

COUPONS FOR LAWYERS



THREE ETHICS OPINIONS APPROVE DAILY DEAL ADVERTISING FOR LAWYERS

By M. Derek Harris, Litigation News Associate Editor

Lawyers may market their services on daily deal websites without violating fee splitting prohibitions, but the practice raises other thorny ethical considerations. Three recent ethics opinions provide sound advice and guidance for lawyers looking to avoid running afoul of their professional responsibilities if they use such sites.

Offering specials on services through daily deal websites such as Groupon is new territory for lawyers. "I've seen a lot of different professionals using these opportunities, just not lawyers," says David J. Scriven-Young, Chicago, cochair of the Networking and Rainmaking Subcommittee of the ABA Section of Litigation's Young Advocates Committee.

"This is obviously on the cutting edge as far as what's going on in the legal community," adds Damian E. Thomas, Miami, cochair of the Section of Litigation's Solo & Small Firm Committee. "It's going to start popping up everywhere because I am sure these companies that provide the advertising are going to start contacting attorneys in different states and offering this service."

HOW DO DAILY DEAL WEBSITES WORK?

A daily deal website operates by allowing consumers to register their email addresses and cities of residence on the site. Registered consumers then receive emails offering daily deals or coupons on services offered by local businesses, and the website retains a percentage of the purchase price paid to the business. Recent ethics opinions from North Carolina, South Carolina, and New York conclude that lawyers may advertise on such websites without violating the rules of professional conduct.

CONCERNS ABOUT LAWYERS' REPUTATIONS

While permissible, a lawyer's use of websites like Groupon does raise reputation concerns. Indeed, the South Carolina Ethics Advisory Committee specifically noted its concern "with the effect the use of such websites may have on the reputation of the legal profession" if lawyers' use of daily deal sites is not done in compliance with the rules of professional conduct. Daily deal online advertising could also "affect how attorneys view other attorneys," says Thomas. "I think a lot of attorneys would be hesitant to do it because of how they would be perceived in the legal community."

Yet "every time a new frontier has come up in lawyers' advertising, a lot of concerns are raised about whether this is something that lawyers should be doing, but then people get used to it, and it really doesn't affect the fundamental practice of law," says Paul E. Lehner, Chicago, cochair of the Section's Solo & Small Firm Committee. He continues, "And if it actually provides a vehicle for members of the public to obtain the services of a lawyer to prepare something such as an estate plan, that's actually a benefit and not a detriment."

As the ABA Commission on Ethics 20/20 explained this summer in its Initial Draft Proposals on Lawyers' Use of Technology and Advertising, the need to know about legal services "is particularly acute in the case of persons of moderate means who have not made extensive use of legal services." And "the Internet and other forms of electronic communication are now among the most

powerful media for getting information to the public, particularly persons of low and moderate income." While the traditional view is that a lawyer should not use advertising to seek clientele, according to the Commission on Ethics, "[t]he interest in expanding public information about legal services ought to prevail over tradition."

Daily deal advertising is not "something lawyers should shy away from because of any sort of reputational taints that might be brought on," says Scriven-Young. Rather, lawyers who make use of this form of advertising should focus on doing so in a responsible manner according to the applicable ethics guidelines.

EXISTING ETHICS RULES ARE ADEQUATE

While daily deal advertising is novel territory for lawyers, the ethical principles at issue in the recent opinions from North Carolina, South Carolina, and New York are not new. In 1987, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 87-355 concerning for-profit prepaid legal services plans. "While the Internet was at best in its infancy in 1987, the Formal Opinion discusses issues that appear to apply to many of the same issues" addressed in the recent ethics opinions, notes Stephen T. LaBriola, Atlanta, chair of the Subcommittee on Advertising of the Section's Ethics and Professionalism Committee.

In its Formal Opinion, the ABA Standing Committee concluded that a lawyer's participation in a for-profit prepaid legal service plan is permissible under the Model Rules, provided the plan complies with certain guidelines. Among other things, the participating lawyer must be able to "exercise independent professional judgment on behalf of the client, to maintain client confidences, to avoid conflicts of interest," and "the plan must not involve improper advertising or solicitation or improper fee sharing."

The same guidelines that have governed lawyers participating in prepaid legal service plans for nearly 25 years are equally applicable to lawyers engaging in daily deal advertising today. The ABA's Formal Opinion and the recent state ethics opinions all touch on the same rules. Each instructs that it is incumbent on the lawyer to ensure that he complies with the rules, especially the prohibition against improper fee sharing with non-lawyers.

From the South Carolina Ethics Advisory Opinion 11-05: The use of daily deal websites to sell vouchers to be redeemed for discounted legal services does not violate the Rule 5.4(a) prohibition on sharing of legal fees, but the attorney is cautioned that the use of such websites must be in compliance with Rules 7.1 and 7.2 and could lead to violations of several other rules if logistical issues are not appropriately addressed.

