The Selling of a Lawyer's Practice

"A lawyer's clients aren't merchandise, nor is a law practice the subject of barter."


Legally and analytically the sale of a law practice is more than a sum of money and books for a library. It is the result of several elements, though not all are necessarily present in every sale. Nevertheless, a possible sale scenario might consist of the following elements: John Doe, newly admitted to the state bar, wishes to practice in Yoknapatawpha County. Ralph Roe, a successful attorney there, is about to retire and on learning of Doe's wishes invites the young attorney down to discuss his future. Eventually a bargain is born. Roe will turn over to Doe, (1) his library, office furniture, and other physical assets, valued at $10,000 dollars, for $15,000 dollars. It is presumed here, as in sales of most businesses, that the additional $5,000 dollars is for the intangible asset of (2) future client patronage, or goodwill. In addition, Roe may promise further to (3) write letters to his clients, past and present, recommending Doe to them. Roe may also allow Doe to (4) use the name "Roe" along with his own to give the impression that there is, or has been, a partnership between the two. Lastly Roe may promise (5) not to practice in the county for a certain period, or perhaps never again due to his retiring. These last three elements may be spoken of as ways to transfer the second element, goodwill.

Let us now look at these elements as they relate to a law practice sale in the United States, and where helpful, in Britain, keeping in mind that the above situation describes a sale that in all of its particulars would probably not be upheld anywhere in Great Britain or in America. The validity of such a sale is certainly doubtful in the United States—at least in New Jersey and California—since the recent cases of *Dwyer v. Jung* and *Geffen v. Moss*. Its validity is doubtful as well in Britain, where the general rule is, and has been

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1. It should be noted that the above scenario is certainly not exclusive. Where necessary and helpful other possibilities will be mentioned, e.g., partner selling his partnership interest to an associate, or the estate of a deceased attorney selling the practice to a beginning lawyer. In the latter case, of course, there would be little need for a restrictive convenant.


since *Bunn v. Guy*,⁴ that a solicitor's practice may be sold just as any business, a rule that until recently, it is felt, influenced law on this subject in the United States.⁵

**Physical Assets and Goodwill**

The sale of the physical assets of a law practice—library, furniture, business machines, and other tangible property attached to the office—is treated like the sale of tangible property by a business and is expressly allowed.⁶ Ethical problems arise, however, when the circumstances of the sale show that the vendor has also attempted to part with goodwill.

In the usual context of the sale of a business, goodwill has been described as the expectation of future patronage⁷ and is quite properly an object of transfer.⁸ In the sale of a law practice, however, goodwill is described by commentators⁹ and bar opinions¹⁰ as the

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8. Id.
9. See H. DRINKER, LEGAL ETHICS 161, 189 (1953) [hereinafter cited as DRINKER]; WISE, supra note 6, at 115.
10. ABA OPINIONS, No. 266 (1945). In deciding that an attorney could not purchase the practice and goodwill of a deceased attorney from his estate the opinion said, “The goodwill of the practice of a lawyer is not, however, of itself an asset, which either he or his estate can sell.” ABA OPINIONS, No. 300 (1961), in an opinion concerned with restrictive covenants, further stated the bar’s opinion on goodwill transfers saying, “The practice of law, however, is a profession, not a business or a commercial enterprise. The relations between attorney and client are personal and individual relationships. The practice of law is not a business which can be bought or sold.”

It should be noted that these ABA OPINIONS, based on the old ABA CANONS OF PROFESSIONAL ETHICS, did not draw from a specific canon but rather implied the prohibition from collateral canons: Canon 7, Professional Colleagues and Conflicts of Opinion; Canon 27, Advertising, Direct or Indirect; Canon 34, Division of Fees; Canon 37, Confidences of a Client. “Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of professional status.” The Association of the Bar of the City of New York, Selected Opinions of the Committee on Professional Ethics [hereinafter cited as
attempt to transfer a client's loyalties and is vigorously disappro-ved. In Britain, however, this is not the case.\textsuperscript{11}

The British practice of allowing goodwill to be sold as an asset just as any other trade or business dates back at least to \textit{Bunn v. Guy}. There an executed agreement between attorneys was upheld by the court. The various elements of that sale almost exactly mirror our scenario above, and the decision has, with minor aberrations,\textsuperscript{12} been accepted in Britain ever since. The transfer of the solicitor's goodwill is usually secured via the recommendation, firm name use, and restrictive covenant elements. A sale is by no means automatic, however. For example, in Britain, while the firm name element is generally given force in executed agreements,\textsuperscript{13} it is open to question whether it is capable of specific performance,\textsuperscript{14} and the use of the seller's name by a non-partner does not seem capable of specific performance at all.\textsuperscript{15}

