

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

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)

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

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Meeting Date: January 22 – 23, 2016

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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr
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Meeting Date: January 22 – 23, 2016

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 and Purchase 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 provided that such consent shall be presumed if the purchaser receives no response to the paragraph (b)(1)(i) notice within 90 days after it is sent 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 the 90-day period.
 - (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 Professions Code § 6180.5, shall obtain the written consent of the client prior to the transfer provided that consent shall be presumed until otherwise notified by the client if no response to the

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr
Co-Drafters: Bleich, Martinez
Meeting Date: January 22 – 23, 2016

paragraph (b)(2)(i) notice is received within 90 days after it is sent 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 lawyer shall be taken.
- (d) Confidential information shall not be disclosed to a non-lawyer in connection with a sale under this Rule.
- (e) This Rule does not apply to the admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] "All or substantially all of the law practice of a lawyer" means, for purposes of this Rule, that, for example, a lawyer may retain one or two clients who have such a longstanding personal and professional relationship with the lawyer that transfer of those clients' files is not feasible. It also recognizes that the purchaser might not be able to accept particular clients due to resulting conflicts of interest. See Rule 1.7. Conversely, this Rule is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by paragraph (b)(1)(ii) or (b)(2)(ii) or by Rule 1.7.

[2] 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, 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.

[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 ~~of~~and Purchase of a Law Practice ~~of a Member, Living or Deceased~~

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

- (a) Fees charged to clients shall not be increased solely by reason of ~~such~~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 ~~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~~member~~lawyer~~lawyer has been appointed to act for the seller pursuant to

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr

Co-Drafters: Bleich, Martinez

Meeting Date: January 22 – 23, 2016

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 ~~3-7001.16~~1.16(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 ~~in~~if the ~~event the client's~~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 consent shall be presumed ~~until otherwise notified by the client if~~ the purchaser receives no response ~~is received to the notification specified in subparagraph (a) to the paragraph (b)(1)(i) notice~~ within 90 days ~~of the date of the sending of such notification to the client's~~after it is sent to the client's last address as shown on the records of the seller, or the ~~client's~~client's rights would be prejudiced by a failure to act during ~~such~~the 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 ~~3-7001.16~~1.16(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~~ consent shall be presumed until otherwise notified by the client if no response to the paragraph (b)(2)(i) notice 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~~after it is sent 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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr
Co-Drafters: Bleich, Martinez
Meeting Date: January 22 – 23, 2016

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.~~

~~(E)~~ Confidential information shall not be disclosed to a ~~non-member~~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 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.~~

Comment~~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.~~

~~“[1] “All or substantially all of the law practice of a member”~~lawyer” means, for purposes of this Rule 2-300, that, for example, a ~~member~~lawyer may retain one or two clients who have such a longstanding personal and professional relationship with the ~~member~~lawyer that transfer of those clients’ files is not feasible. It also recognizes that the purchaser might not be able to accept particular clients due to resulting conflicts of interest. See Rule 1.7. Conversely, this 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~~paragraph (b)(1)(~~aii~~) or ~~paragraph (D)~~(b)(2)(ii) or by Rule 1.7.

[2] “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, 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.”

[3] Transfer of individual client matters, where permitted, is governed by Rule ~~2-200~~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 ~~4-320.5.4(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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr
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Meeting Date: January 22 – 23, 2016

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE:**

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the Commission when they are received from OCTC.)

- **RUSSELL WEINER, OCTC, 6/5/2010:**

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 if 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.

- **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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr
Co-Drafters: Bleich, Martinez
Meeting Date: January 22 – 23, 2016

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

(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

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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr

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Meeting Date: January 22 – 23, 2016

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
 - o Pros: No compelling argument has been made for any substantive change in the current California rule.
 - o 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 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).
 - o Pros: The main argument in favor of expansion is that doing so would recognize the economic realities of law practice.
 - o 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 have happened 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

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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

Lead Drafter: Kehr

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Meeting Date: January 22 – 23, 2016

capitalize on market perceptions of the value of their lawyer-client relationships; and (iii) add to the commercialization of the practice of law. The current rule was created to address a genuine concern. No compelling reason for the MR expansion 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; 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].

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, 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.
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

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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. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Kehr

- [Date]: Email Comment

Bleich

- [Date]: Email Comment

Martinez

- [Date]: Email Comment

XI. 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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-300

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XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 2-300
“Sale or Purchase of a Law Practice of a Member, Living or Deceased”

I. Text of Current Rule:

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;
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 - (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. Background/Purpose:

In 1987, the State Bar recommended a new rule 2-300 to the California Supreme Court as part of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation" ("1987 Request"), page 27 of Bar Misc. No. 5626, December 1987, and pages 5-6 of Enclosure 1. The 1987 version of the rule provided:

Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased [1987 Version]

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 prior to the transfer;

- (1) 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
 - (2) 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 (1) 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.
- (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:

“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) 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.

