

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).

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Lead Drafter: Kehr

Co-Drafters: Bleich, Martinez

Meeting Date: January 22 – 23, 2016

I. CURRENT CALIFORNIA RULE

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

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

- (A) Fees charged to clients shall not be increased solely by reason of such sale.
- (B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then;
 - (1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer;
 - (a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and
 - (b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.
 - (2) in all other circumstances, not less than 90 days prior to the transfer;
 - (a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D)

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and any provisions relating to attorney-client fee arrangements, and

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

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

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

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

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

Discussion

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

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

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

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

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or

The drafting team recommends that the current rule be retained with no changes. The vote taken by the drafting team on this motion was X in favor and X opposed.

III. PROPOSED RULE (CLEAN)

Rule 1.17 Sale of a Law Practice

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 papers and property, as required by [Rule 1.16(d)]; 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 papers and property, as required by [Rule 1.16(d)]; 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

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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 non-lawyer 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] Under paragraph (a), the fact of a sale may not serve as the basis for increasing fees charged to clients of the law practice. Consequently, the sale may not be financed by increasing fees charged for client matters transferred through the sale. To the extent that fee increases are justified by other factors, such as modifications of the purchaser’s responsibilities, the passage of time, or reasonable costs that were not addressed in the original agreement, such modifications must comply with Rules 1.4 and 1.5 and other relevant provisions of 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 non-lawyer broker for arranging the sale or purchase of a law practice is governed by Rule 5.4(a).

IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-300)

Rule ~~2-300~~1.17 Sale ~~or Purchase~~ of a Law Practice ~~of a Member, Living or Deceased~~

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

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

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- (Bb) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code ~~section~~§ 6068, ~~subdivision~~(e)(1), then;
- (1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no ~~member~~lawyer has been appointed to act for the seller pursuant to Business and Professions Code ~~section~~§ 6180.5, then prior to the transfer;
 - (a) the purchaser shall cause a written notice to be given to ~~the~~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 papers and property, as required by ~~rule 3-700~~[Rule 1.16(D)d)]; and that if no response is received to the ~~notification~~notice within 90 days ~~of the sending of such notice, or in the event~~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. ~~Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements~~, and
 - (b) the purchaser shall obtain the written consent of the client ~~provided that such~~. 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 ~~if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.~~
 - (2) in all other circumstances, not less than 90 days prior to the transfer;
 - (a) the seller, or the ~~member~~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~~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 papers and property, as required by ~~rule 3-700~~ [Rule 1.16(D)d)]; and that if no response is received to the ~~notification~~notice within 90 days ~~of the sending of such notice~~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. ~~Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements~~, and
 - (b) the seller, or the ~~member~~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 such~~. 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 ~~if no response is received to the notification specified in subparagraph (a)~~

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~~within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.~~

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

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

(d) The purchaser shall comply with the applicable requirements of Rules 1.7 and 1.9.

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

~~(F) Admission~~This Rule does not apply to the admission to or retirement from a law ~~partnership or law corporation~~firm, retirement plans and similar arrangements, or sale of tangible assets of a law practice ~~shall not be deemed a sale or purchase under this rule.~~

~~Discussion:~~Comment

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

[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.

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

[2] Under paragraph (a), the fact of a sale may not serve as the basis for increasing fees charged to clients of the law practice. Consequently, the sale may not be financed by increasing fees charged for client matters transferred through the sale. To the extent that fee increases are justified by other factors, such as modifications of the purchaser's responsibilities, the passage of time, or reasonable costs that were not addressed in the original agreement, such modifications must comply with Rules 1.4 and 1.5 and other relevant provisions of these Rules and the State Bar Act.

