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Editor's Note: This version of the email compilation includes an email exchange among the drafting team members that addressed an issue regarding modification of fee agreements by the purchaser. It is included to provide some background information on that issue.

December 25, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I have attached a draft of our Report on this Rule. Mimi prepared sections I through VII so as to include my most recent draft of the Rule. All of that looks right to me, but please tell me if you catch any errors.

My additions are in sections VIII and IX.

Attached:
RRC2 - [2-300][1.17] - Report & Recommendation - DFT1.1 (12-25-15).docx

December 26, 2015 Martinez Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I would add the following underlined language to paragraph (A):

> (A) The purchaser assumes the obligations of the seller under existing retainer agreements between the seller and the seller's clients and the fees charged to clients are not be increased solely by reason of such sale.

The idea is to make clear that the purchaser must accept an assignment of the existing fee agreements. It doesn't follow that in selling a law practice the buyer must automatically accept or abide by the terms and conditions of the existing retainer agreement. Also paragraph (A) only addresses the "fees charged" and not other terms and conditions of those agreements. The fees charged represents only one contractual term of the fee agreements. Besides the amount of the fees or rates, the clients could also be forced to accept more onerous terms. For example, the buyer could require arbitration of disputes when the existing agreements do not mandate arbitration of malpractice or other disputes. The buyer could also foist on the client a larger dollar amount as an advance fee retainer (which technically does not increase the fees charged) and such increase would not fall within the present language.

Legally, and as a matter of contract law, I don't see how the buyer is free to "renegotiate" existing fee agreements with the clients. And it's no answer to say that the clients are free to retain other counsel if they don't like the terms offered by the seller.

Moreover, the client has the absolute right to discharge his or her lawyer at any time, not the other way around. So the seller remains obligated to perform and cannot sell the practice and move to the Bahamas, leaving the clients with more onerous fee agreements. Yet the rule seems to allow the seller to do just that. There is no provision that requires the seller to live up to his or her contractual obligations if clients refuse to go along with the transfer. Instead clients are forced to retain other counsel. So much for the sanctity of contracts.

I also think we need a reference to Rule 1.16(b)(1), and specifically, that the seller may withdraw only if the withdrawal can be accomplished without material adverse effect on the interests of the clients, or in the parlance of Rule 3-700, the lawyer may not withdraw without taking reasonable steps to avoid reasonably prejudice to the rights of the clients. The draft rule refers to Rule 1.16(d) but not Rule 1.16(b)(1).

December 28, 2015 Bleich Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I tend to favor Bob's formulation only because I have concerns about how Raul's approach would actually play out. For example, there may be certain terms of a retainer agreement that simply would not work for a different firm that is structured differently. The acquiring firm might, for instance, have paralegals and case clerks who bill at lower rates for the same work, but the original engagement letter might provide that only the attorney may bill time. Even in a less extreme example, I'd think that it would be more in the client's interest to go with a new purchaser that is eager to do their case and is relatively close in terms of its engagement terms, than to have the matter retained by a lawyer who is scaling back or leaving their practice altogether. Limiting fees seems to take care of the worst risk of gouging by an acquiring firm. But I would leave other terms to the lawyer and client to work out a sensible accommodation. I'd be interested in Raul's thoughts though, since this is not an area in which I have particular expertise.

December 29, 2015 Martinez Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

As a compromise what about adopting ABA Comments 6, 9, 10. Note that Comment 10 highlighted below would address Jeff's concern.

> [6] The Rule requires that the seller's entire practice, ~~or an entire area of practice~~, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice ~~or practice area~~, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.
>
> [9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.
>
> [10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

I think these comments (which of course can be tweaked) would help address the client protection concerns that I have raised.

* * *

January 2, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

This is an issue on which the first Commission spent a good deal of time. Its solution was to add the underlined language to what is in the current rule:

> Fees charged to clients shall not be increased solely by reason of the purchase, and, 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.

The added language addresses the possible change in scope that I mentioned in an earlier message. It doesn't recognize that a specific fee might go down, as Jeffrey pointed out with regard to paralegals, and it also doesn't recognize that the buyer might have billing categories that simply don't fit the current fee agreement. What I have in mind is a sole practitioner (necessarily having a single billing rate for any client) who retires and sells his practice to a firm that has multiple billing rates. The first Commission's language overlooked this. A change in billing rates won't always be either unfair to the client or offensive from a rule drafting standpoint.

I would be concerned if the buyer were to agree to pay the seller X% of future collections and increase the buyer's normal billing rates by an equivalent amount, so that clients in effect pay the cost of the purchase. If the buyer were to accomplish that by misrepresenting his or her normal billing rates for similar work, the buyer would have entered into unconscionable fee agreements under the *Herrscher* standard and would have violated our new Rule 1.4. What seems most likely to me is that the buyer will be cautious about raising billing rates for fear of losing the potential new clients. My experience has been the buyers of professional practices attempt to obtain the largest possible down payment, and this should give buyers the motivation to be cautious. This, coupled with the lack of any evidence that this topic is a real-world issue, makes me think the fee question is self-regulating.

