

# Clash of Titans: Groupon v. The Model Rules of Professional Conduct

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*ABSTRACT: Daily deals, like those offered by Groupon and LivingSocial, have become a popular and highly effective form of advertising. The success of daily deals is not without concern in the legal community. State bar associations are split as to whether the Model Rules of Professional Conduct—namely Rules 5.4, 7.2, and 1.15—permit lawyers to advertise through daily deals. This Note argues that lawyers may ethically sell their services through daily deals as a reasonable cost of advertising authorized by Rule 7.2 and that the fee retained by the daily deal company is not an impermissible fee-sharing arrangement outlawed by Rule 5.4. Instead, such fees should be considered an alternative way of charging for advertising—one that will not interfere with the lawyer’s professional independence. Moreover, the flexible daily deal business model enables lawyers to comply with the client trust requirements of Rule 1.15.*

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## I. INTRODUCTION

The development of daily deal advertising—online coupons targeted to consumers based on their geographic location or other identifiable tastes and preferences—has revolutionized the marketing industry.<sup>1</sup> Since the founding of Groupon in 2008,<sup>2</sup> daily deals have “transform[ed] marketing for small businesses.”<sup>3</sup> The year 2008 was also transformative for the legal industry; the recession reduced legal work at most firms and put immense pressure on lawyers to seek new ways to develop business.<sup>4</sup> Craig Redler, a Missouri solo-practitioner, was the first attorney to test whether daily deal advertising could work for lawyers.<sup>5</sup> Mr. Redler’s online daily deal offered clients a will and durable power of attorney, a \$750 value, for \$99, to “keep [their] brain from being inserted into any future Frankensteins.”<sup>6</sup> Needless to say, the daily deal was controversial amongst state bar associations,<sup>7</sup> although not for its advertising ploy.

State bar associations were concerned that a lawyer’s use of daily deal advertising violated their respective rules of professional conduct (styled after the Model Rules of Professional Conduct, or the “Rules”).<sup>8</sup> Currently, ten states have issued opinions on whether it is ethical for lawyers to advertise via daily deals—four states found the practice unethical while six states concluded that lawyers may ethically use daily deals.<sup>9</sup> Although each state’s analysis was slightly different, their ethical opinions focused primarily

1. Kirk Kardashian, *The Pros and Cons of Groupon*, TUCK SCH. BUS. DARTMOUTH (Nov. 7, 2011), <http://www.tuck.dartmouth.edu/news/articles/the-pros-and-cons-of-groupon/>.

2. *About Groupon*, GROUPON, <http://www.groupon.com/about> (last visited Jan. 21, 2014).

3. Kardashian, *supra* note 1.

4. *See infra* Part II.A.

5. Sergei Tokmakov, *Groupon Attorney Advertising*, BLOGZ.ORG (Jan. 27, 2012), <http://blogz.org/Blog812035-Groupon-Attorney-Advertising.htm>.

6. *Law Offices of Craig S. Redler & Associates, LLC - Olivette*, GROUPON, <http://www.groupon.com/deals/law-offices-of-craig-s-redler-associates> (last visited Jan. 21, 2014).

7. Debra Bruce, *Did a Groupon Really Work for a Solo Lawyer?*, SOLO PRAC. U. (Jan. 19, 2012), <http://solopracticeuniversity.com/2012/01/19/did-a-groupon-really-work-for-a-solo-lawyer/>; Tokmakov, *supra* note 5.

8. While this Note uses different states’ applications of their own adopted ethics rules (all of which were styled after the Rules) as examples of diverging viewpoints and applications, this Note’s analysis is intended to speak to the proper application of the Rules generally as it relates to lawyers’ use of daily deals, and should not be understood to prescribe an application within any particular state, which may be constricted by past precedent and/or informed by state-specific modifications to the Rules.

9. *See infra* Parts II.C–D. This issue has also come up outside of the United States as well. The Israeli Bar Association held that lawyers may not advertise their services through daily deals because of concerns that the advertisements will be misleading and dishonor the profession. Hila Raz, *Discount Law on Groupon: Consumer Book or Ripoff?*, HAARETZ (Oct. 24, 2012, 5:13 AM), <http://www.haaretz.com/business/discount-law-on-groupon-consumer-book-or-ripoff.premium-1.471928>.

on the same three Rules.<sup>10</sup> First, the states considered whether the daily deal model violates Rule 5.4 as an improper sharing of attorney fees.<sup>11</sup> Second, the states analyzed whether daily deal arrangements violate Rule 7.2 as an impermissible referral service or an unreasonable cost of advertising.<sup>12</sup> Third, the states contemplated whether the daily deal business model prevents lawyers from depositing all pre-paid legal fees in separate trust accounts as required by Rule 1.15(c).<sup>13</sup>

This Note argues that the Model Rules of Professional Conduct, specifically Rules 5.4, 7.2, and 1.15(c), allow lawyers to use daily deals for three reasons. First, the cost of daily deal advertisements is reasonable. Second, they do not jeopardize a lawyer's professional independence. Third, the flexibility of the daily deal business model allows lawyers to comply with the Rules' independent client trust requirements. Part II discusses the daily deal industry, details the relevant Model Rules of Professional Conduct, and details state ethical opinions that have addressed the issue. Part III considers the problems created by the split in authority over daily deals. Part IV resolves the disagreement in existing ethical opinions and articulates why the fee charged by daily deal providers is neither a referral fee nor a sharing of legal fees, but a reasonable and permissible cost of advertising. Finally, Part V concludes that lawyers may ethically advertise through daily deals.

## II. THE DEAL ON DAILY DEALS

Due to attorneys' interest in advertising via daily deals and an increase in such practices, several state bar associations have considered the "ethical implications" of daily deal arrangements.<sup>14</sup> State bar associations are split as to whether a lawyer's use of daily deal advertisements violates the Rules. Maryland,<sup>15</sup> Nebraska,<sup>16</sup> New York,<sup>17</sup> North Carolina,<sup>18</sup> and South Carolina,<sup>19</sup>

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10. States in favor: Maryland, Nebraska, New York, North Carolina, and South Carolina. States against: Alabama, Arizona, Indiana, and Pennsylvania. *See infra* Part II.B–D.

11. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2012); *see infra* Part II.C–D.

12. MODEL RULES OF PROF'L CONDUCT R. 7.2; *see infra* Part II.C–D.

13. MODEL RULES OF PROF'L CONDUCT R. 1.15(c); *see infra* Part II.C–D.

14. Thomas A. Gilligan, *They're Not Just for [Name Your Commoditized Service or Product Here] Anymore: Ethics Opinions Say Groups for Legal Services OK*, FOR DEF., Mar. 2012, at 63, 63, available at <http://www.murnane.com/publications/120308-FTD-Gilligan.pdf>.

15. Maryland State Bar Ass'n, Comm. on Ethics, Ethics Docket No. 2012-07: Lawyer Advertising on Daily Deal Websites (2012) [hereinafter Maryland Opinion], available at <http://www.msba.org/members/ethics/2012/2012-07.asp> (access available only to fee-paying members of the Maryland State Bar Association).

16. Nebraska Ethics Advisory Op. 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 2865 (2012) [hereinafter Nebraska Opinion], available at <http://www.supremecourt.ne.gov/sites/supremecourt.ne.gov/files/ethics/lawyers/12-03.pdf>.

deemed it ethical for lawyers to use daily deals. Conversely, Alabama,<sup>20</sup> Arizona,<sup>21</sup> Indiana,<sup>22</sup> and Pennsylvania<sup>23</sup> found that a lawyer's use of daily deals violates the Rules. To evaluate whether it is ethical for lawyers to sell legal services through daily deals, this Part details the opinions of state ethical committees that are split on the issue.

Before examining these opinions, however, some background information is necessary. Subpart A explores the nuts and bolts of daily deals and explains why lawyers would want to use them as a vehicle for selling their services. Subpart B details the three Rules relevant to this issue. Finally, Subparts C and D discuss the ethical opinions issued by bar associations that have addressed the issue of advertising through daily deals.

A. *WHAT ARE DAILY DEALS AND WHY WOULD A LAWYER USE THEM TO SELL LEGAL SERVICES?*

The 2008–09 recession devastated the legal market, with the 250 largest firms “shed[ding] more than 9,500 lawyers in 2009 and 2010, nearly 8% of the total.”<sup>24</sup> The job market still remains bleak for recent law school graduates with only 55% of the class of 2011 obtaining full-time legal employment within nine months of graduation.<sup>25</sup> Two important trends, relevant to this Note, are emerging from the “‘hundred-year flood’ [that] is

17. 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) [hereinafter New York Opinion], available at <http://www.nysba.org/customtemplates/content.aspx?id=4711>.

18. North Carolina State Bar, 2011 Formal Ethics Op. 10: Lawyer Advertising on Deal of the Day or Group Coupon Website (2011) [hereinafter North Carolina Opinion], available at <http://www.ncbar.com/ethics/ethics.asp?page=5&keywords=online>.

19. South Carolina Bar, Ethics Advisory Op. 11-05 (2011) [hereinafter South Carolina Opinion], available at <http://www.sbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1012/Ethics-Advisory-Opinion-11-05.aspx>.

20. Alabama State Bar Office of the Gen. Counsel, Op. No. 2012-01: Advertising on Groupon and Similar Deal of the Day Websites (2012) [hereinafter Alabama Opinion], available at <http://www.alabar.org/ogc/fopDisplay.cfm?oneId=430>.

21. State Bar of Arizona Ethics Ops., 13-01: Internet Marketing Vouchers or Coupons (2013) [hereinafter Arizona Opinion], available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=721>.

22. Indiana State Bar Ass'n Legal Ethics Comm., Op. No. 1, 2012-JDH-1: Group Coupon Marketing Opinion (2012) [hereinafter Indiana Opinion], available at [http://www.inbar.org/Portals/0/downloads/appellate/Legal\\_Ethics\\_Committee\\_Op-1-2012.pdf](http://www.inbar.org/Portals/0/downloads/appellate/Legal_Ethics_Committee_Op-1-2012.pdf).

23. Pennsylvania Bar Ass'n, Inquiry No. 2011-027 (2011) [hereinafter Pennsylvania Opinion], available at <http://www.pabar.org/members/catalogs/Ethics%20Opinions/informal/2011-027.pdf> (informal ethics opinion) (access available only to members of the Pennsylvania State Bar Association).

24. *A Less Gilded Future*, ECONOMIST (May 5, 2011), <http://www.economist.com/node/18651114>; see also Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051 n.3 (2010) (explaining that between 2008 and 2010, major law firms laid off 5632 lawyers and 8715 staff).

25. Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J. (June 25, 2012, 10:18 AM), <http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html>.

hitting the profession.”<sup>26</sup> First, clients are more determined than ever to keep costs down, and as a result, alternative fee arrangements have grown dramatically, “account[ing] for 16% of big firms’ revenue in 2010.”<sup>27</sup> Second, law firms are increasingly incorporating technology into all areas of their practices.<sup>28</sup> Given these trends, and the mounting competition for market share,<sup>29</sup> lawyers continue to look for new opportunities to increase their business. One such prospect lies in the emerging daily deal industry.

Daily deal, or group coupon, providers “operate by building large local sales forces that negotiate deals on services and products at roughly 50 percent off.”<sup>30</sup> The provider then markets these negotiated coupons to subscribers and “if enough people” purchase the coupon “the deal will go through.”<sup>31</sup> Although the deal provider generally “keep[s] about half of the revenues from the sale,”<sup>32</sup> “there is considerable variation in [this] percentage . . . across . . . daily deal sites, and across businesses.”<sup>33</sup> Daily deal services can appear especially attractive to prospective vendors because it costs “nothing up front to participate”; the business is only charged if the deal goes through.<sup>34</sup>

The popularity of the daily deal industry has increased dramatically over the past several years. Approximately fifty million Americans,<sup>35</sup> or one-sixth of the population over twelve years of age, are registered users of daily deal websites.<sup>36</sup> Analysts estimated that industry revenues would top \$2 billion in

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26. *A Less Gilded Future*, *supra* note 24.

