safeguard against the creation of conflicts of interest, as discussed earlier, is allowing the buyer to examine the list and names of clients and to identify any potential for conflicts.<sup>165</sup> Some states have allowed this practice even before notification to clients that the attorney will be selling the law firm.<sup>166</sup> This practice allows the seller to avoid repeatedly sending notices to clients for every potential buyer, which would be a waste of time and better saved for a legitimate, serious buyer.<sup>167</sup> In addition to a general discussion with the potential buyer to identify conflicts, the proposed rule will also include the requirement that the parties enter into a confidentiality agreement allowing the attorney to disclose more information without jeopardizing the confidentiality of the client.<sup>168</sup> Ohio's rules of professional conduct have a similar provision, which states:

- (c) The selling lawyer and the prospective purchasing lawyer may engage in general discussions regarding the possible sale of a law practice. Before the selling lawyer may provide the prospective purchasing lawyer with information relative to client representation or confidential material contained in client files, the selling lawyer shall require the prospective purchasing lawyer to execute a confidentiality agreement. The confidentiality agreement shall bind the prospective purchasing lawyer to preserve information relating to the representation of the clients of the selling lawyer, consistent with Rule 1.6, as if those clients were clients of the prospective purchasing lawyer.<sup>169</sup>

When the seller has finally found the best potential buyer for their law practice, it comes time to disclose the sale's details to the clients.

164. MODEL RULES OF PROF'L CONDUCT R. 1.17 (requiring the buyer to be an attorney or a firm of attorneys that are licensed to practice law in the state of purchase).

165. Many states allow general discussion about clients to identify any conflicts before actual notice required from the clients. This allows the seller to easily meet with and identify multiple potential buyers and choose the best one for their clients. *See* Whetzel, *supra* note 99, at 24; MODEL RULES OF PROF'L CONDUCT R. 1.6.

166. *See generally* ABA Comm. on CPR Policy Implementation., *supra* note 8 (identifying a practice by many states that allow firms to identify any conflicts before actual notice is required from the clients).

167. Whetzel, *supra* note 99, at 24.

168. *Id.*

169. OHIO RULES OF PROF'L CONDUCT R. 1.17(c) (2020).

Jurisdictions disagree on the amount of information and to which clients the seller must disclose the sale.<sup>170</sup> However, in all parties' best interest, the seller should disclose the sale's details to all clients affected, former and current.<sup>171</sup> The information required to be disclosed should include the sale's structure, including payments and timeframe, and the buyer's qualifications, including any disciplinary actions on the buyers' record.<sup>172</sup> Louisiana, the last state to adopt a version of the rule in 2016, does an excellent job laying out the requirements of the information that clients need to know:

- (c) At least ninety (90) days in advance of the sale, actual notice, either by in-person consultation confirmed in writing, or by U.S. mail, is given to each of the clients of the law practice being sold, indicating:
  - (1) the proposed sale of the law practice;
  - (2) the identity and background of the lawyer or law firm that proposes to acquire the law practice, including principal office address, number of years in practice in Louisiana, and disclosure of any prior formal discipline for professional misconduct, as well as the status of any disciplinary proceeding currently pending in which the lawyer or law firm is a named respondent;
  - (3) the client's right to choose and retain other counsel and/or take possession of the client's files(s); and
  - (4) the fact that the client's consent to the transfer of the client's file(s) will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of the notice.<sup>173</sup>

The rule must also include a provision that addresses the issue of clients with pending litigation. Many jurisdictions have included in their rule a requirement that the seller client cannot transfer legal representation without court approval.<sup>174</sup> This provision is logical because if there is urgent pending litigation, the buyer will not have the time to review the case

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170. Even Texas has proposed changes to Rule 13.01, which requires an attorney closing their practice to send notices to all clients current and past. The Texas Supreme Court has contemplated only requiring the attorney to notify clients who will be affected by the closure. *See Brill, supra* note 13, at 170. *See generally* TEX. RULES DISCIPLINARY P. R. 13.01.

171. *Id.* RULES OF PROF'L. CONDUCT R. 1.17(c) (2004).

172. LA. RULES OF PROF'L. CONDUCT R. 1.17(c) (2018).

173. *Id.*

174. *See generally* ABA Comm. on CPR Policy Implementation, *supra* note 8.

and fully represent the client competently and is in line with Texas. Disciplinary Rules Professional Conduct Rule 1.15.<sup>175</sup> Therefore, if this is deemed to be the case, the court will need to decide whether it is in the best interest to have the selling attorney finish the litigation or maintain control of the affair until the point where the buyer will be able to represent the client competently. This provision obviously would not apply to a deceased attorney and their estate. In this case, the client would need to find replacement representation. In that case, the buyer could ask the court for an extension on any pending deadlines to familiarize themselves with the subject matter in litigation.