While it is seldom safe to generalize, it does appear that the British allow goodwill to be sold. The British opinions based on \textit{Bunn v. Guy} seem to lack the deference both to the client and to the public which is present in American Bar opinions, and as we shall see in \textit{Geffen} and \textit{Dwyer}.\textsuperscript{16} The difference might be explained merely as a British desire for uniformity in the law as to sales of businesses, a uniformity which thereby must include the solicitor's practice. As the winning argument in \textit{Bunn v. Guy} put it:

\textit{There is no ground on which to distinguish this [contract] from the common case of contracts for the sale of the goodwill of a trade, which, in common experience, are enforced by actors at law at every sittings [sic]. The very term goodwill imports that

\textsuperscript{11}\textit{N.Y. City Opinions} No. 633 (1943). \textit{See N.Y. City Opinions, Nos. 588 (1941), 755 (1950).}

\textsuperscript{12}Not only in Britain, but in Canada and Australia as well. \textit{See Note, The Death of a Lawyer}, 56 \textit{Colum. L. Rev.} 606, 617, 618 n.72 (1956).


\textsuperscript{15}Id.

\textsuperscript{16}See notes 2, 3, \textit{supra}.
the purchaser is to have the recommendation of the seller to his customer.17

Of the few American cases that have spoken of law practice goodwill18 most agree that the goodwill of a law practice is not a saleable asset. The latest assurance that this is the proper position comes from Geffen v. Moss. In that breach of contract action, it was determined from the circumstances of the contract19 that the selling and buying attorneys had attempted to transfer the goodwill of a law practice. The court held the agreement unenforceable and invalid as contrary to public policy.20

Geffen found Linnick v. State Bar21—though not directly on point—to be sufficiently indicative of the ethical considerations involved. In the latter case the court, speaking of solicitation of business for an attorney by a layman, said in essence that the lay intermediary cannot keep the best interests of the client paramount when he profits from his referrals. “He is likely to refer claimants, not to the most competent attorney, but to the one compensating him.” Of course, in Geffen the solicitor would have been the selling

Barton v. State Bar, 209 Cal. 677, 682, 289 P. 818, 820 (1930). “The legal profession stands in a peculiar relation to the public and the relationship existing between the members of the profession and those who seek its services cannot be likened to the relationship of a merchant to his customers.”
19. Such circumstances as: the fact that the contract itself placed the fair market value of the office’s physical assets at $15,000, yet the total sales price was $27,500; the fact that selling attorney—per contract terms—expressed his intention to encourage present and former clients to utilize the law office in the future, and pursuant to that intention, did prepare with buying attorney a letter which was circulated to present and former clients.

20. As there was no specific California statutory or case law dealing with the transfer of law practice goodwill the court relied on the spirit and intent of California’s Business and Professions Code and the State Bar Rules of Professional Conduct to reach their policy conclusions:

RULES OF PROF. CONDUCT OF THE STATE BAR OF CALIFORNIA, 2, & 3, approved by the Supreme Court of California pursuant to CAL. BUS. & PROF. CODE §§ 6076, 14100 (West). Though the trial court relied also on ABA, CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Canon 4, Ethical Consideration [hereinafter cited as EC], 4-6 the higher court did not. The trial court may not have known that California had not adopted the ABA CODE.

attorney, and his promise to encourage former and present clients to patronize buying attorney when carried out, via the letter, would have been the solicitation. The 12,500 dollars in excess of the fair market value of the physical assets was to be the compensation. The court also cited Lyon v. Lyon.\(^{22}\) There in an accounting action following a law partnership dissolution the court determined that there was no goodwill asset to be accounted for.\(^{22}\) The court said, “[I]nsofar as any such goodwill consists of the expectation of future business, it is so personal to such individual members hat it cannot be dealt with as property . . . .” It also spoke approvingly of Opinion No. 633 of the Committee of Professional Ethics of the Association of the Bar of the City of New York which stated: “It is professionally improper for lawyers to attempt to buy or sell the relationship which a lawyer has established with his clients.” After Geffen it should be settled—if it was not before—that the goodwill of a lawyer’s practice is not saleable in America. Some of the policy reasons for this result were touched on in Geffen, but there are others.

Perhaps the most thorough statement of these policy considerations can be found in a 1973 article by James K. Sterrett, The Sale of a Law Practice.\(^{24}\) There it was said that a confidentiality\(^{25}\) problem arises if an attorney attempts to sell both pending matters and client’s files to another attorney. Smalley v. Green\(^{26}\) shows further

\(^{22}\) 246 Cal. App. 2d. 519, 54 Cal. Rptr. 829 (1966).


\(^{24}\) Sterrett, The Sale of a Law Practice, 19 PRAC. LAW. 63 (May 1973) [hereinafter cited as Sterrett].

\(^{25}\) ABA CODE, DR 4-101. ABA CANONS OF PROFESSIONAL ETHICS [hereinafter cited as ABA CANONS] No. 37, cf. ABA CANONS No. 6, CAL. BUS. & PROF. CODE § 6068 (West). “It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his clients.” ABA OPINIONS, No. 155 (1936).

