Ethics Committee Advisory Opinion # 2004-05/1
Non-Recourse Lawsuit Financing

By the NHBA Ethics Committee
April 2005

RULE REFERENCES:	**SUBJECTS:**
NHRPC 1.6	Conflicts of Interest
NHRPC 1.7(b)	Harsh Reality Test
NHRPC 1.8(a)	Confidentiality
NHRPC 1.8(e)	Business Transactions

ANNOTATIONS:

Although participation by an attorney with the client in lawsuit financing programs is not unethical *per se*, attorneys are encouraged to exercise substantial caution in involving clients in such programs and participating with them to obtain such funding.

Before participating in any non-recourse lawsuit financing program, the lawyer must be absolutely convinced that it is in the client's best interests and that the client can clearly articulate how and why such interests are so well-served.

Lawyers must discuss all aspects of such financing with the client, including available alternatives, the costs and impacts of such financing, the ramifications on a potential recovery and other important considerations.

Information provided to the non-recourse lawsuit funding source or broker could be voluntarily or involuntarily disclosed to the disadvantage of the client. Likewise, there is a possible waiver of the attorney-client privilege through the disclosure of information about the case to the third party broker or financing source seeking to extend such financing.

If non-recourse lawsuit financing is used for the payment of a lawyer's fees and costs, it may well be cast as a business transaction between an attorney and client. NHRPC 1.8 (a) not only requires full disclosure and informed consent by the client and substantial certainty that participation in such financing is in the best interests of the client, but also requires counsel to afford the client a reasonable opportunity to seek review by independent counsel, a written consent and overall fairness – when viewed from the client's eyes at the time that such financing is sought.

QUESTION:

May an attorney participate in a program in which a third party provides financing to assist clients with legal fees and expenses, and living costs?

FACTS:

A number of companies have sprung up across the nation which provide non-recourse funding to clients - usually plaintiffs -- involved in lawsuits. That funding assists those plaintiffs in paying for legal fees and expenses, as well as living costs. Most of these programs seek to provide funding to clients involved in personal injury and medical malpractice cases, although it appears from advertising accompanying the programs that funding is available in a variety of different types of tort cases. Under the majority of programs, the client is usually alerted to such funding sources by his or her attorney. The companies generally prefer to fund cases that have been open for six months or longer - the logic being that some discovery has been developed to permit a sound evaluation of the case. The interested client then provides information to either a broker who works to link potential clients with a funding company source or the company itself. That information usually consists of a description of the incident giving rise to a claim and the client's injuries and damages. The client also asks his or her attorney to submit information that is more extensive - including medical records and expenses, treatment regimens and status, insurance limits, employer information, the fee structure between the attorney and the client, the prospects and timing of settlement, the existence of other liens against any potential recovery, the attorney's evaluation about the client and the case,[1] and the impediments to settlement. This often involves a detailed production of materials, pleadings, depositions, accident reconstruction records, medical records and specials, and other similar materials from the client's file.

If funding is approved, then funds are advanced against the client's potential recovery. If there is no recovery, then no repayment is sought. The programs state that the advance is not a "loan" and that any recovery is paid to the funding source *after* the payment of attorney's fees and litigation costs. Between the date of funding and the resolution of the case, the client can be charged a monthly fee based on the amount advanced. Alternatively, the client might agree to a higher percentage

of the potential recovery or build the repayment of the monthly fee into the recovery. The cost to the client is usually dependent upon the risk that a recovery will ultimately result, with the cases in the highest risk category bearing the highest fees and costs. As one broker involved in such programs put it, "this is not cheap money, but it is usually the only way for the plaintiff to get cash to keep their case viable".[2]

Clients are not permitted to make any further assignments of the potential proceeds from their claim. They also grant a security interest to the funding source and represent that there are no prior assignments or commitments relating to such funding, except attorney's fees, costs and properly perfected liens which have already been disclosed. The client is also required to waive any defenses to payment. In one instance, the client agrees to an out-of-state venue in the event of enforcement proceedings, and to liquidated damages in the amount of two times the advance if there is a breach. The client is also required to issue an irrevocable letter to his/her attorney instructing that payment be released to the funding source after payment of legal fees, costs and expenses, and properly perfected prior liens. Finally, the client executes a release which permits the funding company to obtain records and other materials, reports and documents relevant to the case in the future, although the companies state that they exercise no control, input or influence over the conduct of the client's case.