Raul suggested in his first 12/29/15 message that we add three of the MR Comment paragraphs. MR Comment [6] is a policy statement that doesn't explain the content of the Rule and therefore doesn't meet the standard that governs our Comments. MR Comment [9] also doesn't explain the Rule but is more along the lines of collateral information; however, there is nothing in the proposed Rule to suggest that any client cannot fire the buyer (or the seller), and paragraphs (b)(1)(i) and (b)(2)(i) require this information in the client notices. MR Comment [10] would alter the meaning of the Rule and should be in the Rule rather than a Comment, but as I've said above, I would not elaborate on what is in the current draft.

Raul arguable is right in his second 12/29/15 message about the use of "means" in Comment [1]. However, I think of it less as an attempted definition of "all or substantially all" and more of a statement of consequence. Given that this comes from the current *Discussion* and has caused no trouble so far as I know, I am inclined to keep it rather than to spend time on what seems to be a minor nuance.

My conclusion: While there is something inherently unseemly about the buyer financing the purchase by overcharging the clients, this seems to me largely to be self-regulating. To the extent it isn't, it should be covered by Rule 1.4 and existing unconscionable fee standards.

January 2, 2016 Martinez Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I prefer the ABA language and not micromanage the circumstances under which existing retainer agreements may be modified. I think it's implicit that the agreement may be modified in the event the scope of the work expands—i.e., changed circumstances. However, in the sale of any business, the buyer, by definition, assumes the existing contracts of the seller. This is the default position. I also don't like the syntax of the first Commission's language (underlined in your email). What is the client consenting to—tossing out the original agreement and substituting a new agreement (novation)?

With respect to ABA Comment [6], only the first sentence restates the rule. The other sentences are explanatory which is within our charge. Comment [9] is important to emphasize that the sale

does not trump the client's right to retain new counsel. These comments are important for client protection. I am fine with including the concepts of Comment [10] in the black letter.

Defining "All or substantially all of the law practice of a lawyer" with reference to an example of a particular circumstance is bad form. It's more than a minor nuance. The fact that the same language is found in the current Discussion is not a sufficient reason not to fix it. I prefer that we take it out. If not, it should be placed in the black letter.

* * *

January 6, 2015 Bleich Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I'm persuaded by Raul that we should include a version of MR Comment 6. I think it is a helpful explanation, and does not merely repeat the rule. I agree with Bob regarding the current Comment 1. My view is that "substantially" is a term that could be subject to abuse (even if we have not had instances of that raised previously) and that this makes clear that "substantially" truly means virtually all of the practice that the purchaser can legal accept subject to ethics rules absent some special circumstance.

January 7, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I've attached the final (?) version of our Report. I have inserted a new Comment [3] that I hope conveys Raul and Jeff's intent and have edited Section IX accordingly. There are no other new changes.

Attached:
RRC2 - [2-300][1.17] - Report & Recommendation - DFT1.3 (01-07-16).docx

January 7, 2015 Martinez Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

The clean version doesn't seem to match the redline version. Also, comments 2 and 3 in the redline seem identical.

January 7, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

Quite right. The result of multi-tasking. Please take a look at this version.

Attached:
RRC2 - [2-300][1.17] - Report & Recommendation - DFT1.4 (01-07-16).docx

January 7, 2015 Martinez Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I'm fine with it.

January 7, 2015 Bleich Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I am as well. Thanks, Bob.

January 12, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:

The Office of Chief Trial Counsel's comments on the rules under consideration at the January meeting are attached. Please review them in preparation for the discussion at the January meeting.

Attached:
RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to RRC2.docx
RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to RRC2.pdf

January 12, 2015 OCTC Memo to RRC2:

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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.

January 17, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I offer the following comments on proposed rule 1.17:

1. Title: For purposes of brevity and consistency, why not have the same title used in most jurisdictions: "Sale of Law Practice"? Adding "and purchase" does not add anything.

2. Paragraph (a): If "solely by reason of the sale" is retained, there should be a comment that explains what that means so lawyers will understand if a difference is intended between our rule and Model Rule 1.17(d). This draft removes the first sentence in the Discussion to current rule 2-300 and does not address OCTC's and the "law professors" concerns. On balance, I would prefer deleting the word "solely" to avoid confusion. If "solely" is retained, here is a suggested comment derived from Comment [10] to the Model Rule and our current rule:

