

Louisiana State Bar Association
Rules of Professional Conduct Committee
PUBLIC Opinion 12-RPCC-019¹

November 29, 2012

Accepting Credit Cards for Payment of Fees and Costs

A lawyer may accept credit cards in payment for legal services rendered or advanced for fees and/or costs as long as the lawyer abides by the applicable Louisiana Rules of Professional Conduct, including those pertaining to proper communication with the client, fees and expenses charged, confidentiality, and the safekeeping of property. Any credit card agreement between the lawyer and credit card vendor must allow a lawyer to be compliant with the appropriate Rules.

The Committee has evaluated the ethical ramifications of lawyers accepting credit cards in payment of their services or costs. In its consideration, the Committee believes that Rules 1.4, 1.5, 1.6(a), and 1.15 of the Louisiana Rules of Professional Conduct are most relevant.

More and more clients are requesting to use credit cards to pay lawyers' fees for services rendered or to be rendered. In order to accommodate the needs of their clients, many lawyers and law firms enter into so-called "merchant agreements", or contracts with vendors, to offer this service². Before contracting with a vendor/credit card company, the lawyer should study the

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² Other laws, including IRS regulations, should also be considered by a lawyer before deciding to accept credit cards. For instance, pursuant to the Housing Assistance Tax Act of 2008, credit card processing companies, beginning January 1, 2013, will be required to verify and match each merchant's federal tax identification number ("TIN") and business name with those on file with the IRS. Missing or incorrect TIN/name information may result in the imposition of "backup withholding" of 28% of the credit card amounts being processed. For more

agreement carefully to make sure that the obligations imposed would not require the lawyer to violate any of the Rules, and communicate to the client any special fee arrangements which may be required by the client's use of the credit card.³ Among the issues that the lawyer should consider are the following:

- (1) Does the lawyer intend to charge the clients for any "transaction fee" associated with the use of the credit card, and has the lawyer obtained the necessary informed consent to do so?
- (2) Does the credit card merchant require disclosures of any confidential information to

information on this topic, please see the April 2012 *California Bar Journal* article, [New IRS Section 6050W What is it, and How it Affects Attorneys](#).

³ As "merchant agreements" or contracts may differ in content, it is not possible here to anticipate all of the possible variations. See Opinion 348, of the District of Columbia Bar III.A, which outlines several of the provisions which are found in typical agreements, some of which relate to fees charged and confidentiality, and which might not be known or understood by the client unless the lawyer communicates them to the client properly:

"• Requirement that reimbursement of unused fees must be credited to the user's card and not paid by cash or check;

• Requirement that the cardholder (client) have 'chargeback' rights pending resolution of a dispute (i.e., the credit card company has the right to access the lawyer's account to debit funds previously deposited into that account and charge them back to the cardholder),

• Provision that in disputes, no 'chargeback' is made, but the client would not be charged until the matter is resolved (both parties would have an opportunity to submit evidence and have the matter resolved by the company's dispute resolution section);

• Prohibition on charging for services before services are rendered;

• Requirement that payments made to the lawyer by the credit card company be made through an approved Settlement Account."

- process the charge, and has the client provided informed consent as to that disclosure?
- (3) Has the lawyer considered whether to link the credit card merchant agreement to an operating account or a trust account, given that the funds may be required to be held in trust?
- (4) If the lawyer elects to link the credit card to a trust account, has the lawyer provided that any “charge backs” must only come from the operating account to avoid unintentional conversions?

As the credit card arrangement is a special circumstance requiring the client’s informed consent, in keeping with the Louisiana Rules of Professional Conduct the lawyer should communicate with the client, preferably in writing, regarding the obligations of the client and the lawyer under the credit card arrangement.⁴

The use of the credit card typically involves a “transaction fee”, which often is calculated as a small percentage of the transaction amount.⁵ If the lawyer treats the transaction fee as an

⁴ Rule 1.4 Communication: “(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;...”

Rule 1.0: (e) “...(c) ‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

Rule 1.5(B): “... The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing with the representation,...”

