

**RE: Rule 2-300
11/19/04 Commission Meeting
Open Session Item III.D.**

**RE: Rule 2-300
10/8/04 Commission Meeting
Open Session Item III.E.**

-----Original Message-----

From: Jerome Sapiro, Jr. [mailto:JSapiro@sapirolaw.com]

Sent: Friday, September 24, 2004 2:19 PM

To: Hollins, Audrey; McCurdy, Lauren; Difuntorum, Randall; Mohr, Kevin E.; Voogd, Anthony; Ruvolo, Hon. Ignazio J.; Peck, Ellen R.; Melchior, Kurt W.; Martinez, Raul; Lamport, Stanley; Julien, JoElla J.; George, Edward P.; Foy, Linda Quan; Betzner, Karen; Vapnek, Paul W.; Tuft, Mark L.; Sondheim, Harry B.

Subject: Rule of Professional Conduct 2-300

In his memorandum dated August 15, 2004, at page 3, Tony Voogd says that he prefers the ABA rule. The assignment memorandum for our October 8th meeting assigns the co-drafters to consider and respond to Tony's comment and submit a redraft.

We respectfully disagree with Tony. Our rule contains more client protection matters, particularly in paragraph (B). In addition, our rule properly cross-references Rules 3-300 and Rule 3-310. We recommend that these be retained and have retained them, in substance, in the proposed amendment starting at page 2 of Jerry's memorandum dated August 20, 2004.

There is one aspect of the sale of an area of practice which is still of concern, and we invite discussion of it at our meeting. Someone who is getting old and sells off a litigation practice so that he or she can limit himself or herself to trusts and estates is fine. But we have not come up with a cogent way to draft around someone selling an "area of practice" which basically consists of one, big, fat contingency case. If that is, for example, a patent infringement case over widgets, the lawyer could sell it and claim that is the sale of an entire practice area of IP claims concerning widgets. But if that practice area consists of just that one case, or even a few cases, that would be the kind of cherry picking our current rule and the ABA Model Rule dissuade. The selling lawyer could sell that one case, withdraw from the "dog" cases, and let the clients in the less lucrative cases fend for themselves. The ABA Model Rule and its discussion do not suggest a cogent approach to prohibiting this conduct. We raise for discussion whether this is realistically a potential problem, whether we should try to deal with it, and, if so, how.

However, in preparing this comment, we noticed that, because of Jerry's inaccurate proofreading, paragraphs (C), (D), (E), and (F) of our existing Rule 2-300 were not correctly lettered at pages 24 and 25 of Jerry's August 20th memorandum. Since Jerry proposes to add proposed new paragraphs (A) and (B), those paragraphs should have become (D), (E), (F), and (G), respectively. Jerry apologizes for any confusion that he may have been caused.

With best regards to all of you,

Raul, Kurt and Jerry

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MEMORANDUM

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

FROM: JEROME SAPIRO, JR.

DATE: AUGUST 20, 2004

RE: RULE OF PROFESSIONAL CONDUCT 2-300. Sale or Purchase of a Law
Practice of a Member, Living or Deceased

I apologize that my latest hospitalization prevented me from delivering this report timely. Kurt's August 10, 2004, email correctly identifies issues that should be addressed regarding Rule 2-300. This memorandum elaborates on them and proposes some changes to the rule.

Prior to adoption of Rule of Professional Conduct 2-300, a lawyer was prohibited from selling cases, clients, or the goodwill of a law practice. See, *e.g.*, *Geffen v. Moss*, 53 Cal. App. 3d 215, 225-27 (1975); *Howard v. Babcock*, 6 Cal. App. 4th 409, 423 (1993). This left sole practitioners at a disadvantage. Multi-lawyer firms could allow a partner or shareholder to retire and receive compensation including payments on account of the goodwill of the firm, but a sole practitioner could not do so without first forming and dissolving a "quickie," sham partnership with another lawyer.

Current Rule of Professional Conduct 2-300 eliminated the discrimination against sole practitioners and permits a lawyer to acquire all or substantially all of the law practice of another lawyer, including the goodwill of that practice. The rule was originally drafted by Demetrious Dimitriou when he was a member of the Committee on Professional Responsibility

and Conduct. COPRAC proposed the rule, and the Commission recommended its adoption. Originally, the rule was proposed in the Discussion Draft as Rule 2-112; in a subsequent revision, it was numbered Rule 2-400; and in the current rules it is 2-300.

Under Rule 2-300, “all or substantially all of the law practice of a member” must be sold, but sale of either an area of practice or of the position of a practice in a geographic area is not permitted. Rule of Professional Conduct 2-300 Discussion, second paragraph, requires the purchasing lawyer not to “cherry pick” among the clients of the seller. The purchasing lawyer is required to purchase all, or substantially all, of the practice, even though the clients remain free to retain different lawyers.

