

E-mails,

June 9, 2010 McCurdy E-mail to Sapiro, cc Chair, Vice-Chairs & Staff:

Jerry,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

1.11 (Agenda Item III.Y)
3.10 (Agenda Item III.TT)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - SAPIRO - DFT1 (06-09-10).pdf
RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 5-100 [3-10] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 5-100 [3-10] - Rule - PCD [4] (08-12-08) - CLEAN-LAND.pdf
RRC - 5-100 [3-10] - Rule - PCD [4] (08-12-08) - CLEAN-LAND.doc
RRC - 3-310 [1-11] - Rule - PCD [11.2] (05-17-10) - CLEAN-LAND.pdf
RRC - 3-310 [1-11] - Rule - PCD [11.2] (05-17-10) - CLEAN-LAND.doc

June 16, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:

Bob,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site should be up-to-date shortly (<http://sites.google.com/site/commentsrrc/byrule>).

- 1.0.1** (Agenda Item III.B) – **2 Comments: Balin/Dilworth; and, LA Public Defender-Michael Judge (attached)**
- 1.8.5** (Agenda Item III.Q) – OCTC (comment sent by Randy's 6/15/10 e-mail)
- 1.8.6** (Agenda Item III.R) – OCTC (comment sent by Randy's 6/15/10 e-mail)
- 1.9** (Agenda Item III.W) – OCTC (comment sent by Randy's 6/15/10 e-mail)
- 1.17** (Agenda Item III.EE) Co-Lead w/Sapiro – OCTC (comment sent by Randy's 6/15/10 e-mail)
- 5.7** (Agenda Item III.GGG) – Zitrin/Law Professors (comment sent by Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

**RRC – Rule 1.17 [2-300]
E-mails, etc. – Revised (6/21/2010)**

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 1-100 [1-0-1] - BASF (Balin, Dilworth) re Tribunal (06-14-10).pdf
RRC - 1-100 [1-0-1] - 06-14-10 LAPD (Judge) Comment.pdf

June 16, 2010 McCurdy E-mail to Sapiro, cc Chair, Vice-Chairs & Staff:

Jerry,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentstrrc/byrule>).

1.11 (Agenda Item III.Y) 2 Comments: **COPRAC (attached)**; and, OCTC (sent with Randy's 6/15/10 e-mail)

1.17 (Agenda Item III.EE) Co-Lead w/Kehr – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

3.10 (Agenda Item III.TT) 1 Comment: OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 3-310 [1-11] - 06-14-10 COPRAC Comment.pdf

June 16, 2010 Sapiro E-mail to Kehr, Martinez & Melchior:

See June 18, 2010 Kehr E-mail to Sapiro, cc Martinez, Melchior, Chair, Vice-Chairs & Staff., below.

June 18, 2010 Kehr E-mail to Sapiro, cc Martinez, Melchior, Chair, Vice-Chairs & Staff:

Jerry: I'm sorry that, for the obvious reasons, I was not able to look at your 6/16 message until just now. I've interlineated my thoughts among yours.

From: Jerome Sapiro Jr. [mailto:jsapiro@sapirolaw.com]
Sent: Wednesday, June 16, 2010 11:31 AM
To: 'Melchior, Kurt W'; 'Raul Martinez (E-mail)'; Robert L. Kehr
Subject: Rule 1.17

Dear Kurt, Raul and Bob:

I disagree with the comments of the law professors and would not change our proposal in light of it.

Richard's letter makes three separate points. The first is that we misunderstood the MR. I'm afraid I don't follow this point and thus cannot comment on it. Perhaps someone else can explain how we erred. The second is a general comment on commercialization. I agree with this sentiment and voted against the proposed rule, but that debate is long past and does not warrant re-discussion at this point. Third, they disagree with our addition of "solely" to the requirement that fees not be increased by reason of the sale (in our paragraph (e), which is MR paragraph (d)). I disagree with this criticism. I see the MR language as subject to differing interpretations, and on more than one level. The one that is pertinent to Richard's letter is that it could be read as prohibiting the buyer from agreeing with the client to re-define the scope of work (the re-definition would have occurred "by reason of the sale"). This argument could be made either in a disciplinary proceeding or in a civil action, and it could lead to a Rule 1.5 argument under the theory that the fee is illegal. Our change, which includes important limiting language to which Richard did not refer, is in my view considerably better than the MR language. I also should note my recollection (no time to look now) that the MR language caused difficulties in several other states and has been tinkered with in a variety of ways.

The following are my reactions to OCTC comments.

