

## Advertising / Marketing on Groupon

### Avoiding Liability Bulletin - September 2011

... A question has been raised by a reader about the appropriateness of advertising and marketing by therapists and counselors of the kind that is done by and through Groupon or a similar service based upon the idea of the collective buying power by a community of consumers. Consumers receive an email which contains the “deal.” Consumers can purchase the “deal” at a discounted price. If enough people purchase the “deal” it is activated and they can use their “coupon” with the business advertised. If there are not enough purchasers, the deal is cancelled. I was rather surprised by the question, but new advertising and marketing ideas and practices raise new questions about the proper and ethical manner of increasing business for mental health professionals. I admit at the outset that I know little about Groupon in particular, and I’ve heard and read just a little about the general concept. The comments that follow are based upon this limited knowledge. I do not know whether Groupon or similar services actively market to and for health care professionals, but I express my views as a matter of first impression and for purposes of discussion and to raise awareness.

Anyone venturing into this arena would be well-advised to check with his or her own attorney before advertising or marketing in this manner. While it seems by its popularity that this kind of advertising is good for restaurants and many retail businesses (including “health spas”), mental health professionals ought to be well-informed about the precise manner in which the advertising is accomplished, as well as aware of the content of the advertising and the ability of the practitioner to handle the “traffic” that may thereby be created. In this brief discussion of the subject, I am thinking of the private practitioner, and not some larger entity, such as a non-profit corporation, or some other kind of health facility, perhaps with multiple locations. Even if the several legal concerns that may exist are allayed based upon an analysis of a state’s laws, the practitioner must determine whether this kind of mass marketing sends the desired message (based upon the practitioner’s view of his or her profession, the kinds of services offered, and the manner in which he or she wants to be seen by the consumer).

I believe that one of the essential principles of Groupon and similar services is that the company keeps a portion of the money from each Groupon (or coupon) they sell. This raises the issue of unlawful “fee splitting” for licensed mental health professionals in many or most states. There are laws that make it unlawful for specified health care professionals to “split their fees” with unlicensed persons or entities. The rationale and theory behind these laws is that the licensee is to get paid the price for the service provided, and if the licensee “kicks back” a portion of the fee to the person or entity responsible for obtaining the clients, the fee paid by the patient is arbitrarily or wrongfully inflated. On the other hand, perhaps it can be argued that the method used amounts to nothing more than the marketing firm being paid for their services and that no law is violated. On issues such as this, one must research the applicable law in their state of practice. Each state has its own approach to this subject, and of course, with fine nuances, the laws will differ.

Another possible problem arises when the advertisement contains certain words or phrases and when the advertiser is a licensed health care professional. State law may prohibit, limit, or condition the use of certain words in advertising in an effort to prevent false, misleading or deceptive advertising by specified licensed health care professionals. California law, for example, provides that price advertising by health care professionals shall not be fraudulent, deceitful, or misleading, including statements or advertisements of bait, discount, premiums, gifts, or any statements of a similar nature. The law also provides, in connection with price advertising, that the price for each product or service shall be clearly identifiable.

Another issue to be grappled with involves the fact that if enough people buy the deal, then it's a go. It seems strange or awkward to me to offer mental health services to the public and to say that if enough people don't buy the "coupon," no treatment for you – or, I will treat you, but not at my "discounted" coupon price. For me, this raises the issue of bait and switch, an advertising practice that is universally prohibited. I am not saying that it is a bait and switch – I am saying that it raises this issue for me. I am uncomfortable with a professional saying to the public – if enough of you come, I'll give you a special deal, but if enough do not come, there is no deal. But, you can come to see me anyway – and I won't (or will?) give you a "discounted" price.

What is it that will be advertised – unregulated life coaching, treatment of eating disorders, relationship counseling? What is the exact content of the four corners of the coupon or other advertisement, and is it in any way false, fraudulent, misleading, or deceptive – either by its specific content or by the omission of content? Will you be able to accommodate an onrush of people to your practice? How will the discounted fees, when they become known to other patients, appear to those who are paying substantially more? How much of an increase in fees will occur when the discount runs out and will that be disclosed at the outset? How will insurance reimbursement be handled? Does this seem to you like an appropriate, professional, and ethical way for a mental health professional to advertise his or her services or engage in a marketing effort? If "yes," be sure that you have first taken steps to get all of the information and consultation that you need in order to be sure that you are not acting in a manner that will subject you to liability.

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