In 1990, the American Bar Association adopted Model Rule 1.17. It substantially copied our rule. However, in 2002, the American Bar Association amended Model Rule 1.17 to permit a lawyer or a law firm to sell or to purchase a law practice or an area of practice, and not restrict the purchase and sale to an “all or nothing” transaction. In addition, the 2002 amendment to Model Rule 1.17 permits a sale of a practice or of an area of practice within a geographic area or in a jurisdiction. Thus, a lawyer who wants to withdraw from litigation practice in Southern California could sell that geographic aspect of his or her practice under the American Bar Association Model Rule 1.17, but could not do so under California Rule of Professional Conduct 2-300.

Model Rule 1.17(c) copies some of the client-protection requirements of California Rule 2-300. For example, both prohibit increasing client fees solely because of the sale of the practice. See Rule of Professional Conduct 2-300(A); Model Rule 1.17(d). Originally, Model Rule 1.17(d) and its Comment [9] stated that the purchasing lawyer could decline to undertake a matter for a client of the seller unless the client agreed to pay higher fees

usually charged by the purchaser for substantially similar services. The 2002 amendments deleted these statements, to Model Rule 1.17(d) is substantially the same as our Rule 2-300(A).

Model Rule 1.17, Comment [5] used to require that there be a single purchaser of the seller's practice. The 2002 amendments changed that comment to Comment [6] and deleted the requirement that a single purchaser take the entire practice or area of practice. Thus, under the Model Rule, there may be multiple purchasers of the practice or of the area of practice. However, it makes clear that sale of less than an entire practice area is prohibited in order to protect clients whose matters are less lucrative and who might find it difficult to retain other counsel if the a sale could be limited to substantial fee-generating matters.

Rule of Professional Conduct 2-300 provides for the sale of the practice of a deceased or incompetent attorney. Under Rule 2-300(B)(1), if the seller is deceased or is acting through a conservator or attorney-in-fact, but there is no appointed practice administrator, the purchaser causes notices to be given to the clients and obtains written consents from the clients. The American Bar Association Model Rule 1.17 does not have equivalent provisions.

If the original attorney is deceased, his or her estate is also required to comply with Business & Professions Code sections 6180, *et seq.*, dealing with notice of cessation of practice. Business & Professions Code sections 6180 and 6180.1 require that notice be given to clients, to opposing counsel, to the deceased attorney's errors and omissions carriers, and others. Rule 2-300 does not refer to these requirements. I recommend that the Discussion be amended to do so.

Rule of Professional Conduct 2-300(B)(1) and (2) require written notice to be given by the selling attorney or by the purchasing attorney, depending on the circumstances. That notice must include:

1. The fact that the law practice is being transferred to the purchasing attorney.
2. Advice that the client has the right to retain a different lawyer than the purchaser.
3. Advice that the client may take possession of any of the client's files and property.
4. Advice that, if no response is received within ninety days of sending the notice, the purchasing attorney may act on behalf of the client until the client directs otherwise.
5. If the notice is sent by the purchaser, the purchaser may act on behalf of the client during the ninety day period if the client would be prejudiced by a failure to act during that time.

The notice must be truthful, not misleading, and consistent with the other requirements of Rule of Professional Conduct 1-400(D) regarding advertising and solicitation. See Rule of Professional Conduct 2-300(B)(2)(a). These notice requirements are more extensive and more client-oriented than the requirement under Model Rule 1.17(c).

Rule of Professional Conduct 2-300(B)(1)(b) and (2)(b) require the client's written consent to be obtained by the seller or by the purchaser, depending on the circumstances. If the client does not respond within ninety days, or if the client's rights would be prejudiced if the purchaser does not act within that time, the client's consent to the transfer is presumed until otherwise notified by the client. *Ibid.* Model Rule 1.17 does not contain an equivalent requirement. In this regard, I recommend that we retain our form of the rule.

Rule of Professional Conduct 2-300(E) prohibits disclosure of confidential information to a non-member in connection with a sale under the rule. It also requires all activities of a purchaser or potential purchaser to comply with Rules of Professional Conduct 3-300 and 3-310. This means that the purchasing attorney must comply with conflict of interest rules even when evaluating the purchase of a law firm. Therefore, a prudent purchasing lawyer will run a conflicts of interest check before engaging in due diligence activities that might be an actual conflicts of interest.

Model Rule 1.17 does not have equivalent prohibitions. It relegates to its Comments [7], [8], and [9] the subjects of confidentiality, client consent, court approval, and notice. In my opinion, our form of the rule is preferable.

In my judgment, Rule 2-300 has more client protection than Model Rule 1.17. Although this makes our rule longer than Model Rule 1.17, these protections should be retained.

I therefore recommend that we retain the substance of existing Rule 2-300, with three exceptions.

