

STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO
MAINE RULES OF PROFESSIONAL CONDUCT

2015 Me. Rules 18

Effective: September 1, 2015

All of the Justices concurring therein, the following amendments to the Maine Rules of Professional Conduct are adopted to be effective on the date indicated above. The specific amendments are stated below. To aid in understanding of each amendment, an Advisory Note and/or Comment appears after the text of the amendment. The Advisory Note or Comment states the reason for recommending the amendment, but the Advisory Note or Comment is not part of the amendment adopted by the Court.

1. Rule 1.6(b) of the Maine Rules of Professional Conduct is amended to read as follows:

RULE 1.6 CONFIDENTIALITY OF INFORMATION

....

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain substantial bodily harm or death;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's professional obligations;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) in connection with the sale of a law practice under Rule 1.17A or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction; or

~~(6)~~ (7) to comply with other law or a court order.

Advisory Note – August 2015

The addition of subsection 1.6(b)(6) was recommended in conjunction with the Advisory Committee on Professional Conduct's recommended abrogation of Rule 1.17 and adoption of Rule 1.17A, Sale of Law Practice. Subsection (b)(6) delineates the permissive disclosures and obligations of lawyers when engaged in discussions regarding sale of a law practice, a lawyer's change of employment or changes in the composition or ownership of a firm. The language incorporates ABA Model Rule 1.6(b)(7) regarding the change of employment of a lawyer, and circumstances relating to change of ownership or composition of a firm. It adds language specific to disclosures made in connection with a Rule 1.17A. The language recommended by the Advisory Committee is from Rule 1.6(b)(6) of the Oregon Rules of Professional Conduct, as adopted in January 2005. As a consequence of the addition of 1.6(b)(6), what was formerly subsection (6) is renumbered as subsection (7).

2. Rule 1.17 of the Maine Rules of Professional Conduct is deleted and Rule 1.17A of the Maine Rules of Professional Conduct is adopted to read as follows:

RULE 1.17A 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 all of the following conditions are satisfied:

(a) The purchaser, who must be authorized to represent clients in the State of Maine and in matters to be transferred, assumes the obligations of an attorney to the clients whose files are transferred.

(b) The seller gives the following notices:

(1) written notice to each of the seller's current or former clients affected by the sale and to the Board of Overseers of the Bar regarding:

(A) the proposed sale including the name of the purchasing attorney or the names of the attorneys who practice within the purchasing firm;

(B) the client's right to retain other counsel or to take possession of the file;

(C) 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; and

(D) the terms of any proposed change in the fee arrangement authorized by paragraph (c).

(2) If a client cannot be given written notice, the representation of that client may be transferred to the purchaser only with the approval of the Board of Overseers of the Bar through its Bar Counsel. If Bar Counsel and the seller cannot agree on the steps adequate to attempt to give written notice, either party may petition the Supreme Judicial Court for an order from a Single Justice approving the transfer or ordering preconditions to transfer.

(3) Further notice shall be given by publication in digital and paper versions of a newspaper of general circulation in each county in which the seller is engaging in the practice of law, at least thirty days before the anticipated transfer of files.

Such notice shall include the anticipated date of sale and identification of the purchasing lawyer or firm, but not the identities of the clients being transferred.

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

COMMENT

[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 changes its practice mix, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the transferred practice, as may withdrawing partners of law firms. *See* Rules 5.4 & 5.6.

Client Confidences, Consent and Notice

[2] Negotiations between a seller and a prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser with client-specific information relating to the representation and the file is limited as set forth in Rule 1.6(b)(6).

[3] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Because these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires that the Board of Overseers of the Bar must be given notice and an opportunity to be heard through its Bar Counsel.

[4] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[5] The sale may not be financed by increases in fees charged to the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the representation must be honored by the purchaser.

Other Applicable Ethical Standards

[6] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently, *see* Rule 1.1; the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to, *see* Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent; and the obligation to protect information relating to the representation, *see* Rules 1.6 and 1.9.

[7] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. *See* Rule 1.16.

Applicability of the Rule

[8] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. However, because no lawyer may participate in a sale of a law practice that does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to conform to those requirements.

[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.

[10] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Advisory Note – August 2015

Rule 1.17A of the Maine Rules of Professional Conduct replaces Rule 1.17 in its entirety.

Rule 1.17A reflects continued evolution in Maine law regarding the sale of a law practice.

Historically, sale of a law practice or client files was not allowed in Maine. That prohibition did not affect all lawyers alike. Lawyers practicing in partnerships were able to capture the value of their accumulated goodwill through retirement and buy-out provisions in their partnership agreements. Lawyers practicing as solo practitioners could not capture such value due to the prohibitions on sale of practice. Beginning in 2000, the Advisory Committee on Professional Conduct began considering these rules, resulting first in the amendment of Rule 3.14, and in the 2009 adoption of Rule 1.17, permitting any lawyer to sell his or her law practice, so long as the lawyer left the active practice of law entirely and the practice was sold in its entirety.

