speaking of ethics

By Erika Stillabower

To Market, to Market: New Rule 7.1 Compliance

Mick Wiggins

In what seemed like the blink of an eye, Laura Younglawyer graduated from law school, passed the bar exam, was sworn in at the District of Columbia Court of Appeals, and registered for the (free!) Basic Training Course for solos and small firms offered by the D.C. Bar's Practice Management Advisory Service. Still, she feared she would forever remain a fledgling lawyer until she had a roster of clients.

So with the same industry with which she had become a lawyer, she set about creating a pipeline for business. Following a quick scan of the D.C. Rules of Professional Conduct and relying on her knowledge that the District is a jurisdiction supportive of lawyer advertising, she devised a multi-pronged approach to marketing her practice, placing advertisements in a handful of industry journals (noting that she offered "expert legal advice for small businesses") and registering with multiple lawyer referral services, agreeing to pay either a flat fee per client referred or up to 15 percent of any fees earned through a referred matter back to the agency. Given what she believed to be the District's "hands-off stance" on referral arrangements, she also devised an informal referral network among some of her law school classmates, pursuant to which each agreed to pay any member of the group who referred a prospective client $100 each time the client signed an engagement letter.

That night she stood outside of her apartment, exhausted but exhilarated from her client development work, when her inebriated neighbor came tumbling down the decrepit stairs leading to her building. He landed at her feet with a gash across his forehead. This was Laura's moment. Crouching down, she grabbed the man's hand. "I'm a lawyer," she said, looking deeply into his eyes. "Let me help you."

Analysis

With diligence, zeal, and dramatic aplomb, Laura has marketed her way into ethical hot water. Her predicament highlights both the clear boundaries and the shades of gray found in the key D.C. Rules governing advertising and solicitation, referral fees, and referral services.[1]

Advertising and Solicitation

First, Laura is correct to consider herself fortunate to be practicing in the District, where it is understood that "[t]he interest in expanding public information about legal services ought to prevail over considerations of tradition."[2] While lawyer advertising was widely viewed as unseemly and unprofessional in decades past, since 1991 in the District of Columbia advertising is credited with helping people get access to legal services.[3]

That said, the individuals most in need of legal services are often among those most vulnerable to unscrupulous advertising. For this reason, the D.C. Rules on advertising and solicitation demand a high level of transparency, requiring lawyers' statements about themselves and their legal services to be truthful, non-misleading (meaning that relevant facts are not omitted), and capable of substantiation.[4] In other words, mere truthfulness ("I've never lost a case") is insufficient to comply with the Rule 7.1 mandate if additional information ("but that doesn't mean I can win yours") is necessary for the prospective client to make an informed decision.[5]

In addition, although personal solicitation of a prospective client by a lawyer is generally permissible in the District, Rule 7.1(b) contains two straightforward prohibitions on coercive or harassing solicitation techniques, and solicitation in circumstances where a client is in a physical or mental state rendering him or her incapable of reasoned judgment.[6]

Where does this leave Laura? Contrary to the Rules of many jurisdictions, claims about "expertise" *are* permissible in the District, except, of course, when they are untruthful or misleading.[7] Given that Laura is a freshly minted lawyer, it is impossible to imagine that she is in a position to claim *any* expertise without violating Rule 7.1(a)(1) and (2). Further, her statement to her neighbor, to the extent that it could be considered a solicitation, raises the possibility of a Rule 7.1(b)(3) violation because the prospective client was likely "incapable of reasoned judgment" following his fall.[8]

Referral Fees

As to Laura's interpretation of the District's stance on referral fees, while there might have been some wiggle room in the former Rule 7.1(b)(2), which prohibited "giv[ing] anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services" *only* in situations where the recommendation was made through "in-person contact," that flexibility was eliminated with an order issued by the Court of Appeals on October 8, 2015.[9] The new Rule 7.1(c), which actually restores the approach used in the District prior to 1991,[10] provides:

> 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.

This new Rule in effect prohibits payment of referral fees. By virtue of the application of Rule 8.4(a), the Rule would also prohibit a D.C. lawyer from *receiving* a referral fee from another D.C. lawyer.[11] Thus, Laura's casual referral arrangement with her former classmates would likely run afoul of Rule 7.1(c). However, as set forth in subsection 7.1(c)(4) and comment [7], a lawyer may participate in the development of referral networks among lawyers or other professionals, so long as the agreement among the members is not exclusive and the client is made aware of the arrangement. In addition, lawyers involved in such arrangements must ensure that there is no interference with their independent professional judgment.[12]

Fee-Sharing in Lieu of Referral Fees

Rule 7.1(c)'s reach does not extend to the *sharing* of legal fees between two lawyers not in the same firm who are each providing legal services to a client.[13] That conduct is governed by D.C. Rule 1.5(e), which permits lawyers who are not in the same firm to serve as co-counsel on matters and split legal fees, provided that four key elements are satisfied:

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.

