

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS
AND PROFESSIONAL RESPONSIBILITY

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That Comment paragraph [6] to Rule 1.7 of the Model Rules of Professional Conduct
2 be amended by deleting the final sentence and adding two new sentences as follows (deletions struck
3 through; additions underlined and appearing in bold type):

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5 Model Rule 1.7 (Conflict of Interest: General Rule)

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7 Comment [6]

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9 The lawyer's own interests should not be permitted to have an adverse effect on the
10 representation of a client. For example, a lawyer's need for income should not lead the lawyer to
11 undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5.
12 If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or
13 impossible for the lawyer to give the client detached advice. **A lawyer with a referral arrangement**
14 **with a non-lawyer professional service provider should examine carefully whether his or her**
15 **representation of clients may be materially limited by obligations to the other professional**
16 **service provider. If so, the lawyer must determine that the representation will not be adversely**
17 **affected and obtain the affected client's informed consent.** ~~A lawyer may not allow related~~
18 ~~business interests to affect representation, for example, by referring clients to an enterprise in which~~
19 ~~the lawyer has an undisclosed interest.~~

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21 FURTHER RESOLVED, that Rule 7.2 of the Model Rules be amended to add a new subsection
22 (c)(3) and to renumber subsection (c)(3) as (c)(4), as follows:

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24 A lawyer shall not give anything of value to a person for recommending the lawyer's services except
25 that a lawyer may

- 26 1. pay the reasonable costs of advertisements or communications permitted by this Rule;
27 2. pay the usual charges of a not-for-profit lawyer referral service or legal service organization;
28 and

29 3.
30 **refer clients to other lawyers or non-lawyer professionals pursuant to an agreement that**
31 **provides for the other lawyers or professionals to refer their customers or clients to the lawyer;**
32 **and**

33 **(4) (3)** pay for a law practice in accordance with Rule 1.17

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35 FURTHER RESOLVED, that the Comment to Rule 7.2 of the Model Rules be amended by adding
36 the following new paragraph:

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38 **[7] A lawyer also may agree to refer clients to another lawyer or to a non-lawyer**
39 **professional in return for the undertaking of the other lawyer or professional to refer**
40 **customers or clients to the lawyer. Such arrangements must not interfere with the lawyer's**
41 **professional judgment as to making referrals or as to providing substantive legal services. See**
42 **also Rule 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a**
43 **lawyer or non-lawyer professional must not pay anything solely for the referral, but does not**
44 **violate paragraph (c) by agreeing to refer clients to the other lawyer or non-lawyer**
45 **professional. Nor does this rule prohibit the receiving lawyer from paying the reasonable value**
46 **of services provided to the lawyer by another lawyer or non-lawyer professional with whom**
47 **the receiving lawyer has an office-sharing or other arrangement.**

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REPORT

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54 In July, 2000, the House of Delegates adopted Resolution 10F relating to the issue of multi-
55 disciplinary practice. By that resolution, the Standing Committee on Ethics and Professional
56 Responsibility was directed to review the Model Rules of Professional Conduct and to recommend
57 any changes the Committee believed necessary "to assure that there are safeguards in the [Model
58 Rules of Professional Conduct] relating to strategic alliances and other contractual relationships with
59 non-legal professional services providers consistent with the statement of principles in [Resolution
60 10F]." The Committee was directed to do so "in consultation with state, local and territorial bar
61 associations and interested ABA sections, division and committees."

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63 The Committee first reviewed the Model Rules and Resolution 10F as directed by the House
64 of Delegates. It considered the "strategic alliance" or "contractual relationship" arrangements
65 identified in Resolution 10F to be arrangements by professional services providers and lawyers to
66 steer business to each other on a systematic and regular basis. Such arrangements may range from
67 a simple understanding generally to refer business to each other to an agreement that includes sharing
68 space, computer systems and the like to reduce costs by obtaining economies of scale or other
69 efficiencies.

