

Lee, Mimi

**From:** Jerome Sapiro Jr. [jsapiro@sapirolaw.com]  
**Sent:** Thursday, March 18, 2010 2:31 PM  
**To:** kevin\_e\_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu  
**Cc:** Difuntorum, Randall; Lee, Mimi; hbsondheim@verizon.net; mtuft@cwclaw.com; pwwapnek@townsend.com; McCurdy, Lauren; 'Jerome Sapiro Jr.'; kmelchior@nossaman.com; martinez@lbbslaw.com; 'Robert L. Kehr'  
**Subject:** 1.17 [2-300]  
**Attachments:** 579 Rule 1 17 Public Comment Chart - By Commenter.doc; 583 RRC - 2-300 1-17 - Dashboard - FOR ADOPTION - DFT5 (03-10-10).doc; 586 RRC - 2-300 1-17 - CLEAN Landscape - AltA -DFT5 1 (12-16-09) LM & JS additions.doc

Dear Kevin:

Attached are the public comment spreadsheet, redlined rule, and proposed dashboard. I understand from our last conversation that you will annotate them or clean them up. You have my proxy and my thanks.

In the spreadsheet, I tried to integrate Bob's comments with mine. I hope I did him justice. I did not receive responses from members of the drafting committee regarding my drafts sent last weekend.

I apologize it is reaching you so late, but it turned out the spreadsheet I was given did not include any of the COPRAC comments. I added them and found them very valuable and cogent. I have recommended that we accept most of them. Those I recommend I have added to the spreadsheet and to the draft rule. Because the OCTC and COPRAC comments came in late, what I did with them has not been seen or commented on by the rest of the drafting committee, so I do not know whether they will agree with me.

Call me at home if you want to discuss any of this.

With best regards,

Jerry

CONFIDENTIAL E-MAIL from THE SAPIRO LAW FIRM

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

TOTAL =5 Agree = 2  
Disagree = 2  
Modify = 3  
NI = 0

erNo.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Sandra K. McIntyre	AD			No comment.	Because there is no comment, no response is needed. The comment disagrees with the rule but does not state why.
2	Esther	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response is needed.
3	San Diego County Bar Association Legal Ethics Committee	A			Approve the rule in its entirety.	No response is needed.
4	Santa Clara County Bar Association	M			We support this rule with the exception of the 90-day rule. We believe that the 90-day term used in the Proposed Rule is too long a period for a purchaser to wait to start acting on behalf of his new clients. A shorter period not only accommodates the intent of the seller and purchaser, but also provides more protection to the client whose rights might be prejudiced while his or her matter is in a holding pattern. Although there is an exception allowing the purchaser to act on behalf of the client where a client's rights might be prejudiced, without all of the information at the purchasers' disposal (such as the client's confidential information and the previous attorney's work product), the purchaser might not be able to determine	This Rule authorizes a purchaser of all or an authorized portion of a law practice to begin acting on behalf of a client following a 90-day notice to the client, or earlier if needed to protect a client's interest. The Commission previously considered this comment, but the majority disagreed with it. Shortening the 90 day notice requirement could be reasonable, particularly in the case of the sale of the practice of a deceased or impaired lawyer. However, the majority of the Commission concluded that 90 days' notice to clients allows reasonable time for clients to decide whether to retain the buyer of the seller's practice. The rule permits the purchaser to act in an emergency to protect the client. If, absent an emergency, the purchaser wants to act sooner, or the client wants the purchaser to take over sooner, the client and the

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					whether the client's rights are in fact in jeopardy.	purchaser can speak directly, and, if the client decides to retain the purchaser sooner than 90 days, the client can execute written consent and a retainer agreement with the purchaser in less than 90 days. The S.C.B.A. comment assumes that the purchaser will not have access to a client's confidential information until after the 90-day period, so that the purchaser would be unable to act on behalf to the client. This supposition is not correct. Neither this nor any other Rule prevents a seller from disclosing confidential client information to a purchaser once the purchaser has checked for potential conflicts of interest. As a result, the Commission disagrees with the stated concern and did not make the requested change. In addition, the ninety day notice provision reduces the likelihood that a lawyer or law firm will be likelihood that a seller will develop a practice merely for the purpose of resale or that the purchaser will "cherry pick" the practice, which are concerns expressed in the minority dissent. In the 90 day notice period, the seller who is not deceased will retain responsibility for serving the clients competently and will not be able to avoid performing duties owed to the client, and the quantum of work required in the potentially more lucrative cases will likely be greater during the 90 days than in a shorter period.
5	Orange County Bar Association	D			The proposed rule would permit sale of a "geographic area" or "substantive area of practice," but it fails to define those terms,	This comment tracks many of the criticisms of the minority dissent to this rule. The majority of the Commission have rejected them.

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					<p>allowing for varying interpretations of those terms and a great likelihood for abuse.</p> <p>While we recognize that the intent of the proposed Rule is to avoid “cherry picking” cases in the sale of less than all of a practice, we are concerned that the vagueness creates more problems than it solves.</p> <p>There is a likely potential for abuse in the ability of an attorney to build a practice area just for the purpose of selling it, which is not addressed by the proposed Rule.</p> <p>The proposed Rule also allows the wholesale auctioning of cases through a broker, further leading to the degradation of the public perception of the profession.</p> <p>Further, the proposed Rule would presume consent on the part of the client once notified of the sale, by operation of the passage of time and client silence.</p> <p>Current Rule 2-300 permits only a single sale of all or substantially all of a practice. This better serves the legal profession and protects clients from being treated as commercial property.</p>	<p>The Commission endeavored to draft definitions of “geographic area” and “substantive area” of practice. However, we were not able to develop succinct, pragmatic definitions. Conversely, allowing lawyers or law firms to sell such areas of practice is an important aspect of making current Rule 2-300 more useful. That is part of the reasons why the ABA modified Model Rule 1.17.</p> <p>If a lawyer has a general practice, such as both personal injury litigation and criminal defense litigation, the executor of his will may not be able to find a single buyer who wants to practice in both areas. Then, the lawyer’s clients will have to fend for themselves and find new counsel. A lawyer who has a litigation practice and an estate planning/probate/trust practice may decide that he or she cannot handle the pressures of litigation and wants to withdraw from litigation. However, under current Rule 2-300, unless he or she can find another general practitioner willing to buy the entire practice, the lawyer cannot sell and, under the current California rule, cannot both sell the litigation practice and and continue to practice in nonlitigation matters. The lawyer either has to retire <i>in toto</i> or has to form a partnership or some similar guise for not selling under the current rule. If the lawyer is forced to retire, his or her clients who might have continued to retain the lawyer in the limited practice are not well served. If the lawyer forms a partnership, the clients are not given as extensive</p>

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						<p>protections, such as notice of their rights, as under the proposed rule. The aging lawyer, or the law firm that wants to get out of one aspect of its practice, can sell an aspect of it to a willing buyer and not be forced into unnecessary retirement or dissolution. Neither clients nor the bar are as well served by the current rule as they will be under the new rule. The proposed new rule affords greater protections for clients and more rights for lawyers and law firms.</p> <p>The professed fear of abuse by an attorney building a practice just to sell it is chimerical. Lawyers cannot develop marketable practices in the short term. The lawyer or law firm that develops a lucrative practice will find it easier to merge with a law firm than to sell under either the current rule or the proposed rule. If a lawyer has a single lucrative case and wants to transfer it to another lawyer or law firm, he or she is not likely to sell his or her practice. Instead, he or she is more likely to introduce the client to new counsel and take a referral fee, or to associate new counsel and enter into a novation of the fee agreement to provide for fee sharing. Both are easier to do than a sale under either the current California rule or the proposed new rule. Neither a referral fee nor association of counsel require as many formalities as complying with the current or the proposed rules on sale of a practice.</p> <p>Indeed, that chimerical fear is itself a denial of reality. If a lawyer works hard and develops a</p>

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						<p>practice sufficiently lucrative to be salable, the desire to sell all or part of it is neither illegal nor unethical. Surely, the commenter would not advocate that all lawyers are practicing merely to die in the harness.</p> <p>The fear of wholesaling a practice through a broker is also false. The proposed rule requires sales to lawyers or law firms, not to a business broker. It also does not allow sales of cases. If a practice, or part of it, is sold, then that does not mean that a case is sold. Instead, the buyer will have purchased a business opportunity. If he, she or it is not accepted by clients of the seller, so they will not enter into fee agreements with the buyer, the buyer purchases nothing.</p> <p>The presumption of client consent if the client does not respond to the notice is not unique to the proposed new rule. It is in current Rule 2-300. Surely, the commenter would not prefer that the nonresponsive client be abandoned when a lawyer dies. In this respect, the current rule and the proposed new rule provide for client protection. Indeed, they both provide more client protection than the Model Rule does.</p>
6	Office of the Chief Trial Counsel	M			Although the rule states that if substitution is required by the rules of a tribunal all steps necessary to substitute a lawyer shall be taken, this appears incomplete. OCTC	The Commission respectfully disagrees. The requirement of substitution and withdrawal are adequately addressed in the rule and the comment. See, e.g., paragraph (f). In addition, in the case of a

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					<p>believes that the rule should more clearly state that cessation of work by the current attorney requires compliance with the termination rules in all situations. Thus, there should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are some Comments regarding this, but OCTC believes that is should be stated in the Rule itself.)</p> <p>Comment [2] says “see Rule 1.16,” when it should state that the seller is permitted to withdraw only if in compliance with Rule 1.16.</p> <p>Comment [1A] defines “selling lawyer,” this definition should be in the Rule, not a Comment.</p> <p>Comment [4] is completely repetitive of the Rule itself and thus unnecessary.</p>	<p>deceased or incapacitated lawyer, requiring him or her to continue of record would not make sense, and a universal requirement of substitution might impair the buyer’s ability to act to protect the client in an emergency.</p> <p>The Commission respectfully disagrees. Rule 1.16 already states when a lawyer may withdraw. If the seller withdraws in violation of Rule 1.16, that fact should not also be chargeable as an offense under this Rule.</p> <p>The Commission respectfully disagrees. Comment [1A] does not define “selling lawyer.” It explains that the seller as used in the rule is a concept more than the lawyer whose practice is sold. Explaining the concept is a function of the comment and does not have to be stated in the black letter rule.</p> <p>The Commission respectfully disagrees. Comment [4] explains the scope of the rule and its limitations in terms not stated in the rule, itself.</p>

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					<p>Comments [5] – [6] and [13] also serve no purpose.</p> <p>Comment [12], which provides information regarding the withdrawal requirement, should be in the Rule, not a Comment.</p> <p>Comments [15A] (that lawyers must comply with Rules 1.5.1 and 1.5.4) and [15B] (requiring compliance with B&amp;P Code section 6180) also belong in the Rule, not a Comment.</p>	<p>Again, the Commission respectfully disagrees. These comments explain and expand upon concepts suggested but not explicit in the black letter rule. That is a proper purpose of a comment.</p> <p>The Commission respectfully disagrees. The Comment cautions lawyers and others about nuances of the rule and calls their attention to other rules that might apply. The other rules may not always apply. In addition, placing them in this rule would make this rule unnecessarily prolix and create the improper opportunity for charging a violation of this rule and of the other rules for a single act. The Commission has endeavored to avoid the risk of unnecessary double charging for an act that violates a primary rule by incorporating that rule into other rules.</p>
7	COPRAC	M		Paragraph (c) and Comment [6]	<p>Supports the concept of the rule and disagrees with the minority dissent.</p> <p>In accordance with proposed paragraph (c), the sale must include “all or substantially all” of the practice (or of the substantive field or geographic area). While seller and purchaser should endeavor to transfer the entirety of the law practice, as the proposed rule acknowledges there are instances where portions of the practice simply cannot be transferred. For example: (i) as noted in the</p>	<p>No response required.</p> <p>The Commission agrees and has added the suggested phrase and sentence to Comment [6] with conforming changes.</p>