[A] lawyer may not make use of knowledge for information acquired by him through his professional relations with his client, or in the conduct of his client’s business, to his own advantage or profit.

7 C.J.S. Attorney & Client § 125 (1937). Healey v. Gray, 184 Iowa 111, 119, 168 N.W. 222, 225 (1918), “an attorney will not be permitted to make use of knowledge, or information, acquired by him through is professional relations with his client, or in the conduct of his client’s business to his own advantage or profit.” ABA OPINIONS No. 250 (1943). See generally ABA OPINIONS, No. 266 (1945).

\(^{26}\) 52 Iowa 241, 3 N.W. 78 (1879).
that it has long been settled that substitution of attorneys must only be made with the consent of the client. A client's desires must prevail.\textsuperscript{27} Anything less is potentially a compromise of the fiduciary relationship.\textsuperscript{28} There is also a fee-splitting danger in attempting to sell goodwill. This would arise if the sale were on a percentage basis, \textit{e.g.}, if selling attorney gets a percentage of the future fees from old clients.\textsuperscript{29} An attorney is under an ethical duty to charge only a reasonable fee for his legal service,\textsuperscript{30} but he is more apt to charge an unreasonable fee, or more than his services merit, if he must pay a percentage of that fee to another.

The problems of fee splitting are lessened only slightly when the payment is by fixed sum. This is especially true when the fixed sum is based on anticipated future revenues from the selling attorney's former clients, \textit{i.e.}, goodwill.\textsuperscript{31} Hence it seems well settled that payment (percentage or fixed sum of future fees) for a law practice is ethically proper only when it represents actual compensation to the selling attorney for services rendered or for responsibilities assumed.\textsuperscript{32}

\textsuperscript{27} ABA Code, EC 4-6. See Marshall v. Romano, 10 N.J. Misc. 113, 158 A. 751 (Ct. App. 1932) ("A client is always entitled to be represented by counsel of his own choosing.")

\textsuperscript{28} Sterrett, supra note 24, at 67.

The Professional judgement of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

ABA Code, EC 5-1.

\textsuperscript{29} See generally ABA Code, Canons 2, 3; ABA Code, DR 2-107 (A); ABA Canons, No. 34.

Nor can a widow share a percentage of future fees with an unassociated attorney unless in payment for the fair value of whatever services he performed up to his death. ABA Opinions, No. 266 (1945); Informal Opinions, No. 507 (1962), No. 550 (1962). N.Y. City Opinions, No. 646 (1943).

Note, however, ABA Code, DR 2-107 (B) does not prohibit payments to a former partner or associate pursuant to a separation or a retirement agreement.

\textsuperscript{30} "[A] proper fee requires consideration of the interests of both clients and lawyers." ABA Code, EC 2-17.

\textsuperscript{31} Sterrett, supra note 24, at 71.

\textsuperscript{32} Id. at 71. New Jersey State Bar Association Opinions, [hereinafter cited...
If we assume that the transfer of a lawyer's goodwill in America is foreclosed, it would seem that the modes of transferring goodwill should be foreclosed to lawyers as well. The following section discusses this problem.

**Recommendation the Buying Attorney**

Perhaps the most common method used to attempt a transfer of the lawyer's goodwill is a recommendation of the buying lawyer, by the selling lawyer or his estate, to the selling lawyer's clients. This occurred in *Bunn v. Guy*, the leading British case, and the court decided against a remarkably modern sounding argument in opposition to such recommendations. There, speaking of the agreement to recommend clients to the buying solicitors, the defendant argued,

> [R]ecommending another to a situation of trust... is immoral and illegal in its very nature; because it can only be performed by a fraud upon the person on whom such recommendation is to operate... at [the] least there is a temptation to represent falsely for the sake of the reward.34

The court, however, presumably in deciding that the solicitor's goodwill was transferable, decided logically that the methods necessary to effect the transfer must be good in law as well. Hence, today recommendations of successors to the selling solicitor's old clients is quite acceptable in Great Britain.35

In America there is perhaps a different view. For example, the court in *Geffen* seemed to place great emphasis in its findings of an invalid law practice sale on the clause that selling attorney was to encourage present and former clients to utilize in the future the legal

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33. "A lawyer, whether retiring or not, may not solicit his clients on behalf of another attorney..." ABA OPINIONS, No. 266 (1945). ILLINOIS STATE BAR ASSOCIATION OPINIONS, No. 231 (1964) (cited in *Maru, Digest of Bar Association Ethics Opinions* ¶ 991, at 120 (1970)). Cf. where a former firm member habitually recommends the employment of the former firm. ABA OPINIONS, No. 192 (1939).