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71 The Committee's review took into account the "core values" of the profession as described
72 in paragraph 1 of Resolution 10F: the duty of loyalty, the duty to exercise independent professional
73 judgment for the benefit of the client, the duty to protect client confidences, and the traditional
74 prohibitions against sharing legal fees with non-lawyers and against ownership and control of the
75 practice of law by non-lawyers.

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77 In October, 2000, the Committee circulated a memorandum identifying possible changes to
78 the Model Rules that it felt would alert lawyers to the circumstances in which strategic alliances
79 could present ethical problems, and requested comments and suggestions regarding the proposed
80 changes by January, 2001. Contact was made with presidents and executive directors of state, local
81 and territorial bar associations; chairs and staff liaisons of ABA Sections and Divisions; the high
82 courts of the fifty states and the District of Columbia; chief disciplinary counsel in all jurisdictions;
83 and a number of other entities. In all, over five hundred letters were sent soliciting comment. Five
84 responses were received, each of which was taken into account by the Committee in preparing this
85 Recommendation.

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87 The Committee concludes that a limited number of changes to the Model Rules and their
88 Commentary are desirable. The amendments proposed are cautionary rather than prohibitory,
89 consisting mostly of new statements that fix specific attention on the potential conflicts of interest
90 that may arise in the context of strategic alliances. The Committee believes that they provide both
91 warning and guidance to lawyers who participate in strategic alliances. In the Committee's view,

92 strategic alliances do not present concerns within the rubric of “ownership or control of a law firm”
93 by non-lawyers. The Committee focuses its attention instead on conflict-of-interest issues.
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95 Model Rule 1.7 (Conflict of Interest: General Rule) identifies certain situations that prohibit
96 representations from occurring, or that require client consent prior to the undertaking or continuance
97 of a representation. Comments to the Rule provide guidance regarding such issues as the
98 development of conflict-checking procedures and evaluation of the severity, significance, or effect
99 of potential conflicts. The Committee believes that the Comment to Rule 1.7 is an appropriate place
100 to make specific reference to strategic alliances. A fundamental aspect of strategic alliances is the
101 mutual agreement or implicit understanding that a lawyer or law firm and another type of
102 professional services firm will refer business to each other. The interest of a lawyer in obtaining
103 continued business from an “allied” non-lawyer professional potentially could, to be sure, create
104 pressure on a lawyer to refer the lawyer’s clients to the allied professional in situations in which the
105 quality of services rendered by the allied professional may be less than the client desires; in short,
106 a potential conflict could be created. The Committee believes that the subject deserves specific
107 reference in the Comment.
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109 Therefore, to call this issue to the attention of lawyers who are considering developing
110 strategic alliances with non-legal service providers, we suggest that two new sentence be inserted
111 before the last sentence in Comment [6] of Rule 1.7 that would alert the lawyer to the potential for
112 conflict and remind the lawyer of the possible need to obtain consent from the client before making
113 referrals.
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115 The additional Comment language would read as follows:
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117 “A lawyer with a referral arrangement with a non-lawyer professional service
118 provider should examine carefully whether his or her representation of clients may be
119 materially limited by obligations to the other professional service provider. If so, the lawyer
120 must determine that the representation will not be adversely affected and obtain the affected
121 client’s informed consent.”
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123 In its review of the Model Rules, the Committee also noted that the final sentence in
124 Comment [6] to Rule 1.7 appears to be applicable to lawyers’ participation in strategic alliances:
125 “[A] lawyer may not allow related business interests to affect representation, for example, by
126 referring clients to an enterprise in which the lawyer has an undisclosed interest.” The Committee
127 believes, for two reasons, that this original language was inartfully drawn. First, it easily may be read
128 to suggest that even where a lawyer’s “interest” in a referral arrangement would have no conceivable
129 effect upon the representation of the lawyer’s client, the lawyer is obligated to make a disclosure of
130 that interest and obtain the client’s consent. Yet Rule 1.7 quite clearly limits a lawyer’s obligation
131 to disclose to situations in which the lawyer’s interest “may materially limit the representation.”
132 Second, in seeming to obligate a lawyer to take a particular action, it departs from the deliberate
133 format of the Model Rules, which imposes obligations only in the text of black-letter rules. For these
134 two reasons, and because the Committee believes that the proposed amendment to be inserted in

