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Traditionally, doctors, dentists,[1] lawyers, and other professionals dealing with consumers have observed a restriction on imposing interest charges on accounts receivable from patients and clients.[2] Most professionals have handled accounts on a short term credit basis without imposing any finance charges whatsoever.[3] Statements for services rendered have typically been sent to account debtors with the expectation that payment would be received before the next monthly statements were mailed. Delinquent patients and clients have received successive statements until their accounts were either satisfied or written off as bad debts. Generally, no interest charges, late fees, or penalties have been assessed even though an account remained unpaid. Nor have discounts been offered to those who pay for their services in advance or on time.

Under Truth in Lending provisions of the Federal Consumer Credit Protection Act,[4] Congress has exempted the traditional professional service account from the Act's extensive requirements. Unless the credit arrangement involves a finance charge or by agreement may be paid in more than four installments, the creditor is not subject to the Truth in Lending Act.[5] Therefore,

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1. As used in Part I of this article, the terms "medicine" and "doctors" include "dentistry" and "dentists."

2. *See, e.g.*, 1 ABA Comm. on Ethics and Professional Responsibility, Informal Opinions, No. C-741 (1964); AMA Opinions and Reports of the Judicial Council § 7, No. 14, at 40 (1971).

3. AMA Opinions and Reports of the Judicial Council § 7, No. 14(3), at 41; Uniform Consumer Credit Code § 1.301(12), Comment to §§ (12) (hereinafter cited as UCCC).

4. The Federal Truth in Lending Act is Title I of the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968), 15 U.S.C. §§ 1601-1613, 1631-1644, 1661-1665, 1671-1677 (1970 & Supp. V 1975). Regulation Z, promulgated by the Board of Governors of the Federal Reserve System, implements the statute and is found at 12 C.F.R. § 226 (1976) [hereinafter referred to as Reg. Z]. The statute and regulations require disclosure of the terms of a consumer credit transaction. The statutory authorization for Reg. Z is found at Truth in Lending Act § 105, 15 U.S.C. § 1604 (1970).

5. Truth in Lending Act § 103(f), 15 U.S.C. § 1602(f) (Supp. V 1975); Reg. Z, 12 C.F.R. § 226.2(s) (1976).

the normal short term credit arrangements for payment of professional services are not included in the Act's definition of consumer credit sales. Nevertheless, as this article will explain, professionals do not have a blanket exemption from the Act's requirements.

There is a growing trend among professionals to borrow credit practices from retail businesses in an effort to encourage prompt payment for services.[6] It appears that at least some of these new credit practices may bring the professional within the framework of the new laws on consumer credit.[7] For example, the

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6. In October 1976, the author sent 320 questionnaires regarding billing practices to doctors, dentists, and lawyers in Provo and Salt Lake City, Utah, and to recent graduates and members of the Board of Visitors of the Brigham Young University J. Reuben Clark Law School practicing in California, Arizona, New Mexico, Idaho, Oregon, Washington, Alaska, Colorado, Florida, Kansas, and Washington, D.C. As of November 13, 1976, 116 responses had been received [hereinafter referred to as Billing Practice Survey].

The questionnaire consisted of five short questions. The questions and a summary of the *affirmative* responses for each profession are given below:

1. Do you enter into payment agreements with consumer clients or patients permitting payment in more than four installments?
   11 of 15 dentists
   10 of 17 doctors
   59 of 83 attorneys
2. Do you offer a discount to cash-paying clients or patients or for prompt payments?
   6 of 15 dentists
   4 of 17 doctors
   12 of 83 attorneys

(It appears that many of these discounts are in the form of an adjustment or settlement to accommodate clients or patients who are hard pressed or badly delinquent. These are not the type of discount giving rise to Truth in Lending obligations.)

3. Do you assess penalty (late payment) charges on delinquent accounts?
   6 of 15 dentists
   8 of 17 doctors
   10 of 83 attorneys
4. Do you assess finance charges for the extension of credit?
   4 of 15 dentists
   1 of 17 doctors
   2 of 83 attorneys
5. Do you permit payment by bank credit cards?
   9 of 15 dentists
   2 of 17 doctors
   10 of 83 attorneys

The number of professionals who did not use any of the five credit practices were;
   2 of 15 dentists
   4 of 17 doctors
   17 of 83 attorneys

7. One group of professionals has explained that professionals

American Bar Association (ABA) recently reversed earlier pronouncements in allowing the use of bank credit cards in payment for professional services.[8] As a result, many attorneys and physicians have adopted this method of financing consumer payment. In addition, installment payment arrangements for professional services may subject lawyers and doctors to Truth in Lending laws because of the Federal Reserve Board's "More than Four Installment Rule," which has recently become a part of the amended act.[9] Even though there is no finance charge assessed, an installment contract providing for payment in more than four installments is by definition subject to Truth in Lending requirements. Another practice that may bring professionals within reach of the federal consumer credit law is the seemingly benevolent practice of offering cash payment discounts.[10] Cash-paying patients and clients are benefited, but the consumers who fail to take advantage of the cash payment discount are often subjected to shocking effective rates of interest. Finally, a number of professionals include language on their statements to the effect that a service charge of 1-1/2 percent per month will be added to accounts that are not paid within thirty days.

In general, a legitimate delinquency charge does not trigger the Truth in Lending disclosure requirements.[11] But if the late

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> incur a risk of liability every time they use a credit application form, make a decision whether to extend credit, determine the rate of interest they wish to charge for credit, disclose the credit terms to the customer at the time credit is extended, determine the terms of the credit agreement, or bill the patient for services rendered.

OREGON DENTAL ASS'N, EXPLANATION OF CREDIT LAWS 1 (1976). This booklet provides a helpful overview for the professional who extends credit directly to the patient or client.

8. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT OPINIONS, No. 338 (1974). *See also* AMA Opinions and Reports of the Judicial Council § 7, No. 13 & 14, at 40-41. As a practical matter, a professional need not make Truth in Lending disclosures when allowing use of bank credit cards since the sponsoring bank will assume that responsibility. Nevertheless, the professional who accepts bank credit card payments is subject to the Truth in Lending Act.

9. Truth in Lending Act § 103(f), 15 U.S.C. § 1602(f) (Supp. V 1975). Previously, the More than Four Installment Rule had been introduced. 12 C.F.R. § 226.2(k) (1970) (current version at 12 C.F.R. § 226.2(s) (1976)). The rule had been heavily criticized as an unauthorized extension of Truth in Lending by the Federal Reserve Board (FRB). The rule was upheld, however, by the Supreme Court, in Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973). *See* Warren & Larmore, *Truth in Lending: Problems of Coverage*, 24 STAN. L. REV. 793, 819 n.114 (1972). Subsequently Congress expressly accepted the extension by amending the original definition of "creditor." Act of Oct. 28, 1974, Pub. L. No. 93-495, § 303, 88 Stat. 1511 (codified at 15 U.S.C. § 1602(f) (Supp. V 1975)).

10. Reg. Z, 12 C.F.R. § 226.8(o) (1976).

11. *Id.* § 226.4(c): "A late payment, delinquency . . . or other such charge is not a finance charge if imposed for actual unanticipated late payment . . . ."

charge is anticipated from the inception of the credit account, it is viewed as an interest charge or finance charge.[12] Obviously, it is a fuzzy line between the actual delinquency charge and the hidden finance charge which necessitates Truth in Lending disclosures. Each of these potential problem areas will be examined in the first part of this article in order to acquaint professionals with the practices they are employing that could convert them into creditors who must comply with technical requirements of Truth in Lending and other related statutes.

The second part of the article will discuss the relationship of consumer credit practices to the ethical standards of the learned professions. As members of these professions, practitioners of law and medicine are subject to ethical standards set by professional associations. Irrespective of the application of the consumer credit laws to practices in these professions, certain credit practices may constitute breaches of professional ethical standards. For example, prior to the enactment of Truth in Lending legislation, the Committee on Professional Ethics of the American Bar Association[13] made rulings[14] under the Association's Canons of Professional Ethics[15] condemning two of the practices being considered in this article—discounts for prompt payment[16] and late payment charges on delinquent accounts.[17] Subsequently, the American Bar Association adopted a new Code of Professional Responsibility,[18] replacing the former Canons of Professional Eth-

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12. 12 C.F.R. § 226.401 (1976) (FRB Interpretation of Reg. Z, 12 C.F.R. § 226.4(c) (1976)).

13. The Standing Committee on Professional Ethics was created in 1913 by an amendment to the ABA constitution and bylaws. In 1919 the Committee's name was changed to the Committee on Professional Ethics and Grievances. In 1958 the Committee was separated into two committees: a Committee on Professional Ethics and a Committee on Professional Grievances.

14. The Committee designates as Formal Opinions interpretations it believes to be of broad, general interest. Informal Decisions and Opinions are responses to questions that are comparatively narrow in scope and arise infrequently. The term "Informal Decision" is used through Informal Decision 838 in 1 ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINIONS (1975). Thereafter the term "Informal Opinion" is used.

15. The original Canons of Professional Ethics, to and including Canon 32, were adopted by the ABA House of Delegates at the Thirty-first Annual Meeting, August 27, 1908. The Canons were replaced by the Code of Professional Responsibility in August 1969. The new Code does not abandon the basic premises of the old Canons. Rather, it expands and clarifies the ethical considerations upon which the Canons were based.

16. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 151 (1936).

17. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINIONS, No. C-741 (1964).

18. The thought of studying the Canons with a view of possible revision was not a new one. In 1928, 1933, and 1937 special committees made reports recommending overall

ics. A recent Formal Opinion by the Committee on Ethics and Professional Responsibility has taken a more relaxed approach to credit practices by permitting attorneys to accept the use of credit cards for the payment of legal services and to charge interest on delinquent accounts under certain conditions.[19] These new rulings appear to contradict former positions taken by the American Bar Association without adequately explaining the justifications for the changes. The second part of this article will, therefore, attempt to reconcile the standards set forth in the Code of Professional Responsibility with the evolving positions reflected in opinions of ABA ethics committees. It will also explore the ethical standards of the medical profession as they relate to credit practices.

I. Application of Consumer Credit Laws to the Professions

The Truth in Lending Act, in effect since July 1, 1969, applies to all aspects of commerce involving consumer credit, including the loan, sales, and services industries.[20] The professions of law and medicine regularly serve the needs of consumers,[21] whose interests are protected by the Act. Many consumer clients and patients who are unable to pay cash for professional services are permitted to make payments on short term credit or by installments.[22] Thus, lawyers and doctors are frequently involved as creditors in the consumer credit market and are within the scope of the Act.[23] Most credit extended by lawyers and doctors, however, fits within an exemption of the Truth in Lending Act.

The Act's main exemption affecting professional transactions, other than the business or governmental credit exemp-

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revisions. In 1954 a committee of the American Bar Foundation made extensive studies of the Canons and recommended further work. None of these efforts, however, produced concrete results. In 1964, at the request of President Lewis F. Powell, Jr., a special committee was created. The result of the committee's work is embodied in the new Code.

19. ABA Comm. on Ethics and Professional Responsibility, Recent Opinions, No. 338 (1974).

20. Truth in Lending Act § 103(f), 15 U.S.C. § 1602(f) (1970).

21. A consumer credit transaction is "one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes." Truth in Lending Act § 103(h), 15 U.S.C. § 1602(h) (1970).

22. The availability of insurance coverage affects the billing practices of many doctors and dentists, although seldom those of attorneys. Thus, doctors and dentists are often relieved of the need to extend credit by billing the patient's insurance company directly.