35. Lund, A Guide to the Professional Conduct and Etiquette of Solicitors 16, 21 (1960). But cf. id. at 24 for an employed solicitor. There the employer may not recommend the employee unless asked by clients.
services of the office. The mode of encouragement in Geffen was by letter, but this is by no means an exclusive method. At any rate, the attempt of the selling attorney to sell his recommendation for a fee constitutes solicitation of business for the buying attorney, an act which the ABA Code of Professional Responsibility, Disciplinary Rule (hereinafter referred to as DR) 2-103 makes unethical. Nor may the buying attorney purchase such a recommendation, or give a reward for a recommendation's having been made. This latter restriction covers the situations in which buying attorney attempts to purchase not only the physical assets of a deceased attorney's practice from his widow, heirs, or estate, but also their recommendation. If an unsolicited recommendation is sought by a layman, however, an attorney may give one, but it should be free of influence from the recommended attorney.

The reasoning behind the influenced recommendation danger was clearly stated in Geffen. Chiefly there is a conflict of interest problem. If selling attorney is paid a fee for his recommendation, then the recommendation may be given more with the fee in mind, than with the best interests of his client. This may, of course, be a breach of the fiduciary relationship. In addition to the lawyer's duty to his client, there is his duty to the public. Principally this duty is not met when the public is


37. The Canons of Professional Ethics of the American Bar Association, and the decisions of the courts quite generally prohibit the direct solicitation of business for gain by an attorney either through advertisement or personal communication . . . .


38. See ABA Code, No. 27, No. 28.

39. ABA Code, DR 2-103(B). However (B) makes narrow exceptions here as permitted in DR 2-103(C), pertaining to approved lawyer referral services.

40. Id. See also ABA Opinions, No. 266 (1945); Informal Opinions, No. 648 (1963); cf. Informal Opinions, No. 507 (1962), No. 550 (1962); ABA Canons No. 27; Wise, supra note 6, at 83.

41. ABA Code, EC 2-8. See generally EC 2-3, 2-4, 2-6, 2-7, DR 2-104. It seems the influence need not be pecuniary and can be any benefit to the recommending attorney. Indeed EC 2-4 and EC 2-9 read together seem to imply any influence that would interfere with a disinterested and informed recommendation is unethical.

42. See note 21 supra, and accompanying text.

43. See note 28 supra.
misled in its selection of an attorney. The danger here lies in misleading the public, through the recommendation of a trusted attorney, into thinking that the recommended attorney possesses greater credentials than he actually has. A ban on this form of solicitation—recommendation by selling attorney—may be based partly on the interest lawyers have in preserving the dignity of the profession. Whatever the primary reason behind the solicitation ban, however, the policy reasons noted above support it. Some of these same reasons figure in the next element of our sale scenario, the use of misleading names.

**Misleading Names**

Concern for the public’s ability to choose an attorney free from the false impressions that might arise from the attorney’s use of a misleading firm name has led to commentary, opinions, and, in The ABA Code of Professional Responsibility, to DR 2-102(B), a general rule of proscription. The use of a misleading name, one including the selling lawyer’s name, would allow the buyer to secure further the goodwill he had purchased through both the recognition factor of selling attorney’s name and the impression that the seller had enough confidence in him to make him a partner. The ABA Code of Professional Responsibility, Ethical Consideration (hereinafter

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44. See generally ABA Code, Canon 2. “A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.”

45. Cf. ABA Code, EC 2-10.

46. This can more broadly be said of the entire business of selling a law practice and was in Note, The Death of a Lawyer, supra, note 11, at 619. “Even though legal practices in England and the practices of other professions in this country can be so exchanged, nevertheless it seems that this tends to detract at least in part from the dignity of the profession.”

47. A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm. . . .

ABA Code, DR 2-102(B).

The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder.

ABA Code, EC 2-11. See also ABA Canons No. 33; cf. ABA Opinions, No. 303 (1961).
referred to as EC) 2-11 says in effect that the buying attorney should practice only under his own name.48

Interestingly enough, in Britain, as mentioned earlier, while the buyer's use of seller's name is generally given force in executed agreements,49 it is open to question whether it is capable of specific performance.50 The former proposition is aptly illustrated by the leading British case, Bunn v. Guy. On the issue of seller's allowing buying solicitors to use his name, the defendant argued that the use was void as against public policy because the practice was injurious to the public through public inconvenience. The court, however, was swayed by plaintiff's argument that,

While Carpenter's [seller] name was continued in the firm, and gave credit to it, the law would attach responsibility on him with respect to third persons dealing on the credit of it . . . and therefore the public could not be injured.51

In Thornburg v. Bevill,52 a court in equity actually decided that an agreement between selling and buying partner to use a misleading firm name was not subject to specific performance on other grounds. But the court, careful not to challenge Bunn v. Guy, said in reference to the use of the firm name, "I am not prepared to say that it is fit that a Court of Equity should enforce an agreement between two solicitors, that one . . . shall permit the other to carry on the business in his name."53 Hence, in Great Britain, unlike in America, there seems to be a split between law and equity over the propriety of a firm name composed of both buying and selling solicitor's names, and this split does not seem to be narrowing.

