

Fee Sharing the Right Way

Presented by:

Hope C. Todd

Assistant Director for Legal Ethics, Regulation Counsel

D.C. Bar

Resources

<http://www.dcbbar.org/bar-resources/legal-ethics/index.cfm>

- D.C. Rules of Professional Conduct
- D.C. Legal Ethics Opinions
- Speaking of Ethics columns
- D.C. Bar Ethics Helpline (202) 737-4700
 - Saul Jay Singer ext. 3232
 - Erika Stillabower ext. 3198
 - Hope C. Todd ext. 3231

POP QUIZ



ANSWERS

1. TRUE

2. TRUE

3. TRUE

4. TRUE

5. FALSE

6. FALSE

7. FALSE

8. FALSE

9. TRUE

10. TRUE

D.C. Rule 7.1 (Communications Concerning a Lawyer's Services)

Summary of Rule 7.1 (a)

Truthful, Not Misleading, Capable of Substantiation

D.C. Legal Ethics Opinion 249 (Lawyer Advertising):

<https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion249.cfm>

- May say you specialize in X, if you specialize in X
- Can't create unjustifiable expectations

Rule 7.1 (b) (Solicitation)

- Generally, lawyers may solicit in-person in the District of Columbia
- Except Shall Not if:
 - (1) The solicitation involves use of a statement or claim that is **false or misleading**, within the meaning of paragraph (a);
 - (2) The solicitation involves the use of **coercion, duress or harassment**; or
 - (3) **The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.**

What Happened Feb. 1, 2007?

D.C.'s grand failed experiment: 7.1(b)(5) -- Lawyers formerly able to pay a flat fee to non-lawyer "runners" for referring business.

Rule 7.1(b)(5) DELETED. **No more non-lawyer runners.**

D.C. Bar and D.C. Court of Appeals agreed after 15 years, rule was being abused. Some lawyers claimed "not responsible for these non-lawyer runners."

Effective Feb 1, 2007 rule provided:

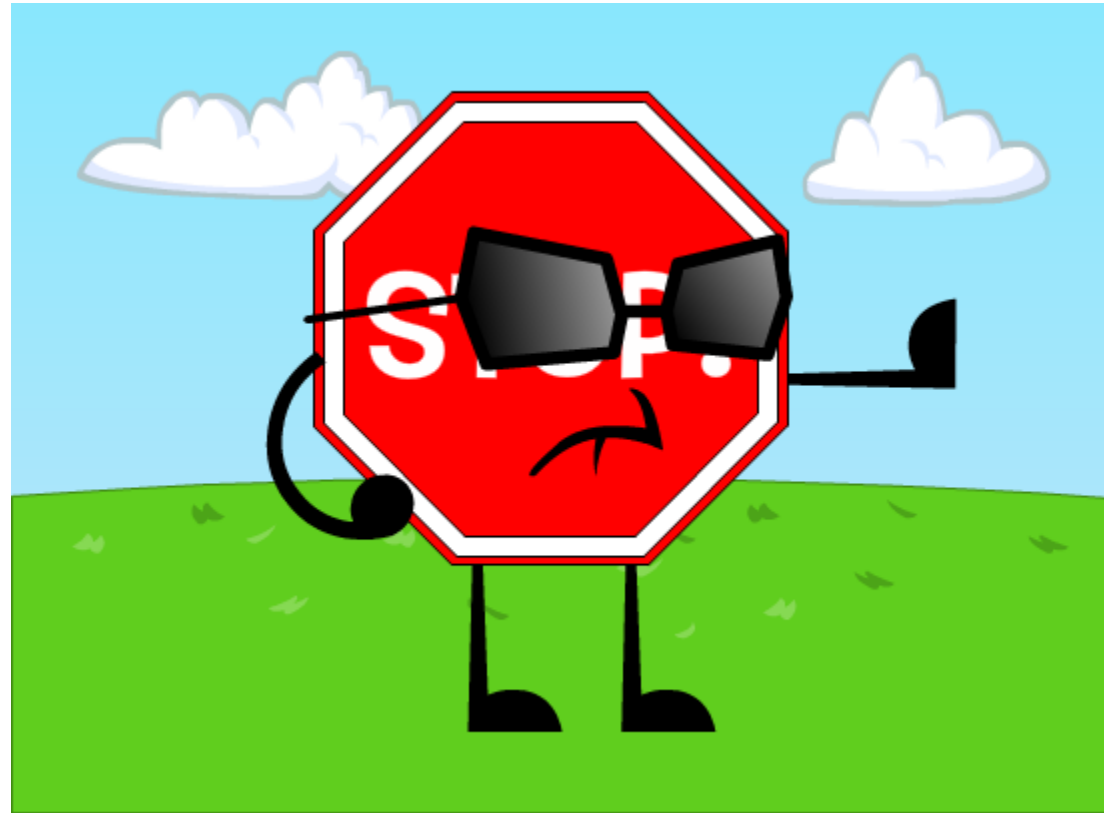
D.C. Rule 7.1 (b)(2): A lawyer shall not give anything of value to a person (other than a lawyer's partner or employee) for recommending the lawyer's services **though in-person contact.**

Comment[5] "in-person includes the telephone, but not email."

Then what happened?

- Lawyers found language of 7.1(b)(2) confusing.
- Work around was electronic communications (But, not intended by 2007 Rule change!).
- Outstanding Qs about whether lawyers not in same firm could still refer cases to each other and/or share legal fees and when.
- So what happened?

October 8, 2015 Amendments to Rule 7.1:
NO REFERRAL FEES IN D.C.



