

**RE: Rule 2-300 [ABA MR 1.17]
6/10/05 Commission Meeting
Open Session Item III.C.**

**RE: Rule 2-300
4/1-2/05 Commission Meeting
Open Session Item III.M.**

MEMORANDUM

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

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

DATE: FEBRUARY 23, 2005

RE: RULE 2-300 [MODEL RULE 1.17]

We last discussed Rule 2-300 in our meeting in Los Angeles on November 19, 2004. At the end of that discussion, Mr. Sondheim identified issues that need to be addressed. This memorandum will give you the subcommittee's recommendations on those issues, *seriatim*. You will see that, on some issues, the subcommittee is not unanimous, and, where that has occurred, we include the opposing points of view.

Before embarking on this summary, we want to pay tribute to the excellent work of Mr. Mohr. On December 14, 2004, he sent to us a memorandum summarizing the results of his survey of information regarding the adoption of counterparts of Model Rule 1.17 in the various states, pointing out the

uniformities or lack of them. For those who are interested in studying this subject in more depth, we commend Mr. Mohr's memorandum and the thorough comparison tables that accompanied it.

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.)

ISSUES FOR CONSIDERATION

1. **Whether the concept of "area of practice" and "geographic area" needs definition or refinement.**

Existing Rule 2-300 requires the sale of "all or substantially all" of a lawyer's law practice. It does not use the concept of "area of practice."

Model Rule 1.17, adopted in 1990, substantially copied our rule. However, the 2002 amendments to Model Rule 1.17 permit a lawyer or a law firm to sell or to purchase a law practice or an area of practice. As amended, Model Rule 1.17 permits the sale of an entire practice, an area of practice, the entire practice within a geographic area or in a jurisdiction, or an area of practice within a geographic area or jurisdiction.

The introductory paragraph of Model Rule 1.17 says that a lawyer or law firm may sell or buy a law practice "or an area of practice," including goodwill, under certain circumstances. Paragraph 1.17(a) requires the seller to cease to engage in the private practice of law "or in the area of practice that has been sold." It adds two alternatives to that phrase, which a jurisdiction may elect. The first is "in the geographic area." The second is "in the jurisdiction." Thus, Model Rule 1.17 begins:

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;

* * * *

Mr. Mohr reports that 28 states have either adopted or recommended the adoption of the version of the Model Rule 1.17 that includes the amendments adopted since Ethics 2000. Two of those (Louisiana and Kansas) have no Rule of Professional Conduct addressing the sale of a law practice. Of the other 26, 20 have approved a sale of an "area of practice." 14 have limited the sale to an "area of law practice." One permits the sale of "part" of a law firm, and one expressly states that it intends to permit both the sale of a substantive practice area and a sale of a practice in a geographic area. Three states do not limit "area of practice" to either "law" or "geographic area." In short, there is no interstate uniformity on this issue.

Model Rule 1.17 does not make explicit whether its references in the introductory paragraph and paragraph (a) to an "area of practice" refer to a substantive aspect of the law practice being sold. However, the juxtaposition in Model Rule 1.17(a) of "area of practice" with "geographic area," and

comments such as Comment [1] ("or ceases to practice in an area of law") suggest that "area of practice" was probably intended to refer to a substantive aspect of the practice and not to a geographic area of practice.

The subcommittee unanimously recommends that Rule 2-300 be amended to permit sale of a substantive aspect of the practice. If a lawyer has built up a diverse practice and decides to limit his or her practice in the future to a particular substantive area of the law, he or she should be able to sell the unwanted areas of practice and not be forced to withdraw from the practice of law entirely.

On the geographic aspect of this issue, however, the subcommittee is divided.

Messrs. Martinez and Sapiro recommend that a sale be permitted to include the sale of a practice in a geographic area. In a state as large as California, if a lawyer decides to limit his or her practice to a restricted geographic area, he or she should have the discretion to sell his or her practice in the other areas of the state. One of the reasons California adopted Rule 2-300 is to permit lawyers to sell their law practices, just as law corporations and partnerships may sell theirs. If a multi-city law firm decided to close its office in Northern California and continue practicing elsewhere, there is no prohibition against it selling its business in the geographic

area, including consideration for good will. A sole practitioner or sole proprietor ought to be able to do the same. If a lawyer practices in both California and Nevada and decides to withdraw from practicing in California, he or she should be able to sell his or her practice in this state, without having to sell his or her practice in Nevada, and should be permitted to continue to practice in that state.

