

**MEMORANDUM**

**TO:** COMMISSION FOR THE REVISION OF THE  
RULES OF PROFESSIONAL CONDUCT

**FROM:** RAUL MARTINEZ, KURT MELCHIOR, and JEROME SAPIRO, JR.

**DATE:** JANUARY 13, 2006

**RE:** RULE 2-300 [Model Rule 1.17]

---

The following contains three different rules. First, existing Rule 2-300 (starting on this page). Second, the American Bar Association Model Rule 1.17, redlined to show amendments made in 2002 (starting on page 6). Third, (starting on page 16) our existing Rule 2-300, redlined to show proposed changes and based on our votes taken at our June 10, July 23, September 9, 2005, and December 2, 2005, meetings.

Following the discussion of the proposed amended rule (starting at page 29) is the text of an email from Kurt Melchior for the December 2, 2005, meeting. Some of Kurt's recommendations were considered at that meeting. Those adopted are reflected in pages 16-28.

**1. EXISTING RULE OF PROFESSIONAL CONDUCT 2-200:**

**Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased**

All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or

law firm subject to all the following conditions:

(A) Fees charged to clients shall not be increased solely by reason of such sale.

(B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then;

(1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer;

(a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as

shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

(2) in all other circumstances, not less than 90 days prior to the transfer;

(a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

(b) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.

(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.

(D) All activity of a purchaser or potential purchaser under this rule shall be

subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) 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 shall not be deemed a sale or purchase under this rule.

*Discussion:*

Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B) (1) (a) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320. (Amended by order of Supreme Court, operative September 14, 1992.)

2. **AMERICAN BAR ASSOCIATION MODEL RULE 1.17,  
REDLINED TO SHOW THE 2002 AMENDMENTS:**

**RULE 1.17: SALE OF LAW PRACTICE**

A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

(a) The seller ceases 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;

(b) The entire practice, or the entire area of practice, is sold ~~as an entirety to another lawyer~~ one or more lawyers or law firm firms;

(c) ~~Actual~~ The seller gives written notice ~~is given~~ to each of the seller's clients regarding:

(1) the proposed sale;

~~(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);~~

~~(3)~~ (2) the client's right to retain other counsel or to take possession of the file; and

~~(4)~~ (3) the fact that the client's consent to the ~~sale~~ 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.

If 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.

(d) The fees charged clients shall not be increased by reason of the sale. ~~The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.~~

#### **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 another lawyer other lawyers or firm takes 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 law firms. See Rules 5.4 and 5.6.

#### **Termination of Practice by the Seller**

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the ~~purchaser~~ purchasers. The fact that a number of the seller's clients decide not to be represented by the ~~purchaser~~ purchasers but take their matters elsewhere, therefore, does not result in a violation. ~~Neither does a return~~ Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has

sold the 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 from a judiciary 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.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographic area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area 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(e). 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 who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

**Single Purchaser Sale of Entire Practice or Entire Area of Practice**

~~{5}~~ [6] The Rule requires a ~~single purchaser~~ that the seller's entire practice, or an entire area of practice, be sold. The prohibition against ~~piecemeal~~ sale of a less than an entire practice area 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 ~~purchaser is~~ purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. ~~If~~ This requirement is satisfied, however, the even if a purchaser is unable to undertake all a particular client matters matter because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

**Client Confidences, Consent and Notice**

~~{6}~~ [7] Negotiations between seller and 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 access to client-specific information relating to the representation and to the file, however, requires client consent. The 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 purchaser ~~and any proposed change in the terms of future representation~~, 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.

~~[7]~~ [8] 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. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

~~[8]~~ [9] All the 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**

~~[9] [10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.~~

~~[10] The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.~~

### **Other Applicable Ethical Standards**

[11] 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 ~~client~~ the client's informed consent after consultation 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).

[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, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

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

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] 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.

[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 or an area of practice.

**REPORTER'S COMMENTARY TO AMERICAN  
BAR ASSOCIATION MODEL RULE 1.17:**

Model Rule 1.17

Reporter's Explanation of Changes

1. Paragraph (b): Eliminate requirement  
that sale be to single buyer

Paragraph (b) of the current Rule requires that the practice be sold "as an entirety" to a single lawyer or firm. The justification offered is that purchasers would otherwise take only a seller's profitable cases and leave some clients unrepresented.

