

OPINION 4 of 2008
Final Opinion

Title

“Attorney’s Legal Services Donation to Charities”

Issue

May an Indiana attorney donate legal services to a charitable organization in anticipation of the same being auctioned for the benefit of the charity?

Conclusion

An attorney’s donation of legal services to a charitable fundraising auction is not an inherent violation of the Rules of Professional Conduct. In particular circumstances, though, the donation can potentially run afoul of a number of ethical rules.

The intention behind these contributions is admirable, but lawyers who choose to make this type of donation should ensure that the terms of the auction do not violate rules addressing attorney competence; advertising or promotion; lawyer referral; conflicts of interest; or fee-sharing. *See, e.g.*, Indiana R. P.C. 1.1; 1.5; 1.7; 1.10; 5.4; 7.2.; 7.3; 7.4.

Hypothetical Facts

Attorney A is asked to make a donation for a charitable auction. Attorney A decides to donate a specified amount of legal services for bid at the auction.

Analysis

For an apparently innocuous practice, this type of donation has received what may seem a surprising amount of scrutiny over the years. Among the many other ethics committees that have addressed this issue are panels in Nebraska (2007, 1992); Ohio (2002); Connecticut (1998, 1996, 1994); Michigan (1993, 1991); Hawaii (1992); South Carolina (1992); New Hampshire (1991); Florida (1987); California (1982); New York State (1980); San Diego County (1974); and the American Bar Association (1972).¹ (The

¹ See, e.g., Nebraska State Bar Op. 06-11 (2007) <http://www.nebar.com/pdfs/nelawyer/2007/FEB07/0207f.pdf>, rescinding Op. 92-4, <http://www.nebar.com/ethics/Opinions/92-4.htm>; Oh. Adv. Op. 2002-5, 2002 WL 1426123; Ct. Eth. Op. 98-16, 1998 WL 988206; Ct. Eth. Op. 96-1, 1996 WL 182267; Ct. Eth. Op. 94-7, 1994 WL 780747; SC Adv. Op. 91-35, 1992 WL 810415; NH Op. 1990-91/2, <http://www.nhbar.org/pdfs/FO90-91-2.pdf>; Fla. Op. 86-9, <http://www.flabar.org/tfb/TFBETOpin.nsf/0/96f72f528d28245285256b2f006caab9?>; Cal. Op. 1982-65, http://www.calbar.ca.gov/calbar/html_unclassified/ca82-65.html; NY Eth. Op. 524, 1980 WL 19223; San Diego Ethics Op. 1974-19; ABA Informal Op. 1250 (1972). *See also*, Peter

Ohio and earlier Nebraska opinion include citations to opinions of many other state and local ethics committees, including those of Kentucky, Alabama, Maryland, Oregon, South Carolina, and Cincinnati, that have considered this issue.)

Many of these opinions express concern about the practice of donating services to an unknown client through a charitable auction. Ohio, New York State, San Diego County, and the ABA have ruled against the practice most emphatically (although the last three of these opinions are sufficiently dated to perhaps be of less guidance).²

New Hampshire advises that lawyers should “avoid this form of donation.” Florida and California have recommended that attorneys enter into these arrangements only after ensuring that various ethics rules are observed; Connecticut has endorsed the practice with somewhat fewer qualifications.

Nebraska, on the other hand, which had in 1992 previously disapproved of an attorney’s auction donation, rescinded that earlier decision last year and instead gave qualified approval to the practice in Nebraska State Bar Opinion 06-11, ruling that an attorney may donate services to such a program if four conditions are met:

- Services only in the lawyer’s area of competence are donated;
- The specific service and identity of the lawyer are disclosed;
- The lawyer retains the right to decline for conflicts of interest or other ethical reasons the representation, in which case the lawyer will refund in full the auction price paid by the client; and
- All communications regarding the auction comply with the above requirements and are not false and misleading.

The concerns expressed by ethics panels in the past stem largely from the inherent awkwardness of initiating a lawyer-client relationship through a third party: that is, the lawyer in these situations is often making a commitment to deliver services to a unknown client – the highest bidder at the auction – without having the attorney-client contact and consultation that would normally precede representation. Furthermore, in these situations a non-lawyer – such as the charitable organization (in a program or in advertising for the event) or an auctioneer (during the bidding process) – could end up promoting or advertising the lawyer’s services outside the lawyer’s supervision.