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					<p>Explanation to paragraph (b), a purchaser may have conflicts of interest and might not be able to take on certain clients and/or matters; (ii) as acknowledged in paragraphs (d)(1)(A) and (d)(2)(A), the client has the right to retain other counsel; and (iii) as contemplated by Comment [3], when a seller moves to a position as in-house counsel to a business that was a client, the seller may in effect retain that client (with the result that matters for that client are not necessarily available to be transferred to the purchaser). These possible exclusions, when taken in the aggregate, may result in an inability to satisfy the requirement to include in the sale “substantially all” of the practice. We do not think that is an appropriate result, nor perhaps what the Commission intended here. Comment [6], which partially addresses this concern, misstates the language of paragraph (c) of the rule (i.e., by not referencing “substantially all”), and doesn’t go far enough to expressly acknowledge the foregoing exclusions. In order to address these concerns and clarify the intent of paragraph (c), We recommend modifying Comment [6]: (1) to conform the comment to the rule (by using the rule’s terminology of “all or substantially all” in place of “entire” or “all”); and (2) by adding a sentence.</p>	

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				Paragraphs (d)(1)(A), (d)(1)(B), (d)(2)(A) and (d)(2)(B):	The notice requirement contained in these provisions reference the imprecise term "the client." For clarity (since the law practice will often not entail only one specific client, and since no notice should be required for clients who are not part of the sale), COPRAC recommends that the term "the client" be replaced with "each of the seller's clients whose matters are included in the sale."	The Commission agrees and has made the suggested change, except in paragraph (d)(1)(B) for brevity.
				Paragraph (d)(2)(B):	The first and third references to "the purchaser" in this paragraph appear to be incorrect. Since it is the seller providing the notice prior to transfer, it is likely that the seller (and not the purchaser) will receive a response from the client. As a result, consent to the transfer should not be presumed if the purchaser does not receive a timely response, when in fact the seller may have received the response. COPRAC recommends modifying the language in the first instance to state that "consent shall be presumed if neither the seller nor the purchaser receives a response," and in the third instance to state "unless the seller or the purchaser is otherwise notified."	The Commission agrees with the recommendation and has made the suggested changes with stylistic changes.
				Paragraph (e) & Comment	This paragraph and related comment obligate the purchaser to assume the seller's obligations under existing client agreements	The observations about scope of work are well taken, but the Model Rule paragraph (d) does not

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				[10]	regarding scope of work. However, there may be instances where the transferred scope of work may need to be narrowed: e.g., where the purchaser may have a conflict of interest with respect to certain matters, or where the purchaser is not qualified or admitted to practice in certain jurisdictions or courts. To address this concern, COPRAC recommends using the language of the Model Rule in paragraph (e) and deleting the second sentence of the proposed Comment [10].	provide adequate client protection, and the client may engage the buyer to perform expanded, not contracted, services. The Commission has amended paragraph (e) and Comment [10] with these considerations in mind.
				Comment [1]:	COPRAC recommends deleting “the reasonable value of” in the second sentence of this comment. The language implies that a law practice may only be sold for its “reasonable value” – a concept not found in the rule itself. We believe that the seller and purchaser should not be so constrained in their negotiation over the price for the sale of the law practice.	Jerry agrees with this criticism and would make the change. However, he was outvoted. Jerry thinks that the selling price should be as agreed by buyer and seller, not as dictated by an expert witness in a disciplinary case or litigation. If the majority do not change their minds, one of them should write a rationale for the bar metering the consideration for a sale.
				Comment [2]	We believe that this comment blurs the distinction between paragraph (b) of the rule (which addresses what the seller makes available for sale) and paragraph (c) of the rule (which addresses what is actually sold), and, in so doing, misstates both rules. Because of the subheadings within the	The Commission respectfully disagrees. The first sentence provides necessary guidance on application of the rule and is part of the explanation contained in the balance of the comment.

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				Comment [2A]	<p>comment portion of the proposed rule, it appears that Comment [2] is intended to provide commentary on paragraph (b), and Comment [5] is intended to provide commentary on paragraph (c). We recommend that Comment [2] be corrected by deleting the first sentence (which, in addition to being incorrect, is unnecessary).</p> <p>Paragraph (a) of the rule requires that the seller cease to engage in the practice of law, or in the substantive field or geographic area for the practice being sold. The language of the paragraph does not preclude the possibility that the seller could return to the practice, or the substantive field or geographic area, at some time in the future following the sale. In fact, Comment [2A] acknowledges that “a return to private practice” after an unanticipated change in circumstance doesn’t violate the rule. However, the use of the word “return” in Comment [2A] is more limiting than the language of paragraph (a) because it fails to recognize that the seller may continue to practice law in a different substantive or geographic area (and therefore would not be returning to the practice of law). To fix this inconsistency, COPRAC recommends revising the first sentence of Comment [2A] to</p>	<p>The Commission agrees and has made the recommended change.</p>

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				Comment [3]	<p>read:                      "Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation."</p> <p>As noted above, paragraph (a) of the rule requires that the seller cease to engage in the practice of law, or in the substantive field or geographic area for the practice being sold. Comment [2] states that if a number of the seller's clients refuse to discharge the seller, there is no violation, and the seller can continue representing such clients until the seller can withdraw. There is, however, no express provision for a transition period following the sale of the law practice, where the seller attorney continues to represent such clients and works with such clients and the purchaser attorney to transition the law practice. The rule and comments do not seem to allow that to occur: the lawyer must quit the relevant practice, and can stay on only if clients refuse to allow withdrawal. Clients, the seller, and the purchaser might be better served by explicitly recognizing that an agreement to allow a reasonable transition period does not violate the rule. COPRAC therefore recommends adding the following</p>	<p>The Commission agrees and has added the recommended sentence. However, the subject of the new sentence does not fit with the subject of the existing sentence in Comment [3]. Therefore, it has been made new proposed Comment [3A], with a conforming change.</p>

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				Comment [4]:	<p>sentence to the end of Comment [3]:                      “In addition, an agreement for sale of a law practice that otherwise complies with this Rule does not violate this Rule if it contains a provision for a reasonable transitional period during which the seller may continue to practice and represent clients for the purpose of facilitating the transition of consenting clients to the purchaser.”</p> <p>COPRAC shares the Minority’s concern regarding the ambiguity of the term “geographic area,” especially in a state as disparate as California. The example set forth in the second paragraph of the Explanation of Changes to the introductory paragraph of the rule provides some guidance: “if a lawyer had a practice in both northern and southern California, he or she might choose to sell one aspect of the geographic area of practice in order not to have to commute to different parts of the state.” However, the example suggests an impractical and broad definition of the term “geographic area,” and might be read to imply that, for example, San Francisco and Sacramento (because they are both in northern California) are in the same geographic area (likewise with San Diego, Los Angeles and Santa Barbara in southern</p>	<p>The Commission agrees with these remarks and has made the recommended addition.</p>

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					<p>California). We agree with the Minority that it is probably not possible to provide an appropriate limiting definition of the term, but we are not of the view that this constitutes a fatal flaw in the proposal. Rather, we believe sufficient clarity can and should be provided by agreement between the seller and purchaser of the law practice. We recommend that the commentary provide that any sale of a geographic area of a law practice specifically define the geographic area in question. We therefore recommend that the following sentence be added to Comment [4]:</p> <p>“The agreement for the sale of a geographic area or areas of a law practice should state as precisely as possible the specific geographic area or areas being sold.”</p>	
				Comment [5]:	<p>Similar to our concern raised with respect to Comment [2A] above, the example in Comment [5] goes further than the requirement of paragraph (a) of the rule by stating that the “practitioner may not thereafter accept [any such] matters.” This language is unduly restrictive and misstates the language of paragraph (a). COPRAC recommends that the last clause of the third sentence of this comment be conformed</p>	<p>The Commission respectfully disagrees. The change proposed would change the intent of the rule. If, because of conflicts of interest or otherwise, the buyer cannot accept all of the seller’s estate planning matters, and the seller is not discharged from some of the matters, the seller must continue to serve the clients that do not retain the buyer. However, the intent of the majority of the commission is that the seller not accept new estate planning matters.</p>

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				Comment [15]:	<p>to the language of the rule, by changing “however, that practitioner may not thereafter accept any estate planning matters” to “however, that practitioner must cease practicing on estate planning matters.”</p> <p>We note that proposed rule 7.2(b) [prohibiting the payment of value to a person for recommending the lawyer’s services] includes a cross reference to this rule to clarify that the payment for a law practice in accordance with rule 1.17 does not constituted an impermissible referral fee in violation of 7.2(b) [see 7.2(b)(3)]. For clarity, COPRAC suggests that a similar cross reference be contained in this rule, and recommends the following be added either to Comment [15] or as a new comment:                      “The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer’s services in violation of Rule 7.2(b).”</p>	<p>Jerry would point out that he thinks that when the seller may re-enter the field should be a matter for agreement between buyer and seller, but that too would contravene the will of the majority of the Commission.</p> <p>The Commission agrees with this comment and has added it to the comment. In sales of businesses, buyers often agree to pay the sellers a percentage of income received from the sellers’ clients who retain the buyers, under formulae that they negotiate. However, this new sentence does not directly relate to the sentence in existing Comment [15]. Therefore, in the new draft it has been made a separate paragraph and is numbered [15.1].</p>



# Proposed Rule 1.17 [2-300] ‘Purchase and Sale of a Law Practice’

(Draft #5.1, 12/16/09)

**Summary:** Proposed Rule 1.17 regulates the sale of a law practice. It includes provisions recently added by the ABA to Model Rule 1.17 that permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. However, the Model Rule provisions concerning the required notice to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current rule 2-300 to provide better protection for the interests of the clients whose matters are being transferred. Additions to the rule and changes in the comments have been made for better client protection. See Introduction and Explanation of Changes.

<b>Comparison with ABA Counterpart</b>	
<b>Rule</b>	<b>Comment</b>
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law

Rules

RPC 2-300.

Statute

Bus. & Prof. Code section 16600

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

At least 16 states have adopted a version of Model Rule 1.17, some based on the 1990 version and others on the Ethics 2000 version, with substantive or no changes. The Commission decided to preserve the notice requirements of the current

- Other Primary Factor(s)

The memorandum from Judy Johnson to the Board of Governors and members of the Board Committee on Member Oversight dated June 18, 2008, regarding Appointment of a Career Transition Planning Taskforce, recommended that the Commission consider whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice, to offer greater options for a lawyer to make a smooth transition to retirement.

---

## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

---

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by Consensus

---

## Commission Minority Position, Known Stakeholders and Level of Controversy

---

Minority/Dissenting Position Included on Model Rule Comparison Chart  Yes  No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Adopting the Model Rule provision that permits lawyers to sell a geographic area of practice or a substantive field of practice will be viewed by some members of the profession as a lessening of client protection and further commercialization of the practice of law. See Introduction and Minority Dissent, attached.

Not Controversial

## Rule 1.17: Purchase and Sale of a Law Practice (Commission's Proposed Rule - Clean Version)

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

- (a) The seller ceases to engage in the private practice of law entirely, or in the substantive field or geographic area in which the seller conducted the portion of the practice being sold.
- (b) The seller makes the entire practice, or the entire substantive field or geographic area of the practice, available for sale to one or more lawyers or law firms.
- (c) The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.
- (d) If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 1.6 and Business and Professions Code section 6068(e), then:
  - (1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:
    - (A) shall cause a written notice to be given to ~~the client~~ each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being

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

- (B) shall obtain the written consent of the client, provided that the affected client's consent shall be presumed until the purchaser is otherwise notified by the client if the purchaser receives no response to the paragraph (d)(1)(A) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90-day period.
- (2) In all other circumstances, not less than 90 days prior to the transfer:
  - (A) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to ~~the client~~ each of the seller's clients whose matters are included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the

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

(B) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of ~~the client~~ each of the seller's clients whose matters are included in the sale. prior to the transfer, provided that the client's consent shall be presumed if ~~neither the seller nor the purchaser receives a response the purchaser receives no response~~ to the paragraph (d)(2)(A) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, unless either the seller or the purchaser is otherwise notified by the client.

(e) Fees charged to clients shall not be increased solely by reason of the purchase, and, unless the scope of the work is narrowed or expanded with the clients' consent, the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.

