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NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 897

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 buyes 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(*l*). 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.

Related Files

Ethics Opinion 897(PDF File)

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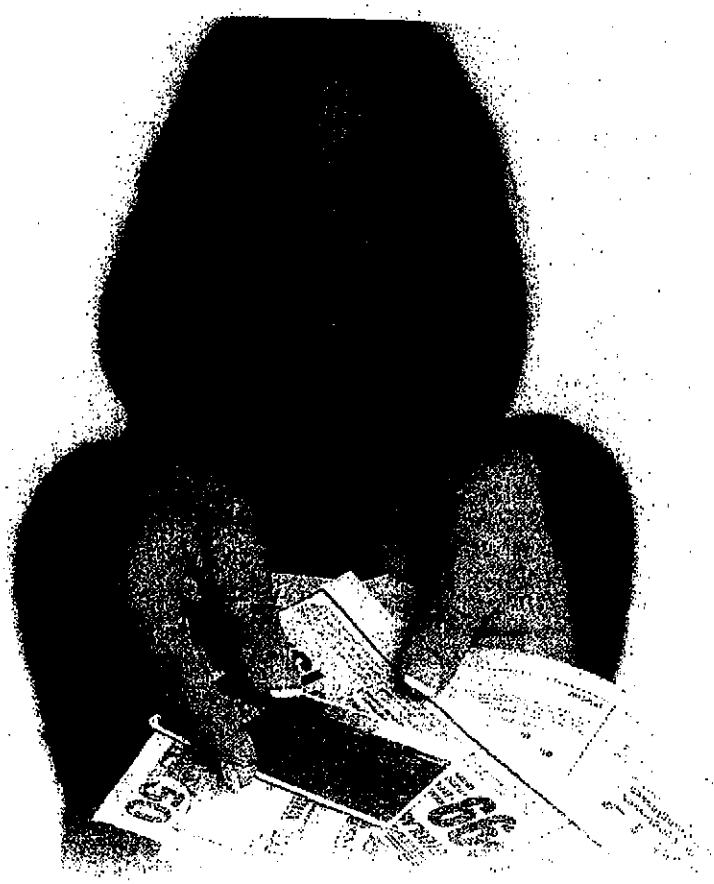

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Deal-of-the-Day Coupons

The Ethics of Discount Marketing by Lawyers

By Devika Kewalramani, Amyt M. Eckstein and Valeria Castanaro Gallotta

Legal Service Coupon Marketing

Deal-of-the-day and coupon marketing have gained in popularity with retailers, being offered via email, websites and other promotional tools. Lawyers seeking to access both broader and more targeted audiences are looking to promote their practices by offering discounted legal services and adopting group coupon marketing strategies as a way to reach new consumers seeking legal services. While there are differing views regarding the propriety of deal-of-the-day advertising[1] and the types of legal services best suited to discount marketing, the reality is that coupon programs for legal services are already widespread in certain marketplaces and regions. While lawyers may seek clients through these new marketing vehicles, they should be mindful of their professional and ethical responsibilities before engaging in this type of advertising activity. In addition, as technology and offer techniques evolve, new considerations arise.

Deal-of-the-Day

What's the Deal?

Group coupon marketing programs allow retailers to market products and services at a discount to consumers via websites that receive a portion of the retailer's profit. The retailer and the website separately negotiate the discounts to be applied. Subscribers to the website usually receive the offer via an email promoting currently available deals, noting certain restrictions or conditions, and providing the caveat that most deals are available for a limited time. Subscribers purchase the deal and are able to redeem a voucher or coupon provided by the website. Often, the offer is valid only if a certain minimum number of subscribers purchase the coupon. Typically, the website collects the cost of the coupon by credit card from the consumer, deducts a percentage of the gross receipts as its compensation and pays the balance to the participating retailer.

Legal Industry Coupon Programs

There are two types of popular legal industry coupon arrangements. The first is an ordinary coupon scenario where the subscriber buys a coupon for discounted legal services at the advertised rate with the promise that the rate applies to a specified number of hours of legal work. The subscriber separately pays the lawyer rendering services for the number of hours worked at the discounted rate. For example, the subscriber buys a $50 coupon that entitles him or her to receive five hours of a lawyer's time at a reduced rate. The second, and far more common, is the prepaid coupon scenario where the subscriber pays the website up front for the entire value of the coupon for discounted legal services, regardless of whether the hours are actually worked or if the coupon is ever redeemed. For example, a lawyer offers an hourly rate discount of 50% for up to five hours, so the subscriber pays the full amount of $750 in advance.