To me, the requirement that a lawyer engage in an “all or nothing” sale is not needed. For example, if a lawyer handles both litigation and estate planning, and decides to withdraw from litigation practice but not to retire, he or she should be able to sell the litigation side of his or her practice and continue practicing probate. Similarly, if a lawyer has a practice in both Northern and Southern California and decides to limit his or her practice in the future to Southern California, he or she should be able to sell his or her Northern California practice. Selling an entire area of practice or an entire geographic location of practice would not raise the same “cherry picking” concerns that caused us to require that the sale be a sale of all or

substantially all of the law practice of a member. Model Rule 1.17 is in this regard preferable. Both Rule 2-300 and its Discussion should be amended.

Second, I recommend that the existing rule be changed so that the rule not solely refer to “another member or law firm.” If an out-of-state law firm wants to sell its California practice to a sole practitioner who is a member of the California Bar, I see nothing potentially unethical or detrimental to clients in such a transaction. If a California lawyer wants to sell part or all of his or her practice to a New York law firm, as long as that law firm has members qualified to practice in this State, again I see no potential harm. For a lawyer to sell his or her practice to several purchasers will not harm clients.

Third, as noted above, I suggest the discussion be amended to cross-refer to Business and Professions Code section 6180, *et seq.*

EXISTING RULE OF PROFESSIONAL CONDUCT 2-200:

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

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

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

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

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

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

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

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

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

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

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

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

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

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

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

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B) (1) (a) or paragraph (D). Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320. (Amended

by order of Supreme Court, operative
September 14, 1992.)

AMERICAN BAR ASSOCIATION MODEL RULE 1.17,

REDLINED TO SHOW THE 2002 AMENDMENTS:

RULE 1.17: SALE OF LAW PRACTICE

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

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

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

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

(1) the proposed sale;

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

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

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

files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

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

Comment

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

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area

of practice, available for sale to the ~~purchaser~~ purchasers. The fact that a number of the seller's clients decide not to be represented by the ~~purchaser~~ purchasers but take their matters elsewhere, therefore, does not result in a violation. ~~Neither does a return~~ Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

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

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area

of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Single Purchaser Sale of Entire Practice or Entire Area of Practice

~~[5]~~ [6] ~~The Rule requires a single purchaser that the seller's entire practice, or an entire area of practice, be sold. The prohibition against piecemeal sale of a less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. If This requirement is satisfied, however, the even if a purchaser is unable to undertake all a particular client matters matter because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the~~

~~requirement that there be a single purchaser is nevertheless satisfied.~~

Client Confidences, Consent and Notice

~~[6]~~ [7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and ~~any proposed change in the terms of future representation~~, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

~~[7]~~ [8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation.

Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

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

FEE ARRANGEMENTS BETWEEN CLIENT AND PURCHASER

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

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

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure ~~client~~ the client's informed consent after consultation for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

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

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements,

and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

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

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

Model Rule 1.17

Reporter's Explanation of Changes

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

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

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

2. Paragraphs (c)(2) and (d): Eliminate buyer's right to refuse representation

unless seller's clients agree to pay
increased fee

Paragraph (d) of the current Rule states that the fees charged clients shall not be increased by reason of the sale. However, it also allows the buyer of a practice to tell the seller's clients that the buyer will not work on their cases unless they agree to pay a greater fee than they had agreed to pay the seller. The only limit is that the buyer may not charge the seller's clients more than the buyer charges the buyer's other clients for "substantially similar services." This is problematical because the seller could not unilaterally abrogate the fee agreement as a matter of contract law. The seller could have withdrawn as permitted under Rule 1.16, but the seller certainly could not have refused to continue the representation unless the client agreed to a modification of the fee contract. In this regard, the Commission thinks the buyer should stand in the shoes of the seller and has modified paragraph (d) accordingly. This proposal is in accord with the rules of California, Colorado (written contracts only), Florida, Iowa, Minnesota (must honor for one year), New Jersey, New York, North Dakota, Oregon, Tennessee (proposed rule), Virginia and Wisconsin.

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

COMMENT:

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

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

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

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

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

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

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

PROPOSED AMENDMENTS TO RULE OF PROFESSIONAL CONDUCT 2-300

If my recommendations are accepted, we would amend Rule of Professional Conduct 2-300 as follows [redlined to show proposed changes]:

Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased ~~All or substantially all of the~~ law practice, or an area of practice, of a ~~lawyer~~member, living or deceased, including goodwill, may be sold ~~to another member or law firm~~ subject to all the following conditions:

(A) The lawyer whose practice is sold substantially ceases to engage in the private practice of law, or in the area of practice that has been sold, or in the geographic area in which the practice has been conducted, or has died.¹

(B) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms.²

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

(BD) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then:³

(1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller

¹ Adapted from Model Rule 1.17(a).

² Adapted from Model Rule 1.17(b).

³ I recommend that the semicolons after introductory paragraphs be changed to colons for correct punctuation.

pursuant to Business and Professions Code section 6180.5, then, prior to the transfer:³

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

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

(2) in all other circumstances, not less than 90 days prior to the transfer:³

(a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may

take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

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

(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member⁴ shall be taken.

