

Ethics Opinion No. 85-5

Payment of Attorney Fees by Credit Card; Interest on Overdue Accounts.

The Committee has received a request for an opinion regarding the propriety of allowing clients the voluntary option of paying attorney's fees and costs through the use of their individual credit cards. The request also asks for an opinion regarding specific methods of charging past due balances.

The Committee concludes that the use of credit cards is permissible, provided that any plan is formulated and administered within the framework of all applicable laws and ethical considerations. Past due balances may be charged against the client's credit card only upon current consent of the client at the time the charge is made, and cannot be done automatically pursuant to an agreement executed prior to the time the charges and expenses were incurred. Interest may be charged on overdue accounts.

The Use of Credit Cards is Permissible

In the 1960's and 1970's, the propriety of the use of credit cards for the payment for legal services and expenses was a matter of great controversy. By the mid and late 1970's, however, the use of credit cards for the payment for legal services and costs was generally accepted as being permitted under the ABA Code of Professional Responsibility, if specified guidelines were followed.

American Bar Association Formal Opinion 338 (November 16, 1974) approved the use of credit cards for the payment of legal expenses and services under the provisions of the ABA Code of Professional Responsibility. Numerous states issued similar opinions, some states adopting the guidelines of ABA Formal Opinion 338, and other states imposing their own or additional guidelines. [See ABA/BNA *Lawyers Manual on Professional Conduct* 41:602 (1984)]

Some states have expressed concern with the terms of the agreement between the attorney and the credit card issuer. Kansas has disapproved a credit card program with a buy-back provision under which the attorney must agree to buy back any drafts from the bank over which the cardholder disputes the performance or quality of service, since that type of plan may place the attorney in a position where the full discharge of the duty to the client would be impaired. (Maru, *Digest of Bar Association Ethics Opinions*, 8463, Kansas Bar Association Opinion 45, May 17, 1970) Maine has stated that any credit card arrangement must be on a recourse basis, and the client must be so advised. (Maru, 11206, Maine State Bar Association Opinion 49, March 1, 1977) Massachusetts has stated that any assignment of the obligation to the bank by the attorney must be without recourse. (Maru, 8648, Massachusetts Bar

Association Opinion 74-1, February 9, 1974) Oklahoma has also stated that the credit card issuer can have no recourse against the attorney. (Maru, 9375, Oklahoma Bar Association Opinion 268, December 14, 1972) New Hampshire has stated that the issuer must waive all holder-in-due-course defenses, and the attorney must reserve the right to decide whether or not to sue on a disputed or unpaid obligation. (Maru, 8792, New Hampshire Bar Association, 1975) New York has also stated that the issuer must waive all holder-in-due-course defenses. (Maru, 9122, New York State Bar Association Opinion 362, October 25, 1974)

Some opinions have stated that it is improper to use credit cards for certain purposes. Maine prohibits the use of credit cards to advance funds for the payment of fines and judgments. (Maru, 11206, Maine State Bar Association Opinion 49, March 1, 1977) The Chicago Bar Association has stated that it is improper to accept credit cards in certain situations, such as divorce and bankruptcy proceedings. (Maru, 11051, Chicago Bar Association Opinion 79-4, 1979) Montana has stated that fees for bankruptcy matters may not be financed with credit cards. (Maru, 11980, State Bar of Montana Opinion 3, 1976) Ohio has stated that credit cards may not be used in bankruptcy, criminal, or domestic cases. (Maru, 9678, Ohio State Bar Association Opinion 29, February 1975) Oklahoma has stated that a contingent fee cannot be financed by a credit card. (Maru, 9375, Oklahoma Bar Association Opinion 268, December 14, 1972)

Summaries of the State Ethics Opinions regarding use of credit cards are collected in ABA/BNA *Lawyer's Manual on Professional Conduct* (1984), beginning at 41:602. Some of these opinions express considerations other than those referred to above. Some of the considerations expressed relate to attorney advertising, which has been substantially affected by developments in the law subsequent to the issuance of the opinions.