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

(g) A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.

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

#### COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

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

#### Termination of Practice by the Seller

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

discharge the selling lawyer, therefore, does not result in a violation. If a client does not agree to retain the purchaser, the selling lawyer is not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. See Rule 1.16.

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

precisely as possible the specific geographic area or areas being sold.

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

#### **Sale of Entire Practice or Entire Area of Practice**

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

discussed infra. 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 one or more clients refuse to retain the purchasers. Whether the purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice, is to be measured by taking into account only that portion of the practice that, in accordance with these Rules, should be transferred to the purchasers. For example, a sale of only a portion of a practice may satisfy this Rule if it includes all or substantially all of the practice excluding client matters subject to a conflict of interest, matters where the clients choose to retain other counsel, and, if the seller becomes employed as in-house counsel to a business that was a client, matters for such business.

#### Client Confidences, Consent and Notice

- [7] Disclosures in confidence of client identities and matters during negotiations between seller and prospective purchaser for the purpose of ascertaining actual or potential conflicts of interest no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific confidential information relating to the representation or to the file, however, requires client consent. This Rule provides that, before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the purchasing lawyer or law firm, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed. However, confidential information may be disclosed to the purchaser if necessary to protect a client from harm, damage or loss of rights, unless the client has made known that the client does not want to retain the purchaser or unless

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

- [8] [RESERVED]
- [9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the law practice, a geographic area of the practice, or a substantive field of practice.

#### Fee Arrangements Between Client and Purchaser

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

#### Other Applicable Ethical Standards

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

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

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, the matter may be included in the sale, but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter. (See Rule 1.16).

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

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

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

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

[14] [RESERVED]

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice, a geographic area of practice, or a substantive field of practice.

[15.1] The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer's services in violation of Rule 7.2(b).

[15A] Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.

[15B] If a lawyer whose practice is sold is deceased, his or her estate must also comply with Business and Professions Code section 6180, et seq., including but not limited to the notice requirements therein.





**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

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Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

**Re: Comments to Proposed Amendments to the Rules of Professional Conduct of  
The State Bar of California (Batch 6)**

**Dear Ms. Hollins:**

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

**Patrick L. Hosey, President**  
San Diego County Bar Association

**Enclosures**

**cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee**  
**Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee**

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.

Yes [ ] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [ ] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [ ] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [ ] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

**Format for Recommendations:**

[ ] We approve the new rule in its entirety.

[ ] We approve the new rule with modifications.\*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.\*

[ ] We abstain from voting on the new rule but submit comments for your consideration.\*

**Summaries Follow:**

1.11 (b) states in part:

“When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: [the prohibited lawyer is screened...].”

The minority argue that the use of the word “knowingly” will require actual knowledge before a lawyer who has a conflict of interest under this Rule may be disciplined. They believe that this will “immunize from discipline a lawyer who does not bother to check for conflicts of interest” and thereby evades actual knowledge of the conflict. They assert “the lawyer who knows or reasonably should know that he or she is prohibited from representation under this Rule ought to be subject to discipline, and not merely the lawyer that OCTC can prove had actual knowledge.” (Emphasis added.)

I agree with the minority on this point and believe that paragraphs (b) and (c) of Rule 1.11 should be modified to prohibit lawyers in a firm who “know or reasonably should know” that a lawyer in his or her firm is prohibited from representation, from undertaking or continuing to representation in such a matter unless the screening is conducted and notice given as set forth in 1.11 (b)(1) and (2).

CONCLUSION: We approve the new rule with modifications.\*

---

LEC Rule Volunteer Name(s): Radmila Fulton

**Old Rule No./Title: RPC 2-300 (Sale or Purchase of a Law Practice of a Member, Living or Deceased)**

**Proposed New Rule No./ Title: 1.17 “Purchase and Sale of a Law Practice”**

(5) The Proposed Rule includes provisions recently added by the ABA to Model Rule 1.17 that permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. This Rule moots many of the criticisms of earlier proposals and also addresses one of the recommendations of the Executive Director to the Board of Governors concerning Appointment of a Career Transition Planning Taskforce. In her memo, the Executive Director suggested that the Commission consider whether the rule permitting the sale of entire law practice should be changed to permit the sale of a part of a law practice. She pointed out that greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement. The Proposed Rule addresses that subject.

However, the Model Rule provisions concerning the required notice to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current rule 2-300 to provide better protection for the interests of the clients whose matters are being transferred. Additions to the rule and changes in the comments have been made for better client protection as follows:

1. The sale of the practice, or a substantive field of practice, or of a geographic area of practice must include the entire practice or entire field or area of practice – lawyers

will not be permitted to “cherry pick” lucrative matters and leave clients with less lucrative matters to fend for themselves;

2. The selling lawyer must cease practice if the entire practice is sold, or cease practice in the particular substantive field or geographic area of practice if only a substantive field or geographic area of practice is sold;
3. Although brokers to facilitate the sale are allowed, the lawyer may only sell the practice to a lawyer, not to a broker or other intermediary – this is to ensure continuity of representation and protection of the seller’s clients;
4. Fees may not be increased solely by reason of the sale - clients are protected by requiring the purchaser to abide by pre-existing fee agreements; and
5. Appropriate protections for confidentiality of the clients have been made part of the rule.

The Commission deemed Proposed Rule 1.17 “Moderately Controversial” because a minority of the Commission believed that the proposed Rule that permits lawyers to sell a geographic area of the practice or a substantive field of practice will be viewed by some members of the profession as a lessening of client protection and further commercialization of the practice of law.

**CONCLUSION:** We approve the new rule in its entirety.

---

~~LEC Rule Volunteer Name(s): Frank L. Tobin~~

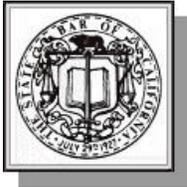
~~**Old Rule No./Title:**            **Not Applicable**~~

~~**Proposed New Rule No./ Title:**    **Rule 1.18 Duties to Prospective Client**~~

~~(5) Rule 1.18 clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek representation. There is no California rule counterpart, but the duty to protect confidential information of a proposed client, even if no attorney client relationship results, is found in Evidence Code section 951 and is discussed at length in Cal. State Bar Formal Opn. 2003-161.~~

~~**Disagreement over the inclusion of a provision permitting the non consensual screening of the consulted lawyer when confidential information is learned during the pre retention period.**~~

~~The Commission voted 5-5 to strike from the proposed Rule 1.18 the concept of non consensual screening and so the concept which is part of Model Rule 1.18, remains in the rule as paragraph (d)(2). Given the split of opinion on whether this paragraph should remain in the proposed rule, the LEC should take a position on whether to strike paragraph (d)(2) or not. A summary of this issue, which is fully set forth in the materials for those interested in the detail, is as follows:~~



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

\* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

# OFFICE USE ONLY.

\* Date

02/19/2010 

Period

PC

File :

F-2010-381c Sandra McIntyre [1.17]

Commented On:

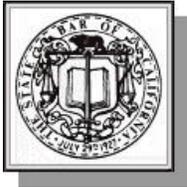
Specify:

Submitted via:

Online

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\* Required



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

We support this rule with the exception of the 90-day rule. The SCCBA believes that the 90-day term used in the Proposed Rule is too long a period for a purchaser to wait to start acting on behalf of his new clients. Once the transaction has been finalized the parties to the transaction want to move forward. A shorter period not only accommodates the intent of the seller and purchaser, but also provides more protection to the client whose rights might be prejudiced while his or her matter is in a holding pattern. Although there is an exception allowing the purchaser to act on behalf of the client where a client's rights might be prejudiced, without all of the information at the purchasers' disposal (such as the client's confidential information and the previous attorney's work product), the purchaser might not be able to determine whether the client's rights are in fact in jeopardy.

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\* Date

03/01/2010 

Period

PC

File :

F-2010-382f SCCBA [1.17]

Commented On:

Specify:

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BAR ASSOCIATION**

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OC WOMEN LAWYERS ASSOC.

March 9, 2010

Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

- Rule 1.0.1 Terminology [1-100]
- Rule 1.4.1 Insurance Disclosure [3-410]
- Rule 1.11 Special Conflicts for Government Employees [N/A]
- Rule 1.17 Sale of a Law Practice [2-300]
- Rule 1.18 Duties to Prospective Client [N/A]
- Rule 3.9 Non-adjudicative Proceedings [N/A]
- Rule 4.1 Truthfulness in Statements to Others [N/A]
- Rule 4.4 Respect for Rights of 3rd Persons [N/A]
- Rule 6.1 Voluntary Pro Bono Service [N/A]
- Rule 6.2 Accepting Appointments [N/A]
- Rule 6.5 Limited Legal Services Programs [1-650]
- Rule 8.2 Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.17 – Purchase and Sale of a Law Practice**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small law firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA opposes the Commission's proposed Rule 1.17, which is based in part on the Model Rule, and supports the retention of current Rule 2-300.

The proposed Rule would permit the sale of a "geographic area" or "substantive area of practice," but it fails to define those terms, allowing for varying interpretations of those terms and a great likelihood for abuse. As noted by the Commission, clients are not commodities that can be purchased or sold at will, and the parsing of a practice into "areas," as left to the discretion of a seller in this Rule, disservices the public.

While we recognize that the intent of the proposed Rule is to avoid "cherry picking" of cases in the sale of less than all of a practice, we are concerned that the vagueness creates more problems than it solves.

There is also a likely potential for abuse in the ability of an attorney to build a practice area just for the purpose of selling it, which is not addressed by the proposed Rule. If the client hires attorney A, he or she expects to receive services from that attorney, and the attorney should not be able to sell off some subset of his or her cases. The attorney should have to substitute out of those cases he or she no longer is able or wishes to handle, following the applicable substitution rules.

The proposed Rule also allows the wholesale auctioning of cases through a broker, further leading to the degradation of the public perception of the profession.

Further, the proposed Rule would presume consent on the part of the client once notified of the sale, by operation of the passage of time and client silence.

Current Rule 2-300 permits only a single sale of all or substantially all of a practice. This better serves the legal profession and protects clients from being treated as commercial property.



THE STATE BAR OF  
CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

OFFICE OF THE CHIEF TRIAL COUNSEL  
ENFORCEMENT

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March 12, 2010

Randall Difuntorum, Director  
Office of Professional Competence & Planning  
State Bar of California  
180 Howard Street  
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed  
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

~~**Rule 1.0.1 Terminology/Definitions.**~~

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

### **Rule 1.17 Purchase and Sale of Law Practice.**

1. Although the rule states that if substitution is required by the rules of a tribunal all steps necessary to substitute a lawyer shall be taken, this appears incomplete. OCTC's believes that the rule should more clearly state that cessation of work by the current attorney requires compliance with the termination rules in all situations. Thus, there should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are some comments regarding this, but OCTC believes that it should be stated in the rule itself.)
2. Comment 2 says "see Rule 1.16," when it should state that the seller is permitted to withdraw only if in compliance with rule 1.16. Comment 1A defines "selling lawyer;" this definition should be in the rule, not a comment. Comment 4 is completely repetitive of the rule itself and thus unnecessary. Comments 5- 6 and 13 also serve no purpose. Comment 12, which provides information regarding the withdrawal requirement, should be in the rule, not a comment. Comments 15A (that lawyers must comply with rules 1.5.1 and 1.5.4) and 15B (requiring compliance with Bus & Prof. Code section 6180) also belong in the rule, not a comment.

### **Rule 1.18 Duties to Prospective Clients.**

- ~~1. The drafters state that this is a new rule to California, although OCTC believes it is already part of existing ethical standards in our state.~~
- ~~2. OCTC is concerned that paragraphs (c) and (d) are essentially repetitions of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule which clearly deals with all related issues.~~
- ~~3. Like the rule itself, comments 6 - 8 are discussions of conflict situations and could create confusion with the conflict rules. It would be better to simply refer the lawyers to the conflict rules, as is done in comment 9 to the competence rules and the client's property rules.~~

### **Rule 3.9 Non-adjudicative Proceedings.**

- ~~1. OCTC is concerned with the Commission's departure from the language in ABA rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should make no difference whether it is in litigation or a non-adjudicative proceeding. There is no reason to depart from the ABA's rule.~~
- ~~2. Comments 1-2 are too general. OCTC also requests a comment that other rules may apply depending on the facts and circumstances.~~



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

Harry B. Sondheim, Chair  
Commission for the Revision of the  
Rules of Professional Conduct  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Proposed Rule 1.17

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.17 and offers the following comments.