[3] Transfer of individual client matters, where permitted, is governed by ~~rule 2-200~~Rule 1.5.1. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by ~~rule 1-320. (Amended by order of Supreme Court, operative September 14,~~

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~~1992.)~~ [Rule 5.4\(a\).](#)

V. PUBLIC COMMENTS SUMMARY

- **Law Professors, 3/3/14:** Recommend against including a provision for geographic area sale of a practice, which would enable a law firm to sell off clients in a particular region while still continuing practice. Also recommend removing the term “solely” from the no increase in fees provision.
- **Law Professors, 8/24/16:** Repeated their recommendation to the first Commission to remove the term “solely”.
- **COPRAC:** It recommends the ABA Model Rule approach, which allows the sale of distinct practice or geographic areas, even if they constitute less than the seller’s entire practice, because it believes that the narrower approach of the current California rule and the Commission’s recommendation risks ethical problems. It gives as an example that a lawyer with a mixed litigation and transactional clients could sell only to another lawyer who practices in both fields, which would eliminate some potential purchasers and might lead a buyer to take on matters for which the buyer is not be qualified.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 1/12/2016:**
D. Rule 2-300: Sale or Purchase of Law Practice
OCTC does not recommend any revisions to rule 2-300. However, any revisions that may be pursued should be consistent with rules 3-300 and 3-310 addressing adverse interests.
- **RUSSELL WEINER, OCTC, 6/15/2010:**
 1. OCTC’s concern is that as to both deceased and living clients it provides that the notice to the client can state that if there is no response to the notice the buyer-lawyer may act. It does not say it is required to act. This could create a problem. There should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are also some comments providing this, but OCTC believes that it should be in the rule itself.)
 2. There are too many Comments and they seem more appropriate for treatises, law review articles, and ethics opinions. Further, Comment 2 says See Rule 1.16 when it should state that the seller is permitted to withdraw only in compliance with rule 1.16. Comments 1A, 12, 15A, and 15B should be in the rule, not the Comments.
 3. Comments 7 and 11 are too long, burying information and being hard to read and understand. Comment 11 involves two different concepts: conflict checks and confidentiality. They should be separated into two separate comments.

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- **MIKE NISPEROS, OCTC, 9/27/2001:**

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

Revise the rule as follows:

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

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

. . .

STATE BAR COMMENTS:

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

- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **West Virginia** is identical to Model Rule 1.17:

Pennsylvania Rule 1.17 Sale of a Law Practice

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:

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

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

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

(1) the proposed sale;

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

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

(d) The fees charged clients shall not be increased by reason of the sale.

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.17: Terminology," revised October 8, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_17.pdf [last visited 12/23/15]
- Eight states have adopted Model Rule 1.17 verbatim.¹ Sixteen states have adopted a slightly modified version of Model Rule 1.17.² Twenty-four jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.17.³ Three states did not adopt Model Rule 1.17.

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Retain the substance of current rule 2-300, edited in conformity with current practice
 - Pros: No compelling argument has been made for any substantive change in the current California rule.
 - Cons: See Section VIII.B, immediately below.

B. Concepts Rejected (Pros and Cons):

1. Substantially modify the current California Rule by adopting some version of the ABA

¹ The eight states are: Arizona, Indiana, Iowa, Kansas, Vermont, West Virginia, Wisconsin, and Wyoming.

² The sixteen states are: Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Missouri, Montana, Nebraska, Nevada, Rhode Island, South Dakota, Utah, and Washington.

³ The twenty-four jurisdictions are: California, District of Columbia, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, and Virginia.

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MR so as to permit sale of a field of practice (such as a firm's contingent fee cases), the seller's practice in a geographic area (such as all cases in Kern County), or the seller's practice in a jurisdiction (such as the seller's Nevada clients).

