



30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street
P: (860) 223-4400
F: (860) 223-4488

Standing Committee on Professional Ethics

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INFORMAL OPINION 15- 04

LAWYER'S PARTICIPATION IN A BARTER-EXCHANGE PROGRAM

We are asked whether an attorney may permissibly participate in a barter exchange program ("Barter Exchange") where the attorney would provide legal services to a client in exchange for receiving barter currency, which the attorney would then use to purchase goods from other members of the Barter Exchange ("Members"), rather than being paid for the services in cash by the client. We understand that the Barter Exchange acts as a clearinghouse for the exchange of goods or services between Barter Exchange Members, keeps track of the value of the barter transactions between Members¹; provides periodic accountings of each Member's account; and provides year-end tax reporting of each Member's barter transactions. For these services, the Barter Exchange charges each Member, including participating attorneys, an annual membership fee, as well as administrative processing fees calculated as a percentage of the value the services consumed by Member (not a percentage of the value of the services provided).

We are asked to opine whether such an arrangement, where payment for attorney services is made via barter currency instead of dollars and where the Barter Exchange is paid the identified fees, is ever permissible under the Rules of Professional Conduct² and if so, whether the following conditions must be satisfied in order for an attorney to ethically participate in a Barter Exchange: (1) the attorney retains the sole discretion to accept or decline matters for which Members seek legal representation and the Barter Exchange will exercise no influence over the professional judgment of the attorney's intake decisions or representation; (2) the Barter Exchange does not receive any information concerning the attorney's representation of Members;³ (3) all listings and advertisements published by the Barter Exchange concerning the

¹ It is our understanding that each Member receives barter currency credits to his or her account based on the services the Member provides. Members may then use these barter currency credits to purchase other Members' services.

² We are mindful that the specific terms and conditions of membership and operation of barter exchange organizations could vary widely. Accordingly, for purposes of evaluating compliance with the Rules of Professional Conduct, we caution that lawyer participation in any proposed barter exchange arrangement must be analyzed based upon the specific facts and circumstances presented. Moreover, our analysis is framed to the specific questions raised (and Rules implicated) by the requester. We do not attempt to identify and opine on every conceivable ethical problem that might be posed by or presented in a barter arrangement for legal services.

³ The requester also asks whether it is necessary that the attorney's membership in the Barter Exchange not create an attorney-client privileged relationship between the attorney and the Barter Exchange. We do not understand why that would be the case; nor do we understand what ethical issue the requester is asking us to address. Therefore, we

attorney are truthful, not misleading, and identify the states in which the attorney is licensed, and the Barter Exchange does not engage in in-person solicitation of the attorney's services; (4) the Barter Exchange does not suggest or recommend the attorney to Members; and (5) Member clients of the Attorney are not allowed to make advance payments for legal services or advance payments for legal costs and expenses using barter dollars or credits.

We opine that an attorney's participation in a Barter Exchange is not per se prohibited by the Rules of Professional Conduct. However, all of the above conditions are required in order for an attorney to ethically participate in the Barter Exchange. Before we address each of the issues raised by the requester in more detail, the Committee emphasizes that Barter Exchange participation does not obviate the need for the attorney to have an engagement agreement with a client who is a Barter Exchange Member. As required by Rule 1.5, the engagement letter should describe the services that the attorney will perform and the terms of payment, including the fact that barter dollars will be used as payment and how expenses will be handled. While it may not be specifically required, the Committee suggests that participating attorneys also address in the engagement letter potential contingencies resulting from this unique arrangement, such as what would happen if the Barter Exchange ceases to exist during the representation, or the Member or attorney discontinues participation in the Barter Exchange.

Now, we turn to the issues raised by the requester, though we combine certain of issues raised and address them together.

Client Payments for Legal Services in Barter Currency Does Not Violate Rule 1.5. There is no requirement in the Rules of Professional Conduct ("Rules") that payment for attorney services must be made in money. The Official Commentary makes clear that "*a lawyer may accept property in payment for services.*" R.P.C. Rule 1.5, Official Commentary (emphasis added). Thus, an attorney is not prohibited by the Rules of Professional Conduct from accepting payment for his or her services in kind.

