

Discounting and Bartering Legal Fees

"It has been said that a characteristic of the legal profession is the subordination of 'financial reward to social responsibility,'"¹ and that as a professional, an attorney's "principle motivation is servicing the well being of [his] clients and the community rather than mere pecuniary gain."² Nevertheless an attorney must charge sufficient fees so that he can serve his client well and still "preserve the integrity and independence of his profession."³ Since a lawyer's fees are generally his only source of income, a reasonable fee will not detract from the profession.⁴ Given this situation, an attorney must devise a system for charging a reasonable fee. The task is not easy. "It may often be more difficult to charge a proper fee than it was to do the work which gave rise to the fee."⁵

In the past, bar associations distributed minimum fee schedules for setting fees and enforced adherence to the schedule by professional discipline.⁶ Since *Goldfarb v. Virginia State Bar*, mandatory reliance on minimum fee schedules has ceased.⁷ One commentator even went as far to say that "One of the best things that has happened to the bar in recent years is the abolition of all forms of promulgated minimum fee schedules. . . ."⁸

The demise of minimum fee schedules places more emphasis on the American Bar Association's Model Code of Professional Responsibility which provides these guidelines for determining a reasonable fee:

- 1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- 2) The likelihood, if apparent to the client, that the

1. PRACTICAL ISSUES OF PROFESSIONAL RESPONSIBILITY IN THE PRACTICE OF LAW (Legal—Medical Studies, Inc.) p. 92 (1984).

2. Stark, *Professionalism on Trial*, 5 B. LEADER 24, 24 (1980).

3. STUART M. SPEISER, ATTORNEYS' FEES § 20:10, at 521 (1973).

4. Brewer, *The Problems of Fee Cutting*, 24 OKLA. B. ASSN. J. 1477 (1953).

5. McRae, *Legal Fees and Representation Agreements*, 1983 A.B.A. SEC. OF ECON. OF LAW PRAC. 25.

6. ABA Comm. on Professional Ethics, Formal Op. 302 (1961).

7. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

8. McRae, *supra* note 5, at 25.

acceptance of the particular employment will preclude other employment by the lawyer.

- 3) The fee customarily charged in the locality for similar legal services.
- 4) The amount involved and the results obtained.
- 5) The time limitations imposed by the client or by the circumstances.
- 6) The nature and length of the professional relationship with the client.
- 7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- 8) Whether the fee is fixed or contingent.⁹

Even considering these factors, setting a reasonable fee is so amorphously defined that it has been called "more of an art than a science."¹⁰

Assuming a lawyer can set a reasonable fee for his services, studies indicate that a potential client in need of legal advice will not seek help because of the expected cost.¹¹ One study indicates "that the actual or feared price of such services coupled with a sense of unequal bargaining status is a significant barrier to wider utilization of legal services."¹² These fears have helped create a situation such that "the middle 70% of our population is not being reached or served adequately by the legal profession."¹³

In response, many lawyers have begun discounting fees and joining bartering groups to barter their legal services for a client's goods and services. The American Bar Association frowns on providing legal services for inadequate compensation because "the quality of the service rendered may be lowered, the welfare of the profession injured, and the administration of justice made less efficient."¹⁴ One source suggests that "an attorney limits the efficiency and effectiveness with which both he and other members of the legal profession can operate if he consistently

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1981).

10. Conner, *The Lawyer's Handbook, Fees and Billing*, 1962 ABA COMM. ON ECON. OF LAW PRAC. 279, 281.

11. *Bates v. State Bar of Arizona*, 433 U.S. 350, 370 (1977).

12. *Id.* at 370, n. 22.

13. *Id.* at 376.

14. SPEISER, *supra* note 3, at 522. (quoting ABA Comm. on Professional Ethics, Formal Op. 302 (1961)).

underestimates the value of his services."¹⁵ Nevertheless, the bartering of services and discounting of fees continues.

As noted, bartering is one way lawyers may circumvent charging high fees. Even "[Abraham] Lincoln once bartered his legal services for a U.S. Army pistol that had been used in the Mexican War of 1846-1848."¹⁶ Through bartering associations, one may trade legal services for vacations, laundry service, dental work, and other items.¹⁷ Presently, bartering's popularity is growing and the trend is substantially unnoticed by bar associations.¹⁸ This was especially true during the depressed economy of 1982; one lawyer stated that, "[a] lot of clients prefer to pay in kind rather than in cash."¹⁹

As a general rule, "bartering legal services in exchange for goods or services of a client is neither illegal or unethical."²⁰ On the other hand, bartering transacted through an organized exchange can present problems. A typical example of an organized bartering exchange is illustrated by the following:

