

# NEW HAMPSHIRE BAR ASSOCIATION

## Providing Legal Services in Exchange for a Client's Goods and Services

### *Ethics Committee Advisory Opinion #2017-18/01*

#### **ABSTRACT:**

In any agreement to exchange goods or services for legal fees entered into at the outset of legal representation or during the course of such representation, a lawyer will need to comply with all the provisions of NHRPC Rule 1.8(a), including the requirement to advise the client in writing of the desirability of seeking the advice of independent legal counsel. Even if the lawyer strictly complies with Rule 1.8(a), however, the courts may view the transaction as voidable if the client later feels aggrieved by the transaction.

#### **ANNOTATIONS:**

Barter agreements are business transactions between a lawyer providing legal services and a client providing goods or services.

NHPR Rule 1.8 regulates all business transactions with clients.

While NHPR Rule 1.8 does not apply to ordinary fee agreements, it does apply when the lawyer accepts nonmonetary property as payment of all or part of a fee.

Under the ABA comments, NHPR Rule 1.8 does not apply to “standard commercial transactions” between the lawyer and the client for products or services that the client generally markets to others.

Under the *Restatement*, the exception for “standard commercial transactions” only applies when “the lawyer does not render legal services.”

Transactions between lawyers and clients likely remain voidable by the client under New Hampshire law.

When the transaction is voided, the client may have the option to either rescind the transaction or recover damages.

Courts usually order the remedy that is “most economically beneficial to the client.”

#### **ISSUES PRESENTED:**

Whether a lawyer who agrees at the outset of representation to receive compensation for legal services in kind, rather than in cash, must advise the client of the desirability of seeking the advice of independent legal counsel, and whether compliance with Rule 1.8 prevents the transaction from being voidable.

#### **BACKGROUND:**

This opinion will include those situations where the compensation for legal services involves the exchange of services, but will be limited to situations where the discussion of barter takes place at the outset of the attorney client relationship. While financial transactions that arise during the course of the relationship will likely give rise to the same considerations, transactions that occur before the onset or after the conclusion may not.

## **DISCUSSION:**

**Rule 1.8.** Barter agreements are business transactions between a lawyer providing legal services and a client providing goods or services. Rule 1.8 of the New Hampshire Rules of Professional Conduct (“NHRPC”) regulates all business transactions with current clients.

- a. *A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*
  1. *the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted **in writing** in a manner that can be reasonably understood by the client;*
  2. *the client is advised **in writing** of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*
  3. *the client gives informed consent, **in a writing** signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.*

*Id.*, emphasis added.

The American Bar Association (“ABA”) comment to Model Rule 1.8(a) provides some guidance about such business transactions by dividing them into three groups.

1. [Rule 1.8] does not apply to *ordinary fee arrangements* between client and lawyer, which are governed by Rule 1.5,
2. although its requirements must be met when the lawyer accepts an interest in the client’s business or other *nonmonetary property as payment* of all or part of a fee.
3. In addition, the Rule does not apply to *standard commercial transactions* between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities’ services.

Rule 1.8(a), Com. 1, emphasis added.

So, ordinary fee agreements are exempted, but barter agreements clearly fall into the second category, as the lawyer is accepting nonmonetary property as payment for legal fees. That leaves open the question whether the barter agreement is a “standard commercial transaction.”

Comment 1 goes on to explain the rationale for excepting standard commercial transaction.

In such [standard commercial] transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

*Id.*

The idea that the client will ordinarily need to be protected from the lawyer also appears in the *Restatement*.

Standard commercial transactions are those regularly entered into between the client and the general public, typically in which the terms and conditions are the same for all customers. In such circumstances, the client's interests in the transaction with the lawyer need no special protection.

*Restatement (Third) of the Law Governing Lawyers* § 126, com. c (2000).

This might suggest that there still may be some "standard" goods or services offered by "commercial" clients that would qualify as standard commercial transaction that you could exchange for legal fees. Perhaps a case of wine from a wine merchant or a pedicure from a nail salon would provide an exchange that does not present any chance of overreaching.

The *Restatement* offers the following, which sheds light on the barter situation.

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction *in which the lawyer does not render legal services*.

*Id.* at § 126(a) (emphasis added). In other words, since the barter transaction does involve the rendering of legal services, it cannot fall within the safe harbor of the standard commercial transaction.

