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Professional Ethics Committee

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INFORMAL OPINION 2014-02

PAYMENT OF ADVANCE FEES AND COSTS BY CREDIT CARD

In 2005 this Committee opined that the Connecticut Rules of Professional Conduct permit a lawyer to receive client payments by credit card. See Informal Opinion 05-14 (2005) (Client Payments via Pay Pal Account and Credit Card). We now address this question in greater depth and in view of developments in the credit card processing market. The primary question before the Committee is whether Rules permit a lawyer to accept advances for fees and costs by credit card payment, and if so, what precautions and practices the lawyer should follow in order to comply with the Rules.

Enabling a client to use a credit card to pay already incurred fees or costs or to pay in advance can be a benefit to both the lawyer as the merchant (in financial system jargon) and the client as the cardholder. For the lawyer there is assurance of timely payment.¹ For the client there is a benefit of deferring or spreading out over time the actual disbursement of funds, and frequently the benefit of earning “points” on the client’s credit card. Furthermore, use of the credit card system enables a lawyer to provide a client with necessary and timely legal services in situations where the client is presently unable to make a fee payment or advance payment that the lawyer reasonably requires. Of course the banking system and credit card processing system have

¹ See Amy Porter, “Why It Pays To Accept Credit Cards,” *CONNECTICUT LAWYER*, May/June 2011.

associated costs and these costs are usually recovered from both the card holder and the merchant receiving the payment.

There are two principal issues: How the lawyer handles (1) credit card processing fees, and (2) chargebacks. In this Opinion, we explain the mechanics of fees and chargebacks, and how the lawyer accepting advance payment by credit card should handle them.

We have reviewed the ethics opinions and IOLTA rules of various other states. Several states have in recent years addressed credit card payments through amendment of their counterpart² of Rule 1.15 of the Connecticut Rules of Professional Conduct; this Rule generally requires safekeeping of client property and is summarized below in pertinent part. While some ethics opinions flatly proscribe receipt of advance payments of fees or costs by credit card,³ this is a distinctly minority position.

We discern a consensus on what constitutes best practices, which we discuss below. As a preliminary matter, we note that many states require that a lawyer obtain the client's written consent to payment by credit card—for fees already earned and costs already incurred, as well as for advance payments. We do not find a basis in the Connecticut Rules of Professional Conduct for such a requirement, but we do recommend obtaining such written consent before the lawyer accepts any credit card payment from the client. A properly crafted consent and engagement agreement may reduce the likelihood of a chargeback.

Connecticut Rule of Professional Conduct 1.15 (Safekeeping Property) does not restrict the type of account into which payments for fees already earned or costs already incurred may be deposited, whether payment is made by cash, check, debit card, credit card or other electronic funds transfer means. Such payments are the lawyer's property.

² See, e.g., Wisconsin Supreme Court Rule 20:1.15(e)(4)(h).

³ See Alaska Bar Assoc. Opinion 85-5 (1985), Arizona Bar Assoc. Opinion 08-01 (2008) (obviated by Arizona Supreme Court Rule 43), California Bar Assoc. Opinion 2007-172 (2007), and Vermont Bar Assoc. Advisory Opinion 89-10 (1989).

As we discuss further below, Rule 1.15 provides that absent a written agreement providing otherwise a lawyer shall hold advance payment of fees and costs as client-property in a trust account that is separate from the lawyer's own property. Such advance payments must be held in an IOLTA account if the lawyer determines that the funds would not earn income for the client in excess of the costs incurred in an individual trust account.⁴ Funds may only be withdrawn when fees are earned or costs incurred.

Credit Card Fees

As we understand the current financial services industry practice, a vendor accepting credit card payments will have a merchant bank account to which such payments are credited. Normally, credit card processing fees are debited from the merchant bank account. A typical fee is about 2.5% of the transaction amount.