An organization of business owners and professional persons trade among each other without using cash. For example, a restaurant provides a meal for another member and receives credit on the books of the supervising organization equal to the value of the meal. The diner's account is debited in equal amount plus a 10% service charge by the organization. Members learn about other members, and their products or services, by telephoning the organization when a specific product or service is needed. The organization's "newsletter" states that membership will increase volume, bring "greater profits," and provide "valuable new Business Contacts," and that "all members sell their . . . services at prevailing prices."²¹

15. Moldenhauer & McMamin, *The Lawyer's Handbook* (Revised Edition) *Fees and Billing*, 1975 [1980 Supp.]; ABA SEC. OF ECON. OF LAW PRACTICE C3-1, C3-3.

16. Quade, *Lawyers Find Market for Bartering Services*, 68 A.B.A. J. 409, 409 (1982).

17. Quade, *Bartering Blossoms and Bars Hardly Notices*, 7 B. LEADER 28 (1982).

18. *Id.*

19. *Id.*

20. *Illinois State Bar Association Op. No. 689* (1980); 3 NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 2 (1982).

21. *Ethical Opinions*, 63 MASS. L. REV. 137 (1978).

Under similar circumstances, both the Illinois and Michigan State Bars have advised that although it is "all right for a lawyer to make his own barter deal," it is "unethical for him to barter through a trade association."²² Illinois State Bar Association Opinion No. 538 further restricts a lawyer in that a "lawyer may not join a trade association where he barter legal services for 'exchange checks' redeemable only in goods and services from other members of the association."²³ In Massachusetts, attorneys may not be members of an organization which "exists for the sole purpose of promoting the use of its members' products and services."²⁴ In Missouri, it is not unethical for an attorney to join a barter group as long as "there is not a directory of services available, published, or distributed to members of the group," and "person seeking such service must gain that information by contact with the central office of the barter group."²⁵ Distribution of a directory to the organization's members listing attorney members would make a lawyer's participation and membership in the barter association improper.²⁶

The Illinois Bar Association has observed that:

[t]he circulation of "exchange checks" which are either issued by the lawyer to potential clients or received by the lawyer from clients and the necessity that these checks be audited by the exchange would make it impossible to preserve the confidence and secrets of the client pursuant to DR 4-101.²⁷

Utah has found that barter group membership by lawyers is improper because it involves improper solicitation of business.²⁸ Still another bar association found that "the promotion of a lawyer by the exchange is not a disinterested act because the exchange derives revenues from the employment of its lawyer members [and] [s]uch payments constitute improper division of fees."²⁹ Los Angeles County Bar Association Formal Opinion 401, for example,

22. Quade, *supra* note 17, at 28.

23. *Illinois State Bar Association Op. No. 689* (1980); 3 NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 2 (1982).

24. THE BAR ASSOCIATION DIGEST 548 (Supp. 1980) [hereinafter cited as DIGEST].

25. *Id.* at 347.

26. *Id.* at 347.

27. *Professional Ethics Opinion*, 66 ILL. B.J. 486 (1978) [Op. No. 583].

28. DIGEST, *supra* note 24, at 548.

29. *Id.* at 26.

reflects the same concern over improper division of fees:

[T]he fee charged to the client for legal services rendered would either be higher than it otherwise would be and therefore perhaps unreasonably excessive, or else would have to be discounted by payment of 10% [amount of premium] to a non-lawyer, the equivalent of a division of legal fees prohibited by DR 3-102.³⁰

Thus, the mere act of joining a barter association may from the outset create ethical problems. However, ethical opinions have held that a lawyer's participation in a plan that recommends legal services is ethical as long as, among other things, the client has a choice in selecting the lawyer through an open panel or a sufficiently large closed panel plan.³¹

Trouble is sure to follow an attorney who uses the bartering association "as a device for evading income taxes [because] the [lawyer] would be engaged in fraud and illegal conduct involving moral turpitude."³² This is true because barter transactions "are reportable as part of a taxpayer's gross income [even though the transaction may involve no cash]."³³ As a result of the general increase in bartering of goods and services across the United States, the IRS has instituted a special project directed at identifying violators who do not report goods or services traded as income.³⁴

Even if an attorney does, he will be presented with an additional problem associated with barter transactions: valuation. Even swaps outside a bartering organization's control present the same problem. For example, "a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property."³⁵ One is under a duty "to charge a fair value on the same basis that [one] would charge a paying person."³⁶ Even if one is conscientious in

30. LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 801:1707 (1984) (*reporting* Los Angeles County Bar Assn. Op. 401) [hereinafter cited as *LAWYER'S MANUAL*].