RESPONSE:

At the outset, we offer two observations. First, it is not within this Committee's purview to express opinions about the legality of a lawyer's conduct under state or federal laws, statutes, regulations and codes. Nonetheless, lawyers should be cautious about the legality of such programs under the state's banking and consumer protection laws, as well as common law notions of champerty and maintenance. Second, we note for guidance that a number of other states have examined such non-recourse lawsuit financing, and have cautiously determined that attorneys may participate in such programs.[3]

For our part, this ethics inquiry encompasses many familiar principles that this Committee visited in 1994 in an opinion dealing with LAWCARD. *See Confidentiality and Conflict of Interest: Use of LAWCARD to Finance Legal Fees*, #1993-94/18 (November 17, 1994) (hereinafter the "LAWCARD Opinion"). In that program, a national company known as LAWCARD invited New Hampshire lawyers to participate in a program that assisted clients in paying a lawyer's legal fees. If LAWCARD accepted the client, it would then pay the lawyer's legal fees and expenses upon receipt of an invoice, and in return, obtain an assignment of the lawyer's right to collect such fees and expenses. Interest on the outstanding balance was charged based on the risk of recovery. In the instance of LAWCARD, advances by the company were truly loans in the sense that amounts advanced had to be repaid by the client irrespective of recovery.[4]

In that opinion, the Committee evaluated the LAWCARD program against the professional conduct rules related to confidentiality and conflicts of interest. *See gen*. New Hampshire Rules of Professional Conduct (NHRPC) 1.6, 1.7 and 1.8(a). Although the Committee found that a portion of the program was unethical - dealing with information and opinions that the attorney had to provide regarding the collectability of the financing, it stated that while an attorney may not encourage a client/borrower to apply for a specific, identifiable credit program, an attorney may ethically participate with the client/borrower in seeking such financing. *Id*.

We reach a similar conclusion in non-recourse, lawsuit financing. That is, the Committee finds that although participation by an attorney with the client in such financing programs is not unethical *per se*, attorneys are encouraged to exercise substantial caution in involving clients in such programs and participating with them to obtain such funding. Attorneys should examine each case and client individually to determine whether, in each instance, participation and involvement is warranted, given the ethical considerations outlined below.

RULE 1.7

As recognized in the LAWCARD opinion, the first area of examination is the conflict of interest rule - NHRPC 1.7. This is because "(i)t seems beyond question that the (non-recourse lawsuit financing programs) present, at least, the question of a conflict between the client's and the lawyer's interests and, therefore, requires scrutiny under the rule". LAWCARD Opinion at p. 2.

Rule 1.7(b) provides:

> "b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation and with knowledge of the consequences ...."

NHRPC 1.7(b)

Thus, under a 1.7(b) analysis, a lawyer must first determine whether, in the context of the present inquiry, the decision to involve a client in a non-recourse lawsuit financing program might be adversely affected by the lawyer's responsibilities to a third party or to the lawyer's own interests. If and only if the lawyer satisfies this first inquiry can the lawyer then inquire of the client whether participation in such financing is warranted.

For years, this Committee has adopted a "harsh reality" test in measuring when it is appropriate to seek consent of a client to a possible conflict. This position has been reflected not only in a number of Committee opinions, but also in the way in which the New Hampshire Supreme Court has viewed conflicts analysis. *See* discussion of opinions and cases at LAWCARD Opinion, pp.3-4. Under this test, "a lawyer attempting to resolve such an issue should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would the lawyer seriously question the wisdom of this representation or question whether there had been full disclosure to the client prior to obtaining the consent". LAWCARD Opinion at p. 3; *see also* other opinions cited therein.

Utilizing this analysis, it is easy to conjure up instances where participation and involvement in non-recourse lawsuit financing would be unethical. For example, if the attorney sought to refer a client to a non-recourse lawsuit financing program to provide funding to assist that attorney's own personal cash flow demands or business needs, or to pay that attorney fees and costs which the attorney originally agreed to defer but now wants (or needs) to collect, then involvement and participation in the program would be impermissible. Likewise, if the irrevocable letter from the client instructing payment to be released to the funding source after legal fees, costs, expenses and other properly perfected prior liens is constructed to oblige counsel to pay irrespective of legitimate disputes between the client and the funding source, an irreconcilable conflict exists. At the other end of the spectrum, the analysis becomes more difficult if, for example, the client himself or herself discovered the program and asked the attorney for advice about applying for such financing. If, for example, the client fully understood the costs of the financing, the conditions under which such financing would be extended, the disclosure about the case which the attorney would be asked to undertake, and the real impacts on any potential recovery the client might achieve, it would be difficult to bar attorneys, based on professional conduct rules, from participating. This is true, even if the lawyer were to receive some benefit from the extension of such financing, such as a client's voluntary reimbursement of litigation expenses or the receipt of monies to pay attorney's fees in costly litigation in which the attorney and client agreed to an hourly fee. It would appear, however, that before participating in any non-recourse lawsuit financing program, the lawyer must be absolutely convinced that it is in the client's best interests and that the client can clearly articulate how and why such interests are so well-served.

