



**OPINION NO. 13-01
(April 2013)**

SUMMARY

Whether an Internet marketing voucher or coupon sold by a lawyer for legal representation is consistent with the Arizona Rules of Professional Conduct will depend on the terms and conditions of the voucher or coupon sold as well as the other facts and circumstances. Absent specific terms and conditions, however, it is unlikely that an Arizona lawyer can ethically use Internet marketing voucher- or coupon-based legal services due to a panoply of ethical concerns arising under Ethical Rules (ERs) 1.1, 1.2, 1.6, 1.7, 1.9, 1.15, 1.16, 1.18, 5.4, 7.1, and 7.2.

FACTS

The Committee has been asked whether it is ethical for an Arizona-licensed lawyer to use Internet marketing vouchers or coupons. Under the voucher or marketing program considered, a lawyer (who may be referred to by the Internet marketer as the “Merchant”) sells a voucher or coupon to consumers (who are or would become clients) that are aggregated by the Internet marketing service provider and identified to the lawyer.¹ The terms and conditions of the voucher or coupon may be subject to substantial variation. As such, the Committee cannot determine without more specifics if under some situations a voucher or coupon would meet the lawyer’s ethical obligations.

The Internet marketing coupon or voucher program considered by the Committee operates “by aggregating customers for its cooperating businesses by daily or other regular notification of the opportunity to purchase coupons at a set price for a specific product valued at a discount to the normal price charged aggregated customers. The aggregated customers are charged for the coupon by the Company only after a predetermined number of members, as negotiated with the provider of the service, are assembled in response to the online advertisement. The daily notice is

¹ No specific voucher or coupon has been presented for review. Several Internet marketing techniques use vouchers, coupons or similar types of devices. As the ethical implications may be different depending on the circumstances, terms and conditions of each program, this opinion is confined to the Internet marketing voucher or coupon program described and does not address other types of programs that may have different terms.

**Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding on disciplinary or other tribunals. This opinion is based on the Ethical Rules in effect on the date the opinion was published.
If the rules change, a different conclusion may be appropriate.**

either emailed to the computer or texted to the smart phone of the group subscriber who is a potential purchaser of the services.”²

Because of the many concerns with such a program, the Committee believes that it is likely that such a voucher or coupon program would violate one or more of the Ethical Rules. Two primary concerns, addressed below, relate to the possibility that the attorney-client relationship is formed even before the client has been identified to the lawyer, and the handling of legal fees paid in the form of the purchase price for the voucher or coupon.

QUESTION PRESENTED

Does a lawyer violate the Ethical Rules by participating in the sale of vouchers or coupons for legal services through an Internet marketing service provider?

RELEVANT ARIZONA RULES OF PROFESSIONAL CONDUCT (“ER __”)

ER 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ER 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

* * *

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

* * *

² Indiana Opinion.

ER 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law; and
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

ER 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by ERs 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ER 1.15 Safekeeping Property

(a) 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. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other

property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

* * *

ER 1.16. Declining or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.

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- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

* * *

ER 1.18. Duties to Prospective Client

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as ER 1.6 would permit and ER 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

* * *

ER 5.4 Professional Independence of a Lawyer

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of ER 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
 - (4) a lawyer may share court-awarded legal fees or fees otherwise received and permissible under these rules with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consists of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
 - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

ER 7.1 Communications Concerning a Lawyer's Services

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

ER 7.2 Advertising

- (a) Subject to the requirements of ERs 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:
- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service, which may include, in addition to any membership fee, a fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter, provided that any

such percentage fee shall not exceed ten percent, and shall be used only to help defray the reasonable operating expenses of the service or organization and to fund public service activities, including the delivery of pro bono legal services. The fees paid by a client referred by such service shall not exceed the total charges that the client would have paid had no such service been involved. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

