



ETHICS OPINION 897

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New York State Bar Association
Committee on Professional Ethics

Opinion 897 (12/13/11)

Topic: Marketing of legal services by use of a "deal of the day" or "group coupon" website.

Digest: Lawyer may market legal services on a "deal of the day" or "group coupon" website provided that the advertising is not misleading or deceptive and makes clear that no lawyer-client relationship will be formed until the lawyer can check for conflicts and competence to provide the services. If the lawyer is unable to provide the offered service due to a conflict or competence issue, the lawyer must give the coupon buyer a full refund. If the coupon buyer terminates the representation, the buyer is entitled to a refund subject to the lawyer's *quantum meruit* claim.

Rules: 1.1, 1.5, 1.10(e), 1.16(e), 7.1, 7.2(a), 7.3

FACTS

1. A number of websites offer subscribers a "deal of the day" or "group coupon" which enables the subscribers to purchase specified goods or services at a discount. For example, such a website might invite consumers to purchase a coupon which can later be exchanged for a described good or service, such as a spa treatment or a restaurant meal. The consumer buys the coupon from the website for an amount which can be significantly less than the regular price for the item in question.

2. The website negotiates the discount with participating vendors, who agree to provide the described good or service in exchange for the coupon or voucher which was purchased at a discount price. The coupon offer may involve a number of conditions or restrictions. Many times the offer is valid only if a certain minimum number of subscribers buy the coupon. Generally the coupon is valid for a specified limited time period after which it expires and is of no further value.

3. The website collects the cost of the coupon via credit card from the consumers who purchase it. Upon the close of the "deal of the day," the website deducts a percentage of the gross receipts as its compensation and pays the balance to the participating vendor.

QUESTION

4. May an attorney market legal services by participating in a "daily deal" or "group coupon" website?

OPINION

5. A recent ethics opinion from South Carolina approves of lawyers' use of such websites, subject to various limitations and conditions. See South Carolina Opinion 11-05.

6. Although not all legal services are suited to this kind of discount marketing, at least some might be. For example, a participating lawyer might offer the preparation of a simple will, for which the lawyer normally charges \$500, for \$250.^[1] Indeed, a lawyer could permissibly publish an equivalent discount coupon advertisement in the newspaper, see N.Y. State 563 (1984), subject to the rules governing advertising.^[2]

7. The use of such a website as a means of marketing legal services raises a number of issues. These include:

- A. Whether the arrangement is an improper payment for a referral, Rule 7.2(a);
- B. Whether the amount received by the lawyer could, under certain circumstances, result in a prohibited excessive fee, Rule 1.5;
- C. Whether any statements made by or on behalf of the lawyer are false or misleading or otherwise violative of the rules regarding lawyer advertising, Rule 7.1; and
- D. Whether the logistical arrangement of payment in advance for a legal service, before the lawyer has had the opportunity to check for conflicts or determine whether the lawyer is competent to perform the service and whether the client needs the service, constitutes a premature and improper formation of a lawyer-client relationship, Rule 1.1, Rule 1.10(e).

Is the money retained by the website an improper payment for a referral?

8. Rule 7.2(a) provides: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client," with two exceptions that do not apply here.

9. Comment 1 to Rule 7.2 notes that Rule 7.2(a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules...."

10. The question then arises whether the money retained by the website is merely an appropriate payment for a novel form of advertising or is a compensation for the referral of a client.

11. South Carolina Op. 11-05 concluded that the money retained by the website was the payment for "the reasonable cost of advertisements."

12. We note that the website has no individual contact with the coupon buyers other than collecting the cost of the coupon. The website has not taken any action to refer a potential client to a particular lawyer - instead it has carried a particular lawyer's advertising message to interested consumers and has charged a fee for that service.

13. We are not privy to the percentage amount retained by these various websites, but assuming that it is a reasonable payment for this form of advertising, we conclude that there is no violation of Rule 7.2.^[3] This conclusion rests on the facts and assumptions stated here. Different arrangements between the lawyer and the website could lead to the opposite conclusion, i.e., that the lawyer is paying for a referral in violation of Rule 7.2.

Excessive Fee

14. Some coupon buyers may not, for various reasons, receive all or any of the legal services to which the coupons entitle them. Rule 1.5 prohibits excessive legal fees as an ethical matter, and fee arrangements are also subject to other rules as a matter of law. Applying these rules requires consideration of the various reasons that the legal services may not be delivered.

