

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS**  
**No. 13-03**

A SALE OF A LAW PRACTICE BY A LAWYER OR LAW FIRM TO AN EXISTING ASSOCIATE EMPLOYEE OR OWNER DOES NOT CONSTITUTE A “SALE” FOR PURPOSES OF NEB. CT. R. OF PROF. COND. 3-501.17 OF THE NEBRASKA RULES OF PROFESSIONAL CONDUCT.

A LAWYER WHO SELLS AN EXISTING LAW PRACTICE MAY CONTINUE TO BE ENGAGED IN THE PRIVATE PRACTICE, INCLUDING SERVICE IN AN “OF COUNSEL” CAPACITY WITH SUCH LAW PRACTICE AFTER THE SALE, SUBJECT TO THE RULES GOVERNING “OF COUNSEL” RELATIONSHIPS FOUND WITHIN THE NEBRASKA RULES OF PROFESSIONAL CONDUCT.

**QUESTIONS PRESENTED**

I. Whether Neb. Ct. R. Prof. Cond. 3-501.17 of the Nebraska Rules of Professional Conduct applies when a Nebraska lawyer or law firm sells a law practice to an existing associate employee.

II. Under circumstances in which Neb. Ct. R. Prof. Cond. 3-501.17 applies to the sale of a law practice to a third party, whether the selling attorney may continue to be engaged in the private practice of law including service in an “of counsel” capacity with such law practice after the sale.

**FACTS**

An attorney is the sole shareholder of a professional corporation which operates a law practice in Nebraska (the “Practice”). An associate attorney with the Practice who is not currently a shareholder of the Practice has expressed an interest in acquiring the Practice from the attorney. The parties are considering a variety of methods of transferring the Practice to the associate ranging from a direct transfer of shares, purchase of assets, or other methods that would achieve the same result. Any of the foregoing methods will ultimately result in a transfer of the overall law practice to the associate attorney.

The selling attorney requests an opinion as to whether the proposed transfer constitutes a “sale” of the Practice for purposes of Neb. Ct. R. of Prof. Cond. 3-501.17.

The selling attorney has also requested an opinion as to whether the selling attorney may continue to practice law after the transfer in an “of counsel” capacity as an employee of the practice in the event Neb. Ct. R. of Prof. Cond. 3-501.17 applies to the sale. As the Committee has determined that the proposed transfer does not constitute a “sale” for purposes of Neb. Ct. R. of Prof. Cond. 3.501.17 as further discussed herein, the selling attorney may continue to serve in an “of counsel” capacity subject to all other applicable rules set forth under the Nebraska Rules of Professional Conduct.

## **APPLICABLE RULES OF PROFESSIONAL CONDUCT**

### **RULE NEB. CT. R. OF PROF. COND. 3-501.17 SALE OF LAW PRACTICE**

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 entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
- (b) 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 the receipt of the notice.

If a client cannot be given notice, that matter shall not be included in the sale and the sale otherwise shall be unaffected and the seller shall comply with the requirements of Rule 1.16 for withdrawal from representation.

- (c) The fees charged clients shall not be increased by reason of the sale.

#### **COMMENT** (Applicable Sections):

[1] The practice of law is a profession not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of the law firms. See Rules 5.4. and 5.6.

#### **Applicability of the Rule**

[9] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

## **DISCUSSION**

*I. Whether Neb. Ct. R. Prof. Cond. 3-501.17 of the Nebraska Rules of Professional Conduct applies when a Nebraska lawyer or law firm sells a law practice to an existing associate employee.*

Historically, the sale or transfer of a law practice was considered to be unethical and therefore prohibited under prior rules. The primary concern involved the unprofessional nature of treating clients as merchandise or commodities and, further, the sale of a practice could violate ethical rules concerning fee splitting, improper solicitation, disclosure of client confidences and restrictions of a lawyer's right to practice. See *ABA/BNA Lawyers Manual on Professional Conduct – Sale of Law Practice – Practice Manual*. The ABA adopted Model Rule 1.17 in 1990, as amended in 2002, which permits the sale of a law practice under certain conditions. The ABA Model Rule is identical to the Neb. Ct. R. of Prof. Cond. 3-501.17 with the exception that Model Rule 1.17 requires the selling attorney to stop engaging in private practice, or discontinue practice in the geographic or jurisdictional area of the practice. Again, Nebraska Rule 3-501.17 does not contain such a prohibition.

