

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 665 (71-93) 6/3/94

Topic: Barter Exchange; Advertising; Lawyer Referral Service

Digest: A lawyer may participate in a barter exchange so long as the exchange does not interfere in the lawyer's professional judgment, the advertising materials for the exchange comply with DR 2-101(A), the exchange does not refer clients to participating lawyers other than through the use of advertising that complies with the Code, the exchange and its agents do not engage in in-person solicitation of lawyers' services, and the lawyer's fee to the client is reasonable.

Code: DR 2-101(A), (B), DR 2-102(A), (B), EC 2-11, DR 2-103(B)-(D), DR 2-106(A), DR 3-101(B), DR 3-102, EC 5-1, EC 5-21, DR 5-103 (B)

QUESTION

May a lawyer participate in a barter exchange?

OPINION

An attorney wishes to participate in an exchange that is an association of retail businesses that want to exchange their goods or services among association members. The exchange manager acts as a third party recordkeeper and clearinghouse of barter transactions among participants. Lawyer participants would sell legal services for "trade dollars," that may be used to "purchase" any services offered through the barter exchange. Thus, if a plumber provides plumbing services to a lawyer, he or she receives trade dollars that may be used to purchase a variety of services, and not solely legal services. The exchange manager assists participants in trading among themselves by publishing directories listing clients in designated geographic regions. It also may advertise to participants the availability of other participants' products or services. In addition, brokers who are independent contractors may broker transactions between participants.

The manager of the exchange charges service fees of \$15 in cash and 15 "trade dollars". In addition, there is a charge of 5% or 6% cash on purchases and 5% or 6% cash on sales.

This opinion is based on a number of assumptions. First, the barter exchange may not interfere with the professional judgment of the lawyer, or require the lawyer to accept a matter when the lawyer otherwise would decline representation (e.g., because the lawyer does not have the requisite competence, the representation would involve a conflict of interests, or the client wishes to pursue a frivolous claim). Canon 5, EC 5-1, EC 5-21. Second, clients must pay the expenses of litigation in cash rather than trade dollars. DR 5-103(B) (lawyer shall not advance or guarantee financial assistance to client other than an advance of the expenses of litigation, for which the client remains ultimately liable). Third, if the barter exchange covers more than one state, the lawyer will not practice law in a jurisdiction where doing so would violate the regulations of the profession in that jurisdiction. DR 3-101(B). Finally, we assume that the lawyer will pay all income taxes due and payable on the income earned through the barter service and does not use the barter exchange in order to evade taxes.

This inquiry raises three issues: (1) whether the barter exchange is a lawyer referral service, (2) whether it otherwise complies with the Code's requirements as to advertising and solicitation of clients, and (3) whether the exchange's payment system complies with various ethical prescriptions on legal fees, including the prohibition against sharing legal fees with non-lawyers.

Lawyer Referral Services.

DR 2-103 provides as follows:

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except by any of the organizations listed in DR 2-103 (D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services . . . other than by advertising or publicity not proscribed by DR 2-101, except that

(1) The lawyer may request referrals from a lawyer referral service operated, sponsored or approved by a bar association and may pay its fees incident thereto.

(D) A lawyer . . . may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services . . .:

* * *

(3) A lawyer referral service operated, sponsored or approved by a bar association.

A barter exchange does not inherently constitute a lawyer referral service, so long as the exchange does not recommend or select a particular lawyer for a member seeking legal services, and does not restrict the number of lawyer participants in any particular area, so that selection of legal services necessarily implies selection of a particular lawyer. As long as these requirements are met, the operation of the barter exchange would not implicate DR 2-103.

It might be argued that the exchange's payment system gives the sponsor an incentive to engage in active recommendation of a participating lawyer. The service fees charged by the manager of the exchange includes both a fee of 15 trade dollars and a percentage of all sales of services. Thus, the manager has an interest in promoting sales of services, and also receives trade dollars which it may wish to use or sell. As long as the trade dollars received by the manager from a participating lawyer may be used to purchase any service offered by the barter exchange, and are not limited to the purchase of legal services from the lawyer, the sponsor would not be motivated to convince prospective trading partners to use the services of the lawyer. In that case, the "in kind" payment to the sponsor would pose no ethical issues. The motivation to promote the use of the lawyer's services is discussed below under "advertising."

Advertising.

The Code authorizes advertising so long as it is not false, deceptive or misleading, DR 2-101(A), and does not contain claims regarding the quality of the lawyer's legal services or claims that cannot be measured or verified, DR 2-101(B). Many lawyers advertise their services through newspapers, magazines and other written materials, including telephone directories. There is no reason to believe that a directory of service providers who are willing to accept "trade dollars" as compensation presents problems that are different from those presented by any other method of advertising. Of course, while a lawyer could pay to place an ad in a directory of service providers, the lawyer may not compensate the exchange to induce it to publish a seemingly unsolicited favorable review.