More recently, the Advisory Committee began looking at this issue afresh, inspired in part by the “The Report and Recommendations of the Board of Overseers of the Bar’s Task Force to Study Bar Demographics” (June 2014) and concerns that the ongoing prohibitions on the sale of part of a law practice and on the selling lawyer’s continued practice of law may not be in the best interests of clients or of the Bar. Anecdotal evidence suggested that the Rule was unfamiliar to much of the Bar, but that where it was known it had prevented transactions from closing that would have seemed to have been in the interests of the lawyers and clients involved. The rule was also perceived as preventing lawyers from making socially beneficial use of their law licenses by refocusing their active practices on a particular area of law (for example, discontinuing trial work while continuing to handle real estate matters), or by continuing post-“retirement” activities such as pro bono work, mediation or mentorships, for which an active law license is required or desirable.

ABA Model Rule 1.17 allows less than all of a law practice to be sold, but it prohibits the selling lawyer from continuing to engage in the area of law practice sold, either entirely or within a defined geographical area. The Advisory Committee recommended amending the Maine Rules to allow sale of part of a practice but found the rationale for requiring discontinuance of the practice of law, either entirely or within a geographic or area-of-law limitation, to be a non-competition rationale more suitably protected by private agreement between buyer and seller than by Rule.

Sale of a practice must be conducted in a manner that protects clients.

Rule 1.17A omits the requirement in Rule 1.17 that the purchaser be registered with the Board of Overseers. Only individual lawyers register with the

Board, but a purchaser may be a law firm, not an individual lawyer. The amended language requiring that the purchaser be authorized to represent clients in the State of Maine and to handle the matters being transferred is meant to serve the same purpose as the prior language—namely, to ensure that the purchaser can properly engage in the practice of law in Maine and that the clients whose files are being transferred will be served by lawyers authorized to handle the matters transferred—without suggesting that only an individual can act as a purchaser.

The authorization of sale of part of a practice is intended to cover a sale that would generally be understood as a sale of substantially all of a lawyer's files in a particular area of law. It is not intended to authorize any attempted end-run of the rules governing fee sharing, solicitation or any aspect of the rules that prevents an ongoing trade in brokering clients or their matters as commodities.

Like the ABA Model Rule and former Maine Rule 1.17, Rule 1.17A continues to require written notice to the current and former clients whose files are to be transferred to new counsel. Rule 1.17A, however, changes the provision regarding the steps to be taken when certain clients cannot be given written notice. Rule 1.17A does not require a court order in all such cases. The Advisory Committee believes that notice to Bar Counsel sufficiently protects client interests, where Bar Counsel is able to recommend additional steps to effect notice if the unsuccessful efforts to give written notice have somehow been inadequate, and where Bar Counsel or the seller can seek court intervention in the event that a selling lawyer and Bar Counsel cannot agree on those further steps that might be warranted to attempt to effect notice.

The Advisory Committee recommended abrogation of Rule 1.17 and adoption of Rule 1.17A because the existing Comments to Rule 1.17 would be inconsistent with the amendments to the Rule itself.

3. The following Advisory Note is added to Rule 5.6 of the Maine Rules of Professional Conduct.

Advisory Note – August 2015

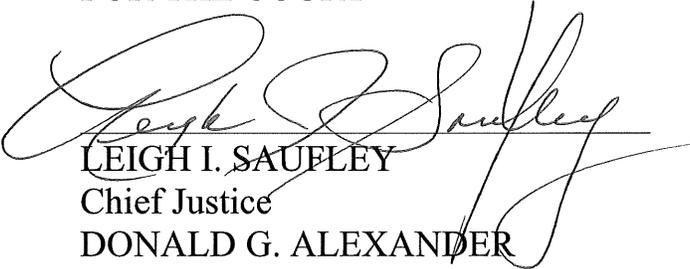
While subsection (a) of Rule 5.6 prohibits restrictions on the practice of law, Comment [3] clarifies such restrictions are not prohibited when used in connection with the sale of a practice pursuant to Rule 1.17. The recommended abrogation of Rule 1.17 and adoption of Rule 1.17A, Sale of Law Practice, is not meant to alter this position. Agreements for the sale of all or part of a practice may require the

use of covenants not to compete in order to protect the buyer's interest. Such arrangements are still subject to the common law restrictions that Maine courts impose generally on non-competition agreements which prevent such restrictions from being any broader than needed to protect the buyer's legitimate interest.

4. These amendments to the Maine Rules of Professional Conduct shall be effective September 1, 2015.

Dated: August 25, 2015

FOR THE COURT*



LEIGH I. SAUFLEY

Chief Justice

DONALD G. ALEXANDER

ANDREW M. MEAD

ELLEN A. GORMAN

JOSEPH M. JABAR

JEFFREY L. HJELM

THOMAS E. HUMPHREY

Associate Justices

* This Rules Amendment Order was approved after conference of the Court, all Justices concurring therein.