23. Some state laws exempt physicians and dentists from consumer credit regulations. *See, e.g.*, Unruh Act, Cal. Civ. Code § 1802.2 (West 1970).

tion,[24] is the short term credit exclusion. Short term, interest free credit transactions are exempt from the requirements of Truth in Lending since they are not covered by the Act's definition of consumer credit—"credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required."[25] Thus, under the traditional financial arrangement between a lawyer and his consumer client, or a doctor and his consumer patient, the professional is sheltered from the burdensome requirements of the Truth in Lending Act.

Recently, however, professionals, motivated by changing commercial pressures and an increased awareness of credit costs, have adopted certain credit practices, three of which in particular might destroy their exempt status and subject them to the penalty provisions of the Truth in Lending Act if the disclosure requirements of the Act are not fully followed. A lawyer or doctor may be subject to the Act because he agrees to accept payments in more than four installments, because he charges a late fee for delinquent accounts in such a manner that the charge must be considered a finance charge, or because he offers his clients or patients a prompt payment discount. Each of these practices, as will be discussed more fully, brings the lawyer or doctor within the full panoply of requirements and sanctions of the Truth in Lending Act.

If a doctor or lawyer is subject to the Act, he must conform to the Act's complex and technical disclosure requirements. The necessary disclosures are set forth in two different categories—those for open end credit plans[26] and those for credit other than open end.[27] Credit extended by professionals for the pay-

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24. Truth in Lending Act § 104(1), 15 U.S.C. § 1603(1) (1970).

25. Truth in Lending Act § 103(f), 15 U.S.C. § 1602(f) (Supp. V 1975).

26. Truth in Lending Act § 127, 15 U.S.C. § 1637 (1970); Reg. Z, 12 C.F.R. § 226.7 (1976).

> Open-end credit is credit extended for a number of different transactions under a single agreement. For example, a department store ordinarily will open a credit account and allow a customer to make various charges against the customer's credit limit. The customer does not fill out a new application with each purchase, but rather makes the purchase pursuant to the terms of the original credit agreement. A [professional] ordinarily would be extending open-end credit if a patient, or a patient's family, is entitled to make regular charges under a credit plan.

OREGON DENTAL ASS'N, *supra* note 7, at 6 (1976).

If the professional offers open end credit, the disclosure requirements become highly complicated. In such cases, the need for qualified counsel is crucial.

27. Truth in Lending Act § 128, 15 U.S.C. § 1638 (1970); Reg. Z, 12 C.F.R. § 226.8 (1976).

ment of service fees will generally be characterized as other than open end credit, since the hallmark of open end credit—repeated transactions covered by the same credit plan[28]—is usually not present. Thus, most professional credit transactions that are subject to the Act must include disclosures, before the credit is extended,[29] of (1) the "cash price" of the service,[30] (2) the amount of any "cash down payment,"[31] (3) the resulting "unpaid balance of cash price,"[32] (4) the total "amount financed,"[33] (5) the amount of the "finance charge,"[34] (6) the "annual percentage rate" of the finance charge,[35] (7) the total price to be paid under the credit plan ("deferred payment price"),[36] (8) the schedule of payments, including the number, amount, and due dates of payments scheduled to repay the indebtedness,[37] (9) the sum of such scheduled payments ("total of payments"),[38] and (10) the amount, or

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> One type of credit which requires disclosure is "closed-end" credit. Closed-end credit is credit extended for payment of an obligation incurred in connection with a single transaction. For example, if a patient requires extensive [professional] services and the [professional] extends credit for that purpose, the credit most likely would be closed-end credit. Repeated charges under a continuing credit plan would not be closed-end credit.
>
> If a [professional] allows a patient to enter into a second credit agreement, the credit continues to be closed end, even though the first credit is not totally paid and the amounts of credit are consolidated into the second agreement, so long as the initial agreement only covers the initial extension of credit. If the initial agreement allowed the patient to make further charges in the future, it would not be closed-end credit.

OREGON DENTAL ASS'N, *supra* note 7, at 5 (1976).

28. Truth in Lending Act § 103(i), 15 U.S.C. § 1602(i) (1970); Reg. Z, 12 C.F.R. § 226.2(x) (1976). FRB Interpretatation of § 226.2(x) explains: "Under an open end credit account plan, it is contemplated that there will be or may be repetitive transactions on a revolving basis." 12 C.F.R. § 226.203(a).

29. Truth in Lending Act § 128(b), 15 U.S.C. § 1638(b) (1970); Reg. Z, 12 C.F.R. § 226.8(a) (1976).

30. Truth in Lending Act § 128(a)(1), 15 U.S.C. § 1638(a)(1) (1970); Reg. Z, 12 C.F.R. § 226.8(c)(1) (1976). The quotation marks in this list indicate the terms that must be used for disclosures.

31. Truth in Lending Act § 128(a)(2), 15 U.S.C. § 1638(a)(2) (1970); Reg. Z, 12 C.F.R. § 226.8(c)(2) (1976).

32. Truth in Lending Act § 128(a)(3), 15 U.S.C. § 1638(a)(3) (1970); Reg. Z, 12 C.F.R. § 226.8(c)(3) (1976).

33. Truth in Lending Act § 128(a)(5), 15 U.S.C. § 1638(a)(5) (1970); Reg. Z, 12 C.F.R. § 226.8(c)(7) (1976).

34. Truth in Lending Act § 128(a)(6), 15 U.S.C. § 1638(a)(6) (1970); Reg. Z, 12 C.F.R. § 226.8(c)(8)(i) (1976).

35. Truth in Lending Act § 128(a)(7), 15 U.S.C. § 1638(a)(7) (1970); Reg. Z, 12 C.F.R. § 226.8(b)(2) (1976).

36. Reg. Z, 12 C.F.R. § 226.8(c)(8)(ii) (1976).

37. Truth in Lending Act § 128(a)(8), 15 U.S.C. § 1638(a)(8) (1970); Reg. Z, 12 C.F.R. § 226.8(b)(3) (1976).

38. Reg. Z, 12 C.F.R. § 226.8(b)(3) (1976).

method of computing the amount, of any late payment charges.[39] Other disclosure requirements[40] are not normally applicable in the extension of consumer credit by doctors and lawyers.

A. *The More Than Four Installment Rule*[41]

Originally, the Truth in Lending Act's definition of consumer credit did not expressly include "credit which is payable by agreement in more than four installments."[42] The rule, first adopted by the Federal Reserve Board in Regulation Z,[43] was challenged on the ground that it expanded the statutory definition of consumer credit transactions contained in the Truth in Lending Act.[44] Attempts to eliminate the rule by judicial action were unsuccessful, however, and the rule was held valid by the United States Supreme Court in *Mourning v. Family Publications Ser-*

39. Truth in Lending Act § 128(a)(9), 15 U.S.C. § 1638(a)(9) (1970); Reg. Z, 12 C.F.R. § 226.8(b)(4) (1976).

40. The disclosures usually not applicable in credit arrangements by doctors and lawyers include:

(1) description of any security interest involved (Truth in Lending Act § 128(a)(10), 15 U.S.C. § 1638(a)(10) (1970); Reg. Z, 12 C.F.R. § 226.8(b)(5) (1976));

(2) prepayment penalty charges (Reg. Z, 12 C.F.R. § 226.8(b)(6) (1976));

(3) other charges included in the amount of credit extended but which are not part of the finance charge (Truth in Lending Act § 128(a)(4), 15 U.S.C. § 1638(a)(4) (1970); Reg. Z, 12 C.F.R. 226.8(c)(4) (1976));

(4) notice of customer's right of rescission (Truth in Lending Act § 125, 15 U.S.C. § 1635 (1970); Reg. Z, 12 C.F.R. § 226.9 (1976));

(5) balloon payments (Reg. Z, 12 C.F.R. § 226.8(b)(3)(1976));

(6) prepaid finance charges (Reg. Z, 12 C.F.R. § 226.8(b)(7) & .8(e) (1976)); and

(7) trade-in downpayments (Truth in Lending Act § 128(a)(2), 15 U.S.C. § 1638(a)(2) (1970); Reg. Z, 12 C.F.R. § 226.8(c)(2) (1976).

41. Two commentators have analyzed the relation of Truth in Lending, including the More than Four Installment Rule, to the legal and medical professions. Note, *The Attorney as an Extender and Arranger of Credit,* 4 U.C.D.L. REV. 261 (1971); Warren & Larmore, *supra* note 9.

42. Truth in Lending Act § 103(f), 15 U.S.C. § 1602(f) (1970). It should be noted that the Uniform Consumer Credit Code (UCCC) in its most recent form incorporates the disclosure requirements of the Truth in Lending Act. UCCC § 3.201 (1974 version). There were definitional differences between early versions of the UCCC and the Truth in Lending Act. For instance, disclosure requirements under the UCCC applied to agreements involving payment in *four or more* installments, UCCC § 1.301(12) (1969 version), whereas the 1974 version matches the Truth in Lending requirement for disclosures if *more than four* periodic payments are involved. UCCC § 1.301(30) (1974 version).

43. *See* note 9 *supra.*

44. Originally, Truth in Lending Act § 103(f), 15 U.S.C. § 1602(f) (1970) read: "The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise." Act of May 29, 1968, Pub. L. No. 90-321, 82 Stat. 146.

vice, Inc.[45] The rule has since been incorporated into the Act by amendment.[46]

The purpose of the rule is to remove a loophole from the original Act. The Act purports to cover all transactions where credit customers are charged more for goods and services than cash customers. There was a fear that creditors would circumvent the Act by hiding finance charges in an inflated retail price.[47] To prevent this possibility, the Federal Reserve Board, and later Congress, adopted the More than Four Installment Rule, thus requiring all creditors to comply with Truth in Lending requirements, whether or not they assess a finance charge, whenever the consumer and creditor agree to a payment arrangement involving more than four installments.

Doctors and lawyers objected strenuously to the rule[48] because they had traditionally permitted clients and patients to pay for services in installments without assessing any finance charge for the privilege.[49] The Supreme Court declared the More than Four Installment Rule valid, notwithstanding "the fact that the regulation may affect such individuals."[50] It does not matter that the rule subjects to regulation some professionals who do not "participate in the conduct the legislation was intended to deter or control."[51] Thus, lawyers, and doctors are subject to the More than Four Installment Rule, even though no finance charge is involved and even if they can show that the deferred payments do not exceed the charges for cash-paying clients or patients.

An important exception to the rule arises from the requirement that payment in more than four installments be pursuant to agreement. The Federal Reserve Board has stated that if a patient or client unilaterally decides to pay in more than four installments, the professional may accept such payments without becoming subject to Truth in Lending requirements.[52] To fall

45. 411 U.S. 356 (1973).

46. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 303, 88 Stat. 1511 (codified at Truth in Lending Act § 103(f), 15 U.S.C. 1602(f) (Supp. V 1975)).

47. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 366 (1973).

48. Warren & Larmore, *supra* note 9, at 819.

49. Several respondents to the Billing Practice Survey, *supra* note 6, commented on their approach:

> "When patients indicate inability to pay in full we accept monthly payments (often as little as $5 per month)."
>
> "Most major bills are covered by insurance—remaining balance is usually cleared in monthly payments."

50. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 373 (1973).

51. *Id.* at 374.