COPRAC generally supports the adoption of proposed Rule 1.17. While we are sympathetic to the concern expressed in the Minority position with respect to the vagueness of the term "geographic area," we believe that concern can be mitigated to some extent by adding specificity to the terms of the sale of the law practice (as discussed below in our suggestions regarding Comment [4]). We therefore support adoption of the rule, and suggest the following modifications:

Paragraph (c) and Comment [6]: In accordance with proposed paragraph (c), the sale must include "all or substantially all" of the practice (or of the substantive field or geographic area). While seller and purchaser should endeavor to transfer the entirety of the law practice, as the proposed rule acknowledges there are instances where portions of the practice simply cannot be transferred. For example: (i) as noted in the Explanation to paragraph (b), a purchaser may have conflicts of interest and might not be able to take on certain clients and/or matters; (ii) as acknowledged in paragraphs (d)(1)(A) and (d)(2)(A), the client has the right to retain other counsel; and (iii) as contemplated by Comment [3], when a seller moves to a position as in-house counsel to a business that was a client, the seller may in effect retain that client (with the result that matters for that client are not necessarily available to be transferred to the purchaser). These possible exclusions, when taken in the aggregate, may result in an inability to satisfy the requirement to include in the sale "substantially all" of the practice. We do not think that is an

appropriate result, nor perhaps what the Commission intended here. Comment [6], which partially addresses this concern, misstates the language of paragraph (c) of the rule (i.e., by not referencing “substantially all”), and doesn’t go far enough to expressly acknowledge the foregoing exclusions. In order to address these concerns and clarify the intent of paragraph (c), we recommend modifying Comment [6]: (1) to conform the comment to the rule (by using the rule’s terminology of “all or substantially all” in place of “entire” or “all”); and (2) by adding the following sentence to the end of the comment:

“The determination as to whether the purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice, is to be measured by taking into account only that portion of the practice that, in accordance with the rules, should be transferred to the purchasers. For example, a sale of only a portion of a practice may satisfy the rule if it includes all or substantially all of the practice excluding client matters subject to a conflict of interest, matters where the clients choose to retain other counsel, and, if the seller becomes employed as in-house counsel to a business that was a client, matters for such business.”

Paragraphs (d)(1)(A), (d)(1)(B), (d)(2)(A) and (d)(2)(B): The notice requirement contained in these provisions reference the imprecise term “the client.” For clarity (since the law practice will often not entail only one specific client, and since no notice should be required for clients who are not part of the sale), COPRAC recommends that the term “the client” be replaced with “each of the seller’s clients whose matters are included in the sale.”

Paragraph (d)(2)(B): The first and third references to “the purchaser” in this paragraph appear to be incorrect. Since it is the seller providing the notice prior to transfer, it is likely that the seller (and not the purchaser) will receive a response from the client. As a result, consent to the transfer should not be presumed if the purchaser does not receive a timely response, when in fact the seller may have received the response. COPRAC recommends modifying the language in the first instance to state that “consent shall be presumed if neither the seller nor the purchaser receives a response,” and in the third instance to state “unless the seller or the purchaser is otherwise notified.”

Paragraph (e) & Comment [10]: This paragraph and related comment obligate the purchaser to assume the seller’s obligations under existing client agreements regarding scope of work. However, there may be instances where the transferred scope of work may need to be narrowed: e.g., where the purchaser may have a conflict of interest with respect to certain matters, or where the purchaser is not qualified or admitted to practice in certain jurisdictions or courts. To address this concern, COPRAC recommends using the language of the Model Rule in paragraph (e) and deleting the second sentence of the proposed Comment [10].

Comment [1]: COPRAC recommends deleting “the reasonable value of” in the second sentence of this comment. The language implies that a law practice may only be sold for its “reasonable value” – a concept not found in the rule itself. We believe that the seller and purchaser should not be so constrained in their negotiation over the price for the sale of the law practice.

Comment [2]: We believe that this comment blurs the distinction between paragraph (b) of the rule (which addresses what the seller makes available for sale) and paragraph (c) of the rule (which addresses what is actually sold), and, in so doing, misstates both rules. Because of the subheadings within the comment portion of the proposed rule, it appears that Comment [2] is intended to provide commentary on paragraph (b), and Comment [5] is intended to provide commentary on paragraph (c). We recommend that Comment [2] be corrected by deleting the first sentence (which, in addition to being incorrect, is unnecessary).

Comment [2A]: Paragraph (a) of the rule requires that the seller cease to engage in the practice of law, or in the substantive field or geographic area for the practice being sold. The language of the paragraph does not preclude the possibility that the seller could return to the practice, or the substantive field or geographic area, at some time in the future following the sale. In fact, Comment [2A] acknowledges that “a return to private practice” after an unanticipated change in circumstance doesn’t violate the rule. However, the use of the word “return” in Comment [2A] is more limiting than the language of paragraph (a) because it fails to recognize that the seller may continue to practice law in a different substantive or geographic area (and therefore would not be returning to the practice of law). To fix this inconsistency, COPRAC recommends revising the first sentence of Comment [2A] to read:

“Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation.”

Comment [3]: As noted above, paragraph (a) of the rule requires that the seller cease to engage in the practice of law, or in the substantive field or geographic area for the practice being sold. Comment [2] states that if a number of the seller’s clients refuse to discharge the seller, there is no violation, and the seller can continue representing such clients until the seller can withdraw. There is, however, no express provision for a transition period following the sale of the law practice, where the seller attorney continues to represent such clients and works with such clients and the purchaser attorney to transition the law practice. The rule and comments do not seem to allow that to occur: the lawyer must quit the relevant practice, and can stay on only if clients refuse to allow withdrawal. Clients, the seller, and the purchaser might be better served by explicitly recognizing that an agreement to allow a reasonable transition period does not violate the rule. COPRAC therefore recommends adding the following sentence to the end of Comment [3]:

“In addition, an agreement for sale of a law practice that otherwise complies with this Rule does not violate this Rule if it contains a provision for a reasonable transitional period during which the seller may continue to practice and represent clients for the purpose of facilitating the transition of consenting clients to the purchaser.”

Comment [4]: COPRAC shares the Minority’s concern regarding the ambiguity of the term “geographic area,” especially in a state as disparate as California. The example set forth in the second paragraph of the Explanation of Changes to the introductory paragraph of the rule provides some guidance: “if a lawyer had a practice in both northern and southern California, he or she might choose to sell one aspect of the geographic area of practice in order not to have to

commute to different parts of the state.” However, the example suggests an impractical and broad definition of the term “geographic area,” and might be read to imply that, for example, San Francisco and Sacramento (because they are both in northern California) are in the same geographic area (likewise with San Diego, Los Angeles and Santa Barbara in southern California). We agree with the Minority that it is probably not possible to provide an appropriate limiting definition of the term, but we are not of the view that this constitutes a fatal flaw in the proposal. Rather, we believe sufficient clarity can and should be provided by agreement between the seller and purchaser of the law practice. We recommend that the commentary provide that any sale of a geographic area of a law practice specifically define the geographic area in question. We therefore recommend that the following sentence be added to Comment [4]:

“The agreement for the sale of a geographic area or areas of a law practice should state as precisely as possible the specific geographic area or areas being sold.”

Comment [5]: Similar to our concern raised with respect to Comment [2A] above, the example in Comment [5] goes further than the requirement of paragraph (a) of the rule by stating that the “practitioner may not thereafter accept [any such] matters.” This language is unduly restrictive and misstates the language of paragraph (a). COPRAC recommends that the last clause of the third sentence of this comment be conformed to the language of the rule, by changing “however, that practitioner may not thereafter accept any estate planning matters” to “however, that practitioner must cease practicing on estate planning matters.”

Comment [15]: We note that proposed rule 7.2(b) [prohibiting the payment of value to a person for recommending the lawyer’s services] includes a cross reference to this rule to clarify that the payment for a law practice in accordance with rule 1.17 does not constitute an impermissible referral fee in violation of 7.2(b) [see 7.2(b)(3)]. For clarity, COPRAC suggests that a similar cross reference be contained in this rule, and recommends the following be added either to Comment [15] or as a new comment:

“The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer’s services in violation of Rule 7.2(b).”

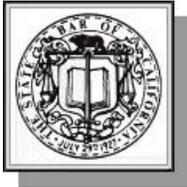
Thank you for your consideration of our comments.

Very truly yours,



Carole J. Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

\* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

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01/26/2010 

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F-2010-378 Esther [multiple].pdf

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# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.17\* Purchase and Sale of a Law Practice

December 2009

(Draft rule to be considered for public comment)

### *INTRODUCTION:*

Proposed Rule 1.17 regulates the sale of a law practice. California was the first state in the nation to adopt a rule permitting the purchase and sale of a law practice. The American Bar Association copied some of California's rule by amendment to its Model Rules prior to 2002. The 2002 amendments to Model Rule 1.17 permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. This proposed Rule adopts those changes. However, the Model Rule provisions concerning the notice required to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current Rule 2-300 to provide better protection for the interests of the clients. Further protections have been added to promote protection of the clients of the selling lawyer. For example, (1) the sale of the practice, or of a substantive field of practice, or of a geographic area of practice must include the entire practice or entire field or area of practice; lawyers will not be permitted to "cherry pick" lucrative matters and leave clients with less lucrative matters to fend for themselves; (2) the selling lawyer must cease practice if the entire practice is sold, or cease practice in the particular substantive field or geographic area of practice if only a substantive field or geographic area of practice is sold; (3) although the use of brokers to facilitate a sale is permitted, a lawyer may only sell the practice to a lawyer, not to a broker or other intermediary, ensuring continuity of representation and protection of the seller's clients; (4) fees may not be increased solely by reason of the sale, and clients are protected by requiring the purchaser to abide by pre-existing fee agreements; and (5) appropriate protections for confidentiality of the clients have been made part of the rule.

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\* Proposed Rule 1.17, Draft 5.1 (12/16/09).

Originally, the Commission circulated two proposed rules for public comment, namely Rule 1.17.1 and Rule 1.17.2. They, respectively, would have dealt with sale of an entire practice and sale of a geographic area of practice or of a substantive area of practice. Those proposals received substantial criticism. In addition, there was substantial dissent within the Commission about those proposals. The current proposal is a single rule, dealing with the purchase and sale of an entire law practice, of a geographic area of a law practice, or of a substantive field of practice. This Rule moots many of the criticisms of the earlier proposals. In addition, it addresses one of the recommendations of the Executive Director of the Bar, Judy Johnson, to the Board of Governors concerning Appointment of a Career Transition Planning Taskforce. In her memorandum, Ms. Johnson suggested that the Commission consider whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice. She pointed out that greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement. The proposed Rule addresses that subject.

*Minority.* A minority of the Commission strongly disagrees with proposed Rule 1.17, taking the position that adoption of the proposed Rule will unnecessarily add to the commercialization of the legal profession. The proposed Rule is unlike current California rule 2-300, which is narrowly drafted to permit a solo practitioner upon retirement to recoup through a one-time sale of his or her practice the good will developed in the practice over the practitioner's professional lifetime. By permitting the sale of a practice under strictly controlled conditions, the current rule both (i) avoids the former use of sham associations of lawyers to facilitate transfer of a practice, and (ii) provides clients with appropriate notice and protections against potential violations of confidentiality, fee increases, and abandonment of their matters. In addition, the current rule levels the playing field for solo practitioners and lawyers practicing in firms, the latter have been able before the current rule to realize upon retirement the value of the good will developed by the law firm of which they were members. The proposed Rule, on the other hand, while purporting to carry forward the client protections of current rule 2-300, permits not just the sale of a practice by a lawyer upon retirement, but also the sale of a practice by a law firm, or the sale of a "substantive field of practice" or a "geographic area of practice" by either a lawyer or a law firm. As discussed more fully in the Minority's Dissent, below, the minority sees great potential for abuse by lawyers and law firms seeking to capitalize on market perceptions of the value of their lawyer-client relationships. The vagueness of the terms "geographic area" and "substantive field" practically invite clever lawyers to use the rule in ways that will benefit them and risk injury to their clients. Unlike the current rule, which was created to address a genuine concern, no compelling reason for this change has been advanced by its proponents, other than that there might be situations where there could be a genuine special need to carve out some part of an established practice and to sell it. The minority urges that the proposed Rule not be adopted. See Minority Dissent, below.

