

**Rule 1.17 [2-300] Sale of a Law Practice  
(Commission's Proposed Rule Adopted on January 22 – 23, 2016 – Clean Version)**

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

- (a) Fees charged to clients shall not be increased solely by reason of the sale.
- (b) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code § 6068(e)(1), then;
  - (1) if the seller is deceased, or has a conservator or other person\* acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code § 6180.5, then prior to the transfer;
    - (i) the purchaser shall cause a written\* notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by Rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and
    - (ii) the purchaser shall obtain the written\* consent of the client. If reasonable\* efforts have been made to locate the client and no response to the paragraph (b)(1)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.
  - (2) in all other circumstances, not less than 90 days prior to the transfer;
    - (i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code § 6180.5, shall cause a written\* notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by Rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and

- (ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code § 6180.5, shall obtain the written\* consent of the client prior to the transfer. If reasonable\* efforts have been made to locate the client and no response to the paragraph (b)(2)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.
- (c) 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.
- (d) The purchaser shall comply with the applicable requirements of Rules 1.7 and 1.9.
- (e) Confidential information shall not be disclosed to a nonlawyer in connection with a sale under this Rule.
- (f) This Rule does not apply to the admission to or retirement from a law firm,\* retirement plans and similar arrangements, or sale of tangible assets of a law practice.

### **Comment**

[1] The requirement that the sale be of “all or substantially all of the law practice of a lawyer” prohibits the sale of only a field or area of practice or the seller’s practice in a geographical area or in a particular jurisdiction. The prohibition against the sale of less than all or substantially all of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial\* fee-generating matters. The purchasers are required to undertake all client matters sold in the transaction, 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.

[2] The sale may not be financed by increases in fees charged to the client of the law practice. Existing arrangements between the seller and the client as to fees and scope of work must be honored by the purchaser. Any modifications of existing fee arrangements between the purchaser and the client after the sale must comply with these Rules and the State Bar Act.

[3] Transfer of individual client matters, where permitted, is governed by Rule 1.5.1. Payment of a fee to a nonlawyer broker for arranging the sale or purchase of a law practice is governed by Rule 5.4(a).

**Proposed Rule 1.17 [2-300] Sale of Law Practice  
Synopsis of Public Comments**

**TOTAL = XX**    **A = X**  
**D = X**  
**M = X**  
**NI = X**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-32g	Law Professors (Zitrin) (07-25-16)	Yes	M	1.17	Section (e) of the current proposed rule says that the fee to the client shall not be increased “solely” by reason of the purchase of the practice. The word “solely” should be stricken in order to make the fee increase absolute in accordance to the ABA rule.	

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED



**August 5, 2016 Lee Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud & Hollins:**

Rule 1.17 Drafting Team:

We have received a public comment on proposed Rule 1.17. Please review the attached comment in preparation for the August 26<sup>th</sup> meeting. In addition, a public comment synopsis table is attached. Staff will insert the brief synopses of these comments shortly and upload an updated copy to the Dropbox folder.

Following review of the public comments, please do one of the following:

1. If the drafting team believes the comment(s) received warrant a revision to the proposed rule, please submit an annotated revised rule draft responsive to the public comment(s);

OR

2. If the drafting team believes the comment(s) received DO NOT warrant further revision to the proposed rule, please either present the drafting team's recommendation to reject the commenter's points in a memo format, and/or by filling in a recommended RRC Response in the attached public comment synopsis table, or providing that "blurb" in an email for staff to place in the synopsis table.

Please submit either of these items to all those copied on this message by **Monday, August 15<sup>th</sup> at 10:00 am** for circulation with the August 26<sup>th</sup> agenda materials. If you would like the assistance of staff to schedule/notice a conference call for your drafting team to discuss the comment(s), please include all those copied on this message with that request as some admin. staff will be out of the office (Angela is out until 8/12/16).