Ethical Obligations in Legal Service Advertising

Legal services group coupon marketing implicates a broad range of ethics issues under the New York Rules of Professional Conduct[2] (the Rules) and the American Bar Association (the ABA) Model Rules of Professional Conduct (the Model Rules). The following Rules are some of the significant ones to consider:

- Rule 1.1 requires lawyers to provide competent client representation;
- Rule 1.5 prohibits lawyers from charging an excessive legal fee;
- Rule 1.7 requires lawyers to avoid conflicts of interest with current clients;
- Rule 1.10(e) mandates conflicts checking for new engagements against existing clients and previous engagements;
- Rule 1.15 proscribes commingling of client funds, requires segregation of client accounts and the safeguarding of client funds and other property;
- Rule 1.16(e) requires withdrawing lawyers to promptly refund any legal fees paid in advance but not yet earned;
- Rule 1.18 governs lawyers' duties to prospective clients;
- Rule 5.4 proscribes lawyer-nonlawyer sharing of legal fees and prohibits nonlawyers from regulating the professional judgment of lawyers whom they pay to render legal services for another;
- Rule 7.1 bars false, deceptive or misleading attorney advertising;
- Rule 7.2(a) forbids lawyers from compensating persons or organizations for a client referral;
- Rule 7.3 regulates solicitation of prospects by lawyers; and
- Rule 7.4 governs lawyers' identification of practice areas and specialties.

Structuring the Ethical Deal

State bar association ethics committees around the country are increasingly placing legal services coupon marketing programs under the ethics microscope. N.Y. State Bar Op. 897 (2011) (NY Opinion) concludes that it is permissible for lawyers to participate in daily deal websites but cautions lawyers to use such advertising carefully to avoid potential ethical pitfalls.[3] While several other states have approved lawyers' use of deal-of-the-day websites – subject to various limitations and conditions – some states prohibit legal service coupon marketing. For example, North Carolina, South Carolina and Maryland permit the use of properly structured legal services group coupon marketing deals, whereas Alabama, Arizona and Pennsylvania have found legal service group coupon marketing to be unethical and, as Indiana Bar Op. 1 put it, "fraught with peril."[4]

Recently, the ABA issued Formal Op. 465 (2013) (ABA Opinion), advising lawyers on using deal-of-the-day marketing programs while complying with the Model Rules.[5] Although the ABA Opinion provides warnings and guidelines regarding many of the same ethics issues analyzed by the NY Opinion, the ABA Opinion examines the issues under two different categories of group coupon arrangements, characterized as either "coupon" or "prepaid." The ABA Opinion concludes that while "coupon" deals can be structured to comply with the Model Rules, it identifies numerous 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. The particular ethics issues triggered by deal-of-the-day marketing websites are discussed below.

Improper Referral Payment, Fee-Splitting or Advertising Cost?

New York Approach

Rule 7.2(a) prohibits a lawyer from compensating a person or entity to recommend or obtain employment, or as a reward for having made a recommendation resulting in employment. Comment [1] to Rule 7.2 notes, however, that Rule 7.2(a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules. . . ." So, when a website collects the cost of a coupon from consumers of legal services and at the close of the deal-of-the-day deducts a percentage of the gross receipts as its compensation and pays the balance to the participating lawyer, does this constitute improper payment for a referral?

The NY Opinion found no violation of Rule 7.2 and agrees with South Carolina Bar Op. 11-05, which concludes that the money retained by the website is payment for "the reasonable cost of advertisements." The NY Opinion reasons that deal-of-the-day advertising does not run afoul of Rule 7.2(a) due to the lack of any individual contact between the website and the coupon pur-

chaser, other than collection of the cost of the coupon by the website. The website takes no action to actively refer a potential client to a particular lawyer but merely charges a fee for carrying an advertisement, crafted by the lawyer, to interested consumers. The NY Opinion assumes that to the extent the percentage amount retained by various websites is a reasonable payment for this form of advertisement, there is no violation of Rule 7.2.

money directly to the website rather than the lawyer paying fees for advertising out of already earned fees.

