

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2002-5

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Withdrawn by Adv. Op. 2019-07

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A lawyer should not donate legal services to be auctioned or used as a prize drawing at a fund raiser for a charitable organization. Under DR 2-103(B), a lawyer's donation of legal services to be auctioned or used as a prize drawing at a fund raiser for a charitable organization is a giving of a thing of value which secures employment of the lawyer. Under DR 5-107(B), a lawyer's agreement with a charitable organization to provide legal services to an unknown silent auction bidder or an unknown winning ticket holder may improperly limit the exercise of the attorney's independent professional judgment as to whom to accept as clients and what services to provide. Further, under DR 2-101(A)(1), it is misleading for a lawyer to donate legal services that he or she may not be able to provide because of other disciplinary rules, such as 6-101(A)(1), DR 5-101(A)(1), DR 5-105, and DR 2-101(F)(1), governing competence, conflicts of interest, and solicitation. Since there has been no clarity on the issue heretofore, this opinion provides guidance for future practice.

OPINION: This opinion addresses ethical issues related to a lawyer's donation of legal services to charitable organizations for use as a fund-raising device.

Is it proper for a lawyer to donate legal services to be auctioned or used as a prize drawing at a fund raiser for a charitable organization?

The question is simple and straightforward. The answer is not. The act of donating legal services and the delivery of the donated legal services raises multiple ethical issues for a lawyer.

First, is the act of donating legal services to a charitable organization for use as a fund-raising item the giving of a thing of value in return for securing the employment of the lawyer?

DR 2-103(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

A lawyer's donation of legal services as an auction item or as a door prize is a thing of value that results in the lawyer's employment by a client. The person who makes the highest bid or wins the prize drawing will contact the lawyer and they will enter into an attorney-client relationship. This constitutes employment by the lawyer even though the client is not paying the lawyer for his or her services. The charitable organization received a donation (a thing of value) in return for securing the lawyer's employment by the highest bidder or the winner of the prize drawing at the charitable fund raiser. Thus, this Board's view is that a lawyer's donation of legal services to be auctioned or used as a prize drawing at a fund raiser for a charitable organization is improper under DR 2-103(B) for it is the giving of a thing of value in return for securing the lawyer's employment.

Second, is the act of donating legal services to a charitable organization for a fund-raising item an improper division of a legal fee with a non-lawyer? In this Board's view, a lawyer's donation of his or her legal services as a fund-raising item does not constitute a division of legal fees with a charitable organization. The attorney is not charging a fee. Individuals who bid on items or purchase tickets for a prize drawing are donating to a charitable organization, not paying for the subject of their bid or the prize offered on a ticket.

Third, is a lawyer's agreement with the charitable organization to provide legal services to an unknown silent auction bidder or an unknown winning ticket holder an improper limitation on the exercise of the attorney's independent professional judgment?

DR 5-107(B) A lawyer shall not permit a person who recommends, employs, or pays him [her] to render legal services for another to direct or regulate his [her] professional judgment in rendering such legal services.

By offering a lawyer's legal services as an auction item or a prize, a charitable organization is involved to some degree in both advertising and recommending the lawyer's services. Thus, the application of DR 5-107 is considered. (The application of DR 2-101, the publicity rule is also applicable, but the facts regarding advertising of the lawyer's services as an auction item or a prize are not before the Board for consideration.)

When a lawyer makes a decision to donate his or her services as a fund-raising device, the identity of the successful silent auction bidder or door prize winner and the nature and extent of their legal needs are unknowns. By agreeing to provide a legal service to an unknown individual with unknown legal needs, a lawyer places limitations on the exercise of the attorney's independent professional judgment as to whom he or she accepts as a client and what legal services to provide. Thus, the Board advises that a lawyer's agreement with a charitable organization to provide legal services to an unknown silent auction bidder or an unknown winning ticket holder improperly limits under DR 5-107(B) the exercise of the attorney's independent professional judgment as to whom to accept as clients and what services to provide.

Fourth, is it misleading for the lawyer to donate legal services that he or she may not be able to provide?