The Commission believes that the present requirement is unduly restrictive and potentially disserves clients. While it remains important to ensure the disposition of the entire caseload, it is not necessary to require that all cases must be sold to a single buyer. For example, it may make better sense to allow the sale of family-law cases to a family lawyer and bankruptcy cases to a bankruptcy lawyer. Common sense would suggest the lawyer should sell the cases to the most competent practitioner and not be limited by such a "single buyer" rule, and paragraph (b) has been redrafted accordingly.

2. Paragraphs (c)(2) and (d): Eliminate  
buyer's right to refuse representation  
unless seller's clients agree to pay  
increased fee

Paragraph (d) of the current Rule states that the fees charged clients shall not be increased by reason of the sale. However, it also allows the buyer of a practice to tell the seller's clients that the buyer will not work on their cases unless they agree to pay a greater fee than they had agreed to pay the seller. The only limit is that the buyer

may not charge the seller's clients more than the buyer charges the buyer's other clients for "substantially similar services." This is problematical because the seller could not unilaterally abrogate the fee agreement as a matter of contract law. The seller could have withdrawn as permitted under Rule 1.16, but the seller certainly could not have refused to continue the representation unless the client agreed to a modification of the fee contract. In this regard, the Commission thinks the buyer should stand in the shoes of the seller and has modified paragraph (d) accordingly. This proposal is in accord with the rules of California, Colorado (written contracts only), Florida, Iowa, Minnesota (must honor for one year), New Jersey, New York, North Dakota, Oregon, Tennessee (proposed rule), Virginia and Wisconsin.

The Commission proposes to delete paragraph (c) (2) in light of the modification in paragraph (d). Its only purpose was to require that notice be given to the seller's clients of the buyer's right to require increased fees under paragraph (d), which right has now been eliminated.

COMMENT:

[1] Minor wording changes have been made as part of the proposed change permitting sale of a practice to more than one lawyer or firm.

[2] Minor changes have been made as part of the proposed change permitting sale of a practice to more than one lawyer or firm and to clarify the third sentence.

[5] This Comment has been changed to explain the rationale for requiring that an entire practice be sold, albeit not to a single purchaser.

[6] Material has been deleted from the Comment because of the Commission's decision to prohibit purchasers from stating they will not continue the representation except at their usual fee.

[9] In accord with the change in the Rule text, the language explaining the right to a unilateral fee increase has been deleted. See discussion of paragraphs (c)(2) and (d).

~~[10]~~ Given the change in the Rule text, current Comment [10] is no longer necessary and has been deleted.

[10] The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

### 3. PROPOSED AMENDMENTS TO RULE OF PROFESSIONAL CONDUCT 2-300:

The following is existing Rule 2-300 redlined to show changes proposed or voted on. If the proposed changes and those approved on June 10, July 23, and September 9, 2005, are adopted, Rule 2-300 would be amended to state:

**Rule 2-300 [1.17]. Sale or Purchase of a Law Practice<sup>1</sup> ~~of a Member, Living or Deceased~~**

~~All or substantially all of the~~A lawyer or law firm may sell or purchase a law practice, ~~or a geographic or substantive area of the practice, member, living or deceased,~~ including goodwill, ~~may be sold to another member or law firm subject to if~~ all of the following conditions are satisfied:<sup>2</sup>

(a) Either the lawyer whose practice is sold has died; or the lawyer or law firm has sold substantially all of the practice, or ~~of the geographic or substantive area of the practice, of the selling lawyer or law firm is sold.~~<sup>3</sup>

<sup>1</sup> Model Rule 1.17 is merely titled "SALE OF LAW PRACTICE." The subcommittee recommends that we include "purchase" because the rule deals with both sides of the transaction.

<sup>2</sup> This introductory paragraph has been adapted from the introductory paragraph of Model Rule 1.17. In our June 10<sup>th</sup> meeting, we voted to apply this rule to the sale and purchase of a law firm, not just the practice of an individual lawyer. This will be consistent with Model Rule 1.17. On July 23, 2005, the Commission voted to permit the sale of a substantive area of practice and to permit the selling lawyer to continue to practice in other substantive areas. The sale of a geographic area of practice was approved on June 10 and July 23, 2005. "Goodwill" is one word per our vote on September 9, 2005.

