Nebraska Ethics Advisory Opinion for Lawyers
No. 94-3

LAWYERS MAY NOT ETHICALLY PARTICIPATE IN A FINANCE PROGRAM WHICH PURCHASES INSTALLMENT ACCOUNTS AND CREDIT AGREEMENTS FROM PARTICIPATING LAWYERS IF THE PROGRAM IS DESIGNED TO BE PROMOTED TO THE CLIENT BY THE LAWYER; DOES NOT PROVIDE FOR SCRUPULOUS OBSERVANCE OF THE LAWYER'S OBLIGATION TO PRESERVE CONFIDENCES AND SECRETS; AND PROVIDES AN INCENTIVE TO INCREASE CHARGES TO COVER THE PLAN'S 10% AND 20% DISCOUNTS. THE ADVANCE DISCOUNTING OF UNEARNED FEES FOR LEGAL SERVICES CONSTITUTES FEE SPLITTING. ADVISORY OPINION 81-2 IS HEREBY MODIFIED.

FACTS

This Committee has been provided with certain information from a corporation which will purchase installment accounts and credit agreements from participating lawyers or law firms and will assist participating lawyers in collecting other accounts receivable which do not qualify for immediate purchase.

The lawyer or a law firm enters into a written participation agreement enabling the lawyer or the law firm to participate in a financing program on the accounts payable of certain of the lawyer's clients. Under this arrangement, there is an initial "set-up" charge of $500 for one lawyer, with an additional charge of $50 for each additional lawyer.

The finance company provides the law office with forms that are used by the lawyer to gather information from the clients which will enable the finance company to conduct its underwriting review and assign the proposed creditor to a classification of A, B, or C, depending upon the client's creditworthiness. Classification A would include approximately 10% to 15% of the general public and involve persons with excellent credit. Classification

B would include clients with a lesser degree of creditworthiness and include approximately 60% of the general public. Classification C would involve clients with poor or unverifiable credit or poor employment histories.

Interest at the rate of 18% would be charged on each account, regardless of whether it is classified A, B, or C. The lawyer may immediately discount Class A accounts at 10%, receiving 90% in cash from the finance company. Class B accounts are discounted at 20%. Class C accounts are not discounted, but the finance company will undertake collection and remit 80% of all collections, including interest, to the lawyer. The discounted 10% or 20 % on the A and B accounts and the remaining 20% of principal and interest on the C accounts would be retained by the finance company.

The participation agreement between the lawyer and the finance company states, in very small print:

> Except for rights and remedies of the finance company in connection with any breach of warranties, representations and covenants made by Participant herein, or in any voucher, the finance company is purchasing the accounts without recourse to Participant. . . .

However, on the reverse side of the agreement (in smaller print), the Participant (lawyer) indemnifies the finance company for any claims made by clients against the Participant or finance company relating to the quality and/or quantity of any service provided by the Participant and agrees to accept a tender of the defense of any such proceeding. Any controversy arising out of the agreement is subject to mandatory arbitration.

The lawyer's duties in the event the client asserts any claim or right not to pay an account in full require the Participant to:

> . . . promptly advise the finance company in writing of the particulars of such claim and cooperate with the finance company on

> whatever investigation of such claim the finance company determines to make. If such claim is based upon an event or circumstance which constitutes a breach of any warranty or representation by Participant herein, then Participant shall promptly commence and diligently pursue completion of all actions reasonable and necessary to obtain full payment on the account in question. In the event Participant's breach is not cured to the finance company's satisfaction within ten (10) days from notice thereof, then the finance company shall have the right to take any or all of the following actions in its sole and absolute discretion:
>
> (1) Offset the remaining balance of the account affected by such breach, together with any and all reasonable and incidental costs and expenses incurred by the finance company in connection with the nonpayment of such account (collectively the "balance"), against any new or future transactions between the finance company and Participant or
>
> (2) Offset the balance against any funds, accounts or other property of Participant in the finance company's control or possession or
>
> (3) Require Participant to repurchase such account at a price equal to the balance minus applicable discounts within ten (10) days of such election.
>
> [Emphasis supplied.]