In Alaska, credit cards may be used for the payment for legal services and costs, subject to the following conditions:

- (1) The client must be fully advised, in advance, of all terms and conditions under which a charge is to be made.
- (2) Charges made pursuant to a credit card plan shall be only for services actually rendered or cash actually paid on behalf of a client. (ABA Opinion 338, November 16, 1974)
- (3) In participating in a credit card program, the attorney shall scrupulously observe the obligation to preserve the confidences and secrets of the client. (ABA Formal Opinion 338, November 16, 1974)

(4) Any credit card plan shall not adversely affect the client's right to fee arbitration pursuant to Alaska Bar Rules 34 through 42; shall not adversely affect any other right or remedy available to the client under any law or principle of legal ethics; nor may it adversely affect any duty of the attorney to the client relating to payment in the event of a fee dispute or regarding the use or application of disputed funds or other property.

(5) The credit card plan must be formulated and administered within the framework of all applicable laws and ethical considerations.

There are certain situations in which it would be improper to accept a credit card. Other states have recognized bankruptcy, domestic relations, and criminal proceedings, as examples of these areas. At this point, however, the Committee will not broadly prohibit the acceptance of credit cards in cases involving specific areas of substantive law. This question will be left open for later opinions upon more particular facts, if it becomes necessary. At this point, the Committee will do no more than point out that there are problems involving the rights of others, including the issuer, which might exist when a credit card is accepted in a bankruptcy, domestic relations, or criminal case. Attorneys should be particularly careful in accepting credit cards in these types of cases, to insure that all ethical principles and requirements of law are followed.

Interest May be Charged on Overdue Accounts

A necessary corollary to the use of credit cards is the charging of interest on delinquent accounts.

Attorneys may charge interest on any delinquent account, regardless of whether or not a credit card is involved. The client must be advised that the attorney intends to charge interest, and the client must agree to the payment of interest on accounts that are delinquent for more than a stated period of time. The client must be fully advised as to the rate of interest, and other terms that may be applicable. The interest charged must not exceed the rate, or be in other violation, of any applicable law or regulation.

Generally, Credit Card Charges May be Made Only by Contemporaneous Agreement

The Committee has been requested to opine as to the following:

(1) The propriety of charging against the client's credit card account those attorney's fees and costs which have remained past due for a specified period of time when done in conjunction with a provision in a written retainer agreement by which the client has agreed that any fees or costs which remain past due for a length of time *without dispute* shall be deemed reasonable and necessary, both in

terms of the quality and quantity of work, and that such undisputed fees and costs which have remained past due for the specified length of time could be charged against the client's credit card account, and

(2) The propriety of automatically charging against the client's credit card account any fees or costs which remain past due beyond a specified period of time when there is a provision authorizing same in the written retainer agreement. Unlike the situation in paragraph 1 above, the retainer agreement would contain no provision as to the client's implied consent as to the quality and quantity of the services.

With respect to proposal (1), it is not appropriate for an agreement to provide that any costs or fees, which are incurred in the future, and which remain past due for a length of time without dispute shall be deemed reasonable and necessary, both in terms of the quality and quantity of the work. The client cannot know with certainty, at the time of signing a retainer agreement, that the services to be performed in the future will be reasonable and necessary, both in terms of quality and quantity. That decision can be made by the client only after the work in question has been performed.

Additionally, with respect to both proposal (1) and (2), the Committee envisions serious problems in a contractual provision authorizing credit card charges based on future non-action by the client, such as failure to object. It is very possible that a client may not object to a bill, simply because the client has not received it, or for some other valid reason. An automatic credit card charge in such a case, where the client in fact would have objected to the charge, could result in an ethical violation. Additionally, a charge on the client's credit card, unanticipated by the client, particularly in a large amount, could create undue or unwarranted financial hardship or embarrassment to the client in the use of the credit card to deal with third parties.

Accordingly, credit card charges for work performed and expenses incurred in the future cannot be authorized by non-action of the client. Pursuant to this opinion and ABA Formal Opinion 338 (November 16, 1974), charges to the credit card may be made only for services actually rendered or cash actually paid on behalf of a client. The credit card charge may be made only if the client actually consents to the charge, with full knowledge of all the relevant facts and circumstances, at the time the charge is made. In addition to consenting to a single charge, a client may also give a current consent to a program of periodic payments, such as to the payment of an undisputed \$500.00 charge by a credit card charge of \$100.00 per month for the next five months. Any consent given by the client may be withdrawn, and further charges to the credit card may not be made, in the event of a bona fide fee dispute.

Accordingly, the procedures set forth in paragraphs (1) and (2) above are disapproved.

Adopted by the Alaska Bar Association Ethics Committee on August 19, 1985.

Approved by the Board of Governors on August 23, 1985.