

June 2013

## Ethics, Groupon's Deal-of-the-Day, and the 'McLawyer'

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### Recommended Citation

Krista Umanos, *Ethics, Groupon's Deal-of-the-Day, and the 'McLawyer'*, 81 U. Cin. L. Rev. (2013)  
Available at: <https://scholarship.law.uc.edu/uclr/vol81/iss3/12>

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## ETHICS, Groupon's DEAL-OF-THE-DAY, AND THE 'MCLAWYER'

Krista Umanos\*

### I. INTRODUCTION

Perhaps the most common complaint made of lawyers is that they charge too much and over-bill clients for little work actually performed.<sup>1</sup> However, a new phenomenon in internet advertising, if it takes hold in the legal profession, may alter the public's perception of lawyers, for better or for worse.

From movie tickets to dinner dates, cooking classes, massages, hotel visits, and dental cleanings, the "deal-of-the-day" phenomenon has become a major player in online advertising and discount sales, with Groupon.com (Groupon) being the largest with over 83 million subscribers as of June 2011.<sup>2</sup> Web sites like Groupon and the rival LivingSocial.com post a new item or service at a deep discount each day.<sup>3</sup> The deal is usually limited in quantity or only available for purchase for a limited time. The web sites serve dual purposes: the deals can increase revenue for businesses while simultaneously providing consumers with affordable goods and services. Groupon has proved highly popular and profitable. According to Groupon's SEC filing in the second quarter of 2011, the company earned \$644.7 million in revenue in the first quarter of 2011 alone.<sup>4</sup> The company also cited having over 7,000 employees, having made sales in 43 countries, and having sold over 70 million "Groupons" up to that date.<sup>5</sup>

Groupon grew out of a website called "The Point," which was launched in 2007 to allow a user to start a fundraising campaign or to encourage others to take some action, but only after a critical mass, or a "tipping point" of people agreed to participate.<sup>6</sup> Groupon, following the model created by "The Point," seeks to harness the power of a large

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\* Associate Member, 2011–12 *University of Cincinnati Law Review*. I would like to thank my family and friends for their support and encouragement. In particular, thanks to my husband Ben for putting up with me, and to my parents for feeding me.

1. See Sonia S. Chan, *ABA Formal Opinion 93-379: Double Billing, Padding and Other Forms of Overbilling*, 9 GEO. J. LEGAL ETHICS 611, 612 (1996) ("The most common source of client discontent is fee disputes. A majority of people today think that lawyers overcharge . . . . All these unethical [billing] practices harm the legal profession by causing negative public opinion of the profession.").

2. See Bill Saporito, *Groupon's "Sellout" CEO Files for \$750 Million IPO*, TIME BUS. (June 2, 2011), <http://business.time.com/2011/06/02/groupons-sellout-ceo-files-for-750-million-ipo/>.

3. See GROUPON, <http://www.groupon.com/about> (last visited Nov. 6, 2012).

4. Saporito, *supra* note 2.

5. *Id.*

6. GROUPON, *supra* note 3.

group by delaying action until enough people come together to participate to have a large impact.<sup>7</sup> The group can accomplish what an individual or a few people cannot do alone.<sup>8</sup> In the case of Groupon, once a tipping point of people buy the featured service or good, the “deal is on.”<sup>9</sup> Groupon claims that it was borne out of a desire to provide city-dwellers with entertainment options outside of the familiar restaurant, and to battle the mundane, ensuring that people do not miss out on all that cities have to offer.<sup>10</sup> By utilizing a large group’s purchasing power, Groupon is able to offer these ordinary services and products at affordable prices, with the average Groupon offering a 56% discount.<sup>11</sup>

Though these discount Web sites have primarily been used for restaurant certificates, spa services, and other “luxury” consumer items, one attorney recently offered discount legal services on Groupon.com.<sup>12</sup> On August 8, 2010, residents of St. Louis, Missouri could purchase a will and durable power of attorney for \$99 from the Law Offices of Craig S. Redler & Associates, LLC.<sup>13</sup> More than forty vouchers were purchased for these legal services, which were actually valued at \$750, giving customers a discount of \$651.<sup>14</sup>

While other lawyers have been hesitant to experiment with Groupon, Mr. Redler’s utilization of the site has caused a buzz in the legal world.<sup>15</sup> Many states have pre-emptively issued ethics opinions, creating a state split as to whether advertising on deal-of-the-day sites is a violation of the rules of ethics which govern practicing attorneys. The primary rules at issue are those dealing with splitting fees with non-attorneys, conflicts of interest, referral fees, and trust accounts.<sup>16</sup> Others have also claimed that advertising on Groupon is not economically wise

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Ryan Spoon, *10 Fun Groupon Statistics, from Geography to Sushi to NBA*, BUS. INSIDER (Mar. 20, 2011), [http://articles.businessinsider.com/2011-03-20/tech/30087787\\_1\\_geography-sushi-promotion](http://articles.businessinsider.com/2011-03-20/tech/30087787_1_geography-sushi-promotion).

12. *Law Offices of Craig S. Redler & Associates, LLC—Olivette*, Groupon, <http://www.groupon.com/stlouis/deals/law-offices-of-craig-s-redler-associates> (last visited Nov. 6, 2012).

13. *Id.*

14. *Id.*

15. See, e.g., 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/> (stating that Mr. Redler received over 150 e-mails and phone calls from lawyers all over the country asking him whether or not the Groupon was successful).

16. See, e.g., N.Y. STATE BAR ASS’N COMM. ON PROF’L ETHICS, Op. 897 (Dec. 13, 2011), available at [http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions825present/EO\\_897.pdf](http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions825present/EO_897.pdf).

for lawyers and that the practice “cheapens” legal services, creating a culture of discounted “McLawyers.”<sup>17</sup>

Part II of this Comment examines case law relevant to attorney speech and advertisement in the public square. Part III explains the jurisdictional split that has come about after state bar associations have issued differing ethics opinions. Part IV offers an in-depth look at the specific rules of ethics in question as well as policy issues raised by those opposed to a lawyer's use of Groupon. Part V discusses each objection to the use of Groupon and argues that these criticisms are without merit. This Comment concludes that the use of Groupon is not prohibited under the Model Rules of Professional Conduct, nor does its use run contrary to public policy. In fact, it may be good for public policy to allow an attorney to use Groupon as an advertising forum.