Returns, Refunds and Retainers

New York Position

The NY Opinion observes that after a coupon is purchased, circumstances can arise where the coupon holder is unable to receive the full benefit of the legal services to

State bar association ethics committees around the country are increasingly placing legal services coupon marketing programs under the ethics microscope.

View of the ABA and Other States

The ABA Opinion reaches a conclusion similar to that of the NY Opinion, concluding that marketing companies that retain a percentage of payments obtain no more than payment for advertising and processing services rendered to lawyers who market their legal services, especially where lawyers structure the transaction as a "coupon" deal, since no legal fees are collected by the marketer. The ABA Opinion observes that the marketer's deducting payment up-front rather than billing the lawyer later for providing the advertised services does not convert the nature of the lawyer-marketer relationship from an advertising arrangement into a fee-sharing arrangement in violation of the Model Rules. The ABA Opinion caveats that the percentage retained by the marketer must be reasonable under Model Rule 7.2(b)(1).

The ABA Opinion also notes that many state bar associations have found lawyers' use of deal-of-the-day marketing arrangements to be permissible – that is, such promotions do not constitute fee-splitting with nonlawyers in violation of Model Rule 5.4. The underlying purpose of Model Rule 5.4 is to protect a lawyer's independent professional judgment by limiting the influence of nonlawyers on the attorney-client relationship. For example, North Carolina State Bar, Formal Op. 10 (2011) concludes that the portion of a fee retained by the website is merely an advertising cost, because "it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee." However, Alabama State Bar, Formal Op. 2012-01 (2012), takes a contrary position, finding that the percentage taken by the website is not tied in any manner to the "reasonable cost" of the advertisement. Thus the use of such websites to sell legal services is in violation of Rule 5.4, because legal fees are shared with a nonlawyer. Similarly, State Bar of Arizona, Formal Op. 13-01 (2013), observes that even if the portion retained by the website is reasonable, it constitutes improper fee sharing, because the consumer pays all the

which the coupon is entitled, thereby implicating Rule 1.5, barring excessive legal fees. For example, after the lawyer is paid by the website but before the purchaser receives the service, if the lawyer is unable to perform the work due to a conflict of interest under Rules 1.7 and 1.10(e) or lack of competence under Rule 1.1, then the lawyer must provide a full refund to the purchaser (including the portion retained by the website unless otherwise disclaimed). Similarly, where the buyer decides not to pursue the lawyer's services and discharges the lawyer, the lawyer must provide a full refund, subject to any quantum meruit claim for legal services performed prior to termination.[6] The NY Opinion also notes that in situations where a subscriber purchases a coupon but allows it to expire either by never seeking to use it or failing to use it before it expires or attempts to do so thereafter, 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."

Treatment by the ABA

The ABA Opinion agrees with the NY Opinion that the lawyer may retain the proceeds where coupon deals are purchased but never used. However, the ABA Opinion disagrees that lawyers must always return the entire amount of the purchase price, including any portion retained by the website, if legal services are not rendered for any reason whatsoever.[7] The ABA Opinion notes that while some states have concluded that retaining funds from an unredeemed deal constitutes an excessive fee under Model Rule 1.5, it differs with these states to the extent that lawyers had offered a "coupon" deal and disclosed that, as part of the offer, the cost of the coupon will not be refunded.[8] However, the ABA Opinion agrees that monies paid as part of a "prepaid" deal likely need to be refunded in order to avoid violating the Model Rules prohibiting unreasonable fees.

Contrasting "coupon" and "prepaid" deals, the ABA Opinion notes that for coupon deals, where the lawyer

properly discloses as part of the offer that there is no right to obtain a refund of the purchase price of the coupon if the subscriber later has a change of heart, the right to compel a refund has been waived; whereas, for prepaid deals where the subscriber decides prior to its expiration not to proceed, the lawyer likely must refund unearned advance fees to avoid collecting unreasonable fees.