<sup>3</sup> Adapted from Model Rule 1.17(b). The text of paragraph (a) as shown in this draft was adopted on December 2, 2005. However, the subcommittee urges that the phrase "of the selling lawyer or law firm" be deleted. It is redundant. The beginning of the clause after the semicolon already says the lawyer or law firm has sold. In addition, in the redrafting on December 2<sup>nd</sup>, the word "substantially" was omitted, we believe inadvertently. To delete the redundancy and restore "substantially, the clause after the semicolon should be amended to state: ". . . ; or the lawyer or law firm has sold substantially all of

(b) Absent exigent circumstances, a lawyer or law firm may sell a practice, or a geographic or substantive area of the practice, only one time directly to another lawyer or law firm.<sup>4</sup>

(c~~b~~) Fees charged to clients shall not be increased solely by reason of such sale.<sup>5</sup>

---

the practice, or substantially all of the geographic or substantive area of the practice.”

<sup>4</sup> Paragraph (b) is added as a result of votes taken on September 9 and December 2, 2005. Messrs. Martinez and Sapiro disagree with the prohibition of more than one sale for the reasons stated in earlier reports that we will not repeat here. The phrase “Absent exigent circumstances” was added by vote on December 2, 2005. The subcommittee recommends that a comment be added, similar to Comment [6] proposed *infra*, to expound upon this paragraph. However, this paragraph is so poorly drafted by reason of the majority vote that we recommend that the proponents of the restriction of one and only one sale in a lifetime draft a comment expressing the rationale and applicable examples of exceptions under it. Proponents of it should address at least two situations that are created by this paragraph as adopted. First, a lawyer sells his or her practice to enter public service, such as being appointed the Governor’s appointments secretary. When that Governor is voted out of office, the lawyer resumes practice, is successful, and wants to retire twenty years later. That does not appear to be a “exigent” circumstance that would permit the lawyer to sell his or her practice a second time. That is just a desire to retire. Second, assume the same series of events, but, instead of the lawyer wanting to sell his or her practice in order to retire, he or she dies. Under the paragraph as drafted, his or her surviving spouse could not sell the practice because it had been sold once before. The point is that “exigent” is too strict a standard. Since the subcommittee disagrees with the concept adopted by the majority, we recommend that a new subcommittee who agree with the majority draft the explication. In addition, the phrase “only one time” is unnecessary in the context of a sale of a geographic area of practice. Under paragraph (g) of this rule as adopted by the majority of the Commission, a seller of a geographic area of practice cannot ever again practice in that geographic area, so he or she will not have a practice to sell more than one time in that geographic area. In the context of a sale of a substantive area of practice, under paragraph (g) as adopted by the majority, the seller may only resume practicing in that substantive area in the event of “exigent” circumstances, so prohibiting multiple sales of a substantive area of practice will be to prohibit something that is not likely to occur.

<sup>5</sup> The language in paragraph (c) was approved on December 2, 2005.

(~~e~~) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then:<sup>6</sup>

(1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer:<sup>7</sup>

(~~Aa~~) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule ~~1.163-700(D)~~; and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule ~~7.21-400(D)~~<sup>8</sup> and any provisions relating to attorney-client fee arrangements, and

(~~Bb~~) the purchaser shall obtain the written consent of the client. ~~provided that such consent shall be presumed until otherwise notified by the client~~ ~~i~~If no

---

<sup>6</sup> The language in paragraph (d) was approved on December 2, 2005.

<sup>7</sup> Although not reflected in the notes prepared by Mr. Mohr, the subcommittee understood the replacement of the semicolon by a colon at this paragraph was approved on December 2, 2005, along with the corresponding changes in the text that accompanies footnotes 6, 10, and 12.

<sup>8</sup> On December 2, 2005, the Commission voted to replace the references to Rule 3-700(D) with the cross-reference to Rule 1.16 and to replace the reference to Rule 1-400 with a cross-reference to Rule 7.2.

response ~~is received~~ to the notification specified in subparagraph (a) is received within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period, such consent shall be presumed until the purchaser is otherwise notified by the client.<sup>9</sup>

---

<sup>9</sup> This rewording of paragraph (B) is in accordance with the subcommittee's recollection of the vote taken on December 2, 2005, as proposed by Kurt. However, this differs from the wording contained in Mr. Mohr's meeting notes. In addition, Mr. Mohr suggests breaking the second sentence into two sentences. The subcommittee disagrees with Mr. Mohr's proposed wording but recommends that paragraph (B) be broken into new sentences as follows [redlined to show changes from Mr. Mohr's wording]:

(B) the purchaser shall obtain the written consent of the client. Such consent shall be presumed until ~~the purchaser is~~ otherwise notified by the client if ~~the purchaser does not receive a response from the client within 90 days of the date the notice specified in subparagraph (a) was sent to the client's last address as shown on the records of the seller. If no response is received or if the client's rights would be prejudiced by a failure to act during such 90-day period,~~ the client's consent shall be presumed.