Mr. Melchior disagrees. He does not want the Rules of Professional Conduct to endorse the thought that, simply because a lawyer wants to move out of an area, he or she should be able to convert the good will created in that area into cash. The commercial pressures on the practice of law are already too great.

He sees no professionally valid considerations in the sale of a location of practice. If a single lawyer wants to stop commuting that can be his or her choice. If a group of lawyers in a community wish to peel away from a firm located elsewhere, that should be their option but there should not be a monetary consideration for the "parent" firm. The proposal of a sale of a geographic area of practice is simply a monetarization of the practice of law which he thinks unnecessary and inappropriate, and far removed from the purposes of liquidity for single practitioners leaving the field (or leaving this earth) which this Rule was designed to serve. Thus, the issues

to be decided by the Commission on the subject of "area of practice" and "geographic area" are:

1. Should Rule 2-300 retain the language that a permissible sale of a lawyer's law practice must be of "all or substantially all" of the practice, or should it be amended? The subcommittee recommends that it be amended.

2. If the rule will be amended, should the amended rule permit the sale of a substantive area of the lawyer's practice and permit the lawyer to continue to practice in other substantive areas of law?

3. If the rule will be amended, should it permit a lawyer to sell his or her practice in a geographic area, while continuing to practice in other geographic areas?

If the Commission votes to permit the sale of a substantive aspect of the practice, the mere addition of the word "law" in the phrase "an area of law practice" would be superfluous and would not clarify the rule. A lawyer's practice is inherently a "law practice." Instead of adding the word "law," we recommend that, in the introductory paragraph of the rule, we add the phrase "or a substantive area of the practice," and that a statement be added in the Comment to the effect that this is intended to permit the sale of a substantive aspect of the lawyer's practice while the lawyer continues to practice in other substantive areas of the law.

If the Commission votes to permit the sale of a practice in a geographic area, while the seller continues to practice in other geographic areas, we recommend that the phrase "or a practice in a geographic area" be added to the introductory paragraph of the amended rule. Corresponding changes would also be made in paragraph (A) of the amended rule. We would also recommend that the Comment be amended to explain that this change is intended to permit a lawyer to sell his or her practice in a geographic area while continuing to practice in other areas of this state or permit a lawyer to sell his or her practice in California while continuing to practice elsewhere, or vice-versa.

If those amendments are adopted, the beginning of Rule 2-300 as amended would read:

The practice of a living or deceased lawyer, a substantive area of practice, or a practice in a geographic area, including good will, may be sold subject to all of the following conditions.

(A) The lawyer whose practice is sold substantially ceases to engage in the private practice of law, or in the area of practice that has been sold, or in the geographic area in which the practice has been conducted, or has died.

If the Commission decides these issues, the subcommittee would rewrite the comment in light of the wording of the new rule.

2. Whether a sale must be to a single purchasing lawyer or law firm or may be to multiple lawyers or law firms.

Existing Rule 2-300 does not expressly state that the law practice must be sold to only one other lawyer or law firm. However, that restriction is implied by the phrase in the introductory paragraph “. . . may be sold to another member or law firm” Since the words “member” and “. . . law firm” are singular, a permissible interpretation is that multiple purchasers are not permitted.

Model Rule 1.17(b), as currently amended, permits a sale of a practice or of an area of practice “to one or more lawyers or law firms;” Comment [6] refers to “purchasers” in the plural.

Mr. Mohr reports that 21 of 26 states allow more than one lawyer or law firm to be purchasers, so long as the entire practice or the entire area of practice is sold.

Again, the subcommittee is not unanimous. Messrs. Martinez and Sapiro recommend that sales to multiple purchasers be permitted. Mr. Melchior disagrees.