Thus, the terms and conditions of the proposed agreement require the lawyer to participate and presumably disclose to the finance confidences and secrets of the client, to pursue active and diligent collection efforts against the client, regardless of circumstances, when requested by the finance company, and do in fact give the finance company the right of recourse against the lawyer, contrary to the language on the first page of the agreement. Collection of the

accounts rests in the sole discretion of the finance company.

Even though the name of the program implies otherwise, there does not appear to be in existence any credit card that enables the holder thereof to obtain immediate credit for services. In each instance, the lawyer is to fax the finance company the underwriting information; and within a day or two, the finance company will respond with its classification of the credit, classifying the credit request entirely in its own discretion in accordance with its own underwriting criteria.

DISCUSSION

This Committee does not involve itself with questions of law; hence, issues involving state licensing requirements and usury laws will not be part of this opinion. However, if the program violates usury or installment loan laws, it could subject a participating lawyer to misdemeanor penalties and disciplinary sanctions.

Similarly, this Committee declines to provide specific opinions about specific plans that may currently be available or be proposed from time to time in the future. However, we will provide an opinion on certain aspects of the program and point out certain considerations that need to be reviewed in connection with the propriety of any program involving the use of credit cards or the financing of a lawyer's accounts receivable.

The primary issues involved concern lawyer misconduct, sharing fees with non-lawyers, secrets and confidences of a client, excessive fees, and conflict of interest.

A. Misconduct

Disciplinary Rule 1-102(A)(4) provides, inter alia, that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. " Use of the program name in this instance, in and of itself would appear to be misleading because there does not appear

to be any card that is similar to a conventional credit card in that it authorizes the holder to obtain immediate credit.

Descriptive material provided to potential participants by the finance company describes how you can convince a client to provide you with a $2,500 advance deposit by accepting $1,500 in cash and persuading the client to finance the remaining $1,000 through the use of the finance program. Financing a $1,000 portion of an advance retainer, where the finance company retains up to 20% of the financed amount, unless this situation is made abundantly clear to the client or potential new client, could involve elements of dishonesty, deceit, or misrepresentation, particularly when there is an 18% interest charge tacked on top of the principal sum.

B. Reasonable Fees

Canon 2 requires a lawyer to assist the legal profession in making legal counsel available. Certain ethical considerations under Canon 2 require review.

Ethical Consideration 2-17 provides that a lawyer should not charge more than a reasonable fee because excessive costs of legal service will deter laymen from utilizing the legal system in protection of their rights. In addition, an excessive charge abuses the professional relationship between lawyer and client. The range of discounts for traditional credit cards issued by financial institutions that are subject to regulation in this area ranges from one and one-half percent to five percent. This is considerably less than what the client would have to pay if the client enters into this program with its 18% interest factor and the 10% and 20% discounts.

Ethical Consideration 2-19 states:

> As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good

> relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

Since this financing program is designed to be promoted by, and originated between, the lawyer and client, this ethical consideration would require a lawyer to spend a great deal of time analyzing the financing program with the client, objectively explaining to the client the potential downside risks to the program, describing other credit programs that may be available, as well as the benefits to the lawyer that may in turn be detrimental to the client.

Ethical Consideration 2-21 provides that a lawyer should not accept compensation or anything of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure. By the same token, this ethical consideration would also require that a lawyer should not compensate a third party without the knowledge and consent of his client after full disclosure. This would require an explanation of the grading classification of A, B, and C; a disclosure of the 10% and 20% discount that is paid, based upon the classification; and the fact that if the client is classified as a C, the lawyer will be splitting 20% of amounts collected, including interest, with the finance company.

Ethical Consideration 2-23 requires a lawyer to be zealous in efforts to avoid controversies over fees and provides that he shall "not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." This would appear to be inconsistent with the provisions of the participation agreement quoted above requiring the lawyer to "promptly commence and diligently pursue to completion all acts reasonable or

necessary to obtain full payment on the account in question."

Ethical Consideration 2-25 calls to our attention the historic need to provide legal services for those unable to pay reasonable fees and the basic responsibility for providing legal services for those unable to pay and the admonition that every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.

It is the opinion of this Committee that aggressive promotion of this financing program has the potential of turning the eye of the lawyer away from the lawyer's obli