27. *Id.*

28. *Id.*

29. *Id.*

30. Tricia Duryee, *Daily Deal Revenues Could Soar to \$6 Billion in 2015*, ALL THINGS D (Mar. 3, 2011, 12:01 AM), <http://allthingsd.com/20110303/daily-deal-revenues-could-soar-to-6-billion-in-2015>.

31. Geoff Williams, *Getting on Groupon: 5 Things You Need to Know*, HUFFINGTON POST (June 28, 2010, 1:10 PM), [http://www.huffingtonpost.com/2010/06/28/getting-on-groupon-5-things-you-need-to-know\\_n\\_921100.html](http://www.huffingtonpost.com/2010/06/28/getting-on-groupon-5-things-you-need-to-know_n_921100.html).

32. Duryee, *supra* note 30.

33. Utpal M. Dholakia, *How Businesses Fare with Daily Deals as They Gain Experience: A Multi-Time Period Study of Daily Deal Performance* 21 (June 25, 2012) (unpublished manuscript, Rice University), available at <http://news.rice.edu/wp-content/uploads/2012/07/2012-07-05-DailyDeals.pdf> (noting that the average “amount retained by the daily deal sites increased from 42.5% [in] October [2011] to 45%” in May 2012).

34. Deborah L. Cohen, *Virtual “Tipping Point” Leverages Group Deals*, REUTERS (June 10, 2009, 10:16 AM), <http://www.reuters.com/article/2009/06/10/us-groupon-idUSTRE5592K720090610>.

35. Annie Lowrey, *Group Coupon Sites: Boom Business, or Bubble?*, WASH. POST (Jan. 16, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/15/AR2011011500297.html>.

36. EDISON RESEARCH, REPORT ON DAILY DEALS 3 (Apr. 2012), available at <http://www.edisonresearch.com/wp-content/uploads/2012/04/Edison-Research-Daily-Deals-Report-2012.pdf>.

2012,<sup>37</sup> and reach \$3.93 billion<sup>38</sup> to \$6 billion<sup>39</sup> by the end of 2015. Groupon and LivingSocial are currently the most popular daily deal websites based on revenue, “account[ing] for 92[%] of the Web traffic in the ‘group buying’ sector.”<sup>40</sup>

Besides being popular with consumers, daily deals offer significant advantages for businesses—namely, inexpensive advertising and price discrimination.<sup>41</sup> These benefits allow “merchants [to] attract consumers who would not ordinarily patronize their business without a major price incentive.”<sup>42</sup> These benefits may also extend to the legal field. The confluence of the increasing pressures for market share, technology incorporation, and alternative fee arrangements<sup>43</sup> can make daily deal services particularly appealing to lawyers.<sup>44</sup> As lawyers increase their use of daily deal services in response to these pressures, ethical concerns implicating the Rules may arise.

37. Susan Johnston, *Daily Deal Sites Push Premium Memberships*, U.S. NEWS MONEY (Mar. 12, 2012), <http://money.usnews.com/money/personal-finance/articles/2012/03/12/daily-deal-sites-push-premium-memberships>.

38. Stephanie Reese, *Start of the Day: Daily Deal Site Revenues to Reach \$1.25 Billion This Year*, EMARKETER BLOG (Mar. 18, 2011), <http://www.emarketer.com/blog/index.php/stat-day-daily-deal-site-revenues-reach-125-billion-year>.

39. Duryee, *supra* note 30.

40. Lowrey, *supra* note 35; *see also* EDISON RESEARCH, *supra* note 36, at 36 (explaining that 83% and 44% of registered daily deal users are registered with Groupon and LivingSocial, respectively).

41. Tim Donnelly, *How Groupon Can Boost Your Company's Exposure*, INC., <http://www.inc.com/guides/201101/how-groupon-works-for-small-businesses.html> (last updated Jan. 24, 2011); Carmen Nobel, *Is Groupon Good for Retailers?*, HARV. BUS. SCH. WORKING KNOWLEDGE (Jan. 10, 2011), <http://hbswk.hbs.edu/item/6600.html>.

42. Nobel, *supra* note 41; *see also* Donnelly, *supra* note 41 (“Small businesses agree that signing up for a Groupon deal is an easy and fast way to advertise in a way that appeals to smart consumers.”). *But see* Yuki Noguchi, *For Some Businesses, Daily Deals Have a Dark Side*, NPR (July 6, 2012, 3:02 AM), <http://www.npr.org/2012/07/06/156333505/for-some-businesses-daily-deals-have-a-dark-side> (explaining that daily deal coupons can be harmful to some small businesses).

43. *A Less Gilded Future*, *supra* note 24.

44. *See* Alberto Bernabe, *Groupon for Lawyer Services*, PROF. RESP. BLOG (Sept. 6, 2011, 12:48 AM), <http://bernabepr.blogspot.com/2011/09/groupon-for-lawyer-services.html> (“Given the slow economy, many lawyers are looking for ways to attract new clients so it was inevitable that someone would think of using groupon [sic] to do so thus raising the question regarding fee-sharing.”); Gilligan, *supra* note 14, at 63 (“But perhaps the confluence of alternative fee arrangements and the Groupon concept is nearer on the horizon than we might think.”). The Law Offices of Craig S. Redler & Associates was the first law firm to use daily deal services in 2010. *See* Tokmakov, *supra* note 5. Redler reports that while the Groupon experiment was not “as profitable as his” normal work, “he still made money on the Groupon experiment.” Bruce, *supra* note 7. In fact, coupon “clients have engaged [Redler] for additional legal services at full fee.” *Id.*

*B. RELEVANT RULES OF PROFESSIONAL CONDUCT*

The Model Rules of Professional Conduct detail “standards that serve as models of the regulatory law governing the legal profession.”<sup>45</sup> While many of these rules are pertinent to a lawyer’s use of daily deals, some rules are more relevant than others. This Note, like the states that have previously addressed the issue,<sup>46</sup> analyzes Rules 5.4, 7.2, and 1.15, and will draw on the changes made to these Rules by the American Bar Association’s House of Delegates in August 2012.<sup>47</sup> Other Rules are important, but not essential to the issue and are thus beyond the scope of this Note.<sup>48</sup> Instead, these other Rules will guide a lawyer’s ethical use of daily deal advertisements should daily deals be deemed permissible under Rules 5.4, 7.2, and 1.15.

1. Rule 5.4: Professional Independence of a Lawyer

As discussed below in Subparts C and D, states were concerned that the fee charged by daily deal providers, a flat percentage of daily deal revenue, constituted the direct splitting of legal fees. Rule 5.4 prohibits such arrangements by providing in subsection (a) that “[a] lawyer or law firm shall not share legal fees with a nonlawyer.”<sup>49</sup> There are two reasons behind this limitation. First, the prohibition ensures “that the total fee paid by a client is not unreasonably high.”<sup>50</sup> Second, as explained in Comment 1, the restriction exists “to protect the lawyer’s professional independence of judgment.”<sup>51</sup> The American Bar Association’s Committee on Ethics and

45. *Preface to MODEL RULES OF PROF’L CONDUCT* (2012).

46. Alabama Opinion, *supra* note 20; Indiana Opinion, *supra* note 22, at 24–25; Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2865; New York Opinion, *supra* note 17; North Carolina Opinion, *supra* note 18; Pennsylvania Opinion, *supra* note 23, at 1; South Carolina Opinion, *supra* note 19; Amber Hollister, *What Hath the Web Wrought? Advertising in the Internet Age*, OR. ST. B. (May 2011), <http://www.osbar.org/publications/bulletin/11may/barcounsel.html>.

47. ABA/BNA Lawyers’ Manual on Prof’l Conduct, *Ethics 20/20 Rule Changes Approved by ABA Delegates with Little Opposition*, BLOOMBERG BNA (Aug. 15, 2012), <http://www.bna.com/ethics-2020-rule-n12884911245/> [hereinafter *Ethics 20/20*]. It is important to note that while these changes are significant, they occurred after the states issued their ethical opinions and are not binding until “adopted by individual states.” *Id.*

48. These include Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communications), 1.5 (Fees), 1.7 (Conflict of Interest: Current Clients), 1.9 (Duties to Former Clients), 1.10 (Imputation of Conflicts of Interest), 1.16 (Declining or Terminating Representation), 2.1 (Advisor), 7.1 (Communication Concerning a Lawyer’s Services), and 7.3 (Solicitation of Clients). MODEL RULES OF PROF’L CONDUCT.

49. *Id.* R. 5.4(a).

50. ABA Comm. on Temp. Lawyers, Formal Op. 88-356 (1988) (quoting ABA Comm. on Lawyer’s Participation in For-Profit Prepaid Legal Serv. Plan, Formal Op. 87-355 (1987)) (internal quotation marks omitted).

51. MODEL RULES OF PROF’L CONDUCT R. 5.4 cmt. 1; see Mark I. Harrison & Mary Gray Davidson, *The Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers*, 22 PENN. ST. INT’L L. REV. 639, 646 (2004) (explaining that the purpose of Rule



Professional Responsibility “interpret[s] Rule 5.4 with [these] purpose[s] in mind, and . . . reject[s] literal application[s]” of the rule that are not in accord with its underlying purpose.<sup>52</sup>

## 2. Rule 7.2: Legal Advertising

State ethical opinions also focused on Rule 7.2 because this Rule addresses referral fees and legal advertising. Rule 7.2(a) allows lawyers to advertise their services because of the public’s interest in learning about, obtaining, and expanding access to, legal services.<sup>53</sup> Comment 3 to Rule 7.2 recognizes the importance of online advertising and warns bar associations against speculative and subjective prohibitions of such advertising because that “would impede the flow of information about legal services to . . . the public.”<sup>54</sup> Moreover, “[l]imiting the information that may be advertised . . . assumes that the bar can” forecast what information the public needs.<sup>55</sup>

Nevertheless, Rule 7.2 does impose a significant limitation on legal advertising. Rule 7.2(a) allows lawyers to advertise their services<sup>56</sup> provided that the lawyer, under 7.2(b), does not “give anything of value to a person for recommending the lawyer’s services.”<sup>57</sup> Lawyers are, however, authorized by Rule 7.2(b)(1) to “pay the reasonable costs of advertisements.”<sup>58</sup> The Rule imposes a reasonable cost limitation as a means to prevent “sham

5.4 “is to protect the lawyer’s independence in exercising her professional judgment on behalf of the client”).

52. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 01-423 (2001) (“See, e.g., ABA Formal Op. 93-374, FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 182-84 (analyzing the four paragraphs of Rule 5.4 in light of its purpose to protect professional independence and concluding that the rule is not violated by a lawyer’s sharing court-awarded fees with a pro bono organization that sponsors the litigation; the conclusion was based partly on the absence in such fee-sharing of any threat to the lawyer’s independent professional judgment); ABA Formal Op. 88-356 . . . (paying service fee to a temporary lawyer agency based on a percentage of lawyer’s wages did not constitute illegal fee-splitting under Rule 5.4(a) or a violation of Rule 5.4(c)).”). In August 2012, a portion of the American Bar Association’s House of Delegates sought a reaffirmation of Rule 5.4’s bar on the sharing of legal fees with non-lawyers. *Ethics 20/20*, *supra* note 47. This motion was not in response to daily deal advertising. Instead, the motion arose from concerns over the sharing of legal fees between law firms owned in whole, or in part, by non-lawyers. ABA HOUSE OF DELEGATES 2012 ANNUAL MEETING CHL., ILL., EXECUTIVE SUMMARIES (2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/2012\\_hod\\_annual\\_meeting\\_executive\\_summaries\\_ind\\_ex.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2012_hod_annual_meeting_executive_summaries_ind_ex.authcheckdam.pdf). The House of Delegates, however, indefinitely postponed ruling on the motion so the ABA Ethics 20/20 Commission could more thoroughly explore the issue. *Postponed Indefinitely: Reaffirms Policy on Sharing Legal Fees with Non-Lawyers*, ABA HOUSE DELEGATES, <http://www.abanow.org/2012/06/2012am10a/>; *Ethics 20/20*, *supra* note 47.

