

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 97-05

Approved April 25, 1997

Issue No. 1: Is it ethical for an attorney to receive payment for legal services other than in money?

Opinion: The Utah Rules of Professional Conduct permit an attorney to accept payment for legal services in a form other than money. All arrangements for payment of an attorney's fees, however, must comply with the applicable provisions of the Utah Rules of Professional Conduct concerning fees and the attorney-client relationship.

Issue No. 2: Is it ethical for an attorney to barter legal services through a barter exchange?

Opinion: Although an attorney's bartering of legal services through a barter exchange is not prohibited per se by the Utah Rules of Professional Conduct, such bartering is unethical if the attorney's conduct or the structure, terms, or conditions of the attorney's arrangements with the barter exchange violate any of the Utah Rules of Professional Conduct.

Analysis: The request for this opinion asks generally, without presenting specific facts and circumstances, whether attorneys ethically may receive payment for legal services other than in money, such as through barter exchanges. The request also asks whether Utah Ethics Advisory Opinion No. 50, issued August 25, 1978, is still valid, noting that questions concerning an attorney's participation in barter exchanges are of continuing interest in Utah.

Payment of Attorneys' Fees Other Than in Money. Nothing in the Utah Rules of Professional Conduct requires that an attorney's fees be paid in money. The fundamental requirement of the Utah Rules of Professional Conduct is that an attorney's fees must be reasonable. (fn1)

Rule 1.5(b) requires a written communication concerning the basis or rate of an attorney's fee when the lawyer has not regularly represented the client and it is reasonably foreseeable that total attorneys' fees to the client will exceed

\$750.00. A determination of whether the \$750.00 threshold will be met in a particular case requires that attorneys' fees be evaluated in terms of their dollar amount.

However, Rule 1.5 does not require that payment for legal services be made in money. The following official comment to Rule 1.5 states that an attorney may accept property in payment for fees:

A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

As this comment illustrates, no arrangement for payment of an attorney's fees, whether in money, property or services, should violate any of the prohibited transaction rules of Rule 1.8. For example, an arrangement for payment of attorneys' fees that involves the acquisition of a pecuniary interest adverse to a client in violation of Rule 1.8(a) is prohibited. Any arrangement for payment of attorneys' fees that involves giving the lawyer literary or media rights in violation of Rule 1.8(d) is prohibited. Accepting reimbursement of costs other than in money in a way that provides for an improper advance of costs or expenses could also violate the financial assistance restrictions of Rule 1.8(e).

If an arrangement for payment of an attorney's fees in property or services is otherwise appropriate under the Utah Rules of Professional Conduct, the attorney should be fully aware of the tax implications of such an arrangement and should comply with applicable tax laws. The application of tax laws to barter arrangements is a matter of substantive law and therefore is not addressed in this opinion. However, it would be professional misconduct for an attorney to engage in a criminal act involving a barter for fees; this would violate Rule 8.4(b) by reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Further, under Rule 8.4(c), it would be professional misconduct for an attorney to engage in any conduct involving participation in a barter exchange that constitutes dishonesty, fraud, deceit, or misrepresentation.

Bartering Legal Services Through a Barter Exchange. The Utah Ethics Advisory Opinion Committee has addressed the ethical propriety of an attorney's participation in a barter exchange on two prior occasions. (fn2)

Opinion No. 12 determined that attorneys may not be members of barter exchanges in which they barter their services for other professional services. The barter exchange addressed in Opinion No. 12 did not list names of attorney members as such, but a list of attorney members would have been made available to exchange members upon request. Opinion No. 12 determined that such a listing would violate Canon 27 of the then-applicable Canons of Professional Ethics, which provided: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations." The opinion further determined that such a listing would violate several provisions of the Code of Professional Responsibility: (a) the provisions of Disciplinary Rule ("DR") 2-101(B) prohibiting advertising by attorneys, (b) the provisions of DR 2-103(B) prohibiting attorneys from giving anything of value to an organization to recommend or secure employment by a client; and (c) the provisions of DR 2-103(C) prohibiting attorneys from requesting an organization (other than an approved referral service) to recommend the attorney's employment.