## II. ATTORNEYS AND ADVERTISING: BACKGROUND & CASES

Until 1977, attorneys in the United States were prohibited from advertising their services.<sup>18</sup> To that date, the American Bar Association and state bar associations embraced traditional notions of the practice of law and looked upon advertising with disdain, fearing that it would lead to the commercialization of the legal profession.<sup>19</sup> The American Bar Association believed that it needed to institute strict codes banning advertising, or else the country would be befallen with “shyster[s], the barratrously inclined, and the ambulance chaser[s].”<sup>20</sup> However, such codes would not last.

In the monumental case of *Bates v. State Bar of Arizona*, the United States Supreme Court held that lawyer advertisements are a form of First Amendment protected commercial speech “which serves individual and societal interests in assuring informed and reliable decision making.”<sup>21</sup> The Court found that the public has an interest in the free flow of commercial speech and advertising, as it serves to inform the public of the availability, nature, and prices of products and services, “and thus performs an indispensable role in the allocation of resources in a free enterprise system.”<sup>22</sup> The Court found the “postulated connection between advertising and the erosion of true professionalism

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17. Stacy Zaretsky, *Ethics vs. Professionalism: Is Groupon Feasible for Lawyers?*, LAWYERIST.COM (Feb. 18, 2011), <http://lawyerist.com/ethics-vs-professionalism-is-groupon-feasible-for-lawyers/>.

18. Linda Sorenson Ewald, *Content Regulation of Lawyer Advertising: An Era of Change*, 3 GEO. J. LEGAL ETHICS 429, 429 (1990).

19. *Id.* at 430.

20. *Id.* at 431.

21. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 350 (1977).

22. *Id.* at 364.

to be severely strained” and rejected the idea that excess advertising would lead to the commercialization of the legal profession.<sup>23</sup> This argument would require the presumption that lawyers must conceal from themselves and their clients that they earn their livelihood by practicing law.<sup>24</sup> Requiring lawyers to conceal from their clients that they do in fact earn their livelihood at the bar would be an unrealistic expectation, and clients typically expect to pay for the lawyer’s services.<sup>25</sup> Moreover, many other professionals like bankers and engineers advertise, yet those professions are not regarded as undignified.<sup>26</sup> Furthermore, some may consider lawyers’ lack of advertising as a failure to reach out to the community.<sup>27</sup> The Court cited studies which reveal that many persons do not obtain counsel even though they may feel they need it because of the feared price of legal services or the inability to locate a competent attorney.<sup>28</sup>

The Court also dismissed the argument that attorney advertising is inherently misleading.<sup>29</sup> While certain complex legal services are indeed unique and difficult to advertise, only routine services like an uncontested divorce, a simple adoption, uncontested personal bankruptcy, change of name, or the like lend themselves to advertising.<sup>30</sup> Furthermore, although advertising does not provide the consumer with complete information on which to base the decision of selecting an attorney, the Court found it “peculiar” to deny the consumer the relevant information needed to make an informed decision simply because it is incomplete.<sup>31</sup>

The argument that attorney advertisements should be prohibited because the advertisements could stir up litigation did not persuade the Court.<sup>32</sup> While advertisements could cause an increase in the use of the judicial machinery, the Court found that it could be a benefit, rather than a harm.<sup>33</sup> The Court could not “accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action,” as the legal profession does not adequately reach or serve the middle 70% of the population.<sup>34</sup> Advertising can serve to inform a potential

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23. *Id.* at 368.

24. *Id.*

25. *Id.* at 368–69.

26. *Id.* at 369–70.

27. *Id.* at 370.

28. *Id.*

29. *Id.* at 372.

30. *Id.*

31. *Id.* at 374.

32. *Id.* at 376.

33. *Id.*

34. *Id.*

client of the potential terms of exchange, and restricting advertising has likely burdened access to legal services for the “not-quite-poor and the unknowledgable.”<sup>35</sup>

Furthermore, the Court rejected the argument that advertisements would lead to an increase in the price of legal services because of the additional overhead costs.<sup>36</sup> The Court found the opposite: that advertisements could lead to decreased prices for clients because of an increased incentive to price competitively.<sup>37</sup> Additionally, the Court found that restraints on advertising are an ineffective way to deter “shoddy work,” because an attorney who is inclined to cut quality work will do so regardless of advertising rules.<sup>38</sup> Similarly, wholesale restrictions on advertising should not stand even though it could be easier to enforce than other restrictions.<sup>39</sup> In short, with advertising, “most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system.”<sup>40</sup> The Court concluded that while there may be some attorneys who overreach through advertising, there will be thousands of others who will be candid, honest, and straightforward.<sup>41</sup>

While the Court held that blanket suppression on attorney advertisements ran afoul of the First Amendment, the Court refrained from holding that advertisements may not be regulated in any manner.<sup>42</sup> Advertising that is false, deceptive, or misleading may of course be regulated.<sup>43</sup> Because the general public lacks the sophistication to interpret the finer details of legal advertisements, attorney advertisements may be subject to special rules that do not apply in other industries, such as prohibitions on certain statements regarding the quality of legal services or restrictions on in-person solicitation.<sup>44</sup> Time, place, and manner restrictions may also be reasonable and warranted.<sup>45</sup> While the holding of this case is limited to a state's ability to prohibit lawyers from running advertisements in newspapers and other media which existed in 1977, the principles it sets forth inform discussion regarding novel issues of electronic attorney advertisements.<sup>46</sup>

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35. *Id.* at 376–77.

36. *Id.*

37. *Id.* at 377.

38. *Id.* at 378.

39. *Id.* at 379.

40. *Id.*

41. *Id.*

42. *Id.* at 383.

43. *Id.*

44. *Id.* at 383–84.

45. *Id.* at 384.

46. *Id.* at 366 (discussing the narrowness of the issue before the Court).

