speaking of ethics

By Hope C. Todd

Exit Strategy

Mick Wiggins

"Repeating that we are surrounded does not qualify as a plan of escape."
—General George C. Marshall

D.C. lawyer Robert B. Boomer sat at his desk late Friday afternoon, contemplating the office he had occupied for over 39 years and wondering how much longer he really wanted to stay. At 67, he had built a successful practice; in the early years he accepted pretty much any case that walked in the door, but after a while, he focused on family matters and built an excellent reputation as a family lawyer, taking on the occasional misdemeanor offense, simple will, or real estate transaction, but usually only for a former client, one whom he knew was good for the fee.

Were he to retire in a year or two, he wondered when, or if, he should stop taking new client matters, or inform his current clients of his plans to retire, or whether he should simply keep practicing and just sell the entire practice "when the moment felt right."

He wondered what to do with the boxes of former client files that filled not only every square inch, floor to ceiling, of his copy room, except the space occupied by the copier and the few bare grey linoleum squares that allowed only an average-sized person to stand and make copies, but also filled the large room located above the garage of his house. (His wife had been telling him for years that if he died, the very first thing she would do would be to haul every last box to the dump.)

Were he to retire in a year or two, what would he do with himself? Of course, he had grandkids and travel plans and tennis . . . , but would he have to retire from the D.C. Bar? If he did retire, could he still handle pro bono cases for his favorite child advocacy organization?

It had been a long month and Boomer promised himself that he would seriously begin to research his options next week. He entered a note on his Outlook calendar, "Call the Legal Ethics Helpline—discuss retirement," then he shut down his computer and went home for the weekend.

Planning for retirement in a manner consistent with the D.C. Rules of Professional Conduct may not be at the top of the to-do list for lawyers contemplating retirement, but for those seriously considering retirement within the next few years, particularly for sole practitioners, the task should be moved quickly to the top of the list.[1]

Retiring sole practitioners typically face different decisions[2] than, for example, lawyers in large firms who are often subject to a mandatory retirement age by firm policies, which also tend to provide a structured path for winding down a lawyer's practice and transferring client matters.

Like Attorney Boomer, a solo must first assess whether he or she wishes to close a practice slowly, perhaps over a number of years, leaving only a few matters, if any, to refer or transfer to another lawyer upon retirement, or whether the solo plans to continue normal operations with the intention of ultimately selling the practice.

In 2007 the District of Columbia Court of Appeals adopted D.C. Rule 1.17 to govern the sale of a law practice.[3] The rule provides that subject to specifically enumerated conditions, "a lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will. . . ." The specific conditions are set forth in Rule 1.17(a)–(d) as follows:

> (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the jurisdiction in which the practice has been conducted;
> (b) The entire practice is sold to one or more lawyers or law firms or an entire area of practice is sold to one purchaser (either a solo practitioner or a single law firm);
> (c) The seller gives a written notice to each of the seller's clients regarding:
> (1) the proposed sale;
> (2) the client's right to retain other counsel, to take possession of the file or of any funds or property to which the client is entitled; and
> (3) the fact that the client's consent to the transfer to the purchasing lawyer or law firm of the client's files, of the representation and of any client funds held by the selling lawyer or law firm 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. . . . ;[4] and
> (d) The fees charged clients shall not be increased by reason of the sale.

At the core of Rule 1.17 is the clear recognition that clients "are not commodities that can be purchased and sold at will," and that clients must be given reasonable notice of the sale and an opportunity to decide whether to continue representation with the purchaser.[5] Lawyers selling their practices remain subject to all of the ethical standards applicable to withdrawing from a representation and/or involving another lawyer in the representation of a client, including rules governing competency, communication, confidentiality, and conflicts, as well as the rules of any tribunal in which a matter is pending.[6]

Indeed, as an ethical matter, the decision to close a practice, rather than to sell it, is really one of form and not substance. Although there is no *per se* 90-day notice requirement to existing clients when lawyers decide to close their practices, there is an ethical duty under Rule 1.4 to "keep a client reasonably informed about the status of a matter" and to communicate information that is "reasonably necessary to permit the client to make informed decisions regarding the representation."[7] As a practical matter, this means that a lawyer closing a practice will at some point almost certainly need to *timely* discuss his or her impending retirement with all remaining clients.[8]

In Opinion 273 (Ethical Considerations of Lawyers Moving From One Private Law Firm to Another), the Legal Ethics Committee found that, "[i]n most situations, a lawyer's change of affiliation during the course of a representation will be material to a client" and that, "not only does Rule 1.4 require the lawyer to

communicate his prospective change of affiliation to the client, but such communication must occur sufficiently in advance of the departure to give the client adequate opportunity to consider . . . [or] to make other representation arrangements." The opinion specifically notes that, "[a]dvance communication is also necessary when the departing lawyer does not intend to continue a representation in his post-departure affiliation, as Rule 1.16(d) requires a lawyer, when terminating a representation, to give 'reasonable notice to the client,' and to allow 'time for employment of other counsel. . . .'"

