FORMAL OPINION NO 2005-133

[REVISED 2014]

Attorney Fees:
Financing Arrangement

Facts:

A company owned by nonlawyers ("Company") offers a plan in Oregon ("the Financing Plan") to enable clients to finance legal fees through Company. Under the Financing Plan, participating lawyers negotiate fee agreements with their clients in accordance with their customary practice. In appropriate circumstances, however, Lawyer may inform Client of the availability of the Financing Plan. If Client is interested, Lawyer will describe the Financing Plan in greater detail.[1] If Client is interested in using the Financing Plan, Client will complete Company's written credit application at Lawyer's office, and Lawyer will forward to the application Company.[2]

Company will review the credit application and, if it is approved, establish a "credit facility" for Client to pay Lawyer's legal fees up to the credit limit established by Company.

Lawyer will submit a voucher to Company as services are rendered. Only vouchers for uncontested services will be submitted to

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1 It is assumed that either Company or Lawyer will provide Client full disclosure regarding the interest rate charged and all other material terms and conditions of the credit agreement used in connection with the Financing Plan. It is also assumed that all disclosures required under Regulation Z and Oregon consumer lending laws will be properly given and that the terms of the Financing Plan and the documents used in connection with the Financing Plan will be consistent with all applicable credit laws. Failure to comply with these requirements could involve Lawyer's violation of applicable substantive law as well as Oregon RPC 8.4(a)(3), which provides that it is professional misconduct for a lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation."

2 It is assumed that the Financing Plan will not be actively marketed to the public by either Company or Lawyer and that in discussing the Financing Plan option with Client, Lawyer will present the option in a low-key, factual manner, as a convenience to Client without attempting to induce Client to choose this option. Public advertising of the Financing Plan could raise issues under Oregon RPC 7.1–7.3 (advertising and solicitation).

Company. Before Lawyer submits a voucher to Company, Client must confirm that the amount of the voucher is appropriate for the services.[3] Vouchers will be submitted only for services actually rendered.[4]

On receipt of a voucher, Company will pay to Lawyer the amount of the voucher (up to Client's unused credit limit), minus a service charge of 10%.

Client must repay the amount of each voucher plus interest, on an installment basis. Interest will be charged at a rate that is comparable to the rates of interest charged on bank credit cards. Company will require Client to deposit a substantial reserve to reduce Company's collection risks.

Company will be responsible for collecting amounts owed by Client and, with certain limited exceptions, Company will have no recourse against Lawyer for uncollected amounts.

Question:

May Lawyer participate in the Financing Plan?

Conclusion:

Yes, qualified.

Discussion:

The Financing Plan is designed to serve the interests of both Lawyer and Client. The Financing Plan enables Lawyer to reduce the risk of nonpayment by Client and to reduce the delay and expense involved in collecting client accounts. At the same time, it enables Client to finance legal fees through a credit facility offered by Company.

Discussed below are potential issues raised under the Oregon RPC by each of these aspects of the Financing Plan.

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[3] If such approvals result in Client's waiver of his or her rights to contest the legal fee at a later point in the representation, the Financing Plan would create a conflict of interest under Oregon RPC 1.7. See discussion at 2.a below.

[4] If payments are received for future services, Lawyer may be required to deposit such payments in his or her trust account. *See* Oregon RPC 1.15.

1. *Collection Aspect.*

Oregon RPC 5.4(a) provides:

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
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> (1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.
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> (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.
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> (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
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> (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
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> (5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from a referral.

Because Company will deduct 10% as a service charge from loan proceeds used to pay the legal fees, an issue arises whether such arrangement constitutes an impermissible division of legal fees by Lawyer and a nonlawyer. The purpose of Oregon RPC 5.4(a), however, is to protect Lawyer's professional independence of judgment. It does not prohibit Lawyer from using a nonlawyer to collect legal fees, even when the nonlawyer is paid from the collected fees. *See In re Griffith*, 304 Or 575, 611, 748 P2d 86 (1987).

2. *Financing Aspect.*

As a general matter, the financing aspect of the Financing Plan is analogous to Client's using a credit card to finance legal fees. See OSB Formal Ethics Op No 2005-97, which recognizes that lawyers may accept credit cards for payment of legal fees. In addition, that opinion

sanctioned a rate of interest comparable to that charged on "many credit cards."[5]

Nevertheless, the financing aspect of the Financing Plan raises two potential issues that should be considered:

a. *Conflict of interest.*

Oregon RPC 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
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> . . .
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer;
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> . . . .
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> (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
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> (4) each affected client gives informed consent, confirmed in writing.

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[5] If the Financing Plan involves an excessive interest rate, it is possible that Lawyer's fee could be deemed excessive. *See* Oregon RPC 1.15. *See also* OSB Formal Ethics Op No 2005-98 (lawyer could enter into flat fee arrangement that might result in more or less fees than what lawyer would earn under hourly billing rate; question is not whether lawyer would earn more than permissible hourly billing rate with respect to particular case but "whether agreement, as a whole, provides excessive compensation"); OSB Formal Ethics Op No 2005-54 (agreement that transforms contingent fee into hourly fee if client rejects settlement offer that lawyer deems reasonable could "very well turn an otherwise lawful fee into a 'clearly excessive fee'").

Oregon RPC 1.0(b) and (g) provide:

> (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
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> . . . .
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> (g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Although negotiation of fee arrangements with clients does not, in general, involve a conflict of interest under Oregon RPC 1.7, certain features of the Financing Plan might not be in a particular client's best interest, which could create a conflict of interest for Lawyer's offering the Financing Plan to Client. For example, Lawyer may have an incentive to encourage Client to participate in the Financing Plan to accelerate Lawyer's receipt of fees or to avoid the risk and expense of collecting fees. If there is a significant risk that Lawyer's professional judgment will be materially limited by Lawyer's own financial interest in having Client choose this payment option, then Lawyer should not offer the Financing Plan to Client without obtaining Client's consent to acceptance or continuation of the employment relationship based on informed consent, confirmed in writing. Oregon RPC 1.7(a)(2), (b).[6]

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[6] If the Financing Plan were structured so that Client's obligation to repay Company is not subject to all the claims and defenses arising in connection with the legal representation that Client could assert against Lawyer, the Financing Plan could significantly diminish Client's rights. Under such circumstances, disclosure of this fact would be required to meet the requirements of Oregon RPC 1.7 and 1.0.

b. *Preservation of information relating to the representation of a client.*

Oregon RPC 1.6 provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
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> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
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> (2) to prevent reasonably certain death or substantial bodily harm;
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> (3) to secure legal advice about the lawyer's compliance with these Rules;
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> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
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> (5) to comply with other law, court order, or as permitted by these Rules; or
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> (6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity. the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.
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> (7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same

> responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.
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> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

It is possible that the Financing Plan could involve disclosure of information relating to the representation of Client through the submission of detailed billing vouchers. Either appropriate permission to disclose must be obtained from Client or the vouchers must not disclose protected information.

Approved by Board of Governors, April 2014.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§3.22, 3.32 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§10, 59–62, 125 (2003); and ABA Model Rules 1.6–1.7, 5.4.