*Variations in Other Jurisdictions.* Twenty-nine states have adopted a rule identical to, or substantially similar to, the Ethics 2000 version of Model Rule 1.17 (2002), which permits the sale of an area of a law practice. Seventeen states (including California) currently have rules that only permit the sale of an entire law practice. Five states have no counterpart to either the 1990 (entire practice) or the 2002 (area of practice) version of the Model Rule, (Alabama, Kansas, Louisiana, Mississippi and Texas). Of the 17 states that restrict sales to the entire practice, three (Michigan, Tennessee and West Virginia) have recommended the adoption of the 2002 version Model Rule, and two others (Georgia and Hawaii) have not yet concluded their review of the Ethics 2000 rules. A number of states (e.g., Florida, Illinois, New York, Ohio and Pennsylvania) diverge substantially from the Model Rule and include additional provisions intended to protect the clients of the selling lawyer.



<p align="center"><u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice</p>	<p align="center"><u>Commission’s Proposed Rule*</u> Rule 1.17 <u>Purchase and Sale of a</u> Law Practice</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:</p>	<p>A lawyer or a law firm may sell or purchase a law practice, <u>a substantive field of practice, or a geographic</u> area of <del>law</del> practice, including good will, <u>only</u> if the <del>following</del> conditions <u>set forth in paragraphs (a) through (g)</u> are satisfied:</p>	<p>The introductory paragraph of proposed Rule 1.17 is based on the introductory paragraph of Model Rule 1.17. However, the proposed paragraph makes it explicit that a lawyer or law firm may sell or purchase a substantive aspect of a practice or a geographic area of practice, and not just an entire practice, so that permission to do so is not merely inferred. In addition, the proposed paragraph adds the word “only,” to make explicit that a sale other than in accordance with the provisions of the Rule is not permissible.</p> <p>The Commission voted to adopt the approach of the Model Rule to permit sale of a geographic area of practice or of a substantive practice area. When lawyers or law firms need to adapt their practices in anticipation of retirement, for economic reasons, for client needs, or for other reasons, allowing them to be flexible regarding what aspects of the law practice are sold gives them greater options. For example, if a lawyer finds himself or herself no longer able to practice litigation effectively, he or she could sell the litigation aspect of his or her practice and continue to practice law in non-litigation areas. Similarly, if a lawyer has a practice in both northern and southern California, he or she might choose to sell one aspect of the geographic area of practice in order not to have to commute to different parts of the state.</p> <p>As stated in the introduction and below, a minority of the Commission disagrees.</p>

\* Proposed Rule 1.17, Draft 5.1 (12/16/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 1.17 Sale Of Law Practice</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.17 <u>Purchase and Sale of a</u> Law Practice</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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;</p>	<p>(a) The seller ceases to engage in the private practice of law <u>entirely</u>, or in the <del>area of practice that has been sold, [in the</del> <u>substantive field or geographic area]</u> <del>[in the jurisdiction] (a jurisdiction may elect either version)</del> in which the <del>practice has been</del> <u>seller</u> conducted; <u>the portion of the practice being sold.</u></p>	<p>Paragraph (a) is based on Model Rule 1.17(a). The Commission recommends adopting both of the Model Rule's alternatives – a sale of a substantive aspect of the practice and of a geographic area of a practice. Wording changes have been made to clarify the options available to a lawyer or law firm under the proposed Rule.</p>
<p>(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;</p>	<p>(b) The <u>seller makes the</u> entire practice, or the entire <u>substantive field or geographic</u> area of <u>the</u> practice, <del>is sold</del> <u>available for sale</u> to one or more lawyers or law firms;.</p>	<p>Paragraph (b) is based on Model Rule 1.17(b). However, the Commission recognizes that a sale of an entire practice or entire area of practice may not be possible. For example, a purchaser may have conflicts of interest that preclude the purchaser from representing some of the seller's clients. Thus, as with current Rule 2-300, the Commission recommends that the Rule only require the seller to make the entire practice, or entire substantive field or geographic area of the practice, <i>available for sale</i>, and recommends that the <i>actual transaction</i> include all or substantially all of the practice. As reflected in proposed Comment [2], if not all of the seller's clients are willing to retain the purchaser, that does not destroy the validity of the transaction. See also Explanation of Changes for paragraph (c).</p> <p>Paragraph (b) has also been reworded to clarify that the transaction may encompass the entire practice, the entire substantive field of practice, or the entire geographic area of the practice, consistent with the introductory paragraph and with paragraph (a).</p>

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	<p>(c) <u>The purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice.</u></p>	<p>Proposed paragraph (c) has no counterpart in the Model Rule. It has been added to complement proposed paragraph (b) and emphasize that not only must the seller make available the entire practice, or field or area of practice, but the actual transfer must include all or substantially all of the practice. This requirement is necessary to prevent a lawyer from making "available for sale" his or her practice, but selling only the most lucrative client files.</p>
<p>(c) The seller gives written notice to each of the seller's clients regarding:</p>	<p><del>(e) The seller gives written notice to each of the seller's clients regarding:</del></p> <p>(d) <u>If the purchase or sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Rule 1.6 and Business and Professions Code section 6068(e), then:</u></p>	<p>Paragraph (d) contains the same concepts as Model Rule 1.17(c), but goes much further in providing protection for the seller's clients. Model Rule 1.17(c) requires notice from the seller of merely the proposed sale, the client's right to other counsel or to take possession of the file, and the presumption that client consent to the transfer will be presumed if the client does not object within ninety days. Proposed paragraph (d), on the other hand, carries forward current California Rule 2-300, which is far more protective of client rights and contains a more robust explanation of the contents of the notice that must be given to clients. For example, current rule 2-300 recognizes that, if the seller is deceased or incapacitated, he or she may not be able to give the required notice. Accordingly, proposed paragraph (d) and its subparagraphs continue the substance of the notice requirements under current Rule 2-300, spelling out in more detail what the notice must contain and distinguishing between the circumstance in which the seller is deceased or incapacitated (in which case the purchaser gives the required notice) and all other sales (in which the case the seller gives the required notice). The Commission concluded that the California approach gives more protection for the clients of the seller.</p>

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<p>(1) the proposed sale;</p>	<p><del>(1) the proposed sale;</del> (1) <u>If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, prior to the transfer, the purchaser:</u></p>	<p>See Explanation of Changes for paragraph (d).</p>
	<p><u>(A) 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 and might have the right to act in his or her own behalf; that the client may take possession of any client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client; and</u></p>	<p>See Explanation of Changes for paragraph (d).</p>
	<p><u>(B) shall obtain the written consent of the client, provided that the client's consent shall be presumed until the purchaser is otherwise notified by the client if the</u></p>	<p>See Explanation of Changes for paragraph (d).</p>

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	<p><u>purchaser receives no response to the paragraph (d)(1)(A) notification within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90-day period.</u></p>	
<p>(2) the client's right to retain other counsel or to take possession of the file; and</p>	<p>(2) <del>the client's right to retain other counsel or take possession of the file; and</del> <u>In all other circumstances, not less than 90 days prior to the transfer;</u></p>	<p>See Explanation of Changes for paragraph (d).</p>
<p>(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.</p>	<p><del>(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.</del></p>	<p>See Explanation of Changes for paragraph (d).</p>
	<p><u>(A) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to 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 and might have the right to act in his or her own behalf; that the client may take possession of any</u></p>	<p>See Explanation of Changes for paragraph (d).</p>

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	<p><u>client papers and property in the form or format held by the lawyer as provided by Rule 1.16(e); and that, if no response is received to the notice within 90 days after it is sent or, if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, the purchaser may act on behalf of the client until otherwise notified by the client; and</u></p>	
	<p><u>(B) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer, provided that the client's consent shall be presumed if the purchaser receives no response to the paragraph (d)(2)(A) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or if the client's rights would be prejudiced by a failure of the purchaser to act during the 90 day period, unless the purchaser is otherwise notified by the client.</u></p>	<p>See Explanation of Changes for paragraph (d).</p>
<p>(d) The fees charged clients shall not be increased by reason of the sale.</p>	<p><del>(d)</del><u>The fees</u>Fees charged to clients shall not be increased <u>solely</u> by reason of the <del>sale</del><u>purchase, and the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.</u></p>	<p>Paragraph (e) is based on Model Rule 1.17(d), but adds a requirement that the purchaser must assume the seller's obligations under existing client agreements regarding fees and the scope of work. Therefore, a client will not be confronted with an increase in fees or fee rate solely by virtue of the sale.</p>

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	<p>(f) <u>If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.</u></p>	<p>Paragraph (f) has no counterpart in the Model Rule. It carries forward current rule 2-300(C), and is intended to provide further protection for the seller's clients by requiring adherence to the requirements of tribunals that permit withdrawal and substitution of lawyers. The Commission concluded that this requirement should be continued in the black letter of the rule.</p>
	<p>(g) <u>A lawyer shall not disclose confidential client information to a nonlawyer in connection with a purchase or sale under this Rule.</u></p>	<p>Paragraph (g) has no counterpart in the Model Rule. It carries forward current rule 2-300(E). The Commission concluded assuring that confidentiality is protected is an essential aspect of client protection if a practice is sold.</p>
	<p>(h) <u>This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.</u></p>	<p>Paragraph (h) is based on Model Rule 1.17, cmt. [14] and current rule 2-300(F), both of which provide that the Rule does not apply to admission to or retirement from a law partnership or law corporation, retirement plans, or similar arrangements nor to the sale of tangible assets of a practice. The Commission concluded that this exclusion from the scope of the Rule should be in the black letter of the rule.</p>

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<p>[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.</p>	<p>[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.</p>	<p>Comment [1] is identical to Model Rule 1.17, cmt. [1].</p>
	<p><a href="#">[1A] As used in this Rule, a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.</a></p>	<p>Comment [1A] has no counterpart in the Model Rule. The Commission concluded that this Rule should permit and apply to sales of practices by certain fiduciaries acting for a lawyer or lawyer's estate. Current California Rule 2-300 expressly applies to sales by such fiduciaries. Rather than including an enumeration of all such fiduciaries in the introductory paragraph of the proposed Rule, the Commission elected to include them by defining the word "lawyer" in this Comment. This comment makes the proposed Rule clearer than the Model Rule. In addition, by spelling out the types of fiduciaries who may act on behalf of the lawyer or his or her estate, this Comment avoids the risk that a generic word such as "fiduciary" could be interpreted to include purchases and sales of law practices by brokers, which is not permitted under this Rule. See Comment [12A] and Explanation of Changes thereto.</p>

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<p><b>Termination of Practice by the Seller</b></p> <p>[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 purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. 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.</p>	<p><b>Termination of Practice by the Seller</b></p> <p>[2] The requirement that all of the private practice, or all of <del>a</del> <u>substantive field or geographic</u> area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the <u>entire substantive field or geographic</u> area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, <u>or refuse to discharge the selling lawyer</u>, therefore, does not result in a violation. <u>If a client does not agree to retain the purchaser, the selling lawyer is not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. See Rule 1.16.</u></p>	<p>Comments [2] and [2A] are based on Model Rule 1.17, cmt. [2]. However, the Model Rule comment has been divided into two parts for clarity. Proposed Comment [2] is substantially the same as the first part of the Model Rule comment. The phrase "substantive field or geographic" has been added to modify the phrase "area of practice" to make explicit that the comment applies to the sale of the entire practice or to sales of substantive fields of practice or to sales of geographic areas of practice. In addition, proposed Comment [2] recognizes that clients have the right to refuse to discharge the selling lawyer, by adding that concept to the second sentence.</p> <p>The last sentence has been added to highlight that the selling lawyer is not relieved from responsibility unless he or she is substituted out, or has permission to withdraw, in accordance with Rule 1.16.</p>
	<p>[2A] 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 <del>the</del> <u>a</u> 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 <u>or retires</u> from a <del>judiciary</del> <u>judicial</u> position.</p>	<p>Comment [2A] is the second half of Model Rule Comment [2], which addresses the kinds of situations under which a return to private practice is permitted after a lawyer has availed himself or herself of the benefits of the Rule. The word "the" has been changed to the word "a," because, in the second sentence, a sale of a specific practice is not at issue. The words "or retires" have been added in the last sentence because a judge may elect to retire and return to private practice. The word "judiciary" has been changed to "judicial" because that is the appropriate adjective to modify "position."</p>

