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## **Law practice sales improved by ABA Formal Opinion 468**

By Michael Downey

Small-firm lawyers work hard to assist their clients and build their practices. So I get frustrated when I help these lawyers sell their practices because Missouri Supreme Court Rule 4-1.17 – the ethics rule governing the sale of a law practice – unfairly impedes their ability to recover for that investment.

The problem with Rule 4-1.17 – and ABA Model Rule 1.17 – was pretty straightforward: under Rule 4-1.17(a) (1), the lawyer who sold the practice had to cease practice in the area of practice sold. This appeared to prevent the seller from transitioning the clients to the buying lawyer, both reducing the value of the practice and increasing the likelihood the client’s representation would be mishandled.

This column discusses how I sought to fix this problem and how that effort resulted in new ABA Formal Ethics Opinion 468 (2014).

Detailing the problem. Like ABA Model Rule 1.17, Missouri Rule 4-1.17 imposes four requirements on the sale of a law practice. ABA Formal Opinion 468 summarizes the first three as “requirements that the entire practice or an entire area of practice must be sold; that the seller give written notice of the proposed sale to each client; and that the fees charged to the client shall not be increased by reason of the sale.”

The fourth requirement, to quote Rule 4-1.17(a), is that the seller must “cease 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, as defined by the agreement between the parties to the sale.” This requirement is unusual because, under Missouri Rule 4-5.6(a), lawyers normally are not

permitted to enter – or ask another lawyer to enter – a non-competition agreement.

Second, it is contrary to common practice in the sale of other professional service firms. When an accounting, dental, marketing, medical or other practice is sold, normally the buyer and seller work together for a time. This helps ensure the clients will maintain their relationship with the buyer, increasing the value of the practice. Also, all parties benefit because the selling professional helps the buyer understand what that customer, client or patient needs, and how to deliver effective services.

Rule 4-1.17(a)(1) appeared to prevent the selling lawyer from continuing to practice, thus making such a transition impossible, potentially harming the buyer, seller, and clients of the law practice.

Seeking a solution. When I became chair of the ABA Law Practice Division in fall 2013, I had a unique opportunity to fix the problem. In October 2013, I prepared a resolution calling for the ABA to amend Model Rule 1.17 to create a narrow exception to Rule 1.17(a) (1) so a seller could work with a buyer after a sale. The Law Practice Division’s Council endorsed the idea and forwarded the resolution to the ABA Standing Committee on Ethics and Professional Responsibility (the “ABA Ethics Committee”). We hoped it would concur with our resolution and help us navigate the ABA House of Delegates, seeking to make our amendment law.

The ABA Ethics Committee, however, saw an easier and faster solution. Rather than amend the Model Rules, an action that would require House of Delegates approval and then adoption of the new rule in every state, the ABA Ethics Committee suggested a formal ethics opinion.

Problem solved – ABA Opinion 468. On October 8, 2014, the ABA Ethics Committee

issued ABA Formal Ethics Opinion 468 to clarify that the “the transition of pending or active client matters from a selling lawyer or firm to a purchasing lawyer or firm need not be immediate or abrupt.” Rather, the selling lawyer could “for a reasonable period of time after the closing of the sale, ...assist in the transition of active client matters.” No definitive period was set; rather, the appropriate period of time would “necessarily depend on the circumstances, including the rules and rulings of courts or other tribunals in pending matters.”

In addition, ABA Opinion 468 clarified that neither the buying nor the selling lawyer should “bill clients for time spent on transition activity

that does not advance the representation or directly benefit the client.” Rather, the buying and selling lawyer should negotiate what consideration the seller will receive for transitioning matters to the buyer.

**Conclusion.** While a part of me wishes I could have helped modify the ABA Model Rules, it seems ABA Opinion 468 provides a nice, easily enacted resolution to allow lawyers selling their practice to work with and help transition cases to the buying lawyer. Hopefully this will help small firm lawyers realize the value of their investment, and make the sale of law firms more prevalent.

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