   > [ ] The sale may not be financed by increases in fees charged 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. Paragraphs (b)(1)(ii) and (b)(2)(ii): I am concerned that sending written notice to the client's last address as shown on the records of the seller may not be adequate in today's legal environment. The Model Rule provides that if a client cannot be given notice, the transfer of the client's matter to the purchaser occurs only upon entry of a court order. Comment [8] explains that one of the reasons for court approval where the client does not receive notice is "to determine whether reasonable efforts to locate the client have been exhausted." I see three possible alternatives:

a. Require court approval where a client cannot be given written notice as provided in Model Rule 1.17(c);
b. Transfer of a client matter where the client cannot be given notice can only occur after reasonable efforts to locate the client has been exhausted and the absent client's legitimate interests will be served by transferring the matter to the purchaser.
c. The seller must retain and conclude a client matter where the client does not receive written notice. [or seek to withdraw – see #7 below]

4. I don't see an explanation for deleting paragraph (D) in the current rule. While I agree the language is awkward and should be redrafted, it seems to me this adds an important public protection requirement to the sale of a law practice that should be in the rule and not in the comments. Here is a suggested alternative:

(d) The seller and the purchaser shall comply with the applicable requirements of Rules 1.7, 1.8 and 1.9.

5. Paragraph (e): I recommend that "law partnership or law corporation" be replace with "law firm".

6. Comment [1]: I agree with the drafter that thinks Comment [1] is awkward and should be redrafted. Here is my attempt to clarify:

[2] "All or substantially all of the law practice of a lawyer" means that the entire law practice is being sold and not just a field or area of practice or the seller's practice in a geographical area or in a particular jurisdiction. At the same time, a seller may retain one or more clients where, for example, [the client does not receive written notice of the sale], the client has a long standing relationship with the seller than transfer that client's matter is not feasible, the purchaser is unable to accept a client as result of a conflict of interest. See Rules 1.7 and 1.9. This Rule does not 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)."

7. Should the rule or the comments give the Seller the option to withdraw under Rule 1.16 if a client does not consent to the transfer or if client is unable to receive written notice?

January 17, 2016 Martinez Email to Tuft, cc Drafting Team, Difuntorum, Mohr & A. Tuft:

I agree with most of your comments.

1. Agree.

2. I was in favor of ABA Comment [10] also. I also favored ABA Comments [6] and [9]. Since this is really not a disciplinary rule at all, but gives lawyers a green light to sell their law practice, I think the comments need to emphasize client protection. However, I think the word "solely" is necessary to allow some flexibility in fees. Some fees may result from factors unrelated to the sale. I was also concerned that as a matter of contract law the buyer is legally obligated to honor the terms of the existing fee agreements. This is true in the sale of any business. Legally, I don't see how the buyer is free to "renegotiate" existing fee agreements. I don't understand why lawyers should be given greater flexibility via a Rule of Professional Conduct that tampers with contract law. After all, a contract is a contract. I also had the concern that there is no provision that requires the seller to live up to his or her contractual obligations if clients refuse to go along with the transfer. Instead the only option clients have is to retain other counsel. I had suggested unsuccessfully that paragraph (a) state: "The purchaser assumes the obligations of the seller under existing retainer

agreements between the seller and the seller's clients and the fees charged to clients are not increased solely by reason of such sale."

3. If the client can't be located, legally I think option c is correct –the seller must honor the existing agreement. I don't know how the Rule can change substantive contract law.

4. I agree we need paragraph (D) from the current rule—again for client protection, to send the message to lawyers about their obligations in that regard.

5. I agree generally with using the term "law firm," but I don't know if this fits within the definition of "law firm" in Rule 1.01 which includes a lot of other types of law practices including public ones. "Law firm" seems too broad. Less may be more here.

6. I was the commenter who believed Comment [1] is awkward. (I see that the actual emails are not in the materials.) I was also in favor of making clear that the Rule doesn't allow "cherry picking." I would add a sentence to this comment stating that the requirement that "all or substantially all of the practice" be sold is intended to preclude "cherry picking" of lucrative matters, while leaving less lucrative clients to fend for themselves. Taking off on your language, Comment [1] could read:

   "All or substantially all of the law practice of a lawyer" means that the entire law practice is being sold and not just a field or area of practice or the seller's practice in a geographical area or in a particular jurisdiction. The requirement is also intended to preclude "cherry picking" of lucrative matters, while leaving less lucrative clients to fend for themselves. At the same time, a seller may retain one or more clients where, for example, [the client does not receive written notice of the sale], the client has a long standing relationship with the seller than transfer that client's matter is not feasible, the purchaser is unable to accept a client as result of a conflict of interest. See Rules 1.7 and 1.9. This Rule does not 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)."

January 18, 2016 Mohr Email to Drafting Team, cc Tuft, Difuntorum & A. Tuft:

Might I suggest a less colloquial term for "cherry picking" in #6, below? I recommend substituting "selective purchase" so that the second sentence would provide:

> "The requirement is also intended to preclude ~~"cherry picking"~~ the selective purchase of lucrative matters, while leaving less lucrative clients to fend for themselves."

January 18, 2016 Martinez Email to Drafting Team, cc Tuft, Difuntorum, Mohr & A. Tuft:

Perfect. (Although "cherry picking" would more accurately bring the message home to the average practitioner.)