

THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT [204 PA. CODE CH. 81]

Adoption of Rule 1.17 of the Rules of Professional Conduct and Conforming Amendments Regarding the Sale of a Law Practice; Notice of Proposed Rulemaking

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Supreme Court of Pennsylvania that it adopt a new Rule 1.17 of the Pennsylvania Rules of Professional Conduct and conforming amendments to read as set forth in Annex A.

Proposed Rule 1.17 was prepared by the Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association following approval in principle of the concept underlying the Rule by the House of Delegates of the Pennsylvania Bar Association.

The purpose of proposed Rule 1.17, which is patterned after ABA Model Rule of Professional Conduct 1.17, is to place solo and small firm practitioners on an equal footing with lawyers in larger firms with respect to the sale of a practice and for estate planning purposes. The proposed Rule will also clarify the permissible manner in which a law practice may be sold in the event of retirement, death, relocation or divorce.

Interested persons are invited to submit written comments regarding the proposed new Rule 1.17 and the conforming amendments to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, First Floor, Two Lemoyne Drive, Lemoyne, PA 17043, on or before September 15, 1997.

By The Disciplinary Board of the Supreme Court of Pennsylvania

ELAINE BIXLER,
Secretary

Annex A

TITLE 204. JUDICIARY SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart A. PROFESSIONAL RESPONSIBILITY

CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

Subchapter A. RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

RULE 1.6. Confidentiality of Information.

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(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another;

(2) to prevent or to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; [or]

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to effectuate the sale of a law practice consistent with Rule 1.17.

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Comment:

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Disclosures Otherwise Required or Authorized

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It is recognized that the due diligence associated with the sale of a law practice authorized under Rule 1.17 may necessitate the limited disclosure of certain otherwise confidential information. However, as stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having a need to know it, and to obtain appropriate arrangements minimizing the risk of disclosure.

Former Client

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RULE 1.17. Sale of Law Practice.

A lawyer may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller sells the practice as an entirety to another lawyer. For purposes of this Rule, a practice is sold as an entirety if the purchasing lawyer assumes responsibility for all of the active files except those specified in paragraph (f) of this Rule.

(b) Actual written notice is given to each of the seller's clients, which notice must include at a minimum:

(1) notice of the proposed sale, including the identity and address of the purchasing lawyer;

(2) a statement that the client has the right to continue to retain the purchasing lawyer under the preexisting fee arrangements;

(3) a statement that the client has the right to retain other counsel or to take possession of the file; and

(4) a statement that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within 60 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 authorizing the transfer 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 transfer of a file.

(c) The seller and purchaser may agree to restrictions on the practice of law by the seller, which shall be set forth in a written agreement.

(d) The fees charged clients shall not be increased by reason of the sale. Existing agreements between the seller and the client concerning fees and the scope of work must be honored by the purchaser, unless the client consents in writing after consultation.

(e) The agreement of sale shall include a clear statement of the respective responsibilities of the parties to maintain and preserve the records and files of the seller's practice, including client files.

(f) The sale shall not be effective as to:

(1) any client to whom notice cannot be given as required;

(2) any client for whom litigation is pending and the court refuses to substitute counsel or terminate the representation; and

(3) any client for whom the proposed sale would create a conflict of interest for the purchaser or who cannot be represented by the purchaser because of other requirements of the Pennsylvania Rules of Professional Conduct or rules of the Pennsylvania Supreme Court governing the practice of law in Pennsylvania, unless such conflict, requirement or rule can be waived by the client and is in fact waived by the client in writing.

(g) For purposes of this Rule, the term "lawyer" means an individual lawyer or a law firm that buys or sells a law practice. The estate of a deceased lawyer may be a seller. Admission to or withdrawal from a partnership or professional corporation, retirement plans and similar arrangements or a sale limited to the tangible assets of a law practice is not a sale or purchase for purposes of this Rule 1.17.

Comment:

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 and another lawyer or firm takes 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.

Sale of Entire Practice

The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients

decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation of this Rule.

Single Purchaser

This Rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of nonwaivable conflicts of interest, other requirements of these Rules or rules of the Supreme Court governing the practice of law in Pennsylvania, the requirement that there be a single purchaser is nevertheless satisfied.