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

(E) Confidential information shall not be disclosed to a non-~~lawyer~~member in connection with a sale under this rule.⁵

⁴ I recommend that, at least for the time being, we leave "member" in this paragraph. Otherwise a person not admitted to the California State Bar could be substituted as attorney of record. Whether we should leave the word "member" in this paragraph permanently will depend on how we define "member" and "lawyer" ultimately.

⁵ I recommend that we substitute "lawyer" for "member" in this paragraph because, if an out-of-state firm is going to purchase the practice of a California lawyer, that firm will probably want to perform due diligent and should be permitted to do so. However, I raise the question of whether we should add a comment in the Discussion to the effect that

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

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

Pursuant to this Rule, when a lawyer ceases to practice, ceases to practice in an area of law, ceases to practice in a geographic area, or dies, his or her practice may be sold to another lawyer or law firm.⁶

The requirement that substantially all of the practice, or all of an area of practice, or all of a practice in a geographic area be sold is satisfied if the seller in good faith makes the entire practice, the practice in an area of law, or the practice in a geographic area available for sale to purchasers. The fact that some of the seller's clients decide not to be represented by the purchasers, but take their matters elsewhere, does not result in a violation.⁶

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.⁶

confidential information shall not be disclosed to an out-of-state attorney if it would jeopardize the confidentiality of the information under California law or the law of another jurisdiction. I think this is a non-issue, but I have not researched it.

This 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, or of less than a geographic area 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 only the most lucrative fee generating matters. The purchasers are required to undertake substantially all client matters in the practice or practice area, or in the geographic 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.⁶

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

Paragraph (C) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.⁷

Transfer of individual client matters, where permitted, is governed by ~~Rule~~ 2-200.

Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law

⁶ These paragraphs are adapted from the Comment to Model Rule 1.17 as amended in 2002.

⁷ Same as existing first paragraph of Discussion.

practice is governed by ~~Rule~~ Rule 1-320.
~~(Amended by order of Supreme Court,
operative September 14, 1992.)~~

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

(9930.16:113:vy)

**RE: Rule 2-300
8/27-28/04 Commission Meeting
Open Session Item III.J.
Supplemental Mailing**

-----Original Message-----

From: Melchior, Kurt W. [mailto:KMelchior@Nossaman.com]
Sent: Tuesday, August 10, 2004 12:02 PM
To: Difuntorum, Randall
Cc: jsapiro@sapirolaw.com
Subject: Rule 2-300

I. With apologies, and in circumstances noted in my e mail a few minutes ago, this is a somewhat cobbled-together report for myself alone, due to Jerry's unavailability.

1. One major difference between 2-300 and ABA 1.17 -- which by the way was added by action of the California delegation, adapted from our 2-300 -- is that ABA allows sale of "an area of law practice" whereas CA does not. On principle this makes sense, as e.g. if a general practice lawyer wants to semi-retire and give up his or her litigation practice to limit the practice to, say, estate planning and such matters. The problem is that no one has apparently defined "area of practice." This was discussed during the '80s and we thought then that a definition would be elusive. For instance, a lawyer lands a big insurance bad faith case, never had one like it, starts it and founders. Can he/she sell that "area of practice" consisting of a single case (or a few cases), cash out up front, and the devil with fee splitting and 2-200? You can see the potential variations, and particularly the possibilities for buying up **cases** instead of meaningful **practice areas**. This subject should be debated: while I support the concept of sale of an area of practice, I believe that there must be controls and haven't found any.

2. Because this subject involves barter in client confidences and also the involvement of non-lawyers (where the seller is deceased) it is necessarily technical and wordy. California has been quite specific in referencing many B&P sections and other related rules; the ABA has -- no doubt unavoidably, since it offers a more generic model -- been more general. I recommend that we retain the specific detail of cross references etc.

3. The ABA model does not refer to the sale of the practices of deceased lawyers except in the discussion. California deals with the subject specifically and in detail (2-300(B)(1)). I think that the mention of deceased lawyers' practices in our present rule is the only extant authority which allows such sale and that its deletion might allow an argument that the right to sell such practices was abandoned, or is not otherwise allowed. Moreover, the detailed material is helpful and should be retained.

4. Also, California has specific reference to practices over which a court has assumed jurisdiction due to incapacity etc. (see 2-300(B)(2)(a) and (b)), and the ABA rule does not, no doubt for the same reasons. Again, and for like reasons, I recommend that we keep what we have.

5. The ABA requires that there be a single buyer or firm; we do not. I think that the ABA's is the better version since it prevents selling off particular cases under the guise of selling practice areas. Although I can think of good arguments in the other direction -- one buyer is interested in probate, another in the franchising practice, etc. -- the ABA's seems like the better idea. Subject to discussion, I recommend it.

