

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Friday, October 02, 2009 8:04 AM
To: McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi
Cc: Jerome Sapiro; Robert L. Kehr; Raul Martinez; Kurt Melchior; Harry Sondheim; Kevin Mohr G
Subject: RRC - 2-300 [1.17] - III.MM - October 16-17, 2009 Meeting Materials - Redux
Attachments: RRC - 2-300 [1-17] - Dash, Intro, Rule, Comment, Dissent, Pub Com - COMBO- DFT2 (10-02-09)KEM.pdf

Greetings Lauren:

To make your job a little easier, I've attached all the materials you need for 1.17 in a single, scaled PDF file. Yesterday I sent you the rule & comment comparison chart and the public comment charts. I have now completed the dashboard and introduction, and the attached PDF includes those documents, the documents I sent yesterday, and Kurt's dissent in a 2-column format.

Please note that the drafters have not had an opportunity to review the attachments. I've tried to incorporate all of their comments in the Rule & Comment Chart. The Introduction represents my efforts alone and any errors are laid at my feet.

I have not attached the underlying Word documents; I'll send those separately later. I realize that you and the others working on putting together the agenda have enough to chew on coordinating the packaging of 30+ rules for the agenda mailing w/o having to sort through e-mail attachments.

The ingredients of the attached file are:

1. Dashboard, Draft 2 (10/2/09)KEM;
2. Introduction, Draft 1 (10/1/09)KEM;
3. Rule & Comment Comparison Chart, Draft 1 (10/1/09)KEM;
4. Minority Dissent, 2 Column format;
5. Rule 1.17.1 Public Comment Chart, Draft 1 (9/29/09)RD-KEM; and
6. Rule 1.17.2 Public Comment Chart, Draft 1 (9/29/09)RD-KEM.

I hope it is not too late to get this in the agenda package. If it is too much hassle, we can send it by e-mail later today.

Please let me know if you have any questions. Thanks again for your incredible efforts.

Kevin

--

Proposed Rule 1.17 [2-300]

“Purchase and Sale of a Law Practice”

(Draft #3.3, 9/29/09)

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.

Comparison with ABA Counterpart	
Rule	Comment
<input 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 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

Case law

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

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

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

Stakeholders and Level of Controversy

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

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.17* Purchase and Sale of a Law Practice

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

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. Further protections have been added to promote protection of the clients of the selling lawyer: (1) the sale of the practice must include the entire practice; lawyers will not be permitted to “cherry pick” lucrative matters and leave less 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 the 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 the rule’s requiring the buyer to abide by pre-existing fee agreements; and (5) appropriate protections for confidentiality of the clients have been made part of the rule.

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

* Proposed Rule 1.17, **Draft 3.3 (9/29/09)**.

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. [**KEM to add later**].

<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 Law Practice</u></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,</u> or an <u>geographic</u> area of law-practice, including good will, <u>only</u>¹ if the following conditions <u>set forth in paragraphs</u>² (a) through (g) are satisfied:³</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 area of practice that has been sold, [in the <u>substantive field or geographic area]</u> [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been <u>seller</u> conducted; <u>the portion of the practice being sold.</u></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, is sold to one available for sale, and the <u>purchase and sale includes all</u> or more <u>lawyers</u> <u>substantially all of the practice,</u> or law firms; <u>of the substantive field or geographic area</u></p>	

* Proposed Rule 1.17, **Draft 3.1 (9/29/09)**. Redline/strikeout showing changes to the ABA Model Rule.

¹ **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 8-3-1 to add “only” before “if” in the introductory clause to the Rule. See 7/24-25/09 KEM Meeting Notes, VI.B., at ¶. 5A.

²

³ **RRC Action:** At the 7/24-25/09 meeting, reversion to the Model Rule language, but with reference to both “a substantive field of practice” and “a geographic area of practice” retained, was deemed approved. See 7/24-25/09 KEM Meeting Notes, VI.B., at ¶. 4.c.(1).

<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</u> Sale of <u>a</u> Law Practice</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>of the practice.</u></p>	
	<p>(c) The entire law practice, the entire substantive field of practice, or the entire geographic area of practice is sold to one or more lawyers or law firms.⁴</p>	
<p>(c) The seller gives written notice to each of the seller's clients regarding:</p>	<p>(c) The seller gives written notice to each of the seller's clients regarding: <u>(ed) 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>(1) the proposed sale;</p>	<p>(1) the proposed sale; <u>(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:</u></p>	

⁴ See footnote 14, below.

<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</u> Sale of <u>a</u> Law Practice</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(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 lawyer⁵ as provided by Rule 1.16(e); and that, if no response is received to the notice⁶ 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;⁷ and</p>	
	<p>(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 purchaser receives no response to the</p>	

⁵ **RRC Action:** At the 7/24-25/09 meeting, substitution in paragraphs (c)(1)(A) and (c)(2)(A) of "in the form or format held by the lawyer" for "held by the lawyer in any form or format" was deemed approved. See 7/24-25/09 KEM Meeting Notes, VI.B., at ¶. 7.b.

⁶ **Drafters' Note:** This change is to make the wording parallel with the use of "notice" in the first line of the paragraph, and also parallel with the construction in paragraph (c)(2)(A).

⁷ **Drafters' Note:** Comma changed to semicolon because the paragraph is so long and because the preceding clauses are separated by semicolons.

<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</u> Sale of <u>a</u> Law Practice</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>paragraph (c)(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 to the extent that 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) the client's right to retain other counsel or take possession of the file; and <u>In all other circumstances, not less than 90 days prior to the transfer;</u></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>(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><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</u></p>	

<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</u> Sale of <u>a</u> Law Practice</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>the client may take possession of any client papers and property in the form or format held by the lawyer⁸ 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 to the extent that 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;⁹ 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 (c)(1)(B) notice within 90 days after it is sent to the client's last address as shown on the records of the seller, or to the extent that 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>	

⁸ See footnote 5.

⁹ **Drafters' Note:** Comma changed to semicolon because the paragraph is so long and because the preceding clauses are separated by semicolons.

<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</u> Sale of <u>a</u> Law Practice</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(d) The fees charged clients shall not be increased by reason of the sale.</p>	<p>(de)The fees<u>Fees</u> charged <u>to</u> clients shall not be increased <u>solely</u> by reason of the sale¹⁰<u>purchase, and the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.</u></p>	
	<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>(g) <u>A lawyer shall not disclose confidential client information to a non-lawyer in connection with a purchase or sale under this Rule.</u></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>¹¹</p>	

¹⁰ **RRC Action:** At the 7/24-25/09 meeting, deletion of the phrase "or sale" following "purchase" was deemed approved. See 7/24-25/09 KEM Meeting Notes, VI.B., at ¶. 7.c.

¹¹ See footnote **Error! Bookmark not defined.**

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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>[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will.¹² 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>[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 section 6068(e).¹³</p>	

¹² **Drafters' Recommendation:** Retain first two sentences of MR 1.17, cmt. [1] because they provide context for the Rule and reflect case law in other jurisdictions to the effect that clients are not commodities. Jerry believes the sentences are unnecessary.

¹³ **Drafters' Note/Recommendation:** Comment added to make clear that this rule applies to sales of the practice by a fiduciary acting for a lawyer or lawyer's estate and does not only permit a lawyer to sell a practice. There was an issue about whether the reference to "fiduciaries" implied suggested that "brokers" are not "lawyers" within the meaning of the Rule. See next footnote.

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[1B] A sale to one or more lawyers or law firms does not violate this Rule. A seller is not required to sell only to one lawyer or law firm.¹⁴</p>	

¹⁴ **Drafters' Note:** Comment added to make clear that a sale of an entire practice or area of practice to more than one lawyers or law firms does not violate this rule.

KEM: The ABA rule explicitly provides this. See MR 1.17(b). This either belongs in the rule itself or should be deleted.

Note that at its 12/12/08 meeting, the RRC voted 5-4 to delete paragraph (a)(8) ("the sale is directly to one or more lawyers or law firms") from rule 1.17.2 [area of practice rule]. Here is the discussion that was held:

7. Paragraph (a)(8) of Draft 8 (8/12/08) provides:

(8) the sale is directly to one or more lawyers or law firms:

a. Jerry: I recommend that it be stricken. It is appropriate but it can be worded more directly.

(1) If we are going to limit a broker from purchasing a practice, then we should say

7A. **MOTION:** Delete paragraph (a)(8).

