

IN THE COURT OF APPEALS OF MARYLAND

R U L E S O R D E R

This Court's Standing Committee on Rules of Practice and Procedure having submitted its One Hundred Forty-Fourth Report to the Court recommending adoption of proposed new Rule 1.17 and amendments to Rules 5.4, 5.6, and 7.2 of the Maryland Lawyers' Rules of Professional Conduct, a proposed revision of Title 16, Chapter 700, and a proposed amendment to Rule 16-811, all as set forth in that Report published in the Maryland Register, Vol. 26, Issue 9, pages 677-724 (April 23, 1999);
and

This Court having considered at a public hearing, notice of which was posted as prescribed by law, all of the proposed rules changes, together with the comments received, it is this 1st day of October, 1999,

ORDERED, by the Court of Appeals of Maryland, that new Rule 1.17 and the amendments to Rules 5.4, 5.6, and 7.2 of the

Maryland Lawyers' Rules of Professional conduct be, and they are hereby, adopted in the form previously published; and it is further

ORDERED that the proposed revision of Title 16, Chapter 700 and the proposed amendment to Rule 16-811 be, and they are hereby recommitted to the Standing Committee on Rules of Practice and Procedure for further study and the development of alternative proposals that would reduce from two to one the number of evidentiary hearings to which an attorney who is the subject of disciplinary proceedings may be entitled; and it is further

ORDERED that the rules changes hereby adopted by this Court shall govern the courts of this State and all parties and their attorneys in all actions and proceedings, and shall take effect and apply to all actions commenced on or after January 1, 2000, and insofar as practicable to all actions then pending; and it is further

ORDERED that a copy of this Order be published in the next issue of the *Maryland Register*.

/s/ Robert M. Bell

Robert M. Bell

/s/ John C. Eldridge

John C. Eldridge

/s/ Lawrence F. Rodowsky

* Lawrence F. Rodowsky

/s/ Irma S. Raker

* Irma S. Raker

/s/ Alan M. Wilner

Alan M. Wilner

/s/ Dale R. Cathell

Dale R. Cathell

/s/ Glenn T. Harrell, Jr.

Glenn T. Harrell, Jr.

* Judge Rodowsky and Judge Raker did not vote in favor of that portion of the Rules Order recommitting to the Rules Committee for further study the revision of Title 16, Chapter 700 and the proposed amendment to Rule 16-811.

Filed: October 1, 1999
/s/ Alexander L. Cummings

Clerk
Court of Appeals of Maryland

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

ADD new Rule 1.17 as follows:

Rule 1.17. Sale of Law Practice.

(a) Subject to paragraph (b), a law practice, including goodwill, may be sold if the following conditions are satisfied:

(1) Except in the case of death, disability, or appointment of the seller to judicial office, the entire practice that is the subject of the sale has been in existence at least five years prior to the date of sale;

(2) The practice is sold as an entirety to another lawyer or law firm; and

(3) Written notice has been mailed to the last known address of the seller's current clients regarding:

(A) the proposed sale;

(B) the terms of any proposed change in the fee arrangement;

(C) the client's right to retain other counsel, to take possession of the file, and to obtain any funds or other property to which the client is entitled; and

(D) the fact that the client's consent to the new representation will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice.

(b) If a notice required by subparagraph (a)(3) is returned and the client cannot be located, the representation of that client may be transferred to the purchaser only by an order of a court of competent jurisdiction authorizing the transfer. 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.

Committee note: The sale of a practice does not mean that the appearance of a lawyer who is in a case will be stricken.

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

Termination of Practice by the Seller.-- 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 does not therefore result in a violation. The purchase agreement for the sale of a law practice may allow for restrictions on the scope and time of the seller's reentry into practice.

Single Purchaser.-- The 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 a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, 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 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, written notice of the contemplated sale must be mailed to the client. The notice must include the identity of the purchaser and any proposed change in the terms of future representation, and must tell the client that the decision to consent or make other arrangements must be made within 60 days. If nothing is heard from the client within that time, consent to the new representation is presumed.

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 new representation 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*.

All 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. Additionally, the transfer of the practice does not operate to change the attorney-client privilege.