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<p>[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.</p>	<p>[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.</p>	<p>Comment [3] is identical to Model Rule 1.17, cmt. [3].</p>
<p>[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 on 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 geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).</p>	<p>[4] <del>The</del><u>This</u> Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within <u>this state or within a defined geographic area of this state.</u> <del>the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on 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 geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17.</del><u>A seller does not violate this Rule by either (i) selling a California practice but continuing to practice in other jurisdictions; or (ii) selling a practice in one geographic area of this state but continuing to practice in another geographic area of this state, as agreed to by seller and purchaser.</u></p>	<p>Comment [4] is based on Model Rule 1.17, cmt. [4], but has been revised extensively to provide guidance on the application of the Rule. Much of the Model Rule Comment [4] is a form of “use note” for guidance to states that choose to follow the Model Rule. Irrelevant parts of that “use note” have been deleted and explicit language added to explain the rights of a seller who sells a part of a practice located in a defined geographic area. Once this Rule is adopted in this state, much of the use note would not be needed, but guidance about the rights of a seller in a sale of a geographic aspect of a practice would be appropriate.</p>

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<p>[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.</p>	<p>[5] This Rule also permits a lawyer or law firm to sell <del>an area</del> <u>substantive field</u> of practice. If <del>an area</del> <u>substantive field</u> of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the <del>area</del> <u>substantive field</u> 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 <del>1.5(e)</del> <u>1.5.1</u>. 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 <del>who leaves a jurisdiction</del> or <del>geographical</del> <u>law firm that sells the practice in this state or in a geographic area typically would sell of this state must make the entire practice in this state or in the geographic area available for purchase</u>, this Rule permits the <del>lawyer</del> <u>seller</u> to limit the sale to one or more <del>areas</del> <u>substantive fields</u> of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.</p>	<p>Comment [5] is substantially the same as Model Rule 1.17, cmt. [5]. "Substantive field" has been substituted for the word "area" because the Commission concluded that there could be confusion between the word "area" in reference to a geographic location of the practice and the word "area" in the sense of a substantive aspect of the practice. As a result, the Commission concluded that the recommended wording provides greater clarity. The reference to Rule 1.5(e) has been changed to Rule 1.5.1 because that is the number of the counterpart to Model Rule 1.5(e) in the proposed new California Rules.</p> <p>The Commission revised the third sentence for clarity and to conform it with the California approach to this Rule. If a lawyer makes the entire practice in this state or in a geographic area available for purchase, he or she will have complied with this Rule, even if purchasers cannot be found for the entire practice or entire practice in this state or in a geographic area.</p>

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<p><b>Sale of Entire Practice or Entire Area of Practice</b></p> <p>[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of 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 purchasers are required to undertake all client matters in the practice or practice area, 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.</p>	<p><b>Sale of Entire Practice or Entire Area of Practice</b></p> <p>[6] <del>The This</del> Rule requires that the seller's entire <u>law practice, or an entire geographic or substantive area of practice, be sold.</u> The prohibition against sale of less than an entire <u>law practice, entire geographic area of practice or entire substantive field of practice</u> protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the <u>law practice-or practice, geographic area of practice, or substantive field of practice,</u> 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 <u>or because one or more clients refuse to retain the purchasers.</u></p>	<p>Comment [6] is based on Model Rule 1.17, cmt. [6]. However, sentences within it have been expanded to clarify that it applies regardless of whether the sale is of an entire practice, of an entire geographic area of practice, or of an entire substantive field of practice.</p> <p>The last phrase has been added to the last sentence of this Comment because a conflict of interest is not the only circumstance under which the purchaser may not be able to undertake a particular client matter. Clients always have the option to refuse to retain the purchaser.</p>
<p><b>Client Confidences, Consent and Notice</b></p> <p>[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</p>	<p><b>Client Confidences, Consent and Notice</b></p> <p>[7] <del>Negotiations</del> <u>Disclosures in confidence of client identities and matters during negotiations</u> between seller and prospective purchaser <del>prior to disclosure for the purpose of information relating to a specific representation</del> <u>ascertaining actual or potential conflicts of an identifiable client interest</u> no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers</p>	<p>Comment [7] is based on Model Rule 1.17, cmt. [7]. However, the first sentence has been reworded for clarity. Not all aspects of negotiations between seller and prospective purchaser are necessarily confidential. In preliminary discussions, the seller should be able to disclose in confidence client identities and matters, so the purchaser has an understanding of the scope of the practice and can check for conflicts of interest. However, the seller should not at that stage disclose specific confidential information relating to the representation nor give the purchaser</p>

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<p>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 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.</p>	<p>between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific <u>confidential</u> information relating to the representation <del>and</del> to the file, however, requires client consent. <del>The</del> This Rule provides that, before such information can be disclosed by the seller to the purchaser, the client must be given actual written notice of the contemplated sale, including the identity of the <del>purchaser</del><u>purchasing lawyer or law firm</u>, 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. <u>However, confidential information may be disclosed to the purchaser if necessary to protect a client from harm, damage or loss of rights, unless the client has made known that the client does not want to retain the purchaser or unless the seller and purchaser have ascertained that the purchaser has actual or potential conflicts of interest that preclude the purchaser from representing the client.</u></p>	<p>access to the file. Those should only be provided by the seller with the consent of the client. The first sentence has been reworded to make those concepts explicit, and the word “confidential” has been added to the second sentence for that same reason.</p> <p>The third sentence has been modified – “purchaser” deleted and “purchasing lawyer or law firm” substituted for it – in order to make explicit that the concept applies regardless of whether the purchaser is an individual lawyer or law firm.</p> <p>In an emergency situation, it may be necessary for the seller to disclose confidential information to the purchaser, in order for the purchaser to protect a client from harm, damage, or loss of rights. The last sentence has been added to this Comment in order to permit a purchaser to obtain access to confidential information if necessary to protect a client in such an emergency.</p>
<p>[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</p>	<p>[8] <del>[RESERVED] 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</del></p>	<p>The Commission recommends that Model Rule Comment [8] not be adopted because it is substantively wrong. Under California law and rules, a seller may not withdraw from representation unless he, she, or it has first complied with Rule 1.16 or the client has agreed to the discharge or has substituted the seller with new counsel. In addition, a lawyer may not disclose confidential information to a tribunal, even <i>in camera</i>, because that may waive confidentiality of the information.</p>

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 1.17 Sale of Law Practice</b>  <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.17 <u>Purchase and Sale of a Law Practice</u></b>  <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>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).</p>	<p><del>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).</del></p>	
<p>[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.</p>	<p>[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the <u>law practice</u> <del>or, a geographic</del> area <u>of the practice, or a substantive field</u> of practice.</p>	<p>Comment [9] is based on Model Rule 1.17, cmt. [9]. The revisions are intended to make explicit that clients have autonomy in choosing their lawyer regardless of whether the sale is a sale of an entire practice, of a geographic area of practice, or of a substantive field of practice.</p>
<p><b>Fee Arrangements Between Client and Purchaser</b></p> <p>[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.</p>	<p><b>Fee Arrangements Between Client and Purchaser</b></p> <p>[10] <del>The</del> <u>Paragraph (e) provides that the</u> sale may not be financed <u>solely</u> by increases in fees charged the clients of the <u>law</u> practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. <u>The purchaser may be required to enter into new fee agreements with each client. See, e.g., Business and Professions Code sections 6147 &amp; 6148.</u></p>	<p>Comment [10] is based on Model Rule 1.17, cmt. [10]. However, the first sentence has been modified so that it expressly calls the reader's attention to paragraph (e). The word "solely" has been added because that is contained in the black letter rule. The word "law" has been added to make explicit that this Rule applies to the sale of a law practice, not of other lines of business.</p> <p>The last sentence has been added to the Model Rule comment to remind purchasers that under this Rule, they must comply with California requirements regarding fee agreements, such as Business &amp; Professions Code sections 6147 and 6148.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.17 <u>Purchase and Sale of a Law Practice</u> Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Other Applicable Ethical Standards</b></p> <p>[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 the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).</p>	<p><b>Other Applicable Ethical Standards</b></p> <p>[11] <del>Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).</del> <u>Lawyers participating in the sale of a law practice, a geographic area of practice, or a substantive field of practice must act in accordance with all applicable ethical standards. These include, for example, the following: The purchaser is obligated to check for potential conflicts of interest so as to avoid conflicts of interest (see, e.g., Rule 1.7 regarding concurrent conflicts and Rule 1.9 regarding conflicts arising from past representations) and thereafter to provide legal services competently (see Rule 1.1). Following a sale, the seller is obligated to continue to protect confidential client information (see Rule 1.6 and Business &amp; Professions Code section 6068(e)(1)) and to avoid new representations that are in conflict with continuing duties to former clients (see Rule 1.9).</u></p>	<p>Comment [11] is based on Model Rule 1.17, cmt. [11], but has been substantially revised to correct an apparent error in the Model Rule comment. The examples in the Model Rule comment focus on the seller's ethical duties in connection with the sale of a law practice. The Commission concluded, however, that most of the examples described duties that a purchaser incurs in connection with a sale. The Commission has clarified which duties a purchaser has and which duties a seller has in its revision of the Comment.</p>

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<p>[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).</p>	<p>[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, <del>such approval must be obtained before</del> the matter <del>can</del>may be included in the sale, <u>but the approval of the tribunal must be obtained before the seller is relieved of responsibility for the matter.</u> (See Rule 1.16).</p>	<p>Comment [12] is based on Model Rule 1.17, cmt. [12]. However, it has been revised to clarify the contractual realities of selling a practice and obtaining a tribunal's permission to withdraw. A sale may contemplate including a given matter within the scope of the sale, and the parties will have to enter into a contract for sale before they can implement it. Nevertheless, if the approval of a tribunal is required before the purchaser may be substituted for the seller, both paragraph (f) of this proposed Rule and this comment now make explicit that the tribunal's approval must be obtained before the seller is relieved of responsibility for the matter.</p>
	<p><u>[12A] Although the services of a broker may be used to assist in a purchase and sale under this Rule, the Rule does not permit such a sale to a broker or other intermediary. Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice under this Rule is governed by the terms of the sale agreement and other law. Other Rules may also apply. See, e.g., Rule 5.4(a) (prohibiting sharing legal fees with a nonlawyer), and Rule 7.2(b) (prohibiting a lawyer from giving anything of value to a person for recommending the lawyer's services).</u></p>	<p>Comment [12A] has no counterpart in the Model Rule. The Commission concluded that a sale to a broker should not be permitted. A seller or a purchaser may utilize the services of a broker, if permitted by other law. However, this Rule does not permit a sale to a broker or other intermediary. In addition, other rules and other law govern whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice or any aspect of it. For example, proposed Rule 5.4(a) prohibits sharing legal fees with a nonlawyer, and proposed Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. Lawyers and the public should be made aware of these restrictions. Therefore, they are spelled out in this Comment.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.17 Sale of Law Practice Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.17 <u>Purchase and Sale of a Law Practice</u> Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Applicability of the Rule</b></p> <p>[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer 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.</p>	<p><b>Applicability of the Rule</b></p> <p>[13] This Rule applies to the sale of a law practice of a deceased, <del>disabled</del><u>impaired</u> or disappeared lawyer, <u>or by a trustee</u>. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. <del>Since, however, or the seller may be a lawyer acting in a fiduciary capacity. Because</del> no lawyer may <del>participate</del><u>assist</u> in a sale of a law practice <del>which</del><u>that</u> does not <del>conform to the requirements of</del><u>comply with</u> this Rule, <del>the representatives of the seller as well as a nonlawyer fiduciary who is represented by counsel, a lawyer selling in a fiduciary capacity, and</del> the purchasing lawyer <del>can be expected to see to it that they are met</del><u>must</u> all comply with this Rule. See, e.g., Rule 8.4(a).</p>	<p>Comment [13] is based on Model Rule 1.17, cmt. [13]. The word “impaired” has been substituted for “disabled” because the selling lawyer may be physically disabled but still able to participate in the sale, and the intent is to apply this Rule to a sale on behalf of a selling lawyer who is incapacitated. In addition, the phrase “or by a trustee” has been added because a lawyer, for estate and tax planning purposes, may hold the ownership of his or her practice in a trust.</p> <p>In the second sentence, the alternative of a seller being a lawyer acting in a fiduciary capacity has been added because a lawyer may be the attorney-in-fact, conservator, or trustee for another lawyer.</p> <p>In the third sentence, the word “because” has been substituted for “since, however,” to rectify the temporal implication. The phrase “assist in” has been substituted for “participate in” in order to clarify that a lawyer need not be a purchaser or seller in order to violate this Rule. A lawyer for a purchaser or seller must assure that the sale of the practice complies with this Rule. Accordingly, the balance of the third sentence has been revised to make these concepts explicit.</p>
<p>[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.</p>	<p>[14] <u>[RESERVED]</u> <del>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.</del></p>	<p>Model Rule 1.17, cmt. [14] has been deleted because the substance of it has been moved into paragraph (h) of the black letter rule. An exception to a rule should appear in the rule itself. Because this exception appears in the proposed Rule, repeating it in the comment is not necessary.</p>