6. The ABA rule is much crisper and shorter than ours; and in many ways that is commendable. Ours may be one of the longest in the entire set of California rules. There is no time to parse words or phrases individually in the face of the unfortunate time limitations. We can elaborate on

those matters over future sessions; but I think that the items I have flagged are sufficient to get the discussion started later this month.

PLEASE NOTE: The information in this e-mail is privileged, confidential and protected from disclosure. If you have received this e-mail in error or are not the intended recipient, you may not use, copy or disclose this message or any information contained in it to anyone. Please notify the sender by reply e-mail and delete the message. Thank you.

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(August 2, 2004)

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NOTE: Refer to comment no. 2002-04 (Edward Poll) included in the clear public comment binder.

RULE AMENDMENT HISTORY (2004)

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

Current Rule

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

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

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

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

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

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

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

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

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

RULE AMENDMENT HISTORY (2004)

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

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

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

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

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

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

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

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

Amendments Operative 1992 (Comparison of Current Rule to 1989 Rule)

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

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

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

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

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

(a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the

RULE AMENDMENT HISTORY (2004)

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

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

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

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

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

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

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

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

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

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

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

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

RULE AMENDMENT HISTORY (2004)

Summary of 1992 Amendments

Proposed amendment to subparagraphs (B)(1), (B)(2)(a) and (B)(2)(b) would add reference to Business and Professions Code, section 6180.5, regarding the courts' authority to assume jurisdiction over an attorney's practice where the attorney dies, resigns or becomes an inactive member of the State Bar (either voluntarily or involuntarily).

Proposed amendment to subparagraphs (B)(2)(a) and (B)(2)(b) would require that a new attorney appointed by the court pursuant to section 6180.5 comply with the written notice and consent requirements found in these two subparagraphs. Proposed amendment to subparagraph (B)(1) would clarify that subparagraphs (B)(1)(a) and (B)(1)(b) do not apply in situations where a new attorney has been appointed by the court pursuant to section 6180.5.

[December, 1991 green bound rule filing at page 12]

Text of New Rule Operative 1989

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

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

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

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

(1) if the seller is deceased, has a conservator or other person acting in a representative capacity, prior to the transfer;

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

(b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.

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

(a) the seller 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

RULE AMENDMENT HISTORY (2004)

retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and

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

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

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

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

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

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

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

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320.

Additional Summary of 1989 Rule Proposal in Response to Supreme Court's letter of Inquiry Dated June 9, 1988

As to the question regarding fee increases after the sale, the proposed language was patterned after the language in current rule 2-108 and was not intended to prohibit all post sale fee increases. It was intended to prohibit the purchaser from routinely charging the "purchased" clients a higher fee than is charged to existing clients to cover the costs of the purchase. In order to clarify conduct prohibited by paragraph (A), it is recommended that the following paragraph be added to the Discussion portion of the rule:

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

As to the question regarding giving notice to all clients whenever a sale is made, the Discussion portion of the rule states that the rule is not intended to permit piecemeal sale

RULE AMENDMENT HISTORY (2004)

of cases, except in rare instances, but rather to permit and regulate the sale and purchase of entire law practices. Therefore, if a member determines to sell his or her practice, except in rare instances, all clients will be subject to the transfer and will therefore receive the notice contemplated by paragraph (B).

As to the concern about inserting a provision indicating that the seller is bound by the ethical duty of confidentiality, such a provision was thought to be redundant because all members of the bar are bound by all the standards of professional responsibility, including Business and Professions Code section 6068, subdivision (e), in whatever situation.

The question raised requiring the seller, rather than the purchaser, to send the notice to avoid the disclosure of confidential information raises the issue of client protection. If the attorney whose law practice is being sold is deceased or is represented by another, the sale might well be handled by someone other than the lawyer. Because the sale might be handled on the seller's side by a non-lawyer, it was determined to impose the duty on the purchaser to send the notice. This is because the purchaser is the one party to the transaction who is certain to be a member of the bar. If the duty to send the notice was placed on the seller, who might not be a lawyer and is therefore not bound by the Rules of Professional Conduct, compliance with the notice requirement could not be ensured.

The Court also inquired regarding the requirement that a written notice be sent 90 days prior to the transfer of the files to avoid disclosure of client secrets prior to consent of the client to the transfer. This involves the same issue of client protection outlined above. There was great concern that if the seller is deceased, has a conservator or other person acting in a representative capacity and the purchaser does not have access to the files, client matters might be left unattended for the 90 day period between the notice and transfer of the files. Allowing flexibility in the time for transfer and permitting the purchaser to act in an emergency on behalf of a client of the seller before the 90day period for response expired would afford the client greater protection in those situations in which the seller is deceased or incapacitated.