The 1987 Request provided the following statement for recommending a new rule 2-300:

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

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

The proposed rule would permit compensation which includes the value of goodwill and would regulate such sales in order to protect the rights and interests of existing clients and potential consumers of legal services. (See page 27 of the 1987 Request.)

In response to the 1987 Request, the Supreme Court sent the State Bar a letter that raised the following issues concerning proposed rule 2-300:

3. Proposed Rule 2-300(A) (Sale or Purchase of a Law Practice of a Member, Living or Deceased) contains ambiguous language limiting attorney's fee increases following the sale and purchase of a law practice. Does the subdivision prohibit all post-sale fee increases? Or, is it simply intended to prohibit unnecessary, unreasonable, or inadequately noticed fee increases? If so, should notice be sent to all clients whenever a sale takes place under this rule? Proposed Rule 2-300 further omits a necessary provision which would indicate that all activities of the seller are subject to Proposed Rule 3-100 (Duty to Maintain Client Confidence and Secrets Inviolable). Even if proposed rule 3-100 does apply, rule 2-300(B) should require the seller, not the purchaser, to send written notice to the client to prevent disclosure of any privileged or confidential client identification information. (See *People v. Pic'l* (1981) 114 Cal.App.3d 824, 883; *Willis v. Superior Court* (1980) 112 Cal.App.3d 277, 291.) To the same end, should proposed rule 2-300(B) specify that the written notice should be sent to the client at least 90 days prior to the transfer, whenever any sale occurs under this rule? (June 9, 1988 Letter from Supreme Court of California to State Bar of California, at page 2 provided as Enclosure 4 to Bar Misc. 5626 "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Supplemental Memorandum and Supporting Documents in Explanation" dated September 1988.)

In response to the Supreme Court's June 9, 1988 inquiry concerning proposed rule 2-300, the State Bar stated:

As to the question regarding fee increases after the sale, the proposed language was patterned after the language in current rule 2-108 and was not intended to prohibit all post sale fee increases. It was intended to prohibit the purchaser from routinely charging the "purchased" clients a higher fee than is charged to existing clients to cover the costs of the purchase. In order to clarify conduct prohibited

by paragraph (A), it is recommended that the following paragraph be added to the Discussion portion of the rule:

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

As to the question regarding giving notice to all clients whenever a sale is made, the Discussion portion of the rule states that the rule is not intended to permit piecemeal sale of cases, except in rare instances, but rather to permit and regulate the sale and purchase of entire law practices. Therefore, if a member determines to sell his or her practice, except in rare instances, all clients will be subject to the transfer and will therefore receive the notice contemplated by paragraph (B).

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

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

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

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

As to those situations in which the seller is deceased, has had a conservator appointed, or has another acting in a representative capacity, the version of the rule currently being recommended continues to impose the duty of notice to the client on the purchaser because, in those situations, the client would be afforded the greatest protection possible. (See pages 9-12 of Bar Misc. 5626 "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Supplemental Memorandum And Supporting Documents In Explanation" dated September 1988.)

In accordance with the State Bar's response, the State Bar submitted a modified proposed rule as follows:

Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased [1989 version]

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 ~~rule 3-400~~ Business and Professions Code section 6068, subdivision (e), then ~~prior to the transfer~~;
 - (1) if the seller is deceased, has a conservator or other person acting in a representative capacity, prior to the transfer;
 - (a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and
 - (b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (1)(a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the

client's rights would be prejudiced by a failure to act during such 90 day period.

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

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

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

- (C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.
- (D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.
- (E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.
- (F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

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

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

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

The foregoing version was approved operative on May 26, 1989 as part of comprehensive revisions to the Rules of Professional Conduct.

In 1991, the State Bar requested that the Court amend rule 2-300 and provided this explanation:

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

Proposed amendment to subparagraphs (B)(2)(a) and (B)(2)(b) would require that a new attorney appointed by the court pursuant to section 6180.5 comply with the written notice and consent requirements found in these two subparagraphs. Proposed amendment to subparagraph (B)(1) would clarify that subparagraphs (B)(1)(a) and (B)(1)(b) do not apply in situations where a new attorney has been appointed by the court pursuant to section 6180.5. (Supreme Court File No. S024408, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," dated December 1991, at page 12.)

The State Bar amended the rule and submitted the following version to the Supreme Court:

Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased [1992 version]

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

- (A) Fees charged to clients shall not be increased solely by reason of such sale.
- (B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then;
 - (1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer;
 - (a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take

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

- (b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90 day period.
- (2) in all other circumstances, not less than 90 days prior to the transfer;
- (a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and
 - (b) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.
- (C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.
- (D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

- (E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.
- (F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

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

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

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

(See Enclosure 1 of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991, Supreme Court File No. S024408, for the clean version text of this rule.)