If a client is "on the fence" about participating, an attorney should be mindful that under the New Hampshire Rules of Professional Conduct, an attorney should only seek consent to a potential conflict once the client has "actual knowledge of the consequences that could occur as a result of the lawyer's divided loyalty". *See* New Hampshire Comments to NHRPC 1.7 discussing the "informed consent" standard of disclosure in NHRPC 1.7(b)(2). Thus, merely providing some form of explanation about the program is insufficient, if the client does not fully understand the consequences -- especially if the lawyer will receive some benefit from the extension of such financing. As paraphrased from the LAWCARD Opinion, this standard seems to present sound practical considerations to an attorney pondering involvement in such financing programs since the context in which such involvement might be contemplated is likely to occur in the charged atmosphere of a lawsuit that is several months old and in the throes of discovery and substantial investments of time. LAWCARD Opinion at p. 5.

Thus, lawyers need to be careful in discussing all aspects of such financing with the client, including available alternatives, the costs and impacts of such financing, the ramifications on a potential recovery and other important considerations. If a lawyer is unable or unprepared to undertake such careful discussion, or the client is not, for any reason, including economic duress, able to fully understand and appreciate the lawyer's advice, then participation in such non-recourse lawsuit financing is unethical.

RULE 1.6 AND ATTORNEY-CLIENT PRIVILEGE

It is also important to note that in the context of explaining to the client the consequences of participation in non-recourse lawsuit financing, the client should understand that by virtue of the questions asked of attorneys about the case, the client must release the attorney from his/her obligations to keep information learned about the client and the case confidential as it applies to the funding source and/or broker. See NHRPC 1.6. The client must also understand that there may be no remedy if the funding source or broker voluntarily or involuntarily discloses this information to the disadvantage of the client at some later date, in spite of contrary assurances in the program's advertising and contracts,. Likewise, the client should understand that there is a possible waiver of the attorney-client privilege through the disclosure of information about the case to the third party broker or financing source seeking to extend such financing. While discussions of privilege go beyond the rules of professional conduct, attorneys must be sure the client is at least aware of the possible waiver through disclosure, and the potentially harmful consequences.

RULE 1.8

Two final considerations are in order - both of which arise under NHRPC 1.8. First, to the extent that a lawyer knows or has reason to know he/she will obtain some form of benefit, such as payment of fees and costs, through the client's participation in

non-recourse lawsuit financing, such an arrangement could well constitute a "business transaction" between the lawyer and client.[5] Rule 1.8(a) prohibits business transactions between a lawyer and client or a lawyer's acquisition of an "ownership, possessory, security or other pecuniary interest adverse to a client unless:

> (1) the transaction and terms in which the lawyer acquires the interest are (i) fair and reasonable to the client, and (ii) agreed to by the client after consultation;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing to the essential terms of the transaction."

NHRPC 1.8(a).

One can easily see that this is a more rigorous standard than the conflict of interest analysis under NHRPC 1.7(b). Much like NHRPC 1.7(b), it requires full disclosure and informed consent by the client and substantial certainty that participation in non-recourse lawsuit financing is truly in the best interests of the client. But it also requires counsel to afford the client a reasonable opportunity to seek review by independent counsel, a written consent and overall fairness - when viewed from the client's eyes at the time that such financing is sought. The element of fairness should be viewed critically in instances where the lawyer will benefit from participation in non-recourse lawsuit financing, given some of the fees charged in such programs.

Finally, one must also be aware of NHRPC 1.8(e), which comes into play to the extent that such financing is used to pay for or underwrite, in whole or in part, fees and costs incurred by an attorney. That provision requires that although a non-recourse lawsuit funding source may be providing some or all of the capital needed to fund a lawsuit, the lawyer's duty of loyalty runs to the client - in spite of pressures that may be placed by the funding source to undertake different directions in the case because the client's risk turned out to be less advantageous than that which the funding source originally perceived.

CONCLUSION

The Committee is unable to determine that participation in non-recourse lawsuit funding is *per se* unethical. However, an attorney contemplating involvement in such programs must be very cautious in advising his or her client to engage in such funding. Only through thoughtful and careful counseling and disclosure to the client can an attorney avoid the ethical pitfalls that exist.

The Committee strongly recommends that any lawyer considering the involvement of his or her client in such programs should carefully review not only this opinion, but also the LAWCARD Opinion. That opinion can be found at .

Footnotes:

[1] One of the forms asks attorneys "what are your thoughts and feelings about your client and the client's case". This question is posed although in advertising, the attorney is told that he/she is not required to make any representations about the merits of the case or the value of the claim.

[2] One of the programs charged ten percent (10%) per month on any advance.