Upon further reflection, it appears that greater client protection would be afforded if the rule contained the procedures outlined in the Court's letter in those situations in which the seller is not deceased, has not had a conservator appointed, nor has another person acting for him or her in a representative capacity. Therefore, the version of the rule most recently adopted by the Board imposes this duty of giving notice to the client on the seller in those situations in which the seller is acting on his or her own behalf in the sale.

As to those situations in which the seller is deceased, has had a conservator appointed, or has another acting in a representative capacity, the version of the rule currently being recommended continues to impose the duty of notice to the client on the purchaser because, in those situations, the client would be afforded the greatest protection possible.

Excerpt from Supreme Court's June 9, 1988 Letter of Inquiry Concerning Select Rules from December, 1991 Rule Filing Submission

....

3. Proposed Rule 2-300(A) (Sale or Purchase of a Law Practice of a Member, Living or Deceased) contains ambiguous language limiting attorney's fee increases

RULE AMENDMENT HISTORY (2004)

following the sale and purchase of a law practice. Does the subdivision prohibit all post-sale fee increases? Or, is it simply intended to prohibit unnecessary, unreasonable, or inadequately noticed fee increases? If so, should notice be sent to all clients whenever a sale takes place under this rule? Proposed Rule 2-300 further omits a necessary provision which would indicate that all activities of the seller are subject to Proposed Rule 3-100 (Duty to Maintain Client Confidence and Secrets Inviolable). Even if proposed rule 3-100 does apply, rule 2-300(B) should require the seller, not the purchaser, to send written notice to the client to prevent disclosure of any privileged or confidential client identification information. (See *People v. Pic'l* (1981) 114 Cal.App.3d 824, 883; *Willis v. Superior court* (1980) 112 Cal.App.3d 277, 291.) To the same end, should proposed rule 2-300(B) specify that the written notice should be sent to the client at least 90 days prior to the transfer, whenever any sale occurs under this rule?

Summary of 1989 Rule Proposal

Proposed rule 2-300 was drafted by COPRAC after an extensive study. The lack of express standards to guide members concerning the termination of their practices results in inadequate protection of clients and the lack of an orderly transfer of client matters to new counsel.

In addition, a member who retires from a firm may receive retirement compensation which can include the value of the member's share of goodwill. In contrast, a sole practitioner who retires from the practice of law cannot receive compensation which includes the value of the goodwill of the practice. (*Geffen v. Moss* (1975) 53 Cal.App.3d 215.)

The proposed rule would permit compensation which includes the value of goodwill and would regulate such sales in order to protect the rights and interests of existing clients and potential consumers of legal services.

[December, 1987 grey bound rule filing at pg. 27]

Excerpt from September 27, 2001 Memorandum

DATE: September 27, 2001

TO: The Commission for the Revision of the Rules of Professional Conduct

FROM: Mike Nisperos, Jr., Chief Trial Counsel

SUBJECT: Recommendations for Changes to the Rules of Professional Conduct

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

OCTC's recommends making the rule clear that the sale of a law firm will not result in a change in the client's fee by deleting the word solely.

Revise the rule as follows:

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

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

. . .

STATE BAR COMMENTS:

OCTC recommends that the term solely be removed from section A. The use of the term solely implies that the fee could be increased in part due to the sale of the firm. This is not appropriate. The fees the client consented to pay should be enforceable unless the client consents to a different fee for legitimate reasons. And, of course, all fees should be reasonable.

Cal. Rule 2-300 – Sale or Purchase of a Law Practice of a Member, Living or Deceased	ABA Model Rule 1.17 – Sale of Law Practice	Comments
All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:	A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:	ABA does not bring up deceased members until the discussion. It also specifies that you can sell just an area of practice, a modification new with Ethics 2000, which was championed by the ABA’s Solo Section.
(A) Fees charged to clients shall not be increased solely by reason for such sale.	(d) The fees charged clients shall not be increased by reason of the sale. [10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.	The ABA has the same rule, but expands on it in the discussion.
(B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions code section 6068, subdivision (e), then;		No ABA equivalent. For an analogous situation, see ABA Formal Ethics Opn. 99-414 (9/8/1999) (Ethical Obligations When A Lawyer Changes Firms).
(1) If the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer;	[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to	The ABA does not have a reference to deceased clients in the content of the rule itself, but does state in the discussion that sale of a deceased client’s practice is still governed by these rules. In all circumstances regarding the sale of a practice, the seller is to contact the client.

Cal. Rule 2-300 – Sale or Purchase of a Law Practice of a Member, Living or Deceased	ABA Model Rule 1.17 – Sale of Law Practice	Comments
	see to it that they are met.	
<p>(a) The purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client’s rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in 1-400(D) and any provisions relating to attorney-client fee arrangements, and</p>		No ABA equivalent since in all instances the seller or representative of the seller is to contact the clients.
<p>(b) The purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the</p>		No ABA equivalent.