As noted, Neb. Ct. R. of Prof. Cond. 3-501.17 permits a lawyer to “sell” or “purchase” a law practice if certain conditions are satisfied. We interpret this rule to apply to sales or purchases of a law practice by third party attorneys who are not employees or existing owners of the practice. For example, Comment 9 to Neb. Ct. R. of Prof. Cond. 3-501.17 (and Comment 14 to ABA Model Rule 1.17) states that “admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements . . . do not constitute a sale or purchase governed by this rule”. As existing owners and associate employees are potentially privy to existing client confidences and secrets, and are correspondingly bound to maintain the confidentiality of such information, the ethical concerns that arise with respect to the sale of a practice to a third party are not the same as those where a practice is transferred to existing owners or associate employees. Although the committee does have concerns in the latter regard, as will be addressed below, the committee does not believe that a transfer to an existing associate employee or existing owner constitutes a sale within the meaning of Rule 1.17 based upon Comment 9 to Neb. Ct. R. of Prof. Cond. 3-501.17 and further ethics authority set forth below.

Although neither the Nebraska Appellate Courts nor the Committee have had occasion to consider this issue, other bar associations have done so. The North Carolina bar, in ethics opinion 98-6 (1998) (“Opinion No. 6”) ruled in connection with a similar Rule 501.17 that “the requirement set forth in Rule 501.17 relative to the sale of a law practice to a lawyer who was a stranger to the firm do not apply to the sale of a law practice to lawyers who are current employees of the firm”. In its ruling, the North Carolina Bar reasoned that “[t]he rule is intended to protect clients from breaches of confidentiality, conflicts of interest, and other abuses that may occur when a lawyer who is not a current member of a law firm purchases the good will of the law firm. Therefore, the sale of all of the shares of a professional association of lawyers to a lawyer who is not a member of the firm or a law firm that includes principals who are not members of the firm is subject to the requirements of the rule”.

In Opinion No. 6, the requesting party sought to structure the transfer as a sale of assets (including good will and the right to use the name) from the existing professional association to a new professional association formed by the associate employees. In further support of its opinion, the North Carolina Bar stated that “although structured like a purchase of assets by a

third party, the asset sale method of transfer is essentially a retirement plan or similar arrangement. . . ‘when the assets of a firm are purchased by a professional association of lawyers who are all current employees of the firm, there is no potential for harm to the interests of the clients of the firm due to conflicts of interest, breaches of confidentiality, or abuse of fee agreements’’. See also generally, *ABA/BNA Lawyers Manual on Professional Conduct – Sale of Practice – Practice Guide*.

Based upon the foregoing, regardless of the structure of the transaction involved in the sale of a law practice to an existing owner or employee of the law practice, the transfer should not be deemed a “sale” for purposes of Neb. Ct. R. of Prof. Cond. 3-501.17. However, attorneys should be mindful of the fact that a client of one attorney in a law practice may not wish to become a client of another attorney in the same law practice for a variety of reasons. To be sure, it is quite possible that the client of an attorney selling a practice may have an attorney from an entirely different practice as his or her subsequent choice. Accordingly, any attorney or law firm transferring a practice to an associate attorney or existing owner is encouraged to provide notice to the clients concerning the timing and nature of the proposed transfer in order to maintain such attorney’s diligence and communication responsibilities with the client as envisioned by Neb. Ct. R. of Prof. Cond. 3-501.3, 3-501.4 and other applicable rules contained with the Nebraska Rules of Professional Conduct.

*II. Under circumstances in which Neb. Ct. R. Prof. Cond. 3-501.17 applies to the sale of a law practice to a third party, whether the selling attorney may continue to be engaged in the private practice of law including service in an “of counsel” capacity with such law practice after the sale.*

Although the Committee has determined that the sale or transfer of a practice by a lawyer or law firm to an existing owner or employee is not considered to be a “sale” under Neb. Ct. R. of Prof. Cond. 3-501.17, the Committee has been asked for further clarification concerning the ability of an attorney to continue practicing law following the sale or transfer of a practice that would otherwise be covered by Neb. Ct. R. of Prof. Cond. 3-501.17.

As noted, Neb. Ct. R. of Prof. Cond. 3-501.17 follows the general structure of ABA Model Rule 1.17 and permits a lawyer to sell a law practice if certain conditions are satisfied. ABA Model Rule 1.17 provides, among other conditions, 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 the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted. Unlike ABA Model Rule 1.17, Rule 1.17, completely omits the foregoing prohibition. The Committee interprets this omission as an affirmative determination by the Nebraska Supreme Court that a Nebraska attorney need not cease the private practice of law following the sale of the attorney’s practice, regardless of whether Rule 501.17 applies, and therefore may continue to practice law in the State of Nebraska following the transfer, including practice in an “of counsel” capacity. The attorney may, of course, be subject to contractual non-compete provisions as part of the transaction of sale as may be permitted by the Nebraska Rules of Professional Conduct.

## **CONCLUSION**

A SALE OF A LAW PRACTICE TO AN EXISTING ASSOCIATE EMPLOYEE OR OWNER DOES NOT CONSTITUTE A “SALE” FOR PURPOSES OF NEB. CT. R. OF PROF. COND. 3-501.17 OF THE NEBRASKA RULES OF PROFESSIONAL CONDUCT.

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