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Practice Tips

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PAYING A RETAINER BY CREDIT CARD: WHERE SHOULD THE PAYMENT GO?

We frequently get calls from attorneys asking whether or not they can accept credit card payments, whether for a flat-fee or a retainer fee. They couldn't find a Nevada-specific rule on point and want to make sure it's not prohibited.

There is no rule prohibiting attorneys from accepting credit card payments. But there are a couple of issues that credit card payments bring up that implicate the Rules of Professional Conduct, especially where an unearned retainer is concerned.

One issue – and this was from an actual caller – is if the client needs to be credited the full amount he or she paid the attorney or just the amount the attorney nets after the credit card company takes its processing fees?

RPC 1.5, which governs fees and expenses, doesn't specifically address credit card fees, but does prohibit charging an unreasonable amount for expenses. Our advice to the attorney is straightforward, if you are going to deduct your credit card fees from the amount credited to the client, the client has to be informed and, of course, consent to the deduction.

Further, if this approach is taken, the client should first be apprised of the amount of the processing fee and, although a written agreement is not necessarily required outside of contingency fee agreements, it's certainly recommended in these instances.

Most attorneys indicate that they give the client full credit for the credit card payment and absorb the fees. Instead, they often ask, where should they deposit it?

We get asked if it's okay to have the payments go into the IOLTA account, especially in the case of unearned retainer fees. It sounds logical, especially when the retainer is unearned. However, there are a couple of concerns to keep in mind when putting the payments into an IOLTA account. First, if the credit card company also collects its fees and charges from the IOLTA account, then other clients' monies may be at risk.

Secondly, "chargebacks" may occur with credit card payments; a customer who believes that he or she was unfairly charged can complain to the credit card company. The credit card company often credits the customer the amount of the disputed charge pending an investigation. The credit card company also debits the disputed amount from the merchant's account during the investigation, hence the chargeback. We initially learned of this issue through bar complaints, wherein the unhappy credit card-paying clients complained to both the state bar and the credit card company.

Chargebacks can be problematic if the attorney has already removed the funds from the trust account, because other clients' funds are necessarily affected as a result and the problem is compounded if the attorney cannot immediately replace the amount removed. The misappropriation, although not intentional, falls afoul of RPC 1.15 (Safekeeping Property).

Next we get asked if the fee can first be deposited into the attorney's general account. This approach keeps other clients from being affected by fees and chargebacks, as only the attorney's money is impacted. However, if unearned funds are being deposited into the general account, commingling occurs in violation of RPC 1.15(a). Although the caller often says that he or she will check the account on a frequent basis and transfer the funds, commingling is still taking place. The only question is, how long does the violation occur?

My advice to callers who wish to accept credit card payments is to have a second trust account

serving as a clearing account. Once the amount clears, the funds can be transferred into the appropriate account. This resolves the concerns about safekeeping property in the IOLTA account and further avoids the concerns of commingling prompted by the use of a general account for unearned returns.

States that have contemplated credit card payments have arrived at different solutions for the issue. Some states, such as Missouri, noted that ethical issues arise from using either the general account or the trust account, but found that having credit card payments deposited into the general account was acceptable if the unearned funds were "immediately" transferred into the trust account.[1] Minnesota has applied similar reasoning.[2]

Meanwhile, Arizona found that the trust account was the appropriate place to deposit credit card payments.[3] Arizona prohibits credit card payments from going into the general account. In doing so, Arizona imposed certain conditions, such as requiring the attorney to possess sufficient funds to allow for the replacement of any processing fees or chargebacks within three business days.

Wisconsin's rules, meanwhile, require a second trust account to be created should an attorney wish to accept credit card payments.[4] Should a chargeback occur, the attorney would have three business days in which to replace the reversed payment. Until the replacement occurs, the attorney would not be permitted to accept any further credit card payments.

My preference reflects Wisconsin's rule, as its approach has, in my opinion, the most inherent safeguards against commingling and misappropriation, however inadvertent or unlikely those occurrences may be.

As noted above, however, Nevada does not have any specific rules regarding credit card payments. Still, an attorney should be mindful of the concerns and requirements of RPC 1.15 when determining where credit card payments are deposited. ■

1 *See Lawyer Trust Account Handbook,* Missouri Lawyer Trust Account Foundation, May 2009, pages 3-4.
2 *See* http://www.mncourts.gov/lprb/trustfaq.html.
3 *See Client Trust Accounting for Arizona Attorneys*, State Bar of Arizona, 2010, page 4.
4 *See Managing Your Client Trust Account Manual,* Wisconsin Office of Lawyer Regulation, October 2007, page 13.