

DELAWARE STATE BAR ASSOCIATION COMMITTEE  
ON PROFESSIONAL ETHICS  
OPINION 1992-6

September 4, 1992

THIS OPINION IS MERELY ADVISORY AND IS NOT BINDING ON THE  
INQUIRING ATTORNEY OR THE COURTS OR ANY OTHER TRIBUNAL

A member of the Delaware Bar has requested the Committee's advice on the ethical propriety of: (1) an attorney advertising his or her legal services on television; (2) an attorney's acceptance of credit cards as a means for payment of legal fees; and (3) if an attorney may accept credit card payment, whether an attorney may advertise such acceptance. The requesting attorney has not provided a sample of the proposed advertising for the Committee's comment.

CONCLUSION

In summary, the Committee concludes that the Delaware Lawyer's Rules of Professional Conduct (the "Rules") do not prohibit an attorney from advertising on television. This is based on the fact that the Rules provide no express prohibition on such advertising, that the Rules' definition of "advertising" includes "broadcast," and that Rule 7.1(c)(2) provides instructions for the reading of required disclosures and disclaimers in broadcast advertising.<sup>1</sup>

An attorney also may accept credit cards as payment for legal fees without violating the Rules. In order to assure that the acceptance of credit cards does not constitute an ethical violation the following guidelines must be adhered to: (1) the client is fully advised in advance of all terms and conditions under which the charge is to be made; (2) the client understands the terms of the attorney fee agreement; (3) the lawyer explains the nature of any payment made by the client in advance of the services to be rendered or monies to be expended on behalf of the client; (4) any advance or retainer fees not earned must be properly refunded or a

---

<sup>1</sup> Before an attorney engages in any type of advertising, care should -be taken to become thoroughly familiar with all applicable Rules regulating the content of such advertisements. See pp. 2-3, infra.

credit issued to the cardholder's account; (5) the lawyer preserves the client's confidences; (6) the client selects the lawyer, the lawyer remains directly responsible to the client, and the lender has no control in the case; and (7) the credit plan otherwise is formulated and administered in accordance with applicable law and ethical considerations.

Finally, an attorney may advertise the fact that credit cards will-be accepted in payment for legal services.

## DISCUSSION

### Issue 1

It is well settled that, subject to certain significant restrictions, the Rules permit attorneys to advertise their legal services. Rule 7.1(f) defines such permissible advertising to ". . . include any broadcast, publication, client mail or other public communication on behalf of a lawyer intended or reasonably to be anticipated to lead to professional employment." Given this definition's inclusion of the word "broadcast," and the lack of an express prohibition of television advertising in the Rules many restrictions on advertising, it is reasonable to conclude that an attorney is permitted to advertise on television.<sup>2</sup>

### Issue 2

A more difficult issue is presented with the question of whether there is any ethical impropriety in an attorney accepting credit cards as a mechanism for payment of legal fees. There is no express consent or prohibition of the acceptance of credit cards provided in the Rules. In fact, the Rules provide little guidance on this question.

A number of other states have considered this very same issue recently. None of the states which has addressed this issue within the last two years and which has published its

---

<sup>2</sup> However, an attorney who decides to engage in television advertising is subject to a number of restrictions and disclosure requirements found in Rules 7.1 through 7.5 with respect to the content of such advertisements.

opinion in the ABA/BNA Lawyer Manual on Professional Conduct, has found any ethical prohibition in an attorney accepting credit cards. These states include Alaska, Opinion 85-5; Alabama, Opinion 84-67; Arizona, Opinion 89-10; Michigan, Opinion CI-1030 (1984); New Hampshire, Opinion 1984-5/1, Opinion 1988-9/21, and Missouri, Journal Opinion 112 (1982) (nullifying a former rule which prohibited payment by credit card). Among other rationales offered for approving the use of credit card payments is that such use will make legal services more accessible. New Hampshire, Opinion 1984-5/1.

A review of the above decisions indicates that there are primarily three types of ethical concerns raised when an attorney accepts credit cards as payment for legal fees. These concerns are as follows: (1) whether such action violates any rule of confidentiality; (2) whether such action violates any rule of professional independence; and (3) whether such action violates any rules regarding the division of fees with a non-lawyer. As noted, none of the other states that has considered this issue recently has found that the acceptance of credit cards violates any of these rules.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The principle is expressed in Rule 1.6(a) which states:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosure that are impliedly authorized in order to carry out the representation . . . .

It seems reasonable to conclude that a lawyer who accepts credit cards for payment of legal fees may have to disclose the general nature of the services rendered. Even so, as long as such disclosure is limited to the general nature of the service rendered and the lawyer does not disclose matters the client tells him in confidence, it does not appear that the spirit of the above rule is violated. Moreover, a client's informed decision to use a credit card evidences consent to this limited disclosure.

In addition to confidentiality concerns raised by the use of credit cards, there is also concern that there may be a violation of Rule 5.4 regarding the professional independence of a lawyer. Rule 5.4(b) and (c) states as follows:

- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Although partnership is a broad concept, it would seem reasonable to conclude that a contractual arrangement between a law firm and a credit card issuer by which a firm agrees to accept credit cards does not rise to the level of being a partnership. First, 6 Del. C. §1506 states: ". . . a partnership is an association of two or more persons to carry on as co-owners a business for profit." Second, a credit card is nothing more than an indication to sellers of goods and services that the issuer of the credit card will pay (or see to it that the seller of the good or service receives payment) for that which is delivered. See 50 Am.Jur.2d Letters of Credit §38 at 428. While credit card payment does involve a third party in payment of the lawyer's fee, the arrangement does not violate any provision of Rule 5.4 or compromise the lawyer's professional judgment so long as the client selects the lawyer, the lawyer remains directly responsible to the client, and the lender has no control in the case. See Arizona opinion 89-10.<sup>3</sup>

---

<sup>3</sup> This obviously assumes that the credit card issuer has no interest in the matter for which the cardholder has retained the lawyer.

Finally, the restrictions governing the division of fees with a non-lawyer is not an issue because the lender merely acts as a collection agency for the lawyer and does not share in legal fees received by the attorney. Arizona Opinion 89-10.

Apart from the foregoing considerations, it should be noted that the characteristics unique to the three-party credit card relationship may often present additional disclosure considerations for an attorney communicating the terms of the fee agreement to the client. See Rule 1.5. For example, an explanation of the basis or rate of the fee should include an understanding of who will bear the creditor's discount. Arizona, Opinion 89-10. Also, an attorney should assure that the credit plan does not adversely affect the client's access to fee arbitration or other fee dispute remedy, or the attorney's duties to the client respecting payment of disputed fees, or the use or application of disputed funds or property. E.g., Alaska, Opinion 85-5.

### Issue 3

Since attorneys may advertise on television and accept credit cards, the next question becomes whether an attorney may advertise that he accepts credit cards. Again, the Rules are not clear on this subject. However, a number of the above cited opinions also address this issue. See, e.g. Arizona, Opinion 1984-5/1 and 1988-9/21. All agree that attorneys may advertise their acceptance of credit cards.

These opinions generally provide that a lawyer who accepts credit card payments may advertise that practice as long as the attorney complies with the rules governing lawyer advertising. As already discussed regarding television advertising, these Rules are primarily contained in Rule 7.1 through 7.5. Simply stated, this means that the advertising cannot be false, deceptive or misleading and must contain any applicable disclaimers and disclosures.

G:\DATA\PCC\GASSN\21573.01

7

6