Cal. Rule 2-300 – Sale or Purchase of a Law Practice of a Member, Living or Deceased	ABA Model Rule 1.17 – Sale of Law Practice	Comments
notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client’s last address as shown on the records of the seller, or the client’s rights would be prejudiced by a failure to act during such 90-day period.		
(2) in all other circumstances, not less than 90 days prior to the transfer;		
(a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the	(c) The seller gives written notice to each of the seller's clients regarding: (1) the proposed sale; (2) the client's right to retain other counsel or to take possession of the file; and (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.	The ABA and CA rules are consistent here with the exception being the references to specific CA statutes and other rules.

Cal. Rule 2-300 – Sale or Purchase of a Law Practice of a Member, Living or Deceased	ABA Model Rule 1.17 – Sale of Law Practice	Comments
requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and		
(b) The seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client’s last address as shown on the records of the seller.	[7] The Rule provides that before such information [confidential 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.	Per the ABA, the client needs to consent in order for a transfer of representation. But for the confidential information, this will be transferred to the new attorney with no consent after 90 days.
(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.	[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).	ABA says that the approval of the tribunal must be obtained before the sale where as the CA rule just says that all steps necessary shall be taken. The approval of the tribunal may be one of the steps necessary, but it is not singled out.
(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.	[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.	ABA has this in the discussion and does not specifically say the purchaser, but all lawyers participating in the sale.

Cal. Rule 2-300 – Sale or Purchase of a Law Practice of a Member, Living or Deceased	ABA Model Rule 1.17 – Sale of Law Practice	Comments
(E) Confidential information shall not be disclosed to a nonmember in connection with a sale under this rule.		No ABA equivalent.
(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.	[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.	ABA and CA rules are almost identical.
DISCUSSION: [1] Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing client.	[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.	The ABA does not compare the existing clients of the purchaser to the acquired clients; they just say that they cannot charge clients a higher fee because of the costs of the sale.
[2] “All or substantially all of the law practice of a member” means, for purpose of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients’ files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).	[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 ABA requires that the entire practice be sold or one area of their practice. Whether this means that a lawyer could not retain just one or two clients under the California test would have to be decided by a court.

Cal. Rule 2-300 – Sale or Purchase of a Law Practice of a Member, Living or Deceased	ABA Model Rule 1.17 – Sale of Law Practice	Comments
[3] Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320.		No ABA equivalent.

-----Original Message-----

From: Harry Sondheim [mailto:hbsondheim@earthlink.net]

Sent: Monday, October 04, 2004 1:40 AM

To: Ethics: Rules Revision Commission

Subject: [rrc] Rule 2-300

Commission Members--

The only issues previously raised regarding this rule (see proposed assignment agenda sent on 9/9/04, which set a 9/20/04 deadline for comments), are the following:

1. Jerry Sapiro's discussion in the second paragraph of his memo regarding this rule. (P. 111 of the agenda materials.) With regard to Jerry's discussion, it should be noted that Kurt previously expressed a preference that there be a single buyer or firm. (Aug. 10, 2004 e-mail set forth at p. 1 of Kevin's compilation of e-mails regarding this rule.)

2. OCTC suggestion that the word "solely" be removed from paragraph (C). (See Kevin's compilation, p. 1.)

3. An obvious typo: The word "the" is missing from the beginning of the rule since "all or substantially all of the" has been deleted.

Absent extenuating circumstances, these are the only issues which will be discussed regarding this rule.

Cheers,
Harry

You are currently subscribed to rrc as: lauren.mccurdy@calbar.ca.gov.

To unsubscribe send a blank email to leave-rrc-3356D@calbar.org

September 27, 2001 OCTC Comment to RRC:

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

OCTC's recommends making the rule clear that the sale of a law firm will not result in a change in the client's fee by deleting the word solely.

Revise the rule as follows:

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

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

* * *

STATE BAR COMMENTS:

OCTC recommends that the term solely be removed from section A. The use of the term solely implies that the fee could be increased in part due to the sale of the firm. This is not appropriate. The fees the client consented to pay should be enforceable unless the client consents to a different fee for legitimate reasons. And, of course, all fees should be reasonable.

February 19, 2002 Edward Poll Letter to RRC (Public Comment #2002-04):

[KEM SUMMARY]

Mr. Poll notes that the Ethics 2000 Commission adopted a revision to the 1983 version of MR 1.17, a rule very similar to California's rule 2-300.

The revision allows a lawyer to sell an "area of practice" and not just an entire practice. He favors the revision because: (1) it allows a "lawyer to slow down instead of stopping altogether"; (2) it levels the playing field for solos compared with large firms (with "of counsel" option, etc.); and (3) assures clients they will have a lawyer "interested and committed to their matter/case."