YES: 5 NO: 4 ABSTAIN: 0

a. Jerry: Comment should state the sale must be directly to another lawyer or law firm but does not proscribe the payment of a brokerage fee, so long as it doesn't violate 1-320 [5.4].

b. KEM: by the vote, were you voting against the concept of prohibiting brokers or simply the indirect prohibition as provided in (a)(8)?

c. Harry: The latter. This is something about which Nace was very concerned.

The foregoing vote and subsequent exchange among Jerry, Harry and me suggests that if we want to limit or prohibit brokers, then we should do so explicitly rather than impliedly as we have done in proposed Comment [1A]. We did that in the introductory paragraph of Draft 1.2 (discussed at the July 2009 meeting) by including there a reference to "one or more lawyers or law firms." I think that in voting to return to the Model Rule introduction in our "vote-on-the-fly" during the July meeting, we inadvertently voted to delete that important limitation.

KEM Recommendation: We should include an express provision in the Rule itself, perhaps new paragraph (c), that tracks MR 1.17(b), which provides:

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Termination of Practice by the Seller</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</p>	<p>Termination of Practice by the Seller</p> <p>[2]¹⁵ The requirement that all of the private practice, or all of an <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>¹⁶ therefore, does not result in a violation. <u>If a client does not agree to retain the buyer, the selling lawyer is not relieved from responsibility for the representation unless the seller is permitted to withdraw from the representation. in accordance with</u>See Rule <u>{1.16}</u>.</p>	

We could revise it as follows to track our language in the introductory clause:

~~(b)~~ (c) The entire law practice, the entire substantive field of practice, or the entire geographic area of practice is sold to one or more lawyers or law firms;

RLK: Except for one unnecessary comma (the one after the third "practice"), I support Kevin's recommendation. I did not understand that the vote he described was intended to remove either the prohibition of sales to brokers or the right to sell to more than one lawyer or law firm, only that it was going to be reworded. His recommendation covers both topics.

Drafters' Note: New paragraph (b) has been added. See above.

¹⁵ Drafters' Note: Comment [2] is substantially the same as Mode Rule Comment [2].

¹⁶ Drafters' Note: Addition to make clear that, if a client or clients refuse to retain the buyer and refuses to discharge the selling lawyer, the seller does not thereby violate the rule. If client(s) do not consent to substitution of the selling lawyer or law firm, he, she or it may have to move a tribunal for leave to withdraw. New sentence added for the same reasons and to make the seller's duty explicit. KEM: I've revised the sentence slightly and removed the brackets around "1.16" to conform to our style.

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>retention election for the office or resigns from a judiciary position.</p>		
	<p>[2A]¹⁷ 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 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 <u>or retires</u> from a judiciary position.</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>[3]¹⁸ 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>	

¹⁷ **Drafters' Note:** Proposed Comment [2A] is substantially identical with the last half of Model Rule 1.17 Comment [2]. We have broken up the comment because it deals with two subjects and is easier to read if divided into two shorter comments. We have added retirement to the comment to avoid a possible misinterpretation that a judge who retires may not reenter practice without violating this rule. "Judiciary" changed to "judicial" because the latter is the correct adjective.

¹⁸ **Drafters' Note:** Identical with Model Rule Comment [3]. Model Rule and to make the scope of what may be sold explicit. New second sentence added to make clear that a seller who withdraws from practice in California does not violate this Rule. Balance of Model Rule Comment [4] is deleted as unnecessary guidance for drafting a rule.

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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]¹⁹ This Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction<u>this state or within a defined geographic area of this state</u>. <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 by seller and buyer.</u>²⁰ 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>	

¹⁹ **Drafters' Note:** Reference to "this Rule" is to be consistent with the Commission's style. Change from "the jurisdiction" to "this state or within a defined geographic area of this state" is ~~to delete the guidance in the Model Rule and intended~~ to make the scope of what may be sold explicit. New second sentence added to make clear that a seller who withdraws from practice in California or an area of practice within California does not violate this Rule. Balance of Model Rule Comment [4] is deleted as unnecessary guidance for drafting a rule.

²⁰ **KEM Note:** I've added this romanette to capture the gist of the Model Rule comment, which contemplates the sale of a geographic area of practice in larger states such as California which, like Gaul, is divided into three parts: Southern, Northern (i.e., Bay Area and environs), and everything else. 😊

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.17 Sale of Law Practice Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.17 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<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</p>	<p>[5]²¹ This Rule also permits a lawyer or law firm to sell a <u>substantive area-field</u> of practice. If a <u>substantive area-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 <u>substantive area-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 1.5(e)<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 <u>or law firm who that sells the practice in California this state or in leaves a jurisdiction or an agreed²²</u> geographical area of this</p>	

²¹ **Drafters' Note:** Based on Model Rule Comment [5]. "Substantive field" has been added to distinguish between sale of a geographic area of practice and sale of a substantive aspect-field of the practice. "Law firm" added because the rule permits a firm to sell and is not limited to a sale by a sole practitioner. Last sentence revised to make it accurate in light of the black letter rule.

²² **KEM Note:** I'm not sure what we mean by "agreed". If we mean a geographic area whose scope has been agreed to seller and buyer, then we should so state. If that language raises the specter of opportunistic gerrymandering, then I would simply delete the word "agreed" and leave what is appropriate demarcation of a geographic area to case law.

RLK: I agree and would change "an agreed" to: "a". Also, the preceding line refers to a "geographical" although every other use in the Rule and the Comments is: "geographic".

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>the areas of the practice that were not sold.</p>	<p>state must make the entire practice in this state or in the geographic area available for purchase typically would sell the entire practice, this Rule permits the sellerlawyer to limit the sale to one or more substantive areasfields of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.</p>	
<p>Sale of Entire Practice or Entire Area of Practice</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>Sale of Entire Practice or Entire Area of Practice</p> <p>[6]²³ The Rule requires that the seller's entire <u>law</u> practice, or an entire <u>geographic or substantive</u> area of practice, be sold. The prohibition against sale of less than an entire <u>law practice, entire geographic area of practice or entire substantive field of practice</u> 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 <u>law practice, geographic area of practice, or substantive field of practice</u> 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 <u>or because one or more clients refuse to retain the purchasers</u>.</p>	

²³ **Drafters' Note:** Substantially the same as Model Rule Comment [6]. "Geographic or substantive" added to make clear that this comment applies to both situations; "practice" added to make clear that this comment applies if the entire practice is sold; and reference to clients who refuse to retain the buyer added to make clear that that circumstance does not cause the buyer or seller to violate this rule. See Comment [2] *supra*.

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Client Confidences, Consent and Notice</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 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,</p>	<p>Client Confidences, Consent and Notice</p> <p>[7]²⁴ Disclosures in confidence of client identities and matters during negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client 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 confidential²⁵ information relating to the representation or and 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 purchaserpurchasing</p>	

²⁴ **Drafters' Note:** Based on Model Rule 1.17 Comment [7]. First sentence revised because the sentence in the model rule is unclear. To Jerry, the preliminary discussions should disclose no more than is necessary to ascertain whether the buyer would have actual or potential conflicts of interest that would preclude representation or preclude representation without compliance with Rules 1.7 or 1.9. Last sentence added because the buyer may have to act as a Good Samaritan before the 90 day notice period expires, particularly if the selling lawyer is incapable of acting.

²⁵ **Drafters' Note:** We've added "confidential" to conform to our approved term of art in proposed Rule 1.6.

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>consent to the sale is presumed.</p>	<p><u>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>[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</p>	<p>[8]²⁶ 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</p>	

²⁶ **Drafters' Request for Discussion:** Jerry does not recommend adopting Model Rule 1.17 Comment [8]. It is substantively wrong. 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 substitution. Disclosure of confidential information to a tribunal, even *in camera*, may be held a waiver of confidentiality.

KEM Note: I think we need to address this issue, at least to some extent. Otherwise, we leave a gaping hole in the Rule, especially as there is a Model Rule comment that does squarely address this situation which is likely to arise. I would include the first two sentences of the Model Rule only and state something along the following: "A description of the procedure for obtaining a court order to transfer the matters is beyond the scope of this Rule. However, in seeking a court order, a lawyer must remain aware of his or her duties under Business and Professions Code section 6068(e)(1) and Rule 1.6."

I realize the foregoing is punting, but I think we need to at least raise the issue.

RLK: I would like to discuss this. My initial view is that Jerry is correct. Is there a procedure of the sort described Model Rule Comment [8] that permits a lawyer to obtain client abandonment absolution in order to retire?

