



ISBA Professional Conduct Advisory Opinion

Opinion No. 14-01
May 2014

Subject: Client Funds and Property; Fees and Expenses

Digest: A lawyer may accept payment for earned services and expenses by credit card, but any security retainers paid by credit card must be deposited directly into the lawyer's trust account. A lawyer accepting credit card payments for both earned fees and security retainers should designate two accounts – one a business account, and a one a trust account – to receive the payments. Further, given the complexity of the rules implicated by credit card payments, a lawyer must obtain a thorough understanding of the agreement he or she will sign with the credit card company before accepting credit card payments. Also, the Rules of Professional Conduct do not prohibit a lawyer from charging a service fee to a client when the client uses a credit card, so long as the fee is reasonable and disclosed in advance to the client, preferably in writing.

References: Illinois Rules of Professional Conduct 1.5, 1.6, and 1.15;

Dowling v. Chi. Options Assocs., Inc., 226 Ill. 2d 277 (2007);

In re Vrdolyak, 137 Ill. 2d 407 (1990);

In re Johnson, 133 Ill. 2d 516 (1989);

In re Gerard, 132 Ill. 2d 507 (1989);

In re Lewis, 118 Ill. 2d 357 (1987);

In re Elias, 114 Ill. 2d 321 (1986);

In re Enstrom, 104 Ill. 2d 410 (1984);

In re Clayter, 78 Ill. 2d 276 (1980);

In re Kutner, 78 Ill. 2d 157 (1979);

COLO. BAR ASS'N, FORMAL OP. 99 (May 10, 1997);

D.C. BAR OP. 348 (Mar. 2009);

KY. BAR ASS'N, ETHICS OP. KBA E-426 (Mar. 23, 2007);

LA. STATE BAR ASS'N, PUBLIC OP. 12-RPCC-019 (Nov. 29, 2012);

STATE BAR OF MICH., ETHICS OP. RI-344 (Apr. 25, 2008);

NEB. ETHICS ADVISORY OP. FOR LAWYERS No. 95-4 (1995);

STATE BAR OF N.M., ADVISORY OP. 2000-1 (2000);

N.C. STATE BAR, 2009 FORMAL ETHICS OP. 4 (Apr. 24, 2009);

ORE. STATE BAR, FORMAL OP. 2005-172 (Aug. 2005);

WASH. STATE BAR ASS'N OP. 2214 (2012);

VA. STATE BAR, LEGAL ETHICS OP. 1848 (Apr. 14, 2009);

VA. STATE BAR, LEGAL ETHICS OP. 999 (Nov. 13, 1987).

FACTS

An attorney would like to accept payment for a retainer through his client's credit card. The credit card company requires that payments received by the attorney be deposited into the lawyer's business account, rather than his trust account. As a result, the attorney will have to write a check or use other means to transfer the retainer from the business account to the trust account. Further, the attorney would like to charge a service fee for accepting credit card payments, and he proposes to clearly note the service fee in the engagement agreement with the client.

QUESTIONS

1. May the attorney accept payment for retainers by credit card, where the retainer must be deposited initially into the lawyer's business account rather than his trust account?
2. May the attorney charge a service fee for accepting payments by credit card, if the service fee is clearly stated in the engagement agreement?

OPINION

Question 1

As a general matter, the Illinois Rules of Professional Conduct do not prohibit a lawyer from accepting a client's payment for legal services through a credit card, rather than a more traditional form of payment such as cash or check, so long as the fee to be collected is reasonable

and otherwise consistent with the requirements governing fee arrangements set forth in Illinois Rule of Professional Conduct 1.5. However, given the complexity of the professional conduct considerations involved in accepting credit card payments, some of which are noted in this opinion, the Committee believes the lawyer is obligated to review and obtain a thorough understanding of the agreement he or she must sign with credit card companies in order to accept credit card payments. In some instances, it may not be possible for a lawyer to accept a credit card company's terms and comply with the Rules of Professional Conduct.

The primary professional conduct issue implicated by Question 1 involves the way in which accepting payment by credit card relates to the lawyer's duties for handling client and lawyer property under Rule 1.15. Under Rule 1.15, a lawyer is required to "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." Further, the lawyer must deposit client or third-party funds "in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person." The lawyer must keep detailed, complete records of client trust account funds as required by Rule 1.15(a). Moreover, "[a] lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose."

Whether and how a lawyer may ethically accept credit cards to pay for legal services and expenses first turns on whether the payment to be made is the lawyer's property or the client's property. If the payment to be made by credit card constitutes payment (1) for services rendered or expenses incurred, (2) in satisfaction of a fixed-fee agreement, or (3) for a general or advance payment retainer, the payment is generally the property of the lawyer and may *not* be deposited in the lawyer's client trust account. *See* RPC 1.15(a) & (c); *Dowling v. Chi. Options Assocs., Inc.*, 226 Ill. 2d 277 (2007) (discussing different types of retainers). As a result, Rule 1.15 would not prohibit a lawyer from collecting one of these types of payments by credit card and designating the lawyer's business account as the account to receive such payments.

