

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 12-03

A Nebraska Attorney May Advertise for Services via Web-Based Services Where the Web Provider Shares in the Fee for Services Provided the Advertising is Reasonable in Relation to the Cost of Advertising and Otherwise Conforms with the Nebraska Rules of Professional Conduct

STATEMENT OF FACTS

A Nebraska Attorney desires to utilize "Groupon" web-based Advertising to offer a single product for a set price, such as a "living will" or a "simple" last will and testament. The Groupon website would feature an offered product at a discounted rate, and Groupon would retain a percentage of total sales in response to the Groupon advertising. An interested customer would purchase the Groupon, make payment to Groupon, and after withholding its percentage of sales, Groupon would forward to the attorney his/her share of the sales.

STATEMENT OF ISSUES

Is it permissible for an attorney to utilize Groupon Advertising where the fee for services to be provided is shared between the attorney and the web provider?

APPLICABLE RULES OF PROFESSIONAL CONDUCT

Several rules contained within the Rules of Professional Conduct are instructive:

§ 3-501.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses....

§ 3-501.15 Safekeeping Property

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

§ 3-505.4 Professional Independence of a Lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except [subsections inapplicable]....

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

§ 3-507.1. Communications Concerning a Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

§ 3-507.2. Advertising.

(a) Subject to the requirements of Rule 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;....

....

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services, not only through reputation but also through organized information campaigns in the form of advertising. Advertising

involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

....

[3] Questions of effectiveness in taste and advertising are matters of speculation and subjective judgment . . . [E]lectronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. *But see* Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

....

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the cost of print directory listings, on-line listings, newspaper ads, television and radio air time, domain-name registrations, sponsorship fees, banner ads and group advertising.

§ 3-507.3 Direct Contact With Prospective Clients.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client shall include the words "This is an advertisement" on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication, and in the subject line of an email, unless the recipient of the communication is a person specified in paragraphs (a)(1) [a lawyer] or (a)(2) [familial or close personal or professional relationship]. "This is an advertisement" shall appear in type size at least as large as the print of the address and shall be located in a conspicuous place on the envelope or postcard.

DISCUSSION

Rule 5.4(a) prohibits, generally, the sharing of legal fees with non-lawyers. It is this Committee's opinion that the principle underlying this fee-splitting prohibition is the risk of undue influence upon the attorney. Although the payment to Groupon is based upon a percentage of total sales, we do not believe that this constitutes an impermissible sharing of legal fees with a non-lawyer under Rule 5.4 because there is little risk that the attorney's representation of the

client will be influenced by Groupon. Rather, it is the Committee's belief that this arrangement must be further analyzed under the limitations of Rules 7.2 and 7.3 which govern advertisements, as well as Rules 1.5 and 7.1. The Committee views Groupon not so much as a referral, but rather, as an entity providing advertising services. Therefore, the limitations of Rule 7.2 and 7.3 must be analyzed.

Rule 7.2 requires that the cost of advertising be "reasonable." Groupon bases the cost of advertising upon a percentage of gross receipts. Comment 1 to Rule 7.2 acknowledges that the rule "does not prohibit a lawyer from paying for advertising and communications permitted by these rules" The threshold requirement is that Groupon's charges are "reasonable." To the extent that the percentage charges arguably exceed the true cost of advertising, then the lawyer risks violating Rule 5.4(a). The committee makes no recommendation as to the level of percentage charge that would be appropriate in any given case as the burden is upon the lawyer to assure that the percentage is reasonable within the Rules.

Several jurisdictions have addressed this issue. South Carolina Op. 11-05 concluded that the money retained by the website constituted "the reasonable cost of advertisements" and not an impermissible fee-splitting arrangement. Likewise, the New York State Bar Association, in Opinion 897 (12/13/11), concluded that the website does not undertake a referral, but rather "carried a particular lawyer's advertising message to interested consumers and has charged a fee for that service." North Carolina, in 2011 Formal Ethics Opinion 10, concluded that the fee retained by the website company is permitted under Rule 7.2(b)(1) as long as the "percentage charged against the revenues generated is reasonable compensation for the advertising service." We, likewise, find that the website does not engage in a referral by carrying an attorney's advertisement and that if the percentage charged against the revenues generated is reasonable

compensation for the advertising service, then an attorney does not violate Rule 7.2 by his or her participation. The Committee offers no opinion on whether such a fee is “reasonable” since no information was provided as to the percentage charged.