- (3) pay for a law practice in accordance with ER 1.17.
- (c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.
- (d) Every advertisement (including advertisement by written solicitation) that contains information about the lawyer's fees shall be subject to the following requirements:
- (1) advertisements and written solicitations indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall disclose (A) that the client will be liable for expenses regardless of outcome unless the repayment of such is contingent upon the outcome of the matter and (B) whether the percentage fee will be computed before expenses are deducted from the recovery;
 - (2) range of fees or hourly rates for services may be communicated provided that the client is informed in writing at the commencement of any client-lawyer relationship that the total fee within the range which will be charged or the total hours to be devoted will vary depending upon that particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;
 - (3) fixed fees for specific routine legal services, the description of which would not be misunderstood or be deceptive, may be communicated provided that the client is informed in writing at the commencement of any client-lawyer relationship that the quoted fee will be available only to clients whose matters fall within the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged;
 - (4) a lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee, or range of fees, for at least ninety (90) days unless the advertisement specifies a shorter period; provided, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.
- (e) Advertisements on the electronic media may contain the same information as permitted in advertisements in the print media. If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full-time at the advertising law firm. If a law firm advertises a particular legal service on electronic media, and a lawyer appears as the person purporting to render the service, the lawyer appearing shall be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by other lawyers in the firm.
- (f) Communications required by paragraphs (c) and (d) shall be clear and conspicuous. To be "clear and conspicuous" a communication must be of such size, color, contrast, location,

duration, cadence, and audibility that an ordinary person can readily notice, read, hear, and understand it.

RELEVANT ETHICS OPINIONS

Ariz. Ethics Ops. 02-04, 06-04, 06-06, 11-02; Indiana State Bar Ethics Op. No. 1 (2012) (the “Indiana Opinion”); North Carolina State Bar 2011 Formal Ethics Op. 10; South Carolina Bar Ethics Advisory Op. 11-05 (2011); New York State Bar Ethics Op. 897 (2011)

OPINION

Under the voucher program considered, a lawyer would sell discounted services to clients or potential clients through the Internet marketing service provider if the service provider could aggregate enough clients or potential clients to meet the minimum number agreed to by the lawyer and the service provider. The client or potential client pays for these legal services by purchasing the voucher. Significantly, this payment is made before the legal services are provided, before there is any personal consultation between the lawyer and the client or potential client, and before the lawyer even knows who the client or potential client will be.³ Moreover, the potential client pays the Internet marketing service provider, not the lawyer. The Internet service provider keeps an agreed-upon percentage of the purchase price and later remits to the lawyer his or her agreed upon amount, which may be as little as 50 percent of the purchase price.

Many ethical issues may arise if a lawyer opts to use such an Internet marketing voucher or coupon. These issues include, among others, whether a conflict with current or former clients precludes an attorney-client relationship under ER 1.7 or ER 1.9; the voucher or coupon model

³ According to the website of one Internet marketing service provider offering vouchers, the businesses that use the service are defined as the “Merchants,” the “customer” or “consumer” is defined as “you” or the “End User” and the item sold by the Merchants is defined as “Vouchers.” The “Terms of Sale” state, in part:

Vouchers you purchase through our Site ... are special promotional offers that you purchase from participating Merchants through our service. The vouchers are redeemable for certain goods, services or experiences offered by, or facilitated through, the Merchant identified on the voucher. The Merchant is solely responsible for redeeming the voucher. The Merchant is the issuer of the voucher and is fully responsible for all goods and services it provides to you

[We are] a service provider for the Merchant identified on the voucher and the Merchant is the sole issuer of the voucher. Vouchers have two separate values: (a) the “**amount paid**” and (b) the promotional value. The “**promotional value**” is the additional value beyond the amount paid. Together, the amount paid and the promotional value equals the “**full offer value**” of the voucher. For example, if you pay \$20 for a voucher that gets you \$50 of goods or services from a Merchant, the full offer value is \$50, the amount paid is \$20 (this amount does not expire until it is used or is refunded), and the promotional value is \$30 (this amount expires on the date stated on the voucher unless expiration of the promotional value is prohibited by law).

<http://www.groupon.com/terms> [Emphasis in original]. The website further discloses that if a Merchant [the lawyer] refuses to honor any voucher, the internet marketing service provider will refund to the consumer the amount paid upon request in the original form of payment, or will credit the consumer with an in-kind voucher for future purchases on the site. *Id.*

ensures confidentiality under ER 1.6; the fees paid directly to the Internet marketing service provider, and partially retained by the Internet marketing service provider, result in unethical fee-sharing with non-lawyers or a failure to properly safeguard an advance deposit in the lawyer's trust account in violation of ER 5.4 and ER 1.15, respectively; the lawyer violates ER 7.2 in the course of advertising; the lawyer participating in the voucher program has adequately defined for the client that the attorney-client relationship has commenced; the scope of the engagement is specifically defined following actual consultation with the potential client leading to informed consent as to the scope of work under ER 1.2(c); the lawyer is competent to perform the work requested via the voucher as required by ER 1.1; and the lawyer is acting consistent with his or her obligations of professional independence under ER 2.1. As the facts, context and terms and conditions of any attorney-client relationship emanating from a voucher program will vary, it is impossible to address all possibilities. Lawyers are advised to carefully consider all of their ethical obligations if they intend to pursue a voucher or coupon program. Generally speaking, the strong likelihood of violating one or more Ethical Rules by using an Internet marketing service voucher or coupon make such an arrangement problematic. As stated by the Committee in Op. 06-04, "An attorney may not enter into a contract that requires the lawyer to violate his or her ethical duties."