The subcommittee believes this wording is clearer. The wording proposed by Mr. Mohr would have unfortunate adverse effects on clients. In the existing rule, the presumption arising from the lack of response from the client is intended to apply both where no response is received within ninety days and if, before the ninety period has expired, some action has to be taken on behalf of the client or the client will be prejudiced. These are two different considerations. Mr. Mohr's proposed language would merge them, so the purchaser could only act during the ninety day response period if the client would be prejudiced and could not act after ninety days if the client has not responded. This would leave the client at a serious risk of abandonment. Remember that this paragraph applies in the case of a lawyer who has died, so the seller (i.e., the dead lawyer's estate) cannot take any action to protect the client. The buyer has to act, or the client is not represented. Therefore, the non-response provision should apply if there is an emergency during the ninety day period and, even absent such an emergency, if the client has not responded within the ninety days and steps have to be taken to represent the client after the ninety day period has expired.

(2) in all other circumstances, not less than 90 days prior to the transfer:<sup>10</sup>

(Aa) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the seller will continue to represent the client, unless the client elects (i) to retain the buyer, (ii) retains other counsel, or (iii) elects to appear in propria personam, or unless the seller has cause to withdraw from the representation in compliance with under rule 1.163-700~~that the client has the right to retain other counsel~~;<sup>11</sup> that the client may take possession of any client papers and property, as required by rule 1.163-700(D); and that, if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 7.2<sup>12</sup>~~1-400(D)~~ and any provisions relating to attorney-client fee arrangements,<sup>13</sup> and

(Bb) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer. If no response is received to the notification specified in paragraph (a) within 90 days of the date of the sending of such notification

---

<sup>10</sup> On December 2, 2005, the Commission voted to replace the semicolon with a colon.

<sup>11</sup> The wording of paragraph (d) (2) (A) was approved on December 2, 2005.

<sup>12</sup> The replacement of the cross-references from 3-700 to 1.16 and from 1-400(D) to 7.2 was approved on December 2, 2005.

<sup>13</sup> On December 2, 2005, the Commission voted to change the comma to a semicolon.

to the client's last address as shown on the records of the seller, ~~provided that~~ such consent shall be presumed until the client notifies the seller or the purchaser to the contrary otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.<sup>14</sup>

~~(ede<sup>15</sup>) If ~~substitution is required by the rules of a tribunal in which~~ a matter is subject to the proposed sale and substitution is required by the rules of the tribunal in which the matter is pending, ~~pending,~~ all steps necessary to substitute a member shall be taken.~~<sup>16</sup>

(f) The sale may not be financed by increases in fees charged to the clients of the seller's practice. Existing agreements between the seller and the seller's clients as to fees and the scope of work must be assumed by the purchaser.<sup>17</sup>

---

<sup>14</sup> The subcommittee has a different understanding of the vote taken on December 2, 2005, regarding this paragraph than reflected in Mr. Mohr's meeting notes. We understood that Mr. Melchior was proposing not only breaking up the paragraph into two sentences but also reversing the order in which the concepts within the net current second sentence appears. This draft reflects the subcommittee's recommendation of appropriate wording.

<sup>15</sup> Because of typographical errors by Mr. Sapiro when paragraph (b) was added, paragraphs (d) through (i) in the November 17, 2005, draft of this report were incorrectly designated. In this draft, paragraphs (e) through (j) have been given the correct letters.

<sup>16</sup> Again, the subcommittee has a different recollection of the vote taken on Kurt's proposal regarding paragraph (e) on December 2, 2005. We understood that Kurt's proposal was accepted. It included both changing the order in which the words of the paragraph appear and adding the reference "subject to the proposed sale."