Legal service coupon marketing must comply with Rule 7.1's strictures on attorney advertising.

The ABA Opinion observes that where a lawyer cannot perform legal services required by the deal (either in coupon or prepaid deals) due to a conflict or other ethical impediment, the lawyer must provide a full refund to avoid receipt of an unreasonable fee. This duty to refund cannot be avoided through disclosure. Such a refund must be for the entire amount paid (i.e., including website fee), regardless of whether the lawyer is entitled to recoup any portion of the website fee. The ABA Opinion reasons that it would be unreasonable to withhold any portion paid by the purchaser if the lawyer's inability to render services is not the fault of the buyer. However, if a lawyer is not obligated to give a refund but chooses to, such as when a buyer allows a coupon deal to expire, the lawyer may refund only the portion of the payment received, provided this limitation is clearly disclosed at the time of purchase.

Avoid False or Misleading Advertising

New York View

The NY Opinion concluded that legal service coupon marketing must comply with Rule 7.1's strictures on attorney advertising: the daily deal advertisement must not be false, deceptive, or misleading (Rule 7.1(a)(1)); a written statement describing the scope of the service advertised for a fixed fee must be made available (Rule 7.1(j)); lawyers must render the service for the advertised fixed fee if the coupon buyer seeks that service within the specified time frame (Rule 7.1(l)); the offered discount must not be illusory and must represent an actual discount for the advertised service (e.g., an advertisement offering discounted services for five hours of legal work at $100 an hour for a total of $500 would be misleading under Rule 7.1(a)(1) if such lawyer's standard rate is $100);[9] the advertisement must include the label "Attorney Advertising" on the webpage and in the subject line of any related email (Rule 7.1(f)); and if the advertisement is "targeted" to a specific group, it becomes a solicitation and must comply with the rules on solicitation (Rule 7.3).

ABA Approach

The ABA Opinion notes that lawyers who choose to use deal-of-the-day marketing programs must properly supervise the accuracy of the content of the offers made to ensure they are not misleading or incomplete, in violation of the Model Rules. The ABA Opinion draws a distinction between advertising a "coupon" and a "prepaid" deal, observing that the latter likely presents greater obstacles because the public, particularly first-time or unsophisticated consumers of legal services, may not easily understand what legal services they require or are covered in an offer for "prepaid" deals for a specified service. The ABA Opinion cautions lawyers who offer "prepaid" legal services deals to carefully draft advertisements that clearly define the scope of the legal services offered, including whether court costs or expenses are excluded. In addition, the ABA Opinion advises that for both "coupon" and "prepaid" deals, lawyers should be explicit about the circumstances that may require a refund of the purchase price of a deal, to whom, and in what amount.

Absence of Attorney-Client Relationship

New York Perspective

The NY Opinion warns that because purchase of a coupon entitles the buyer to the described legal service, there is a risk that such an arrangement could be viewed, prematurely and improperly, as the formation of a client-lawyer relationship, before the lawyer has had any opportunity to check for conflicts of interests, determine if the described services are appropriate for the consumer, and if the lawyer is competent to render such services. The NY Opinion agrees with South Carolina Op. 11-05 that such a problem could be avoided with proper logistical arrangements and disclosures. The lawyer's advertisement on a deal-of-the-day website must disclose as part of the coupon offer that it is subject to a number of conditions: (1) before such a relationship is created the lawyer will check for conflicts and determine his or her competence to render services that are appropriate to the consumer; (2) if the lawyer decides that the client-lawyer relationship is untenable for such reasons, the lawyer must give the coupon purchaser a full refund; and (3) the lawyer must supply any other information preventing the offer from being misleading in any way. The NY Opinion adds that to the extent the client-lawyer relationship is actually formed, the lawyer must promptly describe the scope of the services to be performed and the fee arrangement pursuant to Rule 1.5(b).