A. Analysis of Consideration by other Jurisdictions

The Indiana State Bar Association's Legal Ethics Committee addressed the ethical issues associated with the use of an Internet marketing voucher by a lawyer.⁴ The Indiana committee found that using "such social media marketing is fraught with peril and is likely not permitted in its current form under the Indiana Rules of Professional Conduct." Indiana Opinion at 1. The Indiana committee expressed concern that conflicts of interest must be cleared before entering an attorney-client engagement, and that the requirement for a lawyer to exercise independent professional judgment and render candid advice "is difficult to meet if the decision to represent the client is ... the client's choice, made by the decision to purchase a coupon..." *Id.* at 2. Indiana also expressed concern about delegating to non-lawyers the creation and establishment of an attorney-client relationship, the safekeeping of client funds, confidentiality, fee sharing, and channeling of clients.

The North Carolina State Bar's Ethics Committee came to a different conclusion.⁵ North Carolina found that the fee retained by the Internet marketing provider "is the cost of advertising." North Carolina noted that fee must be treated as an advanced payment and deposited into a trust account. Notably, North Carolina indicated that a "professional relationship with a purchaser ... is established once the payment is made," but found the lawyer's offer conditioned on the absence of a conflict of interest and determination that the service is appropriate. North Carolina further noted that if a purchaser failed to seek the discounted legal services before the expiration date, the lawyer could not keep the fees and provide no services. In such a situation, the lawyer would need to refund the portion of the fees in the trust account.⁶ North Carolina indicated that a lawyer would need to consult each

⁴ See <http://www.inbar.org/Portals/0/downloads/appellate/Op-1-2012.pdf>.

⁵ See <http://www.ncbar.com/ethics/ethics.asp?page=14&from=1/2011&to=12/2011>.

⁶ This is contrary to the finding in New York, as described below. Moreover, North Carolina does not address the issue of whether the lawyer would even know the identity of the client if the client never redeemed the coupon.

prospective client to determine the scope of services, and decline services if there was a conflict or the client did not need representation and “refund the entire advance payment, including the amount retained by the website, to make the prospective client whole.” If there were no conflict and competent representation required “the lawyer to expend more time than anticipated to satisfy the advertised service, the lawyer must do so without additional charge.” North Carolina did not address whether legal fees could be paid directly by the client to a third-party advertiser, or whether an attorney-client relationship (as opposed to a “professional relationship”) arises before an actual consultation between the lawyer and the client occurs.

The South Carolina Bar’s Ethics Advisory Committee found that a voucher would not violate sharing of legal fees, but expressed concern that using the program may violate other ethical rules.⁷ Significantly, South Carolina identified several other ethical issues such as avoiding misleading advertisements, disclosure of the scope of representation and the basis of the fee within a reasonable time, deposits of unearned fees in a trust account, and “the logistical issue of how she will handle conflict of interest situations that may arise under Rules 1.7 and 1.9.” South Carolina did not provide guidance on how these “logistical issues” could be addressed.

The New York State Bar Association Committee on Professional Ethics also has addressed the issue.⁸ It concluded that “a lawyer may market legal services on a ‘deal of the day’ or ‘group coupon’ website provided that the advertising is not misleading or deceptive and makes clear that no attorney-client relationship will be formed until the lawyer can check for conflicts and competence to provide the services. If the lawyer is unable to provide the offered service due to a conflict or competence issue, the lawyer must give the coupon buyer a full refund.” New York assumed that the percentage retained by the website would be “reasonable” and that a purchaser could terminate the representation and then receive a refund of the amount paid less value of services already rendered. New York opined that the lawyer could keep the entire fee if the coupon were not redeemed.⁹ It further opined that the advertisement must not be deceptive. New York considered the issue of a creation of an attorney-client relationship, but concluded “that the problem could be avoided with proper logistical arrangements and disclosures.” New York indicated that such arrangements must include proper disclaimers. Although New York assumed that the amount retained by the website would be “reasonable,” it did not address the situation in which the client pays fees directly to the website.