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<p>[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.</p>	<p>[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 <del>or</del> <u>or, a geographic area of practice, or a substantive field of practice.</u></p>	<p>Comment [15] is based on Model Rule 1.17, cmt. [15]. Language has been added to clarify that the Rule only applies to the sale of an entire practice, of a geographic area of practice, or of a substantive field of practice.</p>
	<p>[15A] <u>Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1 and 5.4 when applicable.</u></p>	<p>Comment [15A] has no counterpart in the Model Rule. This Comment has been added to help assure that lawyers who engage in a transaction under this Rule are alerted to the requirement of complying with proposed Rules 1.5.1 and 5.4.</p>
	<p>[15B] <u>If a lawyer whose practice is sold is deceased, his or her estate must also comply with Business and Professions Code section 6180, et seq., including but not limited to the notice requirements therein.</u></p>	<p>Comment [15A] has no counterpart in the Model Rule. The Commission recommends addition of this Comment so that people who endeavor to conduct a sale of a practice of a deceased lawyer are alerted of the necessity of complying with the State Bar Act.</p>

## Proposed Rule 1.17 Purchase and Sale of a Law Practice Minority Dissent

A minority of the Commission strongly disagrees with this proposed Rule. The proposed rule will create a sea change in the practice of law, commercializing it beyond anyone's prior imagination.

The current rule was created by this Commission in the 1980s and adopted by the Supreme Court of California on recommendation of the Board of Governors for the specific purpose of allowing senior lawyers in solo practice, facing retirement or appointment to a public position such as a judgeship, or their estates after their deaths, to realize the value of their practices by the sale of those practices without the use of transparent devices such as pretended last minute "partnerships;" see *Geffen v. Moss* (1975) 53 Cal.App.3d 215, 125 Cal.Rptr. 687. To avoid the use of these pretend relationships and to give single practitioners the same opportunity to realize the value of what they created over a lifetime – as was routinely provided where lawyers had been practicing in legal groups such as partnerships (see *Howard v. Babcock* [citation]), the State Bar proposed the current rule, which was the first authority ever that allowed the one-time sale of such a practice -- under stringent conditions which protect the clients of that practice through provisions for confidentiality during the sale negotiations and against fee increases by reason of the transfer.

The American Bar Association later adopted a version of this Rule at the instance of the California State Bar

delegation. It was promoted on the floor of the ABA House of Delegates by the then President of the State Bar, Terry Anderlini.

But the current proposal has transformed this modest and reasonable provision into one which will permit and cause the commercial exploitation of a law practice in ways heretofore undreamed of. Under the proposed rule, a lawyer (and thus, a law firm as well) may sell a substantive field of practice or a geographic area of practice. And unlike the current rule, there is the anticipation that the selling lawyer may even return to the practice he or she has merchandised. See proposed comment 2: "Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation."

The dissenters can see a sea change in the practice if this rule is adopted. Since the rule contains no definition of either the concept of "geographic area" or "substantive field" of practice and since probably no limiting definition is possible, an imaginative or greedy lawyer can sell a case or matter, or a set of a few cases or matters, by describing the sales package in a way which excludes the lawyer's other cases in the field, or in other geographic areas of the state or nation.

As some examples, suppose that a lawyer is consulted about a major personal injury case, beyond the lawyer's normal skills and capacities. Can the lawyer sell his or

her “major personal injuries” practice instead of handling the case him- or herself or associating a more skilled lawyer with client consent per current rule 2-200? Suppose that the lawyer has no background in intellectual property law but is consulted by a current client about a major patent infringement case which may well produce a contingent fee in 7 or even 8 figures? Instead of finding a lawyer competent in the field and referring the matter to that lawyer, can the lawyer now sell his or her “intellectual property practice,” consisting of a single matter, to the highest bidder, as long as the confidentiality provisions of this proposed rule are observed? Why would the temptation to sell be any less if the “big winner” case was one of several, where the seller might be quite willing to give up the others in order to cash in on the one “big deal”?

Or consider the case of a “national” law firm which opened a California office with considerable fanfare, spent a fair amount on the facility, on recruitment of lawyers and on promotion of the practice, but found the branch unprofitable. There have been such instances in the past, and the offices were simply closed. If this rule is adopted, the law firm could hire a marketer and would probably succeed in selling the unprofitable practice to another law firm, since its days in California were numbered in any event.

And what is a geographic area of practice? A county? A region? A neighborhood? And why are we proposing to limit the restrictions on reentry only to those which apply

to all businesses, i.e., Business & Professions Code sections 16601 et seq.? What is to preclude the seller from claiming extraordinary circumstances and coming back to the old neighborhood after cashing in on the prize case, except B&P Code section 16601?

We stop the iteration of possibilities here; but the potential changes which this rule will bring about in the merchantization of the practice of law, at all levels of size and activity of any practice, are endless. We are seeing a major evolution in the practice of law, particularly in the larger law firms, where the business element of the law practice has become the driving force and professional services are simply the commodities which such a business produces and sells. No compelling reason for this change has been advanced by its proponents, other than that there might be situations where there could be a genuine special need to carve out some part of an established practice and to sell it. Where these changes will eventually lead is unknown and there is considerable division as to whether the changes are good or bad for the profession and for the public it serves; but it seems clear that the proposed rule will create an enormous change in the business side of the law practice and will encourage the further commercialization of our profession, without any known necessity other than the weak thought that an older litigator might want to maintain a small estate planning practice (in which he/she presumably had little experience) while giving up on the pressure of a litigation practice.

## Rule 1.17: Purchase and Sale of a Law Practice

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**Arkansas** adds Rule 1.17(e), which requires the seller to file a detailed and timely affidavit with the Committee on Professional Conduct showing that the seller has complied with the notice provisions of Rule 1.17.

**California:** Rule 2-300, using different language, addresses the same policy issues as Rule 1.17 and provides that “fees shall not be increased solely by reason of the sale. “All or substantially all” of a practice may be sold.

**Colorado:** Rule 1.17(a) is satisfied only if the seller ceases to engage in the private practice of law “in Colorado,” or in the area of practice “in Colorado” that has been sold.

**Florida** omits the requirement in ABA Model Rule 1.17(a) that the seller cease practicing law, and adds or modifies several provisions, including the following:

(c) Court Approval Required. If a representation involves pending litigation, there shall be no substitution of counselor termination of representation unless authorized by the court....

(d) Client Objections. If a client objects to the proposed substitution of counsel, the seller shall comply with the requirements of rule 4-1.16(d) [which governs withdrawal]...

(e) Existing Fee Contracts Controlling. The purchaser shall honor the fee agreements that were entered into between the seller and the seller’s clients. The fees charged clients shall not be increased by reason of the sale.

Florida’s Comment to subparagraph (f) provides as follows:

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. 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.

**Georgia:** Rule 1.17 tracks the 1990 version of ABA Model Rule 1.17 verbatim except that Georgia deletes paragraph (a) (requiring that the seller stop practicing law).

**Illinois:** The Illinois rule, which was not adopted until 2005, differs significantly from ABA Model Rule 1.17. It permits not only a lawyer but also “the estate of a deceased lawyer, or the guardian or authorized representative of a disabled lawyer” to “transfer” or sell a law practice if the following conditions are satisfied:

(a) The lawyer whose practice is transferred or sold ceases to engage in the private practice of law in all or part of Illinois due to:

- (1) death or disability;
- (2) retirement;
- (3) declaration of inactive status with the ARDC;
- (4) becoming a member of the judiciary;
- (5) full-time government employment;
- (6) moving to an in-house counsel or other position of employment not involving the private practice of law; or
- (7) a decision to no longer be actively engaged in the private practice of law on a fee representation basis in the geographic area in which the practice has been conducted.

(b) The entire practice is transferred or sold to one or more lawyers or law firms....

Illinois Rule 1.17 also adds the following three new paragraphs at the end of the Rule:

(e) 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.

(f) Lawyers who sell or transfer their law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, Rule 1.1 (Competence); Rule 1.5

(Fees); Rule 1.6 (Confidentiality of Information); Rule 1.7 (Conflict of Interest: General Rule); Rule 1.9 (Conflict of Interest: Former Client).

(g) This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of the practice.

The adoption of Rule 1.17 in 2005 marked the end of a long process in Illinois. The Illinois State Bar Association had previously recommended versions of Rule 1.17 in 1991 and 1994, but the Supreme Court had rejected both recommendations without explanation.

**Kansas:** Kansas omits ABA Model Rule 1.17 entirely.

**Maryland:** Rule 1.17 differs significantly from ABA Model Rule 1.17. Maryland Rule 1.17(a)(1) permits the sale of a law practice, upon appropriate notice, if “(1) Except in the case of death, disability, or appointment of the seller to judicial office, the entire practice that is the subject of the sale has been in existence at least five years prior to the date of sale” and “(2) The practice is sold as an entirety to another lawyer or law firm.”

**Michigan:** Rule 1.17(a) provides that a “lawyer or a law firm may sell or purchase a private law practice, including good will, according to this rule.” Michigan adds Rule 1.17(e), which permits the “sale of the good will of a law practice ... conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice has been conducted.”

**Minnesota:** Rule 1.17(b), which is based on the 1990 version of ABA Model Rule 1.17, provides as follows:

(b) The buying lawyer or firm of lawyers shall not increase the fees charged to clients by reason of the sale for a period of at least one year from the date of the sale. The buying lawyer or firm of lawyers shall honor all existing fee agreements for at least one year from the date of the sale and shall continue to completion, on the same terms agreed to by the selling lawyer and the client, any matters that the selling lawyer has agreed to do on a pro bono publico basis or for a reduced fee.

Rule 1.17(d) provides that the notice to clients must include a “summary of the buying lawyer’s or law firm’s professional background, including education and experience and the length of time that the buyer lawyer or members of the buying law firm has been in practice.” Minnesota also adds four paragraphs, including Rule 1.17(f), which permits the selling lawyer to promise that he or she “will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time,” and Rule 1.17(g), which provides that the selling lawyer “shall retain responsibility for the proper management and disposition of all inactive files that are not transferred as part of the sale of the law practice.”

**Missouri:** Rule 1.17(d) adopts the ABA mandate that fees charged to clients shall not be increased by reason of the sale of the practice, but adds that the purchaser may “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.”