The Official Commentary to Rule 1.5 cautions that "a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of business transaction with a client." However, it is our understanding that the Members participating in the Barter Exchange perform services for barter currency, which they can then use to purchase any other Member's services (not just the Member that is using their own services), and that those other Members set their own prices for the services they provide based on fair market values. Thus, we believe that, at least in most instances, the Barter Exchange payment system between attorney and Member client simply substitutes a different type of currency (barter currency instead of traditional dollars) and does not constitute a "business transaction" between the attorney and client that would implicate Rule 1.8(a). As discussed above, the attorney is obligated to comply with Rule 1.5(b), including timely communication, in writing, of the scope of the engagement, the basis or rate of the fee, and the expenses for which the client will be responsible. Moreover, the cardinal principle governing a

do not address this aspect of the request. To the extent the requester intends to ask whether it is necessary that the Barter Exchange not interfere with the attorney-client privilege, the answer is to the affirmative, and we address that issue in connection with the need to maintain the confidentiality of client information.

lawyer's fee still applies: the fee must not be unreasonable, regardless of the form of payment. R.P.C. Rule 1.5 (a).

Fees Paid to the Barter Exchange Do Not Violate Rules 5.4 or 7.2: Rule 5.4 (a) prohibits a lawyer from sharing fees with a non-lawyer. Rationales for prohibiting the sharing of legal fees with non-lawyers include: (1) avoiding the possibility of a non-lawyer interfering with the exercise of a lawyer's professional judgment in representing the client; (2) ensuring that the total fee paid by the client is not unreasonably high, and (3) ensuring the non-lawyer is not motivated to engage in improper solicitation of business for the lawyer. *See e.g.* ABA Formal Op. 88-356 (1988).

Early ethics opinions addressing barter exchange arrangements were undeniably hostile to barter exchanges and the fees charged by them. *See e.g.*, Cal. State Bar Op. 1977-44, reported in 54 Cal. St. B.J. 182 (1979) (improper for lawyers to participate in a barter exchange because it involves an improper solicitation of business and division of fees); ABA Informal Op. 1430 (Jan. 8, 1979) (improper for lawyers to become members of trade exchanges because such exchanges constitute an improper division of fees); Mass. State Bar Op. 78-6, cited in 63 Mass. L. Rev. 137 (1978) (improper for an attorney to become a member of a service which creates a 10% service charge on all transactions between members and exists to promote the members' products and services). However, more recent opinions have been more amenable to lawyer participation in a barter exchange. *See, e.g.*, N.Y. State Bar Op. 665 (71-93)(June 3, 1994)(ethical for lawyer to participate in a barter exchange program if the following requirements are met: (1) the exchange may not interfere with the lawyer's professional judgment, (2) the advertising materials for the exchange must comply with New York DR 2-101(A), (3) the exchange may not refer clients to participating lawyers other than through the use of advertising that complies with the Code of Professional Responsibility, (4) the exchange and its agents do not engage in in-person solicitation of clients for barter-exchange lawyers, and (5) the lawyer's fee to the client is reasonable); Utah State Bar Advisory Op. 97-05 (adopting New York State Bar's approach as 'reasonable,' and characterizing barter exchange fee based on percentage of services provided as a permissible surcharge akin to a bank's credit card processing fee; but cautioning that each barter exchange agreement should, for ethics compliance purposes, be considered on its own particular merits); North Carolina State Bar Formal Ethics Op. 4 (10/29/2010)(agreeing with New York State Bar approach and approving 10% fee charged by exchange to member consuming the lawyer's services).

We do not view the annual fee payable by participating attorneys (as well as every other Member of the Barter Exchange) as fee sharing, since the fee bears no relationship whatsoever to any legal fee charged by the attorney. The percentage-based transaction fee charged by the Barter Exchange presents a closer question. However, we agree with the modern trend characterizing this fee – which is paid by the purchaser of the services, not by the lawyer providing the services – as a surcharge on the transaction. Because the fee is a surcharge on the transaction, it is not impermissible fee sharing in violation of Rule 5.4. As long as the fee is imposed uniformly on all Member transactions, it is permissible.