<sup>17</sup> During our meeting on July 23, 2005, the Commission voted to adopt the Florida concept regarding fee increases. Proposed paragraph (f) is adapted from Comment [9] of Florida Rule 4-1.17. This is a substantial change from California's existing rule. The subcommittee is not aware of any problems with the existing California rule. The subcommittee has deleted the word "honored" as used in the Florida comment and substituted the word "assumed." Requiring the buyer to "honor" the fee agreements between the seller and the seller's clients sounds nice, but it is meaningless in this context. The word "honor" is unintelligible.

(g) If the sale is a sale of a substantive area of practice, the seller may continue to practice in other substantive areas of the practice and, in the event of exigent circumstances, may subsequently resume practicing in the substantive area that has been sold. If the sale is a sale of a geographic area of practice, the seller may continue to practice in other geographic areas. However, the seller may never resume

---

One dictionary shows that it means such words and phrases as "to respect greatly; regard highly; esteem; show great respect or high regard for; treat with deference; worship; exalt; ennoble." In commercial transactions, "honoring" a negotiable instrument means to accept it and pay when due. The latter definition of "honor" really only applies to the client, not to the buyer, because the buyer will not be paying anything to the client. Does "honor" mean that the buyer must "assume" the obligations of the seller under the fee agreement? Does it mean that the buyer is bound by the billing rates of the seller in perpetuity? We suggest that "assumed" is the accurate word. The subcommittee also deleted the last sentence of the Florida comment ["This obligation of the purchaser is a factor that can be taken into account by seller and purchaser when negotiating the sale price of the practice."]. That sentence would add nothing to the rule: the buyer will decide how much to pay in light of potential billing opportunities, the likelihood that seller's clients will retain buyer, and a host of other factors. Mr. Martinez agrees with adding paragraph (f). Although Messrs. Melchior and Sapiro join in the wording of paragraph (f) to comply with the Commission's vote, they still oppose adding that paragraph for, among other reasons, the following. The buyer and the seller's clients will be required in most cases to enter into new fee agreements anyway. Bus. & Prof. Code §§ 6147, 6147.5 & 6148. This change is based on a misperception of what is permitted by the rule. A buying lawyer may buy furniture, equipment, work in progress, and other aspects of the practice, but client files still belong to the clients, and the clients still have autonomy to decide whether to retain the buying lawyer or not. If a client elects to retain the buying lawyer, the buying lawyer is required to execute a new engagement agreement. If the client does not retain the buying lawyer, the selling lawyer is bound to continue to represent the client in accordance with the engagement agreement between the selling lawyer and the client, unless the Rules of Professional Conduct or a court order permit withdrawal or the client decides to hire a third lawyer. The first sentence of paragraph (f) is inconsistent with the second sentence. Under the first sentence, fees may not be increased even if the seller's engagement letter permits fee increases. What happens if the scope of the engagement changes? If the buyer's responsibilities are enlarged after the client has hired the buyer, is the buyer prohibited from negotiating for increased compensation?

practicing law in the geographic area covered by the sale.<sup>18</sup>

(Dh) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

---

<sup>18</sup> Proposed paragraph (g) has been added because it reflects the votes of the Commission on July 23, 2005. To Messrs. Martinez and Sapiro, this paragraph will make Rule 2-300 [1.17] stupid and is inconsistent with Business and Professions Code section 16600, which provides, in part that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." It is also inconsistent with Rule 1-500. If a lawyer reenters the same geographic or substantive area of practice twenty five years later, for whatever reason, it should not matter whether there are exigent circumstances or not. If some clients of the seller elect not to retain the buyer, this paragraph would prohibit the seller from continuing to represent them in the geographic area of practice. This paragraph will force selling lawyers to return to the methods of sale prior to the adoption of Rule 2-300, such as forming a "quickie" partnership and, shortly thereafter, withdrawing from the partnership. As a practical matter, the effects of the rule regarding client notification and other procedures required by the rule are sufficiently burdensome that lawyers are deterred from developing and selling practices as a matter of routine and moot the "cherry picking" concerns that were the rationale for the votes on July 23<sup>rd</sup>. The last sentence of paragraph (g) reduces the public's access to lawyers and therefore is contrary to the public interest. Permanently disbaring a seller from practicing in a geographic area is more draconian than any other Rule of Professional Conduct the Commission has proposed. Even a lawyer who has been disbarred can apply for readmission to the practice after five years. Apparently, the majority of the Commission consider that a lawyer who has the temerity to sell a geographic part of his or her practice has engaged in conduct so reprehensible that he or she should be banned from the profession in that geographic area for life. The last sentence of paragraph (g) also discriminates against sole practitioners. A law firm may sell a geographic area of its practice. If it later decides to open or acquire an office there, or sends a lawyer into that area to act as a lawyer, the firm will be immune from discipline because we do not discipline law firms. An individual lawyer who does the same will be disciplinable. Under the last sentence of paragraph (g), if a sole practitioner sells his or her practice in Southern California and continues to practice in Northern California, he or she would be precluded from taking a deposition in Southern California in a case pending in Northern California. The rule adopted by the majority on July 23<sup>rd</sup> is illogical, unfair to the lawyers, and unfair to the public. To Mr. Melchior, this paragraph is inconsistent nonsense.