53. *Amended Model Rules 1.18, 7.3, 7.2, and 5.5*, ABA HOUSE DELEGATES, <http://www.abanow.org/2012/06/2012am105b/> (last visited Jan. 21, 2014).

54. *Id.*

55. *Id.*

56. MODEL RULES OF PROF’L CONDUCT R. 7.2(a) (2012).

57. *Id.* R. 7.2(b).

58. *Id.* R. 7.2(b)(1).

referral services.”<sup>59</sup> The drafters did not intend to cap advertising costs and, as such, the Rule does not prohibit lawyers from using high quality, expensive advertising.<sup>60</sup>

Rule 7.2 is primarily concerned with preventing lawyers from paying others to recommend their work.<sup>61</sup> The ABA House of Delegates recently updated Comment 5 to Rule 7.2 to clarify how this Rule operates in the Internet age.<sup>62</sup> Formerly, Comment 5 provided that lawyers may not, subject to the advertising exception of section (b)(1), “pay others for channeling professional work.”<sup>63</sup> The House of Delegates removed this language and now the Comment expressly states that lawyers “may pay others for generating client leads, [including] Internet-based client leads.”<sup>64</sup> Lawyers are, however, forbidden from paying others to recommend their work, i.e. endorsements of the “lawyer’s credentials, abilities, competence, character or other professional qualities.”<sup>65</sup> Thus, lawyers may pay others to generate client leads so long as the lead generator does not create the “impression that it is recommending the lawyer[’s]” services and “any payment to the

59. Drew L. Kershen, *Professional Legal Organizations on the Internet: Websites and Ethics*, 4 DRAKE J. AGRIC. L. 141, 168 (1999); see ABA Comm’n on Adver., *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies*, ABA (July 1998), [http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_ethics\\_in\\_lawyer\\_advertising/ethicswhitepaper.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/ethicswhitepaper.html) (“However, the purpose of Rule 7.2(c) is not to cap the legitimate expenses a lawyer may spend on a high quality marketing product, but rather to prohibit arrangements involving referral fees for, as the comment states, ‘channeling professional work.’”); see also *Schulman v. Major Help Ctr.*, No. CV 970569027S, 1997 WL 809909, at \*2 (Conn. Super. Ct. Dec. 24, 1997) (“This court cannot possibly conclude that the payments are for the ‘reasonable cost of advertising. . . .’ Rather, the arrangement is a procedure through which a participating attorney pays a third party a sum surely in excess of the cost of advertising involved in exchange for the third party’s recommendations.”); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 7.2-3(b) (2012–2013 ed.) (“If lawyers may advertise, they obviously must pay advertisers. By negative implication, a lawyer could not pay a ‘shill’ to pretend that he (the shill) is an objective source who then touts the lawyer’s services to prospective clients.”); Md. State Bar Ass’n, *Whether Lawyer Referral Arrangement Is Permissible Under Rules*, 45-AUG MD. B.J. 44, 45 (2012) (explaining that concerns of an improper referral service would arise if the service “is charging fees which exceed the ‘reasonable cost’ of advertising”).

60. See Judith Kilpatrick, *Arkansas’ Amended Advertising Rules, Solicitation and the Internet*, 2000 ARK. L. NOTES 39, 45 (2000) (“It is unlikely that the drafters intended to prohibit a lawyer’s paying for . . . high quality [services], so those costs are likely to be considered ‘reasonable,’ even if expensive, if they are based on the market rate for such services.”); *supra* note 59.

61. MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 1.

62. ABA HOUSE OF DELEGATES, 2012 ANNUAL MEETING CHI., ILL., EXECUTIVE SUMMARIES, *supra* note 52, at 105B cmt. 5.

63. ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 5 (2011).

64. ABA HOUSE OF DELEGATES 2012 ANNUAL MEETING CHI., ILL., EXECUTIVE SUMMARIES, *supra* note 52, at 105B cmt. 5.

65. *Id.*

lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of lawyer).”<sup>66</sup>

### 3. Rule 1.15: Safekeeping Client Property

The last significant obstacle to a lawyer’s use of daily deal advertisements is the relatively straightforward mandate of Rule 1.15. Rule 1.15(c) instructs lawyers to deposit all prepaid legal fees into a separate client trust account.<sup>67</sup> Lawyers may not access these funds until they “are earned or expenses [are] incurred.”<sup>68</sup> This Rule is relevant because the purchase of a daily deal constitutes the prepayment of a legal fee—a fee that must be deposited into a client trust account.

#### C. STATES THAT FOUND VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT WHEN LAWYERS USE DAILY DEAL SERVICES

The ethical opinions of Alabama, Arizona, Indiana, and Pennsylvania<sup>69</sup> held that “[t]he use of daily deal websites . . . violates or potentially violates a number of rules of professional conduct.”<sup>70</sup> Additionally, the Deputy General Counsel of the Oregon State Bar Association published an online bulletin stating that daily deals may run afoul of several rules of professional conduct and warned lawyers to “proceed with care.”<sup>71</sup> Subpart 1 examines the ethical opinions of Alabama, Arizona, and Indiana because they are formal, binding opinions. Subpart 2 considers separately the Oregon bulletin and Pennsylvania opinion because of their informal, nonbinding nature.

#### 1. The Formal, Binding Opinions of Alabama, Arizona, and Indiana

Alabama, Arizona, and Indiana analyzed a lawyer’s use of daily deal websites in a similar fashion. Although the states were primarily concerned with violations of Rules 5.4 and 7.2, they noted a host of other Rules that daily deals may violate as well.

The Indiana, Alabama, and Arizona ethical committees concluded that an attorney’s use of daily deal services fundamentally violates Rules 5.4 and 7.2. These committees concluded that the portion of the fee retained by the

66. *Id.*

67. MODEL RULES OF PROF’L CONDUCT R. 1.15(c) (2012).

68. *Id.*

69. “[This] opinion is advisory only and is not binding . . . [It] carries only such weight as an appropriate reviewing authority may choose to give it. . . and [it] is not an opinion of the full Committee.” Pennsylvania Opinion, *supra* note 23, at 2.

70. Alabama Opinion, *supra* note 20; see Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22 (finding that the use of daily deals “is fraught with peril and is likely not permitted”); Pennsylvania Opinion, *supra* note 23, at 2 (explaining that the use of daily deal services appears to violate several rules of professional conduct).

71. Hollister, *supra* note 46.

daily deal website was an impermissible sharing of legal fees—a violation of Rule 5.4.<sup>72</sup> The committees held further that the daily deal fee is not a permissible cost of advertising because, even if permitted by Rule 5.4, the cost of daily deals is not reasonable as required by Rule 7.2.<sup>73</sup> Daily deal websites charge a fixed percentage, generally 50% of fee revenue, “[n]otwithstanding the fixed, minimal costs associated with creating and administering the online coupon.”<sup>74</sup> Consequently, Alabama, Arizona, and Indiana concluded that the cost of advertising is inherently unreasonable and thus unethical.<sup>75</sup>

Alabama, Arizona, and Indiana noted two other “ethical landmines”<sup>76</sup> presented by daily deal arrangements.<sup>77</sup> First, they were concerned, although for different reasons, with the impact daily deals might have on a lawyer’s ability to deliver quality legal services. These states’ ethical committees were troubled by the fact that lawyers cannot perform conflict of interest checks or consult with the client prior to the purchase of services.<sup>78</sup> Alabama additionally worried that so many people might purchase daily deals such that the lawyer’s caseload would become unmanageable and lead to violations of rules relating to competence, diligence, and communication.<sup>79</sup>

Second, the three states were concerned with violations of Rules 1.15 and 1.16. Rule 1.15 requires that “all unearned fees must be placed into a lawyer’s trust account until earned.”<sup>80</sup> Given the fact that daily deal websites retain half of the fees and often disburse payments incrementally, Alabama concluded that it would be “impossible for the lawyer to place the entire

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72. Alabama Opinion, *supra* note 20; Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22, at 23.

73. Alabama Opinion, *supra* note 20; Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22, at 24.

74. Alabama Opinion, *supra* note 20; Indiana Opinion, *supra* note 22, at 24.

75. Alabama Opinion, *supra* note 20; Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22, at 25.

76. Alabama Opinion, *supra* note 20 (citing ALA. RULES OF PROF’L CONDUCT (2012)).

77. Alabama Opinion, *supra* note 20; Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22.

78. Alabama Opinion, *supra* note 20; Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22. According to Indiana, “[t]he proposed coupon arrangement may be an abrogation and/or violation” of a lawyer’s duty when establishing an attorney-client relationship. Indiana Opinion, *supra* note 22, at 22. The lawyer has no way of performing a conflicts-of-interest check before services are purchased as required by Rule 1.7. *Id.* Moreover, it would be exceedingly difficult for a lawyer to “exercise independent professional judgment and render candid advice,” in violation of Rule 2.1, if the attorney cannot consult with their client prior to the purchase of services. *Id.* (quoting IND. RULES OF PROF’L CONDUCT R. 2.1 (2013)).

79. Alabama Opinion, *supra* note 20 (citing ALA. RULES OF PROF’L CONDUCT R. 1.1, 1.3 & 1.4 (2012)).

80. *Id.*; see Indiana Opinion, *supra* note 22, at 22 (stating that Rule 1.15 requires a lawyer to put unearned fees in a trust account until “earned or expenses are incurred”) (quoting IND. RULES OF PROF’L CONDUCT R. 1.15 (2013)); see also Arizona Opinion, *supra* note 21 (similar).

unearned legal fee into trust as required by Rule 1.15(a).<sup>81</sup> “This [situation] is further complicated by Rule 1.16,” which requires a lawyer to refund advance payments if representation is declined or terminated.<sup>82</sup> A daily deal website’s retention of 50% of client fees and incremental disbursements would prevent lawyers from complying with this Rule.<sup>83</sup>

The Arizona Ethical Committee also mentioned several additional ethical concerns that might arise through a lawyer’s use of daily deal advertisements. First, a client’s purchase of legal services through an online vendor may not be adequately protected and could result in the exposure of confidential client communication.<sup>84</sup> Second, the Arizona ethics committee was disturbed with the formation of the attorney–client relationship.<sup>85</sup> If formed at the time of purchase, lawyers may violate a host of ethical rules due to their inability to “evaluate [a client’s] individual need, [assess] the possibility of [a] conflict[] of interest,” determine their competence to perform the work, and/or “obtain informed consent for . . . limitations on the scope of work.”<sup>86</sup>

## 2. The Informal, Non-Binding Opinions of Oregon and Pennsylvania

Like Alabama, Arizona, and Indiana, Oregon and Pennsylvania were concerned with violations of Rules 5.4 and 7.2.<sup>87</sup> They viewed the daily deal arrangement as “a straightforward sharing of a legal fee”—a violation of Rule 5.4.<sup>88</sup> Oregon and Pennsylvania differed, however, in their analysis of Rule 7.2. Oregon thought that daily deals would violate Rule 7.2(a)’s

81. Alabama Opinion, *supra* note 20; *see* Indiana Opinion, *supra* note 22, at 22 (“[S]ome [c]ompanies disburse the ‘funds’ in incremental amounts . . . . It is unclear how such a relationship could permit a lawyer to faithfully comply with the obligations of Rule 1.15(a).”); *see also* Arizona Opinion, *supra* note 21 (similar).

