

## **BBA Ethics Opinion 93-4**

Summary: A lawyer receives "frequent flyer credits" from airlines on which he travels on clients' matters. The resulting credits belong to the lawyer even though the cost of the travel has been paid for by clients. Assuming that in no case the lawyer has chosen a particular airline with a view to its frequent flyer benefits where the cost of traveling on that airline was higher than on competing airlines, the lawyer is generally speaking under no obligation to discuss frequent flyer credits with the lawyer's clients or to reimburse any client for the resulting benefit. However, where an engagement involves frequent or lengthy trips on the same airline for the same client resulting in frequent flyer credits of substantial value, the lawyer should either use the credits for the benefit of the client if practical or discuss the matter with the client. Further, a lawyer cannot without specific disclosure charge a client for the cost of a flight on the client's behalf where that flight is "paid for", with the lawyer's frequent flyer credits.

Facts: The lawyer is enrolled in several frequent flyer programs with different airlines. Those programs provide the lawyer with free airline tickets or "class upgrades" once the lawyer has flown a specific number of miles on a particular airline. These benefits are not transferable by the lawyer and, in many cases, expire if not used within a designated period of time. The lawyer seeks in every instance to obtain a flight at the lowest cost to the client. Accordingly, the client is not incurring any additional cost through the lawyer's claim to frequent flyer credits. In most cases the benefit from any particular flight is only nominal.

The lawyer notes that inducements in the form of redeemable credits are also offered by car rental companies and court reporting services.

Discussion: The Disciplinary Rule (DR) relevant to this inquiry is DR 5-107, which provides:

"(A) Except with the consent of his client after full disclosure, a lawyer shall not: ...  
(2) Accept from one other than his client anything of value related to his representation of or his employment by his client."

Clearly the lawyer owes an obligation of undivided-loyalty to the client, and the Rule prohibits accepting commissions, discounts or so-called "commercial bribes" except with the consent of his client after full disclosure. This Rule applies whether or not the proffered discount is given with the intent of influencing any decision the lawyer might make on behalf of the client.

However, "frequent flyer credits" are distinguished from other reimbursements to the lawyer in a number of respects. In the first place their existence is so widely publicized that it can be presumed to be known to substantially all clients utilizing the services of the lawyer, so that disclosure would be supererogatory. Secondly, our inquiry to a number of airlines indicates that the credits can neither be converted to cash nor transferred by the person taking the trip to anyone other than family members. Third, they tend to be relatively nominal in any particular case and derive their value only from aggregation with credits from trips taken for a variety of clients and also the lawyer's personal travel. Fourth, whether or not mileage credits are received or used depends in the majority of cases on circumstances entirely unrelated to the client, namely, whether the lawyer is in a position to take yet another flight within the effectiveness

period of the credit on the same airline or some other participating airline, signing up for the frequent flyer program, logging the frequent flyer number with the airline upon ticket purchase or use and proper processing of the mileage credits by the airline.

To require a lawyer to pay a client or otherwise account to a client for the benefit of credits before those credits have in fact been used would be unfair to the lawyer. To require a lawyer generally to account to a client for the benefit of a credit once it had been used would be unduly burdensome since any frequent flyer benefit is in the usual case the result of credits accumulated on a great number of personal and business trips.

Therefore, in the usual case the lawyer is not required to discuss frequent flyer credits with his clients or account to them for their use.

However, a statement of disbursements rendered by a lawyer to a client would be inaccurate if it showed a cash disbursement for a trip taken on behalf of the client when in fact that trip was paid for by frequent flyer credits. Such fact should be specifically disclosed on the bill so that the client can consider whether and to what extent the client wishes to reimburse the lawyer for the use of the lawyer's credits.

Also, when trips for a particular client on a particular airline are frequent or lengthy and may generate a substantial amount of credits, it becomes easier to determine the benefit generated by the client's expenditures. In such cases the lawyer should either use the credit for the benefit of the client if practical or discuss the matter with the client.

With respect to commercial inducements, other than frequent flyer credits, the underlying facts are likely to be different and may therefore lead to a different conclusion.