

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 465

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Lawyers' Use of Deal-of-the-Day Marketing Programs

Deal-of-the-day or group-coupon marketing programs offer an alternative way to sell goods and services. Lawyers hoping to market legal services using these programs must comply with various Rules of Professional Conduct, including, but not limited to, rules governing fee sharing, advertising, competence, diligence, and the proper handling of legal fees. It is also incumbent upon the lawyer to determine whether conflicts of interest exist. While the Committee believes that coupon deals can be structured to comply with the Model Rules, it has identified numerous difficult issues associated with prepaid deals and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.

Introduction

Group-coupon or deal-of-the-day marketing programs have emerged as a new model for advertising and selling goods and services. These marketing programs use websites, email, newspapers, and other tools as vehicles for helping local retailers and service providers to promote their goods and services. Businesses gain an influx of new customers, name and brand exposure through the marketing organization's activities, and the opportunity for increased sales from returning customers and word-of-mouth publicity.¹

One popular model works as follows: a marketing organization uses a website to advertise deals, allowing anyone interested in receiving notifications of such deals to subscribe to the website's frequent emails. Visitors to the website also may view the deals. The marketing organization works with local businesses to create deals for goods or services that are offered to the marketer's subscribers and visitors. After a threshold number of buyers purchase a deal, the marketing organization and the local business share the proceeds in an agreed-upon division. Each successful buyer receives a code, coupon, or voucher to obtain the specified good or service, which typically has an expiration date.²

Lawyers may seek to obtain new clients through these marketing organizations' activities. However, a lawyer must exercise great care to ensure that both the offer and any resulting representation comply with all obligations under the Model Rules, including avoiding false or misleading statements and conflicts of interest, providing competent and diligent representation, and appropriately handling all money received.³

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² Not all deal-of-the-day marketing programs operate alike and the business model is not static. Therefore, variations to the model described in this opinion may impact how a lawyer uses this type of marketing tool. This opinion does not address marketing programs where the recipient has not initiated contact with the marketing organization and requested notification of deals.

³ State ethics opinions addressing lawyer use of marketing organization websites have reached different conclusions. As one opinion concluded, the situation is "fraught with peril." Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1 (2012).

Structuring the Deal to Avoid Ethical Issues

The dictionary definition of a coupon is a “voucher entitling the holder to a discount for a particular product.”⁴ For example, a coupon clipped from the newspaper may entitle a person to buy a jar of spaghetti sauce for fifty cents less than the usual price, but the buyer has to hand over to the merchant both the coupon and the cost of the sauce, less fifty cents. In contrast, marketing organizations often collect the entire discounted price for a good or service and then provide a code that entitles the bearer to collect the good or service from the merchant without any additional payment.

For a lawyer, the two options described above might be illustrated as follows. Assume a lawyer charges \$200 per hour for legal services. The lawyer could sell a coupon for \$25 that would entitle the bearer to buy up to five hours of legal services at a fifty-percent discount; in other words, the \$25 would allow the bearer to pay only \$100 per hour for up to five hours of legal services, potentially saving up to \$500. This first option requires the coupon bearer to make additional payment to the lawyer commensurate with the number of hours actually used. Alternatively, the lawyer could sell a deal for \$500 that would entitle the buyer to receive up to five hours of legal service (with a value of up to \$1,000), but all of the money would be collected by the marketing organization, with no additional payment collected by the lawyer no matter how many of the five hours of legal services were actually used. For ease of reference, this opinion will refer to option one as a coupon deal and to option two as a prepaid⁵ deal.⁶

A lawyer must pay careful attention to how a deal-of-the-day offer is structured. As discussed more fully below, a coupon deal can meet the requirements of the Model Rules. Less clear is whether a prepaid deal can be structured to be consistent with the Model Rules. No doubt other structures may arise in the future, and they will have to be carefully assessed on their particular terms.

The Cost of Advertising Does Not Constitute Sharing of a Legal Fee

Model Rule 5.4 prohibits a lawyer, with certain exceptions, from sharing legal fees with nonlawyers. Several state ethics opinions examining lawyers’ use of deal-of-the-day marketing programs have concluded that these arrangements do not constitute fee sharing and do comport with the purpose behind Rule 5.4, the protection of lawyers’ independent professional judgment, by limiting the influence of nonlawyers on client-lawyer relationships.⁷ The Committee generally agrees with the analysis set forth in such state opinions, with one caveat.

⁴ NEW OXFORD AMERICAN DICTIONARY 397 (3d ed. 2010).

⁵ Although this opinion uses the term “prepaid deal” to describe one form of marketing, it should not be confused with a lawyer’s participation in for-profit prepaid legal service plans which this Committee found permissible, subject to certain requirements, in ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-355 (1987).