To illustrate the arguments in favor of permitting sales to multiple purchasers, consider the situation of a sole practitioner who has a general practice. He or she may find a buyer for the personal injury aspect of the practice, but that same buyer may be incompetent in estate planning or corporate

matters or may have no desire to handle such cases. The clients would not be well served if the seller is required to sell all of his or her practice to that one buyer. Sale of the estate planning practice to a personal injury specialist might result in harm to the clients, and the personal injury specialist might refuse to purchase that aspect of the practice. The seller should be permitted to sell the various aspects of the practice to multiple lawyers or firms.

Similarly, a purchasing lawyer may have a conflict of interest if he or she begins to represent one client of the selling lawyer. The potential conflict could be avoided if selling lawyer sells the bulk of his or her practice to one purchaser but sells to another purchaser the aspect of the practice as to which there may be a conflict of interest.

A seller should not violate the Rule by selling the various substantive aspects of the practice to multiple purchasers. Whether there are multiple purchasers should be irrelevant.

Mr. Melchior disagrees. While he supports the concept of selling an area of practice **but only** in order to accommodate a change in the selling lawyer's situation such as a semi-retirement which leaves only a less demanding type of practice in place, he sees a broadly worded right to sell areas of practice as embarking on seas which are quite uncharted except

only that a few other states have apparently newly authorized the practice. He sees nothing inherently inappropriate about such a sale of "areas of practice" if strictly limited to legitimate situations such as semi-retirement; but if the Commission proposes to adopt such a rule, he would want extremely careful definitions so as to avoid the sale of clients or cases in the guise of selling "areas of practice." Sale of clients or cases **cannot** be acceptable and the Rule must be cast to prevent that.

While he reserves his final position until after discussion, he believes that a sale to multiple purchasers will create a commercial environment far beyond the intention of this Rule and should be generally forbidden, subject to further consideration of a means (if one can be found) by which a lawyer who is leaving the profession but is unable to make a "bulk sale" of his or her entire practice can arrange for the transfer of the "left behind" cases or files without having to abandon such clients.

In any event, he believes that care must be taken to avoid the potential of the following ills: case or client auctions, dealing out clients as in a card game, using "sale of area of practice" as a means of selling a hot case or a bad case, or allowing the sale of clients simply in order to relocate."

Thus, the question for decision by the Commission is whether a practice or area of practice may be sold to multiple purchasers or must be sold, if at all, only to one purchaser.

If the Commission votes to restrict a sale to only one purchaser, no change in the existing rule is required. The introductory paragraph would still include the phrase “. . . may be sold to another member or law firm”

If the Commission votes to permit a sale to multiple purchasers, the committee recommends that the phrase “to another member or law firm” be deleted from the introductory paragraph of the rule and a new paragraph (B) be added to read as follows:

(B) The entire practice, or the entire area of practice, or the entire practice in a geographic area, is sold to one or more lawyers or law firms.

3. May the selling lawyer return to practice after the sale?

Current Rule 2-300 does not address the subject of whether the selling lawyer may ever reenter the practice of law.

Model Rule 1.17 also does not address this subject. Model Rule 1.17(a) does require that the seller cease to engage in the private practice of law or in the area of practice that has been sold, but no part of the rule, itself, speaks to the subject of reentry into the private practice of law by the seller at a later date.

Comment [2] of Model Rule 1.17 provides that a return to private practice as a result of an unanticipated change in circumstances does not necessarily result in the violation.

Mr. Mohr reports that Florida, Maryland, and Michigan do not require cessation of practice as a condition of sale. Florida does not address competition after a sale at all. Maryland, Michigan, and Minnesota provide that the purchaser may condition the purchase on the seller agreeing to cease practice. North Dakota does not require that the seller completely retire from or cease practice of law throughout the state and includes in its comment a statement of reasons why.

Nevada's proposed new Rule 1.17(1) would condition a permissible sale on the seller ceasing to engage in the private practice of law, or in the area of practice that has been sold, or in the geographic area in which the practice has been conducted, for a reasonable time, not less than six months, as agreed by buyer and seller. Nebraska does not condition the sale on a covenant by the seller not to compete.

