NO EASY CREDIT

by Constance V. Vecchione
Bar Counsel

UPDATE January 2017

The article below, *No Easy Credit*, was written in 2001. It describes the ethical pitfalls that lawyers can encounter in accepting payment of legal fees by credit card. In particular, and although the concerns raised in the article as to confidentiality apply equally to payments of earned fees and of retainers, the particular focus of the article was the commingling and record-keeping issues surrounding credit card payment of retainers, i.e., fees paid in advance not yet earned.

Unsurprisingly, although numerous additional ethics opinions and articles have been written in jurisdictions across the country on these questions since this 2001 article was posted, the basic ethical concerns with credit card payment of retainers are unchanged. There still remain problems as to what account to use and how to handle chargebacks and the credit card issuer's service charges for its fees. See, for example, Goldman and Marshall, "Should Lawyers Take Credit Cards" (2010), http://www.massbar.org/publications/section-review/section-review/2010/v12-n2/should-lawyers-take-credit-cards. Indeed, since the original article was written, Mass. R. Prof. C. 1.15(b)(3), as amended in 2015, now provides that both legal fees **and** expenses paid in advance must be deposited to a trust account and withdrawn only as earned.

As to some of these issues, however, technology improvements in the last decade can provide at least a partial solution in the form of credit-card processing services geared specifically to lawyers. Some of these services also integrate with

well-known legal case management software programs. In particular, at least with higher-end plans, such services will separate payments immediately into the lawyer's trust (IOLTA) account or operating account depending on whether the payment is identified as unearned or earned. All processing fees are deducted from the operating account; see in this respect M.G.L. c. 140D, § 28A.

In their basics, these services all provide a "payment gateway," which could be either a physical card reader or an online credit card payment form, and a "merchant account," the account to which payments are deposited before being transferred. The cost of such a service may depend on usage and will generally, but not always, be a mix of flat monthly fees and fees per transaction. The lower end plans will not separate payments into trust accounts and operating accounts and thus are not a good option unless you intend to accept credit card payments only for earned fees or flat fees, but not advance fees. See https://lawyerist.com/credit-card-processing-lawyers/, comparing features and payment options of different credit card processing services specific to lawyers.

In 2017, there is still no easy credit. But accepting payments from clients by credit card can be made safer and, one hopes, easier as well with a technology solution designed to address at least some of the ethical pitfalls.

****

***No Easy Credit,* original October 2001 article**

Frequent flyer miles. Simple monthly installment payments. Whatever their many and varied reasons, Americans want to pay bills with credit cards—and legal fees are no exception.

Ethics opinions by bar associations across the country generally agree that at least some types of legal fees can be paid by credit card. See, e.g., *ABA Formal Ethics Op. 00-419 (2000); Mass. Bar Association Ethics Ops. 78-11 (1978); North*

Carolina State Bar Formal Ethics Op. 97-9 (1998); New Mexico State Bar Association Advisory Op. 2000-1 (2000); Colorado Bar Association Formal Ethics Op. 99 (1997).

However, the devil, as always, is in the details. It is the mechanics of accepting credit card payments that cause the difficulties. Is it only earned fees that can be paid by credit cards or can retainers (advance fees) be paid as well? If both earned and advance fees can be charged, to what account should the card issuers deposit the payments? If advance fees are charged to a credit card, what happens if a dispute with the client results in a chargeback to the account by the credit card company? And who—the attorney or the client—bears the cost of the credit card company's discount for its profit?

Some ethics opinions, such as the recent ABA opinion cited above, give no guidance other than that the lawyer's advertising cannot be deceptive. However, other jurisdictions specifically address some or all of the problems just described and impose a range of restrictions upon the acceptance of credit card payments.

If the attorney only bills for services already rendered and thus only receives earned fees, or if the attorney in any case limits acceptance of credit card payments to earned fees, then at least one answer is simple: credit card payments would be deposited to the attorney's operating account. In the event of a dispute with the client (which itself is less likely for a fee earned before it is paid), chargebacks are made to the same account against other funds that are already the lawyer's property.

As the following discussion will make clear, there is much to recommend restricting client credit card payments to earned fees. But if the attorney wishes to let clients charge retainers as well as earned fees, the situation becomes more complicated. First, the lawyer must determine if the agreement that the lawyer signs with the credit card company even permits charging retainers to a credit

card. Some standard agreements require that services be rendered before the charge is submitted, making it almost impossible to use credit cards for advance fees. *Colorado Bar Association Formal Ethics Op. 99 (1997).*

Second, assuming the credit card agreement allows for charging retainers, Mass. R. Prof. C. 1.15(a) requires that lawyers keep "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" in a trust account. Unearned retainers are therefore required to be maintained in an IOLTA or individual trust account for the benefit of the client until "there is an accounting and severance of [the lawyer's and client's] interests," i.e., until the client has been billed and does not dispute the charges. Mass. R. Prof. C. 1.15(c), (d)(2) and (e). On the other hand, fees paid for services already rendered *cannot* be left in a trust account because that constitutes commingling. So if the lawyer is accepting credit cards for both retainers and already-earned fees, where should the payments be deposited?