**New Jersey:** Rule 1.17 permits a lawyer or firm to sell or purchase a law practice, including goodwill, if the seller is ceasing to engage in private law practice in New Jersey, the

practice is sold as an entirety and certain notices are given to the clients of the seller and by publication in the New Jersey Law Journal and the New Jersey Lawyer at least 30 days in advance of the sale.

**New York:** DR 2-111 allows sale of a “law practice, including goodwill, to one or more lawyers or law firms.” The parties may agree “on reasonable restrictions on the seller’s private practice of law.” Provisions are made for protecting confidential information and checking for conflicts.

**North Carolina:** Rule 1.17(d) provides that if a conflict of interest disqualifies the purchaser from representing a client, then “the seller’s notice to the client shall advise the client to retain substitute counsel.” In addition, Rule 1.17(g) permits the purchaser to pay the seller in installments -but the seller “shall have no say regarding the purchaser’s conduct of the law practice.”

**Ohio:** Rule 1.17 incorporates most of the substantive provisions of the Model Rule, but uses different language and adds many different provisions. For example, Ohio Rule 1.17(a) requires that a law practice must be sold “in its entirety, except where a conflict of interest is present that prevents the transfer of representation of a client or class of clients.” In addition, Rule 1.17(a) prohibits the sale or purchase of a law practice “where the purchasing lawyer is buying the practice for the sole or primary purpose of reselling the practice to another lawyer or law firm,” and Rule 1.17(d)(1) requires the sale agreement to include a statement that “the purchasing lawyer is purchasing the law practice in good faith and with the intention of delivering legal services to clients of the selling lawyer and others in need of legal services.”

Ohio Rule 1.17 (d)(2) requires the sale agreement to provide that “the purchasing lawyer will honor any fee

agreements between the selling lawyer and the clients of the selling lawyer relative to legal representation that is ongoing at the time of the sale,” but the purchasing lawyer “may negotiate fees with clients of the selling lawyer for legal representation that is commenced after the date of the sale.” Rule 1.17 (d)(3) generally permits the sale agreement to include terms that “reasonably limit the ability of the selling lawyer to reenter the practice of law,” but prohibits such limitations “if the selling lawyer is selling his or her law practice to enter academic, government, or public service or to serve as in-house counsel to a business.”

Ohio Rule 1.17(e) specifies in considerable detail what the notice to clients must contain, and a Rule 1.17(g) allows the selling lawyer and purchasing lawyer to give notice of the sale to a missing client by publishing notice of the sale in a newspaper. A Rule 1.17(i) provides as follows:

(i) Neither the selling lawyer nor the purchasing lawyer shall attempt to exonerate the lawyer or law firm from or limit liability to the former or prospective client for any malpractice or other professional negligence. The provisions of Rule 1.8(h) shall be incorporated in all agreements for the sale or purchase of a law practice. The selling lawyer or the purchasing lawyer, or both, may agree to provide for the indemnification or other contribution arising from any claim or action in malpractice or other professional negligence.

**Oklahoma:** Rule 1.17(a) requires the selling lawyer to cease practice only “in the geographic area in Oklahoma in which the practice has been conducted,” not in the entire state. Rule 1.17(b)(2) provides that matters shall not be transferred to a purchaser “unless the seller has reasonable basis to believe that the purchaser has the requisite knowledge and skill to handle such matters, or reasonable assurances are obtained that such purchaser will either

acquire such knowledge and skill or associate with another lawyer having such competence.” Rule 1.17(c) requires the “signed written consent of each client whose representation is proposed to be transferred” unless the client takes no action within 90 days of the notice. Rule 1.17(d) permits the purchaser to “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.”

**Pennsylvania:** Rule 1.17 differs significantly from ABA Model Rule 1.17. For example, Pennsylvania Rule 1.17(b) requires that the seller must sell the practice “as an entirety to a single lawyer,” and explains that a practice is sold as an entirety “if the purchasing lawyer assumes responsibility for all of the active files” except those specified in Rule 1.17(g). Rule 1.17(d) adds the following: “Existing agreements between the seller and the client concerning fees and the scope of work must be honored by the purchaser, unless the client gives informed consent confirmed in writing.” Pennsylvania also adds Rules 1.17(e) and (g), which provide as follows:

(e) The agreement of sale shall include a clear statement of the respective responsibilities of the parties to maintain and preserve the records and files of the sellers practice, including client files.

(g) The sale shall not be effective as to any client for whom the proposed sale would create a conflict of interest for the purchaser or who cannot be represented by the purchaser because of other requirements of the Pennsylvania Rules of Professional Conduct or rules of the Pennsylvania Supreme Court governing the practice of law in Pennsylvania, unless such conflict, requirement

or rule can be waived by the client and the client gives informed consent.

**Virginia:** Virginia requires the selling lawyer, in notifying clients about the proposed sale, to disclose “any proposed change in the terms of the future representation including the fee arrangement.” Nonetheless, Virginia also adopts ABA Model Rule 1.17(d).

**RRC – Rule 1.17 [2-300]  
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**March 10, 2010 McCurdy E-mail to Drafters (Sapiro, Kehr, Martinez, Melchior), cc Chair, Vice-Chairs & Staff:**

Rule 1.17 Drafting Team (SAPIRO/KEHR, Martinez, Melchior):

This message provides the assignment background materials for Rule 1.17 on the March agenda. **The assignment deadline is Thursday, March 18, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received to date – public comment period ends March 12th)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (public comment version)
4. introduction (public comment version – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (public comment version)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

**Attached:**

RRC - 2-300 [1-17] - Dashboard - ADOPT - DFT5 (03-10-10).doc  
RRC - 2-300 [1-17] - Compare - Introduction - DFT4 (12-16-09)KEM-JS-LM.doc  
RRC - 2-300 [1-17] - Compare - Rule & Comment Explanation - DFT4 (12-16-09)KEM-LM.doc  
RRC - 2-300 [1-17] - Rule - AltA -DFT5.1 (12-16-09)-CLEAN-LAND-LM.doc  
RRC - 2-300 [1-17] -Minority Dissent-2COL-LM.doc  
RRC - 2-300 [1-17] - Public Comment Complete - REV (03-10-10).pdf  
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc  
RRC - 2-300 [1-17] - State Variations (2009).pdf

**March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

To assist you in preparing the materials for the 3/26-27/10 meeting, I've attached the following for this Rule:

1. My cumulative meeting notes, revised 11/27/09.
2. Full E-mail compilation, revised 1/5/10.

Please let me know if you have any questions.

**March 14, 2010 Kehr E-mail to KEM:**

Can you tell me who wrote the dissent that was attached to Lauren's 3/18/10 email to the drafting team?

**March 14, 2010 KEM E-mail to Kehr:**

It's Kurt's dissent. I summarized it in the Introduction and he signed off on it. There's an e-mail exchange among you, Jerry, Kurt and me on 10/4-6/09 that explains its genesis (pages 90-91 of the E-mail compilation).

**March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

This message provides an updated public comment compilation adding comments received since the materials I transmitted with the message below. In addition, I've attached an updated commenter chart. Please note that not all of the comments received over the past several days have been synopsised and added to this chart. Please go ahead and add any missing comment synopses and responses yourself in the extra row at the bottom of the table. If you run out of rows, simply press the TAB key in the last cell of the last row and a new row will appear.

Since the last transmission, comments from the following commenters were received:

OCTC  
COPRAC

Any additional comments received will be sent to you as soon as they are received.

***Attached:***

RRC - 2-300 [1-17] - Public Comment Complete - REV (03-10-10).pdf  
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc

**March 18, 2010 McCurdy E-mail to Sapiro & Kehr, cc Drafters, Chair, Vice-Chairs & Staff:**

Is something in the works for this assignment? If so, please let me know the anticipated submission time. It's important that I mail the agenda materials out today given that the meeting is next week. We plan to mail them by overnight mail for receipt on Friday.

**March 18, 2010 Sapiro E-mail to McCurdy, cc Drafters, Chair, Vice-Chairs & Staff:**

I am trying but have been bogged down by the 1.11 comments.

**March 18, 2010 Kehr E-mail to McCurdy, cc Drafters, Chair, Vice-Chairs & Staff:**

I did a draft last weekend, and it turns out that Jerry did one at almost the same time. They overlapped, and he was going to meld them. I am tied up in a client emergency and will have no time today.

**March 18, 2010 McCurdy E-mail to Sapiro & Kehr, cc Drafters, Chair, Vice-Chairs & Staff:**

Thanks for your quick replies. Could each of you please submit your version of the public commenter table for Rule 1.17 to me. We'll include both in the mailing with a covering memo explaining them. And, once you reconcile your comments in a combined document then we'll circulate it prior to the meeting as soon as it is ready.

**March 18, 2010 Kehr E-mail to McCurdy, cc Drafters, Chair, Vice-Chairs & Staff:**

Here it is.

***Attached:***

RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - DFT2 (03-14-10)RLK.doc

**March 18, 2010 Sapiro E-mail to KEM, cc Drafters, Chair, Vice-Chairs & Staff:**

Attached are the public comment spreadsheet, redlined rule, and proposed dashboard. I understand from our last conversation that you will annotate them or clean them up. You have my proxy and my thanks.

In the spreadsheet, I tried to integrate Bob's comments with mine. I hope I did him justice. I did not receive responses from members of the drafting committee regarding my drafts sent last weekend.

I apologize it is reaching you so late, but it turned out the spreadsheet I was given did not include any of the COPRAC comments. I added them and found them very valuable and cogent. I have recommended that we accept most of them. Those I recommend I have added to the spreadsheet and to the draft rule. Because the OCTC and COPRAC comments came in late, what I did with them has not been seen or commented on by the rest of the drafting committee, so I do not know whether they will agree with me.

Call me at home if you want to discuss any of this.

**Attached:**

RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - DFT2A (03-18-10)JS.doc

RRC - 2-300 [1-17] - Dashboard - ADOPT - DFT5.1 (03-18-10).doc

RRC - 2-300 [1-17] - Rule - AltA -DFT6 (03-18-10)JS - Cf. to DFT5.1.doc

**March 18, 2010 McCurdy E-mail to KEM, cc Drafters, Chair, Vice-Chairs & Staff:**

Kevin, We're out of time. We're going with Jerry's materials. We can re-circulate a modified version by e-mail.

**March 22, 2010 Tuft E-mail to RRC List:**

Orange County Bar Association's concerns are legitimate and deserve a less disparaging response. The proposed response focuses on the reasons for allowing a lawyer to sell a substantive area of practice, but does not respond to the concerns raised regarding the ability of lawyers or law firms to sell geographical areas of practice. The response and the Introduction should acknowledge that the proposed rule goes beyond the Model Rule and the rule of other jurisdictions in permitting the sale or purchase of a geographic area of practice apart from the sale or purchase of a substantive field of practice in a geographical area in which the practice has been conducted. It is too cavalier to say that the fear of abuse in lawyers building a practice just to sell it is "chimerical" and to imply that the concerns raised are mere wild fancy and unfounded. In an era of technology and commoditization of legal services, it cannot be discounted that law firms and marketers will do precisely what Orange County fears. The response looks backwards to traditional law practice and fails to consider the impact of technology and market forces that are changing the delivery of legal services and the structure of law firms.

**March 22, 2010 Melchior E-mail to RRC List:**

I have always held to that point of view.

**March 23, 2010 Sondheim E-mail to RRC List:**

1. In the Commenter chart, the RRC response column often says "The Commission respectfully disagrees." (This is also true with regard to at least one other rule--see forthcoming e-mail.) However, in other rules such as 1.0.1 we state "The Commission disagrees." I would hope that all our disagreements are respectful, but we don't need to say it and should be consistent.

2. Page 174: First full paragraph in RRC Response column, as is pointed out, a response is needed.

3. Page 179: Comment column, first full paragraph, sixth line, "constituted" should be "constitute."

4. Page 181: Under the State Rule(s) of Primary Factors, the sentence is incomplete.
5. Page 185: In Comment 3A, the quotation mark at the end should be deleted.