D.C. Rule 7.1(c)

- (c) **A lawyer shall not pay money** or give anything of material value to a person (other than the lawyer's partner or employee) **in exchange for recommending the lawyer's services** except that a lawyer may:
 - (1) Pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;
 - (3) Pay for a law practice in accordance with Rule 1.17; and
 - (4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
 - (A) The reciprocal agreement is not exclusive, and
 - (B) The client is informed of the existence and nature of the agreement.

WHAT CAN YOU DO?

- 1) You **MAY** Pay for Advertising. Rule 7.1(c)(1)
Per click, or flat fee paid by lawyer OKAY



What ELSE Can You Do?

2) You **MAY** participate in a lawyer referral service and pay **the usual and reasonable fees** charged by the LRS.

Rule 7.1(c)(2)

- See D.C. Legal Ethics Opinion 342 (Participation in Internet-Based LRS)
<http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion342.cfm>
- See D.C. Legal Ethics Opinion 369 (Sharing Legal Fees with a LRS)
<http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-369.cfm>

What Else Can You do?

3) You MAY purchase a law practice Rule 7.1(c)(3)

See D.C. Rule 1.17

<http://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule1-17.cfm>



What ELSE Can You Do?

4) You MAY refer clients to another lawyer (or non-lawyer) who refers clients to you,

IF

- (A) The reciprocal agreement is **not exclusive**, and
- (B) The **client is informed** of the existence and nature of the agreement.

Are you seriously telling me that I can never collect any money from another lawyer to whom I refer a case? Or that I may never pay another lawyer who refers a case to me?



Rule 7.1 Comments shed more light:

[6] Rule 7.1(c) does not address fee splitting between two or more firms representing the same client in the same project. Compare Rule 1.5(e).

BUT YES,

[8]. Except as provided in Rule 1.5(e), *a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay money or give anything of material value solely for the referral*, but the lawyer does not violate paragraph (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7.

WHAT IS D.C. RULE 1.5(e)??????

- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
 - (1) The division is in proportion to the services performed by each lawyer **or** each lawyer assumes joint responsibility for the representation.
 - (2) The client is advised, **in writing**, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged;
 - (3) The client gives **informed consent** to the arrangement; and
 - (4) The total fee is reasonable.

Rule 1.5(e): No Free Lunch

- The Rule requires:

(1) The fee division be “*in proportion to the services performed by each lawyer*” **OR** that “each lawyer assumes *joint responsibility* for the representation.”

In VAST MAJORITY of fee shares, it means BOTH lawyers remain ethically and financially responsible to the client for entire matter.



D.C. Rule 1.5, Comment [10]

[10] Paragraph (e) permits the lawyers to divide a fee **either on the basis of the proportion of services they render OR** by agreement between the participating lawyers if **all assume responsibility for the representation as a whole**. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

1) IF “on basis of the proportion of the services rendered”, SEE Rule 1.5 (a): A lawyer’s fee shall be reasonable. (Here means paid only for actual services performed– Hint: must add value!);

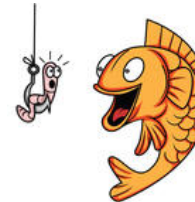
2) IF “joint responsibility” (not matter how lawyers decide to divide up fee: the total fee must be reasonable);

3) See D.C. Rule 5.1 (Responsibilities of partners managers and supervisory lawyers)

<https://www.dcbar.org/bar-resources/legal-ethics/amended-rules/rule5-01.cfm>

Joint Responsibility: YOU are on the Hook

- [11] The concept of joint responsibility is not, however, merely a technicality or incantation. The lawyer who refers the client to another lawyer, or affiliates another lawyer in the representation, **remains fully responsible to the client, and is accountable to the client for deficiencies in the discharge of the representation by the lawyer who has been brought into the representation.** *If a lawyer wishes to avoid such responsibility for the potential deficiencies of another lawyer, the matter must be referred to the other lawyer without retaining a right to participate in fees beyond those fees justified by services actually rendered.*



shutterstock · 150066059

Ignorance is not Bliss

- **[12] The concept of joint responsibility does not require the referring lawyer to perform any minimum portion of the total legal services rendered.** The referring lawyer may agree that the lawyer to whom the referral is made will perform substantially all of the services to be rendered in connection with the representation, without review by the referring lawyer. Thus, the referring lawyer is not required to review pleadings or other documents, attend hearings or depositions, or otherwise participate in a significant and continuing manner. **The referring lawyer does not, however, escape the implications of joint responsibility, see Comment [11], by avoiding direct participation.**

SPELL IT OUT FOR THE CLIENT (no behind the scenes agreements btw lawyers)

- [14] Paragraph (e) requires that the client be advised, **in writing**, of the fee division and states that the client must affirmatively give informed consent to the proposed fee arrangement. For the definition of “informed consent,” *see* Rule 1.0(e). **The Rule does not require disclosure to the client of the share that each lawyer is to receive but does require that the client be informed of the identity of the lawyers sharing the fee, their respective responsibilities in the representation, and the effect of the association of lawyers outside the firm on the fee charged.**

Other practical considerations

- How well do you know the lawyer with whom you are sharing fees?
- Do you have malpractice insurance?
- Does the other lawyer?
- Does your policy cover malpractice of your co-counsel in another firm if the client comes after you?



Other Issues: D.C. Rule 1.15(d)

- Getting paid by the other lawyer/Paying the other lawyer
- 1.15 (d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. **If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.** Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

Additional Resources:

- ***To Market to Market: New Rule 7.1 Compliance***

January 2016, Speaking of Ethics, Washington Lawyer, By Erika Stillabower

<http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/january-2016-speaking-of-ethics.cfm>

- **ABA Formal Ethics Opinion 474** (Referral Fees and Conflicts of Interest)

(April 2016) “Implicit under Rule 1.5(e) is that lawyers have undertaken a representation.”

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_474.authcheckdam.pdf



QUESTIONS