Thus, concerns about a lawyer’s donating legal services to a charitable auction commonly include whether the donation might:

H. Gerahgty, “Going, Going, Gone! Or may a lawyer provide legal services as an item in a charitable auction?” <http://www.abanet.org/media/youraba/200710/article11.html>.

² Some of these analyses were performed under the Canons, Disciplinary Rules, or other ethics codes pre-dating the Model Rules of Professional Responsibility.

- Entail a commitment by the attorney to provide services that may turn out (once the high bidder's particular legal needs are revealed) to be beyond the attorney's professional competence, Rule 1.1, or to (once the high bidder's identity and interests are examined), pose conflicts of interests with the lawyer's existing or past clients, Rules 1.7, 1.9;
- Place limitations on the exercise of the attorney's independent judgment, or constitute fee-sharing with a non-lawyer, Rule 5.4;
- Inadvertently involve the lawyer in prohibited publicity or advertising services such as those proscribed by Rule 7.2(a), (e); or
- Constitute the recommending or soliciting of professional employment by in-person contact, or the giving of anything or value to a person or organization to recommend or secure the lawyer's employment, Rule 7.3(a), (f).

It is worth noting that this Committee has previously disfavored arrangements in which attorneys donated or discounted their services as part of promotional activities with for-profit entities.³ The mere fact that, in the present case, the organization benefiting from the attorney's donation of services is a charitable organization or not-for-profit does not necessarily insulate these arrangements from the same potential ethical problems.

If, for example, either the organization benefiting from the charity auction, or other organizations or individuals (including the auctioneer) involved in the fundraising event, had other business or professional ties with the attorney, or were in a position to direct clients to the attorney, then the attorney's "donation" of services could conceivably be seen as a form of referral fee or fee-splitting.

Conclusion

An attorney's donation of legal services to a charity auction is not a per se violation of the Rules of Professional Conduct, but the attorney should proceed with caution. In particular, the Committee recommends that an attorney contemplating such a donation consider at a minimum the following steps:

1. The attorney's offer of services to the high bidder, whether contained in the auction program or communicated by the auctioneer, should be expressly conditioned on a later consultation between the attorney and high bidder, before any attorney-client relationship is formed or representation begins, to ensure that (a) there is no prohibited conflict of interest with the attorney's other clients; (b) the attorney has the appropriate expertise to handle the client's particular needs competently; and (c) the client is otherwise satisfied with the choice of attorney. The attorney and charitable organization should agree in advance that if for any of the above reasons the attorney cannot begin representation, or the client does not wish, after the initial consultation, to hire the

³ See, e.g., ISBA Legal Ethics Opinion No. 1 of 2004, <http://www.inbar.org/content/pdf/EthicsOp1.04.pdf> (discounted legal services as part of bank's promotional program); ISBA Legal Ethics Opinion No. 1 of 2002 <http://www.inbar.org/content/pdf/Legal%20Ethics/2002.pdf> (free one-hour legal consultation as part of promotional program by financial planner).

attorney, then either the charity or the attorney (by pre-arrangement between themselves) will refund the client's bid.

2. The attorney should consider the tax implications of the auction arrangement and, if appropriate, stipulate in writing with the charitable organization in advance as to which party will be responsible for the full tax consequences of the transaction (depending on, for example, whether the winning auction bid is to be considered income to the attorney that the attorney has donated to the organization, or instead a direct donation by the high bidder to the charity).

3. The attorney should ensure that she has no on-going professional relationship with either the charitable organization or with other persons or entities related to the auction or organization in such a way that the attorney's donation of services could be seen as the "giving of a thing of value in order to recommend or secure a lawyer's employment."

4. The attorney should review in advance, and retain the right to edit or delete, any description of the attorney or her services published in any auction program, promotional materials, or advertising for the event. Also, the attorney and the organizers should stipulate in writing that the auctioneer and others involved in promoting the auction shall not make any laudatory remarks or claim special expertise on the part of the attorney.

There are, of course, other and less problematic ways than an auction for a lawyer to contribute to charitable organizations or fulfill an attorney's pro bono responsibilities under Rule 6.1. Among these alternatives are: offering free volunteer time and legal services directly to not-for-profit organizations; providing free legal services directly to those served by charitable organizations; volunteering legal services through a county bar association or District Pro Bono plan; and financially supporting organizations (such as local legal aid societies or Indiana Legal Services) that provide legal services to persons of limited means. A great number of Indiana attorneys support their communities in these and similar ways.