

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS
AND PROFESSIONAL RESPONSIBILITY

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That Rule 7.2 of the Model Rules be amended to add a new subparagraph (b)(4),
2 as follows:

3

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

6 (1) pay the reasonable costs of advertisements or communications permitted by this
7 Rule;

8 (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer
9 referral service. A qualified lawyer referral service is a lawyer referral service that
10 has been approved by an appropriate regulatory authority; ~~and~~

11 (3) pay for a law practice in accordance with Rule 1.17; and

12 (4) refer clients to another lawyer or a nonlawyer professional pursuant to an
13 agreement not otherwise prohibited under these Rules that provides for the
14 other person to refer clients or customers to the lawyer, if

15 (i) the reciprocal referral agreement is not exclusive, and

16 (ii) the client is informed of the existence and nature of the agreement.
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18 FURTHER RESOLVED, that the Comment to Rule 7.2 of the Model Rules be amended by
19 adding the following new paragraph [8]:

20 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in
21 return for the undertaking of that person to refer clients or customers to the lawyer. Such
22 reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to
23 making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as
24 provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional
25 must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this
26 Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the
27 reciprocal referral agreement is not exclusive and the client is informed of the referral agreement.

28 Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral
29 agreements should not be of indefinite duration and should be reviewed periodically to determine
30 whether they comply with these Rules. This Rule does not restrict referrals or divisions of
31 revenues or net income among lawyers within firms comprised of multiple entities.
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33 FURTHER RESOLVED that the final sentence of Comment [1] to Model Rule 7.5 be amended
34 to read as follows:
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36 However, it is misleading to use the name of a lawyer not associated with the firm or a
37 predecessor of the firm, or the name of a nonlawyer.
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REPORT

In July 2000 the House of Delegates adopted Resolution 10F relating to the issue of multi-disciplinary practice. By that resolution, the Standing Committee on Ethics and Professional Responsibility was directed to review the Model Rules of Professional Conduct, in consultation with state, local, and territorial bar associations and interested ABA Sections, Divisions and Committees, and to recommend any changes the Committee believed necessary

“to assure that there are safeguards in the [Model Rules of Professional Conduct] relating to strategic alliances and other contractual relationships with non-legal professional services providers consistent with the statement of principles in [Resolution 10F].”

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

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

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

In August 2001 the Committee in Report 113 recommended changes to Comment language under Rule 1.7 and changes to the text and Comment under Rule 7.2. The New York State Bar Association (“NYSBA”) asked the Committee to withdraw the Recommendation in Report 113 from consideration by the House at that time to enable it to file their own proposal to deal with cross-referral arrangements between lawyers and

other professionals. It was to be based upon Disciplinary Rules and Ethical Considerations in the New York Code of Professional Conduct that had just gained approval by the New York courts. The Committee accordingly withdrew its Report from consideration.

The Committee resubmitted its proposal for consideration at the Midyear 2002 Meeting, at which time the NYSBA submitted a Report and Recommendation proposing considerably more extensive amendments to the Model Rules, addressing both reciprocal referral agreements between lawyers and non-legal professional services firms and certain forms of “multidisciplinary practice” in which lawyers and law firms might be permitted to offer their services. Once again at the Midyear Meeting, in consideration of the possibility of developing a proposal acceptable to both sponsoring entities, the Standing Committee withdrew its Report and Recommendation; the NYSBA did so as well.

Subsequent to the Midyear 2002 Meeting, the NYSBA communicated with the Standing Committee to report that the NYSBA had determined, after all, that the changes to New York’s Code of Professional Responsibility in this area, although needed in New York because of the absence of commentary in its Code, were not necessary in the revised format of the ABA Model Rules. The NYSBA therefore decided not to submit a proposal to the House of Delegates for consideration at this Meeting. It did, however, recommend one amendment to the Comment to Model Rule 7.5 (“Firm Names and Letterheads”), in light of its concern that law firms engaged in offering certain services jointly with other nonlawyer professionals not create confusion by adding names of nonlawyer professionals to their law firm names. The Standing Committee agrees with this recommendation of the NYSBA, and therefore recommends that such an amendment be made, appearing in the final sentence of Comment [1] to Model Rule 7.5.

The Committee presents to the House once again its conclusion that when lawyers enter into cross-referral agreements with other lawyers and nonlawyer professionals, clients need to be informed of those agreements in order to decide whether to accept the lawyer’s suggestions to use the other professionals’ services. A per se prohibition against exclusive referral arrangements also is required, to ensure that a lawyer is free to exercise independent professional judgment when counseling clients to consult with other professionals. Each of these concepts is therefore embodied in the Committee’s proposed changes to the black-letter of Rule 7.2(b).