To illustrate the problem, consider a lawyer who accepts a judicial appointment or an appointment to an executive branch office. At the next election, the judge is defeated, or the mayor who appointed the former lawyer to a political office is defeated, and the former lawyer finds that he or she is out of a job. Or, consider the case of the lawyer who changes

careers. Six months later, that lawyer concludes that he or she really would prefer to practice law after all. Or the high technology company he or she joined collapses. Should our Rule of Professional Conduct prohibit such a person from reentering the practice? Or consider the lawyer who has sold his or her litigation practice and expects to practice merely estate planning and probate law but, five years later, is asked by a client to handle the defense of a lawsuit. Should a Rule of Professional Conduct prohibit that lawyer from doing so?

Again, the subcommittee is divided. Mr. Martinez and Mr. Sapiro would not prohibit a seller from returning to the private practice of law. Mr. Melchior would permit a seller to return to the private practice of law only in specific, narrowly drawn circumstances.

A fundamental principle also applies here. If Rules of Professional Conduct prohibit a lawyer from reentering the practice of law or an area of practice, the ability of the public to obtain representation by a lawyer of choice would be limited. The Rule of Professional Conduct will decree as a matter of public policy that, once a lawyer sells a practice or an area of practice, the public cannot have access to that lawyer's services or to that lawyer's services in the area of practice sold. Such a rule would also limit competition. Although there are now 200,000 lawyers in this state, many

people cannot afford to hire lawyers. To Mr. Martinez and Mr. Sapiro, a Rule of Professional Conduct should not prohibit the public from having access to lawyer's services just because the lawyer once sold his or her practice or an area of practice. Instead, the Rules of Professional Conduct should encourage lawyers to reenter the practice so that members of the public can have access to the services of more lawyers, not fewer lawyers.

Whether the selling lawyer ought to be permitted to reenter the practice or reenter the area of practice sold to a buyer could be left to a covenant not to compete in the buy-sell agreement between them.

Mr. Martinez and Mr. Sapiro recommend that the seller should be permitted to return to the practice of law, or remain in practice, after a sale of all of a practice or of an area of practice.

Mr. Melchior recommends that circumstances under which a seller should be permitted to reenter the practice should narrowly be defined. He can see this happening where there is a total reversal of fortunes or plans, such as losing reappointment or reelection as a judge, or having assumed a public office or joining a public law practice and then not staying with THAT job for whatever reasons. He would support a right to return to practice under such circumstances but not

otherwise. The point of permitting the sale of a practice is only to allow people to obtain the value of a long period of labor, not to engage in commerce in clients. He would support only a very narrowly crafted and specific "right of return" in identified situations but not more.

Mr. Melchior states that our concern seems to be in a direction quite different from the general law of covenants restraining competition, which has been mentioned in this connection. Covenants protect the buyer. The Commission's task is to protect clients from becoming objects of commerce.

Mr. Martinez and Mr. Sapiro respond that the circumstances under which a lawyer may reenter the practice would be impractical to draft and leave sufficiently broad the scope of circumstances under which doing so would be permissible. The twists and turns a life or a career can take may make enumerating all of the permissible circumstances impossible, and not listing all of them may be unfair to a given individual. For example, consider the lawyer who decides to retire. He or she sells the practice to another lawyer, planning to live off the income to be generated by a Keogh plan. Three months later, the Keogh plan becomes valueless because its principal investment was in an Enron or Worldcom. The lawyer cannot live on the proceeds of the Keogh plan. It would be impractical to write a Rule of Professional Conduct that

anticipates such a wide variety of circumstances under which reentry into the practice ought to be permissible.

Thus, the issues to be decided by the Commission on this subject are:

1. Should the Rule 3-200 be amended to prohibit a selling lawyer from reentering the practice of law or from reentering the area of practice sold?

2. If the Rule does not prohibit reentry, should we include a comment to that effect?

3. If the Rule contemplates that a covenant not to compete will or may be permissible, should the Rule or a comment to it so state?