For purposes of this opinion, however, the Committee assumes the payment to be made by credit card constitutes a "security retainer" – a retainer that "secures payment for future services and expense" and that therefore "remain[s] the property of the client until applied for services rendered or expenses incurred" and is refunded if funds are not applied. RPC 1.15 cmt. 3[B]; *see also Dowling*, 226 Ill. 2d at 287. Under Rule 1.15(a) & (c), a lawyer must deposit a security retainer in a client trust account and keep the funds separate from the lawyer's own property until the lawyer applies the retainer funds to charges for services rendered or expenses incurred.

The question presented to the Committee assumes that retainer payments by credit card would be deposited into the lawyer's business account and then moved into the lawyer's client trust account. This practice would amount to impermissible commingling under Illinois law, even though the lawyer intends the funds to reside in the business account only temporarily.

The Illinois Supreme Court has long held that "it is essential that a client's money be held in such a manner that there can be no doubt that the money does not belong to him personally." *In re Johnson*, 133 Ill. 2d 516, 531 (1989) (quotations and citations omitted). "Strict compliance . . . insures the safety and integrity of clients' funds while in the possession of an attorney." *In re*

Elias, 114 Ill. 2d 321, 333 (1986). The rule “is intended to guard not only against the actual loss of the funds but also against the risk of loss,” *In re Johnson*, 133 Ill. 2d at 531, because “[t]he commingling of funds and depositing [of] clients’ funds in an account standing in the attorney’s name alone endangers the security of the interests of those to whom the money belongs,” *In re Clayter*, 78 Ill. 2d 276, 281 (1980); *accord In re Lewis*, 118 Ill. 2d 357, 362 (1987) (“Commingling or converting a client’s funds is a matter of tremendous concern as it puts the client’s money at risk of depletion or loss to creditors of the attorney entrusted with its safekeeping.”). “[W]hen funds belonging to another are deposited in an attorney’s personal account, there is the danger of the conversion of the fees by operation of law.” *In re Clayter*, 78 Ill. 2d at 281. For example, “in case of the death or insolvency of an attorney, these funds could well become assets of the estate, leaving the rightful owner with only a claim of a creditor against the attorney’s estate.” *Id.*; *see also In re Enstrom*, 104 Ill. 2d 410, 417 (1984) (client funds placed in the lawyer’s personal account were converted by operation of law when the IRS issued a levy on the lawyer’s account). As a result, “[e]ven if the act [of commingling] was unintentional or technical, an attorney who commingles or converts client’s funds is subject to discipline. The motive or intent of the attorney is not relevant to determining whether the attorney violated the [Rules of Professional Conduct].” *In re Vrdolyak*, 137 Ill. 2d 407, 427-28 (1990).

Accordingly, the Committee believes it would be improper to deposit credit card proceeds for “security” retainers into a lawyer’s business account, even if the funds resided there only temporarily. Rather, security retainers, even when paid by credit card, must be deposited into a lawyer’s trust account. A lawyer cannot circumvent this professional obligation by including disclosure statements in the engagement agreement with the client.

A lawyer who accepts credit card payments for both earned fees (the lawyer’s property) and security retainers (the client’s property) should designate two accounts – a trust account and a business account – with the credit card company. The lawyer would have credit card proceeds for earned fees, advance and general retainers deposited into his or her business account and credit card proceeds for security retainers deposited in his or her trust account. The lawyer would have to exercise care, or issue appropriate instructions to the credit card company, to ensure that funds are credited to the proper account. This conclusion is in line with the conclusions of a number of other state bar authorities. *See* COLO. BAR ASS’N, FORMAL OP. 99 (May 10, 1997); KY. BAR ASS’N, ETHICS OP. KBA E-426 (Mar. 23, 2007); STATE BAR OF MICH., ETHICS OP. RI-344 (Apr. 25, 2008); NEB. ETHICS ADVISORY OP. FOR LAWYERS No. 95-4 (1995); STATE BAR OF N.M., ADVISORY OP. 2000-1 (2000); N.C. STATE BAR, 2009 FORMAL ETHICS OP. 4 (Apr. 24, 2009); ORE. STATE BAR, FORMAL OP. 2005-172 (Aug. 2005); VA. STATE BAR, LEGAL ETHICS OP. 999 (Nov. 13, 1987).

The Committee is aware that several state bar associations have approved of lawyers designating their trust account for all credit card payments, on the rationale that the rules of professional conduct already contemplate some situations where earned fees or other non-client funds will be housed temporarily in a lawyer’s trust account. *See, e.g.*, KY. BAR ASS’N, ETHICS OP. KBA E-426 (Mar. 23, 2007); ORE. STATE BAR, FORMAL OP. 2005-172 (Aug. 2005); VA. STATE BAR, LEGAL ETHICS OP. 999 (Nov. 13, 1987). The Committee is of the contrary view and believes that placing client and non-client credit card payments into the lawyer’s trust account is impermissible. That arrangement contemplates regular and potentially extensive commingling of lawyer and client funds, far beyond that suggested by the Rules of Professional Conduct, *see* RPC

1.15(c), and is inconsistent with the Illinois Supreme Court's longtime disapproval of commingling. As a result, a lawyer who accepts both security retainers and earned fees by credit card should not deposit all such funds into a single account, trust or business.

