



**New York State Bar Association
Committee on Professional Ethics**

Opinion 971 (6/26/13) – Overrules N.Y. State 524

Topic: Solicitation; auction of legal services by charity

Digest: Subject to disclosure requirements and limitations, a lawyer may donate legal services to a charitable organization for auction as a fund-raising device.

Rules: 1.1(b), 1.2(c), 1.7, 1.9, 7.1, 7.2(a)

FACTS

1. In N.Y. State 524 (1980), this Committee concluded that it is improper for a lawyer to donate legal services to a charitable organization for auction as a fund-raising device. The inquirer asks whether this remains the Committee’s opinion under the New York Rules of Professional Conduct.

QUESTION

2. May a lawyer donate legal services to a charitable organization for auction as a fund-raising device?

OPINION

3. N.Y. State 524 concluded that a lawyer may not donate legal services to a charitable organization for a fund-raising auction. The principal reasoning was as follows:

[A] lawyer who has committed his services to be auctioned is unable to exercise the professional judgment and discretion that must be brought to bear in deciding to accept a client. The Code specifies a number of factors relating to the client and the legal matter that a lawyer must consider prior to undertaking representation. For example, and most obviously, a lawyer “should accept employment only in matters which he is or intends to become competent to handle.” EC 6-1. In the context of a charitable auction, the lawyer has agreed to represent the successful bidder without knowing whether the employment will involve him in a matter beyond his competence.

Additionally, the Committee expressed concern that “[t]he practice of donating legal services to a charitable organization to be auctioned as a fundraising device may also be deemed improper under DR 2-103(B), which prohibits the lawyer from giving anything of value to a third party for

recommending or obtaining the lawyer’s employment.” Finally, the Committee expressed a concern that “the offering of legal services as a fundraising device does not appear to be an appropriate means of publicizing the lawyer whose services are being offered,” because the Committee believed that such devices “tend to confuse the process of intelligent selection of counsel with the objectives of the fundraising organization.”

4. Most other ethics committees that considered the question at around the same time reached a similar conclusion. *See, e.g.*, ABA Inf. 1250 (1972) (advertising the auction of the lawyer’s services by a charitable organization would contravene the spirit of the advertising and solicitation rules and be undignified); Kentucky Opinion E-239 (1981) (the auction does not facilitate an informed decision whether to retain the lawyer “but merely forces a particular person(s) to go to a particular lawyer”); New Jersey Opinion 319 (1975) (“this arrangement puts the charity in the position of recommending [the] attorney and then being remunerated by him for the introduction”); San Diego County Opinion 1974-19 (1974) (“An attorney may not offer free legal services to a charitable organization because such would be a solicitation of business.”). *But see* California Opinion 1982-65 (auctioning legal services in a charitable fund raiser is not forbidden, and “the benefits that flow from an attorney’s donation of legal services” outweigh “the remote likelihood of abuse of fundamental public policies,” but the lawyer must comport with limitations established by the advertising, competence and conflict rules).

5. The language of the rules applicable to this inquiry has not meaningfully changed since 1980, when this Committee issued Opinion 524. The restriction on undertaking work for which the lawyer is unqualified is codified in Rule 1.1(b), which generally provides: “A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle” The earlier solicitation rule against compensating others for recommending the lawyer’s services has been carried over into Rule 7.2(a), which provides, subject to exceptions inapplicable here, that: “A lawyer shall not compensate or give anything of value to recommend or obtain employment by a client”

6. Nonetheless, the courts’ approach and, accordingly, this Committee’s approach to interpreting rules on lawyers’ advertising and solicitation has become less restrictive since 1980, particularly in light of evolving constitutional case law under the First Amendment recognizing the right of lawyers and other professionals to engage in commercial speech.¹ Where once this Committee interpreted advertising and solicitation rules sweepingly to prevent deceit and the other harms against which the rules protect, the Committee now interprets the rules more cautiously. Our objective is to effectuate the rules’ language and purpose consistently with the public interest in access to information about lawyers’ services, and lawyers’ legitimate interest

¹ *See, e.g.*, N.Y. State 933 (2012) (citing, among other sources, *Ibanez v. Florida Dep’t of Business and Professional Regulation*, 512 U.S. 136 (1994), which struck down advertising restriction on lawyer-accountant); N.Y. State 757 (2002) (discussing implications of *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), which recognized a lawyer’s First Amendment right to state on letterhead “certified civil trial specialist by the National Board of Trial Advocacy”); N.Y. State 637 (1992) (citing, among other cases, *von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163, 481 N.Y.S.2d 40 (1984), holding that the blanket prohibition of mail solicitation of accident victims is unconstitutional).

in marketing their services. *See, e.g.*, N.Y. State 897 (2011) (concluding that “[l]awyer 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 lawyer-client relationship will be formed until the lawyer can check for conflicts and competence to provide the services”).

7. Since the mid-1980s, perhaps influenced by the courts’ evolving approach to lawyers’ advertising and solicitation, many more ethics committees have concluded, contrary to Opinion 524, that subject to certain restrictions, lawyers may donate legal services to a charitable organization to be auctioned at a fund-raising promotion. *See, e.g.*, Florida Opinion 86-9 (1987); Hawaii Opinion 31 (1992); Indiana Opinion 4 of 2008 (identifying caveats, including that the lawyer must be competent, avoid conflicts, and ensure that the client is satisfied with the choice of counsel, and that the description of the attorney must not include laudatory remarks or claims of special expertise); Nebraska Opinion 06-11 (2007) (rescinding earlier opinion, and reasoning that “the possibility of misleading information being communicated to the bidders could be adequately protected against by the attorney in the wording of the auction item that the services would only be in the lawyer’s area of competence, that the attorney retains the right to decline the service for conflicts or other ethical problems in which case the price would be refunded by the attorney, and that communications regarding the auction not be false and misleading”); South Carolina Opinion 91-35 (1991) (“to avoid misleading the recipient of donated services, the donating lawyer must offer the services with certain express qualifications, clarifications, and reservations”). *But see* Nassau County Opinion 97-11 (1998); New Hampshire Opinion 1990-91/2 (1991) (finding that because of ethical concerns, lawyers should not donate their services to a charitable fund raiser even though the rules do not explicitly prohibit doing so); Ohio Opinion 2002-5 (concluding that donating legal services “is a giving of a thing of value which secures employment of the lawyer”).