Consistent with the ethical opinions or Rules of other jurisdictions that have addressed this issue, we opine here that, absent client consent to the contrary, a lawyer must pay out of the lawyer's own funds any fee associated with payment by credit card. While credit card fees are not explicitly addressed in Rule 1.15, a lawyer's overarching duty under the Rule to safeguard the client's property leads us to conclude that the lawyer must absorb such charges—that is, must treat them as an overhead cost or ordinary cost of doing business—unless the client has in writing agreed to some other arrangement.⁵ This is true whether the client payment represents an advance for fees or costs, or constitutes fees already earned or costs already incurred.

Rule 1.15(d) provides that advance payments may only be deposited into a “client trust account,” which we understand to be either the lawyer's IOLTA account or an individual trust account that the lawyer maintains for the benefit of the client, absent a written agreement providing

⁴ Rule 1.15(e). Since the most common trust account is an IOLTA account, we refer to that type of account hereafter.

⁵ While the Rules of Professional Conduct would permit a lawyer and client to reach an agreement whereby the client will pay the credit card fee, we note that Conn. Gen. Statutes 42-133ff(a) provides that “[n]o seller may impose a surcharge” on a credit card transaction. That provision might be interpreted as prohibiting a client from agreeing in writing to compensate the lawyer for the merchant card fee.

otherwise. This means that when advance payments are made by credit card, the lawyer must, absent written client consent otherwise, immediately deposit the lawyer's own funds into the client trust account to cover any charge that has been debited from the client's payment by the card-issuing bank or processor.⁶ As indicated in the next section of this Opinion, there exist commercial credit card processing businesses which represent that their services enable a lawyer to avoid having the lawyer's IOLTA account absorb the cost of the credit card fee, by charging the fee to an account (designated by the lawyer) that contains only the lawyer's funds—e.g., the lawyer's operating account.

Chargebacks

A credit card holder may dispute the validity of a charge after having authorized the credit card payment, commonly by asserting that the goods and services bargained for have not been delivered as agreed upon. In such a circumstance, the holder (for our purposes, the client) acting through the holder's card-issuing bank can cause a "chargeback"—a debit from the bank account of the merchant (here, the lawyer)—of the prior authorized credit payment. We have been advised by several credit card processors that a chargeback typically will be made within one or two months, but that as many as nine months may elapse between the payment credit and the chargeback debit. A chargeback can be contested by the lawyer within the rules of the banking and credit card processing systems.⁷

⁶ The provisions of Rule 1.15 were clearly not written with credit card payments in mind. For instance, section (c) allows the lawyer to put the lawyer's own funds into a client trust account in order to pay "bank service charges," but there is no mention of payment of credit card fees. Some states have updated Rule 1.15(c) to explicitly provide that lawyers may also deposit funds in a client's trust account in order to cover the shortfall caused by fees associated with credit card payments. See, e.g., North Dakota Rule 1.15(b). The Committee believes that Connecticut's Rule 1.15(c) should likewise be updated. Even without an amendment, however, we believe that Rule 1.15, entitled "Safekeeping Property," not only permits but *requires* that the lawyer deposit the lawyer's own funds to an IOLTA or other client's trust account to cover credit card fees, absent a written client agreement saying that the client will absorb such fees. In the absence of the client's written agreement to pay credit card fees, we consider the lawyer's payment of the fees by depositing the lawyer's own funds into an IOLTA or individual trust account to be payment to the account of funds that actually belong to the client.

⁷ The Committee has been informed by financial services professionals that chargebacks to lawyers occur infrequently and are often decided in favor of the lawyer. The Supreme Court

Rule 1.15(e) requires that when a lawyer keeps funds belonging to different clients, those funds may be comingled only in the lawyer's IOLTA account. Any chargeback that debits the IOLTA account would debit the entrusted funds of other clients if a client initiates a chargeback after the lawyer has withdrawn part or all of the advance payment. While it might be possible to manage an IOLTA account so that a client's advance payment would not be withdrawn until the allowable chargeback period has expired, in our opinion unless a lawyer's fund management system is sufficient to avoid risk of exposing IOLTA account funds of one or more clients to the possibility of a chargeback debit associated with another client, then the lawyer should not use such arrangement.