Treatment by the ABA

The ABA Opinion alerts lawyers that they must be prudent and communicate the nature of the relationship formed, if any, by the purchase of a deal, in order to avoid creating any duties of confidentiality or to check for conflicts that may be owed to a "prospective client" (i.e., who consults about the possibility of forming a client-lawyer

relationship regarding a matter) under Model Rule 1.18.[10] However, the ABA Opinion observes that the mere purchase of a deal for legal work does not automatically transform the buyer into a prospective client or a current client, entitled to the attendant duties owed by the lawyer. It notes that the lawyer's advertisement should explain that, until a consultation takes place, no attorney-client relation exists and no such relationship may ever be established if there is a conflict or the lawyer is unable to provide the representation. The ABA Opinion suggests disclosing on the website the use of a retainer agreement if the lawyer will require the potential client to execute one. It advises that the legal services promotions and other materials marketing the lawyer's services should contain language cautioning any consumer to review all purchase terms on the website, including whether the coupon is transferable. The ABA Opinion observes that not all legal services are appropriate for transfer or gift giving (such as "prepaid" deals), thereby obligating lawyers to properly evaluate the deal structure and the website to determine whether the offered legal service may be transferable.

Competence and Diligence

The ABA Opinion advises lawyers to limit legal services offered in such promotions to those they are competent to take on, and they should clearly disclose in the coupon offer any restrictions on the types of matters handled so that consumers can make informed decisions about purchasing the deal. Lawyers should also disclose that the matter covered by the coupon may become more complex than originally expected and may exceed the number of hours allotted under the coupon. The ABA Opinion adds that if the matter will require more time than is offered under the coupon, the lawyer must state how long it will take and at what rate, and be careful to limit the number of deals to be sold in order to avoid situations where the lawyer cannot manage matters promptly, diligently and competently.

Handling Advance Legal Fees

The ABA Opinion observes that deal offers are usually made through websites that collect payments, retain a portion thereof for their advertising services, and transfer the remainder to the lawyer, generally in a lump sum, reflecting the number of deals sold, without identifying individual buyers. So, 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.

The ABA Opinion notes that for coupon deals, the coupon purchase merely establishes the discount applicable to the cost of future legal services. Therefore, no legal fees are involved unless and until a client-lawyer relationship is created, time is spent and the discounted legal fees are collected directly by the lawyer. Hence, the funds collected and forwarded by the website to the lawyer from the coupon sale are not legal fees and may be deposited into the lawyer's operating account. In contrast, with prepaid deals, the funds the lawyer receives from the website constitute advance legal fees because the website collects all the money the lawyer will be entitled to as set forth in the deal. Advance legal fees need to be deposited into a trust account and identified by the buyer's name. The ABA Opinion cautions that, in order to avoid improper handling of trust funds and fee sharing, lawyers should explain to the buyer of any "prepaid" deal what percentage paid is not a legal fee and will be retained by the website. In addition, lawyers who choose to offer a "prepaid" deal must make appropriate arrangements with the website to obtain adequate information about deal purchasers to properly comply with their duties to manage trust funds. The ABA Opinion cautions that despite the practical difficulties associated with tracking deal buyers and accounting for prepaid fees, even where lawyers use a website, they are still responsible for properly handling advance legal fees.

Avoid the Raw Deal

Clearly, legal services coupon programs trigger several important ethical issues. There may be new and different types of coupon arrangements that emerge, posing additional ethical concerns not yet identified. State bar associations thus far have taken divergent views on the propriety of such coupon programs. In light of these factors and other considerations, lawyers must carefully design and structure deal-of-the-day coupon offers to ensure any ethics issues are properly addressed. ■

1. Krista Umanos, *Ethics, Groupon's Deal-of-the-Day, and the "McLawyer,"* 81 U. Cin. L. Rev. 1169, 1182–83 (2013).

2. 22 N.Y.C.R.R. §§ 1200 *et seq.*

3. New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 897, Marketing of legal services by use of a "deal of the day" or "group coupon" website (2011).

4. North Carolina State Bar, Formal Op. 10 (2011); South Carolina Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011); Maryland State Bar Ass'n Comm. on Ethics, Op. 2012-07 (2012); Alabama State Bar, Formal Op. 2012-01 (2012); State Bar of Arizona, Formal Op. 13-01 (2013); Pennsylvania Bar Ass'n, Advisory Op. 2011-27 (2011); Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1 (2012).

5. ABA Comm. on Prof'l Ethics and Prof'l Responsibility, Formal Op. 465, Lawyer's Use of Deal-of-the-Day Marketing Programs (2013).