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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).</p>	<p>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).</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]²⁷ 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, or of a geographic area of the practice, or a substantive area-field</u> of practice.</p>	
<p>Fee Arrangements Between Client and Purchaser</p> <p>[10] The sale may not be financed by increases in</p>	<p>Fee Arrangements Between Client and Purchaser</p> <p>[10]²⁸ The Paragraph (e) provides that the sale may</p>	

²⁷ **Drafters' Note:** Adapted from Model Rule Comment [9]. Additional language is to make clear that this comment applies in all three circumstances.

²⁸ **Drafters' Note:** The first two sentences of this Comment are nearly identical to Model Rule Comment [10], but a reference to paragraph (d), which has no counterpart in the Model Rule, has been added. The second sentence is added to make explicit the requirement that the buyer may need to execute new fee agreements.

KEM Question: Given that we have included paragraph (d), do we need this Comment?

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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>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 & 6148.</u></p>	
<p>Other Applicable Ethical Standards</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</p>	<p>Other Applicable Ethical Standards</p> <p>[11]²⁹ Lawyers participating in the sale of a law practice, <u>a geographic area of practice</u>, or a <u>substantive field of practice area</u> are subject to the ethical standards applicable to involving another</p>	

RLK: My answer to Kevin is "no", I don't think we need to paragraph. It repeats the Rule except for its reference to the B&P Code, which I don't think is needed.

JS: Jerry also agreed the first sentence was not necessary but that it was a good lead-in to the next two sentences. KEM is fine w/ keeping it and the rest of the comment.

²⁹ Drafters' Note: Adapted from Model Rule 1.17 Comment [11]. Jerry disagrees with using Rule 1.1 to define competence in choosing a buyer. Even the Model Rule does not say that. And he disagrees with using 1.1 to require competent representation in a single case. Our Rule 1.1 does not create discipline for a single act of incompetence. Jerry added 1.9 and the distinction between concurrent conflicts and conflicts from past representation to the parenthetical in order to make the concepts explicit. Rule 1.9 is not just based on preserving confidences and secrets. Should it be in the last parenthetical? KEM: To answer this last question, yes it should. See 1.9(c).

KEM Note: I disagree w/ Jerry concerning Rule 1.1. Regardless of whether proposed Rule 1.1 creates discipline for a single act of negligence, a lawyer should not sell his or her patent practice, for example, to a lawyer who is not licensed to practice before the PTO, even if the lawyer intends to take the Patent Bar Exam. Although our proposed rule 1.1 and MR 1.1 both permit lawyers to acquire the appropriate skill and learning through association or study, I think that dumping an entire practice on a newbie lawyer, or a lawyer with no demonstrated expertise in the area of specialty, regardless of the level of complexity of the matters, is "reckless" and demonstrates a material lack of judgment (not to mention a violation of one's duty of loyalty to one's clients).

RLK: We need to discuss this at the meeting. As I understand California law, there is no civil liability potential for making a bad referral.

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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>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, e.g., Rule 1.7 regarding concurrent conflicts, Rule 1.9 regarding conflicts arising from past representation, and Rule [1.0.1(-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>[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]³⁰ 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,³¹ but such the approval of the tribunal must be obtained before the seller may be relieved of responsibility for the matter. matter can be included in the sale (see Rule 1.16).</p>	

³⁰ **Drafters' Note:** Adapted from Model Rule 1.17 Comment [12]. Change is made because the timing of the hearing on a motion to substitute counsel should not impair the entry into the agreement for the sale. The seller remains responsible for the matter until properly substituted out. The sale is not of a "matter." The sale is a sale of all or part of the seller's practice.

³¹ **KEM Note:** I think the main point of the MR comment is that you can include the matter in the sale. I also agree with Jerry's cautionary note that the seller is still responsible until relieved by the tribunal.

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[12A]³² 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 directly to a broker or other intermediary.³³ Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice, a geographic area of a practice, or a substantive field of practice to one or more lawyers or law firms is governed by the terms of the sale agreements 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).</p>	

³² **Drafters' Note:** This comment has no counterpart in the Model Rules but is similar to the last sentence of the Discussion of current Rule 2-300. Jerry recommends that it be adopted. KEM agrees that the Comment should be included, w/ his proposed revisions (in red). RLK: Assuming we change the Rule as Kevin recommended in fn. 15, above, to include the broker issue in the Rule, I also like the Comment. but would simplify it by starting: "Although the services of a broker may be used to assist in a purchase and sale under this Rule, this Rule does not permit" If we do make that change to the Rule, we need to consider the proper location of this Comment and the inclusion of a reference to the correct Rule paragraph. If we don't make that change the Rule, there would be no basis in it for this Comment.

Note Disagreement: Jerry would delete the word "directly" and the term "other intermediary" in the first sentence of the Comment. KEM disagrees with the deletion.

³³ **KEM Note:** I am trying to state explicitly what Nace has urged, the Commission has approved, and that we imply in Comments [1A] and [12A]. See also footnotes 13 & 14, above.

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Applicability of the Rule</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 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.</p>	<p>Applicability of the Rule</p> <p>[13]³⁴ This Rule applies to the sale of a law practice of a deceased, impaired disabled or disappeared lawyer, or by a trustee. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules, or the seller may be a lawyer acting in a fiduciary capacity. Because Since, however, no lawyer may assist in participate in a sale of a law practice that which does not comply with conform to the requirements of this Rule, a nonlawyer fiduciary who is represented by counsel, a lawyer selling in a fiduciary capacity, and the representatives of the seller as well as the purchasing lawyer will must all have to comply with this Rule can be expected to see to it that they are met. See, e.g., Rule [8.4(a)].</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] [RESERVED] 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.³⁵</p>	

³⁴ This comment is adapted from Model Rule Comment [13]. However, that comment is inaccurate. The changes are to make it accurate ~~[hopefully]~~. ~~The reference to Rule 8.4 is in brackets pending adoption of such a rule.~~ **KEM Note:** Our approach is not to bracket rules once they are post-public comment, as is true of proposed Rule 8.4.

³⁵ **Drafters' Note:** ~~The Commission has approved inserting~~ Model Rule 1.17, cmt. [14], in the black letter as paragraph (g).

<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 Purchase and Sale of a Law Practice Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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 or an area of practice.</p>	<p>[15]³⁶ This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice, <u>a geographic area of practice</u>, or <u>a substantive area field</u> of practice.</p>	
	<p>[15A] <u>Lawyers who engage in a transaction described in this Rule also must comply with Rules 1.5.1³⁷ and 5.4 when applicable.</u></p>	
	<p>[15B] <u>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.</u>³⁸</p>	

³⁶ **Drafters' Note:** This comment is adapted from Model Rule 1.17 Comment 15. Changes are to make clear that all three permutations trigger the rule.

³⁷ **Drafters' Note/Disagreement:** Bob questions the reference to Rule 1.5.1 as he believes the rationale underlying the regulation of fee divisions does not apply to the sale of an entire practice, field or area of practice. Jerry disagrees. We should discuss this.

³⁸ **Drafters Note/Recommendation:** We recommend adding this comment from an earlier draft of the proposed Rule that was not included when we merged the full practice and area of practice rules.

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 1.17.1 Purchase and Sale of a Law Practice.
[Sorted by Commenter]**

TOTAL = 5 Agree = 1
 Disagree = 2
 Modify = 2
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Los Angeles County Bar Association (Toby A. Rothschild)	M			Change “may be sold by a lawyer or law firm” to “may be sold to a lawyer or law firm.” A lawyer or small firm may have several specialties which would necessitate the sale of each specialty to a separate buyer. Why can't the seller be “a lawyer or law firm”?	Commission changed the language to read: “A lawyer or a law firm may sell or purchase a law practice, a substantive field of practice, or a geographic area of practice”
3	Orange County Bar Association (Trudy Levindofske)	M			Modify subdivision (d) to make clear “confidential information” is confidential client information and not general financial information or due diligence information pertaining to the law practice being offered for sale. Comment 10 appears to address the issue but the distinction should be included in the body of the Rule.	Subdivision (d) is now subdivision (f) and it reads: “A lawyer shall not disclose confidential client information” Comment [10] is now Comment [7].
4	San Diego County Bar Association (Heather L. Rosing)	A			Proposed rule clarifies the existing rule.	No response necessary.
1	San Francisco, Bar Association of (Minkus)	D			Comment [12] is inconsistent with section (e). Section (e) exempts from the Rule’s provisions transactions by which a sole practitioner creates a partnership with a proposed purchaser of the practice. Comment [12] adds the additional requirement that the formation of the firm be done “in good faith...and not for the purpose of avoiding the	Subdivision (e) is now subdivision (g) and it reads: “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.” The language regarding “good faith” previously in Comment [12] has been deleted.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.17.1 Purchase and Sale of a Law Practice.
[Sorted by Commenter]**

TOTAL = 5 Agree = 1
 Disagree = 2
 Modify = 2
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					limitations of the rule." This undermines the ability of an attorney to understand the obligations by reading the rule itself.	
5	Santa Clara County Bar Association (Christine Burdick)	D			90 day waiting period to start acting on behalf of clients is too long. A shorter period (30 days suggested) 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.	Commission did not make the requested revision, in part, because the 90-day period is the standard used in the existing California rule and nothing in the rule excuses the client's current lawyer (the seller) from protecting that client from prejudice while the issue of a sale is pending.