The crucial provision for lawyers seeking referral fees is the first, since it leaves the precise division of the fee to the lawyers' discretion *if* they each accept joint responsibility for the representation. In such situations, a referring lawyer may be able to share in the fees without performing any substantive work, in effect earning a fee for bringing in the business.[14] A lawyer considering this option should not underestimate the ethical and legal risks of undertaking joint responsibility for a representation, particularly one in which the lawyer is not exerting significant control over the matter.[15]

Referral Services

There is some good news for Laura: Lawyer referral *services* are an approved method of obtaining clients under the D.C. Rules.[16] However, there is tension between the right of a lawyer to "participate in lawyer referral programs and pay the usual fees charged by such programs"[17] and Rule 5.4(a), which generally prohibits lawyers from sharing legal fees with a nonlawyer. In fact, Rule 5.4(a)(5), which creates a narrow exception permitting lawyers to "share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter," could be read to prohibit sharing a percentage of fees earned from non-litigation matters referred by a referral service.[18] Moreover, it is important to note that the term "referral service" is not defined in the Rules. Based on the plain language of the Rules alone, Laura's plans to remit 15 percent of any fees earned through representation of clients referred by the referral agency would fall into an ethical gray area, as it's not clear whether such payment would be considered the "usual fee" or an unethical fee split, or whether the referral service she is dealing with would even qualify as such under the D.C. Rules.

Fortunately, the Legal Ethics Committee recently issued Opinion 369 to fill these significant gaps and to harmonize prior opinions that addressed discrete aspects of these Rules. Most important for lawyers looking to build their practices is the committee's opinion that Rule 5.4(a)(5) does *not* prohibit District of Columbia lawyers from participating in nonprofit referral programs that require the remittance of a reasonable percentage of the fees earned. The basis for the committee's holding is its position, reflected in several opinions over the years, that nonprofit lawyer referral services simply do not pose the kind of risk to lawyers' independent professional judgment that Rule 5.4 seeks to mitigate.[19] Rule 7.1(c) thus provides the governing language for lawyers' payments to nonprofit referral services.[20]

Central to the committee's opinion are the guidelines it provides as to what constitutes a "lawyer referral program." In short, a nonprofit referral program would qualify if it:

- is generally open to D.C. Bar members who agree to its reduced-fee prerequisite, *see* ABA Model Rule 7.2, cmt. [6];
- takes reasonable steps to ensure that lawyers to whom matters are referred are competent to handle such matters, *see* D.C. Rule 1.1;
- does not interfere with the lawyers' professional independence of judgment;
- requires only reasonable referral fees (a criterion that is met by its current 15

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2016 Steering Committee Voting to be Online

The 2016 section steering committee elections will be conducted primarily online with paper ballots only available on request.

Section members in good standing will access their ballots by logging into the Bar's Web site during the spring voting period to cast their ballots. Individuals who wish to receive a paper ballot must submit a request no later than April 15, 2016 to **www.dcbar.org/sections/elections** or by email to **section-ballot@dcbar.org.**

Online voting will be available to all eligible voters throughout the election period but paper ballots will not be generated unless a specific request is submitted.

percent requirement), *see* D.C. Rule 1.5(a);

- requires that all lawyers in its network have reasonably adequate malpractice insurance, *see* ABA Model Rule 7.2, cmt. [6];
- has a neutral dispute resolution mechanism, *see id.*; and
- does not refer matters to lawyers who own, operate, manage, or are employed by the Service, *see id.*

D.C. Legal Ethics Op. 369 (2015). Thus, so long as the referral programs Laura registered with meet the requirements set forth in this article, she is free to pay the agency's "usual fees," even if that means sharing 15 percent of the fees earned.

And That's Not All . . .

Laura has by no means exhausted the practice-building opportunities that exist for District of Columbia lawyers. The Legal Ethics Committee has already provided guidance on lawyers' ethical involvement in prepaid legal services plans,[21] Internet-based lawyer referral services,[22] and Internet chat room discussions with potential clients.[23] Further opportunities for marketing abound in the various social medial platforms that exist today, though lawyers must proceed with caution as technology is evolving faster than guidance on the related ethical issues.

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Notes

1 It is important to note that this article addresses ethical mandates on lawyer marketing under the D.C. Rules of Professional Conduct but does not address other legal limitations affecting lawyers, such as the White Collar Insurance Fraud Prosecution Enhancement Amendment Act of 2006, D.C. Code § 22-3225.14 (2014). *See also* Hope C. Todd, "Ignorantia Juris Non Excusat," *Wash. Law.* (Sept. 2011).

2 D.C. Rule 7.1, cmt [2].

3 *Id.* (". . . 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 limited means who have not made extensive use of legal services."); *id.*, comment [4] ("[the regulations of other jurisdictions] create unneeded barriers to the flow of information about lawyers' services to persons needing such services").

4 D.C. Rule 7.1(a).

5 *See* D.C. Legal Ethics Op. 249 (1994) (statements that a lawyer "can help YOU" violate Rule 7.1(a)(2) because they are incapable of substantiation). *See also* Joe Perry, "Problems With Puffery," *Wash. Law.* (June 2011).