6. *See* Rule 1.16(e); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 599 (1989).

7. *See* State Bar of Arizona, Formal Op. 13-01 (2013).

8. *See* North Carolina Bar, Formal Op. 10 (2011); Maryland State Bar Ass'n Comm. on Ethics, Op. 2012-07 (2012).

9. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 563 (1984).

10. *See* Model Rule 1.18 and Comment [1] to Model Rule 1.18 ("Prospective clients, like clients, may . . . place documents or other property in the lawyer's custody . . ."); Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1 (2012) (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).

The New York Non-Profit Revitalization Act

A Summary and Analysis

By Frederick G. Attea and Kelly E. Marks

A group of actors and playwrights want to form a new not-for-profit theatre company to produce and perform literary dramas in a small upstate New York community that has no active theatre companies. The draft certificate of incorporation under the N.Y. Not-for-Profit Corporation Law (NFPCL) provides that the corporation is a "type B" not-for-profit corporation, and that it does not have members. The Secretary of State rejects the attempt to file the certificate of incorporation and requires that the certificate of incorporation be revised to designate the corporation as a "type C" not-for-profit corporation, which requires the corporation to have members.

A New York not-for-profit social services agency needs additional office space to better serve its clients. The agency identifies an ideal space after evaluating a number of proposals. If acquired, the new space would represent no more than 2% of the assets of the agency. The purchase agreement for the new space must be approved by two-thirds of the agency's entire board, which is the same approval requirement that would apply if the agency sold substantially all of its assets.

These are just two examples of traps for the unwary that exist under the current NFPCL, which as of July 1, 2014, will undergo a major revision as a result of the enactment of the Non-Profit Revitalization Act (the Act).

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HEADLINE: Social Media Creates **Complex Ethical Issues**

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BODY:

Social media networks are indispensable tools used by legal professionals and have transformed the way lawyers communicate with each other and their clients. However, as **social media** networks proliferate and become more technologically advanced, so too do the **ethical issues** they present to lawyers.

Indeed, due to the **ethical** quandaries that **social media** communications sometimes create for attorneys, the Commercial and Federal Litigation Section of the New York State Bar Association at its January 2014 Annual Meeting presented a CLE entitled "**Social Media** in Your Practice: The Ethics of Investigation, Marketing, and More."

[1] At this CLE, section members used their mobile devices to answer questions concerning various hypothetical **social media** scenarios. We discuss below some of the **issues** raised by the hypothetical scenarios as well as the percentage of responses to each question.

Must Understand Technology

Lawyers who practice in 2014 cannot use a **social media** account without understanding the ramifications of how information is posted or shared on such platform. It is crucial that lawyers be conversant with the nuances of each **social media** network that they or their clients use.

[I]t is incumbent upon the attorney to understand the functionality of any **social media** service she intends to use for ... research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site.[2]

Indeed, the comment to Rule 1.1 to the Model Rules of Professional Conduct of the American Bar Association was recently amended to provide:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[3]

Friending of Unrepresented Person

Hypothetical: An attorney, when "friending"[4] an unrepresented witness on Facebook, must reveal his or her: [you may pick multiple answers]

· Real Name (84 percent)

· Real Profile (36 percent)

· Profession (55 percent)

· Name of Law Firm (49 percent)

· Name of Client (42 percent)

· The purpose of the communication (66 percent)

Almost 50 percent of the respondents answered that a lawyer was ethically required to affirmatively reveal the name of her law firm to an unrepresented person being "friended," and more than 50 percent also believed that a lawyer is required to affirmatively identify her profession and the purpose of the "friending" to the unrepresented person.