Subsequent to *Bates*, the Supreme Court has repeatedly acknowledged the danger of attorney advertisements,<sup>47</sup> but has upheld advertisements as a proper exercise of First Amendment rights.<sup>48</sup> In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court established a four-part analysis to be used when judging commercial speech and commercial speech restrictions.<sup>49</sup> First, one must determine whether the speech falls under the protection of the First Amendment.<sup>50</sup> Commercial speech falls under First Amendment protection if it concerns lawful activity and is not misleading.<sup>51</sup> Next, one must ask whether the governmental interest asserted is substantial.<sup>52</sup> If the government's interest is substantial and the speech falls within the First Amendment's protection, then one must determine whether the regulation directly advances the asserted governmental interest, and whether or not it is "more extensive than is necessary to serve that interest."<sup>53</sup>

Applying the four-part test of *Central Hudson*, the Court in *In re R.M.J.* sided with a Missouri attorney who placed advertisements in local newspapers and telephone books and mailed communication cards to selected addresses.<sup>54</sup> The advertisements listed information such as the lawyer's areas of practice and courts to which he was admitted to practice.<sup>55</sup> This information was not explicitly allowed by Missouri rules governing advertisements,<sup>56</sup> and the lawyer was charged with misconduct and privately reprimanded.<sup>57</sup> The Court held that the Missouri rules which led to the attorney's discipline were

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47. E.g., *In re R.M.J.*, 455 U.S. 191, 202 (1982) (recognizing that "[t]he public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling").

48. *Id.* at 207 (upholding a Missouri attorney's advertisements on First Amendment grounds).

49. 447 U.S. 557, 566 (1980).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. See generally *In re R.M.J.*, 455 U.S. 191 (1982).

55. *Id.* at 197.

56. *Id.* at 194-95 (explaining that the Missouri rule allowed a lawyer to publish in newspapers, periodicals, and the yellow pages ten categories of information: "name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified 'routine' legal services." The lawyer could also list one of three general descriptive terms specified in the Rule—"General Civil Practice," "General Criminal Practice," or "General Civil and Criminal Practice." Alternatively, the lawyer could advertise one or more of a list of twenty-three areas of practice, including, for example, "Tort Law," "Family Law," and "Probate and Trust Law." The lawyer could not list both a general term and specific subheadings, nor could one deviate from the precise wording stated in the Rule).

57. *Id.* at 198.

unconstitutional.<sup>58</sup> While a state retains the authority to regulate attorney advertising which is misleading or tends to be misleading in practice, and even retains some authority when the speech is not misleading, the state must establish restrictions with care and in a manner no more extensive than is reasonably necessary to further substantial governmental interests.<sup>59</sup> Otherwise, the state incurs the risk of running afoul of the First and Fourteenth Amendments.<sup>60</sup> Because the attorney accurately represented the areas of law in which he practiced and merely provided recipients with jurisdictional information, the speech was not misleading.<sup>61</sup> Nor could the state prove that it was directly furthering a substantial interest by restricting the speech, or that other less restrictive means were not available.<sup>62</sup>

The Court has also used the *Central Hudson* test to uphold restrictions on commercial speech. For example, in *Florida Bar v. Went For It, Inc.*, the Court upheld a state restriction requiring an attorney to wait 30 days after an accident or disaster to solicit victims or their relatives.<sup>63</sup> This narrowly-tailored rule directly furthered the state's substantial interest in protecting the privacy and tranquility of potential clients and prevented commercial intrusion upon their personal grief in times of trauma, and forestalled "the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered."<sup>64</sup>

### III. THE JURISDICTIONAL SPLIT

Regarding whether or not a lawyer's advertisement on Groupon is a violation of the rules of ethics, the states are split. While not all states have issued opinions, the states that have issued opinions diverge widely in their views.

#### A. States Opposed to a Lawyer's Use of Groupon for Advertising

Indiana has created an effective ban on an attorney's use of Groupon.<sup>65</sup> The Indiana State Bar Association has issued a formal

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58. *Id.* at 207.

59. *Id.*

60. *Id.*

61. *Id.* at 206–07.

62. *Id.*

63. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (recognizing that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society").

64. *Id.* at 631.

65. See IND. STATE BAR ASS'N LEGAL ETHICS COMM., GROUP COUPON MARKETING OP., Op.



ethics opinion finding that it is “likely not appropriate for a lawyer licensed in Indiana to advertise through a group coupon program.”<sup>66</sup> Indiana’s primary concerns were that a lawyer advertising on a group coupon site would violate the Rules of Professional Conduct by delegating the creation of the attorney–client relationship to a nonlawyer, by allowing someone other than the lawyer to hold the potential client’s property, by allowing a potential client to create a conflict of interest with a current client, and by sharing fees for channeling clients.<sup>67</sup> While the Indiana Committee did not explicitly strike down the use of a group coupon site, the Committee did advise lawyers “to conduct rigorous research before entering into such an advertising arrangement . . . [and] to employ competent private counsel to guide the lawyer through the dangers inherent in such marketing.”<sup>68</sup> Such strong advice creates an effective ban on lawyers’ use of Groupon in Indiana.

While the Oregon State Bar Association has yet to issue a formal ethics opinion on the Groupon issue, the Deputy General Counsel for the Oregon State Bar, Amber Hollister, discouraged the advertising innovation and urged lawyers to proceed with caution when using Groupon to advertise.<sup>69</sup> Noting concerns about Rule 7.2 and referral fees, Hollister found that deal-of-the-day Web sites could run afoul of the rules of ethics if a lawyer compensates 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.”<sup>70</sup> Hollister acknowledged potential problems with fee sharing if the website takes a commission from the actual services that the lawyer rendered.<sup>71</sup> She also noted that in Oregon, an attorney–client relationship could be formed “based on a client’s subjective intention to form an attorney–client relationship,” and that lawyers should be mindful of the expectations created in the minds of deal purchasers regarding the relationship.<sup>72</sup> While the internet beckons, lawyers should be sure that all communications about their services should be neither false nor misleading, that lawyers are not sharing fees with non-lawyers, and that lawyers are cognizant of whether or not they are forming an attorney–

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No. 1, JDH-1 (2012).

66. *Id.*

67. *Id.*

68. *Id.*

69. Amber Hollister, *What Hath the Web Wrought? Advertising in the Internet Age*, OR. STATE B. (May 2011), <http://www.osbar.org/publications/bulletin/11may/barcounsel.html>.