**Rule 1.17.2 Purchase and Sale of a Geographic Area or Substantive Field of a Law Practice.
[Sorted by Commenter]**

TOTAL = 5 Agree = 1
 Disagree = 2
 Modify = 2
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Los Angeles County Bar Association (Toby A. Rothschild)	M			<p>Definition of “extraordinary circumstances” should not include the lawyer’s resuming practice when returning to private practice after government service.</p> <p>Extraordinary circumstances should apply equally to resuming practice in a substantive area and a geographic area.</p>	<p>Commission deleted the reference to “extraordinary circumstances” but see new comment stating, in part, that: “Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation.”</p>
3	Orange County Bar Association (Trudy Levindofske)	M			<p>Subdivision (a), by not requiring the inclusion of goodwill in a sale, together with subdivisions (3), (9), (10), and (11) thereof, potentially embody a restraint of trade prohibited by B&P 16601.</p> <p>Subdivision (a)(8) prohibition on compensation to any broker, finder or middleman for the purchase and sale of a geographic area or substantive field of law practice is not warranted and should be removed.</p>	<p>The first paragraph of the rule includes the concept of selling “good will.”</p> <p>The rule language addressing broker compensation has been deleted. The comments have been amended to state: “Although the services of a broker may be used to assist in the sale of a law practice, a geographic area of practice, or a substantive field of practice to another lawyer or law firm, this Rule does not permit such a sale directly to a broker or other intermediary. Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase . . . 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</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.17.2 Purchase and Sale of a Geographic Area or Substantive Field of a Law Practice.
[Sorted by Commenter]**

TOTAL = 5 Agree = 1
 Disagree = 2
 Modify = 2
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						recommending the lawyer's services).
4	San Diego County Bar Association (Heather L. Rosing)	A			Proposed rule tracts ABA Model Rule 1.17.2 and should be adopted in entirety.	No response necessary.
1	San Francisco, Bar Association of (Minkus)	D			1.17.2, by precluding the seller of a portion of a practice from returning to the practice of law without establishing that there are "extraordinary circumstances," creates a rule of discipline that is inconsistent with 1.17.1, which does not preclude the seller of an entire practice of law from returning to the practice of law.	Commission deleted the reference to "extraordinary circumstances" but see new comment stating, in part, that: "Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation."
5	Santa Clara County Bar Association (Christine Burdick)	D			Too narrowly restricts the purchase or sale of a law practice. Delete prohibitions of what a seller can do after the sale; these provisions violate B&P 16600. 90 day period waiting period to act on behalf of new clients should be shortened to 30 days.	Commission deleted the reference to "extraordinary circumstances." Commission did not make the requested revision, in part, because the concept of limitations on sellers is found in the Model Rule counterpart. Commission did not make the requested revision, in part, because the 90-day period is the standard used in the existing California rule.

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]
E-mails, etc. – Revised (10/13/2009)**

October 26, 2008 Sondheim E-mail to Tuft & Kehr, cc RRC:	58
October 26, 2008 Kehr E-mail to Sondheim, cc RRC:.....	58
October 27, 2008 Tuft E-mail to RRC:	58
October 27, 2008 KEM E-mail to RRC:	60
December 16, 2008 Kehr E-mail to KEM:.....	61
December 19, 2008 KEM E-mail to Kehr, cc Difuntorum & McCurdy:	61
December 25, 2008 Kehr E-mail to Drafters (Sapiro, Melchior, Martinez), cc Chair, Difuntorum & KEM: .	61
December 27, 2008 Martinez E-mail to Kehr, cc Drafters, Chair, Difuntorum & KEM:.....	62
December 27, 2008 Kehr E-mail to Martinez, cc Drafters, Chair, Difuntorum & KEM:.....	63
December 30, 2008 Kehr E-mail to Drafters, cc Chair & Staff:.....	63
December 31, 2008 Sapiro E-mail to Kehr, cc Drafters, Chair & Staff:	64
January 1, 2009 Kehr E-mail to Sapiro, cc Drafters, Chair & Staff:	65
January 4, 2009 Melchior E-mail to Drafters, cc Chair & Staff:	66
January 4, 2009 Sondheim E-mail to Melchior, cc Drafters & Staff:.....	67
January 5, 2009 Kehr E-mail to Martinez, cc Drafters, Chair & Staff:	67
January 5, 2009 Martinez E-mail to Kehr, cc Drafters, Chair & Staff:.....	67
January 6, 2009 Kehr E-mail to Drafters, cc Chair & Staff:	68
January 6, 2009 Kehr E-mail to McCurdy, cc Drafters, Chair & Staff:.....	68
January 6, 2009 Martinez E-mail to Drafters, cc Chair & Staff:	68
January 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:.....	69
January 14, 2009 Sapiro E-mail to RRC List:	70
July 13, 2009 Sondheim E-mail to RRC re Rule 1.17 [2-300]:	71
July 24, 2009 KEM E-mail to Difuntorum, cc Sondheim, McCurdy & Lee:	71
August 17, 2009 KEM E-mail to Drafters (Kehr, Sapiro, Martinez, Melchior & Vapnek), cc Chair & Staff: 72	72
August 18, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:	72
August 18, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:	72
August 18, 2009 Kehr E-mail to KEM & Sapiro, cc Drafters, Chair & Staff:	72
August 27, 2009 McCurdy E-mail to Kehr, cc Chair, Vapnek, Tuft & Staff:.....	73
August 27, 2009 McCurdy E-mail to Sapiro, cc Chair, Vapnek, Tuft & Staff:	74
September 19, 2009 Kehr E-mail to Sapiro, cc Drafters (Martinez, Melchior), Chair & Staff:	77
September 19, 2009 KEM E-mail to Drafters, cc Chair & Staff:	77
September 19, 2009 Sondheim E-mail to Drafters & KEM, cc Staff:.....	77
September 20, 2009 Kehr E-mail to Sondheim, cc Drafters & Staff:.....	78
September 21, 2009 Lee E-mail to KEM, cc Difuntorum & McCurdy:	78
September 21, 2009 Sondheim E-mail to Sapiro, cc Drafters & Staff:	78
September 21, 2009 Sapiro E-mail to Sondheim, cc Drafters & Staff:	78
September 21, 2009 Sapiro E-mail to Sondheim:	78
September 22, 2009 Sondheim E-mail to Sapiro, cc Kehr, Difuntorum & KEM:	78
September 22, 2009 KEM E-mail to Staff:	78
September 22, 2009 Difuntorum E-mail to Drafters (Sapiro, Kehr, Melchior, Martinez), cc Chair, McCurdy, Lee & KEM:	79
September 26, 2009 Sapiro E-mail to Drafters (Kehr, Martinez, Melchior), cc KEM:.....	79
September 27, 2009 Melchior E-mail to Drafters, cc KEM:	80
<i>Proposed Minority Statement of Kurt Melchior:</i>	<i>80</i>
September 28, 2009 Melchior E-mail to Drafters, cc KEM:	81