82. Indiana Opinion, *supra* note 22, at 22; *see* Arizona Opinion, *supra* note 21.

83. Alabama Opinion, *supra* note 20; Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22.

84. Arizona Opinion, *supra* note 21. The basis for this statement is wholly unclear. According to the Arizona Ethics Committee the “Terms of Use” of one daily deal vendor warned users that statements made on the website were public and not confidential. *Id.* Thus, a client’s review of the offered legal services or postings on the website are public material—what the Arizona committee fails to understand is that no confidential information is communicated in this manner. The Arizona committee misconstrued the Terms of Use policy, resulting in the misapprehension that the client would be posting confidential statements to the website. The client would only be purchasing a daily deal—this is not a statement and thus it is not subject to public disclosure.

85. *Id.*

86. *Id.*

87. Pennsylvania Opinion, *supra* note 23, at 1; Hollister, *supra* note 46.

88. Pennsylvania Opinion, *supra* note 23, at 2; *see* Hollister, *supra* note 46 (“[O]ffering services on a deal-of-the-day website will violate Rule 5.4(a) if the specific terms of service require the lawyer to pay a fee based on the work derived from the advertising or the number of retained clients.”).

prohibition on lawyers paying referral fees for new clients.<sup>89</sup> Pennsylvania, on the other hand, ignored the issue of referral payments. Instead, Pennsylvania was concerned that daily deals may be misleading and thus violate Rule 7.2 in conjunction with Rule 7.1.<sup>90</sup> Additionally, both Oregon and Pennsylvania agreed that daily deals also raised issues with the formation of the attorney–client relationship—namely the ability of the lawyer to perform conflict of interest checks.<sup>91</sup>

Although Oregon and Pennsylvania raised similar concerns, the definitiveness of their conclusions differed. Pennsylvania was more direct in saying that the daily deal arrangement appeared to violate Rule 5.4 and several other Rules of Professional Conduct.<sup>92</sup> Oregon, on the other hand, simply advised lawyers to “proceed with care to avoid potential ethical traps” and offered advice on how to do so.<sup>93</sup> The difference between these conclusions is likely due to the nature in which they were produced. Oregon’s conclusion was part of an ethics bulletin, written by the Deputy General Counsel of the Oregon Bar, meant to inform bar members of issues they may face in the future.<sup>94</sup> Pennsylvania’s conclusion, however, was in direct response to a lawyer’s “inquiry as to whether . . . attorneys [may] participate” in daily deals.<sup>95</sup> Thus, the nature of the Pennsylvania inquiry demanded a more concrete answer.

*D. STATES THAT FOUND NO VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT  
WHEN LAWYERS USE DAILY DEAL SERVICES*

Despite the preceding analyses, several other states—Maryland, Nebraska, New York, North Carolina, and South Carolina—have concluded

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89. Hollister, *supra* note 46 (“Offering services on a deal-of-the-day website will violate Rule 7.2(a) if a lawyer is compensating the website as a reward for having made a recommendation resulting in employment by a client or securing the lawyer’s employment by a client.”).

90. Pennsylvania Opinion, *supra* note 23, at 2. Pennsylvania explained that a daily deal advertisement might be misleading in two different ways. *Id.* First, the coupon buyer may misinterpret the advertisement. *Id.* For example, the lawyer and prospective purchaser may have very different understandings of a coupon that advertises for a “simple will.” *Id.* Second, the daily deal procedure itself may be misleading because lawyers are only required to honor purchased daily deals if enough individuals purchase the deal. *Id.* Thus, the coupon “is misleading in the sense that it is really a contingent fee, contingent not on the result of the matter, but contingent on enough other ‘clients’ signing up.” *Id.*

91. *Id.*; Hollister, *supra* note 46. Oregon was also concerned about the timing of the formation of the attorney–client relationship and what duties are owed to the prospective client. Hollister, *supra* note 46.

92. Compare Pennsylvania Opinion, *supra* note 23, with Hollister, *supra* note 46.

93. Hollister, *supra* note 46. For instance, the Oregon bulletin advised lawyers to consider the purchaser of the daily deal a prospective client under Rule 1.18 and in the event of a conflict of interest, Rule 1.15 requires the lawyer “to issue a refund to the customer.” *Id.*

94. *Id.*

95. Pennsylvania Opinion, *supra* note 23, at 1.

that a lawyer's use of daily deal services does not violate any of the respective rules of professional conduct.<sup>96</sup> Subpart 1 examines the ethical opinions of Maryland, Nebraska, North Carolina, and South Carolina together because they are exceedingly similar. Subpart 2 separately considers New York's opinion because New York approached the problem differently.

### 1. The Ethical Opinions of Maryland, Nebraska, North Carolina, and South Carolina

Like the states that concluded that daily deals violate ethical rules, Maryland, Nebraska, North Carolina, and South Carolina focused their analysis on Rules 5.4 and 7.2.<sup>97</sup> Their conclusion differed, however, because they characterized the daily deal arrangement in a different fashion.

Maryland, Nebraska, North Carolina,<sup>98</sup> and South Carolina held that daily deals do not violate Rule 5.4(a) because they do not require lawyers to split legal fees.<sup>99</sup> The fee retained by the daily deal provider is not a portion of a legal fee, but merely a permissible cost of advertising.<sup>100</sup> The states reinforced this conclusion by determining that the purpose behind Rule 5.4(a) is to prevent interference with the lawyer's professional judgment.<sup>101</sup> The states determined that this risk is not apparent in daily deal

96. Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2865; New York Opinion, *supra* note 17; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19. It has been widely reported that Missouri lawyer Craig S. Redler obtained approval from the Missouri State Bar Association prior to offering his Groupon. See Stephen C. Hartnett, *Groupon for Lawyers?*, AM. ACAD. EST. PLAN. ATT'YS (Feb. 15, 2012), <http://www.aacpa.com/blog/2012/02/groupon-lawyers/> ("Before taking this innovative step, [Redler] made sure he was in compliance with Missouri's ethics rules."); Sarah Mui, *Around the Blawgosphere: Does Lawyer Who Offered Groupon Have Regrets?*, *Digital Death Plans*, A.B.A. J. (Jan. 20, 2012, 8:33 AM), [http://www.abajournal.com/news/article/around\\_the\\_blawgosphere\\_bully\\_lawyer\\_facebook\\_if\\_i\\_die\\_groupon\\_tsa/](http://www.abajournal.com/news/article/around_the_blawgosphere_bully_lawyer_facebook_if_i_die_groupon_tsa/) ("Craig Redler talked to the ABA Journal about his 2010 Groupon offer . . . (which he cleared with Missouri ethics regulators ahead of time)."). The Legal Ethics Counsel for the Missouri Supreme Court Advisory Committee, however, has made it clear that "Missouri ethics authorities have [not] approved Groupon" usage by lawyers. SARA RITTMAN, MO. LEGAL ETHICS COUNSEL, *GROUPON AND ETHICS OPINIONS 1* (2013), available at <http://www.mo-legal-ethics.org/wordpress/wp-content/uploads/2013/06/Groupon-and-Ethics-Opinions1.pdf>.

97. Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2867-69; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19.

98. In a draft "copy of the proposed opinion," however, North Carolina stated that the daily deal "arrangement amounts to impermissible fee-sharing with a nonlawyer." Debra Cassens Weiss, *Proposed NC Ethics Opinion Says Lawyers Can't Ethically Offer Groupon Deals*, A.B.A. J. (Jan. 19, 2011, 10:18 AM), [http://www.abajournal.com/news/article/proposed\\_n.c.\\_ethics\\_opinions\\_says\\_lawyers\\_cant\\_ethically\\_offer\\_groupon\\_dea](http://www.abajournal.com/news/article/proposed_n.c._ethics_opinions_says_lawyers_cant_ethically_offer_groupon_dea). It is unclear what prompted North Carolina to change its conclusion.

99. Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2867, 2871; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19.

100. Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2867-69; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19.

101. Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2867; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19.

arrangements because daily deal service providers do “not direct[], regulat[e], or interfer[e] with the lawyer’s professional judgment in rendering legal services.”<sup>102</sup> Consequently, a lawyer’s use of daily deals does not violate Rule 5.4(a).<sup>103</sup>

These states found, however, one caveat to this conclusion in “Rule 7.2[, which] requires that the cost of advertising be ‘reasonable.’”<sup>104</sup> Accordingly, Maryland, Nebraska, North Carolina, and South Carolina held that a lawyer may ethically advertise via daily deals so “long as the percentage charged against the revenues generated are reasonable compensation for the advertising.”<sup>105</sup> Nebraska was the only state that attempted to define the term “reasonable compensation.”<sup>106</sup> In Nebraska’s opinion, the cost of advertising is not reasonable “[t]o the extent that the percentage charges arguably exceed the true cost of advertising.”<sup>107</sup>

After concluding that the use of daily deal websites does not violate Rules 5.4 or 7.2, Maryland, Nebraska, North Carolina, and South Carolina noted several other rules that lawyers should contemplate when using daily deals. The states issued three common instructions. First, the states held that Rule 1.15(c) requires lawyers to deposit daily deal fees “into a client trust account until the fees are actually earned.”<sup>108</sup> Second, the daily deal must inform the purchaser that representation is subject to a conflict of interest

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102. Maryland Opinion, *supra* note 15; accord Nebraska Opinion, *supra* note 16, at 2867–68; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19.

103. Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2867–68; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19.

104. Nebraska Opinion, *supra* note 16, at 2868.

105. North Carolina Opinion, *supra* note 18; see Maryland Opinion, *supra* note 15 (explaining that the “lawyer may pay the *reasonable* cost of advertising”); South Carolina Opinion, *supra* note 19 (same); see also Nebraska Opinion, *supra* note 16, at 2868.

106. Nebraska Opinion, *supra* note 16, at 2868.

107. *Id.*

108. South Carolina Opinion, *supra* note 19; see Maryland Opinion, *supra* note 15 (“The payments . . . are advance payments . . . that must be deposited in the lawyer’s trust account . . . until earned . . .”); Nebraska Opinion, *supra* note 16, at 2870 (“Rule 1.15(c) requires that prepaid funds be deposited into a trust account until they are earned.”); North Carolina Opinion, *supra* note 18 (“Second, a lawyer must deposit entrusted funds in a trust account.”).



check.<sup>109</sup> Third, pursuant to Rule 7.1, the advertisement must not be misleading, false, or deceptive.<sup>110</sup>

The ethics opinions of Maryland, Nebraska, and North Carolina then diverged significantly from South Carolina. Maryland, Nebraska, and North Carolina held that “no attorney-client relationship is formed until the purchaser requests” the specific service and the attorney performs a conflicts check.<sup>111</sup> Additionally, they held that Rule 1.5 requires lawyers to refund unused daily deals in full, “including the amount retained by the website company.”<sup>112</sup>

Although South Carolina did not offer these supplemental guidelines, it did analyze a rule left untouched by the other states. South Carolina held that daily deals do not violate “Rule 7.3 concerning contact with prospective clients, because the lawyer will not be communicating directly with the users of the website and because the lawyer does not know [if users of the daily deal website] will be in need of legal services in a particular matter.”<sup>113</sup> South

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109. See Maryland Opinion, *supra* note 15 (explaining that a lawyer has a duty to decline representation and issue a refund of the entire advanced fee if there is a conflict of interest); Nebraska Opinion, *supra* note 16, at 2870 (“[N]o attorney-client relationship is formed until the purchaser requests that service and the attorney can perform a conflicts check.”); North Carolina Opinion, *supra* note 18 (“In addition, the advertisement must state that a conflict of interest or a determination by the lawyer that the legal service being offered is not appropriate for a particular purchaser may prevent the lawyer from providing the service and, if so, the purchaser’s money will be refunded . . . .”); South Carolina Opinion, *supra* note 19 (“Lastly, the lawyer must address the logistical issue of how she will handle conflict-of-interest situations that may arise under Rules 1.7 and 1.9.”).

110. Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2869; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19. North Carolina and Nebraska further defined this qualification. Nebraska requires that the coupon clearly identify what fees will be discounted, “specify . . . limits on the discounted service, and explain terms which may be misinterpreted.” Nebraska Opinion, *supra* note 16, at 2869. In North Carolina, “[t]he advertisement must explain that the decision to hire a lawyer is an important one that should be considered carefully.” North Carolina Opinion, *supra* note 18.

111. Nebraska Opinion, *supra* note 16, at 2870; see also Maryland Opinion, *supra* note 15 (explaining that “[t]he lawyer must spell out that the ‘daily deal’ offered is subject to certain conditions”, one of which is a conflict of interest check); North Carolina Opinion, *supra* note 18 (holding that no attorney-client relationship is formed until a conflict of interest check is performed). North Carolina explicitly stated that prior to this check, the coupon buyer should be considered a prospective client and afforded protections outlined in Rule 1.18. North Carolina Opinion, *supra* note 18.

112. Maryland Opinion, *supra* note 15; see also Nebraska Opinion, *supra* note 16, at 2870 (“[I]f the customer ultimately does not use the Groupon, the attorney must refund the full price.”); North Carolina Opinion, *supra* note 18 (further discussing the refund principle). North Carolina also held that Rule 1.1 may require the lawyer to extend representation at no additional charge to ensure competent representation. North Carolina Opinion, *supra* note 18.

113. South Carolina Opinion, *supra* note 19. Maryland and Nebraska did mention Rule 7.3 in their opinions, but they did not explain why a lawyer’s use of daily deal sites would not violate Rule 7.3. Nebraska only mentioned that Rule 7.3 requires the words “advertising material” be on the daily deal. Nebraska Opinion, *supra* note 16, at 2869. Maryland briefly stated that a lawyer’s use of daily deals is subject to Rule 7.3(b). Maryland Opinion, *supra* note 15.

Carolina also mentioned that lawyers should be aware of conflict of interest issues “that may arise under Rules 1.7 [(Conflict of Interest: Current Clients)] and 1.9 [(Duties to Former Clients)].”<sup>114</sup>

## 2. New York’s Ethical Opinion

New York’s ethical opinion differs noticeably from the previously discussed opinions because New York did not address Rule 5.4.<sup>115</sup> New York was seemingly aware of potential violations of Rule 5.4 because it cited South Carolina’s ethical opinion, which discussed Rule 5.4 in detail.<sup>116</sup> Also, the “Facts” section of New York’s opinion restated the precise Rule 5.4 dilemma posed by daily deals—that daily deal providers “deduct[] a percentage of the gross receipts as its compensation.”<sup>117</sup>

Although New York appeared to ignore Rule 5.4, it did, like the aforementioned states, address whether a lawyer’s use of daily deals is tantamount to an improper payment of referral fees in violation of Rule 7.2.<sup>118</sup> New York concluded that the fee retained by daily deal websites was not a referral fee because the websites did “not take[] any action to refer a potential client to a particular lawyer—instead it” distributed “a particular lawyer’s advertising message to interested consumers and . . . charged a fee for that [advertisement].”<sup>119</sup> Therefore, New York deemed that Rule 7.2 would not be violated so long as the fee charged by daily deal providers was “a reasonable payment for this form of advertising.”<sup>120</sup>

New York then set forth instructions for lawyers to follow when using daily deals. First, according to Rule 7.1 the daily deal must contain the words “Attorney Advertising” and not be misleading.<sup>121</sup> Second, the lawyer must refund customers for unused or partially used coupons as required by Rules 1.5 and 1.16(e).<sup>122</sup> Third, the daily deal should disclose that representation is subject to “a number of conditions” including a client-needs assessment

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114. South Carolina Opinion, *supra* note 19.

115. New York Opinion, *supra* note 17.

116. *Id.* ¶¶ 5, 11, 20.

117. *Id.* ¶ 3.

118. *Id.* ¶¶ 8–13.

119. *Id.* ¶ 12.

120. *Id.* ¶ 13.

121. *Id.* ¶ 18.

122. *Id.* ¶¶ 14–17. A coupon buyer is entitled to a full refund, subject to a lawyer’s “*quantum meruit* claim for services,” if “the coupon buyer, having changed his or her mind about going forward with the representation, . . . discharge[s] the lawyer.” *Id.* ¶ 16. Should the coupon buyer fail to use the coupon by the stated expiration date, the lawyer may “treat the advance payment received as an earned retainer for being available to perform the offered service in the given time frame.” *Id.* ¶ 17.

and conflicts check.<sup>123</sup> Lastly, the daily deal “must also comply with Rule 7.3 regarding solicitation.”<sup>124</sup>

### III. PROBLEMS WITH THE SPLIT IN AUTHORITY

This aforementioned split interpretation of the ethics of daily deal advertising is troublesome. The split creates an unequal playing field in the intense, interstate legal market—allowing some lawyers to use a highly effective advertising tool while denying this benefit to another segment of lawyers. This result is contrary to the purpose of the Model Rules of Professional Conduct and is exacerbated by the rapidly changing legal-business-model landscape.

The Model Rules were meant to establish a uniform set of “enforceable standards of conduct [to] govern[] the practice of law.”<sup>125</sup> Conflicting interpretations of the Rules do not serve this objective. Perhaps more importantly, the drafters of the Rules intended them to create “clear, workable, common-sense standards by which individual lawyers can regulate their own conduct.”<sup>126</sup> Varying interpretations of the same Rule make it virtually impossible for lawyers to “voluntar[ily] compl[y] with the profession’s standards of conduct.”<sup>127</sup>

This problem is further complicated by the expansion of interstate legal practices. The “interstate practice of the law has become increasingly common in recent years.”<sup>128</sup> As “globalization . . . and technological innovation”<sup>129</sup> expand client interests across jurisdictions, lawyers and law firms must correspondingly expand their practice areas to account for “increasingly mobile” clients.<sup>130</sup> The trend toward the interstate practice of law even extends to “routine matters.”<sup>131</sup>

123. *Id.* ¶¶ 21–22 (“If the lawyer-client relationship is formed, the lawyer must promptly describe the scope of the services . . . and the fee arrangement as required by Rule 1.5(b).”).

124. *Id.* ¶¶ 18, 23.

125. Robert J. Kutak, Model Rules of Professional Conduct: Why Do We Need Them?, Address at the University of Oklahoma College of Law (Nov. 3, 1982), in 36 OKLA. L. REV. 311, 314 (1983).

126. *Id.* at 315.

127. *Id.*

128. Duncan T. O’Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 678 (1986); see ABA CTR. FOR PROF’L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 39 (2002) (“Over the past decade . . . [there has been] a significant increase in the interstate practice of law.”).

129. Alessandro Turina, Note, *Temporary Interstate Transactional Practice in the United States and Europe—Keeping up with Modern Commercial Realities*, 28 B.C. INT’L & COMP. L. REV. 225, 225 (2005); see ABA CTR. FOR PROF’L RESPONSIBILITY, *supra* note 128, at 39 (“[T]he growth in the lawyer population and advances in technology and communications have fostered a significant increase in the interstate practice of law.”).

130. Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 342 (1994); see O’Brien, *supra* note 128, at 678 (“Multistate or interstate practice . . . has become increasingly common in

To facilitate their interstate practices, lawyers may seek admission to multiple state bar associations and, as a result, subject themselves to conflicting ethical rules as they must abide by the ethical rules “of each state to which they are admitted.”<sup>132</sup> In addition, lawyers may be subject to the ethical rules of states to which they are not admitted if they are “engaged in substantial legal activity there.”<sup>133</sup> Thus, a lawyer admitted in a state that allows daily deals may still be subject to disciplinary action if the lawyer is admitted to, or has a practice that extends substantially into, another state that forbids lawyers from using daily deals.<sup>134</sup> In fact, a bar association that forbids daily deals could discipline a lawyer even if the daily deal is advertised only in a jurisdiction in which such advertisements are permitted.<sup>135</sup> This puts multistate practitioners based in more restrictive states at a distinct disadvantage, even when their advertising occurs in states

recent years. The greater mobility of lawyers and clients, the interstate scope of many business and legal transactions, [and] . . . the growth of specialized areas of legal practice . . . have all contributed to this phenomenon.” (footnote omitted)); Bruce A. Green, *Assisting Clients with Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century*, ABA (June 2000), [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission\\_on\\_multijurisdictional\\_practice/mjp\\_bruce\\_green\\_report.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice/mjp_bruce_green_report.html) (“[The globalization of business,] modern transportation and communications technology have enabled clients [to] easily . . . travel and transact business throughout the country . . . . Consequently, clients may need lawyers to assist them in . . . multiple jurisdictions.”).

131. Zacharias, *supra* note 130, at 342–43 (“[S]ervicing clients in more routine matters requires local lawyers to offer advice and representation that cross state lines. The practices of both multistate law firms and less ambitious practitioners thus have become national in nature.” (footnote omitted)).

132. O’Brien, *supra* note 128, at 678; see MODEL RULES OF PROF’L CONDUCT R. 8.5(a) (2012) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. . . . A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.”); see also Edward A. Carr & Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. TEX. L. REV. 859, 883 (1995) (“[A] state bar does not lose disciplinary jurisdiction over one of its members simply because the lawyer’s conduct occurs beyond the state line.”).

133. O’Brien, *supra* note 128, at 678.

134. A similar situation occurred in *In re Porep*, 111 P.2d 533 (Nev. 1941). “[A] lawyer licensed both in Nevada and California” was disciplined by the “State Bar of Nevada” for “soliciting professional employment, including divorce cases, by advertisement . . . .” Carr & Van Fleet, *supra* note 132, at 883. Even though the lawyer’s conduct did not occur in Nevada, and California determined that it did not warrant discipline, “[t]he Supreme Court of Nevada concluded that the petitioner had indeed committed professional misconduct” in Nevada. *Id.*; see also MODEL RULES OF PROF’L CONDUCT R. 8.5(a) (“A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.”).

135. See Carr & Van Fleet, *supra* note 132, at 884 (“In 1986, the District of Columbia ethics committee considered an inquiry from a lawyer licensed in D.C. and California who wanted to advertise the lawyer’s services in London and Hong Kong. The committee concluded that [D.C.’s] advertising rule[s] had no geographical limitations and . . . members of the D.C. bar must comply with the D.C. advertising rule ‘wherever their representations or advertisements may be received.’” (citation omitted)).

that allow daily deals.<sup>136</sup> These same concerns extend to and may be exacerbated in law firms that have interstate practices.<sup>137</sup>

Given the ever-increasing pressure for interstate law practices, it is essential that this split interpretation be resolved. Lawyers and law firms should be on an equal playing field when competing for prospective clients. Additionally, harmonizing the interpretation of daily deals will ensure that lawyers can clearly identify and comply with their ethical obligations—thereby satisfying the purpose behind the Rules.

#### IV. THE MODEL RULES OF PROFESSIONAL CONDUCT ALLOW LAWYERS TO ADVERTISE VIA DAILY DEALS

This Part argues that the Model Rules of Professional Conduct permit lawyers to advertise legal services through daily deals. Recent changes to the Rules by the American Bar Association's House of Delegates reinforce this conclusion. Allowing lawyers to use daily deals alleviates the inequities created by the split interpretation, enables lawyers to use modern advertising tools in challenging economic times, and more accurately comports with the purpose of the Rules. Subpart A explains why daily deal advertising arrangements do not contravene Rule 5.4's ban on the sharing of attorney fees. Subpart B analyzes whether the cost of daily deal advertisements is reasonable under Rule 7.2. Subpart C analyzes the trust requirements of Rule 1.5(c) and proposes an acceptable trust structure. Finally, Subpart D notes two other issues that lawyers should be mindful of when using daily deals.