[3] *See e.g.Florida Bar Association, Opinion 00-3* (March 15, 2002); *Virginia State Bar Ethics Opinion 1155*(12/15/88); *Maryland State Bar Ethics Opinion, 89-15* (10/25/88); *New York State Bar Association, Opinion 666 (73-93)* (June 3, 1994); *Philadelphia Bar Association, Opinion 91-9* (May 1991); *South Carolina Bar Ethics Advisory Opinion 94-04; State Bar of Nevada, Formal Opinion No. 29* (8/7/03); *North Carolina State Bar 2000 Formal Ethics Opinion 4* (January 18, 2001); *New Jersey Supreme Court Advisory Committee of Professional Ethics, Opinion 691* (January 15, 2001). *But see Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d. 121 (2003) (relying on principles of champerty and maintenance); *State Bar of Michigan Opinion RI-321* (June 29, 2000).

[4] In the LAWCARD program, attorneys were also asked to opine that the attorney had no knowledge of facts that may result in an uncollectible account or unenforceable loan. Attorneys were also required to cooperate with LAWCARD in the investigation of the claim should the client asset a right not to pay in full. The Ethics Committee found this aspect of the program violative of NHRPC 1.6.

[5] This would be especially true if participation in non-recourse lawsuit financing was a condition of and built into the lawyer's fee agreement as a means to pay for the litigation.

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1993-94/18
Confidentiality and Conflict of Interest:
Use of LAWCARD to Finance Legal Fees
November 17, 1994

RULE REFERENCES:

*Rule 1.6
*Rule 1.6(b)(2)
*Rule 1.7(b)
*Rule 1.7(b)(1)
*Rule 1.7(b)(2)
*Rule 1.8(a)

SUBJECTS:

*Business Activities
*Consultation
*Collections
*Creditors of Client
*Confidentiality
*Fees
*Conflict of Interest
*Harsh Reality Test
*Consent

ANNOTATION:

An attorney may not participate in a credit program to finance legal fees where the attorney must represent and warrant to the lender that the attorney knows of no facts about the client/borrower that would render the debt unenforceable or uncollectable. (Rule 1.6).

An attorney may not encourage a client/borrower to apply for a specific credit program to finance legal fees; but if the client/borrower chooses to seek such financing through that program, the attorney may participate with the client/borrower in the application process. (Rule 1.7(b), Rule 1.8(a)).

An attorney may assist a lender who has financed a client's legal fees in collect; those fees provided the lawyer complies with the requests of Rule 1.6.

QUESTION:

May an attorney participate in the "LAWCARD" program, a legal fees financing mechanism, under the existing terms and conditions of the program as described below?

FACTS:

A national company known as LAWCARD has invited New Hampshire lawyers to participate in a program that assists lawyers in collecting client accounts. The company and the lawyer (known as the participant) set up a contract by which LAWCARD agrees to pay fees on behalf of a specific client as soon as, they are invoiced by the lawyer. In return, the lawyer agrees to assign the right to collect the fee to LAWCARD. The company retains a portion of the fee paid to it by the client as a service charge and charges interest to the client on any unpaid balance.

As the agreement is currently structured,[1] an attorney interested in participating receives from LAWCARD blank credit application forms, marketing information, and training on the completion of the necessary paperwork and participation requirements. The completion of the paperwork and forwarding of the documents is done in the participating attorney's office, presumably by the attorney or a member of the attorney's staff.

As a participant, the attorney agrees to certain contractual conditions, most of which relate to the participant's relationship with LAWCARD. There are, however, a number of terms which relate to the relationship between the lawyer and client, including the lawyer's commitment to LAWCARD that he or she:

1. "[H]as no knowledge of any facts which may result in any Account being uncollectible and/or any Cardmember Agreement being unenforceable." (Participant's Representations and Warranties, Item (10)); and
2. "[S]hall cooperate fully with LAWCARD in the investigation of the claim[ ]" should the client assert a right not to pay in full. (Participant's Duties).

The agreement also provides that LAWCARD may further assign the claims to a third party without the attorney's consent, does not give the attorney the right to notice prior to the institution of a collection action by LAWCARD, and does not bar such collection action during the pendency of the representation.

Once the application material is submitted, LAWCARD will rate the client based on his or her credit worthiness. The client is categorized as an "A," "B." or "C" credit risk. If the client is an "A" or "B" risk, the company pays the client's fees

to the lawyer on the submission of a voucher to the company. LAWCARD charges the lawyer a percentage of the charged fee. In exchange, the company attempts to collect the fees from the client, retains the service fee and any interest accruing on the unpaid balance. Such interest is currently assessed at 18 percent. In the case of an "A" risk client, the fee to the lawyer is 10 percent; a "B" risk client is charged at a rate of 20 percent. The company does not directly pay the fees of a 'C" risk client. Rather, the company remits to the lawyer 80 percent of any amount actually collected.