⁶ These two options are not meant to be exhaustive; rather, they are used to illustrate the types of issues a lawyer must consider in structuring a deal for a marketing program.

⁷ See, e.g., Maryland State Bar Ass’n Comm. on Ethics, Op. 2012-07 (2012) (where website collects fees upfront and retains percentage of purchase price, arrangement is cost of advertising and not legal fee-splitting arrangement); North Carolina State Bar, Formal Op. 10 (2011) (portion of fee retained by website is merely advertising cost because “it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee...”); South Carolina Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011) (website’s share of fee paid by purchaser was an “advertising cost” and not sharing of legal fee with nonlawyer). *But see Advertising on Groupon*

It is the opinion of the Committee that marketing organizations that retain a percentage of payments are obtaining nothing more than payment for advertising and processing services rendered to the lawyers who are marketing their legal services. This is particularly true where the lawyer structures the transaction as a coupon deal because, as discussed below, no legal fees are collected by the marketer. The fact that the marketing organizations deduct payment upfront rather than bill the lawyer at a later time for providing the advertising services does not convert the nature of the relationship between the lawyer and the marketing organization from an advertising arrangement into a fee sharing arrangement that violates the Model Rules.

The one caveat is that the percentage retained by the marketing organization must be reasonable. Model Rule 7.2(b)(1) prohibits a lawyer from paying for referrals but allows a lawyer to pay the “reasonable” costs of advertising.⁸ If the portion of the price retained by the marketing organization is reasonable given the cost of alternate types of advertising, the fee likely would be deemed to be reasonable. Similarly, if additional services are being provided (e.g., where the marketing organization is being compensated for publishing the lawyer’s advertising message to a large group of subscribers that has been developed by the marketing organization, and/or the organization processes payments from the buyers), the fee, even if a significant portion of the purchase price, likely would be considered to be reasonable.

Advertising Must Not Be False or Misleading

Truthful advertising, including that for legal services, is constitutionally protected commercial speech.⁹ Rule 7.1, however, provides that lawyers must not make false or misleading statements about their own abilities or services.¹⁰ Lawyers who choose to use deal-of-the-day marketing programs must supervise the statements made to ensure their accuracy and ensure that the substantive content does not include misleading or incomplete offers that run afoul of the restrictions contained in the Model Rules.

Advertising a coupon deal likely presents fewer hurdles than advertising a prepaid deal. As with any advertising, lawyers must exercise care in offering prepaid deals for a specified service. The public, particularly first-time or unsophisticated purchasers of legal services, may not easily discern what legal services they require or what legal services are encompassed in an offer. Therefore, care should be taken to draft the advertisements and communications to clearly

and Similar Deal of the Day Websites, Alabama State Bar, Formal Op. 2012-01 (2012) (percentage taken by site is not tied in any manner to “reasonable cost” of advertisement, thus use of such sites to sell legal services is violation of Rule 5.4 because legal fees are shared with a nonlawyer); Indiana State Bar Ass’n Legal Ethics Comm., Advisory Op. 1, *supra* note 3 (online providers are being paid to channel buyers of legal work to specific lawyers in violation of advertising and fee sharing rules); Pennsylvania Bar Ass’n, Advisory Op. 2011-27 (2011) (use of deal-of-the-day website is impermissible fee splitting under Rule 5.4); State Bar of Arizona, Formal Op.13-01 (2013) (even if portion retained is reasonable, it constitutes illegal fee sharing because the consumer pays all the money directly to the website versus the lawyer paying fees for advertising out of already earned fees).

⁸ ABA MODEL RULES OF PROF’L CONDUCT R. 7.2(b)(1) provides in full: “A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may pay the reasonable costs of advertisements or communications permitted by this Rule.”

⁹ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

¹⁰ ABA MODEL RULES OF PROF’L CONDUCT R. 7.1 provides in full: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

define the scope of services offered, including whether court costs and/or other expenses are excluded. Whether a coupon deal or prepaid deal is offered, care should be taken to explain under what circumstances the purchase price of a deal may be refunded, to whom, and what amount.

Buyer is Neither a Prospective nor Current Client

Importantly, a lawyer must be careful to communicate the nature of the relationship created, if any, by the purchase of a deal. A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client under Rule 1.18.¹¹ However, mere purchase of a deal for legal services does not make the buyer either a prospective client or a current client, entitled to the attendant duties owed by the lawyer. Prior to establishing a client-lawyer relationship, it is incumbent upon the lawyer to first determine whether conflicts of interest exist and whether the lawyer can competently handle the particular matter based on the expected scope of representation and the buyer's needs. Therefore, the lawyer's advertisement and communications should explain that until a consultation takes place with the lawyer, no client-lawyer relationship exists and that such a relationship may never be formed if the lawyer determines there is a conflict of interest, the lawyer is unable to provide the required representation, or the lawyer declines representation for some other reason.¹²