52. The staff of the Federal Reserve Board has explained in an opinion letter:

within the exception, however, professionals must be careful to bill for the full fee with each statement. They must also avoid indicating to the patient or client in any way that he may pay in more than four installments. This exception is important to professionals who wish to avoid Truth in Lending requirements yet desire to allow patients or clients to defer payments.[53]

A further exemption from the More than Four Installment Rule applies to a common practice among obstetricians and orthodontists.[54] These doctors, who enter into a fee arrangement with patients for services to be provided over a period of time, can accept payments in installments without the necessity of complying with the Truth in Lending Act. Each partial payment is considered payment for services that have been completed up to that time. If the amount due for services completed never exceeds the amount that will be paid in four installments, then the More than Four Installment Rule will not apply. But if a patient falls behind

> The Board recognizes the fact that physicians, although generally sending monthly statements requesting full payment, do permit patients to pay bills in installments. There is nothing in either the Act or the Regulation that would prohibit this practice. Please note the words "pursuant to an agreement" . . . . As long as a physician has not agreed to more than four instalments—and, of course, does not charge a finance charge—he is not subject to the Regulation.
>
> Should a patient pay installments, as opposed to the full amount for which he is billed, this would be his unilateral action and the physician in accepting such payments again would not subject himself to the provisions of the Regulation.

FRB Letter No. 32, July 8, 1969, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,434. *See* Warren & Larmore, *supra* note 9, at 820. *See also* Unnumbered FRB Letter, Dec. 2, 1969, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,228; Unnumbered FRB Letter, Oct. 15, 1969, *id.* ¶ 30,558; Unnumbered FRB Letter, Aug. 9, 1969, *id.* ¶ 30,180; FRB Letter No. 53, Aug. 5, 1969, *id.* ¶ 31,243. (FRB Letters from April 1969 to April 1974 are presently found in a transfer binder entitled Truth-in-Lending, Special Releases—Correspondence. More recent letters are found under the same title in 5 CONSUMER CREDIT GUIDE (CCH).)

53. It appears that many professionals are eligible for the "not pursuant to agreement" exception. Some of the responses to the Billing Practice Survey, *supra* note 6, were:

> "[There are] no 'agreements', but we accept payment at whatever rate the patient wishes—no interest or penalties."
>
> "At times we are ultimately paid in installments, but not pursuant to prior arrangement."
>
> "There is usually a discussion with the client and an agreement concerning the approximate amount of the fee, but we do not normally discuss installment payments, except to say the client should pay as billed as the matter is progressing."
>
> "Many times it takes more than four installments, but we encourage them to pay in three or less payments."

54. FRB Letter No. 262, Feb. 19, 1970, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,516; FRB Letter No. 214, Dec. 16, 1969, *id.* ¶ 30,510. *See* Warren & Larmore, *supra* note 9, at 820.

in payment so that more than four installment payments are owed for services already performed, then the doctor is subject to the Truth in Lending requirements.[55]

Despite these escape valves that are built into the More than Four Installment Rule, professionals face the danger that courts will require them to comply with the Truth in Lending Act whenever they accept payment in more than four installments. The court may find an implied agreement by the doctor or lawyer to accept multiple installments because of a course of conduct of accepting partial payments in more than four installments in a large proportion of accounts.[56] In light of this danger, it may be best for the professional to make the disclosures necessary to comply with Truth in Lending requirements. The Federal Trade Commission has suggested the following form for use by doctors and lawyers who regularly permit patients or clients to pay in more than four installments.[57]

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55. One orthodontist explained a practice that would protect professionals from this pitfall:

> When an account becomes delinquent, it is customary among orthodontists to place a patient on an inactive "rest" basis to afford the [patient or his] parents an opportunity to catch up on back payments.
>
> During the rest period no further monthly payments are charged . . . and appointments are given with sufficient frequency to guard against regression of work already accomplished.
>
> However, no adjustments for further progress are made.

Billing Practice Survey, *supra* note 6.

56. Warren & Larmore, *supra* note 9, at 820.

Several professionals responding to the Billing Practice Survey, *supra* note 6, appear to engage in such a course of conduct:

> "I serve primarily individuals who are unable to make large payments."
>
> "The majority of our accounts are paid in installments."
>
> "We allow clients who cannot pay a retainer a reasonable period to pay. Some have paid as little as $5 per month for a year."

One dentist indicated that he regularly accepted payments in more than four installments, explaining, "large families find it easier to pay at least $10 or more monthly."

57. FTC, Division of Consumer Credit, Staff Letter, July 1, 1969, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,253. "FINANCE CHARGE" and "ANNUAL PERCENTAGE RATE" may be omitted if there are no charges for credit. *Id.*

The Federal Trade Commission, Division of Consumer Credit, has summarized the More than Four Installment Rule for medical and dental services:

> The Truth in Lending Act requires disclosure if the transaction involves a consumer and the commodity or services are for personal, family or household use. Further, the obligation must involve a finance charge *or* be repayable, by agreement, in more than four installments.
>
> At the outset, it should be made clear that the Truth in Lending Act does not come into play in a situation in which the patient decides on his own to pay his bill in installments, or whenever he can. However, when a physician (hospital, etc.) comes to a specific agreement with a patient to pay the physician's fee

Dr. John Doe
10 Main Street
Washington, D.C.

________________ ____________________

Patient's Name Patient's Address

1.	Cash Price (Medical Fee)	$500
	Less: Cash Down Payment (Advance Payment)	100
2.	Unpaid Balance of Cash Price	400
3.	Amount Financed	400
4.	FINANCE CHARGE	NONE
5.	Total of Payments (3+4)	400
6.	Deferred Payment Price (1+4)	500
7.	ANNUAL PERCENTAGE RATE	NONE

The "Total of Payments" shown above is payable to Dr. John Doe at the address shown above in 10 monthly installments of $40.00, the first installment being payable ____________________, 19____, and all subsequent installments are due on the same day on each consecutive month until paid in full.

________________ ____________________

Date Patient's Signature

B. *Imposing Charges on Delinquent Accounts*

It has become common for professional billing statements to contain a notice that "Interest at the rate of ____ percent per month, which is an annual percentage rate of ____ percent, will be charged on all accounts not paid within 30 days."[58] The doctor

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in more than four installments then—*at that point in time*—Regulation Z requires written disclosure of all (and only) *applicable* points of information at the time of the agreement *regardless* of the existence of finance charges. This will be a simple matter in actual implementation, and the attached form illustrates a proper disclosure for medical-dental-hospital transactions.

Should a physician, dentist, orthodontist, hospital, etc. enter into an agreement for payments in more than four installments—as opposed to sending monthly bills for the services as they are rendered—then the attached brief disclosure would satisfy the Truth in Lending Act and no other disclosure is required.

Id.

58. Among the sample billing forms received as part of the Billing Practice Survey, *supra* note 6, were the following notations:

"1½ percent per month if payment schedule is not met."

"A service charge of ½ percent per month charged on all acounts over 30 days old."

or lawyer who imposes such a charge must be careful to avoid losing the exemption from Truth in Lending requirements he might otherwise enjoy.

Finance charge disclosure is a major requirement of the Truth in Lending Act. A "finance charge" includes "all charges, payable . . . as an incident to the extension of credit."[59] Although late payment or delinquency charges would clearly fit in this general definition of the "finance charge" under Regulation Z, they need not be mentioned as a "finance charge" if they are "imposed for actual unanticipated late payment."[60]

In some circumstances, however, a charge imposed on an overdue account may be considered interest rather than an unanticipated late payment charge and therefore must be disclosed in advance as part of the finance charge.[61] For instance, if a lawyer or doctor "imposes late payment charges periodically without regarding the account as delinquent or in default and without taking steps to collect the outstanding balance, [the Federal Reserve Board] would view the late payment charges as finance charges."[62] The crucial question, then, is whether a charge is levied solely because of an "actual unanticipated late payment." The Federal Reserve Board has issued Interpretation 226.401, entitled "Service charges on accounts not paid within a given period of time,"[63] to deal with that question:

> Some vendors bill their customers for property or services purchased under the terms of a credit plan which requires that

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> "A finance charge will be assessed on all amounts past due for 30 days or more, amounts which [*sic*] finance charge is computed by a periodic rate of one and one-half percent (1 1/2%) per month which is an annual percentage rate of eighteen percent (18%) per annum."

The confusion engendered by the Truth in Lending Act, even among attorneys, is illustrated by the last excerpt wherein the attorney at least attempts to use the Truth in Lending language. The Truth in Lending Act does not require any special language for the "true" late charge. Furthermore, the attorney has not given sufficient disclosure to protect himself in the event the charges on delinquent accounts are found to trigger Truth in Lending disclosure requirements.

59. Truth in Lending Act § 106(a), 15 U.S.C. § 1605(a) (1970).

60. Reg. Z, 12 C.F.R. § 226.4(c) (1976); FRB Letter No. 416, Oct. 29, 1970,[1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,605.

61. FRB Letter No. 424, Nov. 18, 1970, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,611.

62. FRB Letter No. 838, Sept. 4, 1974, 5 CONS. CRED. GUIDE (CCH) ¶ 31,160. Even if the doctor or lawyer seldom imposes the charge, he has a legal right to do so and "his intent in selecting which overdue accounts to charge the fee is not determinative of whether the fee is a finance charge" or a late payment charge. FRB Letter No. 883, Mar. 26, 1975, *id.* ¶ 31,208.

63. 12 C.F.R. § 226.401 (1976) (interpreting Reg. Z, 12 C.F.R. § 226.4 (1976)).

> the full amount of each billing be paid within a stipulated period after billing, with no privilege of paying in installments. If the bill is not paid within that stipulated period of time, the vendor imposes a service charge periodically on the unpaid balance until the account is paid in full. The question arises as to whether Regulation Z applies to such transactions.
>
> When in the ordinary course of business a vendor's billings are not paid in full within that stipulated period of time, and under such circumstances the vendor does not, in fact, regard such accounts in default, but continues or will continue to extend credit and imposes charges periodically for delaying payment of such accounts from time to time until paid, the charge so imposed comes within the definitions of a "finance charge" . . . applicable in each case to the amount of the unpaid balance of the account. Under such circumstances . . . the disclosures required for open end credit accounts under § 226.7 shall be made.[64]

The Board Interpretation sets forth a simple formula for distinguishing between bona fide "unanticipated late payment" charges and finance charges which need to be disclosed as part of the cost for extending credit.

Several situations in which this Interpretation has been applied illustrate the effect of this rule. If a hospital, for instance, continues to provide nonemergency services to patients with overdue accounts and routinely imposes periodic late payment charges, those charges may be considered a finance charge.[65] On the other hand, if the hospital treats a delinquent account as in default, in that no further (nonemergency) services are provided until the delinquent account is paid, then the hospital can properly impose a monthly charge of one percent on the outstanding balance of bills not paid within sixty days. In the latter situation, the monthly late payment charge would be a bona fide delinquency charge under section 226.4(c). The Federal Reserve Board would not view such a charge as a disguised finance charge, since the bill is by its terms due in full within sixty days and the actions of the hospital after delinquency arises are consistent with normal collection practices.[66]

One federal court has agreed with the Federal Reserve Board's interpretation by holding that monthly charges imposed

64. *Id.*

65. FRB Letter No. 909, Aug. 1, 1975, 5 CONS. CRED. GUIDE (CCH) ¶ 31,243.

66. FRB Letter No. 912, Aug. 13, 1975, *id.* ¶ 31,246.

on credit card accounts not paid within sixty days were finance charges, not within the exclusion for "actual unanticipated late payment" charges, since they were imposed periodically while credit continued to be extended and payments were repeatedly late.[67] The defendant oil company's argument that Interpretation 226.401 was inconsistent with Regulation Z was rejected by the court.[68]

A doctor or lawyer who assesses late payment charges on delinquent accounts for professional service fees may argue that Interpretation 226.401, applicable to open end credit plans, should not apply to his credit practices, since the account is for a single transaction and no further services are anticipated. The staff of the Federal Reserve Board, however, has expressed its opinion that such a characterization of the plan should make no difference.[69] A similar rule applies to delinquency charges on a short term credit account: "[I]f a creditor continues to assess these charges without treating the account as delinquent or in default and without taking steps to collect the outstanding balance, he is in fact imposing finance charges which should be disclosed as such."[70] Thus, the crucial issue is the manner in which the doctor or lawyer acts in relation to the delinquent account.[71] If he actively attempts to collect the account and gives every indication that he considers the account in default, then monthly late payment charges will be considered unanticipated and will not be viewed as a finance charge.[72] If, however, the doctor or lawyer imposes late payment charges without taking steps to collect on the account, he must compute the finance charge and annual percentage rate and provide his patients or clients who do not make cash payments with these Truth in Lending disclosures during the office visit. A statement received

67. Kroll v. Cities Serv. Oil Co., 352 F. Supp. 357 (N.D. Ill. 1973).

68. *Id.* at 362-63.