**IMPORTANT:** Going forward, all public comments submitted will be uploaded to Dropbox as they are received. We encourage you to regularly check the Dropbox folder for the rules you are assigned to monitor incoming comments. It will not be administratively practical for staff to send comments to each drafting team every time they are received as there are simply too many rule topics to manage in this manner. You can find the public comments on Dropbox:

<http://bit.ly/RRC2014>

Navigate as follows: Public Comments/Comprehensive 90-Day Public Comment Circulation (June 2016)

*(At the top of this folder there is a "File List" document with a table listing all comments received by rule number.)*

**OR** You can find the comments in the individual rule folders: RULES/X Rule/Public Comments

Thank you for your work on this next phase of rule revision work.

Attached:

RRC2 - [2-300][1.17] - Public Comment Synopsis Table - REV (08-05-16).doc

RRC2 - [2-300][1.17] - PubCom - X-2016-32g-Law Professors (Zittrn) [1.17]-PH.pdf

**August 5, 2016 Kehr Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Lee & Hollins:**

Richard's only comment on draft Rule 1.17 is that he objects to the inclusion of "solely" in paragraph (a): "Fees charged to clients shall not be increased **solely** by reason of the sale." This repeats (without explanation) a comment in Richard's letter dated 3/3/14. OCTC made the same recommendation in its letter dated 9/27/2001.

The drafting teams Report and Recommendation responded: "[T]here are legitimate bases on which the buyer and a client might agree to increase fees. These include a change in the scope of the legal work and the passage of time. In addition, we are not aware that the current inclusion of 'solely' has caused any client harm."

On reflection, I recommend no change on this score. There being no question of the policy basis for Rule 1.17 – that a solo practitioner or the lawyer's estate should be permitted to sell a law practice to realize its value along the lines of a large firm's internal retirement plan – removing "solely" would unduly restrict that ability to sell. The reasons for an increase in fees could include, among other possibilities:

- a) The buyer charges a higher fee due to greater expertise and efficiency;
- b) The buyer charges a higher fee but also has younger lawyers or paralegals who bill at lower rates, making the different fee arrangements incomparable; and
- c) The client and buyer agree to increase the scope of work, such as by adding previously excluded appellate representation that is charged at a higher rate.

It is important that any change in the fee would require client consent, and there is no reason why a client should not be permitted to agree to a higher fee for the buyer just as the same client could do if the client were to reject the buyer and hire a different lawyer. It would be implicit in the removal of "solely" that clients lack the competence to protect their own interests, and that condescension is inappropriate and inconsistent with other Rules, such as Rule 1.5(b)(13). Any protection needed by a client in the Rule 1.17 context would be provided by Bus. & Prof. C. §§ 6146-6148, where applicable, and by Rule 1.5 [4-200].

I've reviewed the draft Rule in full and there are two things that caught my eye. *First*, paragraph (e) states: "Confidential information shall not be disclosed to a nonlawyer in connection with a sale under this Rule." This language comes from current rule 2-300, but I wonder whether it doesn't go too far. Should the buyer be prohibited from sharing information with the buyer's advisers, such as an accountant who reviews the seller's financial records, so long as doing so does not waive the privilege? The easiest course would be to make no change on this, but nevertheless it doesn't seem quite right as drafted. *Second*, paragraph (f) states: "This Rule does not apply to the admission to or retirement from a law firm,\* retirement plans and similar arrangements, or sale of tangible assets of a law practice." Wouldn't this be more precise if we were to say:

This Rule does not apply to the admission to or retirement from a law firm,\* a law firm's retirement plans ~~and or~~ similar arrangements, or a sale of tangible assets of a law practice.

**August 5, 2016 Bleich Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Lee & Hollins:**

I agree with Bob regarding (a) -- i.e., no modifications. I understand his points about the other two provisions but I think they are adequate as written. The first has not caused any confusion or made any mischief of which I'm aware. The second is a little inelegant compared to Bob's draft but I think its meaning is clear without the revision. I'd leave it all as is.

