

ETHICS OPINION

R0 2012-01

Advertising on Groupon and Similar Deal of the Day Websites

QUESTION:

May an attorney use websites such as Groupon or other “daily deal” websites to market discounted legal services in the form of redeemable certificates to prospective clients?

ANSWER:

No. The use of daily deal websites, such as Groupon, violates or potentially violates a number of rules of professional conduct.

DISCUSSION:

Recently, the Office of General Counsel has been asked to opine on the ethical propriety of “daily deal” websites, such as Groupon, as a marketing tool for law firms. These “daily deal” websites typically contact the consumer via email and give the consumer the opportunity to purchase a certificate for services or products from a retailer at a discounted rate of 50% or greater. The proceeds from each sale are typically divided on a 50-50 split between the website and the retailer. For example, a law firm would agree to sell a coupon entitling the purchaser to \$500 worth of legal services for a discounted rate of \$250. The purchaser or prospective client would pay the website \$250 and would receive a certificate for \$500 to redeem for legal services with the law firm. The certificate may or may not have an expiration date. From the sale, the website would keep 50% of the revenue, \$125 in this case, and remit the remaining \$125 to the law firm.

Several bar associations have recently issued opinions concerning the ethical propriety of lawyers using these “daily deal” websites. New York, North Carolina, and South Carolina have issued ethics opinions approving the use of websites like Groupon, while Indiana has issued an opinion disapproving of such sites.¹ All acknowledge, however, that marketing discounted legal services

¹ See New York State Ethics Op. 897, North Carolina Ethics Op. 2011-10, South Carolina Ethics Op. 11-05, and Indiana State Bar Ass’n Legal Ethics Comm. Op. 1 of 2012.

through these sites is fraught with ethical landmines. First and foremost among the issues raised is whether the use of Groupon to market and sell legal services constitutes the sharing of legal fees with a non-lawyer in violation of Rule 5.4(a), Ala. R. Prof. C.²

In Formal Ethics Opinion 10, North Carolina found that the portion of the fee retained by the website is merely an advertising cost since “it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee . . .” In Ethics Advisory Opinion 11-05, South Carolina also determined that the website’s share of the fee paid by the purchaser was an “advertising cost” and not the sharing of a legal fee with a non-lawyer.³ The Disciplinary Commission finds these arguments unconvincing. In Alabama State Bar Association v. R.W. Lynch Company, Inc., the Supreme Court of Alabama addressed whether a television advertisement touting the “Injury Helpline” was a for-profit referral service in violation of Rule 7.2(c), Ala. R. Prof. C. 655 So. 2d 982 (Ala. 1995). While there is no claim that sites like Groupon are for-profit referral services, R.W. Lynch is instructive on whether the fees charged by such sites are truly “advertising fees”.

The Supreme Court concluded that R.W. Lynch’s “Injury Helpline” was not a “for-profit” referral system but rather a permissible form of group advertising. In reaching its decision, the Court noted that lawyers who participate in the helpline pay a flat-rate fee for the advertising, regardless of the number of calls forwarded to them. Id. Pursuant to Rule 7.2(c), a lawyer “may pay the reasonable cost of any advertisement”. In this instance, Groupon and other similar sites do not charge a flat rate fee or even a fee based on the website’s traffic. Instead, as noted by the Indiana State Bar Ass’n Ethics Committee, Groupon and other sites take a percentage (usually 50%) of each and every purchase. The percentage taken by the site is not tied in any manner to the “reasonable cost” of the advertisement. As a result, the Disciplinary Commission finds that the use of such sites to sell legal services is a violation of Rule 5.4 because legal fees are shared with a non-lawyer.

² This issue is not directly addressed in New York State Ethics Op. 897.

³ The opinion finds that, alternatively, even if the transaction does constitute the splitting of an attorney’s fee with a non-lawyer, Rule 5.4 is not violated because there is not any interference with the lawyer’s professional independence and judgment. In Alabama, the rule prohibiting fee splitting with a non-lawyer is absolute, regardless of whether the fee-splitting affects the lawyer’s professional independence or judgment.

The use of sites like Groupon would also violate a number of other ethics rules. For example, it is well-settled that pursuant to Rule 1.15(a), all unearned fees must be placed into a lawyer's trust account until earned. See Formal Opinion 2008-03. However, under the fee model employed by Groupon, half of the legal fee paid by the purchaser is claimed by Groupon at the time of the purchase making it impossible for the lawyer to place the entire unearned legal fee into trust as required by Rule 1.15(a). Further, if the purchaser were to demand a refund prior to any services being performed by the lawyer, the purchaser would be entitled to a complete refund regardless of the fact that half of the fees were claimed by Groupon. Failure to make a full refund would be considered charging a clearly excessive fee in violation of Rule 1.5(a) [Fees] and/or failing to return the client's property as mandated by Rule 1.16(d) [Declining or Terminating Representation].

Another ethical dilemma created by the use of daily deal websites is the inability of the lawyer to perform any conflict check prior to the payment of legal fees by the potential client. Under the Groupon model, the lawyer is selling future legal services and receiving the fees for such future services without ever having spoken with or having met with the client. Because the lawyer cannot perform a conflict check prior to being retained, the potential for conflicts of interest among the lawyer's former and current clients is great.

Additionally, the Disciplinary Commission is concerned that the use of such daily deal sites could result in violations of Rule 1.1 [Competence] and/or Rule 1.3 [Diligence]. Because there is no meaningful consultation prior to the payment of legal fees, the purchaser may be retaining a layer that does not possess the requisite skills or knowledge necessary to competently represent the purchaser. There is no opportunity for the lawyer to determine his own competence or ability to represent the client prior to his being hired.

Likewise, the lawyer is also unable to judge whether he will be able to diligently represent the client. Unless the lawyer places restrictions on the type of services offered and on the number of deals available for purchase, the lawyer may find that his caseload becomes unmanageable. Rule 7.2(f), Ala. R. Prof. C., provides as follows:

RULE 7.2
ADVERTISING

A lawyer who advertises concerning legal services shall comply with the following:

(f) If fees are stated in the advertisement, the lawyer or law firm advertising must perform the advertised services at the advertised fee, and the failure of the lawyer and/or law firm advertising to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising and deceptive practices. The lawyer or law firm advertising shall be bound to perform the advertised services for the advertised fee and expenses for a period of not less than sixty (60) days following the date of the last publication or broadcast.

Pursuant to Rule 7.2(f), a lawyer will be bound to honor all purchases made through sites like Groupon. If a large number of purchases are made through Groupon, the lawyer may not have the time or resources to diligently represent each new client resulting in violations of Rules 1.1 [Competence], 1.3 [Diligence], and 1.4 [Communication], Ala. R. Prof. C.

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