DR 2-101(A) A lawyer shall not, on his or her own behalf or that of a partner, associate, or other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication, including direct mail solicitation, that: (1) Contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement.

A lawyer does not have a crystal ball to foresee the multiple ethical challenges that may result from donating legal services as a fund-raising device for a charitable organization. What if the individual who is to receive the donated legal services does not need the offered services, needs legal representation different from the donated services, or needs additional legal services? What if the donor's legal needs are complex and the lawyer is unable to provide competently the legal services that the individual thinks he or she is entitled to receive? What if the individual who is to receive the donated legal services, is someone whom the attorney cannot represent because of a conflict of interest? These "what if" questions present serious and sometimes unsolvable ethical problems for a lawyer.

In fact, the donation of legal services to a charitable organization as a fund-raising device can easily create an ethical quagmire. A donor will expect the lawyer to perform the services bid upon or won, but this may not be possible because of the disciplinary rules governing lawyers. Under DR 6-101(A)(1), a lawyer cannot handle a legal matter in which the lawyer is not competent. As an example, a donor may bid upon a "simple will" but have testamentary needs beyond the competency of the lawyer. Under DR 2-101(F)(1), a lawyer is not permitted to solicit legal business in person. As an example, a donor may have other legal needs that the lawyer thinks it would be in the best interest of the individual to pursue. If the lawyer suggests other legal services at an additional cost, in addition to or instead of the bid upon service, the donor may become disgruntled and certainly may feel like he or she is subject to in-person solicitation or a "bait and switch" tactic. Under DR 5-101(A)(1) and DR 5-105, a lawyer must avoid conflicts of interest. If the lawyer has a conflict of interest, the lawyer cannot deliver the promised legal services. Thus, when the ethical rules prohibit a lawyer from performing the donated services, the lawyer and the individual may become stuck in a situation that does not have a satisfactory resolution. If a donor does not receive the legal services bid upon or won, the donor may feel misled. Thus, the Board advises it is misleading under DR 2-101(A)(1) for a lawyer to donate legal services that he or she may not be able to provide.

For years, advisory committees have grappled with the issue of donating legal services as a fund-raising device for a charitable organization. Some advisory committees view it as improper. *See e.g.*, ABA, Informal Op. 1250 (1972); Kentucky Bar Ass'n, Op. E-239 (1981); Maryland State Bar Ass'n, Op. 80-43 (undated); Monroe County [New York] Bar Ass'n, Op. 1 (undated); Nebraska State Bar Ass'n, Op. 92-4 (undated); New York State Bar Ass'n, Op. 524 (1980). Other advisory committees view it as permissible, subject to

multiple conditions and caveats. *See e.g.*, Alabama State Bar, Op. 90-51 (1990); State Bar of California, Op. 1982-65 (1982); Cincinnati Bar Ass'n, Op. 91-92-04 (undated); Hawaii SupCt, Disciplinary Board, Op. 31 (1992); New Hampshire Bar Ass'n, Op. 1990-91/2 (1991); Philadelphia Bar Ass'n, Op. 80-35 (undated); South Carolina, Op. 91-35 (1991). What emerges upon review of the opinions is that there are so many caveats and conditions that participation by a lawyer is not prudent.

In conclusion, this Board advises that a lawyer should not donate legal services to be auctioned or used as a prize drawing at a fund raiser for a charitable organization. Under DR 2-103(B), a lawyer's donation of legal services to be auctioned or used as a prize drawing at a fund raiser for a charitable organization is a giving of a thing of value which secures employment of the lawyer. Under DR 5-107(B), a lawyer's agreement with a charitable organization to provide legal services to an unknown silent auction bidder or an unknown winning ticket holder may improperly limit the exercise of the attorney's independent professional judgment as to whom to accept as clients and what services to provide. Further, under DR 2-101(A)(1), it is misleading for a lawyer to donate legal services that he or she may not be able to provide because of other disciplinary rules, such as DR 6-101(A)(1), DR 5-101(A)(1), DR 5-105, and DR 2-101(F)(1), governing competence, conflicts of interest, and solicitation. Since there has been no clarity on the issue heretofore, this opinion provides guidance for future practice.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.