69. FRB Letter No. 838, Sept. 4, 1974, 5 CONS. CRED. GUIDE (CCH) ¶ 31,160.

70. *Id.*

71. *See* FRB Letter No. 797, May 16, 1974, *id.* ¶ 31,119; Unnumbered FRB Letter, July 9, 1969, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,088.

72. A number of doctors, dentists, and lawyers responded to the Billing Practice Survey, *supra* note 6, indicating their late payment charges would be bona fide:

> "[Late payment charges are assessed] only when no payments are made and then [as] collection charges."
>
> "[Late payment charges are assessed] only when we turn [accounts] over to our collector."
>
> "Sometimes, if account is bad, we assign it to a corporation that collects it, charging regular interest."

by the client one week later is not timely for purposes of giving the required Truth in Lending disclosures for consumer credit involving finance charges.[73]

It may be helpful to demonstrate the effect of treating an attorney's late payment charges as a finance charge. Assume an attorney bills his client for legal services amounting to $500.00. The client receives a statement with a rubber stamp notice that all accounts not paid within sixty days will incur a late payment charge of 1-1/2 percent per month, but the attorney does nothing else with his delinquent accounts. Assuming that the attorney expects this fee to be paid in a single payment, as in a demand loan, he is then required by Regulation Z to figure the amount of the finance charge and the annual percentage rate as if the account had a maturity of one-half year.[74] Thus, the finance charge may include a late payment charge after 60, 90, 120, 150, and 180 days. At a rate of 1-1/2 percent per month on a principal balance due of $500.00, without compounding the interest charges, the finance charge would be five times $7.50, or $37.50, which on a charge of $500.00 for six months works out to be an annual percentage rate of 15 percent. These disclosures must be made at the time the fee arrangement for legal services is consummated, that is, before the credit is extended.[75]

C. *Discounts for Prompt Payment*

Another tool for inducing timely payment by patients and clients, the prompt payment discount, is becoming increasingly common among professionals.[76] This inducement is attractive to patients, but the effect of this practice is harsh on those who do not take advantage of the discount. Patients who wait to make payment until they have received their bill have been charged a rather hefty finance charge for the privilege of paying on credit. Assume, for example, that a patient owes a doctor $100, but the

73. Truth in Lending Act § 128(b), 15 U.S.C. § 1638(b) (1970) ("disclosures . . . shall be made before the credit is extended").

74. Reg. Z, 12 C.F.R. § 226.4(g) (1976) ("[o]bligations . . . which are payable on demand shall be considered to have a maturity of one-half year for the purpose of computing the amount of the finance charge and the annual percentage rate").

75. Note 73 *supra*.

76. The prompt payment discount is borrowed from commercial transactions where payment terms are often stated as "2%-10 days, net 30," which, interpreted, means that customers paying within 10 days of receipt of the statement can deduct 2% from the net amount due, otherwise the full price is due within 30 days.

doctor offers a ten percent discount for prompt cash payments. If the patient is able to pay cash before leaving the doctor's office, he pays only $90. If he waits for the statement and pays the bill for $100 within thirty days, he has paid a finance charge of $10 for an extension of credit of one month. This amounts to a finance charge at an annual rate of 133 percent.[77]

It is not surprising, therefore, that Regulation Z requires specific disclosures for prompt payment discounts.[78] The required disclosures include:

(1) the date of the sale or invoice,

(2) the rate of discount,

(3) the date by which the discount may be taken,

(4) the date by which the full amount of the obligation is due and payable,

(5) the amount of the discount, designated as a "finance charge,"[79] and

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77. Regulation Z, 12 C.F.R. § 226.8(o)(2) (1976), sets forth a special formula for determining the annual percentage rate for cash discount transactions.

This formula can be demonstrated by using the above example of 10% cash, net 30 day payment arrangement. The amount of the finance charge ($10) is divided by the least amount payable to satisfy the obligation ($90). This quotient is multiplied "by a fraction in which the numerator is 12 and the denominator is the number of whole months (but not less than 1) between the first day of the monthly billing cycle in which the transaction is consummated and the first day of the monthly billing cycle in which the obligation becomes due." *Id.* Here the formula would be (10/90) x (12/1), which amounts to an annual percentage rate of 133%. The fact that the nondiscount payment could have been made within the first few days of the month is ignored, and the creditor is given the benefit of assuming that the payment will be made at the end of one month.

78. Utility companies are generally exempt from the disclosure requirements of the Truth in Lending Act. They are thus able to offer prompt payment discounts without complying with the enumerated disclosure requirements that would be triggered if the public utility exemption were not part of the Act. Truth in Lending Act § 104(4), 15 U.S.C. § 1603(4) (1970).

Although Regulation Z does not directly discuss them, other types of discounts may be permissible—*e.g.*, allowances for relatives, settlements of long delinquent accounts, and bill adjustments in harsh circumstances—without necessitating Truth in Lending disclosures. Several professionals responding to the Billing Practice Survey, *supra* note 6, indicated that they allowed discounts in such limited circumstances:

> "When a client is hard pressed, we will offer to settle for less for a cash payment to avoid extensive billing."
>
> "If we are aware of unusual hardships or if the patient asks we often adjust the bill."

79. Obviously, cash discount arrangements may well be discouraged when disclosures of the finance charge and annual percentage rate are required. In an effort to ease the impact on discount incentives, the newest amendments to the Truth in Lending Act provide that certain cash payment discounts as high as 5% will not be subject to disclosure as a finance charge. This special exemption regarding disclosure of the finance charge arises where the discount is made "available for the purpose of inducing payment for a purchase by cash . . . rather than by use of an open end credit card account." Truth in

(6) the "annual percentage rate,"[80] for discounts exceeding five percent of the obligation, unless the finance charge does not exceed $5 and is applicable to an amount financed not exceeding $75 or does not exceed $7.50 and is applicable to an amount financed exceeding $75.[81] These disclosures may be made on the invoice, which, contrary to the usual disclosure requirements, may be delivered after the transaction has taken place.[82]

State consumer laws pose another hurdle for professionals who offer cash payment discounts to clients and patients. Many of these laws set limitations on the rates of interest that may be charged.[83] For example, in states that have adopted the Uniform Consumer Credit Code (UCCC),[84] the maximum rates allowed for consumer credit sales are generally between fifteen and thirty-six percent per annum, depending on the type and amount of credit extended.[85] As noted above, the annual percentage rate for a ten

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Lending Act § 167, 15 U.S.C. § 1666(f) (Supp. V 1975); Reg. Z, 12 C.F.R. § 226.4(i)(1) (1976). The following stringent conditions must be met: (1) the discount cannot exceed 5% of the price of the goods or services;and (2) the discount must be "available to all prospective buyers, whether or not they are [credit] cardholders." This availability must be "clearly and conspicuously disclosed by a sign or display posted at or near each public entrance to the seller's place of business wherein such discount is offered." It must also be displayed "at all locations within the place of business where a purchase may be paid for." Reg. Z, 12 C.F.R. § 226.4(i)(1) (1976). If the discount is greater than 5%, however, the entire amount of the discount must be disclosed as a finance charge to all consumer customers who do not take advantage of the cash discount. Reg. Z, 12 C.F.R. § 226.4(i)(2) (1976); FRB Letter No. 985, Dec. 31, 1975, 5 CONS. CRED. GUIDE (CCH) ¶ 31,325.

80. Reg. Z, 12 C.F.R. § 226.8(o) (1976). FTC Informal Staff Opinion, Apr. 2, 1970, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,361.

81. Reg. Z, 12 C.F.R. §§ 116.8(b)(2), 226.8(o)(1)(v) (1976).

82. *Id.* § 226.8(o)(8).

83. For a helpful summary of state usury and rate limitation laws, see 1 CONS. CRED. GUIDE (CCH) ¶ 510 (1976).

84. The states that have adopted the UCCC are Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming. The UCCC is a comprehensive consumer credit protection law. It regulates maximum charges, rate ceilings, disclosure requirements, enforcement rights, contract terms, and advertising. The UCCC was created to eliminate conflicts and inconsistency in the consumer credit area among the various states. Its purpose was to make competition the major factor in the establishment of credit prices. The original text was drafted in 1968 and amended in 1974.

85. UCCC § 2.201(2).

percent discount on a $100 charge will amount to 133 percent, which violates the rate ceiling of the UCCC. Thus, even though the rate need not be disclosed under the Truth in Lending Act (if the discount does not amount to more than five percent), the discount arrangement may nonetheless be illegal if it exceeds the rate limitation of the state law.[86]

There is a major exemption, however, that will immunize many credit transactions against the UCCC's maximum rate limitations. For credit sales other than revolving charge accounts, the UCCC permits a minimum service charge of not more than $5 for transactions where the credit extended does not exceed $75, and a service charge of not more than $7.50 for transactions where credit of over $75 is extended.[87] For instance, a lawyer or doctor could not legally offer a standard discount of five percent in states that have UCCC rate limitation laws in any credit arrangement for fees amounting to more than $150, since five percent of $150 is $7.50, which is the maximum service charge allowable in order to qualify for exemption from the state's rate limitation. Without the exemption, higher discounts would represent finance charges at a prohibited, high rate of interest. If the discount were more substantial, for instance ten percent, then the professional would need to be even more careful. A ten percent discount would be exempt from the rate ceiling law only if the amount financed were not more than $50. Any greater amount would result in a discount in excess of the minimum service charge. Stripped of that exemption from the maximum rate laws, the discount arrangement would be outlawed.

In sum, the doctor or lawyer who offers prompt payment discounts may safely avoid Truth in Lending violations by observing the following practices:

(1) If the prompt payment discount is the only credit arrangement offered, the professional may comply with the Truth in Lending requirements by using a rubber stamp on his billing statement that reads:[88]

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86. For example, in a 5 percent discount arrangement, the credit client who pays within one month is being charged an annual percentage rate of more than 63 percent (5/95 x 12/1 = 60/95 = 63.2% APR).

87. UCCC § 2.201(6).

88. Adapted from J. FONSECA, CONSUMER CREDIT COMPLIANCE MANUAL 57 (1975).

The following information is supplied pursuant to the Federal Truth in Lending Act:

Date ______________________

1. Amount due by (date) ______________________
$______________________

2. Amount necessary to pay in full
if payment is made by (date) ______________________
$______________________

3. FINANCE CHARGE (____% discount) (1-2)
$______________________

This amount expressed as an ANNUAL PERCENTAGE
RATE is ___________%

In using this disclosure form, the doctor or lawyer should remember that the annual percentage rate disclosure does not have to be made if (a) the finance charge does not exceed $5 and the amount financed does not exceed $75, or (b) the finance charge does not exceed $7.50 and the amount financed exceeds $75,[89] or (c) if the discount for prompt payment does not exceed five percent.[90]

(2) If patients or clients who forego the prompt payment discount are subject to additional finance charges or payments in more than four installments, then the doctor or lawyer must comply with the full panoply of Truth in Lending disclosure requirements in addition to the special disclosures required because of the prompt payment discount.[91]

The criminal[92] and civil[93] penalties imposed on creditors who

89. Reg. Z, 12 C.F.R. § 226.8(b)(2) (1976).

90. *Id.* § 226.8(o)(1)(v); FRB Letter No. 138, Oct. 10, 1969, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,483.

