

# ADVISORY ETHICS OPINION 88-03

## **SYNOPSIS:**

In the sale of a law practice, the goodwill of the firm may not, consistent with accepted ethical principles, be sold. The selling attorney is obliged to notify his clients of their right to retain other counsel and to take possession of their files. Compensation arrangements between the buying attorney and selling attorney, if the selling attorney remains “of counsel” to the buyer’s firm, should be structured as a genuine attempt to compensate the selling attorney for his services, and must not be simply an attempt to disguise sale of goodwill.

## **FACTS:**

Attorney A has recently become associated in the practice of law with Attorney B. Attorney B intends to resign from the practice of law, and has expressed a willingness to negotiate sale of the law practice to Attorney A. Attorney A seeks advice from this committee regarding any ethical constraints that may exist relative to sale of the practice, as well as advice relating to any ethical constraints regarding the appropriate manner of remunerating Attorney B, if Attorney B should choose to remain “of counsel”. In addition, Attorney A seeks advice relative to the appropriate manner of communicating such a change in the practice to Attorney B’s clients.

## **DISCUSSION:**

Until fairly recently, it has been the nearly uniform position of the case law and ethical rules and opinions of the American and various State Bars that only hard assets such as furniture, equipment, library materials, and tangible goods, including accounts receivable, could be the subject of a sale, and that “goodwill” could not be ethically sold. These decisions and rulings have been premised, in part, upon the following principles:

- (1) clients and their cases are not merchandise which can be sold,
- (2) the goodwill of a law practice is personal and confidential, attaching only to the attorneys in a firm, rather than to a firm itself,
- (3) permitting sale of goodwill would lead to an inherent potential that clients might be recommended to the highest bidder, rather than to the best attorney,
- (4) the sale of goodwill abrogates the client’s right to select an attorney of his choice and
- (5) the sale of client matters could result in breaches of confidences.<sup>1</sup>

On a more practical level, it is generally recognized that even if the “goodwill” of a law practice cannot be sold, the purchaser of the assets of a firm will generally have an interest in maximizing the likelihood of securing an ongoing attorney-client relationship with the clients of the selling attorney. Because it is necessary for the resigning attorney to notify his clients that he is leaving practice, this notification process is frequently used as a mechanism to encourage the clients to use the services of the purchasing attorney in the future, and to satisfy the selling attorney’s duty to inform his clients that they have the right to retain other counsel and to take possession of their files. As a practical matter, even though this obligation is the seller’s obligation, the purchaser is also under an obligation to take reasonable steps to assure that the seller complies with such an obligation. To the extent the letter is used to encourage clients to use the services of Attorney A, the restrictions of DR 2-101 concerning communications about lawyers or lawyers’ services should be borne in mind and care should be taken to insure that no misrepresentations are made.

In the event that Attorney B totally discontinues his association with Attorney A, the provisions of DR 2-107(a) furnish the governing considerations relative to the payment of compensation to Attorney B. In this respect, it should be noted that DR 2-107(a) “does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.” In the event Attorney B remains associated with Attorney A in an “of counsel” relationship, there appear to be no substantial ethical constraints on the compensation arrangements between Attorneys A and B, provided the compensation plan is not merely a disguised compensation for the sale of goodwill of the firm. Naturally, the strictures of DR 2-106 would apply to any fees charged by either Attorney A or Attorney B to clients of the firm.

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<sup>1</sup> See, generally, *How to Manage Your Law Office*, M. Bender ed., 1987, § 16.15; see, also, ABA Formal Opinion 266 (1945).