8. For example, Hawaii’s ethics committee concluded:

A lawyer may donate his or her legal services to a charitable cause or nonprofit corporation, to be auctioned to the highest bidder in fund-raising promotions, provided that:

- (a) only services for which the lawyer has the requisite competence are donated;
- (b) the legal services donated and the identity of the lawyer who will perform the services must be clearly designated at the auction (for example, “preparation of a will by John Doe, Esq.”);
- (c) the lawyer retains the right to decline his or her provision of the donated services in the event of a conflict of interest or for similar cause, in which event the lawyer must take steps to ensure that any auction bid paid by the prospective client is promptly refunded by the charitable organization, nonprofit corporation, or by the lawyer; and

(d) the lawyer takes steps to ensure that communications or advertisements regarding the auction (i) accurately describe the donated legal services and the identity of the lawyer who will perform the services, and (ii) are not false, fraudulent, misleading or deceptive.

Hawaii Opinion 31 (1992) (original emphasis).

9. Likewise, Florida's ethics committee concluded, among other things, that the lawyer (1) must comply with applicable advertising rules, including by "ensur[ing] that the charitable organization, in publicizing and conducting the auction, does not describe the offered legal service in a false or misleading manner," which the lawyer can accomplish by providing the description and requiring pre-approval, and (2) "should have a guarantee from the charitable organization that the successful bidder's money will be refunded on request if the lawyer is prevented by any of the conflict rules from performing the auctioned service for that person." Florida Opinion 86-9 (1987).

10. On reexamining N.Y. State 524, we conclude for the following reasons that, consistent with the language and purposes of the Rules, a lawyer may properly donate legal services to a charitable organization to be auctioned in exchange for a contribution to the organization. However, limitations and conditions apply, including those identified in the Hawaii and Florida bar opinions noted above.

11. First, as N.Y. State 524 correctly recognized, a lawyer will not necessarily be able to provide the requested legal services to the winner of the auction. A lawyer may not accept a representation that the lawyer cannot perform competently. Rule 1.1(b). Nor may a lawyer accept a representation if it would involve an impermissible conflict of interest. *See, e.g.*, Rules 1.7 and 1.9. In allowing his or her services to be auctioned, the lawyer must ensure that bidders are apprised of these limitations and any other applicable limitations in advance, so that prospective clients are not misled. The lawyer must also ensure that the charitable organization sponsoring the auction will offer to refund the bidder's contribution if for any reason the lawyer ultimately cannot provide the relevant legal services. But the fact that there are limitations does not mean that the lawyer cannot participate at all. *See, e.g.*, N.Y. State 897 (2011), cited above.

12. Second, we conclude on reflection that participating in a charitable fundraising auction does not violate Rule 7.2(a) by giving something of value to the charitable organization for the purpose of having it recommend the lawyer's services. The lawyer's purpose is to assist the organization's charitable fund-raising efforts, not to secure a referral. Indeed, it is fair to assume that lawyers will conclude that they have achieved their primary purpose if the winning bidder simply makes a donation without seeking to take advantage of the lawyer's uncompensated services.

13. Third, we do not believe that a charitable fund-raising auction of the lawyer's services will necessarily undermine the prospective client's ability to make an intelligent selection of counsel. However, the lawyer must ensure that sufficient information is provided, including about the areas of law in which the lawyer practices, to enable prospective bidders intelligently to decide whether to bid on the lawyer's services.

14. Fourth, the lawyer must comply with the advertising rules, as applicable,² including Rule 7.1(a)(1), which forbids any “false, deceptive or misleading” statements or claims in advertising the lawyer’s services. Therefore, only accurate information about the lawyer should be provided to potential bidders. The scope of the services to be provided should be clearly described, *cf.* Rule 7.1(j), as should the limitations on the lawyer’s ability to provide services.

15. Often the auctioned service may be a discrete one, such as the preparation of a simple will. However, if the lawyer were to offer a service of limited scope – e.g., a set number of hours of advice concerning estate planning – the representation would have to comport with Rule 1.2(c). That is, any limitation must be “reasonable under the circumstances,” which means that the services may not be too limited to be useful to the client. If the lawyer proposes to donate a limited number of hours of advice to be auctioned by the charitable organization, but to offer the client foreseeably needed additional services for a fee, the auction materials should indicate that as well.

CONCLUSION

16. Subject to disclosure requirements and limitations as described in this opinion, a lawyer may donate legal services to a charitable organization for auction as a fund-raising device.

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² Rule 1.0(a) defines an “advertisement” as “any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm.” Promotional material concerning the lawyer’s services, and distributed by the organization sponsoring the charitable auction, may constitute an “advertisement” under that definition. Although the lawyer’s primary purpose in donating his or her services is not to secure a referral but to make a charitable contribution, the primary purpose of the promotional material describing the lawyer’s services may be “for the retention of the lawyer,” since that is the incentive that the organization offers to attract bids. And even if such materials are not deemed advertising, provisions in Rule 8.4 indicate that the lawyer should not assist the charitable organization in disseminating false or misleading information.