- Pros: The main argument in favor of expansion is that doing so would recognize the economic realities of law practice. Two additional arguments were offered by COPRAC. These are that requiring the sale of an entire practice: (i) would compromise the seller's freedom of action by eliminating potential buyers who don't practice in all the seller's areas; and (ii) would create the risk that a buyer might take on matters for which the buyer is not qualified.
- Cons: Current California rule 2-300 is narrowly drafted to permit a solo practitioner 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. This sale might happen due to the lawyer's death or retirement or because the lawyer is leaving the practice of law, such as would happen if the lawyer were appointed to the bench. Thus, current rule 2-200 overcame the earlier, traditional concept that clients cannot be bought or sold, and it did so only to the extent of leveling the playing field by giving to solo practitioners an opportunity to realize the value of the practice just as might be the case with lawyers in law firms whose interests can be purchased by the firm or its remaining partners. By permitting the sale of a practice under strictly controlled conditions, the current rule: (i) avoids the former use of sham associations of lawyers to facilitate transfer of a practice; (ii) provides clients with appropriate notice and protections against potential violations of confidentiality, fee increases, and abandonment of their matters; and (iii) gives clients an opportunity to choose their own legal counsel. An expansion along the MR's lines would: (i) provide a device for evading the restrictions on fee sharing and referral fees found in Rule 1.5.1 [currently rule 2-200]; (ii) create a great potential for abuse by lawyers and law firms seeking to capitalize on market perceptions of the value of their lawyer-client relationships; (iii) add to the commercialization of the practice of law, and (iv) as explained in Comment [4], create the risk the less lucrative clients would be left in the lurch. The current rule was created to address a genuine concern. One reason for the MR expansion advanced by its proponents is that there might be situations where there could be a genuine special need to carve out some part of an established practice; an example would be a lawyer who is not leaving the practice of law but due to health problems cannot handle particular matters, but that situation can be handled under Rule 1.5.1 [2-200]. COPRAC commented that permitting sale only of an entire practice could compromise a seller's ability to sell, but the Rule is not intended to assure that a seller will receive a maximum price but only to balance the rights of sole practitioners and big firm lawyers to an extent, while balancing the sole practitioners' interests with other considerations. COPRAC also voiced concern of a moral hazard, that a buyer might be motivated to take on responsibilities for which the buyer is not equipped, but we do not see why that risk is greater when a lawyer is paying for clients than it would be if the sale lawyer were invited to take on a matter outside

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of his or her experience without having to make any payment for that new client.

2. Remove the word “solely” from paragraph (a).
 - Pros: At least two commenters on the first Commission’s proposals (OCTC and a group of law professors) recommended this change, the law professors repeated this in a letter to the current Commission, and the current drafting team reconsidered this possibility. The previous commenters did not explain their view, and we find nothing to support the change.
 - Cons: As the State Bar said in its exchanges with the Supreme Court prior to the original adoption of the current Rule, a buyer of a law practice should not routinely increase fees. This would have the effect of causing the clients to pay a part of the purchase price. However, there 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. Removing “solely” might be taken as a change in the rule, but none is intended.
3. Shorten from 90 days to 30 days the waiting period stated in paragraphs (b)(i) and (ii).
 - Pros: This was recommended to the first Commission by the Santa Clara County Bar Assoc., but we are unable to see any aspect of client protection in that suggestion. The Rule does not require the buyer to wait 90 days before providing services. It states that “... if the client’s rights would be prejudiced by a failure of the purchaser to act during that time [the 90-day period], the purchaser may act on behalf of the client until otherwise notified by the client.”
 - Cons: There is no evidence that the 90-day period is deficient, so there is no reason to change the current Rule in that respect.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. None

D. Non-Substantive Changes to the Current Rule:

1. The proposed Rule has been edited in conformity with drafting standards adopted by the current Commission by changing “member” to “lawyer”, altering the paragraph numeration, capitalizing “Rule”, seeking to untangle passive and overly complex sentences, and removing a current Discussion sentence that is not needed to explain the meaning of the Rule.

E. Alternatives Considered:

1. N/A

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr

Co-Drafters: Bleich, Martinez

Meeting Date: January 22 – 23, 2016

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues on the Rule as the drafting team makes its recommendation unanimously. There are two open issues regarding the proposed Comments:

- (1) Proposed Comment [2] largely is copied from MR Comment [6]. One member of the drafting team recommends against this addition because: (a) the first sentence explains the policy underpinning the Rule rather than clarifying the Rule's meaning and therefore does not meet our Comment standards; (b) the second sentence merely restates the Rule without adding clarification of anything in the Rule that might cause confusion; and (c) the third sentence is handled more fully by proposed Comment [1].
- (2) One member of the drafting team recommends redrafting proposed Comment [1], saying that it purports to define or describe what the sale of "substantially all of a law practice" means and then gives only an example and that this is bad drafting form and the example only addresses one aspect of this concept. The other two drafting team members recommend the proposed Comment [1] because it provides a concise explanation that largely tracks the *Discussion* to current rule 2-300, and there is no evidence that there is any confusion over the meaning of "substantially all" or that the *Discussion* has caused any confusion.