RESPONSE:

This case would be simple if it involved nothing more than the use of a credit card to pay for legal services. We held in 1984 that an attorney may accept credit cards and advertise that fact to prospective clients. NH Op 1984-85/1. Although that decision was based on the old Code of Professional Responsibility, rather than on our current Rules, we find nothing in the changes to cast doubt on this conclusion. Our reason for adopting the decision was our recognition that:

> Attorneys have an ethical obligation to assist in making legal services fully available to all persons, including persons for whom the cost of legal services is a deterrent to obtaining representation. At the same time, the attorney is entitled to collect a reasonable fee for services rendered. For some clients the opportunity to use credit cards such as VISA or Mastercard might make legal services more accessible, while assuring that the attorney will get paid.

We believe the logic of this approach is still sound.

The 1984 opinion relies on a prior ABA opinion approving the use of credit card plans. ABA Formal Opinion 338 (1974). That opinion, portions of which are inapplicable due to its restrictions on advertising, contains some conditions we believe relevant to this inquiry. The ABA opinion required that:

1. The lawyer, rather than encouraging the use of a card, provides for its use solely as a convenience; and
2. The lawyer, in participating in the credit card program, "scrupulously observer[s] his obligation to preserve the confidences and secrets of his client."

These conditions reflect the concern that credit card arrangements not undercut the two most fundamental principles of our ethical rules and traditions: loyalty to the client through the avoidance of conflicts of interest and preservation of client confidences.

With this backdrop, we turn to the question of whether the current plan is distinguishable from the use of credit cards by an attorney.[2] We readily admit this is a close question. The Ethics Committee has been divided for several months on the result. We also note that the authority we have been able to locate is in favor of approving the use of LAWCARD as long as the client consents to waive any potential conflict and no confidences are disclosed without client permission. See, e.g., Oregon Formal Opinion No. 1993-1; Michigan Opinion RI-168 (1993). The Michigan opinion, though, requires the lawyer to insure that the financing company not be able to institute collection actions during the period of time during which the lawyer represents the client.

I. Conflicts of Interest

A. Rule 1.7(b)

Rule 1.7(b) describes the circumstances under which an attorney whose own interest may materially limit his or her actions may still go forward with the representation. The rule provides:

> b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

It is important to note that the rule contains independent tests, both triggered by the potential limitation of representation by a third party's or the lawyer's own interests. It seems beyond question that the above-described arrangement presents, at least, the question of a conflict between the client's and the lawyer's interests and, therefore, requires scrutiny under the rule.

1. Reasonable Belief Test

Any careful analysis under Rule 1.7(b) requires meeting a two-prong test, the most important one presented by 1.7(b)(1). The first prong requires that the lawyer reasonably believe that his or her representation will not be adversely affected by either the lawyer's responsibilities to a third party or the lawyer's own interests. If, and only if, the lawyer satisfies this first inquiry can the lawyer then turn to the client and, after consultation, obtain the client's consent for continued representation.

This Committee (in the adoption of its "harsh reality test," discussed below), the New Hampshire Supreme Court in Kelley's Case/Cahalin's Case, 137 N.H. 314 (1993), and the First Circuit in Fiandaca v. Cunningham, 827 F.2d 825 (lst Cir. 1987), unmistakably conclude that this first prong of the analysis is objective and must be conducted from the vantage point of a hypothetical disinterested lawyer. If such a lawyer could not reasonably believe that the lawyer's representation of the client would not adversely affect the client, then the lawyer involved cannot, under any circumstances, attempt to obtain client consent.

a) Harsh Reality Test

The Ethics Committee has attempted to provide some guidance to New Hampshire attorneys on when it is permissible to ask for consent to representation in potentially conflicting situations. In NH Op. 1988-89/24, involving municipal representation, we suggested the use of the "harsh reality test." The opinion stated:

> Under this test a lawyer attempting to resolve such an issue should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would the lawyer seriously question the wisdom of this representation or question whether there had been full disclosure to the client prior to obtaining the consent. (New Hampshire Bar Association's New Hampshire Ethics Opinions Annotated (1993), p. 152.)

This harsh reality test was specifically applied in matters involving multiple client representation by a lawyer representing a community land trust as well as a tenant cooperative, (NH Op. 1989-90/1, p. 160), and again in a multiple-representation situation where an attorney was representing a general contractor in a situation that would give rise to a probable claim against a developer-client of the lawyer, (NH Op. 1989-90/17). In that particular case the Committee stated:

> The complexities inherent in this situation dictate extreme caution and, in the Committee's judgment, should lead the inquiring law firm to conclude that it would not be reasonable to seek the client's consent to this representation. The Committee believes that given among other things, the family relationships which exist and potential economic consequences to the developer if the general contractor's suit is successful, it will be difficult, if not impossible, for the inquiring law firm to zealously represent the general contractor and, at the same time, fail to harm the interests of its other client, the developer. ... Therefore, the Committee concludes that the inquiring law firm could probably not meet the objective standard of the "harsh reality test" articulated by this Committee. (New Hampshire Ethics Opinion Annotated, p. 200).