4. If reentry is to be prohibited, should the prohibition be open-ended, or should there be a finite limit on the number of months or years that the seller is prohibited from reentering the practice or area of practice?

5. If the seller is to be permitted to reenter the practice only under certain defined circumstances, what are the circumstances that will lead to a permissible reentry?

6. Should the new rule copy Comment [2] of Model Rule 1.17, which would allow a lawyer to return to practice in the event of unanticipated circumstances, but without defining those circumstances?

Mr. Melchior suggests that we describe the "unanticipated circumstances" as "such as losing reappointment or reelection as a judge, or having assumed a public office or joining a public law practice and then not staying with THAT job for whatever reasons.

4. What should the Rule provide regarding fees to be charged to the client after the sale?

Rule 2-300(A) requires that fees charged to clients must not be increased solely by reason of a sale of a law practice.

Model Rule 1.17(d) provides that "[t]he fees charged clients shall not be increased by reason of the sale."

None of the states that have adopted Model Rule 1.17 have added the word "solely" as in our existing Rule 2-300. Oregon, North Dakota, and Pennsylvania expressly allow increases of fees with client consent. Michigan and South Carolina permit the buyer to refuse to undertake the representation unless the client consents to pay the buyer fees at a rate not exceeding the fees charged by the buyer for substantially similar services prior to the negotiations for the purchase of the practice. Minnesota prohibits raising fees for one year. Florida requires the buyer to "honor" fee agreements between the seller and the seller's clients. Maryland requires that notice of any fee increase be given to the affected clients.

On this subject, the subcommittee is unanimous: we recommend that the wording of existing Rule 2-300(A) be carried forward into the new rule.

We are not aware of any problems that have been caused by the existing wording of Rule 2-300(A). That rule is both logical and flexible.

Absent a novation or rescission, the selling attorney is under a contractual obligation to continue to represent the client on the basis of the agreed fees. The buyer would have to comply with Business and Professions Code section 6147 and 6148 and have a fee agreement with the new clients. Unless the buyer and the clients can enter into mutually agreeable fee agreements, the seller must continue to perform his or her duties under the original retainer agreements.

We do recommend that the discussion to the new Rule make clear that the seller may be bound to perform his or her contractual obligations with existing clients and that the rule does not permit the seller to withdraw unless withdrawal is permissible under Rule of Professional Conduct 3-700.

We also recommend that the rule be amended to require in the written notice to the clients a statement to the effect that the client has a right not to retain the buyer, may retain a different lawyer, and, if the sellers still admitted to

practice, may have an enforceable contractual right to insist on continued representation by the selling attorney.

Mr. Martinez also recommends that the seller's clients should receive a copy of the Rule of Professional Conduct and a copy of the proposed terms of the sale. Mr. Melchior and Mr. Sapiro disagree with this recommendation.

The subcommittee recommends that California not adopt Florida's version of Model Rule 1.17 in this regard. Requiring the buyer to "honor" the fee agreements between the seller and the seller's clients sounds nice, but what does the word "honor" mean legally? If Florida intends to require that the buyer "assume" the obligations of the seller under the seller's fee agreements, the rule should so state. If it intends that the buyer is bound by the billing rates of the seller in perpetuity, the rule should so state. But the subcommittee finds such a restriction unreasonable and unnecessary. If the buyer offers unreasonable fee proposals, the seller's clients will go elsewhere, or the seller may have to continue representing them. If the buyer cannot negotiate new fee agreements, the seller may not be able to sell a given practice.

In Mr. Martinez's opinion, if the client negotiated favorable terms in the retainer agreement with the selling lawyer, the buying lawyer should be required to honor that agreement. If the seller's retainer agreement contained fixed

billing rates, the buyer should be bound by that agreement.

(However, most retainer agreements that Mr. Martinez is aware of contain provisions that allow for periodic increases in billing rates.) By the same token, if the client negotiated a "flat fee" retainer agreement, the rule should not give the buyer a license to impose an hourly arrangement on the client. The client should be made aware that he or she has the right to require that existing contractual obligations be honored and that the buyer may not impose new terms absent a novation or rescission.

