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Barter transactions may benefit solos but know the risks involved first

Trading legal work for goods or services is not a new notion. According to a 1982 ABA Bar Journal article, Abraham Lincoln once accepted a military pistol as payment for a bill and other biographies recount his acceptance of room and board — and even a bottle of ink — in lieu of cash.

As current market conditions fuel alternative approaches to standard fee arrangements, lawyers again are taking non-monetary payments. A Florida law firm takes bartering to the extreme, advising prospective clients it will accept their surplus possessions and suggesting that "using an old engagement ring, jewelry or second car to pay for your legal services may be the best use for unneeded property to secure your future ability to produce income." (See thehealthlawfirm.com and search for "barter" in the "areas of practice" section.)

Bartering is permitted under our state's disciplinary rules. Comment 4 to Rule 1.5 of the Illinois Rules of Professional Conduct provides that a lawyer "may accept property in payment for services" and refers to "a fee paid in property instead of money."

Given that bartering often involves a one-to-one exchange between individuals, moreover, sole practitioners may be well-positioned to trade with clients and generate new business from previously untapped sources.

But before you agree to swap your hard work for material objects or professional services, be aware such arrangements carry certain obligations and risks.

Assign a fair value; obtain written consent

Under Rule 1.8(a), any business transaction with a client or acquisition of a pecuniary interest adverse to a client must be on fair and reasonable terms and only with written informed consent. Comment 4 to Rule 1.5 suggests a barter arrangement may trigger Rule 1.8(a), so make sure the exchange is fair and obtain the proper consent.

Although accepting the client's suggested price is a good basis for assigning fair value, there may be cases where the attorney has superior knowledge that could affect the valuation. If the lawyer accepts real estate as payment, for example, he or she may be aware of favorable zoning that boosts the property's worth beyond the client's expectations. This needs to be disclosed and addressed.

In addition, commodities such as gold may fluctuate after the items are taken as payment. A significant post-tender increase may leave the client regretful and unhappy. Those sorts of contingencies must be spelled out and agreed in advance.

Avoid taking an interest in the litigation

Comment 4 to Rule 1.5 further cautions against any barter transaction that would give the attorney a stake in the litigation, which is prohibited by Rule 1.8(i). Thus, accepting stock in a business that you are defending from dissolution would not be allowed, nor would accepting a lien against real property, where the litigation concerns the same land.

SOLE SPEAK

GLENN E. HEILIZER

Glenn E. Heilizer is a veteran litigator and sole practitioner based in Chicago and is the founder of the Sole Practitioners Bar Association of Illinois. He handles commercial disputes in the federal, state and appellate courts in Illinois and Wisconsin. He welcomes all questions and comments, and he can be reached at glenn@heilizer.com.

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Report received goods or services as income

Any failure to report as income the fair market value of received goods and services will lead to trouble with the IRS.

Take the case of a two-person Indiana law firm that performed legal work for a roofing company. The roofing company reported to the IRS that it received legal services from the law firm valued at $49,000, and that it installed a roof at one of the attorney's homes, also valued at $49,000. The law firm failed to report any income from the roof installation, and the lawyers found themselves in tax court.

Both attorneys tried to argue the $49,000 bill to the roofing company was still outstanding and unpaid, and the attorney with the new roof claimed he remembered little about the project at his home. The tax court was unsympathetic. The court treated the $49,000 in roofing work as income and imposed penalties. *Badell v. Commissioner*, T.C. Memo. 2000-303.

Barter exchanges may be permitted

The Internet has spawned a number of online barter exchanges, where participants pay a membership fee, provide goods or services and receive in return "barter currency," which can be used to purchase goods or services from other members of the exchange.

Recent feedback from some states suggests lawyers may participate in barter exchanges.

Last year, the Connecticut Bar Association's Standing Committee on Professional Ethics issued Informal Opinion 15-04, which analyzed barter exchanges in depth and concluded they are not prohibited by the Rules of Professional Conduct.

Building on prior opinions from New York, Utah and North Carolina, the committee first determined that payment of the membership fee is not fee sharing with non-lawyers within the meaning of Rule 5.4(a), as long as the fee is "imposed uniformly on all members."

Nor does the exchange violate Rule 7.2(c)'s proscription against payment for a recommendation, the committee decided, because the membership fee is applied to administration costs and the full list of available attorneys is provided to members without any particular recommendations.

However, the committee cautioned that attorneys must still comply with existing ethical obligations, such as specifying the form of payment in a retainer letter, addressing what happens if the exchange closes or the member withdraws, making sure the fee is reasonable, maintaining client confidentiality and using truthful advertising with no direct solicitation.

Finally, the committee warned that barter currency cannot be used for advance payments for legal services, because it cannot be held in a trust fund, and that, as a business transaction, working for a client through an exchange would require informed consent under Rule 1.8(a).

In short, if you are ready to explore alternative forms of payment with clients, barter away, but keep these important caveats in mind.