American Bar Association

ADOPTED BY THE HOUSE OF DELEGATES

February 4-5 2002

Evaluation of Rules of Professional Conduct (Report No. 401)

The Commission’s recommendation recommending that the House of Delegates resume consideration of the debate on the Model Rules of Professional Conduct and adopting the proposed amendments as submitted February 2002 was approved, as amended, with the exception of Rules 5.5 and 8.5. It reads:

RESOLVED, That the American Bar Association resumes consideration of the debate on the Model Rules of Professional Conduct and adopts the proposed amendments as submitted in February 2002*.

Please note the following actions taken on Rules 1.11 through 8.5, the motion to reconsider Rule 1.6(b)(1) and the conforming amendments. Only in instances where the Commission’s recommendations were amended will this summary include the text of the amendments.

Rule 1.11 — Special Conflicts of Interest for Former and Current Government Officers and Employees. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 1.12 — Former Judge, Arbitrator, Mediator or other Third-Party Neutral. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 1.13 — Organization as Client. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 1.14 — Client with Diminished Capacity. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 1.15 — Safekeeping Property. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 1.16 — Declining or Terminating Representation. The committee’s amendments to the rule and accompanying commentary were approved*.

* Amendments to the Model Rules of Professional Conduct dated February 2002, are available upon request to the Division for Policy Administration.
Rule 1.17 – Sale of Law Practice. The committee’s amendments to the rule and accompanying commentary were approved as amended*. As amended, it reads:

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.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for
the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

**Termination of Practice by the Seller**

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the
entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[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.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).

[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.

**Fee Arrangements Between Client and Purchaser**

[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.

**Other Applicable Ethical Standards**

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.9(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

**Applicability of the Rule**

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.
Rule 1.18 – Duties to Prospective Client. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 2.1 – Advisor. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 2.2 – Intermediary. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 2.3 – Evaluation for Use by Third Persons. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 2.4 – Lawyer Serving as Third-Party Neutral. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 3.1 – Meritorious Claims and Contentions. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 3.2 – Expediting Litigation. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 3.3 – Candor Toward the Tribunal. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 3.4 – Fairness to Opposing Party and Counsel. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 3.5 – Impartiality and Decorum of the Tribunal. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 3.6 – Trial Publicity. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 3.7 – Lawyer as Witness. The committee’s amendments to the rule and accompanying commentary were approved*.

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Rule 3.8 – Special Responsibilities of a Prosecutor. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 3.9 – Advocate in Nonadjudicative Proceedings. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 4.1 – Truthfulness in Statements to Others. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 4.2 – Communications with Person Represented by Counsel. The committee’s amendments to the rule and accompanying commentary were approved as amended*. As amended, it reads:

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Comment

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[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a

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communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

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**Rule 4.3 – Dealing with Unrepresented Person.** The committee’s amendments to the rule and accompanying commentary were approved*.

**Rule 4.4 – Respect for Rights of Third Persons.** The committee’s amendments to the rule and accompanying commentary were approved*.

**Rule 5.1 – Responsibilities of Partners, Managers and Supervisory Lawyers.** The committee’s amendments to the rule and accompanying commentary were approved*.

**Rule 5.2 – Responsibilities of a Subordinate Lawyer.** The committee’s amendments to the rule and accompanying commentary were approved*.

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Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 5.4 – Professional Independence of a Lawyer. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 5.5 – Unauthorized Practice of Law. The committee’s amendments to the rule and accompanying commentary were not considered, pursuant to the special rule.

Rule 5.6 – Restrictions on Right to Practice. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 5.7 – Responsibilities Regarding Law-Related Services. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 6.1 – Voluntary Pro Bono Publico Service. The committee’s amendments to the rule and accompanying commentary were approved as amended*. As amended, it reads:

... Comment

... [11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

... Rule 6.2 – Accepting Appointments. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 6.3 – Membership in Legal Services Organization. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 6.4 – Law Reform Activities Affecting Client Interests. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 6.5 – Nonprofit and Court-Annexed Limited Legal Services Programs. The committee’s amendments to the rule and accompanying commentary were approved*.

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Rule 7.1 – Communications Concerning a Lawyer’s Services. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 7.2 – Advertising. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 7.3 – Direct Contact with Prospective Clients. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 7.4 – Communication of Fields of Practice and Specialization. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 7.5 – Firm Names and Letterheads. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 7.6 – Political Contributions to Obtain Government Legal Engagements or Appointments by Judges. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 8.1 – Bar Admission and Disciplinary Matters. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 8.2 – Judicial and Legal Officials. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 8.3 – Reporting Professional Misconduct. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 8.4 – Misconduct. The committee’s amendments to the rule and accompanying commentary were approved*.

Rule 8.5 – Disciplinary Authority; Choice of Law. The committee’s amendments to the rule and accompanying commentary were not considered, pursuant to the special rule.

Rule 1.6(b)(1) – Confidentiality of Information. The motion to reconsider Rule 1.6(b)(1) as approved by the House in August 2001 was approved. The amendment, however, was not approved.

* Amendments to the Model Rules of Professional Conduct dated February 2002, are available upon request to the Division for Policy Administration.
Conforming amendments. The conforming amendments to the committee’s amendments as printed in the bound book were approved in addition to the following:

To amend Rules 1.2 and 1.4 by striking out “mental disability” and inserting “diminished capacity.”

To amend Rule 1.9 comment [3] by striking out “; nor will government information that the lawyer is impliedly authorized to use or disclose or that is otherwise known to persons outside the government agency involved” in lines 66-68.

To amend Rule 3.1 comment 3 by inserting “or contention” in line 30 after “claim.”