Similarly, a lawyer's plan to either sell or close a practice will likely give rise to a duty to disclose such information to prospective clients at some point before even taking on new matters. This is particularly so as the likelihood that the lawyer will be unable to see a matter through to completion appears increasingly foreseeable, if not inevitable. A personal conflict of interest arises under D.C. Rule 1.7(b)(4) whenever a lawyer's "professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."

In such instances, a lawyer may not take on a representation unless the mandates of Rule 1.7(c)(1) *and* (2) can be met, which includes obtaining informed consent from all affected clients.[9]

Let us assume Boomer develops a retirement plan to close his practice within two years, give or take a few months. Although his wife's solution to his former client files is not without significant appeal, the guidance provided in Legal Ethics Opinion 283 (Disposition of Closed Client Files) provides a more cogent ethical framework for the delivery or disposal of such files.[10]

Whether Boomer should change the status of his D.C. Bar membership is strictly a personal choice.[11] Unless otherwise provided by D.C. Court of Appeals Rule 49, which defines the unauthorized practice of law in the District and its exceptions, "no person shall engage in the practice of law in the District of Columbia . . . unless enrolled as an active member of the District of Columbia Bar. . . ."[12] Rule 49 provides a limited exception to practice law "where the person is an enrolled, inactive member of the District of Columbia Bar who is employed by or affiliated with a legal services or referral program in any matter that is handled without a fee" under specific conditions set forth in Rule 49(c)(9)(A).[13] If Boomer meets the conditions of the exception, he will be able to continue handling pro bono matters for his favorite legal services organization under either an active or inactive D.C. Bar status.

At the end of the day, selling or closing a private practice to retire does not preclude a decision by the lawyer to continue to practice law.[14] Although Rule 1.17 prohibits a lawyer who has sold an entire practice from engaging in the private practice of law in this jurisdiction, it does not prevent a lawyer from engaging strictly in pro bono representations, or even taking a full- or part-time paying position with a public agency, a legal services provider, or as in-house counsel to a business or other organization.[15] Indeed, some lawyers envision exactly such work as essential to their retirement plans.

Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 3231 and 3232, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 The last of the so-called boomers, an estimated four million people, will turn 50 next year. More than 45 percent of active D.C. Bar members are over 50. More than half of the D.C. Bar's sole practitioners are also over 50. (D.C. Bar statistics as of March 2013.)

2 Whether a sole practitioner is nearing retirement, is just out of law school, or anything in between, the duty of diligence and zeal arising under D.C. Rule 1.3 calls for contingency planning in the event the lawyer dies, becomes incapacitated, or is otherwise unable to practice law. Comment [5] states:

> To prevent neglect of client matters in the event that a sole practitioner ceases to practice law, each sole practitioner should prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client that the lawyer is no longer engaged in the practice of law, and determine whether there is a need for immediate protective action. *See* D.C. App. R. XI, § 15(a) (appointment of counsel by District of Columbia Court of Appeals, on motion of Board on Professional Responsibility, where an attorney dies, disappears, or is suspended for incapacity or disability and no partner, associate or other responsible attorney is capable of conducting the attorney's affairs).

Such contingency planning for sole practitioners, while extremely important, is beyond the scope of this article.

3 In 1999 the D.C. Bar Legal Ethics Committee issued Opinion 294 analyzing the ethical permissibility of selling a practice under the former D.C. Rules. Though new D.C. Rule 1.17 supersedes Legal Ethics Opinion 294, the rule "generally follows the discussion and views concerning the sale of a law practice expressed in … Opinion 294. The provisions of that Opinion not inconsistent with [Rule 1.17] and Comments remain as appropriate guidance." *See* Comment [16], Rule 1.17.

4 Significantly, Rule 1.17(c)(3) explains that, "[i]f a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file." In addition, Rule 1.17(c)(3) clarifies that "[o]nce a client has consented to the transfer to the purchasing lawyer or law firm of the client's files, funds and representation or the client fails to take action or otherwise object within ninety (90) days of the notice, then the purchasing lawyer is responsible for the client's matter(s)."

5 *See* Rule 1.17(c); *see also* Comment [9] ("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.").

6 *See* Comments [11] and [12].

7 D.C Rules 1.4(a) and (b). Even in the absence of an ethical mandate, a lawyer should be aware that some clients may need a longer period of time to adjust to the idea of a specific person no longer being their lawyer. As one former solo shared, "While I wanted to keep my retirement relatively confidential so that it would not potentially impact certain case results, I gave older clients much more notice than others, and I was very glad that I did. It took some a long time to adjust. For many, it was not a simple matter of 'come get your file.' Closure was a process for them."

8 A lawyer planning to close a practice will likely decide one day to stop taking new matters. The lawyer may also commit to complete each of the lawyer's existing matters. To the extent the lawyer is able to complete each matter, there may, in fact, be no need to inform clients of retirement if the retirement is not relevant to the handling of any existing client matter. However, it is not unusual for legal matters initially anticipated to resolve within a specific time period to extend beyond that estimated period, and sometimes well beyond it. When withdrawal can be accomplished consistent with Rule 1.16, there is no requirement that a lawyer postpone retirement indefinitely.