As an alternative to the proscription of DR 2-102(B), selling attorney and buying attorney could form a partnership agreement in which selling attorney retires. Instead of selling for a fixed sum

48. ABA Code, EC 2-11. ("Improper for Lawyers to Hold Themselves Out as Partners When in Fact Not.")
53. Id.
he agrees to take a percentage of the profits for as long as the parties agree. Seller’s name would then be used by buying lawyer in his firm name. This, however, would seem to be not only misleading but would also seem to involve the danger of fee-splitting. In effect, selling attorney is little more than a paid solicitor for the buying attorney, allowing his name to be the instrument of solicitation. This kind of agreement has been widely criticized on the theory that no partnership in fact exists. Among lawyers, a valid partnership requires joint and severable responsibility, and this is obviously missing in this hypothetical.

The rulings and opinions are a bit different when there is a true partnership involved and one of the partners resigns or dies. These differences will be taken up more broadly in a section below, but here it is interesting to point out that unlike a sole practitioner, a law firm may, under certain circumstances, use the name of a deceased or retired member in its firm name if the firm is a bona fide successor of the firm in which the deceased or retired person was a member, the use of the name is authorized by law or contract, and the public is not misled thereby.

Restrictive Covenants

Probably the most controversial feature in a law practice sale

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54. ABA Code, DR 2-102 (B), (C). ABA Code, EC 2-11.
55. See notes 29, 30, 31, 32 supra, and accompanying text.
56. ABA Opinions, No. 106 (1934); No. 115 (1934); No. 126 (1935); No. 277 (1948). Informal Opinions, No. 555 (1962); No. 966 (1966). See generally Drinker, supra note 9, at 206. Cf. ABA Code, EC 2-13; ABA Opinions, No. 316 (1967).
57. ABA Opinions, No. 277 (1948), citing ABA Canons, No. 33.
58. See ABA Code, EC 2-11; ABA Canons, No. 33.
59. ABA Code, EC 2-11. Opinions seem to place great emphasis on local custom and whether or not it permits retention of the retiring or deceased’s name in the firm name, in deciding propriety. See Drinker, supra note 9, at 206, citing ABA Canons, No. 33. New York State Bar Association Committee on Professional Ethics, Opinions, [hereinafter cited as N.Y. State Opinions] No. 45; 39 N.Y. St. B.J. 455 (1967); N.Y. City Opinions, No. 40 (1926); N.Y. County Opinions, No. 170 (1919).
60. The general rule in America, and also British law, seems to be that agreements in restraint of trade are illegal and void as against public policy but that partial restrictive covenants will be upheld if valid consideration is given and the restriction is reasonable under all the circumstances. Such circumstances are duration of the restriction, territory the exclusion covers, effect on the public, and hardships on the covenantor. This rule is often confused with the seller’s noncompetitive agreements which, in the commercial realm, are more readily and
is an agreement by selling attorney not to practice in the area for a period of years, or ever again.

The criticism of such restrictive agreements largely centers on the client’s right to decide who shall represent him. Also present is the feeling that a restriction on a lawyer's right to choose where he will practice is inconsistent with the lawyer's professional status. Neither of these considerations, however, figured prominently in the British and early American case law concerning this element in the sales scenario given at the beginning of this comment.

Bunn v. Guy contained, for example, a restrictive covenant which forbade the defendant’s practicing within 150 miles of town. The court did not even address this part of the agreement which, as shown earlier, was upheld. A British case that actually considered but rejected the argument that the public might be injuriously affected by being deprived for a considerable period of time of a solicitor-covenantor’s services was Whittaker v. Howe. Speaking of the covenantor, the court said:

Now, whatever may be the talents, knowledge, and experience of Mr. Howe, and I am disposed to rate them highly, I cannot say that in my opinion the public interests will be in any way interfered with or affected by his not being allowed to practice as an attorney and solicitor in Great Britain for twenty years.

What is troubling here is that the public's right to an unfettered choice of counsel is not taken into consideration in determining uniformly enforced. See generally Annot., 45 A.L.R.2d 77, 46 A.L.R.2d 119 (1956).

It will hopefully be shown in this section that the distinction is probably of little consequence in lawyer agreements.

61. See generally ABA Code, EC 2-26, EC 2-31; Sterrett, supra note 24, at 73; Drinkler, supra note 9, at 89, et seq. N.Y. State Opinions, 129 (1970); cf. Marshall v. Romano, 10 N.J. Misc. 113, 158 A. 751 (Ct. App. 1932); ABA Opinions, No. 10 (1926). Wise, supra note 6, at 83.

62. "The practice tended to reduce the professional practice of the law to the level of mere business dealings."