August 10, 2004 Melchior E-mail to RRC (transmitted by Randy D on 8/10/2004):

-----Original Message-----

From: Melchior, Kurt W. [mailto:KMelchior@Nossaman.com]

Sent: Tuesday, August 10, 2004 12:02 PM

To: Difuntorum, Randall

Cc: jsapiro@sapirolaw.com

Subject: Rule 2-300

With apologies, and in circumstances noted in my e mail a few minutes ago, this is a somewhat cobbled-together report for myself alone, due to Jerry's unavailability.

1. One major difference between 2-300 and ABA 1.17 -- which by the way was added by action of the California delegation, adapted from our 2-300 -- is that ABA allows sale of "an area of law

practice" whereas CA does not. On principle this makes sense, as e.g. if a general practice lawyer wants to semi-retire and give up his or her litigation practice to limit the practice to, say, estate planning and such matters. The problem is that no one has apparently defined "area of practice." This was discussed during the '80s and we thought then that a definition would be elusive. For instance, a lawyer lands a big insurance bad faith case, never had one like it, starts it and founders. Can he/she sell that "area of practice" consisting of a single case (or a few cases), cash out up front, and the devil with fee splitting and 2-200? You can see the potential variations, and particularly the possibilities for buying up **cases** instead of meaningful **practice areas**. This subject should be debated: while I support the concept of sale of an area of practice, I believe that there must be controls and haven't found any.

2. Because this subject involves barter in client confidences and also the involvement of non-lawyers (where the seller is deceased) it is necessarily technical and wordy. California has been quite specific in referencing many B&P sections and other related rules; the ABA has -- no doubt unavoidably, since it offers a more generic model -- been more general. I recommend that we retain the specific detail of cross references etc.

3. The ABA model does not refer to the sale of the practices of deceased lawyers except in the discussion. California deals with the subject specifically and in detail (2-300(B)(1)). I think that the mention of deceased lawyers' practices in our present rule is the only extant authority which allows such sale and that its deletion might allow an argument that the right to sell such practices was abandoned, or is not otherwise allowed. Moreover, the detailed material is helpful and should be retained.

4. Also, California has specific reference to practices over which a court has assumed jurisdiction due to incapacity etc. (see 2-300(B)(2)(a) and (b)), and the ABA rule does not, no doubt for the same reasons. Again, and for like reasons, I recommend that we keep what we have.

5. The ABA requires that there be a single buyer or firm; we do not. I think that the ABA's is the better version since it prevents selling off particular cases under the guise of selling practice areas. Although I can think of good arguments in the other direction -- one buyer is interested in probate, another in the franchising practice, etc. -- the ABA's seems like the better idea. Subject to discussion, I recommend it.

6. The ABA rule is much crisper and shorter than ours; and in many ways that is commendable. Ours may be one of the longest in the entire set of California rules. There is no time to parse words or phrases individually in the face of the unfortunate time limitations. We can elaborate on those matters over future sessions; but I think that the items I have flagged are sufficient to get the discussion started later this month.

August 15, 2004 Voogd E-mail/Memo to RRC:

I prefer the ABA rule.

September 24, 2004 E-mail from Sapiro, Martinez & Melchior to RRC:

In his memorandum dated August 15, 2004, at page 3, Tony Voogd says that he prefers the ABA rule. The assignment memorandum for our October 8th meeting assigns the co- drafters to consider and respond to Tony's comment and submit a redraft.

We respectfully disagree with Tony. Our rule contains more client protection matters, particularly in paragraph (B). In addition, our rule properly cross-references Rules 3-300 and Rule 3-310. We recommend that these be retained and have retained them, in substance, in the proposed amendment starting at page 2 of Jerry's memorandum dated August 20, 2004.

There is one aspect of the sale of an area of practice which is still of concern, and we invite discussion of it at our meeting. Someone who is getting old and sells off a litigation practice so that he or she can limit himself or herself to trusts and estates is fine. But we have not come up with a cogent way to draft around someone selling an "area of practice" which basically consists of one, big, fat contingency case. If that is, for example, a patent infringement case over widgets, the lawyer could sell it and claim that is the sale of an entire practice area of IP claims concerning widgets. But if that practice area consists of just that one case, or even a few cases, that would be the kind of cherry picking our current rule and the ABA Model Rule dissuade. The selling lawyer could sell that one case, withdraw from the "dog" cases, and let the clients in the less lucrative cases fend for themselves. The ABA Model Rule and its discussion do not suggest a cogent approach to prohibiting this conduct. We raise for discussion whether this is realistically a potential problem, whether we should try to deal with it, and, if so, how.

However, in preparing this comment, we noticed that, because of Jerry's inaccurate proofreading, paragraphs (C), (D), (E), and (F) of our existing Rule 2-300 were not correctly lettered at pages 24 and 25 of Jerry's August 20th memorandum. Since Jerry proposes to add proposed new paragraphs (A) and (B), those paragraphs should have become (D), (E), (F), and (G), respectively. Jerry apologizes for any confusion that he may have been caused.

With best regards to all of you,

Raul, Kurt and Jerry