It is also essential to include a provision that explains that other professional conduct rules do not bar the sale of a practice. For example, fees paid to non-lawyers are allowed in the sale of a law practice, fees paid to an attorney that are not part of a law firm are allowed in a sale of a law practice, and confidential information is allowed in a sale law practice.<sup>176</sup> The proposed Texas rule that was discussed earlier in this section does just that, and it states:

- (g) Payments for the purchase of the practice of seller
  - (1) may be made to seller even though other Rules would:
    - (i) require consent of the client,
    - (ii) require the fees to be allocated between the parties based on services rendered or on responsibility assumed, or require buyer and seller to practice in the same firm,
  - (2) may be paid to a trustee of a trust for the benefit of seller, to the guardian of seller's estate, to seller's agent acting under a power of attorney, and to the executor, administrator, heirs, and beneficiaries of a deceased seller.

Payments to such non-lawyer payees are permitted notwithstanding the fact that other Rules might be regarded as prohibiting such payments.<sup>177</sup>

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175. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(b)(1), *reprinted in* TEX. GOV'T CODE ANN, tit. 2, subtit. G, app. A.

176. *Proposed Disciplinary Rule, supra* note 97.

177. *Id.*



Finally, the rule will reiterate that clients' fees must not change solely due to the sale of law practice without consent from the client.<sup>178</sup> Additionally, the proposed rule that was not accepted includes a provision to remind the sellers and buyers that they must adhere to professional conduct rules as well as the disciplinary procedures rules such as 13.01<sup>179</sup>, 13.02<sup>180</sup>, and 13.03<sup>181</sup> when selling a law practice.<sup>182</sup>

Below is the proposed rule. All of the provisions discussed have been added and the section numbers are changed to be consecutive.

**Rule 1.17 (Sale of Law Practice)**

- (a) As used in this Rule:
- (1) “Buyer” means an individual lawyer or a law firm;
  - (2) “Seller” means an individual lawyer, the guardian of the estate of a disabled lawyer, the executor, administrator, heir, or beneficiary of a deceased lawyer, a trustee of a trust for the benefit of an individual lawyer, or an agent acting pursuant to a power of attorney from an individual lawyer.<sup>183</sup>
- (b) A lawyer, a law firm, [or estates of a lawyer] may, for consideration, sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:
- (1) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold . . . in [the geographic area in which the practice has been conducted]; however, the seller is not prohibited from assisting the purchaser in the orderly transition of active client matters for a reasonable period after the closing without a fee.

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178. See generally ABA Comm. on CPR Policy Implementation, *supra* note 8.

179. Rule 13.01 deals with the cessation of practice. It requires the leaving attorney to give notification and sets out who and how the attorney must achieve this. See TEX. RULES DISCIPLINARY P. R. 13.01.

180. Rule 13.02 deals with the assumption of jurisdiction. If an interested party would like to take over the affairs of a deceased or retiring attorney, they must petition the tribunal in which the attorney had residence. See *id.* at R. 13.02.

181. Rule 13.03 deals with the ability of the court to assume jurisdiction of client files and appoint an attorney to be a custodian over them. See *id.* at R. 13.03.

182. *Proposed Disciplinary Rule, supra* note 97.

183. *Id.*

- (2) [T]he entire practice, or the entire area of practice, [is sold] to one or more lawyers or law firms, [authorized to practice law in Texas].<sup>184</sup>
- (c) The selling lawyer and the prospective purchasing lawyer may engage in general discussions regarding the possible sale of a law practice. Before the selling lawyer may provide the prospective purchasing lawyer with information relative to client representation or confidential material contained in client files, the selling lawyer shall require the prospective purchasing lawyer to execute a confidentiality agreement. The confidentiality agreement shall bind the prospective purchasing lawyer to preserve information relating to the representation of the clients of the selling lawyer, consistent with Rule 1.6, as if those clients were clients of the prospective purchasing lawyer.<sup>185</sup>
- (d) At least ninety (90) days in advance of the sale, actual notice, either by in-person consultation confirmed in writing, or by U.S. mail, is given to each of the clients of the law practice being sold, indicating:
  - (1) the proposed sale of the law practice;
  - (2) the identity and background of the lawyer or law firm that proposes to acquire the law practice, including principal office address, number of years in practice in [Texas], and disclosure of any prior formal discipline for professional misconduct, as well as the status of any disciplinary proceeding currently pending in which the lawyer or law firm is a named respondent;
  - (3) the client's right to choose and retain other counsel and/or take possession of the client's file(s); and
  - (4) the fact that the client's consent to the transfer of the client's file(s) will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of the notice.<sup>186</sup>

A notice from any lawyer to that lawyer's clients, is a permitted communication and is not a violation of these Rules. If such a

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184. PA. RULES OF PROF'L. CONDUCT R. 1.17(a) (2016).