As to the notice to clients and the transfer of the file in the case of a client who does not respond, I have several reactions. First, these provisions are in the current rule, and I have not heard of any problem with them. Second, in the case of sale on behalf of a lawyer who is deceased or incapacitated, apparently OCTC would have the corpse or the incapacitated lawyer retain the file and continue to be of record unless he or she can move for leave to withdraw. I

would not make their change. Third, if the client does not respond, requiring the buyer to act might be inconsistent with Rule 1.16.

I agree with Jerry and would add one thought, which might be what Jerry had in mind with his 1.16 reference. The buyer might not be willing to accept a particular client for any number of reasons that the buyer might learn of only after the notice is sent to a client, including, for example, the buyer might not be competent to handle a particular matter, the buyer might be willing to handle a matter only with a re-definition of the scope of work, or the buyer might have a conflict.

In RRC debates, we discussed having the requirement that the seller not withdraw except in compliance with 1.16 in the black letter rule 1.17, but, as we have done in other rules, we did not do so here in order to avoid double charging for a violation. I think the combination of Comments [2] and [12] suffice.

I agree and would make no change.

I think OCTC's criticism of Comment [2]'s cross reference to Rule 1.16 deserves attention. The preceding sentence should be more explicit. We could adapt OCTC's recommendation: ". . . unless the seller is permitted to withdraw from the representation under Rule 1.16."

I do think we could sharpen that sentence a bit. My thought is that "permitted" is too narrow b/c Rule 1.16 also addresses mandatory withdrawal. What if we were to say: "... unless the seller withdraws from the representation in compliance with Rule 1.16."

We debated whether to put Comment 1A in the black letter rule. It defines selling lawyer. I think we made the correct decision but could live with it either place.

As I said with respect to one or more other rules, OCTC seems to believe that a definition needs to be in the Rule.

I agree with Jerry and disagree with OCTC.

I would not recommend moving Comments 12, 15A and 15B into the black letter rule. That would invite double charging. Calling lawyers' attention to the other standards in the comments should suffice.

Agreed. I see no reason why an explanation of how rules work together needs to be in one (or both?) of the rules.

I disagree with OCTC's comments about Comments [7] and [11] and would not change them.

I agree as to Comment [11], which I think provides valuable guidance, but Comment [7] is worth a second look. I cannot find any basis in the Rule to the Comment statement (in its second and third sentences) that no client-specific confidential information may be disclosed without client consent. The only notice requirements are in paragraphs (d)(1) and (2) and are notices before transfer, not before disclosure. And paragraph (g) suggests that confidential information may be disclosed to a lawyer, but not to a non-lawyer. Am I missing something?

OCTC's criticisms about too many Comments, etc., mostly would be criticisms of the Model Rule comments. Unless we want to re-debate them, I would not reconsider them just because of the volume of them.

Agreed.

What are your thoughts? If you agree with mine, we would recommend only a change to Comment [2].

June 21, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:

Bob,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-21-10).doc
RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc
RRC - 3-310 [1-8-6] - Public Comment Chart - By Commenter - XDFT2 0(6-21-10)ML.doc
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 4-210 [1-8-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

June 21, 2010 McCurdy E-mail to Sapiro, cc Drafters, Chair & Staff:

Jerry,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

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If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 5-100 [3-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc

June 22, 2010 Sapiro E-mail to McCurdy, cc Drafters, Chair, Vice-Chairs & Staff re 1.11, 1.17 & 3.10:

Attached are my revisions to the public comment charts. Please note that I changed the footers. I hope I did not mess up your coding by doing so.

I do recommend a change in the wording of one sentence in 1.11.

I send copies of this to drafters of these three rules for their info and criticisms.

Attached:

RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-JS.doc
RRC - 5-100 [3-10] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)JS.doc
RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)JS.doc

June 22, 2010 KEM E-mail to McCurdy & Sapiro, cc Drafters, Chair, Vice-Chairs & Staff re 1.11, 1.17 & 3.10:

I've restored our footers to the files you just sent in. The footers we use in the charts automatically update whenever the file name is changed so there is no need to change them. It's important that we keep track of the draft numbers in case we have to return to them in the future to make any changes. It's the only way we can efficiently keep track of these in the brief time we have between the end of one of our meetings and the date for submission to the BOG.

I've also put the comments in alphabetical order as is our standard approach. I haven't made any changes to your responses. Thanks,

Attached:

RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10)JS-KEM.doc
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)ML-JS-KEM.doc
RRC - 5-100 [3-10] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10)JS-KEM.doc

P.S. To get the footer to update as you're looking at it on the computer screen, all you need do is go into "Print Preview". Alternatively, the new file name in the footer will automatically update whenever you print the document.