However, the above three disclosures, in fact, are not required in New York when seeking to "friend" an unrepresented person. While a New York ethics opinion has stated that a lawyer shall not "friend" an unrepresented individual using "deception,"[5] it opined that it is ethically proper for a "friending" lawyer or her agent to use her "real name and profile" when seeking to be connected with, and thereby being able to view, an unrepresented person's **social media** account. In New York, a lawyer is not specifically required to disclose her profession, the name of her law firm or the reasons for making the "friend" request to the unrepresented person.[6]

Ethics opinions from other states, however, have opined differently. New Hampshire requires that a request to a "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation."[7] San Diego requires disclosure of the lawyer's "affiliation and the purpose for the request."[8] Philadelphia notes that the failure to disclose that the "intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" constitutes an impermissible omission of a "highly material fact."[9] Finally, Oregon has opined that if the person being sought out on **social media** "asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request."[10]

Client Friending

The question that next arises is when your client seeks to "friend" a person and then provides counsel with a copy of private or restricted information the client obtained from being granted access to that "friend's" **social media** site. Although New York has not addressed this **issue,** New Hampshire has opined that a lawyer's client may send a "friend" request and, if access is granted, the client can provide the information to her lawyer, but the **ethical** propriety of same "depends on the extent to which the lawyer directed the client who is sending the [**social media**] request," and that the lawyer has complied with all other **ethical** obligations. In

addition, the client's profile needs to "reasonably reveal[] the client's identity"[11] to the other person.

Rule 4.2(b) of the New York Rules of Professional Conduct provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not "cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,"

a lawyer may cause a client to communicate with a represented person ... and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Thus, in New York, lawyers need to use caution when communicating with a client about her connecting to or "friending" a represented person and obtaining private information from that person's **social media** site.

Viewing Juror's **Social Media** Posts

Hypothetical: Is it permissible for an attorney preparing for or in the midst of a trial to view a juror's public **social media** postings when the attorney is also a member of such **social media** platform?

· Yes (54 percent)

· No (30 percent)

· It depends (16 percent)

New York ethics opinions draw a distinction between public and private juror information,[12] and permit viewing the public portion of a juror's **social media** profile. However, ethics opinions prohibit attorneys from attempting to access private juror information from a juror's **social media** network through a "friend request" or by other means.

Significant **ethical** concerns would be raised by sending a "friend request," attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog or "following" a juror's Twitter account. We believe that such contact would be impermissible communication with a juror.[13]

When researching jurors, attorneys must have a clear understanding of the functionality of any **social media** network where they may search for public information.

[W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any **social media** service she chooses to utilize and to act with the utmost caution.[14]

In addition, an "attorney must not use deception-such as pretending to be someone else-to gain access to information about a juror that would otherwise be unavailable."[15] New York, however, has not addressed whether a lawyer may non-deceptively view a potentially **social media** account, that from a juror's prospective is not public, but which the lawyer has a right to view and have access to, such as an alumni **social** network where both the lawyer and juror are members.

In response to the questions raised in the above hypothetical, 16 percent of the audience

correctly answered "it depends." On the other hand, 54 percent of the audience believed it was ethically permissible, without restriction, to view a juror's public **social media** postings when the attorney is also a member of such **social media** platform. Very few lawyers understand that if they perform a simple Google search and click on a link to a **social media** account of a juror that an automatic message may be sent by that **social media** network, such as LinkedIn, to the person whose profile is viewed. This notification would identify the name of the person viewing the juror's **social media** account.

In New York, such an "automatic" communication with a juror is prohibited and a

request or notification transmitted through a **social media** service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.[16]

Currently, LinkedIn is the **social media** platform that would most likely cause an attorney to run afoul of such prohibition. Thus, in order for an attorney's profile not to be identified through LinkedIn when viewing a person's public **social media** profile, a user must change her settings so that she is anonymous or, alternatively, be fully logged out of her LinkedIn account.

Attorneys in jury trials would be wise to take note that opening a juror's LinkedIn profile page may result in such communication. This **issue** nearly caused a mistrial in a recent federal trial where an associate looked up a juror's LinkedIn profile during the course of the trial without taking the above precautions. The juror then sent the judge a note complaining of being cyberstalked by the defense and indicated that she felt intimidated and not objective. The trial proceeded after the court directed the jury to disregard the communication.