The Committee also believes that the Comment to Rule 7.2(b) should be amplified to address lawyers’ participation in referral arrangements in the context of related Model Rules. For example, the independent professional judgment required of a lawyer who is making referrals to other professionals is set out in Rules 2.1 and 5.4(c), which are therefore included in the Comment. Similarly, the Comment notes that actual payment by a lawyer to a referring non-lawyer professional for the referral itself is prohibited, except in the narrow lawyer-to-lawyer referral situation that is permitted under Rule 1.5(e)’s exception to the prohibition against fee-sharing. Finally, reference is made in the Comment to Rule 1.7 (“Conflict of Interest”), to remind lawyers that they

must not allow their contractual relationships for reciprocal referrals, which might be considered “related business interests”, to adversely affect the representation of their clients.

The Committee believes that these proposed amendments to Model Rule 7.2 and its Comment, addressing reciprocal referral agreements between lawyers and other lawyers or nonlawyer professionals, and its amendment to Model Rule 7.5’s Comment, will provide necessary and helpful safeguards to the ethical practice of law, as contemplated by the House in its Report 10F in August, 2000, and therefore urges their adoption.

Respectfully submitted,
Standing Committee on Ethics and
Professional Responsibility

Marvin Karp, Chair
May 15, 2002

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Marvin Karp, Chair

1. Summary of Recommendation(s). Amend the ABA Model Rules of Professional Conduct to provide guidance with respect to lawyers' participation in referral arrangements with other lawyers and nonlawyer professional services providers. The black letter of Model Rule 7.2(b) ("Advertising") would be amended to provide that such arrangements, as long as they are non-exclusive and are revealed to the clients being referred, do not fall under the rule's prohibition of a lawyer "giving something of value to another for recommending the lawyer's services." The Comment would be amended to explain the need for the limitations, and to cross-reference other applicable Rules of Professional Conduct that may be implicated when lawyers participate in such arrangements.
2. Approval by Submitting Entity. The Recommendation as submitted was originally approved by the Standing Committee at its meeting on February 2, 2002, and was re-approved with minor amendment following communication with the New York State Bar Association ("NYSBA") on May 15, 2002.
3. Has this or a similar recommendation been submitted to the House or Board previously?
The Standing Committee submitted a similar Report and Recommendation at the Annual Meeting in 2001, which was withdrawn at the request of the NYSBA. Both the Standing Committee and the NYSBA filed Reports and Recommendations on this subject at the Midyear 2002 meeting; those Reports were also withdrawn in contemplation of the two entities developing a proposal that might be acceptable to each. On May 8, the President of the NYSBA communicated with the Chair of the Standing Committee to indicate that the NYSBA had decided not to submit another recommendation on this subject, having determined that the format of the Model Rules, containing as it does instructive Commentary that is lacking in the New York State Code of Professional Responsibility, makes further amendment of the Model Rules unnecessary. The NYSBA did, however, propose a single amendment to the Comment to Model Rule 7.5, which the Standing Committee endorses and presents in the attached Report and Recommendation.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
The present ABA Model Rule 7.2 is lacking in two respects when evaluated in the context of referral relationships that may exist between lawyers and non-legal professional services providers. As presently drafted, the rule could easily be misread to prohibit such arrangements, a result not intended by the rule's original drafters. In addition, the Rule lacks useful guiding language, in the form of Commentary discussing referral arrangements that could be of great value to lawyers engaging in such arrangements.
5. What urgency exists which requires action at this meeting of the House?
The Standing Committee was directed by the House of Delegates in the Annual Meeting of 2000 (Report 10F) to study this issue and to make recommendations for amendment to the Model Rules that would help to assure that the core values of the legal profession were protected.
6. Status of Legislation. (If applicable.) N/A
7. Cost to the Association. (Both direct and indirect costs.) None
8. Disclosure of Interest. (If applicable.) None
9. Referrals. The Standing Committee's Report and Recommendation was distributed to the Chairs and Staff Directors of all ABA Sections, Divisions, Committees, and Commissions in late November, as well as to state disciplinary counsel and supreme courts and directors of state and local bar association represented in the ABA's House of Delegates.
10. Contact Person. (Prior to the meeting.) George Kuhlman, Ethics Counsel;
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11. Contact Person. (Who will present the report to the House.) Marvin Karp,
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