The one potentially troubling aspect of the barter service is that the sponsor or other broker may "broker" transactions between participants. If this brokerage function involves in-person solicitation (including solicitation by telephone) of legal services, participation in the barter exchange would be prohibited by DR 2-103(C). Such in-person solicitation by the sponsor would be especially troubling, since the sponsor may be deemed to have a pecuniary interest in the employment of the lawyer. See Matter of Greene, 54 N.Y.2d 118, 120, 429 N.E.2d 390, 391, 444 N.Y.S.2d 883, 884

(1981), cert. denied, 455 U.S. 1035 (1982); *Matter of Alessi*, 60 N.Y.2d 229, 231, 457 N.E.2d 682, 683, 469 N.Y.S.2d 577, 578 (1983), cert. denied, 465 U.S. 1102 (1984) (explaining that Greene did not ban all mailings to third parties requesting solicitation on behalf of attorneys, but was limited to mailings to real estate brokers and others whose interests might "be more closely intertwined with those of the attorney than with those of the client"). If, however, the brokerage function involves only written advertising material, and the attorney has control over the statements made about the attorney's services, it should present no problems under the Code.

Fee Splitting.

DR 3-102 prohibits a lawyer from sharing legal fees with a nonlawyer. The manager of the exchange not only charges a service fee of \$15 in cash and 15 trade dollars, but also charges 5% or 6% cash on purchases and 5% or 6% cash on sales. This payment system raises serious questions under the Code's proscriptions against splitting legal fees with nonlawyers. There is a long line of ethics opinions prohibiting lawyers from paying for the services of nonlawyers based on a percentage of the lawyers' fee in the matter with respect to which the nonlawyer's services are rendered. See, e.g. N.Y. State 633 (1991) ("staff leasing company" could not lease staff to engage in debt consolidation and financial planning for a law firm's clients and be compensated based on the volume of business developed); ABA 86-1519 (1986) ("Payment on the basis of a percentage of the lawyer's fee has long been considered a sharing of fees in violation of the applicable rules.")

Nevertheless, bar association opinions have sanctioned the use of credit card plans for payment of legal services, despite the fact that the financing bank charges a fee calculated as a percentage of the legal fee. Compare N.Y. State 117 (1969) (disapproving on other grounds a program in which the bank charged a fee of 2-1/2% to 5%, with N.Y. State 362 (1974) (approving participation in a bank charge card system).

A different approach to the problem of fee splitting was taken by ABA Formal Opinion 88-356 (1988) (use of lawyer placement agency to obtain temporary lawyer services). In that case, lawyer placement agencies placed lawyers temporarily with law firms and were paid a fee calculated as a proportion of the lawyer's compensation. The ABA concluded that this arrangement did not violate the ethical codes as long as the professional independence of the lawyer was maintained without interference by the agency, and the total fee paid by each client to the law firm was reasonable. The ABA concluded that the fact that the agency's fee was based on the amount of a lawyer's fee did not mean that the agency was splitting a legal fee. See also N.Y. City 273 (1933) (barter exchange involving 12% fee paid to exchange did not involve unethical fee splitting).

There are a number of rationales for the prohibition against sharing legal fees with nonlawyers: (1) to avoid the possibility of a nonlawyer interfering with the exercise of the lawyer's professional judgment in representing a client, (2) to ensure that the total fee paid by the client is not unreasonably high, and (3) to ensure that the non-lawyer is not motivated to engage in improper solicitation of business for the lawyer. ABA Formal 88-356 (1988), N.Y. State 565 (1984). We do not believe that the proposed barter exchange implicates these concerns so long as the barter exchange exercises no influence over the professional judgment of the lawyer, the lawyer's legal fee complies with DR 2-106(A) of the Code, and the exchange sponsor does not engage in in-person solicitation of customers or use written advertising materials that the lawyer/participant could not use. N.Y. State 565 involved a lawyer who wanted to employ a public relations and marketing firm to solicit potential clients, for which it would be paid a percentage of the legal fees. In that case, we noted that the duties of the marketing firm would include in-person solicitation of clients, and said of the compensation arrangement:

Such form of compensation would tend to give the marketing firm a pecuniary interest in the success of the solicitation, and may lead to the use of hard-sell tactics or other improprieties.

However, where the exchange sponsor is not being hired for the purpose of in-person solicitation, and the advertising materials used by the sponsor or the lawyer/participant comply with the Code, the concern with hard-sell tactics is not implicated.

CONCLUSION

For the reasons stated and subject to the qualifications discussed above, the question is answered in the affirmative.