Attorneys' Listings on LinkedIn

Hypothetical: May an attorney or law firm identify areas of expertise on LinkedIn under the categories "specialty" or "skills & expertise"? [you may pick multiple answers]

· An attorney may identify his areas of expertise under "specialty" (30 percent)

· A law firm may identify its areas of expertise under "specialty" (27 percent)

· An attorney may identify her areas of expertise under "skills & expertise" (72 percent)

· A law firm attorney may identify its areas of expertise under "skills & expertise" (66 percent)

Another recent New York ethics opinion focused on what an attorney and law firm can post as part of their **social media** profile. The New York State Bar Association opined that listing areas of law practice

under a heading of "Specialties" would constitute a claim that the lawyer or law firm "is a specialist or specializes in a particular field of law" and thus, absent certification as provided in Rule 7.4(c), would violate Rule 7.4(a) ... . We do not in this opinion address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings such as "Products & Services" or "Skills and Expertise."[17]

It is remarkable that 30 percent of the audience believed that it would be ethically appropriate for a lawyer to identify her areas of expertise under the "Specialties" heading, even if she was not certified by the appropriate accrediting body, where New York has expressly opined that this is not permissible.

In March 2012, LinkedIn deleted the "Specialties" heading as an option for an individual's LinkedIn profile, but it remains available for law firms. Therefore, law firms need to use caution in listing practice areas under the "Specialties" heading. NYSBA Opinion 972, however, expressly does not address the question of whether a lawyer or law firm can list practice areas under other headings such as "Skills & Expertise." Other bar associations have opined on this **issue,** including Philadelphia, which found listing areas of practice under "Skills and Expertise" to be permissible.[18] South Carolina would prohibit use of the term "expert" or "expertise" by an uncertified "specialist" under the LinkedIn heading "Skills and Expertise."[19]

Technology has created many new tools that attorneys can take advantage of in their practice. Technology equally presents challenges as **social media** networks are constantly changing and new **social media** applications and platforms are being created. The one constant, however, is that attorneys must have a broad understanding of the **social** networks that they and their clients are using.

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Endnotes:

1. The CLE was moderated by co-author Mark A. Berman and the panelists were: U.S. Magistrate Judge Lisa Margaret Smith, Southern District of New York; U.S. Magistrate Judge Ronald J. Hedges, (ret.) District of New Jersey; Prof. Jonathan I. Ezor; Touro Law School; Nicole Black, Esq., and Ignatius A. Grande, Esq., Hughes Hubbard & Reed, also a co-author of this article.

2. The Association of the Bar of the City of New York (NYCBA) Formal Op. 2012-2.

3. Model Rules of Professional Conduct of the American Bar Association, Rule 1.1 Comment (emphasis added).

4. "Friending" is the process through which a member of Facebook designates another person as a "friend" in response to a request by that person to be able to view and respond to restricted information of the member. "Friending" may enable a member's "friends" to view the member's restricted content. "Friending" may also create a publicly viewable identification of the relationship between the two members.

5. NYCBA Formal Op. 2010-2.

6. Id.

7. New Hampshire Bar Association Ethics Committee Advisory Op. 2012-13/05.

8. San Diego County Bar Legal Ethics Op. 2011-2.

9. Philadelphia Bar Association Professional Guidance Committee Op. Bar 2009-02.

10. Oregon State Bar Formal Ethics Op. 2013-189.

11. New Hampshire Bar Association Ethics Committee Advisory Op. 2012-13/05.

12. See New York County Lawyers Association (NYCLA) Formal Op. 743 (2011); NYCBA Op. 2012-2.

13. NYCLA Op. 743 (2011).

14. NYCBA Op. 2012-02.

15. NYCBA Op. 2012-02; see NYCLA Op. 743 (2011).

16. NYCBA Op. 2012-02.

17. New York State Bar Association Committee on Professional Ethics (NYSBA), Ethics Op. 972 (2013) (emphasis added).

18. See Philadelphia Bar Association Professional Guidance Committee Op. Bar 2012-8; see also New Hampshire Bar Association, Ethics Corner Opinion (June 21, 2013) ("[Y]ou may list your areas of practice under Skills and Expertise, so long as you are careful not to identify yourself as a specialist. Also, be mindful that LinkedIn sometimes changes its headings. The profile section now identified as 'Skills and Expertise' used to be 'Specialties,' and listing your areas of practice as 'Specialties' could be problematic."). But see Florida Bar Advisory Advertising Opinion (Sept. 11, 2013).

19. See http://abnormaluse.com/2013/03 /the-south-carolina-bar-and-the-linkedin-loophole.html.

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