91. *Id.* § 226.8(o)(7); FRB Letter No. 201, Dec. 5, 1969, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,507; FTC Informal Staff Opinion, Apr. 23, 1970, *id.* ¶ 30,376.

92. Truth in Lending Act § 112, 15 U.S.C. § 1611 (1970).

93. *Id.* § 130, 15 U.S.C. § 1640. The civil penalty provisions of Truth in Lending have been subject to recent criticism:

> In a recent statement before the House Subcommittee on Commerce, Consumer, and Monetary Affairs, Philip C. Jackson, Jr., a member of the Federal Reserve Board, asked that Congress study the possibility of limiting the penalty provisions of the Truth-in-Lending Act to violations that actually interfere with the consumer's ability to make meaningful comparisons of credit terms.
>
> He said the Fed has repeatedly testified before Congress that the majority

violate the Truth in Lending disclosure requirements are severe enough to make careful compliance with the Act's requirements important to the professions. The most effective penalty provision permits consumer victims to bring civil actions to recover specified statutory damages. The injured consumer is entitled to a statutory penalty amounting to a minimum recovery of $100 for each violation and a maximum of $1,000.[94] In addition, the successful consumer litigant is entitled to recover attorneys' fees and costs from the violating creditor.[95]

D. *Application of Other Consumer Credit Laws to the Professions*

Other federal credit laws affecting professionals include the Fair Credit Reporting Act,[96] the Fair Credit Billing Act,[97] and the Equal Credit Opportunity Act,[98] all of which are part of the Federal Consumer Credit Protection Act. Also, specific restrictions in the Uniform Consumer Credit Code[99] govern consumer credit transactions in several states.[100]

Lawyers occasionally seek to obtain reports on clients, par-

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of violations are purely technical in nature and are due to unintentional and inevitable human error. In most violations the consumer is neither overcharged nor misled. Under present law, a creditor may be penalized for purely technical violations in which the consumer may have been unaware at the time and which in no way entered into the decision to accept or reject the credit terms offered. Technical violations could be dealt with by administrative remedies.

Jackson pointed out that only a limited number of terms seem to be genuinely helpful to a consumer in making a meaningful comparison of credit terms. These probably include the annual percentage rate, the finance charge, the amount financed and the repayment schedule. Perhaps only material misstatements of these terms should be brought to the attention of consumers and civil liability should only attach where such misstatements have occurred. While individual suits provide an important enforcement tool, the Fed believes that Congress should carefully review the present civil liability provisions to determine whether modification of them might reduce needless litigation and the resulting regulatory complications.

1 Cons. & Comm. Cred. (P-H) ¶ 6.4 (1976).

94. Truth in Lending Act § 130(a)(1), 15 U.S.C. § 1640(a)(1) (1970).

95. *Id.* § 130(a)(2), 15 U.S.C. § 1640(a)(2).

96. The Fair Credit Reporting Act is Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1681, 1681a-t (1970).

97. The Fair Credit Billing Act is integrated into existing law by appropriate amendments to Title I (Truth in Lending) of the Consumer Credit Protection Act, 15 U.S.C. §§ 1666, 1666a-j (Supp. V 1975).

98. The Equal Credit Opportunity Act is Title V of the Consumer Credit Protection Act, 15 U.S.C. §§ 1691, 1691a-e (Supp. V 1975).

99. UCCC § 3.301-.309 (1974 version).

100. *See* note 84 *supra*.

ties to a lawsuit, witnesses, and jurors from credit bureaus, which are subject to the provisions of the Fair Credit Reporting Act.[101] Under that Act, credit reporting agencies cannot release consumer reports[102] unless the use of the report is specifically sanctioned by the Act.[103] Lawyers can lawfully receive consumer reports under the Act if the reports are to be used in connection "with a credit transaction involving the consumer . . . and involving the extension of credit to, or review or collection of an account of, the consumer."[104] Thus, attorneys attempting to discover information regarding a client's delinquent customer can obtain consumer reports. Similarly, doctors and lawyers obtaining information in advance of extending credit to a patient or client are entitled to receive consumer reports. It is no longer proper, however, for credit bureaus to give attorneys reports from their consumer credit files if the attorney will use the information for noncredit purposes such as sizing up prospective jurors. To gain information from a credit bureau for that purpose, the attorney must request a special investigation, in which the consumer reporting agency must avoid using information originally collected, used, or intended for use in consumer reports. The agency must keep the information obtained in such a special investigation separate from the information held for use in future consumer reports.[105] If a doctor or lawyer declines to extend credit to patients or consumer clients because of information contained in a consumer report, he is required to inform the consumer of this fact and must give the consumer the name and address of the reporting agency.[106]

The Fair Credit Billing Act requires all creditors who extend open end credit to provide periodic information to consumer-debtors detailing the procedures available to the debtor for disputing alleged billing errors.[107] For the most part, doctors and lawyers are not subject to these special requirements, since the credit they extend is not like the revolving charge account systems that are within the definition of open end credit.[108] Nonethe-

101. Foer, *What Every Lawyer Should Know About Consumer Reports*, 61 A.B.A.J. 857 (1975).

102. Fair Credit Reporting Act § 603(d), 15 U.S.C. § 1681a(d) (1970).

103. *Id.* § 604, 15 U.S.C. § 1681.

104. *Id.* § 604(3)(A), 15 U.S.C. § 1681b(3)(A).

105. Foer, *supra* note 102, at 858.

106. Fair Credit Reporting Act § 615, 15 U.S.C. § 1681m (1970).

107. Truth in Lending Act § 127(a)(8), 15 U.S.C. § 1637(a)(8); § 127(c), 15 U.S.C. § 1637(c) (Supp. V 1976); Reg. Z, 12 C.F.R. § 226.7(a)(9) (1976).

108. Truth in Lending Act § 103(i), 15 U.S.C. § 1602(i) (1970); Reg. Z, 12 C.F.R. §

less, procedures for resolving and answering consumer credit complaints should be adopted as far as possible by doctors and lawyers who extend credit, if for no other reason than to deal efficiently with such problems and to avoid alienating patients and clients because of billing disputes.[109]

The Equal Credit Opportunity Act, as originally adopted,[110] is aimed at eliminating discrimination in the consumer credit market on the basis of sex. Amendments to the Act now prohibit discrimination based on race, color, religion, national origin, or age.[111] Doctors and lawyers should be familiar with the requirements of this Act to avoid unlawful discrimination in whatever credit arrangements they make with patients and clients. Among other general requirements,[112] a creditor may ask only limited questions about an applicant's marital status.[113] In addition, each applicant for credit must be given a written notice stating: "The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of sex or marital status. The Federal agency which administers compliance with this law concerning this [office] is (name and address of the appropriate agency)."[114] Consumers whose credit accounts were established prior to and remained in existence on November 1, 1976, are entitled to receive a special statutory notice by February 1, 1977.[115] This notice is designed to acquaint married women

226.2(x) (1976); FRB Letter No. 960, Nov. 28, 1975, 5 CONS. CRED. GUIDE (CCH) ¶ 31,299. *See* notes 26-37 *supra* for discussion of characterization of open end versus closed end credit arrangements.

109. *See generally* Littlefield, *Federal Consumer Credit Legislation—Some New Developments* (pts. 1-2), 80 COM. L.J. 312, 349 (1975).

At least one attorney who responded to the Billing Practice Survey, *supra* note 6, includes the Fair Credit Billing Act's prescribed disclosure entitled "In Case of Errors or Inquiries About Your Bill" on the back of the firm's monthly statement form.

110. Equal Credit Opportunity Act § 503, 15 U.S.C. §§ 1691, 1691a-e (Supp. V 1975).

111. Act of Mar. 23, 1976, Pub. L. No. 94-239, 90 Stat. 251 (effective Mar. 23, 1977).

112. Pursuant to the authority of § 503 of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, 1691a-3 (Supp. V 1975), 12 C.F.R. § 202 [hereinafter referred to as Reg. B] was adopted on October 22, 1975.

113. Reg. B., 12 C.F.R. § 202.4(c) (1976).

114. *Id.* § 202.4(d).

115. The notice requirement for previously established accounts is satisfied by the following form:

NOTICE
CREDIT HISTORY FOR
MARRIED PERSONS

The Federal Equal Credit Opportunity Act forbids all creditors from discriminating against any applicant on the basis of sex or marital status in any aspect of a credit transaction. Regulations adopted under the Act give married persons the right to have credit information concerning those credit accounts with their right to have credit information reported in their own names as well as their spouses' names with respect to the history of a credit account that a married woman shares with her husband or is authorized to use. Except as expressly permitted under the Act, the creditor may not inquire concerning the spouse of an applicant unless the spouse will be permitted to use the account or the spouse will be contractually liable upon the account.[116] If credit is denied, the applicant must receive a notice of the denial, and has a right to receive reasons for such action upon request.[117] These restrictions apply if the applicant for credit will use the service primarily for personal, family, or household purposes.[118]

Generally, doctors and lawyers will escape the more onerous requirements of the Equal Credit Opportunity Act, such as providing written notice and refraining from inquiries about marital status or concerning the spouse, since they will usually fit within

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that they hold or use jointly with a spouse reported to consumer reporting agencies and creditors in the names of both the wife and husband. Accounts of married persons opened before November 1976—even those opened in the names of both spouses—are often reported in only the husband's name. This is generally true regardless of who has been paying the bills or whose income was used to obtain the account. As a result, many married women do not have a credit history in their own names, although their husbands do. If a woman ever needs to obtain credit on her own, for example, when divorced or widowed, a credit history is usually necessary.

If your account(s) with us is a joint account which you share with your spouse or an account(s) in the name of one spouse which the other spouse is authorized to use, you have the right to have credit information concerning it reported in both your name and your spouse's name. If you choose to have credit information concerning your account(s) with us reported in both your name and the name of your spouse, please fill in the statement below and return it to us.

Please note that the Federal regulation provides that your signature below will not make either you or your spouse legally liable for any different or greater debts. It will only request that credit information be reported in both your names.

When you furnish credit information on this account, please report all information concerning it in both our names as follows:

________________	________________
Account Number (if any)	(print or type)
	________________
	(print or type)
	________________
	________________
	Signature of either spouse

an "incidental credit" exemption contained in the Act.[119] To fit within this exemption, the credit extended by the doctor or lawyer must meet all of the following requirements:

(1) the credit is not represented by and does not arise from the use of a credit card; [since the definition of creditor "does not include a person whose only participation in a credit transaction is to honor a credit card,"[120] most credit card transactions are exempt in any event] and

(2) no finance charge . . . late payment or other fee is or may be imposed other than statutory interest or other costs recoverable in legal proceedings for the collection of the credit; and

(3) there is no agreement by which the credit may be payable in more than four installments.[121]

If a doctor or lawyer fits within the incidental credit exemption of the Equal Credit Opportunity Act, he is subject only to the general rule prohibiting discrimination[122] and to certain specific restrictions such as those prohibiting inquiries about the childbearing intentions or capability of the applicant.[123] Furthermore, he must not refuse to set up a separate account for a creditworthy applicant on the basis of sex or marital status,[124] refuse to use the birth-given first name and surname of the applicant,[125] or engage in any other practices deemed to be particularly offensive under the Act as interpreted by the framers of Federal Reserve Board Regulation B.[126]

Among the prohibitions of the Uniform Consumer Credit Code that may require doctors and lawyers to modify their procedures with clients and patients is the role against taking a negotiable promissory note in a consumer credit transaction.[127] The

119. *Id.* § 202.10(b).
120. *Id.* § 202.3(j).
121. *Id.* § 202.10(b).
122. *Id.* § 202.2.
123. *Id.* §§ 202.5(h), 202.10(b).
124. *Id.* § 202.4(b).
125. *Id.* § 202.4(e).
126. *Id.* § 202.10(a)-(b).
127. UCCC § 3.307 (1974 version) provides: "With respect to a consumer credit sale or consumer lease, . . . the creditor may not take a negotiable instrument other than a check dated not later than ten days after its issuance as evidence of the obligation of the consumer."