31. *Id.* at 801:7112 [*reporting* Oregon State Bar Opinion 487].

32. *DIGEST*, *supra* note 24, at 247.

33. Middleton, *IRS Crackdown on Barter Business*, 68 A.B.A. S. 410 (1982).

34. *Id.*

35. *MODEL RULES OF PROFESSIONAL CONDUCT*, 52 L W 3, 5 (1983).

36. Quade, *supra* note 16, at 410.

trading like-value for one's services, bartering can work against the lawyer. For example, if an attorney accepts a precious metal, *i.e.* gold, in exchange for his services, and the price of gold drops \$X per ounce, then the attorney has lost money and has not received a reasonable fee.³⁷ (Obviously, an increase in the price of gold would work to one's advantage.)

Even with these problems, bartering as a means of attracting business continues to grow in popularity.³⁸ In response to the rise of bartering of legal services, Adrian Foley, Chairman of the American Bar Association's Commission on Advertising stated in 1982: ". . . I haven't seen any problems with bartering. . . . I suppose it's an issue that needs to be addressed."³⁹ Perhaps, the issue on bartering has been best addressed by Richard Williams, an East Lansing, Michigan lawyer who suggests that bar associations will have to recognize barter associations "'as a legitimate business that helps lawyers find clients.'"⁴⁰ "'It allows people to save their cash for the phone bill.'"⁴¹

Another technique used to reduce legal fees is discounting, the reducing of the fee one normally charges. Obviously, a lawyer should consider all the factors outlined earlier⁴² in determining a fee, but other considerations exist. In the past, lawyers were chastised for giving competitive fee quotations "and for systematically charging fees below the minimum fee schedules set by many bar associations."⁴³ *Goldfarb v. Virginia State Bar*, however, stopped *per se* price-fixing.⁴⁴

Since *Goldfarb*, the trend has been toward more open competition. As one commentator noted, "The day is past when professionals can insulate themselves or ask the states to insulate them from having to engage in all forms of honest competition that we expect of others who provide us with goods and services we need in our daily lives."⁴⁵

37. *Id.*

38. Quade, *supra* note 17, at 28.

39. *Id.*

40. *Id.*

41. *Id.*

42. *See* n. 9.

43. DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 137 (1974).

44. *Goldfarb*, 421 U.S. at 773.

45. Stark, *supra* note 2, at 25.

The discounting or reducing of legal fees to attract clients is a logical out-growth of competition. A leading concern generated by increased competition is that "competition and professionalism are not compatible."⁴⁶ Critics charge that "when members of the bar are induced to render legal services for inadequate compensation, . . . a consequence [is that] the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient."⁴⁷ For example, the argument has been made that competitive bidding reduces the practice of law to a more money-making occupation instead of upholding the standards of a profession.⁴⁸ One scathing criticism articulated in the hey-day of minimum fee schedules is still applicable to critics' concerns over price competition:

The practice of law is a profession not a trade. Those lawyers who would solicit clients on the basis of price should enter a business where professional standards are not required. . . . [A] lawyer will ultimately find it necessary to so increase his volume of work that its quality will suffer and a proper professional interest in the client's welfare will not be maintained.⁴⁹

Commentators insist that an attorney should charge reasonable fees because failure to do so "limits the efficiency and effectiveness with which both he and other members of the legal profession can perform legal services, if he consistently underestimates the value of his services."⁵⁰ Other problems may arise from charging reduced fees. For example, in a small town, one incident of a low fee might lead the whole town to a pre-conceived notion that the proper fee is the low fee charged.⁵¹

Outside the context of a small town lawyer, an attorney who discounts his fees "encourages the shopping-type client whose main consideration is to obtain maximum services at the minimum

46. *Id.* at 27.

47. S.D. THURMAN, E.L. PHILLIPS, JR., & E. E. CHEATHAM, *THE LEGAL PROFESSION* 449 (1970).

48. ABA Comm. on Professional Ethics, *Formal Op.* 292 (1957).

49. *Ethics, Fee Cutting, and Enforcement, Minimum Fee Schedules: Manual for Assistance of State and Local Committee*, 1963 A.B.A. COMM. ON ECON. OF LAW PRAC. 13.