##### A. DAILY DEALS ARE PERMITTED BY RULE 5.4

As previously discussed, several state bar associations hold that daily deal arrangements violate Rule 5.4(a) because the daily deal provider retains a portion of the fee charged to the coupon purchaser.<sup>138</sup> Facially, this conclusion appears accurate—the cost of daily deal advertisements is fixed at a set percentage of revenue. There are two arguments why this facial violation of Rule 5.4(a) should not preclude lawyers from using daily deal advertisements. First, the fee retained by daily deal websites is actually an innovative way of charging for advertising. Second, this payment method does not threaten a lawyer's professional independence of judgment—a necessary condition for finding a violation of Rule 5.4.

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136. See *id.* (explaining that D.C. licensed lawyers must comply with D.C.'s more restrictive advertising rules regardless of where the advertisements are delivered).

137. Zacharias, *supra* note 130, at 346–47 (“For example, members of the same law firm who belong to different bars or who practice through offices in different states are covered by distinct rules. The ability to represent a client therefore may vary from lawyer to lawyer in the same firm. . . . These discrepancies create quandaries both for the individual lawyers engaged in national practice and for the national firms.”).

138. See *supra* Part II.C.

The fee retained by daily deal websites is not an impermissible sharing of legal fees, but an alternative means of charging for advertising.<sup>139</sup> The critical issue here is the timing of the advertising charge—daily deal arrangements merely require lawyers to pay advertising costs upfront “rather than invoiced and then paid from the lawyer’s operating account.”<sup>140</sup> On some level, all fees paid to advertisers equate to a sharing of legal fees; lawyers must use a portion of their legal fee revenue to pay their costs.<sup>141</sup> The timing of the advertising charge should not transform the transaction “from the payment of advertising costs into an improper fee split.”<sup>142</sup> Furthermore, states that currently prohibit daily deal advertisements,<sup>143</sup> would seemingly allow them if the provider initially furnished all daily deal revenue to the lawyer and subsequently sent the lawyer an advertising bill—even if the bill was for the same amount that would have been retained upfront.<sup>144</sup> This delayed “fee sharing” is permissible because Rule 7.2 empowers lawyers to pay reasonable advertising costs and, as addressed in Subpart B, the cost of daily deals is reasonable.<sup>145</sup>

Although the aforementioned argument reclassifies the percentage retained by the daily deal provider as a cost of advertising, the fact remains that daily deal websites charge a fixed percentage of fee revenue for their services. This charge is permissible because it does not threaten lawyers’ independence. Rule 5.4 was enacted to “protect the lawyer’s professional independence of judgment”<sup>146</sup> and “specifically ‘allow[s] for experimentation in methods of delivering legal services.’”<sup>147</sup> According to the American Bar Association’s Committee on Ethics and Professional

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139. Maryland Opinion, *supra* note 15; Nebraska Opinion, *supra* note 16, at 2871; North Carolina Opinion, *supra* note 18; South Carolina Opinion, *supra* note 19.

140. South Carolina Opinion, *supra* note 19.

141. See James M. Fischer, *Why Can't Lawyers Split Fees? Why Ask Why, Ask When!*, 6 GEO. J. LEGAL ETHICS 1, 39 (1992) (“[I]f we indulged ourselves in the fact that, as service businesses, all revenues obtained by lawyers are derived from clients’ fees, all payments . . . could be treated as fee splits. Such a situation would be overkill; as a general proposition, we do not believe that the lawyer’s independent judgment will be compromised by [all cost payments].”).

142. South Carolina Opinion, *supra* note 19.

143. Alabama Opinion, *supra* note 20; Indiana Opinion, *supra* note 22.

144. In addition, Indiana held that daily deals violated Rule 5.4 because the advertising charge constituted a payment “for channeling professional work,” a violation of Rule 7.2. Indiana Opinion, *supra* note 22, at 24. Subpart B examines this concern and demonstrates that daily deal advertisements are actually permitted by Rule 7.2. Following that determination, Indiana’s conclusion regarding Rule 5.4 would likely be reversed. As discussed in Subpart B, daily deals are not improper referral services.

145. MODEL RULES OF PROF’L CONDUCT R. 7.2(b)(1) (2012); see *supra* Part IV.B.2.

146. MODEL RULES OF PROF’L CONDUCT R. 5.4 cmt. 1.

147. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 87-355 (quoting ABA, THE LEGISLATIVE HISTORY OF THE MODEL PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 160 (1987)).

Responsibility, Rule 5.4 must be interpreted “with this purpose in mind.”<sup>148</sup> The Committee has rejected “literal applications” of the Rule that are not in “accord with the purpose for the Rule.”<sup>149</sup> Rule 5.4’s “prohibition against fee sharing has no application in circumstances where” concerns for lawyers’ professional independence are not present.<sup>150</sup> Therefore, the Model Rules permit scenarios that literally violate Rule 5.4(a) when they do not threaten lawyers’ professional independence.<sup>151</sup>

Daily deals are permitted under this standard because nothing about the arrangement interferes with lawyers’ independent judgment.<sup>152</sup> A lawyer’s independence is threatened when a third party has an economic incentive “to intervene in the attorney-client relationship” and the lawyer has “an economic incentive . . . to allow such intervention.”<sup>153</sup> This incentive does not exist in daily deal arrangements. The sole interaction between the lawyer and daily deal provider is the creation of the advertisement and the disbursement of proceeds from “the daily deal [provider] to the lawyer.”<sup>154</sup> The daily deal provider has no “control over the services . . . rendered by the [lawyer]”<sup>155</sup> and no control over “the legal representation of [the daily deal] purchaser[.]”<sup>156</sup>

148. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-423 (2001).

149. *Id.*

150. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-374 (1993).

151. The ABA Committee on Ethics and Professional Responsibility (“ABA Committee”) has utilized this exact reasoning several times: (1) permitting the sharing of court awarded fees with a nonprofit organization that helped sponsor the litigation, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-374 (1993); (2) authorizing a lawyer’s participation in a for-profit prepaid legal service plan, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-355 (1987); (3) authorizing law firms to pay fees to agencies that provide temporary lawyers lawyers in proportion to the compensation received by the temporary lawyer. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988).

152. See Stephanie Francis Ward, *Coupon, You're On: 3 Opinions Say Lawyers May Participate in Daily-Deal Websites*, ABA J. (May 1, 2012, 2:39 AM), [http://www.abajournal.com/magazine/article/coupon\\_youre\\_on\\_3\\_opinions\\_say\\_lawyers\\_may\\_participate\\_in\\_daily-deal\\_web/](http://www.abajournal.com/magazine/article/coupon_youre_on_3_opinions_say_lawyers_may_participate_in_daily-deal_web/) (“If you had a literal reading of the rule, you might think daily-deal sites are a division of fees. But if you look at the purpose of the rule prohibiting fee sharing, you come to the conclusion [that] this is not problematic,” says Will Hornsby Jr., staff counsel for the ABA Standing Committee on Delivery of Legal Services and an authority on ethics rules . . . .”); see also Maryland Opinion, *supra* note 15 (finding that use of daily-deal websites does not affect the duties of an attorney); Nebraska Opinion, *supra* note 16; North Carolina Opinion, *supra* note 18 (same); South Carolina Opinion, *supra* note 19 (same).

153. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-374.

154. North Carolina Opinion, *supra* note 18 (internal quotation marks omitted).

155. South Carolina Opinion, *supra* note 19.

156. North Carolina Opinion, *supra* note 18; see Maryland Opinion, *supra* note 15 (“[T]he daily deal website is not directing, regulating, or interfering with the lawyer’s professional judgment in rendering legal services to another.”). Even states that deemed daily deals unethical seemingly agree with this conclusion; their opinions did not include any allegations that daily deals interfere with a lawyer’s professional independence. See Alabama Opinion, *supra*

At most, a lawyer might consider the cost of daily deal advertising when determining the fee charged to clients. By itself, this is not an impermissible consideration. The Rules permit lawyers to include “[a]ny reasonable calculation of direct costs as well as any reasonable allocation of related overhead [costs]” in their client fees.<sup>157</sup> Additionally, a lawyer’s consideration of the cost of daily deal advertising is significantly limited by Rule 1.5(a), which requires that the total fee charged be reasonable.<sup>158</sup> So long as the fee charged is reasonable, there is nothing in the daily deal arrangement to suggest that it impugns a lawyer’s autonomous judgment.

Moreover, the daily deal advertising charge is limited to a percent of the initial fee advertised in the daily deal—the daily deal provider does not retain a set percentage of the total fee revenue generated by the attorney-client relationship. A significant limitation in daily deal advertising is that lawyers cannot immediately and fully understand their clients’ needs prior to the clients’ purchase of the daily deal. As a result, clients’ actual needs may expand the scope of representation and increase lawyers’ fee income. Daily deal providers have no access to this revenue—their charges are limited to the upfront recovery of their advertising fees.

Daily deals simply streamline the advertising and billing process without threatening a lawyer’s independence. Consequently, a lawyer’s use of daily deal advertisements does not violate Rule 5.4.

#### B. DAILY DEALS ARE ALLOWED BY RULE 7.2

After concluding that the daily deal billing process does not violate Rule 5.4, the next question is whether the Rules permit lawyers to use the daily deal method of advertising. Rule 7.2 gives lawyers permission to advertise their services and identifies the “Internet, and other forms of electronic advertising” as permissible marketing methods.<sup>159</sup> The Rules authorize legal advertising as a way of assisting the public, “particularly persons of low and moderate income,”<sup>160</sup> “in learning about and obtaining legal services.”<sup>161</sup> Daily deals are particularly well suited for accomplishing this objective.

Daily deals allow lawyers to apply price discrimination in their practices and thereby offer services at reduced prices.<sup>162</sup> As a result, some people may

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note 20; Indiana Opinion, *supra* note 22; Pennsylvania Opinion, *supra* note 23; Hollister, *supra* note 46.

157. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-379 (1993).

158. MODEL RULES OF PROF’L CONDUCT Rule 1.5(a) (2012); *see also* ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 00-420 (2000) (“[T]he Committee stated that lawyers should disclose to their clients the basis for the fee and any other charges to the client.”).

159. MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 3.

160. *Id.*

161. *Id.* R. 7.2 cmt. 1.

162. Nobel, *supra* note 41.



gain access to legal services that they would not have otherwise utilized.<sup>163</sup> The ability of daily deal arrangements to improve public access “ought to prevail over considerations of tradition[al]” notions against such advertising.<sup>164</sup> Further, Comment 3 to Rule 7.2 explicitly warns bar associations against proscribing legal advertising because that “assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.”<sup>165</sup> Preventing lawyers from using daily deals, a highly effective means of advertising,<sup>166</sup> would seemingly subvert Rule 7.2’s justification for allowing advertising as a means of expanding public access to, and knowledge of, legal services.<sup>167</sup>

Rule 7.2 does, however, present two significant hurdles to daily deal advertising. First, the Rule forbids lawyers from “giv[ing] anything of value to a person for recommending the lawyer’s services.”<sup>168</sup> Second, the exception to this general prohibition provides that lawyers may pay only the *reasonable* costs of advertising.<sup>169</sup> The following subparts address these concerns in turn. Subpart 1 explains why daily deals are not impermissible referrals. Subpart 2 examines the cost of daily deal advertising and concludes that the cost is reasonable.

### 1. Daily Deals Are Not Improper Referrals

Rule 7.2 does not outlaw daily deals as an impermissible referral service. Previous versions of Rule 7.2 stated in Comment 5 that “[l]awyers are not permitted to pay others for channeling professional work.”<sup>170</sup> Although Comment 5 explained that lawyers may still “pay for advertising,”<sup>171</sup> some states were concerned that daily deals violated Rule 7.2 because they

163. See Jim Rossi & Mollie Weighner, Note, *An Empirical Examination of the Iowa Bar’s Approach to Regulating Lawyer Advertising*, 77 IOWA L. REV. 179, 226 (1991) (“[A]dvertising should . . . cause more individuals to obtain lawyers at lower fees.”). For instance, many of the clients who bought attorney Craig Redler’s Groupon had intended to obtain a lawyer for “months or years, and the [daily deal] spurred them to finally take action.” Bruce, *supra* note 7.

164. MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 1.

165. *Id.* R. 7.2 cmt. 3.

166. ABA HOUSE OF DELEGATES, 2012 ANNUAL MEETING CHI., ILL., EXECUTIVE SUMMARIES, *supra* note 52, at 105B cmt. 3 (“Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public. . . .”); MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 3 (same); Cohen, *supra* note 34 (explaining that daily deals provide a “risk-free alternative to traditional marketing”).

167. MODEL RULES OF PROF’L CONDUCT R. 7.2 cmts. 1, 3.

168. *Id.* R. 7.2(b).

169. *Id.*

170. *Id.* R. 7.2 cmt. 5.

171. *Id.*

“channeled professional work.”<sup>172</sup> The newly updated Rules resolve this concern.<sup>173</sup>

The American Bar Association’s House of Delegates restructured Comment 5 by eliminating “channeling professional work” and inserting language that explains that Rule 7.2 forbids lawyers from paying others to recommend their work.<sup>174</sup> Lawyers may, however, use “Internet-based advertisements” and “pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer.”<sup>175</sup> Lawyers may also compensate “agents and vendors who are engaged to provide marketing or client development services.”<sup>176</sup> Consequently, daily deals, as a marketing and client development service, are permitted so long as they do not create the “reasonable impression that [the website] is recommending the lawyer.”<sup>177</sup> Lawyers can avoid such impressions by carefully composing their daily deal advertisements and complying with Rule 7.3(c), which requires the words “Advertising Material” to be clearly marked on all legal advertisements.<sup>178</sup>

## 2. Daily Deals Comply with Rule 7.2(b)(1)

Daily deals comply with Rule 7.2(b)(1)’s provision that lawyers pay only the reasonable costs of advertising. As a preliminary matter, the reasonable limitation is not applicable to daily deals because its purpose is to prevent lawyers from using sham referral services and daily deals are not referral services. Even if the reasonable limitation was pertinent, the cost of daily deals advertisements is reasonable because lawyers are merely paying the standard, market rate for a highly successful and popular service. A lawyer’s purchase of services at the market cost is not unreasonable.<sup>179</sup>

The three states that analyzed Rule 7.2(b)(1), Alabama, Arizona, and Indiana, concluded that the cost of daily deals was unreasonable because the advertising charge is set at a fixed percentage of revenue and is not tied to

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172. Both New York and Oregon expressed this concern. See New York Opinion, *supra* note 17; Hollister, *supra* note 46.

173. *Ethics 20/20*, *supra* note 47.

174. *Amended Model Rules 1.18, 7.3, 7.2, and 5.5*, *supra* note 53.

175. *Id.*

176. *Id.*

177. *Id.*

178. MODEL RULES OF PROF’L CONDUCT R. 7.3(c) (2012). For an example of a daily deal advertisement see Redler’s Groupon, *supra* note 6. In this daily deal, the lawyer explicitly warns prospective purchasers that “[t]he choice of a lawyer is an important decision and should not be based solely upon advertisements, so consider character [and] comportment.” *Id.* The daily deal also makes it clear that it is an advertisement and not a recommendation of the lawyer’s services. *Id.*

179. See Kilpatrick, *supra* note 60 (“It is unlikely that the drafters intended to prohibit a lawyer’s paying for . . . high quality [services], so those costs are likely to be considered ‘reasonable,’ even if expensive, if they are based on the market rate for such services.”).

the actual cost of advertising.<sup>180</sup> This analysis is fundamentally unsound. Indiana, Arizona, and Alabama misinterpreted the purpose of the “reasonable” limitation. Rule 7.2(b) generally provides that lawyers may not pay referral fees to others for recommending their work.<sup>181</sup> Subsection (1) modifies this general rule by stating that lawyers are still permitted to “pay the reasonable costs of advertisements.”<sup>182</sup> The “reasonable” limitation was not enacted to cap advertising costs;<sup>183</sup> instead, it exists to prevent “sham referral services.”<sup>184</sup> As daily deals are not referral services<sup>185</sup> this limitation is not appropriate.

Even if the reasonable limitation was applicable, the cost of daily deal advertisements is, in fact, reasonable. Daily deal advertising falls within the list of acceptable, and thus reasonable, advertising charges identified in Comment 5 of Rule 7.2.<sup>186</sup> Comment 5 provides that a lawyer may pay for Internet-based advertisements and “may compensate . . . agents and vendors . . . to provide marketing or client development services.”<sup>187</sup> Lawyers may also compensate “others for generating client leads, [including] Internet-based client leads.”<sup>188</sup> Daily deals fit these descriptions precisely—daily deals are Internet-based advertisements that generate and develop client leads. Accordingly, the fee charged by daily deals is a permissible advertising cost.

The question remains, however, whether it is reasonable for the cost of daily deals to be determined by a percentage of generated revenue. This advertising structure is reasonable. Daily deals initially provide free advertising for the lawyer; lawyers only remit payments for effective advertisements that actually generate new clients. There is no significant difference between the charges generated by this pay-for-performance<sup>189</sup> model and those generated by traditional advertising—advertisers price *all* advertisements based on their effectiveness.<sup>190</sup> Daily deal pay-for-

180. Alabama Opinion, *supra* note 20; Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22, at 24.

181. MODEL RULES OF PROF'L CONDUCT R. 7.2(b).

182. *Id.* R. 7.2(b)(1).

183. See Kilpatrick, *supra* note 60.

184. Kershen, *supra* note 59, at 168; see also *supra* note 59.

185. See *supra* Part IV.B.1.

186. See MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 5; ROTUNDA & DZIENKOWSKI, *supra* note 59, § 7.2-.3 (“Comment 5 lists the types of advertisements and other communications that lawyers may use through the payment of the fee.”).

187. *Amended Model Rules 1.18, 7.3, 7.2, and 5.5, supra* note 53.

188. *Id.*

189. Daily deals are a performance-based advertising model because lawyers only remit payments for successful advertisements. See Cohen, *supra* note 34.

190. See RODNEY A. SMOLLA, 1 LAW OF LAWYER ADVERTISING § 7:24.50 (2012) (“[A]ll advertising pricing is, in theory, grounded in how effective the advertising is.” (emphasis omitted)); see also South Carolina Bar, Ethics Advisory Op. 01-03 (2003), available at [http://ww2.scbbar.org/member\\_](http://ww2.scbbar.org/member_)

performance advertising is “simply better at measuring that effectiveness with precision”; accordingly, it more accurately “reflect[s] the true ‘reasonable cost’ of advertising.”<sup>191</sup> State bar associations should not disallow daily deals simply because their advertising costs are more accurate.<sup>192</sup> Since the traditional model for charging for advertising is reasonable, then the more precise daily deal pay-for-performance model is also a reasonable cost of advertising.

Additionally, the Alabama, Arizona, and Indiana ethical opinions that considered the 50% market rate advertising charge unreasonable, seemingly analyzed the wrong side of the cost equation. Indiana, Arizona, and Alabama deemed the percent charged unreasonable because they assumed, *without a factual basis*, that it exceeded the reasonable costs incurred by daily deal websites in creating and executing the advertisements.<sup>193</sup> This conclusion is flawed for three reasons. First, these states presented no facts to support their conclusion. Second, as discussed above, the daily deal pay-for-performance cost model is actually very accurate at reflecting true advertising costs.<sup>194</sup> Third, the analysis performed by Alabama, Arizona, and Indiana is one that is fundamentally different from the analysis required by the Rules. The Rules do not forbid lawyers from using expensive, high quality advertising services whose fees are not closely tied to the services’ costs.<sup>195</sup> Such a requirement would compel lawyers to investigate their advertisers’ business practices to ensure that the advertisers’ fees are closely linked to their actual costs. Instead, Rule 7.2(b)(1) examines the cost of advertising from the lawyers’—the advertising purchasers—side of the equation. The true question is whether the cost of daily deal advertisements is a reasonable expense for lawyers to incur in generating revenue. The answer to this question is clearly yes. Lawyers are merely purchasing daily deal advertisements at market cost and procuring these services at market cost is not unreasonable.

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resources/ethics\_advisory\_opinions/&id=555 (“Television stations and newspapers vary their advertising fees based on the effectiveness of its advertising. It is common for the charge for such ads to be based in part on the size of the viewing audience or the circulation of the newspaper.”).

191. SMOLLA, *supra* note 190, § 7:24.50 (emphasis omitted).

192. See South Carolina Bar, Ethics Advisory Op. 01-03, *supra* note 191 (“The fact that the technology available to an Internet service allows for a more precise measurement of its effectiveness, does not, in and of itself, make the method of payment impermissible.”).

193. See Alabama Opinion, *supra* note 20; Arizona Opinion, *supra* note 21; Indiana Opinion, *supra* note 22, at 23–24.

194. The Arizona ethics committee at least admits this fact in part by stating that “no specific voucher or coupon proposal has been presented for review.” Arizona Opinion, *supra* note 21.

195. In fact, many market prices are not closely related to cost. For example, real estate agents receive a commission of 6% of the sale price even though it is marginally more expensive to sell a \$1,000,000 house than a \$200,000 house. Moshe Pollock, *How Do Real Estate Agents Get Paid?*, REALTOR.COM, <http://www.realtor.com/home-finance/homebuyer-information/how-do-real-estate-agents-get-paid.aspx> (last visited Jan. 21, 2014).

The fact that daily deal providers charge the market rate for their advertising is conclusive on the reasonableness inquiry. The free market supports a daily deal advertising cost across all industries of roughly 50% of the revenue generated from successful daily deals.<sup>196</sup> Lawyers paying the market price for advertising is, by definition, a reasonable result. According to the Oxford English Dictionary, reasonable means “within the limits of what . . . would be rational or sensible to expect; . . . appropriate for the circumstances; not extravagant or excessive; . . . fair . . . .”<sup>197</sup> It is rational, sensible, appropriate in the circumstances, and fair for lawyers to be charged the market rate for advertising. The charge is not excessive or extravagant, as freestanding market forces determine the advertising charge. Extravagant implies something above and beyond normal—this is not the case with daily deals as lawyers are simply charged the normal market rate.

A seemingly persuasive, although ultimately unconvincing, response to the foregoing analysis may be the following hypothetical. Suppose that Lawyer *X* and Lawyer *Y* advertise the same exact service on Groupon for \$100 and \$1000, respectively. Their cost of advertising would be \$50 per purchased Groupon for Lawyer *X* and \$500 per purchased Groupon for Lawyer *Y*. This result appears unreasonable—Lawyer *Y* is paying 10 times the cost for the same Groupon advertisement. This conclusion, however, is unsound for two reasons. First, both lawyers incur the same exact cost in generating new revenue—50% charge per revenues generated. It is not unreasonable for daily deal advertising costs to affect both lawyers equally.

Second, if the lawyers are successfully charging vastly different fees for the same service then there *must* be a significant difference in the quality of services between Lawyer *X* and *Y*—the services are not market substitutes. The difference in price would arise because the lawyers are not competing against each other—they are offering different quality services to different clientele who purchase services at different price points. Therefore, the lawyers are operating in completely different markets and the daily deals must be tailored to attract the varying interests of clients in those markets. Accordingly, it is completely appropriate for the cost of advertising to be different between Lawyer *X* and *Y*.