ABA Opinions, No. 300 (1961),

The right to practice law is a privilege granted by the State and, so long as a lawyer holds his license to practice, this right shall not be restricted by an agreement restricting future employment. An attorney at law should remain free to practice his profession at all times.


whether the covenant against competition pursuant to the sale of a business or the express restrictive covenant is reasonable. Other British cases which deal with solicitor sales or employee covenant situations propose to look for reasonableness under all the circumstances, but in effect do so only as between the two parties. 65 Again, while this appears to be an honest effort by the British law to maintain uniformity in its treatment of trades and professions, it might also be characterized as representing a narrow view of the solicitor’s profession and its duty to the public and the public’s rights as they pertain to the profession.

The British view did not remain limited to the British Isles, for it is clearly responsible for a line of American cases dealing with lawyer restrictive covenants that appears to have culminated in Hicklin v. O’Brien. 66 Hicklin proceeded upon the theory that the restrictive covenant there imposed no undue burden upon the selling attorney or public, and like the British and earlier American cases, it completely ignored the effect that the covenant might have on potential clients. Treating the matter purely as a business proposition, Hicklin accepted the position that, “It is not necessary for us to determine whether the contract violates some canon of profes-

65. Fitch v. Dewes, [1921] 2 A.C. 158 (A solicitor-clerk agreement upheld as not against the public interest, though unlimited in time).

Dickson v. Jones, [1939] 3 All E.R. 182,
Restriction of radius of 15 miles and extending to the whole life of the defendant, also an articled clerk as in Fitch, held wider than necessary for the protection of plaintiff and therefore unenforceable. However, the court said at 187: “It is quite plain that this is not a case where public policy enters into the question at all . . . .”


Smalley, representative of the above cases, upheld a restrictive covenant against the defendant not to practice law in the town of Adel, as not being against public policy. Besides Bunn v. Guy, the court relied on commercial cases: Hedge, Eliot & Co. v. Lowe, 47 Iowa 133 (1877) (an implement business involved); Jenkins v. Temples, 39 Ga. 656 (1869) (a grocery business); Chappel v. Broadway, 21 Weid. 157 (N.Y. 1839) (Erie Canal Packet Boat business).

Heinz v. Roberts, supra, while upholding the restrictive covenant ancillary to a law practice sale, nevertheless contained a good dissent which said in essence that agreements that restrict a man from pursuing his chosen calling wherever he may elect to live should be closely scanned by the courts. The dissent would have limited relief to damages, thus leaving the defendant free to practice law.
Until the recent case of Dwyer v. Jung, it was not clear whether the Hicklin rule was still good law. It clearly has not been overruled. Today, however, there is ABA Code EC 2-31, DR 2-108(A), as well as supporting commentary and Bar opinions, to suggest that the rights of an attorney to practice should not be restricted in this manner. While DR 2-108(A) purports to cover only partnership and employment agreements to restrict rights of a lawyer to practice after the termination of their relationship, it would seem sufficiently analogous to cover our sale scenario between two sole practitioners.

Likewise, there is the recent New Jersey case, Dwyer v. Jung. There the court held a restrictive covenant contained in a partnership agreement void as against public policy. The agreement, because of a division between them of the client market, would have prohibited the attorneys from dealing with certain insurance carriers. The court first distinguished restrictive covenants from non-competitive covenants incident to the sale of a business, but it held the former void and strongly implied that the latter would not be allowed between lawyers either. Hence, the distinction, as far as lawyers are concerned, is largely academic. In its discussion of the restrictive covenant, the court embraced the general rule as to restrictive covenants, but then it adopted a strong position. It said

While the Geffen agreement, see notes 19-23 supra and accompanying text, contained a restrictive covenant, the court did not substantively discuss it.
69. "A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits."
ABA CODE, DR 2-108(A).
70. See ABA OPINIONS, No. 300 (1971). Wise, supra note 6, at 83.
Cf. INFORMAL OPINIONS, No. 1301 (1975), No. 1072 (1968) at note 62 supra.
In Britain, the distinction between restrictive covenants and covenants not to compete remains strong in solicitor sales agreements. See Graham-Green, supra note 14, at 484.
that commercial standards may not be used to evaluate the reasonableness of restrictive covenants as between lawyers even though it appears from the rest of the opinion that the court did use the commercial standards of undue hardship on the covenantor, and injury to the public, to hold the covenant void. The court could have been more logical simply by stating that the same general standards applied, but as between lawyers an agreement restricting the right of a lawyer to practice his profession is never reasonable. However, the statement as to the inapplicability of commercial standards may have been a conscious choice designed to separate further, if only semantically, the legal profession from other trades and professions and indeed from the earlier American and British cases.

Unlike Hicklin and the older cases which dealt with restrictions on practice within a geographical area, Dwyer dealt essentially with a covenant restricting the right to deal with certain clients. This would seem, however, to make a stronger case for the non-enforceability of the restrictive covenants in Hicklin and the older American cases today.