One of the dentists responding to the Billing Practice Survey, *supra* note 6, offers a credit plan to patients that violates the cited provision. He explains on his statement that one alternative for payment is by means of "a series of post dated checks which we will hold and deposit on the date posted." The Utah law applicable to the dentist is not violated, however, because it is based on an earlier version of the UCCC which prohibits use of negotiable instruments "other than a check". No postdating provision exists.UTAH garnishment limitation of the UCCC[128] and of the Federal Consumer Credit Protection Act[129] also affect the creditor's ability to reach the wages of a delinquent debtor. There is, for example, no longer any garnishment permitted before judgment against a consumer debtor has been obtained,[130] and the amount of a consumer's wages that may be garnished is usually limited to no more than twenty-five percent of the wage earner's take-home pay.[131] For the most part, these restrictions are easily observed.

This summary of consumer credit laws affecting the professions reveals that unless the attorney or doctor obtains informed advice regarding his credit practices, with special attention to the Truth in Lending disclosure requirements, he is taking considerable risk if he engages in any one of the following credit practices:

(1) Agreements with his clients permitting payments for professional services in more than four installments. (Even if he does not expressly agree to be paid in more than four installments, if a majority of his patients or clients pay in that manner, there is a possibility that his transactions may be subject to the Act's disclosure requirements.)

(2) The imposition of late charges on delinquent accounts when the professional fails to institute collection or continues to provide services to the delinquent account debtor. (It should also be noted that the mere imposition of late payment charges on accounts subjects an attorney or doctor to the full requirements of the Equal Credit Opportunity Act.)

(3) Offers of prompt payment discounts to clients or patients. (The requirements for complying with the Truth in Lending Act are more difficult if the discount exceeds five percent.)[132]

If the doctor or attorney is unwilling or unable to seek informed counsel on these credit matters, he is best advised to avoid new techniques designed to induce efficient and prompt payment of his outstanding accounts.[133] He should, instead, care-

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CODE ANN. § 70B-2-403 (1954). Another respondent is also in violation of either the amended or the previous version of the UCCC in that "long outstanding debts are sometimes transferred to a promissory note with 10% interest," unless the debtor is not a consumer.

128. UCCC §§ 5.104-.105 (1974 version).

129. Consumer Credit Protection Act § 301-07, 15 U.S.C. §§ 1671-77 (1970).

130. UCCC § 5.104. *See also* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

131. UCCC § 5.105(2); Consumer Credit Protection Act § 303, 15 U.S.C. § 1673 (1970).

132. *See* text accompanying note 90 *supra*.

133. One response to the Billing Practice Survey, *supra* note 6, is illustrative: "Our firm has used several methods of billing for consumer credit in the past, but we found them all to be more trouble than they were worth in light of the Federal and State

fully qualify for the consumer credit laws built-in exemptions for the traditional credit practices employed by the professions. If the doctor or lawyer is content with the old "professional" method of permitting clients to pay as they can, without any finance charge or late payment charge being imposed, without expressly agreeing to a specified installment payment arrangement, and without giving prompt payment discounts, then he need not worry about complying with consumer credit disclosure requirements. As will be suggested below, however, the public may not be served optimally by this traditional professional approach. Doctors and lawyers adopting modern credit practices in order to more efficiently deliver professional services to patients and clients of moderate means must be willing to pay the increased costs of assuring themselves that their credit practices are in line with federal and state consumer credit laws. The laws, regulations, and interpretations are complex and difficult enough that professionals should be willing to employ specialists to set up proper forms, systems, and practices.

The regulatory apparatus for the growing consumer credit market has expanded as rapidly as the credit practices themselves. Lawyers, doctors, and their professional associations should become acquainted with the present situation without delay. Otherwise, the consuming public will eventually force them to comply with consumer credit laws through the private attorney general remedies available in the statutes. Indeed, it has been suggested that "Truth in Lending has become a trap for the unwary." Doctors and lawyers may be among those who "will probably not come into compliance until they have been caught a couple of times."[134]

Regulations governing the extension on consumer credit." This same firm has advised its professional clients (doctors and dentists) as follows:

> In recommending to you your future course of action with respect to credit transactions, I feel no other alternative but to recommend that you avoid involvement in credit transactions wherever possible. This is not only because of the complexity of the regulations but also because such regulations are often amended and the forms that are shown . . . may become obsolete. One of the best alternatives for you, in my opinion, would be not to charge for small extensions of credit for routine treatments, and to use Bank Americard or Mastercharge for larger bills. These two courses of action will eliminate computations for interest and compliance problems, and would leave collection responsibilities with the Bank Americard or Mastercharge people.

134. B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES 91 (Supp. 1976).

II. Ethical Context of Credit Practices by the Professions of Law and Medicine

Although many professionals have not adopted credit practices governed by Truth in Lending legislation, within the past decade the professional ethical standards relating to credit arrangements have been relaxed and in some cases reversed. Consequently, many traditional prohibitions against the use of credit plans and procedures have disappeared. This part of the article will describe various statements made by professional associations regarding such consumer credit practices as the use of discounts, late payment charges, bank financing plans, and bank credit card systems. It will then evaluate recently adopted credit practice standards in the legal profession.

A. *Ethical Pronouncements by the Legal Profession*

Prior to the adoption of the American Bar Association's Code of Professional Responsibility, several opinions regarding the financial side of the attorney-client relationship referred to a maxim from Canon 12 of the Association's Canons of Professional Ethics: "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."[135] With emphasis on that principle, the Committee on Professional Ethics of the American Bar Association rejected several credit practices that were common business practices, including the use of discounts for prompt payment and late fees for delinquent accounts. As to discounts, the Committee stated in Formal Opinion 151 that:

> Although the giving of discounts may be an entirely sound and proper practice in business, we do not think it is suited to the legal profession. Business transactions are frankly impersonal and commercial in character. On the other hand, the professional relationship between an attorney and his client is highly personal, involving an intimate appreciation of each individual client's particular problem. Practices which overlook the personal element in the attorney's relationship with his client and which tend toward an undue commercial emphasis are to be condemned.[136]

The Committee similarly proscribed the assessment of late fees

135. ABA Canons of Professional Ethics No. 12; ABA Comm. on Professional Ethics, Opinions, No. 151 (1936).

136. ABA Comm. on Professional Ethics, Opinions, No. 151 (1936).

on delinquent accounts for the same basic reason—that the fixing of fees would be determined upon a basis other than fair and reasonable compensation for legal services performed, as mandated by Canon 12. Thus the Committee ruled in Informal Decision C-741 that it would be improper for a lawyer to indicate on his bill to clients that "[i]nterest at the rate of 6% per annum will be charged on all accounts not paid within 30 days."[137]

In 1968, in the first pronouncement marking an apparent departure from the traditional approach to credit procedures, the American Bar Association's Committee on Professional Ethics sanctioned bank financing of legal fees, thereby approving plans adopted by several local bar associations.[138] In Formal Opinion 320,[139] the Committee made an exhaustive survey of the Canons affected by the approved financing plan and concluded that there were no valid objections to the plan and that there were adequate safeguards to meet all pertinent ethical standards. The chief obstacles to be cleared in approving the legal fee finance plans were grounded in the "commercialization" argument underlying former opinions concerning late payment charges and discounts for prompt payments. A prior opinion by the Los Angeles County Bar Association,[140] cited by the Committee in Opinion 320, represents the strong anticommercialization traditions and feelings shared by many lawyers:

> If the proposed financing plan were approved, and if such plan were to become common practice amongst attorneys, *the profession unfortunately would be emulating the conduct of countless commercial establishments ranging from credit mercantile stores to such semiprofessional operations as advertising-credit-dentists.* Such conduct would appear to be in direct violation of Canon 12 which admonishes lawyers never to forget that their profession is not a mere money-getting trade. Surely this admonition is applicable not only to the fixing of fees but also in the collection thereof.[141]

Nonetheless, the Committee decided that the benefits to the public and to the profession outweighed the possibilities for abuse by

137. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINIONS, No. C-741 (1964).

138. For an excellent article explaining the details of the Philadelphia Bar Association Plan, see Spiegel, *Bank Financing of Legal Fees,* 152 THE BANKERS MAGAZINE 20 (1969).

139. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 320 (1968), at 22.

140. *Id.* at 23 (citing Opinion 228 of the Los Angeles County Bar Ass'n Comm. on Legal Ethics, Feb. 4, 1965).

141. *Id.* at 24 (emphasis added).

individuals.[142] The Committee also stated a guideline for evaluating the propriety of new credit practices for the legal profession: "It is not only the right but the duty of the profession as a whole to utilize such methods as may be developed to bring the services of its members to those who need them, so long as this can be done ethically and with dignity."[143]

Since the adoption of Formal Opinion 320, the American Bar Association has adopted the new Code of Professional Responsibility. Now, in place of the general canons, attorneys are guided by the ideals set forth in the Canons and Ethical Considerations of the Code and are limited by the proscriptions of the Disciplinary Rules. The primary pronouncements regarding credit practices by the legal profession are found under Canon 2 of the new Code—"A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Ethical Consideration 2-16, for example, provides:

> The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

One of the few opinions rendered by the Committee on Ethics and Professional Responsibility since adoption of the Code concerns the use of bank credit cards for the payment of legal services. In Formal Opinion 338,[144] which is disappointingly brief, the Committee reversed its former position on the use of credit cards, stating its opinion "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, providing all of its provisions are fully and completely observed."[145] This may be a correct application of the new Code of Professional Responsibility, but a closer analysis of the change and attention

142. One commentary on the opinion emphasized the benefits to the "'middle class' . . . who require the services of an attorney more often than they realize, but who are either financially unable to meet the expense in one payment or are reluctant to seek professional advice because of the fear of its high cost." Spiegel, *supra* note 139, at 21.

143. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 320, at 29 (1968).

144. ABA COMM. ON ETHICS AND PROFFESSIONAL RESPONSIBILITY, RECENT OPINIONS, No. 338 (1974).

145. *Id.*

to opposing viewpoints would have been helpful.[146] The minimal restrictions established on the use of credit cards in Formal Opinion 338 include:

(1) a requirement of prior approval of all publicity and advertising relating to the credit card plan from the local bar association;

(2) a prohibition against a directory of the attorneys who subscribe to the credit card plan;

(3) a strict limitation of promotional materials to a small sign in the attorney's office indicating availability of the credit card plan;

(4) a requirement of neutrality by the attorney with respect to the use of the credit card plan in that he shall not encourage its use or charge clients who take advantage of the plan extra;

(5) a restriction on the use of the credit card plan to payment for legal services rendered and reimbursement for expenses actually paid by the attorney for the client; and

(6) preservation of the confidential relationship between the attorney and his client.[147]

It is one thing to permit banks or credit card companies to charge interest for financing legal services, since the attorney is not directly involved in charging or receiving the extra amounts paid for the privilege of obtaining credit. Other considerations might come into play, however, when the attorney receives finance charges directly, not in payment for legal services rendered, but for the "banking" services of extending credit by permitting the client to pay for legal services over time. The statement in Formal Opinion 338 sanctioning bank credit card plans, however, ignores this distinction:

> A necessary corollary to the use of credit cards is the charging of interest on delinquent accounts. It is the Committee's

146. Significantly, Formal Opinion 320, which approved bank financing of legal fees, had already disposed of most of the arguments that could be raised against a bank credit card plan. *See* text accompanying notes 138-43 *supra*.