15. As described above, the lawyer's portion of the gross amount of the website's coupon sales receipts is paid to the lawyer shortly after the offer closes and before the individual buyers receive services. In some cases, when the buyer comes to receive the service, the lawyer may determine that he or she is unable to render the described services, either because of a conflict of interest or because the lawyer is not able to deliver competent services that are appropriate for the client. In such a case, the lawyer cannot provide what the coupon buyer purchased, and must give the buyer a full refund.^[4]

16. In other cases, the coupon buyer, having changed his or her mind about going forward with the representation, may discharge the lawyer. If that occurs, rules of ethics and law require the lawyer to give a full refund, subject to any *quantum meruit* claim for services rendered prior to the termination of the representation. See Rule 1.16(e) (providing that upon termination of representation, lawyer must promptly refund any part of a fee paid in advance that has not been earned); N.Y. State 599 (1989) (citing case law for proposition that a client "may always discharge his attorney, with or without cause, and in the absence of a contract providing otherwise an attorney discharged without cause is entitled to be compensated in quantum meruit").

17. Some buyers might purchase the coupon from the website and then never seek the discounted services from the lawyer. Other buyers might wait too long to use the coupon, which has a stated expiration date, and try to use it after that date. In either case, the lawyer is entitled to treat the advance payment received as an earned retainer for being available to perform the offered service in the given time frame.

Compliance With Rules Regulating Advertising

18. Like all lawyer advertising, the "daily deal" advertisement must not be false, deceptive or misleading, Rule 7.1(a)(1). The lawyer must comply with Rule 7.1(j), requiring the availability to the public of a written statement describing the scope of the service advertised for a fixed fee. Having offered a particular service for a fixed fee, the lawyer must provide the service for the advertised fee if the coupon purchaser seeks that service within the specified time frame, Rule 1.7(j). The offered discount must not be illusory, but must represent an actual discount from an established fee for the named service. Otherwise the advertisement would be misleading. See N.Y. State 563 at n. 2. The advertisement must include the words "Attorney Advertising" on the web page and in the subject line of any related email, as required by Rule 7.1(f). If the specific language of the advertisement makes it "targeted," then the advertisement is a solicitation and must comply with Rule 7.3 as well.

Premature and Improper Formation of Lawyer-Client Relationship

19. Purchase of the coupon entitles the consumer to the described legal service. The danger is that the arrangement could be taken to establish a lawyer-client relationship before the lawyer has had any opportunity to check for conflicts, determine whether the described legal services are appropriate for the consumer, and whether the lawyer is competent to provide those services.

20. South Carolina Ethics Advisory Opinion 11-05 confronted this issue and concluded that the problem could be avoided with proper logistical arrangements and disclosures. We agree.

21. To avoid the premature and improper formation of a lawyer-client relationship, the lawyer's advertisement on a "deal of the day" website must make clear that the offer made on the website is subject to a number of conditions. These would include that before such a relationship is formed, the lawyer will check for conflicts and determine that the lawyer is competent to provide legal services that are appropriate to the consumer. If the lawyer determines that the lawyer-client relationship is untenable for these reasons, the lawyer must give the coupon buyer a full refund. This arrangement should be disclosed as part of the coupon offer on the website, along with any other information needed to avoid making the offer misleading in any way.

22. If the lawyer-client relationship is formed, the lawyer must promptly describe the scope of the services to be performed and the fee arrangement as required by Rule 1.5(b).

CONCLUSION

23. A lawyer may properly market legal services on a "deal of the day" or "group coupon" website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the Rules governing attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation.

(26-11)

[1] It has long been established that a lawyer may properly offer a particular legal service at a specified price, so long as the lawyer actually performs the service for that price. *Bates v. State Bar of Arizona*, 433 U.S. 350 at 372-73, 378-79 (1977).

[2] For example, N.Y. State 563 makes clear that an offer of a discount from a customary fee would be misleading if the customary fee were not "readily ascertainable."

[3] A useful comparison might be to an arrangement where the lawyer publishes an advertisement on, for example, a directory website. Clicking on the ad follows a link to the lawyer's website. Instead of paying a flat fee for the

placement of the ad, the website's compensation (and the lawyer's cost of advertising) is determined by how many times the lawyer's ad is clicked. In this arrangement the lawyer is still paying the cost of advertising, but the calculation of the cost is different from the traditional arrangement customary in newspaper or television advertising.

[4]In reaching this conclusion we have assumed that the original advertisement on the website did not include any contrary provision regarding refunds.

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One Elk Street, Albany , NY 12207
 Phone: 518-463-3200 Secure Fax: 518.463.5993

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