70. *Id.*

71. *Id.*

72. *Id.*

client relationship.<sup>73</sup> Thus, while Oregon has not banned the use of deal-of-the-day Web sites, in light of such strong words from the Deputy General, it would take a brave lawyer to try to advertise on Groupon in Oregon.<sup>74</sup>

*B. States Approving of a Lawyer's Use of Groupon for Advertising*

The North Carolina State Bar Association, after issuing a proposed ethics opinion deciding against the use of Groupon for attorney advertisements,<sup>75</sup> has issued a formal ethics opinion upholding the practice.<sup>76</sup> North Carolina found that advertising on Groupon does not violate the Rules of Professional Conduct primarily because there is no interaction between the website company and the lawyer regarding the legal representation of coupon purchasers, thereby preserving the independent professional judgment of lawyers.<sup>77</sup> However, North Carolina did acknowledge that there are "professional responsibilities that are impacted by this type of advertising," and advised lawyers to use caution.<sup>78</sup>

The New York State Bar Association issued an opinion finding that a lawyer's use of Groupon is a valid form of advertisement and is not contrary to the rules of ethics.<sup>79</sup> New York found that while Rule 7.2(a) prohibits a lawyer from making payments for referrals, an exception allows a lawyer to pay for advertising and communication as the rules permit.<sup>80</sup> In regards to the deal-of-the-day Web sites, New York noted that the Web sites have no contact with the coupon buyers other than to collect payment.<sup>81</sup> Nor does the website take any action to refer an individual to a particular lawyer.<sup>82</sup> The website merely carries a particular lawyer's advertising message to interested consumers and charges a fee for that service.<sup>83</sup> Assuming that the percentage of the sale that the website retains is reasonable, New York finds that the use of

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73. *Id.*

74. *Id.*

75. Debra Cassens Weiss, *Proposed NC Ethics Opinion Says Lawyers Can't Ethically Offer Groupon Deals*, ABA J. (Jan. 19, 2011), [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).

76. N.C. STATE BAR, 2011 FORMAL ETHICS OP. 10 (Oct. 21, 2011).

77. *Id.*

78. *Id.*

79. N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, Op. 897 (Dec. 13, 2011).

80. *Id.* at 2.

81. *Id.*

82. *Id.*

83. *Id.*

Groupon is not an unethical payment for referrals.<sup>84</sup> In response to the concern that the coupon could be an excessive fee, proscribed by Rule 1.5, because some purchasers may not, for various reasons, receive any of the legal services which they purchase, New York found that the coupon is not an excessive fee.<sup>85</sup> If the coupon buyer changes his mind, or if the lawyer determines that he cannot render the described services, the lawyer must give the buyer a full refund.<sup>86</sup> In other cases, the buyer might purchase the coupon and never seek the services from the lawyer, or the coupon may expire before the buyer has an opportunity to utilize it.<sup>87</sup> In those cases, the lawyer may properly keep the coupon payment as “an earned retainer for being available to perform the offered service within the given time frame.”<sup>88</sup> In either situation, according to New York, the fee is not excessive.<sup>89</sup>

However, New York did provide multiple caveats to lawyers looking to advertise on a deal-of-the-day website. The advertisements, like all others, may not be false, deceptive, or misleading, as required by Rule 7.1(a)(1).<sup>90</sup> The lawyer must provide a written statement of the scope of the services offered for a fixed fee, and must actually provide those services for the advertised fee.<sup>91</sup> The discount may not be illusory, but must represent an actual discount from an established fee for the named services.<sup>92</sup> The website must also include the words “Attorney Advertising.”<sup>93</sup> Cognizant of the concern that purchasing a coupon could prematurely form an attorney–client relationship, New York proposed that lawyers should explain on the website that before an attorney–client relationship is formed, the lawyer will check for conflicts of interest, and only then would the lawyer be able to render the services purchased.<sup>94</sup> If the lawyer finds that the attorney–client relationship is untenable for any reason, the lawyer must provide the purchaser with a full refund.<sup>95</sup> In sum, while the lawyer must walk a tight line, New York found that using a group coupon or deal-of-the-day website to advertise is not a violation of the ethics rules.<sup>96</sup>

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

Like New York, the South Carolina Bar Association found that the use of Groupon is not a violation of the ethics rules.<sup>97</sup> South Carolina stated that the percentage of the coupon payment collected by Groupon is not fee-splitting with a non-lawyer, as proscribed by Rule 5.4(a), but rather constitutes a reasonable payment for advertisements or communications.<sup>98</sup> South Carolina pointed to the purpose of the prohibition of splitting fees with non-lawyers, which is to preserve the independent professional judgment of the lawyer.<sup>99</sup> Sharing fees with a non-lawyer may be permitted when circumstances indicate that the lawyer's professional judgment is not encroached upon.<sup>100</sup> South Carolina noted that the Web sites do not have the ability to exercise control over the legal services rendered, and therefore there is no improper fee sharing.

South Carolina also stated that although using deal-of-the-day Web sites should not be prohibited, lawyers should still use caution and should comply with Rules 7.1 and 7.2, which require transparency and honesty in advertising.<sup>101</sup> The South Carolina Committee also spelled caution, urging compliance with Rule 1.5(b), which requires a lawyer to disclose the scope of representation and the basis of the attorney's fee within a reasonable time after the commencement of the attorney-client relationship.<sup>102</sup> The lawyer must deposit unearned fees into a trust account, as required by Rule 1.15(c).<sup>103</sup> One must also be aware of the logistical issues regarding conflicts of interest, addressed in Rules 1.7 and 1.9.<sup>104</sup> While the South Carolina Committee acknowledged the concern that deal-of-the-day Web sites could have a negative impact on the reputation of the legal profession, South Carolina ultimately found that that concern could be addressed by ensuring honesty and transparency, and such concerns were not enough to prompt the Committee to prohibit a lawyer's use of Groupon.<sup>105</sup>

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97. S.C. BAR ETHICS ADVISORY COMM., Ethics Advisory Op. 11-05 (2011), available at <http://www.scbars.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1012/Ethics-Advisory-Opinion-11-05.aspx>.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

#### IV. OBJECTIONS TO AN ATTORNEY'S USE OF A DEAL-OF-THE-DAY WEBSITE

Various objections have been made to an attorney's advertisement on deal-of-the-day Web sites. Many objections are based upon perceived violations of rules of professional conduct that govern a lawyer's activities. Each state has adopted its own rules of ethics, but each states' rules are remarkably similar and closely resemble the Model Rules of Professional Conduct published by the American Bar Association.<sup>106</sup> These rules are far-reaching and have a significant impact on the everyday business of attorneys. Using deal-of-the-day Web sites also implicates policy issues regarding the professionalism of the legal field.