9 *See* Rule 1.7(c):

> (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

10 *See also* Saul Jay Singer, *On File,* Wash. Law., Nov. 2012, at 12. Available at www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/november_2012/ethics.cfm.

11 Bar membership classes and requirements are set forth in Article III of the Bar's bylaws, found at www.dcbar.org/inside_the_bar/structure/bylaws/article03.cfm#sec4.

12 *See* DCCA Rule 49(a).

13 *See* DCCA Rule 49(c)(9)(A).

14 Programs such as SAILS (Senior Attorneys Initiative for Legal Services), a joint initiative of the D.C. Bar Pro Bono Program and the D.C. Access to Justice Commission, are working with area law firms and the legal services community to develop firm structures and pro bono projects, and to train, mobilize, and reduce barriers for senior lawyers looking to increase their participation in pro bono work as they transition toward winding down their law practices and beyond. The Pro Bono Program also maintains a list of resources and pro bono opportunities for senior lawyers who are not affiliated with a participating District law firm. Information on SAILS can be found at www.dcbar.org/for_lawyers/pro_bono/sails/.

15 *See* Rule 1.17, Comment [3].

Disciplinary Actions **Taken by the Board on Professional Responsibility**

Original Matters

IN RE MIKEL D. JONES. Bar No. 456094. February 28, 2013. The Board on Professional Responsibility recommends that the

D.C. Court of Appeals disbar Jones pursuant to D.C. Code § 11-2503(a), based on his convictions of crimes involving moral turpitude *per se*. Jones was convicted in the United States District Court for the Eastern District of Pennsylvania of conspiracy to commit mail and wire fraud, aiding and abetting mail and wire fraud, and aiding and abetting money laundering.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE JOHN B. BLANK. Bar No. 208660. February 14, 2013. The D.C. Court of Appeals disbarred Blank by consent, effective forthwith.

IN RE NIKOLAOS P. KOURTESIS. Bar No. 495165. February 14, 2013. The D.C. Court of Appeals indefinitely suspended Kourtesis based on disability.

Reciprocal Matters

IN RE PETER A. ALLEN. Bar No. 369607. February 7, 2013. The D.C. Court of Appeals granted Allen's petition for reinstatement, subject to the conditions imposed in the state of Massachusetts.

IN RE ERIN M. WEBER ANDERSON. Bar No. 422977. February 7, 2013. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed functionally equivalent reciprocal discipline and disbarred Anderson.

IN RE CHIKE IJEABUONWU. Bar No. 461434. February 7, 2013. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Ijeabuonwu for 30 days, *nunc pro tunc* to January 24, 2013.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE J. SCOTT BROWN. Bar No. 958256. February 20, 2013. Brown was suspended on an interim basis based upon his conviction of a serious crime in the United States District Court for the Eastern District of Missouri.

IN RE SHANNON M. GUIGNON. Bar No. 977747. February 11, 2013. Guignon was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE JOSEPH LOUIS LISONI. Bar No. 966515. February 20, 2013. Lisoni was suspended on an interim basis based upon discipline imposed in California.

IN RE DAVID H. LOOMIS. Bar No. 394857. February 11, 2013. Loomis was suspended on an interim basis based upon discipline imposed in California.

IN RE REBECCA L. MARQUEZ. Bar No. 444762. February 11, 2013. Marquez was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE HENRY D. MCGLADE JR. Bar No. 379954. February 11, 2013. McGlade was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE GREGORY MILTON. Bar No. 978857. February 28, 2013. Milton was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE DAVID B. NOLAN SR. Bar No. 379804. February 11, 2013. Nolan was suspended on an interim basis based upon discipline imposed in the United States District Court for the District of Columbia.

continued on page 46

The McCammon Group

is pleased to announce our newest Neutral

Hon. Christine O.C. Miller (Ret.)
Retired Judge,
United States Court of Federal Claims

Christine Miller began her career as a Trial Attorney at the Department of Justice in the Court of Claims Section, Civil Division and then in the Bureau of Consumer Protection at the Federal Trade Commission. She went on to serve as Special Counsel to the Pension Benefit Guaranty Corporation and as Deputy General Counsel to the United States Railway Association. Later, she entered private practice with a focus on international commercial litigation, government contracts, taxation, and construction matters. Judge Miller was then appointed to the United States Court of Federal Claims, where she served with distinction for 30 years, during which time she also conducted hundreds of settlement conferences at the request of counsel and other judges. Judge Miller now joins The McCammon Group to serve the mediation, arbitration, and special master needs of lawyers and litigants in the District of Columbia, the mid-Atlantic, and throughout the United States.

Dispute Resolution and Prevention

For a complete list of our services and Neutrals throughout DC, MD, and VA, call 1-888-343-0922 or visit www.McCammonGroup.com

THE MCCAMMON GROUP