

ETHICS ADVISORY OPINION

08-02

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Lawyer is considering entering into an agreement with a trade credit account processor (TCAP) who, working with affiliated lenders (Trade Lenders), will offer trade credit to Lawyer's non-consumer clients for payment of Lawyer's fees. TCAP performs essentially the same functions that Visa and MasterCard perform in consumer credit transactions, which were approved for payment of legal fees in Ethics Advisory Opinion 81-01.

Under this arrangement (currently in place in a variety of other trades and professions), Lawyer submits clients to TCAP for TCAP account, providing only the name, address, and telephone number of the client and the amount of credit requested. The lawyer's agreement will be with TCAP to provide account processing and with the Trade Lender to provide the advance, just as it is in accepting Visa and MasterCard for payment. The relationships among Lawyer, TCAP, Trade Lender, and clients will differ from consumer credit bill-payment transactions in only a few ways.

First, Trade Lenders do not extend credit to individuals for consumer transactions. They extend only trade credit to businesses for business-to-business transactions. Therefore, only Lawyer's non-consumer clients can be involved in the arrangement. Lawyer intends to enter into this arrangement only with Lawyer's collection and foreclosure clients that have ongoing business with Lawyer in multiple legal matters who are themselves sophisticated lending institutions.

Second, Trade Lenders will not charge interest to clients on monies advanced to Lawyer. Lawyer pays Lenders' and TCAP's fees for this service.

Finally, client participation in these trade credit arrangements will be by consent of each non-consumer client. Client authorization for TCAP payment of Lawyer's fees will apply to all matters in which Lawyer represents each client, just as Lawyer's current fee agreement with each client applies to all legal matters as they arise. The agreement between Lawyer and clients will also provide that when a client disputes a fee, Lawyer will refund the TCAP payment and resolve the dispute directly with the client or through the Bar's fee dispute board, if necessary.

As with credit card payments, no confidential client information will be given to TCAP when

Lawyer submits payment requests. Detailed accounts of work performed will be sent only to clients.

Questions Presented:

1. May Lawyer ethically enter into this fee-payment arrangement with clients?
2. May Lawyer, with informed client consent, sell existing accounts receivable to a TCAP (relating only to those clients participating in the trade credit arrangement)?

Summary:

Yes. 1) Lawyer may ethically enter into a fee-payment arrangement with clients and a trade credit account processor (TCAP) and 2) Lawyer, may sell existing accounts receivable to a TCAP, provided informed consent is obtained from the client.

The facts as presented address any ethical concerns in that the client's informed consent is obtained prior to entering into the fee-payment arrangement; clients are not charged any fees, costs, or interest; and client confidentiality is maintained (except for client name and address, which are divulged with permission of the client).

Opinion:

The facts on which this question is based are similar those in a situation where credit cards are accepted by a lawyer in payment of legal fees, with the exception (in the instant case), that fees, costs, or interest are not charged to the client. Apparently, the lawyer here pays the associated fees as a premium for receiving payment early from TCAP.

While SC Bar Ethics Advisory Opinion 81-01 was written under the former Code of Professional Responsibility, its conclusion continues to be applicable under the present Rules of Professional Conduct (SC Ap. Ct. Rule 407). EAC 81-01 approved monthly service charges and permitted a lawyer to take an interest-bearing note for fees owed. In the present case, the facts do not posit any fees being charged to the client, but the precept of client agreement still applies.

SC Bar Ethics Advisory Opinion 96-06 specifically permitted the use of credit cards for payment of legal fees, with caveats as to written fee agreements and opportunities for clients to review invoices. Here, Lawyer's prior agreement with clients and TCAP states that Lawyer will refund any disputed fee and resolve any such issue directly with the client.

Even though the inquiring lawyer states that the TCAP arrangement will apply only to sophisticated non-consumer clients, Lawyer's engagement letter and fee agreement should

disclose all relevant facts. If, in cases where Lawyer desires to “sell” existing accounts to the TCAP, the agreements did not contemplate using a TCAP, Lawyer should obtain informed client consent prior to passing the accounts to the TCAP.

The members of the Ethics Advisory Committee are satisfied from the recitation of the facts that the inquiring lawyer has provided adequate safeguards in the agreement with clients and the TCAP.

Practitioners are reminded of the requirement of the reasonableness of fees in Rule 1.5 and the requirement of client confidentiality in Rule 1.6.