

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-11**

(This opinion rescinds Formal Opinion 92-4)

AN ATTORNEY MAY DONATE LEGAL SERVICES TO A CHARITY TO BE AUCTIONED BY THE CHARITY AS A FUND RAISER WITH THE CHARITY TO KEEP ALL THE PROCEEDS OF THE AUCTION IF APPROPRIATE ETHICAL SAFEGUARDS ARE IN PLACE.

QUESTION PRESENTED

May an attorney donate to a non-profit organization for use at a fund raising auction a gift certificate which would be redeemable alternatively for \$100 in cash or restaurant certificates, or \$500 in legal services by the donating attorney? In other words, may an attorney donate legal services to a non-profit organization for auction as a fund raiser?

FACTS

An attorney wishes to donate to a non-profit organization for sale at an auction for the benefit of the non-profit organization, a gift certificate redeemable for \$100 in cash or restaurant certificates, or at the option of the purchaser, \$500 worth of the attorney's legal services.

APPLICABLE RULES PROVISIONS

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) 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 legal service plan or not-for-profit or qualified lawyer referral service. . .

(c) any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment [5] Lawyers are not permitted to pay others for channeling professional work.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client shall include the words "This is an advertisement" on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication, and in the subject line of an email, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2) [lawyers or close relatives].

RULE 7.4 COMMUNICATIONS OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

RULE 1.1 COMPETENCE

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation, and judgment reasonable necessary for the representation.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligation of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer . . .

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

DISCUSSION

Formal Opinion 92-4 determined that an attorney may not donate legal services to a nonprofit organization for sale at an auction for the benefit of the nonprofit organization. Subsequently, in an informal opinion the committee reversed itself and determined that a similar plan was ethical so long as certain safeguards were in place to avoid ethical pitfalls, overruling Formal Opinion 92-4 but not publishing the opinion with the result that the practicing bar is still guided by Opinion 92-4. Opinion 92-4 discussed that there was a split among the states and some allowed and some disapproved of such conduct. Eight years later two other jurisdictions had lined up on the side of allowing such conduct, and one jurisdiction had reversed its prior stance.

In the informal opinion this committee discussed the reasons for prohibiting donations of legal services, specifically that there was the possibility that a lawyer would be giving something of value to the charity in return for the charity recommending the lawyer's services, and that misleading statement could be made about the attorney, resulting in the selection of an attorney on an uninformed basis. It determined that the issue of a referral fee seemed to apply more appropriately to a lawyer paying a fee to a third party to recommend that lawyer to a paying client. Here, the client pays something of value to the charity and the lawyer receives nothing other than the satisfaction of doing a good deed. It further determined 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.

CONCLUSION

The informal opinion concluded that an attorney may donate legal services to a charitable organization if all of the following requirements are met:

1. Services only in the lawyer's area of competence are donated;
2. The specific service and identity of the lawyer are clearly disclosed;
3. 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
4. All communications regarding the auction comply with the above requirements and are not false and misleading.

The Advisory Committee agrees with this conclusion. Opinion 92-4 which conflicts with this opinion is rescinded.

Formal Opinion No. 92-4 is rescinded for the reasons stated herein.