

Something for Nothing? Not Really

by

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Depositions with us are a gas — get a \$25 gas card for every depo!

Sir Roy Harrod, the English economist, once famously opined, “The most basic law of economics is that one cannot get something for nothing.”

The principle that nothing comes for free may be a fundamental tenet of economics, but marketing wizards know that “freebies” are one of the most widespread and effective marketing tools for business solicitation, including businesses providing services to the legal profession.

Recently, there has been an increase in the number of gift giving or reward programs offered to attorneys and their staff for scheduling depositions with a particular court reporting agency. The gifts clearly are made in order to influence the selection of court reporting agencies when scheduling depositions.

Recently, the following scenario was brought to the attention of the Director’s Office: A court reporting agency sent a \$25 debit gift card to a secretary who had scheduled a recent deposition with the agency. The lawyer was unaware of the secretary’s participation in the court reporting agency’s reward program. The lawyer investigated the court reporting agency’s website and determined that among the “perks” for scheduling depositions with the agency were the following: cookies on the dates of depositions, small gifts on birthdays and holidays, gift certificates to a mall for referring new clients and a rewards program that provided a gift certificate for a certain number of depositions scheduled with the agency. After reviewing the court reporting agency’s gift-giving policy and determining that many of the gifts or rewards offered were not nominal in nature, the lawyer declined to use their services further.

The offering of gifts or reward programs by court reporting agencies is not a new phenomenon, but does merit a second look given the apparent resurgence of such marketing programs.

In 1993, the Lawyers Board adopted Opinion 17, “Accepting Gratuities from Court Reporting Services and Other Similar Services.” The opinion provided: A lawyer ought not to accept, or to permit any nonlawyer employee to accept, a gratuity offered by a court reporting service or other similar service for which a client is expected to pay unless the client consents after consultation. However, a lawyer may accept nominal gifts, such as pens, coffee mugs, and other similar advertising-type gifts without consent of the client. See Rules 1.4, 1.5(a), 1.8(f)(1) and 5.3 of the Minnesota Rules of Professional Conduct; see also Rule 1.0(c).

Under Opinion 17, lawyers may accept most gifts or rewards only with the client’s consent. A lawyer

cannot receive something of value from a service provider for which a client is paying without the client's consent. If a lawyer accepts such a gratuity without the client's consent, the lawyer is essentially receiving a benefit that rightfully belongs to the client who paid for the service. (American Bar Association Opinion 278 also states that a lawyer should not accept a gratuity from anyone without the client's consent and that the gratuity belongs to the client.)

In addition, a lawyer is not excused from the requirement of obtaining the client's consent if the gift or reward is received by a nonlawyer employee in the firm. Under MRPC Rule 5.3, a lawyer is required to ensure that a nonlawyer assistant's conduct is compatible with the professional obligations of the lawyer. Thus, in the above scenario, if the secretary had been taking gifts that were not nominal in nature without the consent of the client, the lawyer's conduct could have been in violation of Rule 5.3.

Under Opinion 17, lawyers may accept gifts or rewards from a court reporting agency that are truly nominal in nature without obtaining the client's consent. Cookies or other edible items often fall within this category as do calendars, pens, coffee mugs and other nominal items used for advertising purposes. Twenty-five dollar debit gift cards on the other hand would clearly require obtaining the client's consent.

The National Court Reporters Association launched an "Ethics First" campaign in April 2009 to address the growing concern with gift giving by some court reporting agencies. The NCRA created the campaign to encourage court reporters to ensure public confidence in the court reporting system, to promote the neutrality and impartiality of the court reporting profession, and to avoid inappropriate gift-giving practices within the profession. While the NCRA's Code of Professional Ethics does not prohibit token gifts or inexpensive items, those items cannot exceed more than \$100 in the aggregate per recipient per year. (See Provision 8 of the NCRA Code of Professional Ethics and Advisory Opinion 45: "Guidance of Gift Giving," which can be found at <http://ncraonline.org/NCRA/advisoryops/Advisory/045.htm>.)

Another reason to be cautious of gift-giving and reward programs is that such gifts may have unforeseen tax consequences. The Internal Revenue Service considers many of these gifts to be revenue attributable to a lawyer or law firm regardless of whether the recipient was the lawyer or a nonlawyer assistant. In some instances the law may attribute the gift as taxable income to the client.

While the acceptance of nominal gifts from court reporting agencies is permissible, whenever a question is raised as to whether the gift is nominal, the best course of action is to consult the client.