All of these opinions consider some of the same issues. The Committee agrees with the conclusion from all of these opinions that any use of an Internet marketing voucher or coupon model must not include any deceptive advertisements; must accurately describe the full services offered, the existence of the normal full price for those services and the discounted price offered; and must provide for proper accounting for fees in a trust account until the services are provided. If a coupon or voucher were used, the Committee believes that that purchase price of the coupon or voucher would likely constitute legal fees. As such, any use of the program would require a refund of all payments, including the portion of the purchase price of the voucher or coupon that was retained by the internet marketing service provider, if services are not provided or cannot be

⁷ See <http://www.sbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1012/Ethics-Advisory-Opinion-11-05.aspx>.

⁸ See http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions825present/EO_897.pdf.

⁹ As noted above, this is inconsistent with North Carolina’s finding.

provided due to a conflict of interest or inability to provide competent representation in the area. The Committee further agrees that the voucher or coupon must fully disclose all terms, conditions and disclaimers that are necessary for a lawyer to meet all ethical duties. Even then, however, the Committee believes that it will be problematic for a lawyer to comply with all of the relevant Ethical Rules using an Internet marketing voucher or coupon model.

Although the Committee does not completely adopt any of the ethics opinions from other jurisdictions, it finds the Indiana Opinion to be the most persuasive. Notably, North Carolina finds that a “professional relationship” is created as soon as the coupon is purchased, but finds that the “offer and acceptance” of the relationship is conditional. As described below, the Committee does not believe that this is a sound analysis of the formation of an attorney-client relationship. South Carolina and New York do not address when an attorney-client relationship is formed, and neither fully explain how a lawyer can ethically deal with the logistical issues that arise in the formation. None of the other opinions examine whether legal fees paid by a client directly to a non-lawyer constitute an impermissible fee-sharing arrangement.

B. Scope of Legal Services

For a lawyer to adopt or attempt to adapt an Internet marketing voucher or coupon business plan, there would need to be a uniform scope of service that could be offered to a group of potential clients that could be aggregated by the Internet market service provider. In other words, the business plan appears to depend on providing a uniform service to a large enough group of prospective clients such that there can be a volume discount obtained. However, the need for uniformity in the business model is potentially in conflict with several ERs. For example, ER 1.2 contemplates individual consultation with a client. Although ER 1.2(c) allows a lawyer to limit the scope of representation, the limitation requires informed consent. Here, the limitation on the scope of service is proposed and the legal fees would be paid before there is any consultation with the client as to whether such limitation. A lawyer would need to satisfy himself or herself that individual consultation with clients would be possible and that informed consent was obtained for the scope of representation. This likely limits the application to a narrow range of potential legal matters.

C. The Formation or Termination of a Lawyer-Client Relationship

A fundamental problem with using the Internet marketing voucher business model in the legal profession is the establishment of an attorney-client relationship. The program contemplates that the voucher or coupons are from the lawyer, and the lawyer is “solely responsible for redeeming the voucher.” This means that the lawyer is selling a voucher or coupon for his or her services, and the legal fees for his or her services are collected from the client before the lawyer even knows the identity of the client. ER 1.16 requires a lawyer to decline representation if the representation will result in a violation of the Rules of Professional Conduct or other law. As discussed below, such issues as a conflict of interest would require the lawyer to decline representation. As such, the sale of a voucher or coupon would be unethical if it creates an attorney-client relationship at the point of sale.

The Committee discussed the formation of the attorney-client relationship in Op. 02-04. That opinion stated: “The test adopted in Arizona to determine whether an attorney-client relationship was formed is a subjective one, where ‘the court looks to the nature of the work performed and to the circumstances under which the confidences were divulged.’” Op. 02-04, *citing Alexander v. Superior Court*, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984). The Committee further stated: “An attorney-client relationship is proved ‘by showing that the party sought and received advice and assistance from the lawyer in matters pertinent to the legal profession.’” *Id.*, *citing Matter of Petrie*, 154 Ariz. 295, 299, 742 P.2d 796, 800 (1987). *See also Foulke v. Knuck*, 162 Ariz. 517, 520, 784 P.2d 723, 726 (App. 1989). The Committee concluded that the “[a]pplication of the subjective test necessarily requires a case-by-case determination.” Some of the factors to consider include the client’s reasonable belief that an attorney-client relationship existed, the client’s expectation of confidentiality, and payment of a fee. *See id.* *citing Foulke v. Knuck*, 162 Ariz. 517, 520, 784 P.2d 723, 726 (App. 1989); *Matter of Petrie*, 154 Ariz. 295, 299; *Hrudka v. Hrudka*, 186 Ariz. 84, 919 P.2d 179 (1995).