6 D.C. Rule 7.1(d) similarly prohibits coercive or threatening tactics by organizations that promote the lawyer's services. Other limitations include those related to solicitations outside of the D.C. Courthouse, D.C. Rule 7.1(e), and solicitations of incarcerated individuals, D.C. Rule 7.1(f).

7 *See* D.C. Legal Ethics Op. 249 (1994).

8 Note that Rule 7.1(b)(3)'s prohibition on "ambulance chasing" does not prohibit a lawyer from helping someone in dire circumstances (for example, a victim of spousal abuse) obtain critical legal services. *See* D.C. Legal Ethics Op. 261 (1995).

9 Two other Rule changes became effective on October 8, 2015. Rule 1.10 was amended to allow for the ethical screening of lawyers moving between private employers as a means of avoiding disqualifying conflicts, so long as certain client notification obligations are met. A new comment [2] was added to Rule 1.15 to provide more detailed guidance to lawyers on financial record keeping for trust accounts. A redline of the new rules can be found at http://bit.ly/2128Tss.

10 In 1991 the District adopted a version of Rule 7.1 that allowed lawyers to use and compensate "runners" to solicit prospective clients. However, this Rule was modified in 2007 to prohibit in-person solicitation by paid intermediaries. There were simply too many stories of abuses by these runners who, by virtue of being free agents, were not sufficiently supervised by the attorneys for whom they brought in clients. As noted in comment [5] to Rule 7.1, "[a] lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary, i.e., a person who is neither the lawyer's partner (as defined in Rule 1.0(i)) nor employee (see Rule 5.3) and who is compensated for such services." *See* Rule 5.3 and the accompanying comments for guidance on a lawyer's professional obligation to supervise nonlawyer employees and independent contractors.

11 For better or worse, a D.C. lawyer may, assuming other conditions set forth in the Rules of Professional Conduct are met, accept a referral fee from a nonlawyer (such as an accountant). D.C. Legal Ethics Op. 361 (2011). Interestingly, Rule 7.1(c) would *not* prohibit a D.C. lawyer from *accepting* a referral fee from a lawyer in another jurisdiction where such payments are permitted (though other ethical considerations may counsel against such arrangements).

12 D.C. Rules 2.1 and 5.4(c).

13 D.C. Rule 7.1 cmt [6].

14 D.C. Rule 1.5, comments [9] through [14], provide valuable guidance on the subject of fee-sharing among unaffiliated lawyers.

15 *See* Saul J. Singer, "Let's Split," *Wash. Law.* (Nov. 2013).

16 D.C. Rule 7.1(c)(2); *id.* cmt [8].

17 *Id.* cmt [8].

18 Note that non-contingent flat fees are not considered fee-sharing but rather a marketing expense. D.C. Legal Ethics Op. 286 (1998) ("[a] non-contingent payment for the referral of legal business, i.e., one that is paid regardless of the success or outcome of the representation, is not a division of legal fees").

19 *See, e.g.,* D.C. Legal Ethics Op. 201 (1989), D.C. Legal Ethics Op. 307 (2001).

20 Note that payment of a percentage of fees earned to a nonprofit referral service may also be consistent with Rule 5.4(a)(5), but only in the context of a litigation matter where the legal fees were "awarded by a tribunal or received in settlement." D.C. Rule 5.4(a)(5).

21 D.C. Legal Ethics Op. 225 (1992).

22 D.C. Legal Ethics Op. 342 (2007).

23 D.C. Legal Ethics Op. 316 (2002).

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This interactive program uses hypotheticals to explore one of the most basic yet often confusing questions that lawyers face: Who is the client? For more information, visit www.dcbar.org/marketplace.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE RONALD L. CHASEN. Bar No. 164426. October 15, 2015. The D.C. Court of Appeals disbarred Chasen by consent.

Reciprocal Matters

IN RE MARC H. HOFFMAN. Bar No. 963538. October 15, 2015. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed functionally equivalent reciprocal discipline and disbarred Hoffman. Hoffman consented to the revocation of his license in Florida when faced with 46 disciplinary complaints involving allegations that Hoffman's law firm generated millions of dollars in illegal upfront fees by convincing consumers to pay for the opportunity to be included as a plaintiff in mass joinder lawsuits against their mortgage lender, but that the firm did little or nothing to assist consumers.

IN RE ROBERT L. SHIELDS. Bar No. 463074. October 15 2015. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Shields. In consenting to disbarment in Maryland, Shields admitted that Bar Counsel would be able to sustain charges that he had continued to practice law while indefinitely suspended from a prior disciplinary matter, failed to notify clients of his suspension, and abandoned a representation without protecting the client's interests.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE JOEL D. JOSEPH. Bar No. 183830. October 8, 2015. Joseph was suspended on an interim basis based upon discipline imposed in Maryland.

The Office of Disciplinary Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Disciplinary Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dcattorneydiscipline.org. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.*