A more complicated question arises in relation to Rule 7.1, which precludes a lawyer from engaging in misleading advertising. The lawyer expressed intent to "offer a single product for a set price, such as a living will or a simple last will and testament." The Committee's concern is whether the public will have a full understanding of the product offered. We stated in Formal Opinion No. 89-56 that the language of a proposed coupon for a "free simple will," or a discount on more complex wills under our former Code of Professional Responsibility, was misleading because the general public may not know what constituted a "simple" or a "complex" will. Later, in Formal Opinion No. 09-05, we determined that a coupon offering a percentage off or a reduced fee was not necessarily prohibited, but that "[t]he language of the attorney's coupon must be clear in identifying what 'professional fees' will be discounted (i.e., will the discount apply to paralegal or legal assistant fees, filing fees, mileage costs, and copied print charges?). Furthermore, in identifying the service to be offered at a discount, it is necessary to specify any limits on the discounted service, and explain terms which may be misinterpreted by the potential client."

We continue to believe that the use of the term “simple will” is misleading due to the absence of any indication that the general public will understand what that term includes. However, if the services to be offered can be clearly described so as not to be misleading or potentially confuse the public, then Rule 7.1 is not violated by participation in such a program.

It is important to note however that Rule 7.3 requires that the words "advertising material" be visible on the outside of the envelope. In Advisory Opinion No. 10-03, we

recognized the availability of Internet advertising and stated that "[i]f the advertising does not have an envelope, the specified word should be inserted next to the advertisement in the same size font as the actual advertisement." The same is true in this context.

The program at issue here requires the customer to pay for service at the time of purchasing the Groupon. Rule 1.15(c) requires that pre-paid funds be deposited into a trust account until they are earned. Amounts received from Groupon, must, therefore, be deposited into a trust account until the service is rendered. If it turns out that the attorney is unable to "earn" the fee because of a conflict, or for other reasons, the attorney is responsible for returning the full amount paid by the purchaser, including the amount retained by Groupon.

Because an attorney may not collect fees for services he or she did not perform pursuant to Rule 1.5, if the customer ultimately does not use the Groupon, the attorney must refund the full price. In order to avoid an indefinite attorney-client relationship, the Groupon should advise the purchaser that no attorney-client relationship is formed until the purchaser requests that service and the attorney can perform a conflicts check.

In Advisory Opinion No. 06-11, in which the Advisory Committee rescinded Formal Opinion No. 92-4, we held that it was not unethical for an attorney to donate specific services to be auctioned by a charity if certain ethical safeguards were in place. In doing so, we held that the wording of the auction item must not be false and misleading, that the specific service be clearly disclosed and convey that the attorney retained the right to decline the service for conflicts or other ethical problems, and if that situation arose, the price would be refunded by the attorney. We find that the same procedure must be followed here.

CONCLUSION

The use of a Groupon for discounted, prepaid legal services does not violate Rule 5.4 as an improper sharing of legal fees, but the amount charged as an advertising fee must be reasonable otherwise it may be deemed to be in the nature of fee-splitting. In addition, the following ethical safeguards must be taken:

- (1) the Groupon must clearly identify the service being offered and cannot be false, deceptive, or misleading;
- (2) the Groupon must clearly disclose that no lawyer-client relationship is established until after a conflicts check has been performed;
- (3) the Groupon must state that it is "advertising material;"
- (4) payment received from Groupon must be placed in the attorney's trust account until earned;
- (5) if the services cannot be performed due to conflicts, or if the customer later decides not to utilize the service, the entire fee paid by the customer must be refunded.