147. ABA Comm. on Ethics and Professional Responsibility, Recent Opinions, No. 338 (1974). The results of the Billing Practice Survey, *supra* note 6, suggest that even when professionals permit payment by bank credit cards, few patients or clients take advantage of this payment option. Typical remarks on this subject were:

> "Not very often used by patients but available in our office."
>
> "Only two patients in three years have chosen to use this type of payment."
>
> "Would be happy to use it, but no clients have done so."
>
> "We've never been asked to use cards, but would consider it favorably."
>
> "During five years of practice, only one client inquired regarding payment by bankcard."

> opinion that it is proper to use a credit card system which involves the charging of interest on delinquent accounts. It is also the Committee's opinion that a lawyer can charge his client interest providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than a stated period of time.[148]

In rendering this opinion, the Committee overruled Informal Decision C-741.[149]

It appears, then, that attorneys are now allowed to provide bank credit card payment plans to their customers and that they may directly charge interest and impose finance charges on clients' delinquent accounts. There has been no recent opinion regarding discounts for prompt payment. Although this practice was formerly prohibited,[150] it may be that under appropriate safeguards it too could be done "ethically and with dignity."[151]

B. *The Medical Profession's Ethical Standards*

The medical profession's ethical standards also have sanctioned new billing and credit devices. The Principles of Medical Ethics,[152] like the legal profession's Code of Professional Responsibility, emphasize the service objectives of the profession.[153] Both mention upholding the dignity and honor of the profession[154] and prohibit solicitation of patients or clients.[155] Medical opinions also

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148. *Id.*

149. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINIONS, No. C-741 (1964). Although Formal Opinion 338 makes no explicit reference to Informal Opinion C-741, "[a] later formal opinion overrules earlier formal opinions or informal opinions with which it is necessarily in conflict . . . . This is true whether or not the earlier opinion is specifically mentioned in the later opinion." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 317 (1967).

150. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 151 (1936).

151. *Id.* No. 320 (1968).

152. The AMA's first code, adopted in 1847, has, in general, remained the same throughout the years. Major revisions did occur in 1903, 1912, and 1947. In 1955, an attempt was made to distinguish medical ethics from matters of etiquette. That proposed draft was not accepted, however. Subsequently, a proposal was made to change from the lengthy Code of Medical Ethics to the new Principles—10 short sections preceded by a preamble—which express the fundamental concepts that were embodied in the old Code. This proposal was adopted in June, 1957. AMA OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL, at IV-V.

153. *Id.* § 1, at VI; *cf.* ABA CANONS OF PROFESSIONAL ETHICS Nos. 1 & 2.

154. AMA OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL § 4, at VI; ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 9-6.

155. AMA OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL § 5, at VI; ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rules 2-101 to -104.

frequently express the theme that "the practice of medicine should not be commercialized nor [sic] treated as a commodity in trade."[156] The Principles of Medical Ethics also have specific provisions that apply to the financing aspect of the profession.[157] These include statements on fees, charges, collection practices, fee splitting, investments, and other related topics. Of special interest here are rules regarding assessment of delinquency charges on patients' accounts and use of bank credit cards, topics that are directly related to consumer credit.

The medical profession has an express rule prohibiting delinquency charges: "It is not in the best interest of the public or the profession to charge interest on an unpaid bill or note or to charge a penalty on fees for professional services not paid within a prescribed period of time . . . ."[158] This medical profession rule is thus contrary to the most recent pronouncement by the legal profession on that topic. Bank credit card plans, however, have been approved by the medical profession in a manner similar to the American Bar Association's approval of such plans, with one additional caveat:

> the use of a bank card in connection with the payment of larger fees—which might normally be paid to the physician in installments—is not to be encouraged. All members of the Association are expected to continue the traditional practice of permitting patients of limited means to pay relatively large fees in installments without interest or carrying charges. Out of respect for the dignity and traditions of the medical profession, the physician may not relieve himself of his obligations "to render service to humanity, reward or financial gain being a subordinate consideration."[159]

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156. AMA OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL § 5, No. 20, at 27 (1971). This pronouncement is reminiscent of the ABA's pronouncement about law as a profession rather than as a mere money-getting trade. ABA CANONS OF PROFESSIONAL ETHICS No. 12.

157. Most statements regarding credit practices are connected with section 7 of the Principles:

> In the practice of medicine, a physician should limit the source of his professional income to medical services actually rendered by him, or under his supervision, to his patients. His fee should be commensurate with the services rendered and the patient's ability to pay. He should neither pay nor receive a commission for referral of patients. Drugs, remedies or appliances may be dispensed or supplied by the physician provided it is in the best interests of the patient.

AMA OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL § 7, at VII.

158. AMA OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL § 7, Opinion 12, at 40 (1971).

159. *Id.*, Opinion 14(3), at 41 (1971).

Obviously the medical professional has not lost sight of the traditional theme that underlies its ethical pronouncements on money matters:

> One of the strongest holds of the profession on public approbation and support has been the age-old professional ideal of medical service to all, whether able to pay or not. That ideal is basic in our ethics. The abandonment of that ideal and the adoption of a principle of service only when paid for would be the greatest step toward socialized medicine which the medical profession could take.[160]

That same "age-old professional ideal" has also been a foundation of the legal profession. While the legal profession has recently adopted commercial credit practices, the context of these new developments suggests that the profession's attention to the worthy ideal of service to all has not been obscured or diminished. The remainder of this article evaluates the effect of modern credit practices on the legal profession, and argues that the adoption of such practices is ethically sound and does not threaten to reduce the profession to a mere "money-getting trade."

C. *Evaluating Credit Practice Standards of the Legal Profession*

The traditional model of providing legal services has required attorneys to assist "persons unable to pay all or a portion of a reasonable fee."[161] Thus lawyers have historically provided free legal services to indigents[162] and have permitted clients of limited means to pay relatively large fees in installments, without interest or carrying charges.

Two significant developments in our society, which have been accelerating during the past decade, have an important bearing on this traditional model[163] of extending professional services to indigents and people of moderate means.[164] First, the development of federally financed legal service projects has resulted in an enormous increase in the amount of professional services

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160. *Id.* § 1, Opinion 2, at 5 (1971).

161. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-16.

162. *Id.*, Ethical Consideration 2-25.

163. "The old ideal of the legal profession . . . that of the individual independent lawyer serving directly the individual independent client who chose his own lawyer and paid the fees out of his own funds" is changing. S. THURMAN, E. PHILLIPS, E. CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION 55 (2d ed. 1970).

164. The term "people of moderate means" is borrowed from B. CHRISTENSEN, BRINGING LAWYERS AND CLIENTS TOGETHER (1968). He roughly characterizes this group in terms of income as those earning between $5,000 and $15,000 a year. *Id.* at 5 n.8.

provided to the poor.[165] Because of the development of legal aid programs it is probable that lawyers in private practice will not be called on to provide legal services without compensation as frequently as they have in the past. Second, the increasing credit orientation of our economy[166] has reached a high level of maturity and sophistication that is characterized by the adoption of the Federal Consumer Credit Protection Act and the corresponding extensive regulations. Businessmen have become more conscious of the costs of serving their customers as "bankers" whenever they allow payment on credit for goods and services. Likewise, the consumer has become more credit conscious because of the frequent reminders of the costs of credit provided by the myriad of monthly bills he receives containing Truth in Lending disclosures. Very few sales or services to be paid for over time are available without the familiar finance charge of 1 to 1-1/2 percent per month. The staggering growth of the consumer credit industry has contributed significantly to the increased ability of the American consumer to purchase large cost items such as automobiles, furniture, appliances, and other durable goods.

These significant societal changes threaten the traditional model for assiting clients of modest means in obtaining professional services. For example, when a client is permitted to pay legal fees in installments without interest or carrying charges, the lawyer's bill will likely remain unpaid until all the bills imposing finance charges for delayed payment have been satisfied.[167] Con-

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> 165. Compared to where we were in 1964, one must conclude that the program has made a substantial dent in serving the poor. Expenditures are up sixteenfold, the number of cases handled per thousand population has quadrupled, and the total number of cases handled annually has jumped from some 380,000 to over a million.

H. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES—THE OTHER SIDE OF THE LAW 273 (1975). Yet, "observers are in agreement that the legal services effort is but a drop in the bucket, the unmet need being immense." *Id.*

166. "From the end of World War II through 1967, the amount of such credit outstanding had increased from $5.6 billion to $95.9 billion, a rate of growth more than 4 1/2 times as great as that of the economy." Mourning v. Family Publications Servs., Inc., 411 U.S. 356, 363 (1973). More recently the amount has doubled again to a high of $190.1 billion in 1974. As of March 1975, the outstanding consumer credit amounted to $184.3 billion. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1975, at 475 (96th ed. 1975).

167. An illustration of this problem in the context of the dental profession is seen in that profession's response to a recent advertisement for a credit car plan in a dental magazine:

> The most successful ad ever run by Master Charge—maybe the most successful magazine ad of 1973—was one in *Dental Economics* showing a handsome young man with a slightly crooked smile sitting in a wing chair with a small pile of envelopes in his lap, and holding up a piece of paper to be taken by his pretty wife, who leans affectionately

sequently, the "professional" aproach of the lawyer leads to a large backlog of delinquent accounts receivable that remain unpaid until the consumer sees his way clear to meet his other obligations, often incurred subsequently.[168] Since legal service costs are often extraordinary, unanticipated, and unbudgeted, the monthly paycheck is hard pressed to absorb the added burden of new installment payments related to professional services. Although the client may have every intention of paying the bill, he does not do so until he has extra cash on hand. "The inevitable result" of the traditional model "is that the attorney suffers economically by becoming a 'banker' for his client or, alternatively, being compensated at a rate not in keeping with the services performed."[169] The real loser under this system, however, is the client, and ultimately the public, since it is perhaps inevitable that the attorney will give greater attention to the clients who do not need special accommodations regarding the payment of fees.

In assessing the standards set by the legal profession for credit practices, it is essential to identify the public and professional benefits supposedly flowing from the professional standards and restrictions and to consider the conflicting values involved.[170] The core problem involved is how people "who are either financially unable to meet the expense in one payment or are reluctant to seek legal advice because of the fear of its high

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over the back of the chair, her hair brushing his cheek. "It's only the dentist's bill," the young man is saying. "He can wait." The ad drew responses from more than 40 percent of the circulation of the magazine.

M. Mayer, The Bankers 350 (1974).

168. Several professionals indicated a concern regarding their billing practices (Billing Practice Survey, *supra* note 6):

> "Billing and collecting has always been a problem in my office."
>
> "[W]e have recently become very concerned about unpaid accounts and whether or not we can help clear up the problem by employing the use of some kind of finance charge."
>
> "Billing clients is one part of private practice which I do not enjoy. I usually end up requiring a substantial retainer in order to avoid the problem of delinquent accounts or extension of credit.

169. Spiegel, *supra* note 138, at 21. The problem of unpaid accounts is illustrated by one lawyer's response to the Billing Practice Survey, *supra* note 6:

> "The head secretary now and then writes 'This account is long overdue' in red ink on the statements or indicates that the firm will halt work in progress if not paid for past work. We bill monthly for about a year and if no payment is made, simply write the debt off. Nor do we ever sue for collection, a procedure which is viewed with some distaste in this area."

170. The evaluative approach and analysis of this section was suggested by an American Bar Foundation monograph dealing with the Bar Association's restrictions on advertising. B. Christensen, *supra* note 164.

cost"[171] are affected when professional standards restrict full use of modern credit practices by attorneys.