Lawyers should recognize that purchased deals generally can be traded or given as gifts. Lawyers must ensure that the coupon or voucher and all materials marketing the lawyer's services contain language cautioning any holder to review all terms of the purchase on the marketing organization's website, including whether the coupon is transferable. There may be some legal services that are not appropriate for transfer or gift giving due to the nature of the services or the marketing program's technical inability to adequately provide necessary information to the lawyer. For example, we noted earlier that it is not clear whether a prepaid deal can be structured to be consistent with the Model Rules. Similarly, it is not clear whether a prepaid deal, if it can be structured to comply with ethical requirements, could be transferable. Thus, another decision that the lawyer must make in evaluating the marketing program provider and in structuring a deal-of-the-day marketing program is whether or not the service offered can or should be transferable.

Competent Representation and Diligence

Competent handling of a matter requires a preliminary inquiry into, and analysis of, the factual and legal elements of a problem.¹³ A lawyer who is offering deals should limit the type

¹¹ Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1, *supra* note 3, states that the court could reasonably find that a person who has deposited money with the lawyer or lawyer's agent to form a client-lawyer relationship qualifies as a prospective client under Rule 1.18. Comment [1] to ABA MODEL RULES OF PROF'L CONDUCT R. 1.18 states: "Prospective clients, like clients, may ... place documents or other property in the lawyer's custody ..."

¹² While not all jurisdictions require lawyers to use retainer agreements, such use is advised. If the advertising lawyer expects as part of the deal to require one who is accepted as a client to execute a retainer agreement, that information likely should be disclosed on the website as well.

¹³ See ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

of services and practice area(s) covered in the offer to those in which the lawyer is competent so that individuals can make informed decisions whether to purchase the deal. Then, before establishing a client-lawyer relationship pursuant to a deal purchase, a lawyer must determine whether the services required by the purchaser are within the lawyer's competence. A lawyer offering deals should also specify any limitations on the types of matters the lawyer handles.

Even with proper disclosures, a legal matter may be more complex and require more work than contemplated by the offered deal. The lawyer should assess the amount of time and effort necessary to complete the matter, and, if the offer limits the number of hours of legal services the lawyer is obligated to provide, should address the possibility that the allotted time may expire before the representation is concluded. Where appropriate to the scope of services to be provided, the lawyer has an obligation to communicate¹⁴ the fact that additional services may or will be required to complete the representation beyond those included in the deal, and to advise whether the client will be obligated to pay additional fees in that event, and if so, in what amount or at what hourly rate.¹⁵

In addition, the lawyer must be careful in establishing the maximum number of deals to be sold by the marketing organization. Businesses have been harmed by overselling deals and then struggling to meet the ensuing demand. For a lawyer, setting too high a cap on the number of deals sold could lead to a violation of the Model Rules if the result is excessive work that the lawyer cannot handle promptly, competently, and diligently.¹⁶ The duty to provide competent representation and the duty to act with reasonable diligence and promptness require the lawyer to provide the necessary time and effort appropriate to each case accepted.

Properly Managing Advance Legal Fees

As noted above, deal offers are typically made through marketing organizations that collect payments and retain a portion of those payments for their advertising services. The remainder is transferred to the lawyer, generally in a lump sum, reflecting the number of deals sold without identification of individual purchasers. Whether this lump sum constitutes "legal fees ... paid in advance" within the meaning of Model Rule 1.15(c) depends on the nature of the deal.

If a lawyer offers a coupon deal, the purchase of a coupon merely establishes the discount applicable to the cost of future legal services. No legal fees are involved unless and until a client-lawyer relationship is formed, time is spent, and the discounted legal fees are collected directly by the lawyer. In other words, the funds that a marketing organization collects and forwards from the sale of coupon deals are not legal fees. Thus, the aggregate amount transmitted by the marketing organization from such sales may be deposited into the lawyer's general account. On

¹⁴ See ABA MODEL RULES OF PROF'L CONDUCT R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

¹⁵ At least one state opinion concludes that it would be unethical to charge the client additional fees to complete the representation. North Carolina Bar, Formal Op. 10, *supra* note 7, states that the lawyer's duty of competent representation under Rule 1.1 requires the lawyer to complete the representation without additional fees if the matter requires more time than originally anticipated to satisfy the advertised service. This Committee does not agree that it is *per se* improper to charge additional fees for supplemental services not covered by the terms of the original offer.

¹⁶ See ABA MODEL RULES OF PROF'L CONDUCT R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

the other hand, if a transaction is structured as a prepaid deal, then the money that a lawyer receives from the marketing organization constitutes advance legal fees, because the marketing organization collects all of the money to which the lawyer will be entitled for legal services that fall within the terms of the deal. Those advance legal fees need to be identified by purchaser's name and deposited into a trust account.¹⁷ The lawyer who chooses to offer a prepaid deal must make appropriate arrangements with the marketing organization to obtain sufficient information about deal buyers in order to appropriately discharge all obligations associated with handling trust funds. Regardless of whether tracking deal buyers and accounting for prepaid fees may prove difficult when a lawyer uses a marketing organization, the lawyer is still responsible for properly handling advanced legal fees.