From Dwyer, an executed agreement, we might also gather that any possible distinction between the enforceability of executed and executory agreements, still at least partially recognized in Britain, has ended in America, at least in New Jersey, with Dwyer v. Jung.

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73. This is not absolutely so, however, as the ABA Code, DR 2-108 (A) permits partners of a firm to restrict the right of a retiring member to practice law as provided in a bona fide retirement plan, but only to the extent reasonably necessary to protect the plan. As will be shown, this is an example of the greater potential of law practice sales between partners.

74. See notes 49-53 supra and accompanying text.

75. Actually the only evidence such a distinction existed in America as pertains to law practice sales, is from lack of appellate cases covering such unexecuted agreements—iffy evidence, indeed. Perhaps also, questions put to bar committees on the enforceability of such covenants. E.g., Informal Opinions, No. 521 (1962) and dicta there on ABA Opinions, No. 300 (1961) that partnership restrictive covenants were not covered there and don't invoke questions of ethics where parties deal on an equal footing. (Note, however, his part of Opinion 300 has been overruled by Informal Opinions, No. 1072 (1968)). Justification for a maintenance of such a distinction, and argument for enforceability of the executed agreement, is illustrated by the situation, common to the old American cases, where selling attorney, after receiving his consideration, returned to practice in violation of the covenant. The courts, of course, decided that seller should not be allowed to reap the benefits without bearing the burdens. Sterrett, supra note 24, at 74, points out this justification is outweighed by the public's right to freely select counsel, and this aim is best served "by refusing to enforce restrictive covenants between attorneys thereby discouraging their use."
After Dwyer perhaps even executed agreements between lawyers containing restrictive covenants will be non-enforceable.

It must be cautioned, however, that Dwyer v. Jung, as important as it would seem to be in the area of restrictive covenants between partners, is not on point with our basic scenario76 which concerns a buying and selling attorney who had never practiced together. However, as will be seen, the partnership provisions of the ABA Code of Professional Responsibility are generally more liberal in the areas discussed above than in those dealing with the sole practitioner. Hence, logically the decision of Dwyer could be applied as strictly, if not more so, in a situation between two sole practitioners.

Sole Practitioners and Partnerships: Differences in Treatment Under the Code

To this point the chief consideration has been the sole practitioner and the problems he may face in attempting to sell a practice. While in Great Britain both sole practitioners and partners77 may sell their practices, in America there may be a difference in treatment between the two forms, at least in some of the sale elements noted at the beginning. These differences bear inspection.

We have seen in Geffen that a sole practitioner may not transfer his goodwill to another. This should also hold true when a partner attempts to sell his partnership interest to a previously unassociated lawyer. The policy reasons mentioned above in the section on goodwill would certainly seem applicable here.78 When, however, a partner retires the Code allows his firm to make payments to him pursuant to prior agreement,79 and Opinion No. 327 of the ABA Committee on Professional Ethics says that the Code allows these payments to be determined by subsequent earnings of the firm.80 It is

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76. See pages 147 and 148 supra.
77. See Graham-Green, supra note 14, at 461, 463, 483-484, for generally adequate discussion of the British partnership in the area of law practice sales.
78. See notes 24-32 supra and accompanying text. See also, N.Y. City Opinions, No. 633 (1943).
79. ABA Code, DR 2-107(B). The provision reads even more broadly: “This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.” [Emphasis added.] The same holds true for payments to the estate of a deceased partner for a reasonable period, ABA Code, DR 3-102(A)(1). See also, ABA Opinions, No. 266 (1945).
80. ABA Opinions, No. 327 (Supp. 1971). This opinion also holds for payments
not difficult to see that such payments to the retiring partner could be interpreted as being more than a form of social security, or return of his contributed assets. Such payments could be interpreted as payment for the partner's goodwill. This seems more likely, if, pursuant to DR 2-108(A), a restriction upon the retiring member's right to practice law is made a condition to his receiving the "retirement benefits." As has been seen, a sole practitioner may not be so restricted.81

While recommendations to clients would almost be a necessary, if unethical, way for a sole practitioner to pass on his goodwill to his successor, they are of less value in a partnership situation. The nature of a partnership has its own built-in recommendation. Unless the client has directed otherwise, the partner or associate may have had access to the client's files.82 Thus, when the partner retires it is not necessary for the succeeding attorney to inform the client that he has the client's files and will await his instructions.83 While the client has the final decision, the inertia will probably allow the succeeding attorney to take over the client's affairs. If disclosure of client information to the succeeding partner or associate was for the purpose of aiding such a succession, then the parties have fallen under the proscription of DR 4-101(B)(3) which forbids "[u]se of a confidence or secret of [a] client for the advantage of . . . [either] unless the client consents after full disclosure." However, unless the partnership has been a sham put together to defeat the policy against selling a practice, there is more protection for the client in that presumably the succeeding partner or associate has been chosen, not for pecuniary reasons, but on his legal merits.84 If the partnership has been in existence for some time, the client will presumably be aware of the successor's reputation and can make an