We must next analyze whether the fees imposed by the Barter Exchange on the attorney run afoul of Rule 7.2(c), which provides that “[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 not-for-profit referral service...."

We are advised that the Barter Exchange does not suggest or recommend the attorney to Barter Exchange Members. Accordingly, there is no basis to conclude that the attorney's payment of an annual membership fee or the proposed administrative processing fee constitutes the giving of value to a person "for recommending the lawyer's services" in violation of Rule 7.2 (c). Our conclusion on this point is bolstered by our understanding that there are no restrictions on the number of attorneys who may participate in the Barter Exchange, and that the Barter Exchange provides Members seeking legal services with the complete, impartial list of all participating attorneys, without recommendation of any kind.⁴

Preservation of Attorney's Independent Professional Judgment. In order for participation in the Barter Exchange to be ethically permissible, the attorney must retain the sole discretion to accept or decline matters for which Members seek legal representation, and to exercise his or her professional judgment in the handling of the matters. Rule 1.1 requires an attorney to provide a client with competent representation; if the attorney fairly cannot do so, the attorney must decline the representation. Thus, an attorney must have unfettered freedom to accept or decline a representation as he or she sees fit, to ensure that the client protections inherent in Rule 1.1 are properly preserved. In addition, Rule 5.4(c) expressly prohibits a lawyer from allowing a third party to interfere with his or her professional judgment. Thus, the Barter Exchange may not exercise any influence over the matter.

Preservation of Client Confidences and Attorney Client Privilege. Rule 1.6 mandates that a lawyer maintain the confidentiality of information relating to the representation of a client, subject to certain exceptions not relevant here. Thus, the Barter Exchange must not be entitled to information relating to the representation. The attorney is obligated to preserve the confidentiality of such information. Thus, for example, the attorney should not be sharing detailed invoices with the Barter Exchange. These should instead be conveyed directly to the client.

Compliance with Applicable Solicitation and Advertising Restrictions. An attorney's provision of services through the Barter Exchange is fully subject to the requirements of Rule 7.1 (regarding communications about legal services), Rule 7.2 (regarding attorney advertising), and Rule 7.3 (regarding attorney solicitation of clients). Thus, all listings and advertisements published by the Barter Exchange concerning a participating attorney must be truthful and not

⁴ We do not view the barter exchange as constituting a "lawyer referral service" within the meaning of the Rules of Professional Conduct. A lawyer referral service is a service that purports to screen lawyers before allowing them to participate and to match prospective clients with suitable participating lawyers. The Official Comment to Rule 7.2 adds that a lawyer referral service: "is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and for other client protections, such as complaint procedures or malpractice insurance requirements."

misleading.⁵ Further, just as the attorney cannot engage in in-person solicitations (except in certain limited situations), the Barter Exchange also cannot engage in-person solicitations on the attorney's behalf that would violate Rule 7.3. (There are numerous other requirements set out in the Rules governing advertising and solicitation, but the requestor does not specifically inquire about them. Suffice it to say that the attorney cannot avoid any of these requirements by allowing the Barter Exchange to violate the Rules on his or her behalf.) The attorney should monitor the actions and communications relating to attorney services of the Barter Exchange with Members and ensure continued compliance with the advertising and solicitation rules.

Payment of Litigation Expenses in Non-Cash Barter Currency. The requestor asks whether barter money may be used for advance payments for legal services or as advance payments for legal costs and expenses. Because barter money is a fictional currency generated by the Barter Exchange and could not be held in an attorney's trust fund pursuant to Rule 1.15(b) (safekeeping property), it may be used for advance payments only if the attorney enters into a written agreement with the client pursuant to Rule 1.15(d), and complies with Rule 1.15(b).

THE COMMITTEE ON PROFESSIONAL ETHICS

BY 
Marcy Tench Stovall, Chair

⁵ Inclusion of the states of licensure is desirable, see R.P.C. Rule 5.5. If the Barter Exchange operates in multiple states, it will avoid conveying the misleading impression that the attorney is licensed in all states in which the Barter Exchange operates.