Because the test for whether an attorney-client relationship is formed is subjective and must be applied on a case-by-case basis, without more facts it cannot be determined whether the relationship would be found at the point of sale of the voucher or coupon, or if it would arise some time later. When the attorney-client relationship is formed may depend on the wording of the voucher or coupon, and possibly the “fine print” authorized by the Internet marketing service provider. When a potential client purchases a voucher or coupon from the Internet marketing service provider, he or she is purportedly bound to the service provider’s “Terms of Sale.” These “Terms of Sale” permit the lawyer to include “fine print” in the voucher or coupon, which may allow the lawyer to include necessary disclaimers and provide information for informed consent. However, this arrangement begs the question of whether such information is effective before the lawyer even knows the identity of the client who has already purchased his or her voucher or coupon, or any particular need or concern the client may have. Depending on how the voucher or coupon is worded, the attorney-client relationship may well be established when the voucher or coupon is purchased. Because no specific voucher or coupon proposal has been presented for review, the Committee cannot speculate as to whether a voucher or coupon proposal could avoid establishing an attorney-client relationship at the point of purchase. However, the Committee does conclude that if the relationship is established at the point of purchase before a lawyer could evaluate the individual need, the possibility of conflicts of interest, the competence of the lawyer to perform the work, or obtain informed consent for the limitation on the scope of work, the arrangement would not be consistent with the lawyers’ obligations under the ERs.

Termination of the attorney-client relationship is also problematic. ER 1.16(d) requires that upon termination of representation, the lawyer must, among other actions, take steps reasonable to protect the client’s interest, give reasonable notice, and refund any advance payment of a fee that has not been earned. One problem is that the Internet marketing service provider collects the payment for the voucher or coupon. As noted below, this raises the issue of the unethical sharing of legal fees with a non-lawyer. Another problem is that if the coupon or voucher was not redeemed, the representation was declined for any reason, or the service was otherwise not provided, the lawyer would need to refund unearned fees. The lawyer must return the entire amount of the purchase price including any portion retained by the Internet marketing service provider, if the legal services were not rendered for any reason. This means that the lawyer

would need to have the names and contact information for all consumers who purchased the coupons or vouchers even if they were never redeemed. The lawyer may not rely on the Internet marketing service provider's refund program. Although the Internet marketing service provider may promise the consumer to refund the price of the voucher or coupon if it is not honored by the merchant, this may be done by an in-kind credit. An in-kind refund from the Internet marketing service provider would not meet the requirements of ER 1.16. Moreover, the lawyer cannot delegate the obligation to refund legal fees to a third party. If the lawyer is not able to identify the purchaser so that a refund could be made, it would not be ethical to participate in the program. In addition, the "fine print" in the voucher must adequately disclose all issues with regard to any refunds.

ER 1.15 also plays a role here. As noted, the Internet marketing service provider keeps a portion of the price of the voucher or coupon (the legal fees) and releases some of the funds to the lawyer over time. Unless the lawyer can provide for a method to account for the full amount of legal fees paid (in other words, the entire purchase price of the voucher or coupon), and deposit all legal fees into a trust account until the legal services are rendered, this would violate the lawyer's obligations under ER 1.15 to keep client funds separate and to maintain complete records of each client's property. The deposit must include the full amount paid to purchase the coupon or voucher, and not just the portion remitted by the service provider to the lawyer.

D. Confidentiality

ER 1.6 precludes a lawyer from disclosing information relating to the representation of a client without informed consent. The website for one such program defines the "Terms of Use" for such a program with the following:

19. Public Nature of Your Statements.

You [the consumer/client] understand and agree that all Statements are public and not private. Any other person (whether or not a user of [the] services) may read your Statements without your knowledge. Please do not include any Personal Information (as defined in our Privacy Statement) in your Statements. [The Service Provider] does not control or endorse any Statement found in any part of the Communities, and we specifically disclaim any liability concerning the Statements and the Communities and any actions resulting from your participation in any part of the Communities, including any objectionable content. Any and all Statements you post to our Site are not confidential.