##### *A. The Deal-of-the-Day is an Improper Referral Fee*

One objection to the use of a deal-of-the-day website is that the percentage of the sale of the coupon that the website retains is an improper referral fee.<sup>107</sup> Rule 7.2 provides that "a lawyer may advertise services through written, recorded or electronic communication, including public media."<sup>108</sup> However, "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this Rule . . . ."<sup>109</sup> If Groupon is more than an advertising service and actively refers clients to a specific lawyer, the use of Groupon would be considered an improper referral fee. However, if Groupon is simply a forum for lawyers to announce their services and to be introduced to clients through a website, then the use of Groupon is simply a form of advertisement, and not an active referral service.

##### *B. The Deal-of-the-Day Website Causes the Attorney to Improperly Share Fees with a Non-Lawyer*

Rule 5.4 states that "[a] lawyer or law firm shall not share legal fees with a non-lawyer . . . ."<sup>110</sup> Based upon this rule, some have objected to the use of Groupon claiming that the portion of the sale that the website

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106. In order to uniformly inform the discussion, the Model Rules of Professional Conduct will serve as the primary source of rules of ethics in this Comment.

107. IND. STATE BAR ASS'N LEGAL ETHICS COMM., GROUP COUPON MARKETING OP., Op. No. 1, JDH-1 (2012).

108. MODEL RULES OF PROF'L CONDUCT R. 7.2 (2010).

109. *Id.*

110. *Id.* at R. 5.4.

retains is an improper instance of fee-sharing with a non-lawyer.<sup>111</sup> Groupon takes a 50% commission off every sale made through the website.<sup>112</sup> Groupon takes no commission from sales that surpass the value of the voucher when the purchaser “cashes in” the deal at the merchant’s place of business.<sup>113</sup> Whether the use of Groupon is an instance of improper fee-splitting hinges upon whether the commission taken from the sale is a payment for advertising or if the commission is a portion of the lawyer’s earned fees.

*C. The Deal-of-the-Day Prematurely Creates an Attorney–Client Relationship*

Some have claimed that purchasing the coupon prematurely creates an attorney–client relationship, so as to prevent the attorney from performing a check for conflicts of interest and potentially creating a conflict with a current client.<sup>114</sup> Model Rule of Professional Conduct 1.7 states that, unless certain conditions apply, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”<sup>115</sup> Some have argued that the coupon creates an expectation on the part of the purchasers in regards to the attorney’s services, and thereby creates an attorney–client relationship.<sup>116</sup> If the coupon purchase creates an attorney–client relationship, the lawyer owes certain duties to the client, such as confidentiality and loyalty.<sup>117</sup> The situation would be further complicated if the lawyer later learns that a conflict of interest or some other obstacle to representation exists.

*D. The Deal-of-the-Day is an Excessive Fee*

Model Rule of Professional Conduct 1.5(a) states that “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”<sup>118</sup> After purchasing the coupon, the consumer, for various reasons, may not actually seek the

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111. IND. STATE BAR ASS’N LEGAL ETHICS COMM., GROUP COUPON MARKETING OP., Op. No. 1, JDH-1 (2012).

112. Robert Smith, *Groupon’s Secret: Everybody Has a Price*, NPR (Apr. 8, 2011), <http://www.npr.org/blogs/money/2011/04/08/135244697/groupons-secret-everybody-has-their-price> (explaining that Groupon took a \$4.50 commission from every \$9 coupon purchased).

113. *See id.*

114. IND. STATE BAR ASS’N LEGAL ETHICS COMM., GROUP COUPON MARKETING OP., Op. No. 1, JDH-1 (2012).

115. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2010).

116. Hollister, *supra* note 69.

117. *Id.*

118. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2010).

purchased legal services.<sup>119</sup> The coupon also has an expiration date, requiring the purchaser to seek the services within a limited time frame.<sup>120</sup> Some have argued that because the coupon expires or because the purchaser may not seek the services for some other reason, the fee is excessive and unreasonable.<sup>121</sup>

*E. The Deal-of-the-Day Website Causes Lawyers to Fail in Their Duty to Safeguard Property Belonging to Clients*

Model Rule of Professional Conduct 1.15 states that “[a] lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property.”<sup>122</sup> In Groupon’s case, after the vouchers are purchased, the advance legal fees are deposited in the company’s account, rather than being sent directly to the lawyer.<sup>123</sup> It is left to Groupon’s discretion to disburse the funds to the attorney, which is done in incremental amounts.<sup>124</sup> The Indiana State Bar Association stated that this is a violation of the lawyer’s duty to safeguard a client’s property in a trust account.<sup>125</sup>

*F. The Use of Groupon Erodes the Image of the Legal Profession*

Many have objected to the use of Groupon or similar site because of its supposed potential to erode the professionalism, appearance, and opinion of the legal profession.<sup>126</sup> Some think that advertising on Groupon has the effect of “cheapening” law firms in the public eye.<sup>127</sup> One lawyer stated that there is a sense of being a “McLawyer” when one advertises legal services on Groupon, and told other lawyers that “[p]utting your legal services on the shelf alongside discounted pizza and laser hair removal might not be the image you’re going for.”<sup>128</sup> Others have cited concerns that Groupon is only for “desperate”

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119. N.Y. STATE BAR ASS’N COMM. ON PROF’L ETHICS, Op. 897 (Dec. 13, 2011). (“Some coupon buyers may not, for various reasons, receive all or any of the legal services to which the coupons entitle them.”).

120. *Id.*

121. *See id.* (addressing the excessive fee objection).