Additionally, deals may be purchased and then never used. So long as the lawyer has offered a coupon deal, the lawyer may retain the proceeds.¹⁸ While some jurisdictions have concluded that retaining funds from an unredeemed deal constitutes an excessive fee under Rule 1.5, the Committee does not agree with these jurisdictions to the extent the lawyer has offered a coupon deal and explained as part of the offer that the cost of the coupon will not be refunded.¹⁹ The Committee does agree that monies paid as part of a prepaid deal likely need to be refunded in order to avoid the Model Rules prohibition of unreasonable fees.²⁰

In one jurisdiction, if a deal purchaser decides before the expiration of the deal that he or she does not want to be represented by the lawyer, the purchaser is entitled to discharge the lawyer and receive a full refund of the funds paid.²¹ The Committee disagrees with this opinion to the extent the lawyer offers a coupon deal and properly explains as part of the offer that there is no right to obtain a refund of the purchase price of the coupon; in such circumstances, the coupon purchaser waives the right to compel a refund. On the other hand, if the purchaser of a prepaid deal decides, prior to the deal's expiration, that he or she does not want to proceed, the lawyer likely must refund unearned advanced fees to avoid the collection of unreasonable legal fees.²²

¹⁷ To avoid issues of improper handling of trust funds and fee sharing, a lawyer should be sure that any prepaid deal offer explains to the buyer what percentage is not a legal fee and will be retained by the marketing organization. The Committee does not agree that a lawyer always must return the entire amount of the purchase price, including any portion retained by the marketing organization, if legal services are not rendered for any reason whatsoever. See State Bar of Arizona, Formal Op. 13-01, *supra* note 7.

¹⁸ See New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 897 (2011) (lawyer may retain coupon proceeds if buyer never seeks the discounted services).

¹⁹ See North Carolina Bar, Formal Op. 10, *supra* note 7; Maryland State Bar Ass'n Comm. on Ethics, Op. 2012-07, *supra* note 7. Rule 1.5 of the North Carolina Rules of Professional Conduct prohibits the charging of an "excessive" fee while the Model Rules and the Maryland Lawyers' Rules of Professional Conduct both prohibit the charging of an "unreasonable" fee. However, the Model Rules, the Maryland Rules of Professional Conduct, and the North Carolina Rules of Professional Conduct all use the same factors to determine whether a fee is unreasonable or excessive.

²⁰ A refund might not be required in all circumstances. For example, the Committee can envision a deal that offers a reduced flat rate only for an initial consultation. If the overall cost were modest, and if the offer explained that there would be no refund except for situations of conflict or lawyer unavailability, an unreasonable fee would not arise and no refund would be required.

²¹ See New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 897, *supra* note 18.

²² If the prepaid offer were for a simple service at a modest charge, along the lines of the initial consultation discussed at footnote 20, it is possible no refund would be required, provided proper and full disclosure of a no-refund policy had been made.

Finally, in the event the lawyer cannot perform legal services in accordance with a deal, such as when a conflict of interest or other ethical impediment prevents representation, the duty to refrain from receipt of an unreasonable fee compels a full refund to the purchaser. This is true for both coupon and prepaid deals. The lawyer cannot avoid this obligation to make a refund by stating otherwise in the offer.

In those instances in which a lawyer must refund money from the purchase of a deal, e.g., the lawyer has a conflict and cannot render legal services, the lawyer must refund the entire amount paid, regardless of whether the lawyer is entitled to recoup that portion of the amount that was retained as an advertising fee by the marketing organization. The Committee bases this opinion on the fact that it would be unreasonable to withhold any portion of the amount paid by the purchaser if the lawyer is precluded from providing the proffered services through no fault of the purchaser. The lawyer cannot avoid this obligation to make a full refund by providing otherwise in the offer. On the other hand, if a lawyer is not obligated to give a refund but chooses to do so, e.g., a coupon purchaser has failed to use a coupon deal before it has expired, then the lawyer may choose to refund only the portion of the payment the lawyer received, provided this limitation has been clearly disclosed at the time of purchase.

Conclusion

Offering services through deal-of-the-day or group-coupon marketing programs presents a new way for lawyers to market their services and to provide consumers with legal assistance. Lawyers who make use of this form of advertising, however, must observe their ethical and professional obligations. The Committee believes that coupon deals can be structured to comply with the Model Rules. The Committee has identified numerous difficult issues associated with prepaid deals, especially how to properly manage payment of advance legal fees, and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.

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