June 22, 2010 Tuft E-mail to RRC List:

Jerry, your proposed response to the law professors' comment on the sale of a geographic area of practice is not correct. Model Rule 1.17 permits the sale of an entire area of practice in the geographic area in which that practice been conducted but not a geographic area of an entire law practice or an area of practice that is conducted in multiple geographic areas. Model Rule 1.17(a) and (b). That is why the RRC's proposed rule is much broader than the Model Rule and why it would be more accurate to say the RRC thinks that is a good idea because, as you state, law is a business.

**Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]**

TOTAL = 3 Agree = 1
Disagree =
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Office of Chief Trial Counsel	M	Yes		OCTC's concern is that as to both deceased and living clients it provides that the notice to the client can state that if there is no response to the notice the buyer may act. It does not say the buyer is required to act. This could create a problem. There should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are also some Comments providing this, but OCTC believes that it should be in the rule itself.)	<p>The Commission disagrees. These provisions are in current Rule 2-300. The Commission is not aware of any problem with them. The rule should not require the buyer to act if the client does not respond. The buyer may not be permitted to act on behalf of the client. For example, the buyer may have an actual or potential conflict of interest, and the non-responsive client must be given an opportunity to give his or her informed, written consent to the representation before the buyer may act. Instead, the selling lawyer retains responsibility. If a given client has not responded to the notice, requiring the buyer to act might be inconsistent with Rule 1.16 and other rules. Conversely, if the lawyer whose practice is sold is deceased or incapacitated, the corpse or the incapacitated lawyer should not be required to retain the file and continue to represent the client.</p> <p>The Commission disagrees with the proposal to move compliance with Rule 1.16 into the black letter paragraphs of this rule. Doing so would permit double charging of disciplinary violations without cause. The Comments should direct the attention of selling lawyers to other rules with which they must comply.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree =
Modify = 2
NI =**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					There are too many Comments and they seem more appropriate for treatises, law review articles, and ethics opinions.	The Commission disagrees.
				Comment [2]	Comment [2] says See Rule 1.16 when it should state that the seller is permitted to withdraw only if in compliance with rule 1.16.	The Commission agrees in part. The Commission has reworded the last clause of Comment [2] to state: “. . . unless the seller withdraws from the representation in compliance with Rule 1.16.” The Commission has stricken the sentence that used to say, “See Rule 1.16.”
				Comments [1A], [12], [15A], [15B]	Comments [1A], [12], [15A], and [15B] should be in the rule, not the Comments.	The Commission disagrees. Relatively early in the drafting process, the Commission considered placing Comment [1A] in the black letter rule. However, doing so made the rule more awkward, so the Commission recommends that its contents be in the Comment. Not all definitions need to be in the black letter rule.
				Comments [7] & [11]	Comments [7] and [11] are too long, burying information and being hard to read and understand. Comment [11] involves two	The Commission disagrees. Comment [7] is adapted from Model Rule Comment [7]. The buyer should not normally obtain access to client-specific

**Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]**

**TOTAL = 3 Agree = 1
Disagree =
Modify = 2
NI =**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					different concepts: conflict checks and confidentiality. They should be separated into two separate comments	confidential information relating to the representation or to the file without client consent. The Comment gives guidance on compliance if the client does not respond to notice. The Commission disagrees with the remark concerning Comment [11].
1	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.
3	Zitrin, Richard (for group of law professors)	M	Yes		Re: Geographical area : The Commission has conflated the reference to "geographic area of practice" in the ABA rule -allowing a selling lawyer to cease practice in a state or particular "geographic area" -into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise. Importantly, this also damages clients. Sale of an "area" would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to practice in the same field. Clients will then be shunted to another law	The Commission disagrees. Model Rule 1.17 expressly includes as one of its permissive clauses the sale of a practice in a geographic area. It is not confined to a sale of a practice in an entire state. If a lawyer wants to cut back the size of his or her practice, a lieu of retiring entirely he or she could stop accepting cases that would have to be filed in Southern California and confine his or her practice in the future to Northern California. The Commission interprets this as but one of the many possible applications of the Model Rule. The Commission disagrees. The commenters misinterpret the rule. The rule does not permit the sale of clients. The rule does not make clients chattel. Instead, it permits the sale of all or part of the practice. Clients will continue to be free to reject the buyer as their new lawyer, and the selling

**Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]**

TOTAL = 3 Agree = 1
Disagree =
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				§(e)	<p>firm not of their choosing in a wide variety of circumstances.</p> <p>This rule was designed to allow lawyers or law firms that are retiring or moving or materially changing their practice to forward their practices to other qualified lawyers. The geographical area sale proposed by CRPC 1.17 is far too broad, allowing buying and selling of areas as if the practice of law were only a business and not also a profession, and clients were products to be bought and sold.</p> <p>This breadth should be narrowed substantially.</p> <p>Re: No increase of fees:</p> <p>Section (e) of the current proposed rule says that the fee to the client shall not be increased "solely" by reason of the purchase</p>	<p>firm will remain responsible for the client matter unless permitted or required to withdraw in accordance with Rule 1.16. If a law firm wants to withdraw from practicing in a geographic area, it may do so now, for there is no rule regarding the sale of a practice of a law firm. Clients, accordingly, have no protection except under other Rules of Professional Conduct. The proposed Rule will provide greater client protection by regulating what is now an unregulated aspect of practice.</p> <p>The Commission disagrees. California was the first state in the nation to adopt a rule regulating the sale and purchase of a practice. It was adopted for more reasons than expressed by the commenters. The private practice of law became businesslike long ago. Not adopting this rule will not restore times that are long gone. Instead, it will permit the regulation of sales and purchases of practices that are now unregulated.</p> <p>The Commission disagrees. Paragraph (e) is taken from the current Rule 2-300, which is better crafted than the Model Rule. Model Rule 1.17(d) is not</p>

**Rule 1.17 Sale of a Law Practice
[Sorted by Commenter]**

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					<p>of the practice. Section (d) of the ABA rule makes this fee increase absolute. We strongly believe that the California language should also be absolute, and that the word "solely" should be stricken.</p>	<p>realistic because it does not contemplate the realities of the transition when all or part of a practice is sold. For example, the buyer and a client who wants to be represented by the buyer will normally enter into a new engagement agreement. In doing so, the client may want to expand or contract the scope of the work to be performed by the new lawyer. The fees charged to the client may properly be increased or decreased accordingly. Therefore, current Rule 2-300(A) provides that fees charged to clients may not be increased "solely" by reason of the sale. That flexibility should be continued. The Model Rule is deficient on this subject.</p>

(9930.16:620:vy)

Rule 1.17: Purchase and Sale of a Law Practice

(Commission's Proposed Rule – Clean Version)

A lawyer or a law firm may sell or purchase a law practice, a substantive field of practice, or a geographic area of practice, including good will, only if the conditions set forth in paragraphs (a) through (g) are satisfied:

- (a) The seller ceases to engage in the private practice of law entirely, or in the substantive field or geographic area in which the seller conducted the portion of the practice being sold.
- (b) The seller makes the entire practice, or the entire substantive field or geographic area of the practice, available for sale to one or more lawyers or law firms.
- (c) The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.
- (d) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 1.6 and Business and Professions Code section 6068(e), then:
 - (1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:
 - (i) shall cause a written notice to be given to each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and
 - (ii) shall obtain the written consent of the client, provided that the affected client's consent shall be presumed until the purchaser is otherwise notified by the client if the purchaser receives no response to the paragraph (d)(1)(i) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90-day period.
 - (2) In all other circumstances, not less than 90 days prior to the transfer:
 - (i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel and might have the right to act in

his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, the purchaser may act on behalf of the client until otherwise notified by the client; and

(ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of each of the seller's clients whose matters are included in the sale, prior to the transfer, provided that the client's consent shall be presumed if neither the seller nor the purchaser receives a response to the paragraph (d)(2)(i) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, unless either the seller or the purchaser is otherwise notified by the client.

- (e) Fees charged to clients shall not be increased solely by reason of the purchase, and, unless the scope of the work is narrowed or expanded with the clients' informed consent, the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.
- (f) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.
- (g) A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.

- (h) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

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 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 practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[1A] As used in this Rule, a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of a substantive field or geographic area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the entire substantive field or geographic area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, or refuse to discharge the selling lawyer, therefore, does not result in a violation. If a client does not agree to retain the purchaser, the selling lawyer is

not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. See Rule 1.16.

- [2A] Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold a practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns or retires from a judicial position.
- [3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.
- [3A] An agreement for sale of a law practice that otherwise complies with this Rule does not violate this Rule if it contains a provision for a reasonable transitional period during which the seller may continue to practice and represent clients for the purpose of facilitating the transition of consenting clients to the purchaser.
- [4] This Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within this state or within a defined geographic area of this state. A seller does not violate this Rule by either (i) selling a California practice but continuing to practice in other jurisdictions; or (ii) selling a practice in one geographic area of this state but continuing to practice in another geographic area of this state, as agreed to by seller and purchaser. An agreement for the sale of a geographic area or areas of a law practice should state as precisely as possible the specific geographic area or areas being sold.

