

## Opinion No. 1 of 2012

### Query

Can a lawyer licensed in Indiana use group coupon or daily deal marketing in compliance with Indiana's Rules of Professional Conduct?

### Analysis

The Indiana State Bar Association's Legal Ethics Committee has looked at the burgeoning group coupon forms of social media marketing. The Ethics Committee's analysis is that such social media marketing is fraught with peril and is likely not permitted in its current form under the Indiana Rules of Professional Conduct.

### Background

There are a growing number of online coupon programs created by businesses and advertising agencies (herein "the Company") that are gaining popularity with computer savvy consumers.<sup>1</sup>

The Company's various marketing campaigns work by aggregating customers for its cooperating businesses by daily or other regular

## Group coupon marketing 'fraught with peril'

notification of the opportunity to purchase coupons at a set price for a specific product valued at a discount to the normal price charged to those who are not using the Company's coupon. The aggregated customers are charged for the coupon by the Company only after a predetermined number of members, as negotiated with the provider of the service, are assembled in response to the online advertisement. The daily notice is either emailed to the computer or texted to the smartphone of the group subscriber who is a potential purchaser of the services.

The Company and the business usually establish a price for the good or service sold and share in the purchase price of the sale, which results in a further discounted payment to the business but in a savings to the customer. Some customers purchase coupons and do not redeem them in the time periods stated in the offer.

A few states have looked at the group coupon issue to date.<sup>2</sup> The reports are that they have considered different aspects of the program as important and have disagreed as to the propriety of such programs.

### Issue of lawyer-client engagement

A lawyer is required to perform certain functions before making a decision to undertake a representation. For example, the lawyer is responsible to assure that there are no conflicts of interest between the interests of the potential client and the interests of existing clients of the lawyer or law firm (Rule 1.7, Indiana Rules of Professional Conduct – herein "Rule"). The lawyer must determine that there are no personal interests of the lawyer or members of the law firm that are affected prior to entering an attorney-client engagement with the potential client (Rule 1.7(a)(2)).

Should either of these factors or other factors not be resolved by the lawyer prior to the beginning of the engagement, then the lawyer has the responsibility to decline or terminate the representation (under Rule 1.16) and, to the extent that any property or fees have been received by the lawyer or law firm, to comply with Rules 1.5, 1.15 and 1.16(d).

Rule 2.1 states that "in representing a client, a lawyer shall exercise independent professional judgment and render candid advice." This standard is difficult to meet if the decision to represent the client is not the lawyer's decision, but is the potential client's choice, made

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by the decision to purchase a coupon provided by a lawyer the client may have never met. The Committee is especially concerned about a client “purchasing services” without permitting the attorney the opportunity to consult with the client to determine a proper course of conduct best fitting the client’s situation.

One other aspect of the establishment of an attorney-client relationship in Indiana is governed under Guideline 9.3 for Use of Non-Lawyer Assistants. This guideline states that “a lawyer may not delegate to a non-lawyer assistant: (a) responsibility for establishing an attorney-client relationship...”

The Guidelines and Rules of Professional Conduct provide that the creation and establishment of an attorney-client relationship is the nondelegable duty of the lawyer.

The obligation to establish the attorney-client relationship and the language of the guideline are such that engaging in the Company’s style of sales arrangement is a problem for the lawyer who would thereby delegate the initial creation of the lawyer-client relationship to either the Company or the client. That duty rests with the lawyer. The proposed coupon arrangement may be an abrogation and/or violation of that duty.

### **Issue of safekeeping of property**

The process used to engage the lawyer by the potential client is also a violation of Rule 1.15 Safekeeping of Property. The Rule requires: “A Lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses are incurred.” Rule 1.15(c). A lawyer agreeing to allow the tender of

advance legal fees to be made into the Company’s accounts, to be held at the Company’s discretion until the Company finally disburses a portion of the fees to the lawyer,<sup>3</sup> appears to be a violation of Rule 1.15(c). Further, some Companies disburse the “funds” in incremental amounts over time. It is unclear how such a relationship could permit a lawyer to faithfully comply with the obligations of Rule 1.15(a), which requires the lawyer to keep funds separated and to keep “complete records” of each client’s property.

Some of the contracts offered by the Companies even require the lawyer to agree that any funds deposited to the lawyer remain the property of the Company. The Committee believes that a lawyer violates Rule 1.15 if she enters into a contract which transfers title to her client’s property to a third party.