See also NH Op. 1991-92/4 (applying the test to a lawyer official under Rule l.11 A(b)(1)); NH Op 1992-93/12 (involving conflict resolution of dealings between a lawyer and a real estate company controlled by the lawyer's spouse).

b) New Hampshire Supreme Court Decisions

Historically, there has been little detailed analysis in conflicts of interest rulings by the Supreme Court. Perhaps the most germane discussion of conflicts was stated in Broderick's Case, 104 N.H. 175 at 178 (1962): "The requirement that an attorney shall not represent conflicting interests nor favor his own interests to the detriment of his client illustrates the fiduciary nature and non-delegable responsibility of an attorney for his own professional conduct."

In recent years, however, the Court has provided greater clarity on conflict issues. In Otis's Case, 135 N.H. 612 (1992) (involving representation by a lawyer sexually involved with his client), the Court first held in analyzing Rule 1.7(b) that the rule "only requires a *possibility* [emphasis supplied] that the client's interests may be materially limited by the lawyer's interest," and then proceeded to hold in that particular case: "[no] lawyer could have reasonably concluded that the representation of Sarah B. would not have been adversely affected." The Court clearly pronounced that an objective, not subjective, standard would be applied to this first prong of Rule 1.7(b). In Boyle's Case, 136 N.H. 21 (1992) (involving an attorney representing one of the parties to a divorce in a criminal proceeding while also representing the parties' children as the Guardian ad Litem), the Court specifically quoted the ABA Model Rule 1.7 Comment (Consultation and Consent)[3] and concluded that the attorney involved could not reasonably request consent of his clients in that situation.

In Kelley's Case/Cahalin's Case, 137 N.H. 314 (1993), this important 1.7(b)(1) requirement was again squarely addressed. In that case an attorney was representing two clients having materially different interests in the outcome of an estate, after first obtaining written consents from both clients to represent them and an agreement as to how their respective monetary interests would be divided in the litigation. Notwithstanding such specific consent and agreement, however, the Court had no trouble in finding that the attorney had acted unethically:

> Although Rule 1.7(b)(2) provides that clients can waive a potential conflict after consultation and with knowledge of the consequences, there are situations in which, even if the client consents to representation, a lawyer should decline to represent that client. "'[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.'" Boyle's Case, 136 N.H.21, 24, 611 A.2d 618, 619-620 (1992) (quoting comments to ABA Model Rule 1.7(b)). The respondents' representation of the two women, who had substantially different interests in the estate, presented a fundamental conflict and violated Rule 1.7(b).

Id. at 319.

Consequently, in applying either the Supreme Court's "disinterested lawyer" perspective or this Committee's "harsh reality test," the focus of any appropriate ethical analysis applying Rule 1.7(b) is that of a disinterested, uninvolved attorney reviewing the situation after things have gone wrong. If it is determined that an attorney would not reasonably seek to represent the client, then no matter what good-faith belief or efforts may have been exerted by the inquiring attorney, it will still be deemed unethical to try to obtain the client's consent.

The Committee is sharply divided on the result of this objective inquiry in the LAWCARD context. Many members believe that under no circumstances should an attorney ethically request consent of a client to participate in LAWCARD under its present terms and conditions. This is based upon the conflicting interests between the client's legal representation and the active involvement of and representations the attorney must make to LAWCARD in the application process and possibly later in the representation. More importantly, there exists a serious potential that client confidences may have to be disclosed in unprivileged communications to LAWCARD during the attorney's participation with LAWCARD (which would be detrimental to the client).

Other members of the Committee, while admitting there will be factual situations clearly precluding the attorney from asking for the client to consent to the conflict posed by the use of LAWCARD (under the Kelley/Cahalin case and harsh reality tests), nevertheless believe that there are circumstances under which LAWCARD may be ethically used. Therefore, they would leave the use of LAWCARD to the attorney's individual ethical scrutiny in a case-by-case situation of the Committee.

A narrow majority adheres to the latter view provided that LAWCARD deletes or otherwise does not enforce Item 10 of the Agreement requiring participating attorneys to represent or warrant that the attorney "has no knowledge of any facts which may result in any Account being uncollectible and/or any Cardmember Agreement being enforceable." Clearly, as in any situation, there may exist circumstances under which the attorney cannot ask for his or her client's consent to waive a potential conflict of interest. Here, the attorney is apprising the client of the availability of a means of paying legal fees.[4] A disinterested lawyer could explain the provisions of the card to a client, identify the potential conflicts, and seek the consent of the client in pursuing a LAWCARD application. We do not believe, however, that a disinterested lawyer could ethically request the consent of the client to divulge confidential information to LAWCARD that may render the debt uncollectible or the agreement unenforceable. As a result, Item 10 of the Participant's Representations and Warranties would have to be deleted or not enforced before a New Hampshire attorney could participate.[5]