Other Applicable Ethical Standards.-- Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to the involvement of 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 client consent after consultation for those conflicts which can be agreed to (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, that 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 or disabled lawyer, or one who has disappeared. 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.

Admission to or retirement from 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.

This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice. This Rule does not prohibit an attorney from selling his or her interest in a law practice.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

LAW FIRMS AND ASSOCIATIONS

AMEND Rule 5.4 for consistency with new Rule 1.17, as follows:

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 purchases the practice of a lawyer who is deceased or disabled or who has disappeared may, pursuant to the provisions of Rule 1.17, pay the purchase price to the estate or representative of the lawyer.

~~[(2)]~~ (3) 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)]~~ (4) 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.

(b) A lawyer shall not form a partnership with a nonlawyer

if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

Code Comparison.-- DR 3-102 (A) provides that "A lawyer or law firm shall not share legal fees with a nonlawyer" DR3-103 (A) provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." DR 5-107 (B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in

rendering such legal services." DR5-107 (C) provides that "A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) A nonlawyer owns any interests therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) a nonlawyer is a corporate director or officer thereof; or (3) a nonlawyer has the right to direct or control the professional judgment of the lawyer." EC 5-24 states that "A lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a nonlawyer. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is not interference in the relationship of the lawyer and the individual client her serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant...."

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

LAW FIRMS AND ASSOCIATIONS

AMEND Rule 5.6 for consistency with new Rule 1.17, as follows:

Rule 5.6. Restrictions on Right to Practice.

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; 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.

COMMENT

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreement except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Code Comparison.-- Rule 5.6 is substantially similar to DR 2-108.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT
INFORMATION ABOUT LEGAL SERVICES

AMEND Rule 7.2 for consistency with new Rule 1.17, as follows:

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3 (b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television advertising, or through communications not involving in person contact.

(b) A copy or recording of an advertisement or such other communication shall be kept for at least three years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule, [and] may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization, and may pay for a law practice purchased in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

(e) An advertisement or communication indicating that no

fee will be charged in the absence of a recovery shall also disclose whether the client will be liable for any expenses. Cross reference.-- Maryland Rule of Professional Conduct 1.8 (e).

(f) A lawyer, including a participant in an advertising group or lawyer referral service or other program involving communications concerning the lawyer's services, shall be personally responsible for compliance with the provisions of Rules 7.1, 7.2, 7.3, 7.4, and 7.5 and shall be prepared to substantiate such compliance.

COMMENT

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or over-reaching.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of law and moderate income; prohibiting television advertising,

therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paragraph (a) permits communication by mail to a specific individual as well as general mailings, but does not permit contact by telephone or in person delivery of written material except through the postal service or other delivery service.

Record of advertising.-- Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying others to recommend a lawyer.-- 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.

Responsibility for compliance.-- Every lawyer who participates in communications concerning the lawyer's services is responsible for assuring that the specified Rules are complied with and must be prepared to substantiate compliance with those Rules. That may require retaining records for more than the three years specified in paragraph (b) of this Rule.

Code Comparison.-- Rule 7.2 (a) has no counterpart in the Maryland Disciplinary Rules, which spoke in terms of what advertising is prohibited rather than in terms of what is permitted. DR 2-103 (B) prohibits a lawyer from recommending to a nonlawyer the employment of the lawyer, "his partner ... or associate," except for "commercial advertising which complies with DR 2-101." DR 2-103 (A). See also DR 2-104 (A). This could have been construed as prohibiting all direct

mailings seeking legal employment sent to those known to need legal services in specific matters. Such direct mailings are specifically permitted by Rule 7.2 (a), but are subject to Rule 7.3 (b) as well as Rule 7.1.

With regard to Rule 7.2 (b), DR 2-101 (D) provides that "If the advertisement is communicated over television or radio ..., a recording of the actual transmission shall be retained by the lawyer."

With regard to Rule 7.2 (c), DR 2-101 (B) provides that "A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item." DR 2-103 (C) provides that "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment ... except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103 (D)."

(DR 2-103 (D) refers to legal aid and other legal services organizations.)

There is no counterpart to Rule 7.2 (d) in the Code.

There is no counterpart to Rule 7.2 (e) in the Code.

Rule 7.2 (f) is substantially the same as the last paragraph of DR 2.101 (A).