**RRC – Rule 1.17 [2-300]
E-mails, etc. – Revised (10/13/2009)**

September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:	82
September 29, 2009 Sapiro E-mail to Drafters, cc Chair & Staff:.....	83
September 29, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:	83
September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:	83
September 29, 2009 Sapiro E-mail to Drafters, cc Chair & Staff:.....	84
September 29, 2009 Lee E-mail to KEM, cc Difuntorum:	84
September 29, 2009 Kehr E-mail to Drafters, cc Chair & Staff:.....	84
September 29, 2009 KEM E-mail to Lee, cc Difuntorum:	84
September 29, 2009 Lee E-mail to KEM, cc Difuntorum:	84
September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:	85
September 29, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:	85
September 29, 2009 Sondheim E-mail to Drafters, cc Staff (reply to September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:	85
September 29, 2009 Melchior E-mail to KEM, cc Drafters, Chair & Staff:.....	85
September 29, 2009 Sapiro E-mail to KEM, cc Drafters, Chair & Staff:	85
September 29, 2009 Melchior E-mail to Drafters, cc Chair & Staff:.....	87
September 29, 2009 Kehr E-mail to Drafters, cc Chair & Staff:.....	87
September 29, 2009 Sapiro E-mail to Kehr, cc Drafters, cc Chair & Staff:	87
September 30, 2009 Kehr E-mail to Sapiro, cc Drafters, Chair & Staff:	88
September 30, 2009 Sapiro E-mail to Kehr, cc Drafters, Chair & Staff:	89
October 1, 2009 KEM E-mail to Drafters, cc Chair & Staff:	89
October 2, 2009 KEM E-mail to McCurdy, cc Drafters, Chair & Staff:.....	90
October 4, 2009 Kehr E-mail to Sapiro & KEM, cc Drafters, Chair & Staff:.....	90
October 4, 2009 Sapiro E-mail to Kehr, cc Drafters, Chair & Staff:.....	90
October 4, 2009 Kehr E-mail to Sapiro, cc Drafters, Chair & Staff:	91
October 4, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:.....	91
October 5, 2009 Melchior E-mail to Drafters, cc Chair & Staff:	91
October 6, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:.....	91
October 9, 2009 Sondheim E-mail to RRC:.....	91

August 17, 2009 KEM E-mail to Drafters (Kehr, Sapiro, Martinez, Melchior & Vapnek), cc Chair & Staff:

I've attached draft 2 (8/17/09) of the merged rule, redline, compared to draft 1.2 (1/6/09), the draft considered at the July 2009 meeting. In Word.

1. I've made the changes approved at the July meeting and inserted the Model Rule comments as the starting point for the comment to the Rule.
2. I've also made a suggestion at the end of the introductory clause (see footnote 2) to address an anomaly in the rule's structure (paragraph (g) is an exception, not a condition).
3. Please note that per the "rolling" agenda Randy has drafted at Harry's direction, Rule 1.17 is set for consideration at our October 2009 meeting. The October meeting deadline for submitting the comparison charts for this Rule is 9/30/09. We can help you set up the template for the charts but we need your proposed revisions to the Model Rule comment.

Please let me know if you have any questions.

August 18, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

I'm afraid that my recovery from the knee surgery is going slowly, and I'm far behind on things. This will go deep into a pile for future consideration.

August 18, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

No problem, Bob. If you can get us something by late middle September or so, we (i.e., Mimi or I) can turn it around and get you a comparison chart template (w/ comparisons to the MR) within a day or two so that you can input the explanations (or if you wanted to include explanations in footnotes, we can transfer those as well and have them ready for the 9/30 deadline). We'll work it out one way or another.

August 18, 2009 Kehr E-mail to KEM & Sapiro, cc Drafters, Chair & Staff:

Kevin: I was the lead drafter on 1.17 only on a pro tem basis, having relinquished the honor back to Jerry.

Jerry: I'm glad to help if I can, but Ellen and I will be on holiday from 9/22 through 9/26.

August 27, 2009 McCurdy E-mail to Kehr, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead drafter assignments.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.AA. Rule 8.3 Reporting Misconduct [1-500(B)]** (Dec. 2008 Comparison Chart)
Codrafters: Peck, Tuft, Vapnek
Assignment: (1) a chart comparing proposed Rule 8.3 to MR 8.3; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

2. **III.II. Rule 1.7 Conflicts of Interests: Current Clients [3-310]**
(Post Public Comment Draft #12.1 dated 10/21/08)
Codrafters: Melchior, Mohr, Snyder
Assignment: (1) a chart comparing proposed Rule 1.7 to MR 1.7; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.LL. Rule 1.16 Terminating Representation [3-700]** (Post Public Comment Draft #6.1 dated 9/29/08)
Codrafters: Foy, Melchior
Assignment: (1) a chart comparing proposed Rule 1.16 to MR 1.16; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.MM. Rule 1.17 Purchase & Sale of a Geographic Area or Substantive Field of a Law Practice [2-300]** (Post Public Comment Merged Rule Draft #1.1 dated 1/6/09 to be revised following the July 2009 meeting)
Codrafters: SAPIRO (co-lead), Martinez, Melchior
Assignment: (1) a chart comparing proposed Rule 1.17 to MR 1.17; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

August 27, 2009 McCurdy E-mail to Sapiro, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission’s upcoming September, October and November meetings. A “rolling assignments agenda” is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered “rolling” because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

**RRC – Rule 1.17 [2-300]
E-mails, etc. – Revised (10/13/2009)**

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead drafter assignments.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

**1. III.MM. Rule 1.17 Purchase & Sale of a Geographic Area or Substantive Field of a Law Practice [2-300] (Post Public Comment Merged Rule Draft #1.1 dated 1/6/09 to be revised following the July 2009 meeting)
Codrafters: KEHR (Co-lead), Melchior, Martinez**

Assignment: (1) a chart comparing proposed Rule 1.17 to MR 1.17; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response

2. III.PP. Rule 3.10 Threatening Charges [5-100] (Post Public Comment Draft to be revised following the August 2008 meeting) Codrafters: Melchior, Snyder

Assignment: (1) a chart comparing proposed Rule 3.10 to RPC 5-100; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **IV.N. Possible Rule re: Practice Succession Plan (no counterpart rules) (consideration of a possible rule arose from the Board's Career Transition Planning Task Force, Judy Johnson memo dated 6/18/08) Codrafters: Sapiro, Vapnek**
Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a "dashboard" cover sheet.

2. **IV.O. Possible Rule re: Use of Private Will Depositories (no counterpart rules) (consideration of a possible rule arose from the Board's Career Transition Planning Task Force, Judy Johnson memo dated 6/18/08) Codrafters: Lamport, Vapnek**
Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a "dashboard" cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

September 19, 2009 Kehr E-mail to Sapiro, cc Drafters (Martinez, Melchior), Chair & Staff:

I see that this Rule is on the October agenda, and I want to be certain that you are taking the lead although I am listed as a co-lead drafter. I have multiple other assignments and am leaving on vacation on Tuesday. Please tell me if there will be a problem with this.

September 19, 2009 KEM E-mail to Drafters, cc Chair & Staff:

Back in August, I sent you a revised Draft 2 (8/17/09), redline, compared to Draft 1.2 (1/6/09), the draft considered at the 7/24-25/09 meeting. I've again attached that draft, together w/ my notes from the July 2009 meeting. Here is what I wrote in my 8/17/09 e-mail:

I've attached draft 2 (8/17/09) of the merged rule, redline, compared to draft 1.2 (1/6/09), the draft considered at the July 2009 meeting. In Word.

1. I've made the changes approved at the July meeting and inserted the Model Rule comments as the starting point for the comment to the Rule.
2. I've also made a suggestion at the end of the introductory clause (see footnote 2) to address an anomaly in the rule's structure (paragraph (g) is an exception, not a condition).
3. Please note that per the "rolling" agenda Randy has drafted at Harry's direction, Rule 1.17 is set for consideration at our October 2009 meeting. The October meeting deadline for submitting the comparison charts for this Rule is 9/30/09. We can help you set up the template for the charts but we need your proposed revisions to the Model Rule comment.

Bob had just undergone knee surgery and could not work on the rule then and, in any event, had only been the interim lead drafter, and because his vacation next week immediately preceded the deadline, asked Jerry to take over.

Unfortunately, I did not follow up on my 8/17 e-mail and remind Jerry. We are now in a position where we have not yet attempted to draft the comment to the Rule. All the Commission has approved so far is the black letter and, given our divergence from the Model Rule, I'm not sure we can easily translate the Model Rule comment into a comment for our rule.

Harry, what would do you like to do with this Rule? Should we kick it to Batch 6? We (staff) need the drafters to at least take a pass at the Comment before we can create a comment comparison chart. We can move forward with the rule comparison chart and, I suppose, the Introduction, Dashboard and Public Comment chart, but the comment to the rule will be a problem. What would you like us to do?