⁵ The Committee understands that the credit card vendor typically subtracts this transaction fee from the amount remitted to the lawyer. For instance, if the original charge amount was \$500.00 and the transaction fee is 2% of that amount, the credit card vendor would subtract \$10.00 from the remittance, credit the lawyer’s bank

overhead expense, the lawyer must make arrangements to treat the remittance received from the credit card company as a remittance in satisfaction of the entire amount owed. If the lawyer intends that the client still must pay the difference between the original charge amount and the remittance received (i.e., the “transaction fee”), then the lawyer must be certain to comply with Rule 1.8(e)(3) and obtain the informed consent of the client for such a charge.⁶ By way of example, if the client uses a credit card to pay a \$500.00 advance deposit with a lawyer subject to a 2% “transaction fee”, and if the lawyer treats the “transaction fee” as an overhead expense, the lawyer must add \$10.00 from his operating account to the trust account such that the client enjoys the benefit of an undiminished \$500.00 trust balance as a result of the credit card transaction. Alternatively, with the informed consent of the client, the lawyer could reflect that the original intended trust balance of \$500.00 has been reduced to \$490.00 to offset the “transaction fee”, thus leaving the client with a reduced trust balance of \$490.00 rather than the full \$500.00. Lawyers should be aware, however, that some credit card vendors prohibit the lawyer (merchant) from passing “transaction fees” through to the client (consumer). In such cases, the latter option described above would not be available to the lawyer, and the lawyer would be required to treat the “transaction fee” as an “overhead” cost.⁷ There is also a

account for \$490.00, and seek to bill and collect the entire \$500.00 from the client. The Committee does not believe this practice constitutes the impermissible sharing of a legal fee with a non-lawyer pursuant to Rule 5.4, and is aware of no authority to the contrary.

⁶ Rule 1.8(e)(3) provides: “... (3) *Overhead costs of a lawyer’s practice which are those not incurred by the lawyer solely for the purposes of a particular representation, shall not be passed on to a client. Overhead costs include, but are not necessarily limited to, office rent, utility costs, charges for local telephone service, office supplies, fixed asset expenses, and ordinary secretarial and staff services.*”

With the informed consent of the client, the lawyer may charge as recoverable costs such items as computer legal research charges, long distance telephone expenses, postage charges, copying charges, mileage and outside courier service charges, incurred solely for the purposes of the representation undertaken for that client, provided they are charged at the lawyer’s actual invoiced costs for these expenses...”

⁷ See Opinion 348, District of Columbia Bar, and footnote 9 therein: “... *At least one other jurisdiction considering this issue has found that the fees charged by the credit card company ‘are legitimate costs that the attorney may pass on to the client.’*” *Utah State Bar Ethics Advisory Op. No. 97-06 (1997).*

distinction between a reasonable “transaction fee” and, for example, a monthly charge for a credit card processing machine that should only be considered as a non-recoverable overhead cost of the lawyer’s practice.

Use of a credit card by the client may impose on the lawyer, under the lawyer’s agreement with the credit card company, certain obligations to reveal confidential information, some of which the client may not understand would have to be revealed, such as the client’s name, address and nature of the services provided. If the lawyer is unable to find or negotiate an agreement with the vendor/credit card company to use “service descriptions” of a generic nature, such as “services rendered,” the lawyer must comply with Rule 1.6(a) by advising the client of the required disclosures and seeking the client’s informed consent. Clients should also be informed that if there is a dispute regarding charges among the client, the lawyer and credit card vendor/company, confidential information may not be protected due to exceptions contained in Rule 1.6.⁸

“Merchant agreements” or contracts usually require that the lawyer’s credit card account must be linked to a bank account of the lawyer. This has significant implications if trust account funds are involved. In the event of a client dispute with regard to the lawyer’s fee, depending on the terms of the “merchant agreement”, the bank/credit card company may have the right to “charge back” the disputed amount to the lawyer’s account, regardless of whether the bank account is a

Rule 1.5, Fees: “(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses ...”

⁸ Rule 1.6(a), Confidentiality of Information: “...(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent,....(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:...(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,...”