Although in our opinion an attorney can satisfy the above objective test of Rule 1.7(b)(1), New Hampshire lawyers must be aware of the applicable standard in obtaining consent under Rule 1.7(b)(2). Our Rule 1.7(b)(2) differs substantially from the ABA Model Rules. The New Hampshire Rule requires that the client consent after consultation and with knowledge of the consequences. The New Hampshire Comment makes clear that this language was inserted to insure the client will have "actual knowledge of the consequences that could occur as a result of the lawyer's divided loyalty." Thus, merely providing an objectively reasonable explanation is insufficient if the client does not understand it. This rigorous standard seems to the Committee to present a practical consideration since the context in which such a dispute is likely to occur is in the charged environment of a client reacting to a collection lawsuit.[6]

B. Rule 1.8(a)

The Committee also believes that this case should be analyzed under the more rigorous standard of Rule 1.8(a). This rule provides:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms in which the lawyer acquires the interest are: (i) fair and reasonable to the client, and (ii) agreed to by the client after consultation;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing to the essential terms of the transaction .

The purpose of the Rule is to insure fairness in a business arrangement between a client and lawyer representing that client. The lawyer must obtain consent as described above, and produce an objectively fair agreement. The rule further provides that whenever a lawyer acquires a pecuniary interest adverse to his or her client, the terms must also be fair. The majority of the Committee believes that due to the contractual arrangement between the lawyer and LAWCARD, the role of the lawyer as an agent of the company, or at least something closely related, and the adverse pecuniary interest, at least in a category "C" client, this rule applies and would subject the lawyer to the after-the-fact scrutiny of the arrangement to determine if it was fair to the client. This seems a heavy burden to bear, but one we cannot say can never be satisfied. We note the admonition of the District of Columbia Ethics Committee that a lawyer thinking of referring a client to a bank for a loan to cover legal fees must insure he is not placing the client in a financially untenable position. D.C. Bar Association Opinion 138 (1984).

II. Client Confidentiality

Rule 1.6 provides:

> (a) a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or bodily harm or substantial injury to the financial interest or property of another: or
>
> (2) 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.

The information a lawyer must keep confidential under this Rule includes information about the client's finances. Neither of the exceptions described above would provide the ability of the attorney at the application phase to provide any information without client consent. Therefore, the lawyer should fully inform his or her client that the information provided on the credit application is not subject to confidentiality and will be used by the credit card company to enforce the agreement against the client.

In this regard, the Committee has additional concerns with the independent obligation imposed on the lawyer by LAWCARD to disclose to LAWCARD any facts that might result in the uncollectability of the debt. May a lawyer intentionally take this application before gathering the relevant facts on the client's finances? Must the lawyer warn his or her client about certain disclosures and the likely affect such information might have on the lawyer's ability to represent the client? These are clearly problems that could result in discipline and client dissatisfaction.

The obligation under Item 10 of the Agreement to disclose facts that might result in uncollectability of debt gives rise to additional significant concerns. In some instances, a weakness in the very case for which the client is seeking LAWCARD financing which may ultimately result in the client's inability to repay LAWCARD would presumably have to be disclosed to LAWCARD by the lawyer. This, it seems, would either preclude the lawyer from signing the agreement, or would require the lawyer to qualify that certification by bringing to the attention of LAWCARD the potential weaknesses. "Since the payment of legal fees by a third person does not create a lawyer-client relationship between the lawyer and the third party, the third party cannot claim a privilege," In re Priest v. Hennessey, 51 N.Y.2d 62, 409 N.E.2d 983, 431 N.Y.S 2d 511 (1980), cited in N.H. Rules of Professional Conduct, a CLE Seminar of N.H. Bar Association 1/30/86 at p. 111. It is conceivable that the absence of privilege might result in the discovery by opposing counsel in the client's case of the lawyer's disclosures to LAWCARD. In those circumstances, under the "harsh reality" or "disinterested lawyer" test it is difficult to see how an attorney could ask the client to consent to waive the confidentiality requirements of Rule 1.6. This situation could arise, for example, where the client wants to use LAWCARD to finance representation in a collection matter where the client might have to file bankruptcy unless successful in the collection matter. Likewise, this situation could arise where the client wanted to use LAWCARD to finance a suit by the client to enforce the client's patent where the patent might be invalidated in the litigation and where invalidation of the client's patent might result in the client's inability to pay LAWCARD. While many other such situations are conceivable, the concern may be adequately addressed by the "Ethical Duties" provision of the Agreement discussed in footnote 5. Because of these significant confidentiality concerns, a majority of the Committee believes that a "disinterested lawyer" could not ethically request a client to disclose such confidential information as required under this condition of the Agreement.

