

FORMAL OPINION NO. 2005-172

Trust Accounts: Accepting Credit Card Retainer Payments

Facts:

Lawyer wishes to accept credit card payments from clients for earned fees and as retainers¹ for work to be performed. Lawyer's bank indicates that Lawyer will need to deposit all credit card payments into a single "merchant account" and that a service fee will be deducted from each credit card transaction.

Questions:

1. May Lawyer accept credit card payments from clients?
2. May Lawyer use Lawyer's general business account as the "merchant account"?
3. May Lawyer credit client accounts with the net amount of the credit card transaction, that is, the amount left after the service charge is assessed?
4. Are there other ethical issues connected with accepting credit card payments?

Conclusions:

1. Yes.
2. No.
3. No, qualified.
4. Yes.

¹ For purposes of this opinion, the word *retainer* refers to fees paid in advance for work to be performed in the future.

Discussion:

1. *Credit Card Payments for Professional Services.*

Oregon lawyers may accept payment by credit card. The questions here are questions of the mechanics of meshing the trust account rules with credit card company practices.

2. *Segregation of Client Funds and Lawyer Funds.*

Oregon RPC 1.15-1 provides, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. . . .

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

The rationale for requiring lawyers to maintain separate accounts is to protect client funds from being mixed with the lawyer's own funds and applied, purposely or inadvertently, to the lawyer's own use. The rule does not prohibit all "commingling" of funds. The plain language of Oregon RPC 1.15-1 contemplates some mixing of lawyer and client funds in the trust account by allowing the deposit into trust of funds to pay bank service charges, Oregon RPC 1.15-1(b), or "belonging . . . in part presently or potentially to the lawyer," Oregon RPC 1.15-1(e). In contrast, depositing client funds into the lawyer's business account is absolutely prohibited. *See, e.g., In re Biggs*, 318 Or 281, 864 P2d 1310 (1994) (interpreting former DR 9-101). Funds not yet earned are, by definition, client funds. Oregon RPC 1.15-1(c); OSB Formal Ethics Op No 2005-151.

The better practice may be to have separate merchant accounts for credit card retainers and earned fees. However, if a lawyer's bank insists on a single merchant account, it should be a trust account. Credit card payments representing earned fees are funds belonging "presently or potentially" to the lawyer. It is not a violation of Oregon RPC 1.15-1 to deposit all credit card transactions into a trust account, if the portion

representing earned fees is promptly transferred to the lawyer's business account.²

3. *Service Fees for Credit Card Transactions.*

Depositing lawyer funds into the trust account to cover the bank charge is permitted by Oregon RPC 1.15-1. Some banks will make an automatic transfer of sufficient funds from the lawyer's business account; if that is not possible, the lawyer must ensure that sufficient funds are deposited in a timely manner. Otherwise, there is a risk that other client funds on deposit in the trust account will be depleted to cover the service charge.

Some jurisdictions suggest that a lawyer can pass the credit card transaction fee on to the client, if the client agrees.³ Interpretation of federal and state law on this issue is beyond the scope of this opinion, but we note that charging the client for the transaction fee may implicate Regulation Z of the Truth in Lending Act, 12 CFR pt 226, requiring that the lawyer make certain specific disclosures to the client and offer cash discounts to all clients.⁴

4. *Chargebacks.*

One additional issue relating to credit card payments is the practice referred to as a "chargeback." Credit card issuers generally allow the customer to dispute a credit card payment for some period of time after it appears on the billing statement. On being notified of the dispute, the credit card company "charges back" the payment against the account to which it was originally credited. This practice can put the funds of other clients at risk if the credit card payment has already been earned and

² *Accord* Kansas Legal Ethics Op No 01-01 (2001); Missouri Legal Ethics Op No 20000202 (2000); North Carolina Legal Ethics Op No 247 (1997). Arizona State Bar counsel concurs with this approach but has no formal opinion. But cf. Colorado Formal Legal Ethics Op No 99 (1997), which requires that credit card transactions be treated like cash payments, with earned fees going into the business account and retainers into a trust account. Also, anecdotal information from the Washington State Bar Association is that Washington lawyers must segregate credit card retainer payments from earned fees and that the banks will allow multiple merchant accounts when informed of lawyers' ethical obligations.

³ *See, e.g.,* South Carolina Legal Ethics Op No 98-08 (1998); Maryland Legal Ethics Op No 97-14 (1997); Colorado Legal Ethics Op No 99 (1997) (responsibility for transaction fee is matter of contract between lawyer and client).

⁴ For further discussion, see CONSUMER LAW IN OREGON ch 14 (Oregon CLE 1996 & Supp 2005).

withdrawn before the lawyer learns of the chargeback. One solution is to have the bank deduct all chargebacks from the lawyer's business account. If the bank is unwilling or unable to debit a separate account, the lawyer should try to arrange for an interaccount transfer process by which funds from the lawyer's business account will be transferred immediately to cover any chargeback to the trust account. However it is ultimately handled, the lawyer is ethically bound to ensure that any chargebacks that jeopardize other client funds in trust are promptly covered with the lawyer's own funds.

5. *Summary.*

Credit card payments for unearned fees pose a variety of ethical risks and practical complications for lawyers that payments for earned fees do not. The simple solution is to limit credit card payments to earned fees. A client who wishes to use a credit card for a retainer deposit can do so by obtaining a cash advance that is deposited into the lawyer's trust account. This method is more costly to the client because cash advances typically carry a higher interest rate than other charges. However, it avoids for lawyers the problems of covering the service charge from the lawyer's own funds and the risks associated with chargebacks.

Paying for professional services with credit cards is a convenience for clients who may not have sufficient cash available; it also enables lawyers to be paid immediately and avoid the risk of slow payment or nonpayment. Nevertheless, lawyers must be careful to structure their credit card payment arrangements to ensure compliance with their ethical obligation to safeguard and segregate client funds. This obligation includes taking care to understand the terms of the merchant agreement as it relates to the issues discussed in this opinion.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §11.6 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§15, 44 (2003); and ABA Model Rule 1.15.