From the Report of the ABA Commission on Ethics 20/20: Prior to the Internet, [the] dichotomy between advertising and lawyer referral services was not difficult to understand. For example, payments to television stations to run a commercial or payments to a phone book company to run a Yellow Pages advertisement were clearly permissible, whereas sharing fees with a for-profit referral service was clearly impermissible. The Internet has blurred these lines, and it is highly likely that continued technological innovation will make the lines even less clear.

PAYING PART OF A LAWYER'S FEE FOR ADVERTISING IS FAIR

As with a lawyer's participation in a prepaid legal services plan, at first blush the use of daily deal websites also appears to violate the prohibition on splitting fees with non-lawyers. "My presumptive thought [prior to reading the Carolina opinions] was that the bar associations would say 'no, this is fee sharing with a non-lawyer and, therefore, prohibited,'" says Scriven-Young. However, they "took a very modern and thoughtful approach and said, it is not necessarily fee sharing; you're paying for advertising."

In its Advisory Opinion 11-05, the South Carolina Ethics Advisory Committee concluded that this arrangement constitutes the permitted payment of "the reasonable costs of advertisements or communications" and is not the prohibited sharing of a legal fee with a non-lawyer. The Advisory Committee further concluded that, even if the transaction does constitute the splitting of an attorney's fee with a non-lawyer, the prohibition on fee-splitting "only applies in situations where such fee-splitting interferes with 'the lawyer's professional independence of judgment' on behalf of the client." Thus, the use of daily deal websites as a marketing tool does not violate the South Carolina Rules of Professional Conduct, "provided the website does not have the ability to exercise any control over the services which are to be subsequently rendered by the attorney."

The North Carolina Ethics Committee arrived at the same conclusion in its Opinion 11-10, adding that after the fee is paid, there is "no interaction between the website company and the lawyer relative to the legal representation of the purchaser" and "the lawyer earns the fee by providing the legal services to the purchaser." Accordingly, "the fee retained by the website company is the cost of advertising on the website," not prohibited fee-splitting. Thus, lawyers may participate in this type of advertising as long as the fee charged "is reasonable compensation for the advertising service."

Similarly, the New York Committee on Professional Ethics noted in its Opinion 897 that 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."

OPINIONS ADDRESS QUESTIONS REGARDING EXCESSIVE FEES

One reason advertisers are willing to discount their goods or services on daily deal websites is that a certain percentage of the purchasers will never cash in on their "deal." Thus, for every 10 husbands who buy a package of six dance lessons, the dance studio is betting there are likely three wives who either have no time (or interest) in going to the lessons. That's usually \$100 that the husband "writes off" but that the dance studio (and daily deal site) can keep.

Lawyers cannot retain unearned fees. As the North Carolina Ethics Committee cautions, any payments received from the website company must be deposited in the lawyer's trust account and may not be paid to the lawyer "until earned by the provision of legal services." The lawyer, as a fiduciary, must place "the interests of his clients above his own and may not accept a fee for doing nothing."

Thus, if the lawyer determines that the client does not need the legal service advertised and purchased or that a conflict of interest prohibits the representation, the North Carolina Ethics Committee instructs that "the lawyer must refund the prospective client's entire advance payment, including the amount retained by the website company to make the prospective client whole." The New York Committee on Professional Ethics likewise states that "the lawyer cannot provide what the coupon buyer purchased, and must give the buyer a full refund."

However, the opinions differ on the ethical implications if a purchaser fails to take advantage of the discounted legal service before the deal expires. The South Carolina Ethics Advisory Committee cautions, "The compensation paid to the lawyer may be considered an unearned fee." In contrast, the New York Committee on Professional Ethics says that "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."

OTHER ETHICS CONSIDERATIONS REMAIN

These opinions emphasize that lawyers using daily deal websites must also ensure that they comply with other rules of professional conduct. Specifically, advertisements cannot be misleading, advertised discounts cannot be illusory, and certain disclosures must be included. "These opinions continue to reinforce how important it is for lawyers to consult the law in the jurisdictions where they practice. Particularly in advertising, as various states have enumerated different requirements and prohibitions," cautions LaBriola. Lawyers who take this new marketing vehicle for a test drive must therefore navigate the terrain with full awareness that there are no discounts on lawyers' ethical and professional obligations.

RESOURCES:

- 🔗 South Carolina Ethics Advisory Opinion 11-05 at <http://tinyurl.com/LNw12-SC1105>.
- 🔗 North Carolina State Bar 2011 Formal Ethics Opinion 10 at <http://tinyurl.com/LNw12-NC1110>.
- 🔗 New York State Bar Association Committee on Professional Ethics Opinion 897 at <http://tinyurl.com/LNw12-NY897>.
- 🔗 ABA Commission on Ethics 20/20 Initial Draft Proposals on Lawyers' Use of Technology and Advertising, June 29, 2011, at <http://tinyurl.com/LNw12-aba20>.
- 📄 ABA Model Rule Formal Opinion 87-355.