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81. See notes 69-70 supra and accompanying text.
82. ABA Code, EC 4-2.
83. This is necessary for a sole practitioner. ABA Code, EC 4-6. ABA Opinions, No. 266 (1945). And is seemingly proper for a succeeding partner, Informal Opinions, No. 648 (1963). See also, Informal Opinions, No. 507 (1962). Note: the text does not apply to those situations where a matter is pending before a tribunal. See ABA Code, EC 2-31, 2-32, DR 2-110.
84. Sterrett, supra note 24, at 73-74. This presumption might break down however, where a nephew, or son, or other blood relation is chosen.
informed decision as to whether the successor should be allowed to take control of his affairs.\textsuperscript{85}

As mentioned earlier, the chief danger of misleading the public through a partnership or firm name exists when there has been no partnership.\textsuperscript{86} When a true partnership exists (although a client might think the retired or deceased partner is still practicing in the firm) the client should be able to rely on the partners and associates since they are generally chosen carefully.\textsuperscript{87} Thus, DR 2-102(B), EC 2-11, and EC 2-12 generally allow the firm or partnership to retain the name of a retiring or deceased member.\textsuperscript{88} Again, however, the partnership must be bona fide, and the Code, opinions, and commentators require that the name practice be allowed by local law\textsuperscript{89} or custom.\textsuperscript{90}

The exception to the general Code proscription against restrictive covenants which allows such a restriction if provided in a bona fide retirement plan\textsuperscript{91} is difficult to justify. The policy of Canon 2 of the ABA Code to make legal counsel available seems to be as strong here as in any of the sole practitioner or partnership covenant situations above. If the exception is designed merely to protect the firm from a partner who is practicing outside it, yet who still draws

\textsuperscript{85} Cf. ABA Code, EC 2-6.

\textsuperscript{86} See notes 47-48, 54-57 \textit{supra} and accompanying text.


\textsuperscript{88} However, there are occasions when the firm or partnership may not retain the name of the former member in the firm name: ABA Code, EC 2-11 (“The name of a partner who withdraws from a firm but continues to practice law. . . .”); ABA Code, DR 2-102(B), EC 2-12 (“A lawyer occupying a judicial, legislative, or public executive, or administrative position . . . .”) (This second rule does not apply if he has the right to practice law concurrently and is regularly and actively practicing in the firm.) \textit{Cf. ABA Canons, No. 33; ABA Opinions, No. 315 (1965).}

\textsuperscript{89} ABA Code, DR 2-102(B), EC 2-11; ABA Canons, No. 33; Drinken, \textit{supra} note 9, at 206.

\textsuperscript{90} Id. ABA Code, EC 2-11, although not specifically mentioning custom, draws heavily on ABA Canons, No. 33, which did mention custom. However, this omission is arguably a rejection of that criterion. \textit{Cf. ABA Opinions, No. 6 (1925), No. 97 (1933), No. 208 (1940), No. 267 (1945). Drinken, \textit{supra} note 9, at 207-08 citing the above opinions. As to how local custom determined, see ABA Opinions, No. 11 (1927), No. 24 (1930).

\textsuperscript{91} ABA Code, DR 2-108(A). But only to the extent reasonably necessary to protect the plan.
benefits, then, while perhaps fair to the firm, it is certainly inconsistent with treatment of the selling sole practitioners and perhaps unfair to the public as well.92

Conclusion

The scarcity of appellate cases concerning the sale of a lawyer’s practice should not be taken to mean that the practice is rare. Perhaps the opposite is true. Nevertheless, as this comment has attempted to show, a contract to sell anything beyond the physical assets of a law practice is nearly always unethical in America, and, as Dwyer and Geffen show, should be unenforceable if legal action is taken against it. The law is very porous in this area, and the Code is not as uniformly strict as perhaps it should be. Its chief inconsistency seems to concern the partnership and firm. Courts and bar associations should examine closely all purported sales or successor agreements between partners to determine if there has in fact been a bona fide partnership. They should also consider whether the policy behind the prohibition of sales by sole practitioners, as in our scenario, should not apply with equal uniform force to partnerships and firms.

Both of the new cases—Dwyer and Geffen—place great emphasis upon the uniqueness of the legal profession, and perhaps therein lies the chief reason for prohibiting the sale of a law practice in America, as it arguably should be in Britain. The legal profession in America is distinct from a trade or business or even from other professions because of the duties that it has adopted toward the public and the rights that the client and the public have concerning it. The sale of a law practice obscures this distinction and turns the profession away from its goals and duties. The law in America should continue to look disfavorably upon such a sale.

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92. Sterrett, supra note 24, at 79, suggests that courts could better balance the competing interests of the public right to free choice of counsel and the interest of the firm or partnership whose retired partner has begun practicing again by “crediting fees earned by the former partner against his specified retirement payment.”