135 Comment [6] of the Rule provides clearer guidance on the issue of strategic alliances, the Committee
136 recommends deletion of the final sentence of paragraph [6] as unnecessary and misleading.
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139 As stated earlier, this Recommendation calls for “cautionary” rather than “prohibitory”
140 amendments to the Model Rules. The Committee believes that lawyers’ participation in strategic
141 alliances, with the proper consideration given by the participating lawyer to the ethics rules and to
142 the lawyers’ primary obligations to their clients, should not be discouraged; instead, such alliances
143 should be recognized and brought within the rubric of the Model Rules. The Committee thus finds
144 problematic the language of current Model Rule 7.2(c), which, in prohibiting a lawyer from giving
145 “anything of value” to someone for recommending the lawyer’s services, reasonably might be
146 interpreted to apply to the referral aspect of a strategic alliance. Although its proscription is most
147 often applied to prohibit solicitation of clients through paid third parties or “runners,” the *quid pro*
148 *quo* aspect of any agreement whereby a firm agrees to refer its clients to a non-legal professional
149 service provider upon receiving reciprocal referrals may meet the definition of “giving something
150 of value.” The Committee’s investigation of this issue revealed, for example, that referrals of legal
151 clients to lawyers in exchange for various services or agreements on their part have been condemned
152 by courts and ethics committees under this provision.
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154 In light of these interpretations, the Committee believes that an additional limited exception
155 to Rule 7.2(c) should be considered so that it is clear that lawyers may participate in strategic
156 alliances without being in violation of the Model Rules. The Committee proposes that Rule 7.2 (c)
157 be amended as follows:
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159 “A lawyer shall not give anything of value to a person for recommending the lawyer’s
160 services except that a lawyer may
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- 163
164 **(4) refer clients to other lawyers or non-lawyer professionals pursuant to an**
165 **agreement that provides for the other lawyers or professionals to refer their**
166 **customers or clients to the lawyer. “**
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168 To provide guidance to lawyers in their application of this new exception, the Comment to Rule
169 7.2(c) also should be amended, adding the following explanatory paragraph:
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171 **[7] A lawyer also may agree to refer clients to another lawyer or to a non-lawyer**
172 **professional in return for the undertaking of the other lawyer or professional to refer**
173 **customers or clients to the lawyer. Such arrangements cannot interfere with the lawyer’s**
174 **professional judgment as to referrals or as to providing substantive legal services. See also**
175 **Rule 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer**
176 **or non-lawyer professional must not pay anything solely for the referral, but does not violate**

177 **paragraph (c) by agreeing to refer clients to the other lawyer or non-lawyer professional. Nor**
178 **does this rule prohibit the receiving lawyer from paying the reasonable value of services**
179 **provided to the lawyer by another lawyer or non-lawyer professional with whom the receiving**
180 **lawyer has an office-sharing or other arrangement.**

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183 The Standing Committee on Ethics and Professional Responsibility views these proposed
184 changes to the Model Rules and their Comment as valuable tools that will assist lawyers who
185 participate in strategic alliances in recognizing potential ethical problems and in resolving those
186 problems consistent with the profession's core values. For this reason, we urge their adoption by the
187 House of Delegates.. As a result, the Committee suggests these few changes to the Model Rules and
188 Comments.

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190 The Standing Committee recommends that the House of Delegates undertake consideration
191 of these proposed changes to the Model Rules concurrent with its consideration of the proposals of
192 the Commission on Evaluation of the Model Rules of Professional Conduct. The Commission has
193 made recommendations for additional, and in some instances overlapping amendments to both
194 Model Rules 1.7 and 7.2.

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Respectfully submitted,
Standing Committee on Ethics and Professional
Responsibility

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Donald B. Hilliker, Chair

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August 2001

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