September 19, 2009 Sondheim E-mail to Drafters & KEM, cc Staff:

The intent of the Batch 6 rules is generally to only include rules which are not currently ABA rules (rule 1.0.1 being an exception because it may have definitions related to Batch 6 rules). This would give us an escape hatch in the event we did not timely finish Batch 6 since all the ABA rules would be finished, including 1.0.1 which would be the first rule considered in Batch 6.

Therefore I would like the co-drafters to take a shot at completing the comments for the Oct. meeting.

September 20, 2009 Kehr E-mail to Sondheim, cc Drafters & Staff:

Harry: With the several other items I have on the October agenda and my trip next week, it should not be assumed that I will be able to participate before the agenda deadline. I certainly will if I can.

September 21, 2009 Lee E-mail to KEM, cc Difuntorum & McCurdy:

Attached you will find comparison tables for Rules 1.5, 8.1, and 1.17. These rules were not included with the ones we had sent you on Friday. These comparisons were a little harder to do. I'd appreciate it if you could review them before we send them out to the drafters.

September 21, 2009 Sondheim E-mail to Sapiro, cc Drafters & Staff:

You and Bob are listed as lead co-drafters for this rule. In light of Bob's uncertainty, could you be the lead drafter and Bob, as well as the other co-drafters and Kevin, would assist you as best they can?

September 21, 2009 Sapiro E-mail to Sondheim, cc Drafters & Staff:

I will, but I just got out of a hearing in the state bar court and have not yet looked at what Bob and Kevin have sent.

September 21, 2009 Sapiro E-mail to Sondheim:

I had not read this before my last email to you. I'll work on the comments. Should I assume the spreadsheets etc. will be for November?

September 22, 2009 Sondheim E-mail to Sapiro, cc Kehr, Difuntorum & KEM:

Thanks for stepping up to the plate for the comments. By this e-mail I am asking staff to prepare the spreadsheets (dashboard, introduction and commenters) for the Oct. meeting and to circulate them prior to the 9/30 deadline so that the co-drafters can provide their input on these additional materials.

September 22, 2009 KEM E-mail to Staff:

I've attached a slightly revised rule & comment comparison chart template for Rule 1.17. I moved paragraphs and subparagraphs in a couple of spots to lessen confusion. I also added a footer, identified the rule draft number, and revised the properties so that the rows will break

across pages and not swallow language in the third column (I think some of the explanations may exceed a page in length).

I think the attached can be sent to Jerry and the other 1.17 drafters (Bob, Kurt and Raul).

I haven't done anything w/ 1.5 yet. I gave the drafters until 5 p.m. this evening to respond to my changes and I want to first see whether there are any further revisions before tackling the chart.

I sent out the revised 8.1 chart to Linda last night.

September 22, 2009 Difuntorum E-mail to Drafters (Sapiro, Kehr, Melchior, Martinez), cc Chair, McCurdy, Lee & KEM:

Here are the draft template materials for the Rule 1.17 assignment. Thanks to Mimi and Kevin for the good work on the rule comparison chart. Note that there are two templates for the public commenter charts because two rules were issued for public comment. The templates can be completed when the rule comments are submitted.

Attachments:

- Dashboard Template
- Introduction Template
- Rule & Comment Comparison Chart, Template (9/19/09)ML-KEM
- Public Comment Chart, 1.17.1, Template (9/22/09)
- Public Comment Chart, 1.17.2, Template (9/22/09)
- State Variations (2009)

September 26, 2009 Sapiro E-mail to Drafters (Kehr, Martinez, Melchior), cc KEM:

Attached is my attempt at the next draft of Rule 1.17. I made a few changes in the wording of the black letter rule. However, most of the changes are in the comments. I used the model rule comments as the starting point and made changes from them as indicated by the redlining.

I am sending a copy of this to Bob for his information. If he is on vacation, he is instructed to ignore this email.

Please give me the benefit of your comments, changes, and criticisms. I understand that this report is due by the 30th. Therefore, if I can receive your remarks by Monday night, it will be easier for me to incorporate them into the end product.

September 27, 2009 Melchior E-mail to Drafters, cc KEM:

Jerry: I'm trying to work on the unbelievable workload the commission is passing around; and with regard to rule 1.17—2-300, I think that my most useful contribution would be a statement of the minority position. I am really so opposed to this rule that I would prefer not to have to get involved in drafting explanations etc., and thus assist in making this rule into law. So I've written this from home (Sue's computer) and am saving a step by sending it to you directly, with copies to Raul, the co-drafter, and to Kevin.

Proposed Minority Statement of Kurt Melchior:

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* [citation]. 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

**RRC – Rule 1.17 [2-300]
E-mails, etc. – Revised (10/13/2009)**

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. 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.

September 28, 2009 Melchior E-mail to Drafters, cc KEM:

I added one sentence, in a different color below.

* * *

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.

September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:

Harry, Kurt, Bob & Jerry: Please note that I have specific questions for you below.

1. I've attached revised draft 3.1 (9/29/09)JS-KEM, redline, compared to draft 1.2, the last draft considered by the Commission (at its July 2008 meeting). In PDF and Word. I recommend reviewing the Word version so if you have comments on a particular line, we will all be on the same line (as we've noted many times before, the line numbering changes in Word depending upon your default printer. That has caused us some confusion in the past).
2. Here is how the attached rule draft was created. After the July 2009 meeting, I revised draft 1.2 to incorporate the changes voted at that meeting. Because we had only addressed the black letter up to that point, I added the Model Rule comment verbatim. Jerry then revised the MR comment and circulated it to the drafters as Draft 3 (9/26/09). I have reviewed Jerry's changes to the MR comment and made further suggestions. They are found in the attached Draft 3.1 (9/29/09)JS-KEM. Jerry changes are in brown; mine are in red. Most of my revisions are self-explanatory (I think). Where I thought explanation was required, I included it and have highlighted my explanation in yellow on the attached PDF.
3. What remains to be done. We have not yet drafted a Dashboard, Introduction, Comparison charts, or public comment charts (we have two -- one for 1.17.1 and another for 1.17.2).
 - a. Comment Chart. Given the short time frame for the agenda submission, I don't think we have time to attempt a comparison chart for the Comment. The redlines in the comment in the attached draft 3.1 are to the Model Rule already. More important, the comment is subject to change and preparing these charts is time-consuming. I don't recommend we attempt it until we know what the comment is.
 - (1) Harry: Because this rule has the farthest to go for final approval, perhaps you can set it for a Friday discussion. That way, if the Commission wants to see revised language before approving the comment, we can make appropriate revisions on Friday night and bring it back on Saturday.
 - b. Dashboard. However, I think we have time for a dashboard and I'll gin one up and circulate it to you presently.
 - c. Introduction. I'll do a first draft on this. Kurt has circulated a lengthy minority position.
 - (1) Kurt. Would you be amenable, as was Raul w/ his dissent to Rule 5.1, to my attempting to reduce your dissent to a single paragraph for inclusion in the Introduction, with the understanding that your entire dissent would be included in the package that goes to BOG? Please refer to the 10-day ballot for 5.1 so you

can see what I'm referring to. You would of course have final say on what goes in the Introduction. If you don't like my summary, you would be free to revise it.

(2) I can get this to you later today or this evening (probably the latter).

d. Rule Comparison Chart. Because the rule is complete, I can create a rule comparison chart template that would require filling in the Explanation of Changes column. I'll circulate that presently.

(1) **Jerry or Bob**: Will either of you be able to complete column three of the chart before the submission deadline tomorrow at noon?

e. Public Comment Comparison Charts. I've attached the templates for 1.17.1 and 1.17.2.

(1) **Jerry, Bob or Randy**: Do any of you have the time to fill in the last column where an explanation is required? I think in most instances in the 1.17.2 chart, I think we have simply removed the provision at issue from the AltA version of the Rule that we're now working on.

Please let me know if you have any questions.

September 29, 2009 Sapiro E-mail to Drafters, cc Chair & Staff:

I can work on the public comment and rule comparison charts tonight, but I doubt I can complete them by noon tomorrow. Given my calendar, late tomorrow is more realistic. On the other hand, because RRC has not seen the draft comment, are the intro and comment charts really needed by tomorrow?

September 29, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:

I'll work on the public commenter charts and get you something by the end of the day.

September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've attached the rule comparison chart template. Thank you.