(~~E~~i) Confidential information shall not be disclosed to a non-lawyer<sup>19</sup>~~member~~ in connection with a sale under this rule.

(~~F~~j) 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 shall not be deemed a sale or purchase under this rule.

DiscussionComment:<sup>20</sup>

[1] Pursuant to this Rule, when a lawyer ceases to practice, ceases to practice in a substantive area of law, ceases to practice in a geographic area, or dies, his or her practice may be sold to another lawyer or law firm. The sale may be to more than one lawyer or law firms.<sup>21</sup>

[2] The requirement that substantially all of the practice, or substantially all of the geographic area or substantive area of the practice, be sold is satisfied if the seller in good faith makes the entire practice, the practice in a substantive area of law, or the practice in a geographic area available for sale to purchasers. The fact that some of the seller's clients decide not to be represented by the purchasers, but stay with the seller or take their matters elsewhere, does not result in a violation of this rule.

[3] If a geographic area of a practice is sold, but the selling lawyer remains in the active practice of law, the selling lawyer

---

<sup>19</sup> The subcommittee recommends that "lawyer" be substituted for "member" because the purchase and sale may be an interstate transaction.

<sup>20</sup> The subheading has been changed to "Comment" to follow the Model Rules style.

<sup>21</sup> Comments [1] through [4] have been adapted from the Comment to Model Rule 1.17 as amended in 2002. We added the last sentence to Comment [1] to make clear that the present limit of sale to one buyer has been repealed.

must cease accepting any matters in the geographic area that has been sold.<sup>22</sup>

[4] This requirement that substantially all of the seller's practice, or of the geographic or substantive area of the seller's practice, be sold is intended to prohibit piecemeal sales of individual cases and to protect those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to only the most lucrative fee generating matters. The purchasers are required to undertake substantially all client matters in the practice, or in the geographic or substantive area of practice, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest or because clients do not retain the purchaser.

~~[5] "All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain Paragraph (a) of this rule is satisfied, for example, even if the selling lawyer retains one or two clients whose matters cannot feasibly be transferred. have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible.~~ Conversely, rule 2-300 [1.17] is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (Bc) (1) (aA) or paragraph (Deg).<sup>23</sup>

[6] This rule is not intended to prohibit the selling lawyer from returning to the private practice of law after the entire practice has been sold. If a substantive aspect of the

---

<sup>22</sup> Comment [3] has been revised to reflect the votes on June 10<sup>th</sup> and July 23<sup>rd</sup>.

<sup>23</sup> Comment [5] has been adapted from the existing Discussion to Rule 2-300.

practice is sold, this rule is not intended to prohibit the seller from resuming practice in that aspect of the law in the event of exigent circumstances, subject to the terms of any covenant not to compete the seller has made with the buyer. For example, if the seller has withdrawn from the private practice of law to enter government service but loses his or her government job, he or she may reenter private practice. However, a seller of a geographic area of practice may not resume practicing in that geographic area, regardless of exigent circumstances.<sup>24</sup>

[7] Under Paragraphs (Ac) and (e), the purchaser may not is intended to prohibit the purchaser from charging the former clients of the seller a different higher fee than the seller did purchaser is charging his or her existing clients. If the client agrees to retain the purchaser, the purchaser must enter into a written fee agreement with the client, subject to paragraph (c) of this rule, or assume in writing the duties of the seller under the seller's fee agreement, if required by Business and Professions Code sections 6147, 6147.5, or 6148 or similar laws. However, if the client refuses to retain the purchaser, the seller may have to continue to represent the client unless withdrawal is permitted under applicable rules such as Rule 1.163-700.<sup>25</sup>