X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 2-300 [1.17] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 2-300 [1.17] in the form attached to this Report and Recommendation.

XI. DISSENTING POSITION(S)

None.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300
Lead Drafter: Kehr Co-Drafters: Bleich, Martinez Meeting Date: January 22 – 23, 2016
XII. FINAL COMMISSION VOTE/ACTION
Date of Vote: Action: Vote: X (yes) – X (no) – X (abstain)

Rule 2-3001.17 Sale or Purchase of a Law Practice of a Member, Living or Deceased

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

- (Aa) Fees charged to clients shall not be increased solely by reason of ~~such~~the sale.
- (Bb) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code ~~section~~§ 6068, ~~subdivision~~-(e)(1), then:
 - (1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no ~~member~~lawyer has been appointed to act for the seller pursuant to Business and Professions Code ~~section~~§ 6180.5, then prior to the transfer;
 - (a) the purchaser shall cause a written notice to be given to ~~the~~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 papers and property, as required by ~~rule 3-700~~[Rule 1.16(D)d]; and that if no response is received to the notification notice within 90 days ~~of the sending of such notice, or in the event 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. ~~Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements,~~ and
 - (b) the purchaser shall obtain the written consent of the client ~~provided that such. 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 ~~if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.~~
 - (2) in all other circumstances, not less than 90 days prior to the transfer;
 - (a) the seller, or the ~~member~~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~~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 papers and property, as required by ~~rule 3-700~~[Rule 1.16(D)d]; and that if no response is received to the notification notice within 90 days ~~of the sending of such notice 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. ~~Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and~~

- (b)(ii) the seller, or the ~~member~~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 such~~. 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 ~~if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.~~
- (C)c) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a ~~member~~lawyer shall be taken.
- ~~(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.~~
- (d) The purchaser shall comply with the applicable requirements of Rules 1.7 and 1.9.
- (E)e) Confidential information shall not be disclosed to a ~~non-member~~non-lawyer in connection with a sale under this ~~rule~~Rule.
- (F)f) ~~Admission~~This Rule does not apply to the admission to or retirement from a law ~~partnership or law corporation~~firm, retirement plans and similar arrangements, or sale of tangible assets of a law practice ~~shall not be deemed a sale or purchase under this rule.~~

Discussion: Comment

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

[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.

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

[2] Under paragraph (a), the fact of a sale may not serve as the basis for increasing fees charged to clients of the law practice. Consequently, the sale may not be financed by increasing fees charged for client matters transferred through the sale. To the extent that fee increases are justified by other factors, such as modifications of the purchaser's responsibilities, the passage of time, or reasonable costs that were not addressed in the original agreement, such

modifications must comply with Rules 1.4 and 1.5 and other relevant provisions of these Rules and the State Bar Act.

[3] Transfer of individual client matters, where permitted, is governed by ~~rule 2-200~~Rule 1.5.1. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by ~~rule 1-320. (Amended by order of Supreme Court, operative September 14, 1992.)~~Rule 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 ¹	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.	
X-2016-43s	COPRAC (Baldwin)	Yes	D	1.17	The proposed rule seeks to limit the sale of a law practice to “all or substantially all” of that practice, and expressly prohibits the sale of only certain areas of practice or the sale of only specific geographic areas. We believe the better approach is the one taken by the ABA in Model Rule 1.17, which allows the sale of distinct practice areas or geographic areas, even if they constitute less than the entire practice.	
X-2016-52g	Law Professors (Zitrin) (08-24-16)	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.	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