50. Conner, *supra* note 10, at 280-81.

51. SPEISER, *supra* note 3, § 20:4 at 515.

prices."⁵² Shoppers have proven themselves disastrous to the profession.⁵³ The bargain hunter client often has no loyalty to his attorney, and although submitting to the shopper will get one business, "it only contributes to the downgrading of the standard as well as the economic status of the profession."⁵⁴

Attorneys who undervalue their services (fee "chiselers")⁵⁵ are, in the minds of the critics, committing economic suicide.⁵⁶ They argue that "[t]he public will not long maintain professional confidence in the lawyer who cannot maintain adequate facilities, who cannot pay his rent or his grocery bill or who cannot provide adequately for his family."⁵⁷

Perhaps the whole situation is best summarized as follows:

It matters not that their (lawyers') clients could be satisfied with less or might be willing to dispense with full care and caution for a lesser fee. The ethics of the Bar & the profession admit no skeletonizing of service, no lawyer dares to judge for himself that shoddy service is good enough for a client who seeks to pay a lower fee. Shoddy service for lesser fees lowers public respect for lawyers, reduces the standards of the profession and is unethical. Indeed, adequate service for lesser fees also lowers public respect for lawyers and, in particular, this is so when they strive for business by undercutting competition.⁵⁸

Despite the harsh criticism directed at attorneys who cut their fees, discounting continues. Of course, "[t]he inability of a client to pay must be considered in arriving at a decision as to the reasonableness of a fee for that client,"⁵⁹ and various other reasons should be examined also. For example, a lawyer may reduce his normal fee because he feels a ". . . case embodies a social, political, moral, or philosophical cause or issue."⁶⁰ Still another lawyer will reduce his fee "out of a sense of public duty or public

52. *Id.* at 521.

53. *Id.*

54. *Id.* at 513.

55. Brewer, *supra* note 4, at 1478.

56. SPEISER, *supra* note 3, at 521.

57. Conner, *supra* note 10, at 279.

58. Brewer, *supra* note 4, at 1477.

59. Conner, *supra* note 10, at 299.

60. JOSEPH C. MCGINN, *LAWYERS: A CLIENT'S MANUAL* 17 (1979).

service. . . .”⁶¹ An attorney may also “grant a prompt payment discount”;⁶² he “may charge interest on delinquent bills . . .”⁶³ and regarding the cost of litigation fee:

An attorney may accept a discount on process serving provided he changes all of his records to show the true cost of service, advises and bills his client accordingly, requires the process server to file an amended return of services reflecting the true costs charged on each individual’s service where the discount is received, and amends the judgment in any case where the statement of costs is filed showing the original costs and where the attorney subsequently receives and accepts the discounts.⁶⁴

A potpourri of classifications exists under which discounts are closely scrutinized. For example, in group legal plans, “[o]ffering legal services of less than a normal rate without justification constitutes a ‘special’ rate and becomes a ‘loss-leader,’ both of which are prohibited.”⁶⁵ Additionally, advertising “a ‘special’—(a) specific service that is available at advertised rates for a limited time” is improper.⁶⁶ Its main criticisms, are that it leads clients to use or requests advice or services they do not need, and it is “deceptive because it does not say what the regular rate is.”⁶⁷

An attorney is also prohibited from advertising “the fees he charges for routine legal services in print media and simultaneously advertis[ing] that he will provide such services for members of a sizeable identifiable group at a reduced price.”⁶⁸ However, an attorney may use and even mail reducible discount fee coupons to private homes, but the lawyer “may not mail discount advertisements to a group of potential clients with an identifiable present need for legal service.”⁶⁹

61. *Id.*

62. LAWYER’S MANUAL, *supra* note 30, at 801:7501 (1984). (*reporting Philadelphia Bar Assn. Op. 80-4*) *But see* DRINKER, LEGAL ETHICS (19___).

63. *Id.* at 801:7519 (*reporting Philadelphia Bar. Assn. Op. 81-77*). (Attorney must be certain that proper contractual elements exist).

64. *Id.* at 801:1303 (*reporting State Bar of Arizona Op. 80-24*).

65. *Id.* at 801:7104 (*reporting Oregon State Bar Op. 448*).

66. DIGEST, *supra* note 24, at 172.

67. *Id.*

68. LAWYERS’ MANUAL, *supra* note 30, at 801:5801 (1984) (*reporting New Jersey Op. 457*).

69. *Id.* at 801:4833 (*reporting State Bar of Michigan Op. C1-704*).

Conclusion

Since *Goldfarb* struck down minimum fee schedules as price fixing, economic pressure has steadily mounted on lawyers to produce their legal services in a price-competitive atmosphere. In response, lawyers have used bartering of legal services, advertising of fees and services, and discounting of fees to attract customers and still remain within ethical bounds. The task is difficult and if the present trend continues, competitive pressures will get worse. One thing is certain, debate on the ethics of bartering, discounting, and associated advertising will continue. Hopefully, the debate will sift through the complications and produce a rule on fees that will satisfy all.

Rushton McClees