The Committee agrees that a variety of online coupon advertising arrangements designed to produce potential clients may be permissible under certain limited circumstances.<sup>4</sup> However, when a Company solicits clients and takes advance payments of legal fees, and then remits only a portion of the fees to the lawyer, we find that this arrangement likely violates the Rules regarding lawyer-client relationship formation and safekeeping a client’s property.

This is further complicated by Rule 1.16, which covers the process for declining or terminating a client representation. Subsection (a) provides for when a lawyer must decline or withdraw, and subsection (d) defines the necessary actions to protect the client’s interests, including the return of fees. The lawyer is required to “surrender[] papers and property to which the client is entitled and refund[]

any advance payment of fee or expenses that has not been earned or incurred.”<sup>5</sup>

The Committee finds that when a lawyer has received funds from a prospective client who is not or cannot be represented by the lawyer for any reason, the lawyer has a duty to refund the entire amount of fee paid, including the Company’s share, to the client. Because the Company might be disbursing the “funds” to the lawyer incrementally, it is unclear how a lawyer can ethically refund *the client’s* funds at that time.<sup>6</sup>

### **Issue of duties to prospective client**

A prospective client<sup>7</sup> is a person who has discussed with the lawyer the possibility of forming a client-lawyer relationship. The Supreme Court could reasonably find that a person who has deposited money with the lawyer or lawyer’s agent (the Company) for the purpose of forming a client-lawyer relationship qualifies as a prospective client under Rule 1.18.

The lawyer undertakes certain obligations to the prospective client, including the responsibilities (a) of confidentiality and (b) of avoiding conflicts of interests. It is difficult to foresee all permutations of facts that could result in a prospective client creating a conflict with existing clients or other prospective clients, but the obligation lies with the lawyer not to violate Rule 1.18.<sup>8</sup>

### **Issue of fee sharing and channeling clients**

Rule 5.4<sup>9</sup> prohibits fee sharing with nonlawyers except in specific circumstances. Advertising normally would not be a violation of fee sharing.<sup>10</sup> Comment 4 to Rule 7.2 provides: “Lawyers are not permitted to pay others for channeling professional work. ...” By the

process of the advertising companies creating buying groups, the online providers such as the Company are being paid to channel buyers of legal work to the specific lawyer, in violation of the advertising and fee-sharing rules. We believe this is comparable to the situation analyzed in Opinion 3 of 2008, in which we concluded that there is a prohibition on the fee

sharing between a brokerage firm and an attorney.

Moreover, Rule 7.2(b)(1) provides that an attorney may pay “the reasonable costs of advertisements or communications permitted by this Rule.” However, the business models employed by many of the online coupon providers do not ask

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the attorney to pay “reasonable costs.” Rather, some of the Companies ask for *half* of the fees collected. Notwithstanding the fixed, minimal costs associated with creating and administering the online coupon, the Company gets 50 percent of the fees charged. The Committee finds that such an arrangement violates Rule 7.2(b)(1)

because the fees being kept by the Company are not tied to the “reasonable costs” of the advertisements.

### Conclusion

The Committee’s analysis of this inquiry is that a lawyer accepting a group coupon style arrangement may violate the Rules of

Professional Conduct by: (1) delegating the creation of the lawyer-client relationship to a nonlawyer; (2) allowing someone other than the lawyer to hold the property of the potential client pending the lawyer’s engagement or transfer of the property of the potential client or completion of the legal work, which is not permitted by Rule 1.15; (3) allowing a potential client to create a conflict of interest with a current client, which may force the lawyer to withdraw from the representation of a current client for an inappropriate reason under Rule 1.16; and (4) sharing fees for channeling clients in violation of Rules 5.4 and 7.2 as stated.

The situation is reminiscent of the question posed in Opinion 4 of 2008, in which the Committee found that an attorney’s proposed donation of legal services to a charity was not an inherent violation of the Rules of Professional Conduct, but was fraught with concerns.