The Agreement also has the potential to require a lawyer to testify in a suit by LAWCARD against a client should LAWCARD deem it helpful. This type of disclosure would be permitted by Rule 1.6(b)(2) if the suit were in the attorney's name. A suit by LAWCARD, however, is not technically such a suit. The Committee believes that this distinction is not insignificant. The exception in the Rule is a very limited exception from the duty of confidentiality and seems to us, in part, to be based on the institutional reluctance lawyers have to sue clients. We do not believe a lawyer can assign a claim to a third party, abandon any control over the timing and initiation of the collection action, and still rely on the Rule 1.6 exception.

Again, one resolution of this concern is for the lawyer to rely on the "Ethical Duties" provision of the agreement which would protect the lawyer from disclosing confidential information in a collection action by LAWCARD. Another resolution is found in the credit card context. The Chicago Ethics Committee, in approving the use of credit cards, required the lawyer to insure that he or she was notified of any impending suit for the underlying fees so the lawyer could repurchase the debt or arrange to resolve the fee dispute without the card issuer's involvement. Chicago Ethics Opinion 79-4 (1979). This practice is consistent with our prior ethics opinion, NH Op 1986-87/4, in which we stated that "the practicing attorney should attempt to avoid controversies concerning fees and attempt to resolve disputes amicably with clients."

With these alternatives available and if LAWCARD deletes or does not enforce Item 10 of the Agreement, the Committee cannot say that a lawyer's participation in LAWCARD is unethical, but it is clear that the lawyer should proceed with caution and be cognizant of the important ethical concerns that may arise in the course of the arrangement.

SUMMARY:

A majority of the Committee is of the opinion, guided by the concerns and caveats set forth above, that an attorney may ethically consider the use of LAWCARD for a prospective client if LAWCARD deletes or does not enforce Item 10 of the Agreement. It is noted, however, that a significant number of Committee members believe, based upon the New Hampshire Supreme Court's recent decisions and this Committee's articulation of the "harsh reality" test, that a lawyer could not ethically seek a client's consent to participate; this belief is based largely upon the lawyer's involvement in the application process and the lawyer's obligations (as set forth in the "Participant's Representations and Warranties") under the "Participation Agreement" with LAWCARD.

The majority of the Committee further believes that a necessary prerequisite for the use of LAWCARD, at the very least, is the elimination or non-enforcement of the Participant's Representations and Warranties, Item 10, which currently requires disclosure by the attorney of information about the client that might result in the uncollectability or unenforceability of the debt.

In any use of LAWCARD, the lawyer must avoid actually "encouraging" its use. The lawyer is further cautioned in the manner of his or her involvement in any actual collection or enforcement action, to avoid an inadvertent violation of Rule 1.6(b)(2).

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[1] While the Committee's decision on LAWCARD was pending following the initial inquiry, LAWCARD revised its Participation Agreement. This opinion applies to the version of the agreement bearing a last-revised date of August 13, 1994.

[2] We note also that several states have approved a lawyer's participation in a financing mechanism through which the lawyer refers to a bank a client who lacks funds to pay legal fees. See, e.g., North Carolina Ethics Opinion 678 (1969); District of Columbia Ethics Opinion 138 (1984). Since our opinion focuses on the advice of and level of involvement by the attorney, we do not believe the considerations are any different in this type of arrangement, and do not, therefore, discuss them separately.

[3] "A client may consent to representation notwithstanding a conflict. However, as indicated in ... paragraph (b)(1) with respect to material limitations on representations of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

[4] A New Hampshire attorney must be careful not to cross the line between making the LAWCARD service available to clients and actually "encouraging" its use. As with conventional credit cards, encouragement is not permitted. (See ABA Formal Opinion 338 (1974), supra)

[5] An Alternative resolution of this problem is found in the Agreement itself. The Agreement reads, in part:

> Ethical Duties. Except with the permission of Client, Participant shall not reveal any Client confidences or secrets in the course of submitting applications or vouchers. Participant will avoid any conflict between Participant's own financial and business interests and those of the Client, and Participant will fully disclose any potential conflict to Client.

While this provision does not specifically refer to the "harsh reality" or "disinterested lawyer" test under Rule 1.7(b)(1), LAWCARD and the attorney could agree that the mandatory language of this provision preempts Item 10.

[6] We note that malpractice litigation and disciplinary complaints often arise after a lawyer sues to collect from a client, especially with a less-than-satisfied client. The loss of control over the timing and institution of such a suit is a practical concern lawyers considering this service should bear in mind, and should certainly identify in any Rule 1.7(b)(2) consent document. While there is no specific requirement in the rule to obtain such consent in writing, the better suggested practice, of course, is to document the consultation and consent.