Even assuming *arguendo* that the lawyers are actually selling the *exact same service* to the same market, the daily deal advertising charge is still reasonable. The law of supply and demand will mandate that Lawyer *X*, with a lower priced service, will capture the entire market and Lawyer *Y* will sell nothing. No one would pay \$1000 for the *exact same service* that is available for \$100. Thus, there is no inequity in advertising costs. A more likely scenario is that that Lawyer *Y* is an experienced attorney from a prestigious

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196. Dholakia, *supra* note 33, at 21. There is some variation in this percent depending on the negotiating power of the business. *Id.*

197. OXFORD ENGLISH DICTIONARY (3d ed. 2009).

law firm while Lawyer *X* is a recent graduate and solo practitioner. In this scenario, wealthier clientele may be more apt to purchase Lawyer *Y*'s experience and the high priced Groupon while less wealthy clientele, more concerned with cost, may be more likely to purchase Lawyer *X*'s Groupon. Again, this leads to the conclusion that Lawyer *X* and *Y* are actually operating in different market segments and it is entirely appropriate for Groupon to charge different fees for advertisements targeting different markets.

In summation, Rule 7.2(b) does not forbid lawyers from advertising via daily deals. The reasonable limitation of Rule 7.2(b) should not be applied to daily deals because they are not, as discussed in Subpart 1 above, sham referral services. Even if applied, the cost of daily deal advertisements is reasonable. Daily deal providers employ a pay-for-performance model that more accurately reflects the true cost of advertising since lawyers are charged only for successful advertisements that actually generate new clients. In addition, it is reasonable for lawyers to pay the cost of advertising services as determined by the free market.

### C. SOLUTIONS TO THE TRUST REQUIREMENTS OF RULE 1.15(C)

While the Rules permit daily deal advertising, the existing daily deal business model complicates a lawyer's compliance with Rule 1.15(c). This Rule demands that lawyers "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."<sup>198</sup> Daily deals confound a lawyer's observance of Rule 1.15(c) because the lawyer never actually possesses the entire pre-paid fee. Once a daily deal is purchased the provider immediately takes 50% of the resulting revenue as its advertising charge and disburses the remaining 50% to the lawyer.<sup>199</sup> At most, a lawyer will only be able to deposit 50% of a client's advance payment into a trust account—a result that violates Rule 1.15(c). To overcome this problem, this Note proposes two different solutions.

One option is for the lawyer to personally contribute to the client trust fund to ensure that it contains 100% of the pre-paid legal fees. The lawyer would contribute an amount equal to that retained by the daily deal company as the cost of advertising. At first blush, this arrangement appears to destroy the incentive to use daily deals in the first place. In actuality, this solution is not that restrictive; it affects a lawyer's business in the same way traditional advertising expenses do. Ordinarily, a lawyer directly receives 100% of pre-paid legal fees, places these funds into a client trust account,

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198. MODEL RULES OF PROF'L CONDUCT R. 1.15(c) (2012).

199. Alabama Opinion, *supra* note 20; Dholakia, *supra* note 33, at 21; *Groupon FAQs*, GROUPON WORKS, <https://www.grouponworks.com/merchant-resources/FAQs> (last visited Jan. 21, 2014) (select "How does Groupon make money?").

and then pays advertising expenses from a separate operating budget. The proposed solution merely rearranges these payments. The only difference is that the lawyer deposits the advertising expense payment into the client trust account instead of sending it to a marketing company.

Another option is for lawyers to structure their contracts with daily deal providers in a manner that complies with Rule 1.15(c). For instance, daily deal providers themselves could create independent client trust accounts and disburse daily deal revenue directly into these trusts. Lawyers could withdraw funds from these accounts once earned or expenses are incurred. If legal daily deal advertising is a profitable endeavor, there might be enough of an incentive for daily deal providers to create client trust accounts so lawyers may ethically use their advertising services.

Although it may require a bit of ingenuity, the solutions detailed above demonstrate that lawyers may comply with Rule 1.15 when advertising through daily deals.

#### *D. ADDITIONAL RULES LAWYERS SHOULD CONSIDER WHEN ADVERTISING THROUGH DAILY DEALS*

The clearing of the hurdles imposed by Rules 5.4, 7.2, and 1.15 does not mean, however, that lawyers are free to use daily deals in any way imaginable. A lawyer's use of daily deals is still subject to the regulations and limitations the Rules impose on all forms of advertising.<sup>200</sup> There are, however, two situations unique to daily deal advertisements that lawyers should be aware of. Subpart 1 addresses the dangers lawyers face if their advertisements are overwhelmingly successful. Subpart 2 explores a lawyer's obligations should clients fail to redeem purchased daily deal services.

##### 1. Steps to Prevent the Evils of Too Much Success

The success that may come with daily deals is not always a good thing. Sometimes daily deals can be so successful that they overwhelm the business.<sup>201</sup> For example, a bakery's 2010 daily deal was so successful that the store received over 72,000 orders—an influx of business for which the bakery was wholly unprepared.<sup>202</sup> Lawyers that advertise via daily deals could face similar risks.

200. Although not discussed here because it does not effect the overall determination of whether lawyers may ethically use daily deals, lawyers should especially make note of Rules 1.7, 1.9, and 1.18 dealing with conflicts of interest and duties to former and prospective clients. MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.9, 1.18.

201. E.g., Dan Merica, *Some Small Businesses Overwhelmed by Daily Deal Rush*, CNN TECH (Aug. 2, 2011, 2:02 PM), [www.cnn.com/2011/TECH/web/08/02/living.social.business.merica/index.html?\\_spm:Tech](http://www.cnn.com/2011/TECH/web/08/02/living.social.business.merica/index.html?_spm:Tech) (“[S]ome merchants feel overwhelmed by the rush for discounts and are questioning whether the bottom-line boost is worth the logistics headache.”).

202. Joseph Galante, *Groupon Coupons Bombard Businesses*, BLOOMBERG BUSINESSWEEK (June 21, 2010, 1:45 PM), [http://www.nbcnews.com/id/37693590/ns/business-us\\_business/t/groupon-coupons-bombard-business#Ukd6GYakprB](http://www.nbcnews.com/id/37693590/ns/business-us_business/t/groupon-coupons-bombard-business#Ukd6GYakprB).

According to the terms of the daily deal arrangement<sup>203</sup> and state contract law,<sup>204</sup> lawyers would be bound to honor all daily deal purchases. This would seriously jeopardize the lawyer's ability to competently represent each client "in violation[] of Rules 1.1 [Competence], 1.3 [Diligence], and 1.4 [Communication]."<sup>205</sup> Although a legitimate concern, daily deal websites offer a mechanism for preventing such deleterious results. Lawyers may set a limit on the number of available daily deals<sup>206</sup> to ensure that the advertisement does not bring in so many new clients as to risk violating Rules 1.1 (Competence), 1.3 (Diligence), or 1.4 (Communications).<sup>207</sup>

## 2. What Happens When Daily Deals Go Unused?

Limiting the number of daily deals available for purchase does not resolve all ethics related issues. Several Rules of Professional Conduct come into play when daily deals go unused. If the lawyer terminates the engagement because of a conflict of interest,<sup>208</sup> Rule 1.16(d) states that the lawyer must refund any portion of the fee "that has not been earned."<sup>209</sup> If the purchaser fails to redeem the deal,<sup>210</sup> the lawyer must still refund the entire fee because Rule 1.5(a) states that a lawyer may not collect

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203. See Courtney Rubin, *Groupon Requires Companies to Honor Gift Certificates for Five Years*, INC., <http://www.inc.com/news/articles/2010/04/groupon-settles-lawsuit.html> (last updated Apr. 20, 2010) ("[T]he merchant, must honor any coupon for the period of time required . . .").

204. In addition to basic contract principles, several states—including Alabama, Arizona, Connecticut, Florida, Mississippi, Nevada, Pennsylvania, South Carolina, and South Dakota—have actually modified Rule 7.2 such that it requires lawyers to honor fees advertised in coupons. See CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 7.2 ADVERTISING (2011), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/7\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/7_2.authcheckdam.pdf); see also Alabama Opinion, *supra* note 20. Also, a lawyer's refusal to honor daily deals may violate Rule 7.1's prohibition on false or misleading communication. See MODEL RULES OF PROF'L CONDUCT R. 7.1.

205. Alabama Opinion, *supra* note 20. The Alabama Bar Association explicitly noted this concern because Alabama's Rule 7.2 includes a requirement that lawyers honor all advertised fees. *Id.*

206. See Donnelly, *supra* note 41 (explaining that it may be beneficial for small businesses to limit the number of daily deals); 4 *Tips for Using Groupon Coupons*, INC., <http://www.inc.com/magazine/20100401/4-tips-for-using-groupon-coupons.html> (last updated Apr. 1, 2010) ("Your [daily deal] offer may lead to more customers than you can handle. When working with [daily deals], be sure to specify the maximum number of coupons you want to sell.").

207. Besides limiting the quantity of deals, a lawyer may limit the scope of the deal to services that are within the lawyer's competence as required by Rule 1.1. See MODEL RULES OF PROF'L CONDUCT R. 1.1.

208. See *id.* R. 1.7, 1.9, 1.16 (defining situations where a lawyer must or may terminate a client relationship due to a conflict of interest).

209. *Id.* R. 1.16(d).

210. Approximately 20% of daily deals go unused. Idalmy Carrera, *Aftermarket Groupon Sites Eat into Revenues*, N.Y. TIMES (Sept. 15, 2011), [http://www.nytimes.com/2011/09/16/us/aftermarket-groupon-sites-eat-into-revenues.html?\\_r=0](http://www.nytimes.com/2011/09/16/us/aftermarket-groupon-sites-eat-into-revenues.html?_r=0).



unreasonable fees.<sup>211</sup> Consequently, lawyers must return all unearned or unused fees to the daily deal purchaser—including the portion of the fee retained by the daily deal provider as an advertising charge.

If the lawyer actively terminates the attorney–client relationship, as opposed to a purchaser’s failure to redeem the daily deal, the attorney may only be required to refund the portion of the fee (generally 50%) that the lawyer actually receives from the daily deal advertisement. The daily deal provider would be responsible for returning the remaining portion of the fee because the lawyer refused to accept the daily deal and, according to the daily deal terms of use policy, this refusal entitles the purchaser to a refund from the daily deal provider.<sup>212</sup> Lawyers should be aware, however, that in all other scenarios they are responsible for returning the entire unused fee to the client.

## V. CONCLUSION

The Internet has significantly modified the manner in which lawyers attract and communicate with clients. The development of innovative, Internet-specific advertising models has immense potential for enabling lawyers to effectively attract and maintain clients in challenging economic times. Daily deals not only benefit lawyers by attracting clients, but also increase public access to legal services through price discrimination.

As new forms of advertising emerge, the Model Rules of Professional Conduct will be implicated. In this case, daily deal advertising is consistent with the Model Rules. Daily deals do not violate Rule 5.4 because the advertisements do not threaten the professional independence of the lawyer. The advertising fees charged by daily deal providers are reasonable and thus constitute authorized expenditures under Rule 7.2. Additionally, lawyers may structure independent client trust accounts on their own or through daily deal providers in a manner that complies with Rule 1.15. While daily deal arrangements do present some concerns, they are no different than those raised by traditional advertising. The daily deal model is flexible and allows lawyers to ensure compliance with all of the Model Rules of Professional Conduct.

For these reasons, the Model Rules of Professional Conduct permit lawyers to advertise their services through daily deals. As the Internet changes the advertising landscape, the Rules must adjust; tradition should not stand in the way of innovative concepts that may help lawyers survive and thrive in today’s difficult economic times.

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211. MODEL RULES OF PROF’L CONDUCT R. 1.5(a); *see id.* R. 1.5 cmt. 4 (“A lawyer may require advance payment of a fee, but is obliged to return any unearned portion.”).

212. *See The Groupon Promise*, GROUPON, <http://www.groupon.com/groupon-promise> (last visited Jan. 21, 2014) (“[W]e will always honor your refund requests if a business closes permanently, an event is canceled or rescheduled, or a business refuses to accept your unredeemed Groupon voucher.”).