Ethics opinions in Massachusetts and other jurisdictions concur that credit card charges for retainers are required to be deposited to trust accounts. See, e.g., *Mass. Bar Association Ethics Op. 78-11 (1978); Colorado Bar Association Formal Ethics Op. 99 (1997); North Carolina State Bar Formal Ethics Op. 97-9 (1998); Missouri Bar Ethics Op. 20000202 (2000).*

Some of these opinions suggest that it is acceptable, and would not be considered impermissible commingling, to have credit card charges for both retainers and earned fees initially deposited to the trust account as long as the fees already earned are then *immediately* withdrawn and transferred to the attorney's operating account. *North Carolina State Bar Formal Ethics Op. 97-9 (1998); Missouri Bar Ethics Op. 20000202 (2000).* Neither the Board of Bar Overseers nor the Supreme Judicial Court has as yet spoken to this issue. Minimally, the removal of earned fees must be accomplished without delay.

However, the real difficulty with depositing credit card payments to trust accounts is the problem of how to handle chargebacks. The dilemma is that, if fees for a particular client have been withdrawn, then a chargeback on that client's payment will be made against another client's money, thus constituting a misuse of the unrelated client's funds.

The likelihood that fee disputes will result in chargebacks against unrelated funds is, of course, substantially eliminated if lawyers follow the mandates of Mass. R. Prof. C. 1.15(c) by billing the client before withdrawing any portion of the retainer and leaving any disputed sums intact in the trust account. But lawyers should also try to negotiate arrangements with credit card issuers that chargebacks will be made to an account other than a trust account, such as an operating account.

If the chargeback cannot be made to a different account, some jurisdictions such as North Carolina require or permit establishing another IOLTA account for the sole purpose of receiving credit card payments. However, setting up a second trust account complicates record keeping and carries its own opportunities for errors. Most commonly, monies are deposited to one account but mistakenly withdrawn from the other. A second trust account also requires keeping yet another set of books—check register, individual ledgers—and performing another monthly reconciliation.

If, despite these complications, the attorney intends to accept payments of retainers by credit card, it may be preferable to use the main trust account for this purpose. However, the attorney must **immediately** cover any chargeback with personal funds if the offset has been made against the funds of other clients in the account.

Finally, there is the issue of how to handle the credit card issuer's debit (usually about 3%) for its fee. A payment by a client of $1000 may only net the

lawyer $970. Lawyers who do not wish to credit the client with the full payment need to insure, first, that the card issuer's regulations allow this practice and, second, that the client understands in advance and consents to the extra charges.[1] *Missouri Bar Ethics Op. 20000202 (2000).*

Most lawyers, as a matter of good client relations, will undoubtedly decide to absorb the discount. At least one state requires the attorney to do so. *State Bar of Michigan Ethics Op. RI-168 (1993)*. In either event, the client then must be credited with payment of the additional $30 in the attorney's records.

One last concern is always worth mentioning. Lawyers who accept credit cards must take care to preserve client confidentiality. Mass. R. Prof. C. 1.6(a). The attorney must also explain to the client that the use of a credit card by definition requires some disclosure of confidential information. To the extent that the credit card issuer requires a description on the charge slip of the reason for the charge, the attorney should say nothing more than "fees and expenses" or some similar phrase. Should a dispute arise with a client over charges, the attorney can only provide confidential information to the credit card company as permitted by Mass. R. Prof. C. 1.6(b)(2). See *Colorado Bar Association Formal Ethics Op. 99 (1997).*

Given all these concerns, Bar Counsel strongly discourages accepting payments of retainers by credit cards. The benefits may be more than outweighed by the regulatory, bookkeeping, and confidentiality problems. To avoid these pitfalls, lawyers are well-advised to consider limiting their acceptance of credit cards to earned or flat fees.

---

[1] 2017 note: As suggested in the update at the beginning of this article, M.G.L. c. 140D, § 28A arguably prohibits passing processing charges, particularly "surcharges," along to the clients. Lawyers who wish, and believe that they are entitled, to charge "convenience" fees of this type would be well advised to consult counsel and/or the Division of Banks as to whether and how these charges can be made.