122. MODEL RULES OF PROF’L CONDUCT R. 1.15 (2010).

123. IND. STATE BAR ASS’N LEGAL ETHICS COMM., GROUP COUPON MARKETING OP., Op. No. 1, JDH-1 (2012).

124. *Id.*

125. *Id.*

126. Zaretsky, *supra* note 17.

127. *Id.*

128. *Id.*

businesses, and respectable businesses should stay away from it.<sup>129</sup>

*G. It Can't be Profitable, Can it?*

Many have argued that Groupon cannot be profitable for lawyers.<sup>130</sup> For non-legal businesses, Groupon can bring new business and more revenue in the door. Many consumers are likely to spend more than the value of the coupon.<sup>131</sup> First-time customers may also refer friends or become repeat customers.<sup>132</sup> Furthermore, while Groupon certainly is not free, as Groupon takes a portion of each sale, it can spare retailers from some up front advertising costs.<sup>133</sup> Even if a visitor to the site does not purchase the offered deal, that visitor could become a patron of the business due to exposure.<sup>134</sup> However, businesses offering non-perishable goods, manufactured products, or high-value services can take a financial loss by using Groupon.<sup>135</sup>

Offering legal services on Groupon presents different financial considerations than offering discounted spa services or restaurant certificates. A lawyer seeking to utilize Groupon may find that only some legal services lend themselves to being purchased in advance.<sup>136</sup> Similarly, while a consumer may be willing to spend \$200 for \$500 worth of spa services, a consumer is unlikely to spend \$200 for \$500 worth of legal services unless that consumer has a present need for legal services.<sup>137</sup> Some have opined that one reason that Groupon is so appealing to consumers is that the coupon is likely to be sufficient for the entire service.<sup>138</sup> For example, a \$20 certificate to a reasonably priced restaurant purchased for \$10 should be sufficient to pay for a meal for one or two.<sup>139</sup> If Groupon offered a \$20 certificate to a five-star restaurant, it would likely be less popular because of the additional cost one would incur by eating at the restaurant.<sup>140</sup> In the context of legal services, Groupon might be less appealing to some because of the

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129. Jay Goltz, *Doing the Math on a Groupon Deal*, N.Y. TIMES (Nov. 23, 2010), <http://boss.blogs.nytimes.com/2010/11/23/doing-the-math-on-a-groupon-deal/>.

130. E.g., Carolyn Elefant, *The Scoop on Groupon for Lawyers*, NOLO'S LEGAL MARKETING BLAWG (Jan. 18, 2011), <http://www.legalmarketingblawg.com/2011/01/the-scoop-on-groupon-for-lawye.html>.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*



additional expenses one might incur by engaging the attorney's assistance, even if accompanied by a discounted certificate.<sup>141</sup> Some have also opined that Groupon may not yield as many referrals or repeat customers as it does for restaurants and other forms of entertainment.<sup>142</sup>

## V. DISCUSSION

Despite many objections, a lawyer's use of Groupon is not only permissible under the Model Rules of Professional Conduct, but can also help to improve the image of the legal profession and make legal services more accessible and mainstream. In a time when the legal profession is undergoing a massive structural shift<sup>143</sup> and many are finding ways to do without legal advice,<sup>144</sup> marketing innovation should be encouraged, rather than disallowed due to an ethical technicality.

### A. Groupon is Not a Referral Service

One of the biggest objections to a lawyer's use of Groupon is that the commission Groupon takes from the sale of the voucher is an improper referral fee.<sup>145</sup> However, Groupon is merely an advertising agency and not a referral service.<sup>146</sup> Groupon is a for-profit company that collects money from companies seeking to promote their services or products.<sup>147</sup> Groupon does nothing to "recommend" the services or products of the companies, but is merely a forum on which those companies can promote their own services or products.<sup>148</sup> While Groupon does state

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141. *Id.*

142. *Id.*

143. William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And it May Be a Sign of Lasting Change*, ABA J. (July 1, 2011), [http://www.abajournal.com/magazine/article/paradigm\\_shift/](http://www.abajournal.com/magazine/article/paradigm_shift/) ("Whether BigLaw lawyers, boutique specialists or solo practitioners, U.S. lawyers can expect slower rates of market growth that will only intensify competitive pressures and produce a shakeout of weaker competitors and slimmer profit margins industrywide. Law students will find ever-more-limited opportunity for the big-salary score, but more jobs in legal services outside the big firms. Associates' paths upward will fade as firms strain to keep profits per partner up by keeping traditional leverage down.").

144. *Id.* (stating that 80 to 85 percent of divorces in Connecticut have an unrepresented party and 90 percent of criminal cases are self-represented or represented by a public defender because families cannot afford an attorney).

145. IND. STATE BAR ASS'N LEGAL ETHICS COMM., GROUP COUPON MARKETING OP., Op. No. 1, JDH-1 (2012).

146. *Too Much of a Good Thing?*, GROUPON (Sept. 16, 2010), <http://www.groupon.com/blog/cities/too-much-of-a-good-thing/> (explaining that Groupon itself acknowledges that most businesses look at Groupon as a form of advertising, and companies decide between running a radio or newspaper ad to get new customers in the door).

147. See Saporito, *supra* note 2 (citing Groupon's \$644.7 million in sales in the second quarter of 2009).

148. N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, Op. 897 (Dec. 13, 2011).

that it seeks to provide services or products that people actually want to buy, Groupon does not testify to the quality of legal services to be rendered, and therefore is still a passive forum for advertising.<sup>149</sup> The royalties that Groupon takes from voucher purchases are merely “reasonable costs of advertisements or communications,” which the Model Rules of Professional Conduct permit.

*B. Groupon Does Not Prompt Improper Fee-Splitting with Non-lawyers*

Similarly, the use of Groupon as an advertisement forum is not an instance of improper fee-splitting with non-lawyers. The argument that it is fee-splitting is invalid for the same reasons that the referral fees argument is invalid. Groupon does not engage in any legal work; rather, it is a conduit for advertising.<sup>150</sup> Groupon does not collect a percentage of a contingency fee which a lawyer collects in litigation or when reaching a settlement.<sup>151</sup> As one lawyer stated, “[t]he restriction on sharing profits between lawyers and nonlawyers exists to prevent the undue influence of the lawyer’s professional judgment in representing a client.”<sup>152</sup> Even though Groupon takes a portion of the fee collected for the legal services, “the relationship between Groupon and the attorney does not extend beyond that of any other advertiser.”<sup>153</sup> Groupon has no stake in the outcome of the services rendered and exercises no control over the relationship between the attorney and the client.<sup>154</sup> The website does not receive a commission based on how much the client would actually spend when utilizing the certificate.<sup>155</sup> Groupon’s interest in the transaction comes to a halt after the coupon is purchased.<sup>156</sup> An attorney’s use of Groupon is neither a violation of Rule 5.4’s prohibition of fee-splitting, nor is it a violation of the spirit of the rules, as the lawyer’s professional judgment and independence is never at issue when advertising on Groupon.