See also Colorado Formal Ethics Op. 99 (1997) ... A lawyer cannot assume that a client who is paying a bill by credit card has impliedly authorized the attorney to disclose otherwise confidential information.

trust account or an operating account. Assume that a lawyer appropriately has a trust account for the purpose of receiving advanced deposits for fees and/or costs. If (a) earned fees or funds for costs for a client have been transferred from the lawyer's trust account to the lawyer's operating account, (b) the client thereafter disputes the fees or costs, and (c) the credit card account is linked to the trust account, a "charge back" by the credit card company against the lawyer's trust account may result in a failure to safeguard or conversion of other clients' funds in violation of Rule 1.15.⁹ On the other hand, if a lawyer's credit card processing account is linked to the lawyer's operating account, it would be a violation of Rule 1.15 to place advanced deposits for fees and/or costs provided by a client using a credit card directly into the operating account, as those funds should properly be placed in the trust account. In other instances, when a lawyer might be collecting a payment for work already performed and/or receiving a flat fee, the funds may be placed directly into the operating account, since the funds become the property of the lawyer when paid¹⁰.

⁹ Rule 1.15: "...*(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property...*", and "...*(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred...*"

¹⁰ For an explanation of the handling of client and third party funds please see the publication [The Louisiana Lawyer and Other People's Money: A Guide to Managing Client Funds](#), which can be found on the "online publications" section of www.LSBA.org.

As for flat fees, while they may be placed in the operating account, one conservative approach may be to place the flat fee amount initially into the trust account until the work has been performed. If a fee is questioned, Rule 1.5(f)(2) and (5) provide:

- (f) Payment of fees in advance of services shall be subject to the following rules: ...*
- (2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account...*
- (5) When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee*

Thus, “best practices” would recommend that a lawyer have both the trust account and the operating account linked to the lawyer’s credit card account protecting a client so that funds received from the client’s credit card may be placed correctly into the proper account. The “merchant agreement” or contract between the vendor/credit card company and lawyer should also provide that any “charge back”, other disputed transaction, or costs associated with using the credit card will be charged solely to the lawyer’s operating account. In short, care should be taken by the lawyer to make sure that the lawyer’s agreement with the bank/credit card company does not contain any provisions which would trigger a violation to Rule 1.15, *Safekeeping of Property*. A lawyer accepting credit cards, therefore, should take steps to make sure that any bank/credit card company used for credit card transactions with clients will be responsive to the ethical requirements of the lawyer. The lawyer should review any “merchant agreements”/contracts and make sure they allow the lawyer to be compliant with the Louisiana Rules of Professional Conduct¹¹.

dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer’s contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the [Louisiana State Bar Association Fee Dispute Program](#).

¹¹ The Committee is aware that some vendors, such as [LawPay](#) or others, may focus on the handling of credit card arrangements with lawyers’ accounts. Whatever vendor/company is used, a lawyer has an obligation to ensure that the “merchant agreement” and transactions permit a lawyer to meet all ethical standards. While some jurisdictions may have approved a web-based payment processing service allowing for an intermediate account where funds are not placed directly into a lawyer’s trust account but soon thereafter transferred there, other jurisdictions have not. Lawyers should be wary if client funds will not flow directly to the lawyer because the lawyer

Conclusion

The Committee is of the opinion that a lawyer may ethically accept credit cards for payment of reasonably earned fees and/or in situations where money is advanced by the client for fees to be earned or for costs, provided that the lawyer has reviewed the “merchant agreement” or contract with the credit card vendor and nothing therein requires the lawyer to violate any of the Louisiana Rules of Professional Conduct. Furthermore, the lawyer should explain to the client any requirements contained in the agreement which may affect client confidentiality and which the client might not understand may be required by the use of the card, and obtain the client’s informed consent with respect to any necessary disclosures and/or the treatment of transaction fees. Additionally, the transactions should not be linked to bank accounts in a manner that exposes the lawyer’s trust account to “charge backs” or credit card costs arising from client disputes and/or transaction costs. The accounts must be arranged to protect clients’ funds and to keep them separate from the lawyer’s own property.

In conclusion, a lawyer may accept credit cards in payment for legal services rendered or advanced for fees and/or costs as long as the lawyer abides by the applicable Louisiana Rules of Professional Conduct, including those pertaining to proper communication with the client, fees and expenses to be charged, confidentiality, and the safekeeping of property. Any credit card agreement between the lawyer and credit card vendor must allow a lawyer to be compliant with the appropriate Rules.

may inadvertently violate Rule 1.15 if the funds at issue are not directly placed in trust. One way to avoid this concern would be to use an internet payment processing service only for earned and/or flat fees, but not for advanced deposits for fees and/or advanced costs.