Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 97-06

Approved May 30, 1997

Issue: Under the Utah Rules of Professional Conduct, what are the ethical limitations that govern attorneys' acceptance of clients' credit cards to pay fees and costs?

Opinion: Generally, attorneys may accept payment for fees and costs by credit card in the same way that other merchants and service-providers do. This general conclusion is, in part, in conflict with Utah Ethics Advisory Opinion No. 21, which is accordingly overruled.

Background: In 1975, the Utah Ethics Advisory Opinion Committee issued Opinion No. 21, which placed significant restraints on the acceptance of credit cards by attorneys in payment of fees and cost. That opinion was issued under the then-effective Code of Professional Responsibility, which, among other differences, is at variance with the current Utah Rules of Professional Conduct in the area of attorney advertising. To the extent the world of communicating about attorneys' services has changed, this Committee has been asked to revisit the issue of attorneys' acceptance of credit cards under today's Rules.

The following specific questions have been asked:

1. May an attorney accept cash or a check from a client to be held against unearned fees or costs when the attorney knows that the client obtained the funds through the use of a credit card?

2. May an attorney enter into a retainer agreement with a client under which the client gives the attorney a credit card number and authorizes the attorney to charge the client's card when fees are earned or costs incurred?

3. May an attorney suggest to a client that the client use a credit card to pay attorneys' fees or costs?

4. May an attorney place a notice on bills sent to clients stating that the attorney accepts credit card payments?

5. In accepting credit-card payments, must an attorney enter into a bank charge card-attorney agreement similar to the agreement attached to Ethics Advisory Opinion No. 21, issued February 19, 1975?

Analysis: In 1969 the American Bar Association issued Informal Opinion 1120 which stated that "it is unprofessional for an attorney to subscribe to credit card plans." That view was reaffirmed in February 1971 by ABA Informal Opinion 1176. However, by 1974 in Formal Opinion 338, the ABA had revisited the issue of attorneys' accepting credit cards for fee payments in light of the adoption of the ABA Model Code of Professional Responsibility, which had replaced the ABA Canons of Ethics. The ABA reversed course and concluded in Opinion No. 338 that "the Code has overruled Informal Opinion 1176 and that the use of credit cards for the payment of legal expenses and services is permitted under the Code." However, the opinion went on to list six "considerations" to which a credit card plan was required to conform:

1. All publicity and advertising relating to a credit card plan shall be subject to the prior approval in writing of the state or local bar committee having jurisdiction of the professional ethics of the attorneys involved.

2. No directory of any kind shall be printed or published of the names of individual attorney members who subscribe to the credit card plan.

3. No promotional materials of any kind will be supplied by the credit card company to a participating attorney except possibly a small insignia to be tactfully displayed in the attorney's office indicating his participation in the use of the credit card.

4. An attorney shall not encourage participation in the plan, but his position must be that he accepts the plan for the convenience for clients who desire it; and the attorney may not because of his participation increase his fee for legal services rendered the client.

5. Charges made by attorneys to clients pursuant to a credit card plan shall be only for services actually rendered or cash actually paid on behalf of a client.

6. In participating in a credit card program the attorney shall scrupulously observe his obligation to preserve the confidences and secrets of his client.

ABA Opinion 338 does not cite any provision of the ABA Model Code of Professional Responsibility as support for the "considerations," nor does the opinion cite any provision of the Code as support for any conclusion in the

opinion.

The year after Opinion 338 was issued, the Utah State Bar approved Opinion No. 21, which adopted the conclusion of ABA Formal Opinion 338: "We concur with Formal Opinion 338, and accordingly hold that if those requirements [the "six considerations"] are met fully, the use of credit cards for the payment of attorney's services and charges is proper for members of the Utah State Bar." Also appended to Opinion No. 21 was a suggested form of "Bank Charge Card-Attorney Agreement." As with ABA Opinion 338, Utah Ethics Opinion 21 does not cite any provision of the Utah Code of Professional Responsibility (the predecessor to today's Utah Rules of Professional Conduct) to support the requirements.

Rule 1.5 of the Utah Rules of Professional Conduct deals with fees. The rule does not prohibit credit cards. Just as Opinion No. 21 concluded that "the use of credit cards for payment of legal expenses and services is permitted," Rule 1.5 of the Rules of Professional Conduct currently permits the use of credit cards for payment of legal expenses and services.