To this, Mr. Sapiro responds that these conditions are not necessary for client protection. If the buyer is unwilling to assume the fee agreement of the seller, the seller is still obliged to perform under that fee agreement. Notice to the clients to that effect is sufficient client protection. On the other hand, if the sale is conditional on the clients entering into different fee agreements with the buyer, the clients do not want to do so, the sale will not close.

Mr. Melchior suggests that the rule not deal with this issue. The buyer may have a different practice style or office set up that dictates that different fee agreements be made from those of the seller. Since there have not been problems under the existing rule on this subject, no new restrictions are needed.

If the Commission accepts the recommendation of the subcommittee, a new paragraph would be added to the discussion.

The new paragraph would read:

Paragraph (C) 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 solely by reason of the sale. If the client agrees to retain the purchaser, the purchaser must enter into a written fee agreement with the client, or assume in writing the duties of the seller under the seller's fee agreement, if required by Business and Professions Code sections 6147 or 6148 or similar laws. However, if the client refuses to accept a fee agreement offered by the purchaser, the seller may have to continue to represent the client until withdrawal is permitted under applicable rules such as Rule 3-700.

5. What, if anything, should the rule provide if there is a conflict of interest that prevents a buyer from representing a particular client of the seller?

Existing Rule 2-300(D) states that all activity of a purchaser or potential purchaser under the rule “. . . shall be subject to compliance with Rules 3-300 and 3-310 where applicable.”

Model Rule 1.17 does not have a corresponding provision. However, Comment [6] provides that the requirement of a sale of an entire practice or of an entire area of practice is satisfied, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest. Comment [11] also states that all lawyers who participate in the

sale of a practice are “. . . subject to the ethical standards applicable to involving another lawyer in the representation of a client . . .” including “. . . the obligation to avoid disqualifying conflicts, and to secure the client’s informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent).”

The subcommittee is not aware of any problems that have arisen regarding conflicts of interest under the existing rule. The subcommittee recommends that existing 2-300(D) be retained but that the discussion be amended to state that a check for potential conflicts of interest must be performed before the sale is consummated and before notices are sent to the clients, so that a notice of the potential transfer of a case to the buyer will not occur be sent to a client as to whom the buyer has an actual conflict of interest.

If the buyer has an actual conflict of interest, the transaction should not be allowed to be consummated as to that client. On the other hand, if the conflict of interest is merely potential, the buyer and seller may be able to communicate sufficient information to the affected clients that the clients can decide whether to waive the potential conflict of interest in accordance with Rule of Professional Conduct 3-310.

We also recommend that the notice to the clients of the sale of the practice or area of practice tell the clients that, if seller has grounds to move for withdrawal from the representation, and the buyer has a conflict of interest that precludes the buyer from representing a given client, the client must either retain a different lawyer or appear *in propria personam*.

6. Should the buyer be required to retain the purchased practice for a specified period of time?

The subcommittee unanimously recommends that no such requirement be added to the rule.

Presumably, a buyer of a law practice or of an area of practice will not pay for a practice that he or she does not intend to retain. The notice and other requirements of the existing rule are sufficiently burdensome that a buyer is not likely to purchase and resell in a short period of time, absent a bona fide need. On the other hand, a prohibition of a resale of a purchased practice could work a detriment both to the buyer and to the clients. For example, consider the circumstance of a lawyer that purchases the practice of another lawyer and, three months later, finds that he or she has terminal cancer. The buyer should not be prohibited from selling the buyer's own practice, including the acquired practice.

The unique circumstance that caused Maryland to adopt a five year restraint on further sale of the acquired practice should not cause California to do so.

7. Should the seller be required to give clients a description of the purchasing lawyer or law firm in its expertise?

The subcommittee recommends that such a requirement not be added to the rule.

Rule 2-300 does not prohibit a seller from touting the qualifications of the buyer. The seller will probably want to say something laudatory about the buyer as a way of inducing the clients to retain the buyer. However, a Rule of Professional Conduct ought not to require such advertising of the buyer by the seller. A client can always ask for such information, if he or she wants it. We see no reason to require that the client be "force fed" with such information.

(9930.16:157:vy)