Placing payments made by credit card into a trust account raises other concerns under the Rules of Professional Conduct that the lawyer must consider, given that a lawyer is obligated to maintain a balance in the trust account that is sufficient at all times to satisfy the amount owed to clients:

- First, the lawyer must deposit into the trust account an amount sufficient to pay all service fees charged by the credit card company. This is expressly permitted by Rule 1.15(b).
- Second, the lawyer must consider issues involving "chargebacks." The Committee understands that credit card companies give their customers (here, the lawyer's client) a period of time in which to dispute a charge. When the customer informs the credit card company of a dispute, the credit card company removes the charge from the customer's (client's) account pending investigation of the dispute and charges it back to the merchant's (lawyer's) account. If the chargeback is accomplished by withdrawing funds from the trust account and the lawyer has withdrawn the disputed amount believing that the fees had been earned, the trust account will be depleted below the required level, and the lawyer will have violated the Rules of Professional Conduct. There may be several possible solutions to this problem, but for purposes of this opinion, the Committee advises lawyers who accept credit card payments to review carefully the credit card company's terms to determine if those terms are consistent with the Rules of Professional Conduct. Other state bar associations have more specifically addressed the issue of chargebacks; the Committee references these opinions for informational purposes but declines at this time to opine on the nature of permissible or impermissible chargeback arrangements. *See* LA. STATE BAR ASS'N, PUBLIC OP. 12-RPCC-019 (Nov. 29, 2012); N.C. STATE BAR, 2009 FORMAL ETHICS OP. 4 (Apr. 24, 2009); D.C. BAR OP. 348 (Mar. 2009); STATE BAR OF MICH., ETHICS OP. RI-344 (Apr. 25, 2008); STATE BAR OF N.M., ADVISORY OP. 2000-1.

Finally, regardless of how the lawyer decides to structure his business and trust accounts with the credit card company, lawyers accepting credit cards for payment for legal services must be mindful of their duties of confidentiality under Rule 1.6. The Committee has identified two confidentiality issues (there may be others) involved in accepting payment for legal services by credit card:

- First, the Committee understands that credit card issuers generally require a description on the credit card charge slip of the goods and services provided. In furnishing such a description, the attorney may not disclose confidential information without the client's informed consent. *See* RPC 1.6(a). To that end, the description should be general in nature, such as "for professional services rendered" or for "fees and expenses." Moreover, lawyers should advise clients that certain information relating to their representation, such as the client's identity, will be revealed to the credit card company when the credit card is charged. "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." COLO. BAR ASS'N, FORMAL OP. 99 (May 10, 1997). Further, "[w]here a client informs a lawyer that he wishes the fact of being represented to remain confidential, or a lawyer has reason to believe that he does, the lawyer should be especially vigilant in informing the client that

the use of credit cards involves the disclosure of some confidential information, and of the kind of information that is likely to be disclosed.” D.C. BAR OP. 348 (Mar. 2009).

- Second, the Committee understands that some credit card companies require the merchant (here, the lawyer) to cooperate with the company in the event there is a dispute between the customer (here, the client) and the company. The Committee believes the lawyer should seek to enter into an agreement with the credit card company that relieves the lawyer of any obligation to cooperate with the credit card company in the event of a dispute. If that is not possible, the lawyer should advise the client as to the ramifications of this obligation and obtain the client’s informed consent. Nevertheless, in a dispute between the client and the credit card company, the lawyer still must comply with Rule 1.6’s confidentiality obligations. *See* D.C. BAR OP. 348 (Mar. 2009).

Question 2

Rule 1.5(a) provides that a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. A client’s acquiescence to an excessive or unreasonable fee does not purge the lawyer’s misconduct of its unethical character. *In re Gerard*, 132 Ill. 2d 507, 523 (1989). “[W]here there is an unconscionable fee fixed in an attorney-client agreement, the matter is subject to action by the Attorney Registration and Disciplinary Commission.” *In re Kutner*, 78 Ill. 2d 157, 163-64 (1979).

Rule 1.5(b) requires a lawyer to communicate to the client, preferably in writing, before or within a reasonable time after commencing the representation, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible.

Thus, it is permissible, at least under the Illinois Rules of Professional Conduct, for the attorney to charge a service fee for accepting payments by credit card if the service fee is reasonable and the fee is disclosed to the client, preferably in writing, before or within a reasonable time after commencing the representation, such as in the engagement agreement. Whether charging clients a service fee for credit card transactions would violate some contractual provision with the credit card company, or a rule, law, or regulation other than the Illinois Rules of Professional Conduct, is beyond the scope of this opinion. *See* WASH. STATE BAR ASS’N OP. 2214 (2012); VA. STATE BAR, LEGAL ETHICS OP. 1848 (Apr. 14, 2009).

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