The Court approved the foregoing amendments operative on September 14, 1992. The 1992 version is current rule 2-300.

III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):*

A. 2015 Comment

In a _____, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 3-200:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2001 Comment

In a 2001 letter to the prior Commission, OCTC provided the following comment on rule 2-300:

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.

C. 2010 Comment

In a 2010 letter to the prior Commission, OCTC provided the following comment on rule 2-300:

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 if 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.

IV. *Potential Deficiencies in the Current Rule:*

- A. See above input from OCTC.
- B. Current rule 2-300 is limited to a sale of "all or substantially all of a law practice." As a consequence of this limitation, the rule would subject a lawyer to discipline for selling only a part of the lawyer's law practice. Such sales include: (1) a partial sale of a substantive area of a lawyer's practice (for example, a sale in which a lawyer transfers the lawyer's estate planning practice to a buyer, but retains all civil litigation cases); and (2) a partial sale of a geographic area of a lawyer's practice (for example, a sale in which a litigator transfers all of the cases pending or to be filed in a court in northern California but retains cases pending or to be filed in southern California). (See ABA MR 1.17.)

- C. Current rule 2-300 does not expressly require that unless the scope of the work is narrowed or expanded with the clients' informed consent, the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work. Imposing this requirement might improve client protection.
- D. Current rule 2-300 does not expressly provide that a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4. Clarifying this point may further the purpose of the rule and eliminate an ambiguity.
- E. Current rule 2-300 does not clarify that a seller cease the private practice of law. Would such a requirement prohibit the seller's 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. In part, clarifying this point might remove an unintended obstacle to a seller's post-sale participation in legal services activities.

V. California Context:

- A. Business and Professions Code section 16602.

California law regulates certain anti-competitive agreements among partners. Business and Professions Code section 16602 provides that:

(a) Any partner may, upon or in anticipation of any of the circumstances described in subdivision (b), agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.

(b) Subdivision (a) applies to either of the following circumstances:

- (1) A dissolution of the partnership.
- (2) Dissociation of the partner from the partnership.

- B. Business and Professions Code sections 6180 et seq.

The State Bar Act provides that the courts shall have jurisdiction over the law practice of a lawyer who dies, resigns, or becomes an inactive or disbarred member.

- C. Business and Professions Code sections 6190 et seq.

The State Bar Act provides that the courts shall have jurisdiction over the law practice of a lawyer who has for any reason, including but not limited to excessive use of alcohol or drugs, physical or mental illness, or other infirmity or other cause, become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client.

D. Probate Code Probate Code section 2468.

The conservator of the estate of a disabled attorney who was engaged in the practice of law at the time of his or her disability, or other person interested in the estate, may bring a petition seeking the appointment of an active member of the State Bar of California to take control of the files and assets of the practice of the disabled member. The appointed person serves as the “practice administrator” and may petition to exercise the powers set forth in Business and Professions Code section 6185. Section 6185 includes the authority to sell “the practice and its goodwill.”

The State Bar of California offers a [model agreement](#) for the designation of an attorney to administer a lawyer's law practice in the event that the lawyer becomes disabled or incapacitated. The agreement details the typical responsibilities of the lawyers involved in an "Agreement to Close Law Practice in the Future" and is intended to facilitate compliance with Probate Code section 2468 and Business and Professions Code section 6185.

VI. Approach In Other Jurisdictions (National Backdrop):

A. 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

- 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 1.17.⁴

VII. Public Comment Received by the First Commission:

The clean text of proposed rule 1.17 drafted by the first Commission and adopted by the Board to replace rule 2-300 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 2-300, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

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.

⁴ The three states are: Alabama, Louisiana, and Texas.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 2-300 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the rule should be amended to delete the requirement that a lawyer's entire practice must be sold and instead expressly permit a partial sale of a substantive area of a lawyer's practice (for example, a sale in which a lawyer transfers the lawyer's estate planning practice to a buyer, but retains all civil litigation cases). (See ABA MR 1.17.)

(2) Whether the rule should be amended to delete the requirement that a lawyer's entire practice must be sold and instead expressly permit a partial sale of a geographic area of a lawyer's practice (for example, a sale in which a litigator transfers all of the cases pending or to be filed in a court in northern California but retains cases pending or to be filed in southern California). (See ABA MR 1.17.)

(3) Whether the rule should be amended to require that unless the scope of the work is narrowed or expanded with the clients' informed consent, the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.

(4) Whether the rule should be amended to clarify that a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.

(5) Whether the rule should require that the lawyer-seller cease to engage in the private practice of law. And, if so, should such requirement permit the 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.

IX. Research Resources:

- [Business and Professions Code § 6180 et. seq.](#)
- [Business and Professions Code § 6190 et. seq.](#)
- [Business and Professions Code § 16602](#)
- [Probate Code Probate Code § 2468](#)
- [Probate Code § 9764](#)
- [Probate Code § 17200](#)