

Check out North Carolina if 'Daily Deal' in your future

by

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Reprinted from *Minnesota Lawyer* (November 7, 2011)

The use of online sites offering “daily deals,” of which Groupon is probably the best known example, raise a number of questions for attorneys wishing to market their practices through such sites. While neither the Minnesota Supreme Court nor the Lawyers Professional Responsibility Board has taken a position on the issue, the use of such daily deals has been the subject of much discussion nationally.

For those not familiar with the concept, Groupon (short for “group coupon”) allows consumers to sign up for a coupon for discounted services. If a pre-established number of people sign up for the service, it becomes available to all. Groupon makes its money by retaining a portion of the money paid by the customer, or in the case of lawyers, potential client. For example, if a lawyer offers to provide \$750 of legal services for \$500, the client will receive \$750 of legal services while Groupon and the lawyer split the \$500 payment, each receiving \$250 (so in effect, the lawyer is offering \$750 in services for only \$250). The potential issues with such an agreement include fee-splitting with a nonlawyer and whether the lawyer must hold the money received in trust.

One state has examined the use of daily deals in some detail, and its proposed opinion provides sound guidance for Minnesota attorneys. North Carolina recently solicited comments for its Proposed Formal Opinion 2011-10. On the issue of whether such an arrangement constitutes fee-splitting with a nonlawyer, the proposed opinion observes that “although the website company’s fee is deducted from the amount paid by a purchaser for the anticipated legal service, it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee by providing the legal services to the purchaser.” The Director’s Office finds persuasive North Carolina’s reasoning that the fee retained by the website company is better construed as “the cost of advertising on the website” and therefore, “does not violate Rule 5.4(a) which prohibits the sharing of legal fees with nonlawyers.”

The proposed opinion goes on to note that the traditional reason for the limitation on fee-splitting, i.e., to prevent interference in the independent professional judgment of a lawyer by nonlawyers, “is not confounded” by this arrangement. There is no interaction between the website company and the lawyer regarding the legal

representation of purchasers, the only interaction being the transfer of the proceeds of the daily deal to the lawyer.

It also provides that “a lawyer may not engage in misleading advertising.” Therefore, if the lawyer is representing that he or she is going to be providing the services at a discount, there must be “an established, standard fee for the service that is being offered at a discount.” Also, since the fees are not yet earned when paid to the lawyer, the lawyer must deposit the funds in a trust account. “The payments received by the lawyer from the website company are advance payments of legal fees that must be deposited in the lawyer’s trust account and may not be paid to the lawyer or transferred to the law firm operating account until earned by the provision of legal services.”

Other issues associated with any form of prepaid legal services include whether the potential client is actually in need of the services or what happens if the lawyer is unable to provide the services (e.g., because of a conflict of interest). The proposed North Carolina opinion requires any lawyer who has agreed to offer his or her services to confirm that the proposed services are appropriate and that there is no conflict of interest. “The purchaser of the daily deal must be considered a prospective client entitled to the protections afforded to prospective clients under Rule 1.18.”

Finally, a lawyer may not charge an excessive fee. In other business situations if the potential customer failed to redeem the coupon before the expiration date, the business owner might simply consider the payment forfeited. However, a failure by the prospective client to redeem the coupon “does not justify the receipt of a windfall by the lawyer.” Accordingly, under the proposed opinion if a prospective client does not claim the discounted service within the designated time, the lawyer must refund the advance payment or, if the prospective client still desires the legal service, “the lawyer may charge his actual rate at the time the service is provided but must give the prospective client credit for the advance payment on deposit in the trust account.”

Again, neither the Minnesota Supreme Court nor the Lawyers Professional Responsibility Board have taken a position on the issue of the use of daily deals by Minnesota lawyers. However, until that occurs, Minnesota lawyers who follow the analysis of North Carolina’s proposed opinion are in compliance with the Minnesota Rules of Professional Conduct.