Before lawyers are freed from all credit practice restrictions, conflicting values must be considered. Permitting attorneys greater freedom in adopting credit practices from the business world may increase the availability of legal services to people of moderate means, induce more timely and regular payment of fees, allocate the cost of extending credit more directly to those who receive the credit, foster more clearly understood financial arrangements between the lawyer and client, and improve professional relationships through reduced potential for personal feelings of guilt or conflict. These advantages must be weighed, however, against the increased actual cost of legal services to individual clients who pay in installments and the profession's concern with the "commercialization" of the practice of law.[172]

The ordering principle underlying these conflicting values is that the public interest should be served by the credit practices of the legal profession. Insofar as the public interest conflicts with the traditions of an honorable profession, the traditional professional standards should be carefully scrutinized, since the justification for restrictions on the profession "should be in the extent to which they benefit the public as a whole and can thus be said to be in the *public* interest."[173]

At first blush, it may seem paradoxical that the public interest is promoted by charging clients interest on delinquent accounts. For the individual client who must pay such interest, it is difficult to point to any benefits. Nonetheless, it can be argued that an attorney should permit clients to pay for legal services under a bank credit card plan, since there are in fact advantages to the client:

(1) he can feel free to obtain legal services even though he cannot pay for them at once;

(2) he has the convenience of paying for legal services in the same manner as he may elect to pay for other goods and services, including the postponement of the obligation to pay (without any finance charge) for as long as fifty-five days;[174] and

171. Spiegel, *supra* note 138, at 21.

172. The traditional concerns of professionals are illustrated by the comment of one attorney in the Billing Practice Survey, *supra* note 6: "I personally feel a Mastercharge or Bank Americard symbol on a secretary's desk in a law office portrays a poor professional image."

173. B. CHRISTENSEN, *supra* note 164, at 13 n.15.

174. "[T]he 25-day 'grace period' authorized under typical bank credit card plans means that sharp consumers can do their shopping immediately after receipt of their

(3) he need not explain his present inability to make payment, nor does he have to ask his attorney for special accommodations such as the privilege of paying a reduced fee or of paying the full fee in installments.Since it is the client himself who opts to use the credit card plan, he makes the decision whether the opportunity of receiving credit is worth any finance charge he might incur. The availability of such credit would thus appear to serve the public interest without unduly offending the traditions of the legal profession.[175] The profession has no concern with the manner chosen by the client of making a cash payment to the attorney for legal fees. The profession should not object to the use of a credit card plan any more than it would object to accepting money from a client who previously borrowed the payment from a bank, a friend, or a relative.

Although bank credit card plans may help attorneys extend their services to a greater number of clients of moderate means, there must be other means available for clients who are not eligible bank card holders. Furthermore, many fees will exceed the ceiling limits set by the bank for charges. Financing provided directly by the attorney himself becomes important at this point.

It is more difficult to decide whether the public interest is better served by prohibiting than by permitting attorneys to charge clients interest directly for the privilege of paying legal fees over time. Such a practice is a clear departure from the traditional model. Yet, for the public as a whole, it may be advantageous. To fully evaluate the change, one must ask how existing billing patterns and attorney-client relationships might be affected by departures from prior restrictions.

Is it fair to say that clients who pay their fees promptly under the traditional model subsidize those who pay on credit? If a retailing merchant engaged in a practice like the profession's traditional model where no finance charges are assessed, the mer-

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monthly billing, thereby 'tacking' the 25-day 'grace period' to the time period before the next billing statement. Such machinations can result in 55 or 60 days of 'free credit.'" B. Clark & J. Fonseca, Handling Consumer Credit Cases 171-72 (1972). A countervailing factor is that the client under the traditional model would have paid nothing for the privilege of paying in installments, whereas he will pay interest charges if he does not pay the credit card bill in full within the grace period.

175. *See* ABA Code of Professional Responsibility, Ethical Consideration 2-23 on limitations on suing a client for a fee. It appears that the attorney loses some control over his client's account. The client may, in fact, be sued by the credit card plan for failure to pay. The attorney's control over the decision whether or not to sue for his fees may have been delegated to the bank, although the attorney can at any time effectively repurchase the account by refunding his client's account through the credit card plan.

chant would be indirectly forcing cash customers to subsidize credit customers. The same analysis applies only roughly to the attorney-client relationship, since legal services are not always tied to standard fees. Unlike the costs of goods sold by a retailer, the cash price of legal services may vary considerably, depending on the circumstances of the individual matter and the client involved.[176] Except to the extent these fees have been reduced for a client of moderate means, however, a reasonable fee should be the same for any one client whether he pays in cash or needs to make payments in installments over a period of time. In such a case, the attorney who assesses no finance charge is actually paid more by the cash-paying client than by the client who pays over time, since the attorney is deprived of the use of the installments until they have been paid.

If the attorney is only occasionally involved in installment payment arrangements, the effect of granting credit without finance charges is minimal and there is probably no effect on the fees paid by cash-paying clients. The attorney who serves primarily clients in business or clients with wealth can probably afford to provide his services on credit to an occasional client of moderate means. But what is the effect of the traditional model on attorneys who serve almost exclusively moderate income clients? Might he not be forced to raise his fees significantly if his clients took advantage of his willingness to accept payments in installments without the imposition of any interest charges? When the proportion of clients who pay in installments increases, the attorney or his cash-paying clients will have to absorb the costs of extending credit. As the attorney encounters a volume of delinquent accounts, he will probably increase his fees or be more reluctant in extending credit in the future. If that is the case, cash-paying clients and future clients of moderate means who ask to pay in installments will be forced to subsidize the clients currently paying on account.

Why would an attorney want to impose interest charges on installment-paying clients? The attorney's primary interest is not in increasing his total earnings by assessing finance charges. He could do that by raising his charges for the legal services themselves. Furthermore, most merchants who offer revolving charge

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176. The considerations to be weighed in setting reasonable legal fees are listed in ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-106. The ability of the client to pay is not one of the factors listed, but the ethical considerations clearly state: "[P]ersons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services." *Id.*, Ethical Consideration 2-16.

accounts to their customers do not collect enough finance charges to meet their expenses.[177] The real advantage to the attorney and the public interest involved in this departure from the traditional role is that it creates an incentive for prompt payment and is a method of increasing the availability of legal services to clients of moderate means.[178] As soon as attorneys assess finance charges on delinquent accounts, their services will be treated by the bill-paying client in the same way that he handles payments for other goods and services purchased on credit; the disincentive that previously induced the client to postpone payment of the legal services bill until all others were paid will have been removed.

Are there further ethical considerations to be raised in evaluating the prompt payment discount arrangement that have not been discussed in the context of credit cards and finance charges?[179] As is reflected in the requirements of Truth in Lending, customers who fail to take advantage of such discounts are in effect being assessed a finance charge.[180] Thus, imposing interest charges and providing prompt payment discounts should be viewed as equivalents as far as ethical standards are concerned. They are both modern creditor devices that reward prompt payment and have the effect of charging consumers for the privilege of paying for goods or services on credit.

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177. NATIONAL RETAIL MERCHANTS ASS'N, ECONOMIC CHARACTERISTICS OF DEPARTMENT STORE CREDIT 53 (1972). This study of 15 retail stores from various parts of the nation by Touche, Ross, Bailey & Smart showed that the total credit servicing costs exceeded the service charge revenue by 4.13%. These results are cited in 3 R. STUCKI, UTAH CONSUMER CREDIT REPORT 69, 73 (1974).

178. In exploring the question "Why do retail merchants continue to extend credit to their customers if they incur losses in so doing?," one author explains: "The logical explanation seems to be that the merchant views credit as a selling device and a competitive necessity rather than a profitable endeavor in and of itself. Accordingly, anything that he can do to enhance total sales is of primary importance." R. STUCKI, *supra* note 177, at 74, 76. Retailers appear to accept the proposition that there is a direct relationship between sales volume and the extent to which credit terms are offered to the buying public. The professions may also discover that increased use of modern credit practices will enhance their retailer's profit motive by making their legal counsel available to a larger portion of the public.

179. Discount arrangements are more common among doctors and dentists than among lawyers, probably because of the differences in the kinds of services offered. The patient leaving the doctor's office generally knows what services have been performed and what standard costs will be assessed for those services. The doctor can, therefore, give the patient an option to be billed later or to pay the set fee immediately, in which case a discount is available. The lawyer is not often in the same position. After an initial visit, a client may know how much the lawyer's services will cost on an hourly basis, but the full fee cannot be ascertained until the services have been performed. There are major exceptions to this situation, however, where discount arrangements could be used—in simple cases involving wills, default, divorce, or bankruptcy, for instance, where an attorney charges a set fee that he can explain to the client in advance.

180. *See* text accompanying notes 76-78 *supra*.

Can it be claimed that abandonment of traditional financial arrangements will improve the quality and quantity of legal services being delivered to people of moderate means? Under the traditional model, the attorney may be inclined to pay less attention to the affairs of the client who has not completed paying for previous services than to the affairs of the client who pays his fees on schedule. Likewise, the client who, under the traditional model, becomes delinquent in his payment of legal fees may be inhibited from bringing further matters to the attorney because of feelings of guilt or embarrassment. Under such circumstances, despite the highest ideals of morality and ethics, the professional relationship is likely to suffer. On the other hand, by handling such a relationship on a business-like, credit basis, the attorney and client know from the beginning that the privilege of delayed payment for legal services will be paid for by the client.

The bar has traditionally expressed concern that the reputation of the legal profession would be damaged if its image as a noncommercial enterprise ceased to exist. As one serious critic has pointed out, however, it is doubtful that many people would be shocked or alienated by expanded commercialization of the legal profession.[181] The public simply does not connect an attorney's honor or honesty with his practice of charging clients a finance charge for delinquent accounts. Moreover, given the accepted, widespread use of credit practices throughout our economy, it seems unlikely that responsible participation by lawyers in such practices would give a pejorative, "commercial" taint to the profession.

It can also be expected that the profession's serious concern with expanding the availability of legal services will be promoted by expanding the freedom of lawyers to use credit devices. There will always be bad credit risks, and some fees will never be paid whether or not interest charges are assessed. But the consumer credit market has evidenced that all but four or five percent of credit consumers do pay their bills.[182] By assessing finance charges, and thereby giving clients a greater incentive to pay their bills promptly, attorneys may be able to cut down on the backlog of overdue accounts receivable. Attorneys might then be more willing to serve clients of moderate incomes, and those same

181. B. Christensen, *supra* note 164, at 32.

182. "Consumer credit is an actuarial science. It is based on the fact that the large majority of citizens are honest and stable, that they keep their jobs, support their families, and pay their debts." J. Turner, The Bankers Handbook 505 (1966), *cited in* M. Mayer, The Bankers 335 (1974).

clients would be more willing to seek legal services if they knew in advance that credit at reasonable rates was available to them. As bills are paid with greater promptness, attorneys may even be able to reduce the total fees they charge and still maintain the financial returns they require.

It may be that the ABA's Professional Ethics Committee considered all of the factors presented here in reaching its decision in Formal Opinion 338.[183] If so, it is unfortunate that the Committee did not discuss them. In the absence of a more emphatic and articulate approval, many attorneys may reject the new credit devices with the age-old cry that the law should avoid commercialization. This point of view overlooks the fact that modern credit practices that are carefully safeguarded by the various consumer protection laws may do much to make legal services more readily available to people of moderate incomes. The position of the American Bar Association appears to recognize this benefit to the public and the profession. In light of these considerations, members of the Bar should reassess their individual financial practices.

183. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT OPINIONS, No. 338 (1974).