The previous opinions of the ABA and the Utah State Bar were written under the prior Canons of Ethics or the Code of Professional Responsibility. Attorney advertising was much more limited in those days under the Code of Professional Responsibility than it is today under the Rules of Professional Conduct. Since then, court decisions, (fn1) combined with the adoption of the Rules of Professional Responsibility, have granted attorneys greater freedom in the area of advertising. In light of these changes, the following discusses, in turn, each of the six "considerations" listed in Opinion 21.

1. Current Rule 7.2 deals with advertising by attorneys. It does not require "prior approval in writing of the state or local bar committee having jurisdiction of the professional ethics of the attorneys involved."

2. Rule 7.2 does not prohibit attorneys from being included in a directory of firms and businesses that accept credit cards. This would not be substantially different from an attorney's being included in (or actually advertising in) a directory of firms and businesses that have a telephone and accept telephone calls.

3. Rule 7.2 does not limit an attorney to a "small insignia to be tactfully displayed in the attorney's office indicating his participation in the use of the credit card."

4. Nothing in the Rules of Professional Conduct explicitly requires an attorney to discourage the use of credit card in payment of fees or services. However, Rule 2.1, Advisor, provides:

> In representing a client, an attorney shall exercise independent professional judgment and render candid advice. In rendering advice, an attorney may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Therefore, economic factors of a client's situation could require an attorney to advise that a client not use a credit card to pay the attorney's fees and services.

In addition, there is no ethical principle that would prohibit the attorney from passing along any additional costs incurred in accepting credit-card payment. As with most retail merchants, the attorney or law firm might typically forego this charge. But, if a credit-card company charges the attorney, for example, 3% of the gross billings to provide its services, these are legitimate costs that the attorney may pass on to clients. (This could be a direct charge or could, for example, take the form of a discount to cash-paying clients of an equivalent percentage.

5. The Rules of Professional Conduct do not require that the attorney restrict credit card acceptance to those instances in which the attorney is billing only for services actually rendered or cash actually paid on behalf of a client. However, if an attorney accepts credit-card payment as an advance of fees or reimbursements, then the attorney must comply with Rule 1.15, Safekeeping of Property, and with Rule 1.16(d), which deals with refunding any advance payment of fee which has not been earned, upon termination of representation.

6. An attorney does have a duty to preserve confidences in accordance with Rule 1.6, which forbids disclosure of "information relating to representation of a client . . . , unless the client consents after disclosure." The rule has been read as being broad enough to protect the client's identity. (fn2) It is possible that the acceptance of a credit card will reveal to the credit card company that the client has paid an attorney. Therefore, in an instance where the attorney is aware that the client wishes the fact of his being represented by an attorney to remain confidential, the attorney should alert the client who offers to pay by credit card of the disclosure of his name to the credit-card company to insure that the client consents.

With this discussion as a foundation, we now address directly the questions raised in this request:

1. An attorney may accept cash or a check from a client to be held against unearned fees or costs when the attorney knows that the client obtained the funds through the use of a credit card.

2. An attorney may enter into a retainer agreement with a

client under which the client gives the attorney a credit card number and authorizes the attorney to charge the client's card when fees are earned or costs incurred.

3. An attorney may suggest that a client use a credit card to pay attorneys' fees or costs.

4. An attorney may place a notice on bills sent to clients stating that the attorney accepts credit card payments.

5. In accepting credit-card payments, an attorney has no obligation to enter into a bank charge card-attorney agreement similar to the agreement attached to Ethics Advisory Opinion No. 21. Indeed, we see no reason that the relationship between the attorney and the bank or credit-card company would be significantly different from that between a card company or bank and other providers of professional services.

For the reasons discussed above, this opinion overrules Utah Ethics Advisory Opinion No. 21.

Footnotes

1. *See, e.g., Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91 (1990); *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel* , 471 U.S. 626 (1985); *In re R.M.J.,* 455 U.S. 191 (1982); *Bates v. State Bar of Arizona* , 433 U.S. 350 (1977).

2. Utah Ethics Advisory Committee Op. No. 97-02, 1997 WL 45141 (Utah St. Bar); *see Przypyszny,* Public Assault on the Attorney-Client Privilege: Ramifications of *Baltes v. Doe,* 3 Geo. J. Legal Ethics 351 (1989) (discussing a Florida case where lawyers refused to disclose the identity of a client that had allegedly consulted them concerning a hit-and-run.) *But cf. In re Subpoena to Testify Before the Grand Jury* (*Alexiou v. U.S.*), 39 F.3d 973 (9th Cir. 1994) (holding that a lawyer had to reveal the identity of the client in a counterfeiting case).

Rules Cited:

1.57.2