Opinion No. 50 again determined that attorneys may not join barter exchanges. The barter exchange addressed in Opinion No. 50 consisted of businesses paying a membership fee to the exchange operators and receiving in return a credit in the same amount in an "exchange account." Thereafter, payment for any services or goods which one member provided to another member of the exchange was reflected as a credit to its exchange account rather than being paid for by the recipient. The exchange charged a percentage fee for each transaction. The exchange issued a monthly newsletter including a general description of the types of businesses associated with the exchange and would have noted that attorneys at law were members of the exchange. Had the arrangement been approved, an exchange member needing legal services would have called the exchange, which would then have given the member a list of the attorney members of the exchange.

Opinion No. 50 reasoned that, in spite of changes in DR 2-101(B) permitting advertisement of legal services under certain restrictions, the restrictions on solicitation contained in DR 2-103 had been virtually unchanged. Opinion No. 50 noted that solicitation of services by an attorney through a barter exchange was still prohibited by the Code of Professional Responsibility and had not been authorized by the then-recent opinion of the United States Supreme Court in *In re Primus*. (fn3) Accordingly, Opinion No. 50 concluded that participation of an attorney in a barter exchange would be improper, expressly basing its conclusion on the solicitation rules of DR 2-103.

Within the past 20 years, other jurisdictions have addressed whether it is ethical for an attorney to barter legal services

through a barter exchange, generally concluding that attorneys may not barter legal services through barter exchanges. (fn4) Recently, however, the New York State Bar Association Committee on Professional Ethics issued its Opinion No. 665 (71-93) (June 3, 1994), permitting New York lawyers to participate in barter exchanges that meet certain requirements. The New York ethics committee concluded that, for a lawyer ethically to participate in a barter exchange, the following requirements must be 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), (fn5) (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, (fn6) (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. These conditions are reasonable, and we adopt them in principle.

Rule 7.3 of the Utah Rules of Professional Conduct (Direct Contact with Prospective Clients) provides solicitation rules that are different from the solicitation rules in effect when Opinion Nos. 12 and 50 were issued. Due to these changes, the categorical statements in Opinion Nos. 12 and 50 such as "[s]olicitation of services by an attorney is still prohibited" are no longer accurate, and Opinion Nos. 12 and 50 are overruled. However, Rule 7.3 does prohibit certain forms of solicitation, and the fundamental premise of Opinion Nos. 12 and 50 that an attorney may not participate in a barter exchange in violation of current solicitation rules remains valid.

Under current ethical rules governing solicitation of legal services, and given the variety in possible structures, terms, and conditions of barter exchanges, the Committee cannot make a categorical determination that an attorney's participation in a barter exchange is a violation of the Utah Rules of Professional Conduct. A determination of the ethical propriety of an attorney's participation in a particular barter exchange could only be made following a review of the attorney's proposed conduct and the structure, terms, conditions of the particular barter exchange under current ethics rules, including: Rule 1.1 (Competence), Rule 1.2 (Scope of Representation), Rule 1.5 (Fees), Rule 1.6 (Confidentiality of Information), Rule 1.7 (Conflict of Interest: General Rule), Rule 1.8 (Conflict of Interest: Prohibited Transactions), Rule 1.9 (Conflict of Interest: Former Client), Rule 1.16 (Declining or Terminating Representation), Rule 3.1 (Meritorious Claims and Contentions), Rule 4.1 (Truthfulness in Statements to Others), Rule 5.5 (Unauthorized Practice of Law), Rule 7.1 (Communications Concerning a Lawyer's Services), Rule 7.2 (Advertising), Rule 7.3 (Direct Contact with Prospective Clients), Rule 7.4 (Communication of Fields of Practice). Finally, an attorney bartering services through an

exchange should be fully informed of the tax implications of such an arrangement and should comply with applicable tax laws.

Footnotes

1. Utah Rules of Professional Conduct 1.5(a).
2. Utah Ethics Advisory Opinion No. 50 (Aug. 25, 1978); Utah Ethics Advisory Opinion No. 12 (Aug. 15, 1973).
3. 436 U.S. 412 (1978).
4. *See, e.g.*, Ill. State Bar Op. 583, 1980 WL 130458 ("a lawyer may not join a trade association where he barter legal services for 'exchange checks' redeemable only in goods and services from other members of the association"); 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).
5. The corresponding rules in Utah are Rules 7.1 (Communications Concerning a Lawyer's Services) and 7.2 (Advertising).
6. This corresponds to the Utah Rules of Professional Conduct.

Rule Cited:

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