I agree the Comment chart is not necessary, nor should we prepare until the Commission has weighed in on the proposed revisions to the MR comment. We can't explain the changes until we know whether or what the changes will be. That's the gist of my comment 3.a., below. However, because the black letter has been approved, we can prepare a chart for the rule only. That's what I've attached.

As for the Introduction, because our introductions have evolved to address the rule primarily and the comments only secondarily, I think we can take a first shot at it. It's one less thing we'll have to address down the road.

I'll leave it to Randy & Lauren but my guess is that if we can get them the materials by tomorrow evening so they can send them out with the rest of the agenda materials on Thursday, that will work for them.

I'll circulate a Dashboard shortly.

September 29, 2009 Sapiro E-mail to Drafters, cc Chair & Staff:

Thanks for your help.

September 29, 2009 Lee E-mail to KEM, cc Difuntorum:

I just received your Rule comparison table for Rule 1.17. Randy has asked me to add a comment comparison table in that same document and include the footnotes in the explanation column.

September 29, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

I will be able to dig into this tonight and will begin with the Comment, and if time permits then move on to the Introduction. Its hard to believe we are at another agenda deadline.

September 29, 2009 KEM E-mail to Lee, cc Difuntorum:

First, because they are at different stages of development, please do not combine the rule and comment tables. Let's keep them separate. It will be easier to keep track of what we're doing if we keep them separate. It's an extra document but it will avoid confusion in the future.

To make your job easier, I've attached the template we created a couple of weeks ago and the comparison file I created earlier this morning with Change Pro comparing Draft 3.1 to the Model Rule. I've also attached draft 3.1 compared to draft 1.2, which contains the footnotes Randy wants you to insert in the document. Please use the comparisons from Change Pro document for the middle column.

Finally, I strongly urge you to hold off on this task. I'm fine w/ having a comparison chart for the comment BUT Bob just sent an e-mail that he is going to look at the comment tonight. What you do today will probably have to be discarded tomorrow. Better to hold off and send this out separately by e-mail later in the week or we'll just have the endless confusion from having half the members with one version and the other half w/ the other version.

Whatever you do, please keep the version of the Comparison chart I sent earlier. I moved paragraphs around from what Change Pro produced to make the differences between our rule and the ABA rule easier to see.

September 29, 2009 Lee E-mail to KEM, cc Difuntorum:

Randy told me that Bob Kehr is planning on working on the comments for Rule 1.17 so I'll hold off on putting them into a table until then.

September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've attached a proposed first draft of dashboard (or is it a first dash of the draft board?) I welcome comments, particularly re the summary and controversy section.

September 29, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:

Attached please find the revised draft public commenter charts.

Attachments:

- Public Comment Chart for Rule 1.17.1 (9/29/09)-KEM-RD
- Public Comment Chart for Rule 1.17.2 (9/29/09)-KEM-RD

September 29, 2009 Sondheim E-mail to Drafters, cc Staff (reply to September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:

It will be set for Friday.

September 29, 2009 Melchior E-mail to KEM, cc Drafters, Chair & Staff:

Re intro: sure. Take a shot.

September 29, 2009 Sapiro E-mail to KEM, cc Drafters, Chair & Staff:

Thanks for doing this. Now that I am back from today's meetings, I offer the following comments.

1. Regarding your footnote 2, you are correct. Deletion of the "s" is another example of my lousy typing skills. I would make it plural and delete your footnote 2.
2. Regarding your addition to footnote 13, if we reinsert the sentence, I am tempted to add a sarcastic sentence that this rule does not permit the purchase and sale of clients. I have visions of a slave auction. I do not have a hard position on the subject, but I still think the sentence is unnecessary.
3. I don't understand your comment in footnote 14. Comment 1A does not have anything to do with brokers. It allows some types of fiduciary for the lawyer or the lawyer's estate to sell. We deleted corresponding language from the beginning of the black letter rule, but we need something to allow such a fiduciary to sell. Otherwise, the lawyer's practice has no value to the lawyer's estate. I agree with your changes in Comment 12A, but Comment 1A does not relate to a broker. What am I missing?
4. Similarly, Comment 1B has nothing to do with brokers. It merely makes explicit that a lawyer may sell to more than one lawyer or law firm, as long as the entire practice is available for purchase. My understanding is that RRC voted to delete that language from the black letter rule, so we are to add the concept to the comment. See lineouts at line 2. I have no problem restoring it to the black letter rule, but that would require reversing the prior

decision of RRC and would invite the Christmas tree syndrome, of adding random epithets to the rule, that made our prior versions unacceptable. If this has anything to do with brokers, what am I missing?

5. I like your addition of the romanettes in Comment 4. But I disagree with the reason in footnote 21. I think the change makes the paragraph more readable, but it has nothing to do with practice in Susanville. Unless, once again, I am missing something.
6. Regarding the text at footnote 21, I intended the scope to be as agreed by seller and buyer. But I would shorten (ii). How about “**selling a practice in one area of this state but continuing to practice in another geographic area of this state, as agreed by the seller and buyer**”? I don’t think we need to refer to moving. The seller may sell part of the practice, but limit her future practice to an area, all without having to move.
7. I agree with your changes in Comment 5.
8. On reading this today, I was again struck by the positioning of Comment 2 and Comment 6. I think 6 should be moved to precede 2. They are related. Your thoughts?
9. I like your changes to Comment [7].
10. I respectfully disagree with your note in footnote 27. The seller cannot get out of the representation except in accordance with Rule 1.16. If the client cannot be found, that does not necessarily constitute good cause to terminate the engagement. If I were a judge, the fact that a lawyer wants to sell his or her practice also would not be good cause. And if the matter is not a litigation matter, no court would have jurisdiction to relieve the lawyer from the representation without actual notice to the client – a tautology if the lawyer moves for relief because the client cannot be given notice under Rule 1.17. On the other hand, if the seller sends notice to the last known address of the client, and the notice comes back, the lawyer has satisfied the presumption created by the client’s failure to respond within the 90 days. If the client later surfaces, the client can object to the successor lawyer working on the matter, and the seller [if living and competent] has to resume representation.
11. I like your changes in Comment 9.
12. Responding to your question in footnote 29, I do not think we need the first sentence of Comment 10. However, it is a good lead-in to the second and third sentences. I think lawyers should be reminded of what is in the second and third sentences, but I would not object if the first sentence is deleted.
13. Responding to your comments in footnote 30, Rule 1.1 does not say or imply the duties and liabilities you suggest. Where in 1.1 do we find language that the seller must exercise care in selecting a buyer for his, her or its practice? If, in the communications to the clients, the seller expressly or impliedly vouches for the competence of the buyer, an aggrieved client might have a right of action, but that is not under Rule 1.1. And if, in the communications to the clients, the seller tells them he or she does not know the competence of the buyer, the seller avoids liability but is likely to find that the clients do not change lawyers and that the seller has to continue to represent them because there is no cause to withdraw under Rule 1.16.

14. Responding to footnote 32, I disagree. The sale is a sale of the practice, or part of the practice. I can't sell an individual case. I can sell my practice, and that gives the buyer access to my clients so the buyer may be retained by them. I remain liable unless and until discharged by a client or by a court.
15. I think your change of Comment 12A is a step in the right direction. However, in line 239, I would delete the word "directly." Neither the buyer nor the seller can sell to a nonlawyer broker. And I am not sure what "another intermediary" means in this context. A sale under this rule would not be made to a lawyer-broker. The time delays are too long, and the buyer would be undertaking responsibility for the practice, with all the liabilities that entails. Or do you mean that the lawyer cannot sell the practice to an escrow holder? I have difficulty seeing that as a step of a transaction for a law firm. If there is a bill of sale or other title document, such as a deed, the rule should not prohibit that being lodged with an escrow holder as a part of the closing. However, that would not involve the intermediary or escrow holder becoming the buyer and would not involve the intermediary in the practice or its management. I would delete "another intermediary."
16. I would shorten part of Comment 12A. "Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of a law practice, a geographic area of a practice, or a substantive field of practice to one or more lawyers or law firms is governed . . ." could become "Whether a fee may be paid to a nonlawyer broker for arranging a sale or purchase of all or part of a law practice to one or more lawyers or law firms is governed"
17. I agree with your changes in Comments 13 and 15.

By copy of this email to Bob, Raul and Kurt, I invite their comments too.

September 29, 2009 Melchior E-mail to Drafters, cc Chair & Staff:

I don't know that I am to do anything more on this. You have my dissent & I told Kevin to go ahead and digest it for the intro.