- [5] This Rule also permits a lawyer or law firm to sell a substantive field of practice. If a substantive field of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the substantive field of practice that has been sold, either as counsel or co-counsel, or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5.1. For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer or law firm that sells the practice in this state or in a geographic area of this state must make the entire practice in this state or in the geographic area available for purchase, this Rule permits the seller to limit the sale to one or more substantive fields of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

- [6] This Rule requires that all or substantially all of the seller's entire law practice, or an entire geographic or substantive area of practice, be sold. The prohibition against sale of less than substantially all of an entire law practice, entire geographic area of practice or entire substantive field of practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the law practice, geographic area of practice, or substantive field of practice, subject to client consent or other contingencies. This requirement is satisfied, however, even if a purchaser is unable to undertake particular client matters because, for example, the purchaser has a

conflict of interest, a client decides not to retain the purchaser, or the purchaser lacks the ability to undertake a matter. Whether the purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice, is to be measured by taking into account only that portion of the practice that, in accordance with these Rules, should be transferred to the purchasers. For example, a sale of only a portion of a practice may satisfy this Rule if it includes all or substantially all of the practice excluding client matters subject to a conflict of interest, matters where the clients choose to retain other counsel, and, if the seller becomes employed as in-house counsel to a business that was a client, matters for such business.

Client Confidences, Consent and Notice

- [7] Disclosures in confidence of client identities and matters during negotiations between seller and prospective purchaser for the purpose of ascertaining actual or potential conflicts of interest 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 access to client-specific confidential information relating to the representation or to the file, however, requires client consent. This Rule provides that, before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchasing lawyer or law firm, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. However, confidential information may be disclosed to the purchaser if necessary to protect a client from harm, damage or loss of rights, unless the client has made known that the client does not want to retain the purchaser or unless

the seller and purchaser have ascertained that the purchaser has actual or potential conflicts of interest that preclude the purchaser from representing the client.

- [8] [RESERVED]
- [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 law practice, a geographic area of the practice, or a substantive field of practice.

Fee Arrangements Between Client and Purchaser

- [10] Paragraph (e) provides that the sale may not be financed solely by increases in fees charged the clients of the law practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser unless precluded by conflicts of interest, or [unless the scope of work is changed with client consent](#). The purchaser may be required to enter into new fee agreements with each client. See, e.g., Business and Professions Code sections 6147 and 6148.

Other Applicable Ethical Standards

- [11] Lawyers participating in the sale of a law practice, a geographic area of practice, or a substantive field of practice must act in accordance with all applicable ethical standards. These include, for example, the following: The purchaser is obligated to check for potential conflicts of interest so as to avoid conflicts of interest (see, e.g., Rule 1.7 regarding concurrent conflicts and Rule 1.9 regarding conflicts arising from past representations) and thereafter to provide legal services competently (see Rule 1.1). Following a sale, the seller is obligated to continue to protect confidential client information (see Rule 1.6 and Business and Professions Code section 6068(e)(1)) and to avoid new

representations that are in conflict with continuing duties to former clients (see Rule 1.9).

- [12] 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, the matter may be included in the sale, but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter. See Rule 1.16.
- [12A] Although the services of a broker may be used to assist in a purchase and sale under this Rule, the Rule does not permit such a sale to a broker or other intermediary. Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice under this Rule is governed by the terms of the sale agreement and other law. Other Rules may also apply. See, e.g., Rule 5.4(a) (prohibiting sharing legal fees with a nonlawyer), and Rule 7.2(b) (prohibiting a lawyer from giving anything of value to a person for recommending the lawyer's services).

Applicability of the Rule

- [13] This Rule applies to the sale of a law practice of a deceased, impaired or disappeared lawyer, or by a trustee. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules,

or the seller may be a lawyer acting in a fiduciary capacity. Because no lawyer may assist in a sale of a law practice that does not comply with this Rule, a nonlawyer fiduciary who is represented by counsel, a lawyer selling in a fiduciary capacity, and the purchasing lawyer must all comply with this Rule. See, e.g., Rule 8.4(a).

- [14] [RESERVED]
- [15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice, a geographic area of practice, or a substantive field of practice.
- [15A] The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer's services in violation of Rule 7.2(b).
- [15B] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.
- [15C] If a lawyer whose practice is sold is deceased, his or her estate must also comply with Business and Professions Code section 6180, et seq., including but not limited to the notice requirements therein.