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149. GROUPON, *supra* note 3 (“We sell stuff we want to buy. A great price is only half the battle—it’s also got to be a great product or service. Between our top-rated business partners and unbeatable prices, you should feel comfortable venturing out and trying something new—just because it’s featured on Groupon. We want Groupon to be an addiction you can feel good about.”).

150. N.Y. STATE BAR ASS’N COMM. ON PROF’L ETHICS, Op. 897 (Dec. 13, 2011).

151. S.C. BAR ETHICS ADVISORY COMM., Ethics Advisory Op. 11-05 (2011).

152. Zaretsky, *supra* note 17.

153. *Id.*

154. S.C. BAR ETHICS ADVISORY COMM., Ethics Advisory Op. 11-05 (2011).

155. *See id.*

156. N.Y. STATE BAR ASS’N COMM. ON PROF’L ETHICS, Op. 897 (Dec. 13, 2011).

*C. Conflict of Interest Issues and Forming the Attorney–Client Relationship—A Mere Logistical Issue*

Lawyers should not be prohibited from advertising on deal-of-the-day Web sites merely because there is a lack of opportunity for the attorney to check for conflicts of interest before receiving payment. This is a logistical problem that can be remedied by requiring the lawyer to grant a refund if a conflict is discovered. Furthermore, it is unlikely that purchasers of a Groupon voucher will believe that they have created a relationship with the attorney and that the attorney owes them any duty of loyalty or confidentiality from engaging in an online transaction. Even if the purchaser would have the requisite subjective intent for creating an attorney–client relationship, as required in some states, the nature of legal services lending themselves to advertisement on these sites would not likely be heavily affected by conflicts of interests.<sup>157</sup> Any potential problems stemming from the premature formation of an attorney–client relationship can be solved through providing refunds in the rare case of a conflict of interest and by warning the purchaser of the potential problem. This logistical hurdle should not bar lawyers from advertising on a deal-of-the-day website like Groupon.

*D. An Unused Voucher is not an Excessive Fee*

The claim that an unused voucher purchased on Groupon is an excessive fee and therefore lawyers should not be permitted to use the sites is without merit. Groupon and other competitor sites are popular because of the deep discounts they provide. By definition, a discounted service cannot be considered excessive.<sup>158</sup> One cannot reasonably argue that \$99 for a will and durable power of attorney, as Mr. Redler advertised, is excessive.<sup>159</sup> After the services have been purchased, the lawyer is then bound to perform the services when the purchaser seeks to utilize the legal services, unless an unforeseen conflict exists.<sup>160</sup> Therefore, because the lawyer is bound to perform the services, the coupon price paid serves as a retainer for future services. The rules of

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157. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977) (citing examples of name changes and drafting wills).

158. See THE LAW DICTIONARY (2002) (defining “discount” as “an allowance or deduction”).

159. GROUPON, *supra* note 3.

160. *US/Canadian Terms of Service*, GROUPON, <https://scheduler.groupon.com/terms/tos> (last visited Nov. 6, 2012) (“To the extent that you use . . . the Groupon marketing and promotional platform to advertise an offer of discounted goods or services (‘Offer’), you agree that you are bound by the terms of any and all independent merchant agreements between you and Groupon with respect to any such Offer and are responsible in all respects with complying with the terms . . . as advertised on the Groupon Sites and as stipulated to the consumer . . .”).

ethics permit retainers.<sup>161</sup> If the purchaser never actually seeks the paid-for legal services and the voucher goes unused, the lawyer may keep the earned retainer as compensation for having held the services available for the specified period of time.<sup>162</sup> Deal-of-the-day advertising should not be prohibited merely because a coupon purchaser may fail to take advantage of the legal services purchased.

### *E. Client Property is Not in Danger*

Any danger created by the need to place client property in a trust account should not prohibit a lawyer from advertising on Groupon. Model Rule of Professional Conduct 1.15 states that “[a] lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property.”<sup>163</sup> Although Groupon does collect the purchasers’ payments and later disburses the payments to the attorney,<sup>164</sup> Groupon’s holding of the funds does not violate the spirit of Rule 1.15, which is primarily directed at preventing lawyers from impermissibly mixing the client’s funds with the attorney’s own funds and collecting unearned fees.<sup>165</sup> By attaching the condition to the described property that it be “in a lawyer’s possession,” the rule presupposes that the property is already in the lawyer’s possession.<sup>166</sup> The rule does not mandate that the lawyer safeguard all property related to the legal services rendered. While certain risks are encountered any time funds pass through the hands of a third party, the purchaser’s payment is not at risk, as Groupon guarantees disbursement.<sup>167</sup> In compliance with Rule 1.15, the lawyer, upon payment disbursement from Groupon, could arrange for the payments to be directed to a client trust account, as with all other funds collected.<sup>168</sup> The funds can remain in the trust account until the client

161. MODEL RULES OF PROF’L CONDUCT R. 1.5 cmt. (2010) (“A lawyer may require advance payment of a fee, but is obliged to return any unearned portion.”).

162. N.Y. STATE BAR ASS’N COMM. ON PROF’L ETHICS, Op. 897 (Dec. 13, 2011).

163. MODEL RULES OF PROF’L CONDUCT R. 1.15 (2010).

164. Geoff Williams, *Getting on Groupon: 5 Things you Need to Know*, AOL SMALL BUS. (June 28, 2010), <http://smallbusiness.aol.com/2010/06/28/how-to-get-on-groupon/> (explaining Groupon’s payment system, Julie Anne Mossler, consumer marketing manager at Groupon, stated that after being featured on Groupon, Groupon will mail the payments in three installment checks to the business within sixty days).

165. S.C. BAR ETHICS ADVISORY COMM., Ethics Advisory Op. 11-05 (2011).

166. MODEL RULES OF PROF’L CONDUCT R. 1.15 (2010).

167. *Merchant Terms of Service*, GROUPON, <http://www.groupon.com/pages/merchant-terms-of-service-1> (last visited Nov. 6, 2012).