<sup>24</sup> Comment [6] has been revised to reflect the votes taken on July 23, 2005. *Quaere*: Are these circumstances really exigent? The subcommittee has used "exigent" because that was the majority's vote. But the exceptions are not "exigent," because they are not urgent, and they are foreseeable. Shouldn't a different word be used? Other examples of "exigent" circumstances could be added. For example, we might say it is appropriate for a lawyer who has retired from the practice to reenter the practice in the event that his or her retirement plan became worthless. Does the Commission want to add to the examples? In any event, adding examples does not make the word "exigent" correct in this context. We recommend that another word be used, but we do not have a correct word to recommend in this context. "Good faith" and "reasonable basis" are close, but the majority clearly intended a more restrictive concept.

<sup>25</sup> As a result of the vote on December 2, 2005, the first sentence of Comment [7] has been deleted, and the phrase "subject to paragraph (c)"

[8] This rule is not intended to create a contract between the buyer and the client by estoppel and is not intended to impair the rights of the buyer or the client to enter into contracts regarding fees. If the purchaser acts to protect the interests of clients under paragraphs (d) (1) (A) or (d) (2) (A) but has not entered into a written fee agreement with the client, the buyer may not be able to recover a contractual rate of payment.<sup>26</sup>

[9] If there is an actual or potential conflict of interest between a potential buyer and a client of the seller, the transaction may

---

has been added. However, in the latter phrase, we also expanded it so it reads "subject to paragraph (c) of this rule . . . ." However, we think this change incorrectly alters the balance of the sentence. By inserting that clause where the Commission voted to insert it, the phrase "if required by Business and Professions Code sections 6147, 6147.5, or 6148 . . ." modifies the assumption in writing of the duties of the seller under the seller's fee agreement. Those code sections do not speak about assumption of a retainer agreement by a buyer of the lawyer's practice. The subcommittee recommends that what is now the first sentence of Comment [7] be further changed to read:

If the client agrees to retain the purchaser, the purchaser must enter into a written fee agreement with the client, if required by Business and Professions Code sections 6147, 6147.5, or 6148 or similar laws, or assume in writing the duties of the seller under the seller's fee agreement. Fees charged to clients must not be increased solely by reason of the sale.

In the next sentence, we would delete the word "however," so it would state:

If the client refuses to retain the purchaser, the seller may have to continue to represent the client unless withdrawal is permitted under applicable rules such as Rule 1.16.

By vote taken on December 2, 2005, the reference to Rule 3-700 has been changed to refer to Rule 1.16.

<sup>26</sup> We suggest the addition of Comment [8] to alert lawyers that they cannot assume that the client is bound to a fee agreement by mere non-response and to protect clients against arguments to the contrary. This, however, was not discussed or voted in our June 10, 2005, meeting.

not proceed as to that client absent compliance with other rules, such as rule 3-310.<sup>27</sup>

[10] Transfer of individual client matters, where permitted, is governed by rule 2-200.

[11] Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320.

[12] If the 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.<sup>28/29</sup>

---

<sup>27</sup> We recommend the addition of Comment [9] so the duties are made explicit.

<sup>28</sup> This Comment does not appear in existing Rule 2-300 or in Model Rule 1.17. However, it is a cross-reference that the subcommittee recommends because lawyers might otherwise not know that they must comply with Section 6180.

<sup>29</sup> Mr. Martinez recommends that clients should be told about the terms of the agreement between buyer and seller. As reflected in our earlier report, Mr. Melchior and Mr. Sapiro disagree. The Commission has not voted upon this subject.

## COMMENTS AND CRITICISMS FROM MR. MELCHIOR

The following are the comments and criticisms of Mr. Melchior in regard to the proposed amendments set forth above.

Reading this in one gulp continues to persuade me strongly that I must speak out against this expansion of the rule, essentially in the areas of geographic and practice area sales, which I have protested before. I hope that this written statement will be incorporated for others to see if the draft continues to have traction. My basic point, of course, is that from a pioneering rule which allowed single practitioners to realize some value from their practice at the end of that run without engaging in sham partnerships and the like – California was first in the nation on this and also sponsored the ABA rule thereafter – we are changing the rule into a device which will do even more to commercialize the practice of law than we see on all sides around us. I am in basic and fundamental, and probably unchangeable disagreement with the ideas of allowing lawyers or law firms to sell geographic or substantive practice areas, except in the limited sense of pre-retirement reductions of the more demanding areas of one's practice such as litigation. But I've said all that before and the Commission disagrees.