**August 5, 2016 Martinez Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Lee & Hollins:**

1. Bob, aren't the fee increases in your examples prohibited by Comment [2] which states: "Existing arrangements between the seller and the client as to fees and scope of work must be honored by the purchaser."? Legally under contract law a buyer of any other business would not be allowed to change the terms of existing contracts with third parties (here, clients). The buyer would have to take the business lock, stock and barrel. The normal requirements for novation and modification of an agreement would apply. The buyer could not raise the price of goods without new consideration. On the other hand, it's not clear to me that in the sale of a law practice the client can insist that the seller honor his or her contractual obligations in the event the seller wants to change the terms of the original retainer. Removing the word "solely" would make the rule consistent with Comment [2] and eliminate these concerns.

2. I would not change Paragraph (e) in view of Evidence Code 952 ["confidential communication" encompasses disclosure to third persons "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted"].

3. I'm fine with Paragraph (f) as you have changed it.... Or if we really wanted to clean up this language (which is derived from the current Rule), it could be revised as follows:

This Rule does not apply to ~~the admission to or retirement from a law firm,\*~~ a law firm's retirement plan or similar arrangements, or the sale of tangible assets of a law practice.

**August 5, 2016 Kehr Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Lee & Hollins:**

Raul and all, and following Raul's numbering:

1. Comment [2] needs to be read in full, and I see it as consistent with the inclusion of "solely" when it is. It currently states: "The sale may not be financed by increases in fees charged to the client of the law practice. Existing arrangements between the seller and the client as to fees and scope of work must be honored by the purchaser. Any modifications of existing fee arrangements between the purchaser and the client after the sale must comply with these Rules and the State Bar Act." I hope this will be read to mean that the current fee agreement is the starting point for the relationship between the buyer and a client, but they are as free as any other lawyer and client to reach their own financial arrangements. What is we were to edit this to say: "The purchaser, like any other contractual assignee, is obligated to honor the terms of the current fee agreements unless the purchaser and a client agree to modify the arrangement. Any such modification must comply with these Rules and the State Bar Act."

2. I'm fine with leaving paragraph (e) as it is. My concern had been that the section 952 language quoted by Raul does not apply here (b/c there is no communication with or for a client), permitting the argument that the paragraph (e) language is absolute. I've looked at potential drafting solutions, and one doesn't come easily to me. I'd rather err on the side of confidentiality.
3. I would prefer not to remove "admission to or retirement from a law firm". Much the same thing is in rule 2-300, and I would not want us to suggest we intended any change on this point.

**August 10, 2016 McCurdy Email to Drafting Team, cc Chair, Difuntorum, Mohr, Marlaud, Hollins & Lee:**

Proposed Rule 1.17 Drafting Team:

We have not received a submission from this drafting team for the agenda materials for this rule (see 8/5/16 assignment message below). If the public comment received on this rule is non-substantive or simply supports the proposed rule as drafted then the assignment can be completed with an email from the team informing staff that the team does not recommend any revisions to the proposed rule at this time.

Please don't hesitate to request the assistance of staff to schedule/notice a conference call for your drafting team if that is necessary to complete your assignment. Make sure to include all those copied on this message with any requests for a conference call, as some admin. staff will be out of the office (Angela is out until 8/12/16).

Attached:

RRC2 - [2-300][1.17] - Public Comment Synopsis Table - REV (08-05-16).doc

RRC2 - [2-300][1.17] - PubCom - X-2016-32g-Law Professors (Zitron) [1.17]-PH.pdf

**August 10, 2016 Bleich Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Hollins & Lee:**

We need further discussion among the drafting committee. My sense of the comments so far is that I would leave this as is. Bob would also keep the word "solely" but would make two other changes not raised by the public comments. And [Raul] would eliminate the word "solely" and take some but not all of Bob's suggested rewrites. I'd be grateful for [Raul's] and others' input.

**August 10, 2016 Martinez Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Hollins & Lee:**

Per my email attached, I am leaning in favor deleting the word "solely."