



Committee on Professional Ethics

Opinion #362 - 10/25/74 (18-73) Topic: Professional fees paid through bank credit card.

Digest: Not improper for lawyer to use bank charge plan subscribed to by both attorney and client for payment of professional fees where proper safeguards employed.

Code: EC 2-9; 2-10; 2-17; 5-2; 5-21; 5-22.
Canon 2.

QUESTION

May a lawyer participate in a bank charge card system where the agreement with a bank provides that lawyers may participate in a charge card system permitting their clients to make payments for legal services by the use of credit cards?

OPINION

The principal features of a proposed Professional Participation Agreement between a bank, participating attorneys and the local bar association are that the participating lawyer will honor such card properly tendered for use "for transactions and shall maintain a policy which shall not discriminate between clients seeking to make transactions through use of a valid charge card and cash clients or other clients"; the plan is open to all lawyers, whether or not members of the sponsoring bar association, upon the same terms, but the bank may refuse participation to any particular lawyer as it deems fit; no fee shall be increased by any lawyer because of his participation in the plan and such lawyer shall not pass on to the client any charges incident to such participation; such participation shall not be used to gain a competitive advantage over non-participation lawyers; clients able to pay without the use of the credit card should be encourage to do so; where the lawyer would normally permit deferred payments, he should continue to do so; the lawyer may inform the client of the plan but shall not urge its use.

The agreement further provides that the lawyer submit to the bank a brief description of the services performed or state thereon "professional services rendered" and the price thereof in detail sufficient to identify the transaction. For each transaction the lawyer represents and warrants that he has performed his obligation to the client in connection with the transaction and has no knowledge or notice that would impair enforceability or collection against the client.

It is further provided that if the client within a reasonable time notifies the bank that he has a defense to payment, such as the lawyer's failure to perform the services or that he was over-charged, the lawyer will be notified of such defense and the bank will

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have the right to debit the lawyer's account with the bank or else seek to recover the disputed charge from the lawyer. In the latter event the lawyer may then proceed against the client consonant with the Code. Moreover, even if the client fails to notify the bank of his defense to payment within a reasonable time and the bank has collected from the client, the latter can sue the lawyer or bring arbitration proceedings. Arbitration of any disputes shall be binding between the bank and the lawyer.

N.Y. State 117 (1969) sets forth the general principles applicable to a lawyer's participation in a bank credit card plan. It was there held improper for a lawyer to use the particular bank charge plan (similar to the general plan used in connection with the sale of goods) which was subscribed to by both the attorney and the client for payment of professional fees. That Opinion stated that within proper safeguards bank charge plans may be used for payment of professional fees, but "any approved financing plan should reserve to the attorney the right to recapture the loan in the event that the client fails to pay the loan before the bank brings suit thereon, thereby entitling the attorney to determine whether or not to proceed to sue. In such case, of course, the attorney would be required to pay to the bank whatever might be due if in fact he wishes to proceed directly against the client." That Opinion continued:

"Further safeguards under a permissible plan would include, but not be limited to the following: The contract with the bank should provide that neither the attorney nor the client would be compelled to divulge the nature of the services rendered; that arbitration before a Bar Committee be provided in order to protect the client against an improper fee; that the client still retains the right to take his case to court if he chooses not to arbitrate; that the bank and its transferees agree not to raise the defense of a holder in due course; that if the client is successful in court the attorney is bound to make good the award of the court in favor of the client; that the bank and the attorney agree that the client may raise against the holder in an action to collect an obligation, all defenses which the client might have had against the attorney."

N.Y. County 601 (1972) citing N.Y. State 117 (1969) held that the utilization of the usual merchant's bank charge card system by lawyers was improper, pointing to the following specific objections to such plan:

"Thus, the information which the lawyer is required to disclose to the bank may include client's confidences which it is the lawyer's duty to preserve. Canon 4; EC 4-1, 2, 3; DR 4-101. Even client's prior consent, exacted as the price of obtaining credit for the payment of his lawyer's fee should not justify this, absent safeguards which the Plan does not provide. Cf.

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EC 2-25. The provision obligating the lawyer to assign his right to his fee, without an express recapture privilege, constitutes a surrender by the lawyer of control over an essential feature of his professional relationship with his client, viz: the power to determine whether or not or when to enforce payment by the client. EC 2-23. Additionally, the requirement that the lawyer participate in advertising the bank's credit service does not conform with the standards of dignity expected of members of the bar."

Ethics committees in a number of jurisdictions have considered the propriety of lawyers' participating in bank credit card plans. Some have upheld such plans seemingly without any variation from the so-called "merchant plans". North Carolina 664, 678 (1969), 16 North Carolina Bar No. 3 (1969), 10, 18; Texas, 34 Texas Bar Journal (1971), Supp. No. 8 - Dec. 1971 - State Bar Rules and Canons of Ethics 267, Michigan, Michigan State Bar Journal (Nov. 1972) 721. Others have approved such plans with conditions and limitations. Oregon, 30 Oregon State Bar Bulletin, No. 5 (Feb. 1970) 10-12; Arizona 70-20 (1970), 71-34 (1971). Florida has disapproved such plans. Florida 70-9 (1970), reaffirmed 1/22/73. See, also, ABA 320 (1968); ABA Inf. 1120 (1969); ABA Inf. 1176 (1971); Illinois 295 (1968), 56 Illinois Bar Journal, No. 11 (April 1968) 949, indicating that suitable, ethical plans can be formulated.

In light of the governing principles set forth in N.Y. State 117 (1969) and other safeguards hereinbefore mentioned which are deemed essential for an ethical credit card plan for payment of lawyers' fees, the professional participation agreement and plan described is not improper provided that it also expressly provides (1) that the bank in any possible suit against the client waives all defenses a holder in due course might have, (2) that the attorney shall fully and fairly disclose to the client, both orally and in writing prior to the consummation of each credit card transaction, that any defenses the client may have regarding the professional transaction may be asserted against the bank as well as the attorney and that any dispute between the lawyer and client may, at the option of the client, be submitted to arbitration, and (3) that there be no display of an emblem or window decal in the lawyer's office relating to the credit card. Such display is undignified and may be a form of improper solicitation. North Carolina 664, 678 (1969); Texas, 34 Texas Bar Journal (1971), Supp. No. 8 - Dec. 1971 - State Bar Rules and Canons of Ethics 267.

The use of credit cards to pay for legal fees is an innovation which should not be discouraged where the participating lawyer complies with the appropriate safeguards set forth above for it fills a need for a segment of the public that conceivably might not otherwise have access to legal services. Canon 2. Participating attorneys should have the provisions of EC 2-9, EC 2-10, EC 2-17, EC 5-2, EC 5-21 and EC 5-22 firmly in mind in connection with all credit card transactions.