It is the advisory opinion of the Indiana State Bar Association Legal Ethics Committee that group coupon marketing is similarly fraught with danger. The lawyer should especially be concerned that:

1. a lawyer’s engagement of an advertising company’s arrangement to sell a coupon for legal services and accept funds for those legal services, outside of the lawyer’s trust account, likely violates Rule 1.15;
2. a lawyer allowing the creation of a potential client-lawyer relationship by a nonlawyer advertising company breaches the lawyer’s duty under Rule 2.1 and Guideline 9.3;
3. a lawyer working with an advertising program in which the lawyer shares fees for channeling professional work to a lawyer likely violates Rules 5.4 and 7.2, which prohibit fee sharing and only permit an attorney to pay the “reasonable costs” for the marketing; and

4. the lawyer's duties to prospective clients under Rule 1.18 cannot be controlled or created by the transaction between the Company and its customers, the lawyer's prospective clients.

Based on the above, this Committee finds that it is likely not appropriate for a lawyer licensed in Indiana to advertise through a group coupon program, designed like the one described above or any other advertising programs with the same or similar deficiencies. Therefore, the bar is advised to conduct rigorous research before entering into such an advertising arrangement, and any lawyers contemplating such action would be well served to employ competent, private counsel to guide the lawyer through the dangers inherent in such marketing, including discussion of alternative courses of action that may comply with the Rules. ⚖️

coupons and did not timely redeem them? The Committee finds that a lawyer must timely determine all such non-clients and promptly refund 100 percent of the fees and costs paid by the potential clients. Whether the refund of the Company fees is an appropriate use of lawyer advertising dollars is not the issue for the Committee.

6. For example, assume 50 prospective clients purchase group coupons for \$99 durable healthcare powers of attorney. Prospective client Abby calls the lawyer on day 1, regarding her coupon. When setting the appointment, the attorney's office asks Abby to bring her current estate planning documents with her.

When meeting with Abby, the lawyer reviews the documents and realizes that Abby already has a durable healthcare power of attorney. If the lawyer informs Abby of this, and Abby asks for a refund, the lawyer does not have Abby's money to return to her. If the lawyer gave a refund to Abby out of his trust account, this would violate the Rules because he would be paying Abby with his other clients' funds.

The Committee notes that, if the attorney drafts a durable healthcare power of attorney anyway, despite knowing that the prospective

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1. The Committee attempted to discuss this product with one prominent company, but was not able to get a response from its legal department.
2. North Carolina has a pending Formal Opinion #10 as of this writing. Missouri is reported to have accepted such coupons, but no opinion or ruling is included in the report seen. <http://lawyerist.com/ethics-vs-professionalism-is-groupon-feasible-for-lawyers.html>, *The Lawyerist*. South Carolina has issued an opinion 11-05 available at <http://www.sbar.org/MemberResources/EthicsAdvisoryOpinions.aspx> approving the use of "daily deal" websites with several cautions. The New York State Bar Association Committee on Professional Ethics issued Opinion 897 on 12-13-11, which provides that any use of group coupons requires the lawyer to provide a full refund to the client.
3. The other part is kept by the Company as its fee for the marketing program and the expenses for the "processing" of the fees collected from the prospective clients.
4. For example, the lawyer could provide a coupon to offer legal services at a specified rate, with the client paying the lawyer directly. If the client paid a nominal fee for this coupon, in line with the reasonable costs of the marketing, the Committee believes that this type of arrangement would not violate the Rules.
5. The Committee believes that the lawyer's duty to make a full refund of what was paid by the now non-client is clear under the Rule. What is not clear is when the non-client's fees need to be refunded: when the lawyer determines to terminate a specific representation seems clear, but what about the customers who purchased

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client already has an existing document, then the attorney is arguably entitled to no fee because the attorney has not provided anything of value to the client.

7. Rule 1.18(a): “A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”
8. Could an opposing party to a current client purchase a coupon through an advertisement for a legal consultation and thereby create an irreconcilable conflict of interest that would require the lawyer to withdraw from the underlying representation due to receiving payment from the opposing party while representing the current client? The lawyer may never see the fees, will have to pay the non-client the amount paid to the Company for the share of the coupon paid by the opposing party, and could lose the existing client for an impermissible reason. The lawyer would likely have a duty to disclose the transaction to the existing client.
9. “5.4(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: ...”
10. A lawyer also has a responsibility to ensure that communications are not misleading. Rule 7.1. Because some of the Companies insist on creative control of the coupon-generating process, it is unclear how the attorney can comply with Indiana’s advertising restrictions.