**Presumptions and Voidability.** Lawyers need to remember that they have a fiduciary responsibility to their clients.

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client.

Com. 1 to Model Rule 1.8. The *Restatement* suggests that the burdens will always rest on the attorney in any dispute with a client in these matters.

In any civil proceeding between a lawyer and a client or their successors, the lawyer has the burden of persuading the tribunal that requirements stated in this Section have been satisfied. In a discipline case, once proof has been introduced that the lawyer entered into a business transaction with a client, the burden of persuasion is on the lawyer to show that the transaction was fair and reasonable and that the client was adequately informed.

*Restatement, supra*, § 126, com. a.

In approving the bartering of stock for legal services, the Ethics Committee had a few similarly sobering thoughts.

The ABA [opinion] noted in passing that if the client challenges the transaction it “remains voidable in a civil suit.” In fact, New Hampshire appears to follow the almost universal rule that establishes a presumption that transactions with clients are voidable. *Whipple v. Barton*, 63 N.H. 613 (1885) (gift). Summarizing the law when a client challenges the transaction, one respected treatise concludes:

The obvious conclusion to be derived from almost two centuries of American decisions is that an attorney rarely can prove there was compliance with the fiduciary obligations in business transactions with the client. The lesson to be learned is that, when the attorney and client become parties to a transaction, the requisite independent advice is best furnished by another unrelated lawyer.

Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 14.22 (4th ed. 1996). When the transaction is voided, the client may rescind the transaction or recover damages. Courts usually order the remedy that is “most economically beneficial to the client.” *Id.* at § 14.23.

“Taking Stock in Your Client As Legal Fees Or An Investment,” NHBA Ethics Committee, *Practical Ethics Article* (November 8, 2000); “Acquiring Ownership in a Client in Connection with Performing Legal Services,” ABA Formal Opinion 00-418 (2000).

Courts in other jurisdictions have been similarly disposed. *In re Disciplinary Action Against Bullis*, 723 N.W.2d 667, 673 (N.D., 2006) (attorney “engages in business transactions with a client at the attorney’s peril”); *Chism v. Tri-State Const., Inc.*, 374 P.3d 193, 210 (Wash.App. 2016) (“an attorney-client transaction is prima facie fraudulent”); *Liggett v. Young*, 877 N.E.2d 178, 184 (Ind. 2007) (attorney-client transactions “are presumed to be fraudulent”); *Rosas v. Commission for Lawyer Discipline*, 335 S.W.3d 311 (Tex.App. 2010) (the attorney has “the burden to prove his and [the client]’s transaction is exempted from Disciplinary Rule 1.08(a)”).

Even in New Hampshire, the situation can get messy if problems arise. In *Becksted v. Nadeau*, 155 N.H. 615 (2007), a dispute arose between a lawyer and carpenters who had worked on the lawyer’s office. The lawyer offered to write off the cost of legal services provided in exchange the carpenters writing off their bill. The dispute went first to the Attorney Dispute Resolution Committee, and ended up in superior court when the carpenters filed a mechanics lien. The dispute also made its way to the Professional Conduct Committee where the lawyer received a Public Censure and agreed to resign from the New Hampshire Bar. *Nadeau advs. Becksted*, #04-048 (2009).

## **CONCLUSION:**

The lawyer will need to comply with all the provisions of NHRPC Rule 1.8(a), including the requirement to advise the client in writing of the desirability of seeking the advice of independent legal counsel, in any agreement to exchange goods or services for legal fees entered into at the outset of legal representation or during the course of such representation. Even if the lawyer strictly complies with Rule 1.8(a), however, the courts may view the transaction as voidable if the client later feels aggrieved by the transaction.

**NH RULES OF PROFESSIONAL CONDUCT:**

Rule 1.8

Rule 1.8(a)

**NH ETHICS COMMITTEE OPINIONS AND ARTICLES:**

“Taking Stock in Your Client As Legal Fees Or An Investment,” Practical Ethics Article  
(November 8, 2000);

**SUBJECTS:**

Barter

Business transaction with a client

Conflict of Interest

Fees

Standard commercial transaction

Voidable transaction

- **By the NHBA Ethics Committee**

- *This opinion was submitted for publication to the NHBA Board of Governors at its November 16, 2017 meeting.*