Clearly, the website does not provide for confidentiality of potential client's communication with a lawyer. Moreover, as the potential client purchases the voucher or coupon through the service before contacting the lawyer, it is doubtful that sufficient information could be conveyed to allow for informed consent to limitation of the scope of services, the disclosure of confidential information, or the waiver of conflicts. A lawyer who relied on the "public" communication offered by an Internet marketing service provider to communicate with clients would run afoul of the confidentiality requirements of ER 1.6.

E. Conflicts of Interest

Perhaps one of the greatest challenges to an Internet marketing voucher or coupon program would be the potential for conflicts of interest. If applied in its traditional approach, the voucher or coupon would be purchased by the client prior to consultation with the lawyer. As such, the lawyer would not be able to determine if there were a conflict of interest with a current or former client, or personal interest of the lawyer until after his or her voucher or coupon was purchased and the legal fees paid. On its face, this arrangement is problematic. If a conflict exists, the lawyer must decline or terminate the representation. As noted above, if the attorney-client relationship is deemed to attach (because of the nature of the voucher or coupon purchased) at the point of sale of the voucher or coupon, the undertaking of the representation would violate ER 1.7 or ER 1.9. Moreover, as noted above, the termination of any representation may also be problematic unless there was an immediate full refund.

F. Competence and Professional Independence

ER 1.1 and ER 2.1 require a lawyer to provide competent representation and exercise independent professional judgment. Given the fact that the clients purchase the lawyer's voucher or coupon before even meeting with the lawyer, it is difficult to see how this standard will be met. There are many scenarios where there may be questions about a lawyers' competence or professional independence. Indeed, the Internet voucher concept is that an agreed-upon minimum number of customers will be aggregated and delivered to the lawyer. It is unknown whether there is or could be a maximum limitation. Whether the number of clients is too little to create an effective volume practice or too great such that it may overwhelm the lawyer would be factors to consider in determining whether a lawyer could competently provide the representation offered through a voucher or coupon program. Because the consumers would never be delivered to the lawyer if the minimum number for aggregation were not obtained, all of this must be accurately and adequately disclosed in the voucher. In any event, the Committee is concerned about the purchasing of services prior to having an opportunity to consult with the client. The Committee believes that it would only be appropriate, if at all, in very narrow circumstances that were adequately described and disclosed in the voucher or coupon.

G. Fee Sharing and Advertising

ER 5.4 precludes the sharing of legal fees with a non-lawyer. On the other hand, ER 7.2 allows a lawyer to pay the reasonable costs of advertisements or communications permitted by the Rule. *See* Opinion 11-02 and Opinion 06-06. Although a specific coupon or voucher has not been presented for review, it appears to the Committee that the business model contemplated would violate the fee sharing prohibition even if the amount paid to the Internet marketing service provider were deemed to be reasonable. The problem is that the program provides that the purchase price of the coupon or voucher is paid by the consumer directly to the service provider. Unless the program is clearly designed so that the consumer is not deemed to be a client at the time of the payment, and the payment can be characterized as something other than a legal fee, this situation would not be ethical. This is not a situation in which the lawyer pays the Internet marketing service provider from his or her own account or from legal fees that the lawyer has already earned and is entitled to use. Instead, the coupon or voucher are for services that the

lawyer has not yet performed. As such, unless the program could be designed in such a way as to avoid the characterization of the purchase price as a legal fee, it would be unethical. The Committee doubts that any coupon or voucher under the program reviewed could be sold in such a way as to avoid the characterization of the purchase price as legal fees. As such, the Committee believes that any such program would constitute an unethical sharing of legal fees with a non-lawyer. In addition, there is a concern as to whether a fee of up to 50 percent of the value of the coupon or voucher would be a reasonable fee under the requirements of ER 7.2.

CONCLUSION

The Committee has not been presented with any specific voucher or coupon to review, and the terms and conditions of each, along with other unique facts and circumstances, would need to be reviewed and analyzed to make a final determination as to whether a lawyer could ethically participate in an Internet marketing voucher or coupon program. Nevertheless, given the numerous potential and probable ethical issues with such a program, the Committee believes that participation in such a program would likely result in violations of the Ethical Rules. In short, the Internet marketing voucher or coupon model gives rise to potential issues and ethical violations pursuant to one or more of ERs 1.1, 1.2, 1.6, 1.7, 1.9, 1.15, 1.16, 1.18, 5.4, 7.1, and 7.2. Practitioners are discouraged from using an Internet marketing voucher or coupon system and, if they opt to do so, they must proceed with caution and only after careful consideration and analysis of the ethical rules and implications.