Client Confidences, Consent and Notice

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 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 the 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 and file transfer including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 60 days. If actual notice is given, and the client makes no response within the 60 day period, client consent to the sale will be presumed. If actual notice cannot be given with regard to a client, paragraph (f)(1) makes clear that the sale is not effective with regard to that client.

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 disposition of their files, the Rule requires an Order from a court having jurisdiction authorizing their transfer. 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 representation. Preservation of client confidences requires that the petition for a court order be considered in camera. It may be necessary for courts having such jurisdiction to provide for appropriate procedures to effectuate such disposition where the existing procedures are not adequate to cover such petitions.

The Rule provides the minimum notice to the seller's clients necessary to make the sale effective under the Rules of Professional Conduct. The per-

son responsible for notice is encouraged to give sufficient information concerning the purchasing law firm or lawyer(s) who will handle the matter so as to provide the client adequate information to make an informed decision concerning ongoing representation by the purchaser. Such information may include without limitation the buyer's background, education, experience with similar matters, length of practice, and whether the lawyer(s) are currently licensed in Pennsylvania.

No single method is provided for the giving of actual written notice to the client under paragraph (b). It is up to the person undertaking to give notice to determine the most effective and efficient means for doing so. For many clients, certified mail with return receipt requested will be adequate. However, with regard to other clients, this method may not be the best method. It is up to the person responsible for giving notice to make this decision. The interests of the client are protected by the provision in paragraph (f)(1) that the sale is not effective as to that matter if notice cannot be given.

The party responsible for giving notice is likewise not identified in the Rule. It is anticipated that in most cases the selling lawyer will undertake to give notice, if he or she is available to do so. It is often more appropriate for the selling lawyer, with whom the client already has a relationship, to initiate the client notification. However, in situations where the selling lawyer is not available, or it is otherwise to be preferred, the Rule permits the purchasing lawyer(s) or law firm to fulfill the notice requirement.

All of the 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.

Fee Arrangements Between Client and Purchaser

The sale may not be financed by increases in fees charged to the clients of the practice. This protection is underscored by both paragraph (b)(2) and paragraph (d). Existing agreements between the seller and the client as to the fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation.

Other Applicable Ethical Standards

Lawyers participating in the sale of a law practice are subject to ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the obligation to avoid disqualifying conflicts, and to secure client consultation for those conflicts which can be agreed to by the client (see Rule 1.7); and the obligation to protect information relating to the representation (See Rules 1.6 and 1.9).

If approval of the substitution of the purchasing attorney for the selling attorney 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

This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, the purchasing lawyer may be participating in the sale of a law practice that 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 those requirements are met.

This Rule does not apply to transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

LAW FIRMS AND ASSOCIATIONS

RULE 5.4. Professional Independence of a Lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; [and]

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer or law firm may purchase the practice of another lawyer or law firm from an estate or other eligible entity consistent with Rule 1.17.

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RULE 5.6. Restrictions on Right to Practice.

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or an agreement for the sale of a law practice consistent with Rule 1.17; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.2. Advertising.

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(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay:

(1) the reasonable cost of advertising or written communication permitted by this rule [and may pay];

(2) the usual charges of a not-for-profit lawyer referral service or other legal service organization; and

(3) for a law practice in accordance with Rule 1.17.

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Comment

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Paying Others to Recommend a Lawyer

Subject to the limitations set forth under paragraph (j), a lawyer is allowed to pay for advertising permitted by this Rule **and for the purchase of a law practice in accordance with the provisions of Rule 1.17**, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

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[Pa.B. Doc. No. 97-1295. Filed for public inspection August 15, 1997, 9:00 a.m.]

**PART V. PROFESSIONAL ETHICS AND CONDUCT
[204 PA. CODE CH. 83]**

Amendment to the Pennsylvania Rules of Disciplinary Enforcement Relating to the Continued Practice of Law by Formerly Admitted Attorneys; Notice of Proposed Rulemaking

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Supreme Court of Pennsylvania that it amend the Pennsylvania Rules of Disciplinary Enforcement, to read as set forth in Annex A, to provide a procedure under which a formerly admitted attorney who continues to practice law may be held in contempt.