September 29, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

I've attached a revision that includes my comments on the Comment. I made no changes in the text other than adding or removing about two commas. All of my comments are in previously existing footnotes. I can see with the lateness of the hour that I will not get any further on this Rule before the agenda deadline, but as least you have my thoughts on the Comment.

September 29, 2009 Sapiro E-mail to Kehr, cc Drafters, cc Chair & Staff:

Thanks for reviewing this. For your sake, I am glad you were not waiting at your office for my call last night.

Following are my comments on your comments.

1. Footnote 14: I agree with you.

**RRC – Rule 1.17 [2-300]
E-mails, etc. – Revised (10/13/2009)**

2. Footnote 15: If you and Kevin are sure we are not changing a vote of RRC contrary to Harry's rules, adding new (c) is alright with me. As long as it does not open the door to the usual myriad of further amendments.
3. Footnote 18: I can't identify the correct line. I think your line 112 is a typo, but I can't find the correct one.
4. Footnote 23: We have agreement. Did you see my suggestion regarding Comment 4?
5. Footnote 25: I agree with you.
6. Footnote 27: The Model Rule Comment 8 is not clear. It describes a procedure that I think is fatally flawed in this state. I know of no judicial procedure for a lawyer who just wants to retire. A court could supervise the work of a practice administrator, attorney in fact, executor, or conservator.
7. Footnote 29: Majority rules, but I think the cautions in the second and third sentences need to be stated.
8. Footnote 30: Discussion at the meeting it shall be.
9. I forgot to include in my draft from last weekend two additional comments I had mentioned in an earlier draft, I think last year. They are:

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

[--] 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.

I recommend that we add them. If you and Kevin agree that the reference to 6147 and 6148 can remain, we could add these two plus the 6147 and 6148 sentence under the heading of other applicable ethical standards. What are your thoughts?

September 30, 2009 Kehr E-mail to Sapiro, cc Drafters, Chair & Staff:

I have a brief break in a conference call while someone tries to locate a missing document.

1. Line 112 in my version includes: "sold the practice to accept" I would make it "sole a practice"
2. I cannot locate your Comment [4] suggestion.
3. On fn. 27, as I said in my tacked-on comment, I agree unless someone else can point out such a procedure.
4. Regarding a Rule 1.5.1 reference, I am concerned that this might lead to confusion b/c a practice sale is distinct from a fee sharing arrangement unless the Commission decides that

they are not. I had understood that the Commission's view is that the terms of a practice sale are not the business of the clients.

5. Regarding the 5.4 reference, I'm not certain how that would come up, perhaps b/c I am going so quickly and must get back to my conference call.

September 30, 2009 Sapiro E-mail to Kehr, cc Drafters, Chair & Staff:

1. In my copy, "sold the practice to accept" is at line 119. I agree with changing "the" to "a" as you recommend.
2. The comment 4 suggestion was in my email yesterday afternoon:
3. Regarding the text at footnote 21, I intended the scope to be as agreed by seller and buyer. But I would shorten (ii). How about "selling a practice in one area of this state but continuing to practice in another geographic area of this state, as agreed by the seller and buyer"? I don't think we need to refer to moving. The seller may sell part of the practice, but limit her future practice to an area, all without having to move.
4. I think fee sharing can come into play because the buy-sell agreement can have the buyer pay an amount measured by the proceeds of the acquired practice. If RRC has decided not to trespass on that subject, so be it.
5. 5.4 can apply, for example, if the seller is the estate of a deceased lawyer, so the buyer cannot share fees with a nonlawyer.

October 1, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've attached a scaled PDF of a Rule & Comment Comparison Chart that I hope accurately reflects (more or less) the e-mail exchange we've been having among the drafters and me.

I have a Dashboard but not an introduction (not enough time). We will have to circulate those when we've had time to review them.

I've also attached scaled PDFs of the Public Comment charts for 1.17.1 and 1.17.2.

I'll follow up w/ the Word documents later today or tomorrow but I wanted to get these to Lauren for the agenda mailing today.

Please let me know if you have any questions.

Attachments:

- Rule & Comment Chart, Draft 1 (10/1/09)KEM [concerning Draft 3.3 (9/29/09)JS-KEM-RLK of the Rule]⁴
- Public Comment Chart for 1.17.1, Draft 1 (9/29/09)RD-KEM
- Public Comment Chart for 1.17.2, Draft 1 (9/29/09)RD-KEM

⁴ **KEM Note:** Although the chart refers to Draft 3.1, the correct reference is to Draft 3.3.

October 2, 2009 KEM E-mail to McCurdy, cc Drafters, Chair & Staff:

I've attached all the materials you need for 1.17 in a single, scaled PDF file. Yesterday I sent you the rule & comment comparison chart and the public comment charts. I have now completed the dashboard and introduction, and the attached PDF includes those documents, the documents I sent yesterday, and Kurt's dissent in a 2-column format.

Please note that the drafters have not had an opportunity to review the attachments. I've tried to incorporate all of their comments in the Rule & Comment Chart. The Introduction represents my efforts alone and any errors are laid at my feet.

I have not attached the underlying Word documents; I'll send those separately later. I realize that you and the others working on putting together the agenda have enough to chew on coordinating the packaging of 30+ rules for the agenda mailing w/o having to sort through e-mail attachments.

The ingredients of the attached file are:

1. Dashboard, Draft 2 (10/2/09)KEM;
2. Introduction, Draft 1 (10/1/09)KEM;
3. Rule & Comment Comparison Chart, Draft 1 (10/1/09)KEM;
4. Minority Dissent, 2 Column format;
5. Rule 1.17.1 Public Comment Chart, Draft 1 (9/29/09)RD-KEM; and
6. Rule 1.17.2 Public Comment Chart, Draft 1 (9/29/09)RD-KEM.

I hope it is not too late to get this in the agenda package. If it is too much hassle, we can send it by e-mail later today.

Please let me know if you have any questions. Thanks again for your incredible efforts.

Attachment:

- Combo File, Draft 2 (10/2/09)KEM

October 4, 2009 Kehr E-mail to Sapiro & KEM, cc Drafters, Chair & Staff:

The Introduction that one of you drafted includes a section entitled "Minority" that appears to combine the majority view and at least part of the minority view. I wonder if one of you could send this to me in Word so that I can take a stab at removing the minority view and placing it in a separate section.

October 4, 2009 Sapiro E-mail to Kehr, cc Drafters, Chair & Staff:

I suspect that was Kevin adapting Kurt's dissent. I attach a copy of Kurt's dissent, but I do not have the introduction in Word.

October 4, 2009 Kehr E-mail to Sapiro, cc Drafters, Chair & Staff:

Thank you for this. I think that you're right that the Minority paragraph in the Introduction borrows heavily from Kurt's dissent, but it mixes it with arguments in favor of the proposed Rule. I would like to wait for Kevin to send his version so that the two can be separated.

October 4, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

I've attached both the full dissent and the Introduction for 1.17 in Word.

I have to disagree w/ you on this. Everything that I put in the minority statement is in Kurt's dissent. He noted that the current rule is appropriately narrow and specifically designed to provide protection for the clients. There's no reason to change it. He then explained why in his (the minority's) view, the proposed Rule does not fly. Yes, by noting the protections of the current rule, he arguably has incorporated some of the majority's arguments (because the proposed Rule carries forward the notice requirements, etc.), but those arguments are all in relation to the current rule, not to the proposed Rule.

Regardless, I'd recommend that before you spend time on the minority statement, please give Kurt an opportunity to weigh in. He has not seen the summary of his dissent in the Introduction yet. He was out of the office the end of last week and won't return until tomorrow. Kurt may very well want to rewrite what I wrote to emphasize different aspects of his argument. As with our other rules, the minority should have the opportunity to draft the minority statement and the majority should have the opportunity to draft the Commission position. Hopefully, we'll be able to resolve any disagreements before the meeting.

October 5, 2009 Melchior E-mail to Drafters, cc Chair & Staff:

I have not tried to read every word of this rule, and certainly not of rules where I was less directly engaged; but I think that Kevin has fairly caught my intent in the introduction, and appreciate his (and the group's) willingness to attach my long protest verbatim as well.

October 6, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

I'll look at this more carefully when I have a few minutes. Perhaps I misread it the first time through.

October 9, 2009 Sondheim E-mail to RRC:

In the Introduction, p. 337, seventh line, the second "the" in that line should be deleted.