To be specific, beyond those general objections:

1. Raul is right: this role is becoming a poster child for the basic error of our drafting process, which is that we are making the rules complex, inaccessible and incomprehensible for anyone but ethics specialists. 2-300 is becoming book size all by itself.

2. I disagree with the attempt to regulate here what "law firms" may do. There may indeed be good reason to regulate law firms – as general counsel of one I have a keen appreciation of the practice problems which a firm setting represents. But that should not be done by occasional excursions into law firm territory. If the bar wants to go in that direction, I recommend that there be a special task force which can devote time and attention to the special concerns about firm practice, and get extensive input from those who would be particularly affected by such a program.

3. As to fn 4, I do not "disagree with the first part of this change" – quite the contrary. I stated my reasons at the relevant meeting.

4. Further re fn 4, I favor the concept that repeat sales should be allowed only under extraordinary circumstances. Somewhere you used the word "exigent", and while that is a pliable term, it probably catches my feelings.

5. Still on that part, I agree that law firms should not be given broader license to be commercial than single lawyers, although of course in fact they are. How would one control a law firm's barter in geographic or practice areas? For that matter, and not just for law firms, what is a geographic area, or a practice area? As I said at a meeting, is it the Norwalk courthouse? LA Central West? Biotech patent disputes with a value of over \$100M? Child custody cases where the kids are under 12? We have done quite well with the limited scope of current 2-300 and are really changing the contours of the playing field here, for no reason other than that someone can make some money.

6. Still on fn 4, of course there is no known instance of churning, **not yet, because it is now forbidden.** But that's no reason to open the door to it.

7. There is a syntax problem, maybe a logic problem, in (a) on p. 19. What is meant by compliance with "any provisions relating to . . . fee agreements"?

8. Part (b) on p. 19 needs work, I think that you mean that (new sentence) "If no response is received [etc] , the client's consent shall be presumed." Also, the point of the prejudice issue is unclear and needs to be a separate sentence or semicolon clause.

9. In 2(a), it is not clear to what "the interest in the law practice" refers. Also, I would put the "unless" portions before "will continue," and possibly set them off in subparagraphs for easier reading.

10. At (b) on p. 19, same problems as with item 8 above.

11. In (d) on that page, "matter" is too loose. You mean "a matter subject to the proposed sale".

12. Generic question re all these conditions: nowhere do we say at what point such a sale will be effective.

13. (e) on p. 19 is well meant but won't work in a law firm. An individual seller may have an agreement with client X to work at \$AAA/hour; but firm engagement agreements probably never read that way. Typically they say that the hourly rates for the lawyers assigned are currently shown on the attached schedule and are subject to change (= increase) at annual etc. intervals. Thus if firm Z takes over, they can (if so inclined) simply put higher priced lawyers on the case and yet be in full compliance with this rule. This is a serious defect and gap, caused by commercial thinking!!

14. On p. 20 9 lines from the bottom of the enormous footnote, I would think that the selling lawyer is bound only *if living and able*. But then again, the way the rules are developing, maybe we do intend to regulate the dead.

15. I disagree with the sentence 5 lines down from there which starts "The first sentence is . . ." It is also unnecessary – if the buyer can use the income from the bought cases to pay off the purchase price, why not, as long as he/she is not jacking the price up? Your grocer can and does pay his wholesaler with the cash from his collections, as long as he has 30 days' credit. And boy, are you asking for audit problems!!

16. "Permanently disbaring" a seller is hard language, but it is no different from B&P Code 16600,. and a proper accommodation to the extraordinary permission to trade in client relationships!

17. I totally disagree with the tone of this note 14, as you might expect. And the restriction is not "reprehensible" at all but in my mind a reasonable condition of allowing such extraordinary and unprecedented sales of client relations!

18. For reasons I stated during the Commission meeting, I disagree with the right to sell one unit of sales, geographic or substantive, to several law firms (fn 2 on p. 22).

19. Re fn 7, it is not impossible, where there is no sale, that a retention agreement may allow increases in the fee arrangements if certain contingencies happen; and we should be careful not to adopt language (first phrase of 7??) which could

be read to preclude that entirely in otherwise proper situations.

20. And last (thank goodness): In fn 21, line 1, the word "does" is surplus.

Amen.

(9930.16:189:vy)