The Rules of Disciplinary Enforcement provide that Disciplinary Counsel may bring an action in any court of competent jurisdiction for an injunction or other relief whenever Disciplinary Counsel has probable cause to believe that a formerly admitted attorney is continuing to practice law or has failed to comply with the provisions of the Rules designed to protect clients when an attorney ceases to practice. Pa.R.D.E. 218(j). The Rules do not provide any details, however, on the procedure to be followed when Disciplinary Counsel seeks such relief. The Board is considering recommending an abbreviated procedure in those cases patterned after the procedures for seeking temporary suspensions in Pa.R.D.E. 208(f) and 214(d).

Interested persons are invited to submit written comments regarding the proposed amendment to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, First Floor, Two Lemoyne Drive, Lemoyne, PA 17043, on or before September 15, 1997.

By The Disciplinary Board of the Supreme Court of Pennsylvania

ELAINE BIXLER,
Secretary

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart B. DISCIPLINARY ENFORCEMENT

CHAPTER 83. PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT

Subchapter B. MISCONDUCT

Rule 217. Formerly admitted attorneys.

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(j) Disciplinary Counsel may bring an action in any court of competent jurisdiction for such injunctive and other relief as may be appropriate, including without limitation filing a petition for contempt with the Supreme Court under subdivision (k), if Disciplinary Counsel has probable cause to believe that a formerly admitted attorney:

- (1) has failed to comply with this rule or Rule 218(a) (relating to reinstatement), or,**
- (2) is otherwise continuing to practice law.**

(k) The procedure for filing a petition for contempt with the Supreme Court shall be as follows:

(1) Disciplinary Counsel shall file the petition with the Supreme Court and shall personally serve a copy of the petition upon the formerly admitted attorney.

(2) The Court, or any justice thereof, may enter a rule directing the formerly admitted attorney to show cause why the formerly admitted attorney should not be found in contempt, which rule shall be returnable within ten days.

(3) If a rule to show cause has been issued under paragraph (2), and the period for response has passed without a response having been filed, or after consideration of any response, the Court may enter an order holding the formerly admitted attorney in contempt or directing that a hearing be held before a panel of at least three members of the Board.

(4) Any required hearing before a panel of the Board shall be held within ten days. Following the hearing, the panel shall within five days submit a transcript of the hearing and a recommendation to the Court. Upon receipt of the recommendation and the record relating thereto, the Court shall enter an appropriate order.

(5) There shall be no right to oral argument before the Court under this subdivision (k).

Rule 218. Reinstatement

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[(j) If Disciplinary Counsel shall have probable cause to believe that any formerly admitted attorney:

- (1) has failed to comply with this rule or Rule 217 (relating to formerly admitted attorneys), or,**

(2) is otherwise continuing to practice law, Disciplinary Counsel may bring an action in any court of competent jurisdiction for such injunctive and other relief as may be appropriate.]

[Pa.B. Doc. No. 97-1296. Filed for public inspection August 15, 1997, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

Partial Suspension of Section 5506(b)(1) of Title 68 of the Consolidated Statutes; No. 283; Doc. No. 5

Order

Per Curiam:

And Now, this 31st day of July, 1997, in accordance with Article V, Section 10(c) of the Constitution of 1968, Section 5506(b)(1) of Title 68 of the Pennsylvania Consolidated Statutes is suspended to the extent that the section provides that Chapter 55, insofar as it provides for methods of service and bond, shall not be deemed to be

suspended or affected by the Pennsylvania Rules of Civil Procedure governing the action in equity.

This Order shall be processed in accordance with Pa.R.J.A. 103(b) and shall be effective immediately.

[Pa.B. Doc. No. 97-1297. Filed for public inspection August 15, 1997, 9:00 a.m.]

SUPERIOR COURT

Notice to the Bar

After the publication of Volume 456, the Superior Court will no longer publish the *Superior Court Reports*. The *Atlantic Reporter* will thereafter be the official reporter of the Pennsylvania Superior Court. When publication of the *Superior Court Reports* has ceased, citations to the Superior Court should be only to the *Atlantic Reporter*, for example, *Jones v. Smith*, 692 A.2d XXX (Pa. Super. 1997).

JOSEPH J. MITTLEMAN,
Executive Administrator
Superior Court of Pennsylvania

[Pa.B. Doc. No. 97-1298. Filed for public inspection August 15, 1997, 9:00 a.m.]