For credit card payments of already earned fees and incurred costs, the typical arrangement is to have the lawyer's operating account be the merchant account into which payments are credited and from which fees and chargebacks are debited. This arrangement does not implicate any provision of the Rules of Professional Conduct. If the lawyer and client desire that advance payments be made by credit card, however, the best way to ensure compliance with Rule 1.15(d) (requiring that lawyers place client funds in a trust account), Rule 1.15(e) (providing that lawyers may comingle client funds only in an IOLTA account), and Rule 1.15 as a whole (requiring that lawyers safeguard all client funds) is for a lawyer to have two different merchant accounts: the IOLTA account for receiving fees and costs paid in advance, and the lawyer's operating account for debiting all credit card fees and chargebacks—as well as for receiving payments of earned fees and incurred costs.⁸ With such an arrangement in place, the lawyer would be able to designate which account—the IOLTA account or the operating account—should be credited with a given credit card payment, while the lawyer's operating account would be charged all credit card fees and chargebacks.

recently held that the federal Credit Repair Organizations Act does not preclude enforcement of a written agreement obligating the client to arbitrate the dispute underlying the chargeback. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

⁸ See, e.g., North Dakota Ethics Opinion 09-05 (2009); State Bar of Michigan Ethics Opinion RI-344 (2008); Oregon Bar Assoc. Formal Opinion 2006-172 (2005).

Financial professionals have advised the Committee that there are credit card processors (entities whose purpose is to facilitate the transaction between the card-issuer bank and the merchant bank) operating in Connecticut that enable lawyers to have two credit card merchant accounts in accordance with the procedures we have recommended. See www.lawpay.com, www.lawcharge.com, and www.atticus.com.⁹

There may well be alternative ways of complying with the requirements of Rule 1.15. We recommend the procedures set forth above because they ensure the proper handling of credit card processing fees and avoid comingling of client property and the lawyer's property, even for a short period of time. However, we opine that it would also be permissible for a credit card advance payment to be credited to a lawyer's operating account provided such advance payment is without delay transferred to an IOLTA account (or to an individual client trust account). As long as the funds are immediately transferred to a client trust account, their initial receipt into the lawyer's operating account may be understood as facilitating the transaction between the lawyer and the client. In these circumstances, the funds are not "held" or "kept" with the lawyer's property, which is prohibited by Rule 1.15(b). See Informal Opinion 05-14 (opining that where a client pays unearned fees through PayPal to the lawyer's operating account and the lawyer within 24 hours transfers the funds to a trust account, Rule 1.15(b) is not violated because the operating account is merely a "temporary conduit" to receive and transfer client funds).

Other Issues

Any credit card transaction must be consistent with the confidentiality requirements of Rule 1.6, and the communication requirements of Rule 1.4. The client, as well as the lawyer, should understand that entities such as banks and credit card processing companies may routinely be able to access and question credit card transactions of the client. If in that connection a merchant-lawyer is required to give any information about the nature of the charge, we suggest it should be no more revealing than "legal services" or "professional services."

⁹ See also Connecticut Bar Association Membership Benefits, Office Savings, "LawPay – Credit Card Processing for Attorneys". See also, advertisement of [lawpay.com](http://www.lawpay.com) in CONNECTICUT LAWYER, September 2013.

A lawyer making arrangements to receive payments by credit card should also be mindful of the requirements of pertinent tax laws, financial regulations, and standards—such as the Truth in Lending Act, the Electronic Fund Transfer Act, Internal Revenue Code Section 6050W, and the Payment Card Industry Data Security Standards (PCI-DDS).

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____
John R. Logan, Chair