185. OHIO RULES OF PROF'L. CONDUCT R. 1.17(c) (2020).

186. LA. RULES OF PROF'L. CONDUCT R. 1.17(c) (2018).

notice is sent by buyer due to the inability of seller to give the notice, it is not subject to compliance with the Rules regarding advertisements or communications with non-lawyers nor is it an event that constitutes barratry or solicitation.

If notice cannot be given to a client, a district court or a court exercising probate jurisdiction, as applicable, can determine whether or not to permit the transfer of representation to buyer.

- (e) The purchase of seller's practice or part thereof carries with it the obligation of buyer to assume the professional obligations of seller's practice and to take possession and preserve all of seller's active[,] inactive[,] and closed client files. Buyer shall have access to all of such files and other records relating to seller's practice and shall preserve confidentiality to the same extent as though having been originally retained by each client.
- (f) Except for emergencies, due dates, and deadlines requiring immediate response, buyer may not perform and will not be responsible for performing services for seller's clients until the expiration of the [90] day notice period or until receiving specific authorization from the client, whichever occurs first.

The court in which a matter is pending shall determine whether to permit buyer to assume representation of seller's client.

Other proceedings relating to the sale or proposed sale of seller's practice are to be brought in a district court or a court exercising probate jurisdiction, as the case may be and venue is in the county in which seller most recently maintained an office for the practice of law.<sup>187</sup>

- (g) Payments for the purchase of the practice of seller
  - (1) may be made to seller even though other Rules would:
    - (i) require consent of the client,
    - (ii) require the fees to be allocated between the parties based on services rendered or on responsibility assumed, or require buyer and seller to practice in the same firm,

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187. *Proposed Disciplinary Rule, supra* note 97.

- (2) may be paid to a trustee of a trust for the benefit of seller, to the guardian of seller's estate, to seller's agent acting under a power of attorney, and to the executor, administrator, heirs, and beneficiaries of a deceased seller. Payments to such non-lawyer payees are permitted notwithstanding the fact that other Rules might be regarded as prohibiting such payments.<sup>188</sup>
- (h) The fees charged clients shall not be increased by reason of the sale[, without consent of the client].<sup>189</sup>
- (i) In addition to satisfying the provisions of this Rule, buyer and seller must comply with the applicable provisions of Rules 13.01, 13.02, and 13.03 of the Texas Rules of Disciplinary Procedure.<sup>190</sup>

In summary, this rule addresses confidentiality, conflict of interest, fees, and the solicitation of clients. It will undoubtedly need to be adjusted over time to cover the Texas legal system's nuances. Still, it shows that Texas can formulate a rule that can ensure that clients and lawyers are protected in the ethical sale of a law practice.

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188. *Id.*

189. ILL. SUP. CT. R. 1.17(d) (2016).

190. *Proposed Disciplinary Rule, supra* note 97.

## VI. CONCLUSION

Texas has an opportunity to join the majority and adopt a version of the rule to allow a sale of law practice, including goodwill. Attorneys should be able to realize the value of their hard work throughout their law careers. The belief that lawyers should not be able to sell their practice is even more absurd in light of the undisputed fact that attorneys in a professional corporation do just that, and every other profession in Texas allows the sale of a business, including client goodwill. The era of prohibiting this practice is a remnant of the past, and states have proven that it is possible ethically to clients' and attorneys' benefit. Texas's continued failure to support the solo practitioners in Texas does more harm than good. Providing a rule that will give guidance on how to sell a law practice ethically will undoubtedly improve the legal profession by ridding the profession of unnecessary grievances.

As this Comment discussed, the legal profession is unique, and many ethical concerns can arise from the sale of law practice, but with a carefully designed rule, these issues are not insurmountable. With the proper disclosures to clients and payment plans structured to ensure the competent representation of the purchasing attorney, there is no reason to deny solo practitioners the ability to sell their practice's goodwill.

It is time for Texas to act and allow attorneys and their families to benefit and protect clients. Adopting the rule will ensure that a sale is in the best interest of all parties involved. Ultimately, Texas should adopt a rule because they must protect clients and the legal profession's integrity, which are at the highest risk in the face of silence.