168. See THE LAW DICTIONARY (2002) (defining “trust account” as “an account . . . in the name of one or more parties as trustees for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution . . . and there is no

redeems the voucher and the lawyer earns the fees. Similarly, if the voucher expires because the purchaser never seeks the legal services, the lawyer may then move the funds from the trust account to the lawyer's general operating fund as an earned retainer. Because the purchaser's fee is secure when passing through Groupon and because the lawyer may place the funds disbursed from Groupon in a trust account like any other collected fee, Rule 1.15 should not prevent the lawyer from advertising on Groupon.

### *F. Addressing Concerns About the "McLawyer"*

The use of Groupon may help to improve the image of the legal profession rather than erode it. One of the most common criticisms of lawyers is that they charge too much.<sup>169</sup> As the Supreme Court noted in *Bates*, the public may perceive advertisements as an attempt to reach out to the community, making legal services more accessible for those who would otherwise be unable to hire a lawyer.<sup>170</sup> Legal fees are often prohibitive, and perhaps the Groupon phenomenon will cause the legal profession to come down from its own perceived ivory tower and consort with those who need legal services.<sup>171</sup> Groupon or other deal-of-the-day Web sites could even serve as an alternative to commercials or billboards, which have been the subject of much criticism due to a frequently perceived lack of good taste in attorney advertisements.<sup>172</sup>

Groupon can also help bring to the forefront the quiet attorney in the middle: one who is not at a high-paying large firm whom only corporations can afford to hire, but also not the one who is not advertising to be an expert in helping you "get rid of that vermin you call a spouse."<sup>173</sup> It is hard to foresee large firms advertising on Groupon because their clientele primarily consists of corporations rather

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subject of the trust other than the sums on deposit in the account. It is not essential that payment to the beneficiary be mentioned in the deposit agreement.").

169. Chan, *supra* note 1.

170. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1977).

171. See *id.*

172. See *Public Citizen Inc. v. La. Attorney Discipline Bd.*, 632 F.3d 212, 222 (5th Cir. 2011) (explaining a survey conducted in Louisiana which found that "(1) 83% of the interviewed public did not agree 'client testimonials in lawyer advertisements are completely truthful'; (2) 26% agreed that lawyers endorsed by a testimonial have more influence on Louisiana courts; (3) 40% believe that lawyers are, generally, 'dishonest'; and (4) 61% believe that Louisiana lawyer advertisements are 'less truthful' than advertisements for other items or services . . . . The general responses indicate that the public has a poor perception of lawyers and lawyer advertisements.").

173. Mollie Reynolds, 'Hate that Vermin You Call a Spouse?' Then Steve Miller is Your Divorce Lawyer!, NEWS CHANNEL 5 (Sep. 22, 2010), [http://www.wptv.com/dpp/news/local\\_news/water\\_cooler/hate-that-vermin-you-call-a-spouse%3F-then-steve-miller-is-your-divorce-lawyer](http://www.wptv.com/dpp/news/local_news/water_cooler/hate-that-vermin-you-call-a-spouse%3F-then-steve-miller-is-your-divorce-lawyer).

than individuals.<sup>174</sup> Groupon does not lend itself to the more controversial aspects of advertising, like soliciting for personal injury suits,<sup>175</sup> but only to the more mundane practices such as writing wills.<sup>176</sup> Therefore, the nature of advertising prevents the expensive firm and the proverbial “ambulance chaser” from advertising on Groupon. That leaves the quiet attorney in the middle to utilize Groupon and to offer services which frequently preempt litigation. This can only help improve the public perception of the legal profession.

### *G. The Economics of Groupon for Lawyers: It Can Work*

Although offering deeply discounted legal services on Groupon may not be immediately profitable for the lawyer, it can be beneficial to the lawyer in the long-term. Mr. Redler, the first to experiment with the process, stated that the venture has been successful.<sup>177</sup> He said that although he would not advertise on Groupon again because of the resulting “brouhaha” in the legal community, he has received repeat business and referrals from his Groupon clients.<sup>178</sup> People who purchased the durable will and power of attorney also sought his services in other legal matters.<sup>179</sup> Nor are his Groupon clients any less desirable than his other clients.<sup>180</sup> Therefore, the Groupon advertisement achieved what it was meant to achieve: it garnered new business and new clients came in the door. Furthermore, businesses advertising on Groupon are required to offer a discount, but not so much of a discount as to the point of absurdity. Lawyers may offer more moderate discounts in order to cover costs while still garnering new business and getting the firm in the public eye. It is not the job of the state bar associations to restrict attorney advertisements simply because the ethics council thinks it an unwise financial decision.

## VI. CONCLUSION

Because the Supreme Court has held that time, place, and manner restrictions on attorney speech may be allowed, restrictions on the use of Groupon by lawyers may not run afoul of the First Amendment.<sup>181</sup>

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174. See generally Ted Schneyer, Symposium, *Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 VA. L. REV. 1777 (1998).

175. See generally Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

176. See S.C. BAR ETHICS ADVISORY COMM., Ethics Advisory Op. 11-05 (2011).

177. See Bruce, *supra* note 15.

178. *Id.*

179. *Id.*

180. See *id.*

181. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1997).

However, banning the use of Groupon is unreasonable. At their core, the arguments made against attorneys using deal-of-the-day sites to advertise are not novel. Efforts to prevent attorneys from utilizing this new form of advertising are attempts to maintain the aloofness and “better than thou” attitude of many in the legal profession. While a lawyer’s work is often complex and individualized, that reason alone cannot justify holding lawyers back from advancing with popular technology and maintaining relevancy in a discount-seeking culture. Indeed, lawyers should proceed with caution if they choose to advertise on Groupon in order to avoid ethical violations. However, the states’ prohibition on lawyers’ use of Groupon is an unreasonable restriction on attorney advertising. In such difficult economic times, Groupon can only serve to benefit lawyers by bringing new business in the door. It can also benefit the general population by providing consumers with access to legal services which would otherwise be cost-prohibitive.

The use of Groupon for advertising can also help improve the perception of the legal profession by illustrating that legal services can be affordable and that lawyers are not too good to consort with common man. The legal profession has reached a juncture in which it must decide whether it will evolve with changing technology and popular culture or whether it will remain a staunch bulwark against change. In a time when more lawyers than ever are unemployed and the legal profession struggles to maintain its prominence in an economy that continues to find ways to avoid legal costs, practices like Groupon can launch the legal profession into the mainstream and inject it with energy.<sup>182</sup>

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182. See Henderson & Zahorsky, *supra* note 143.