

99

USE OF CREDIT CARDS TO PAY FOR LEGAL SERVICES

Adopted May 10, 1997.

Summary of Opinion

The acceptance of payment for legal services and expenses from a client when made by credit card is permitted under the Colorado Rules of Professional Conduct provided that certain protective measures are implemented by the lawyer and further provided that the lawyer consults with the client prior to the acceptance of payment by credit card.

Analysis

Lawyers are currently accepting payments by credit cards to pay for fees and expenses incurred. Credit cards are also used to pay for services yet to be rendered. Lawyers have entered into contracts with their clients where fees and expenses are charged to a client's credit card when a client's account becomes delinquent. Finance companies have created credit cards specifically for the payment of legal fees and expenses. The purpose of this opinion is to provide general guidance to attorneys with respect to the use of credit cards. It is not intended to address each and every one of the numerous ways in which credit cards can be used to pay for a lawyer's services.

The use of credit cards for the payment of legal services and expenses was deemed permissible by the American Bar Association in 1974 in Formal Opinion 338. The Colorado Bar Association Ethics Committee issued a parallel Informal Opinion Y, but withdrew that opinion in 1991. Several other state ethics opinions have followed Formal Opinion 338. Some of these opinions may be found in the *ABA/BNA Manual on Professional Conduct*. See *Alabama Opinion* 93-19 at 1001:1013, *Kentucky, Formal Opinion* E-370 at 1001:3904, *Michigan Formal Opinion* RI - 168 at 1001:4768, *Nebraska Formal Opinion* 95-4 at 1001:5504, *New Hampshire Formal Opinion* 1993-94/18 at 1001:5707, *New York Formal Opinion* 690 at 1001:6502, *Ohio Formal Opinion* 94-8 at 1001:6861, *Pennsylvania Formal Opinion* 94-30 at 1001:7337 and *South Dakota Opinion* 92-2 at 1001:8002. Several ethics opinions approve of the use of credit cards conditionally, although there is not uniformity among the states as to what those conditions should be. This opinion draws from the ABA and other states' opinions to alert lawyers to the more significant ethical issues that this committee believes should be considered in connection with accepting payments by credit card.

Confidentiality

A lawyer accepting payment by credit card must take care to maintain client confidentiality. Colo. RPC 1.6(a) requires that a lawyer not reveal any information relating to the representation of a client unless the client consents after consultation. "Consultation" means that information be communicated in a reasonably sufficient manner to permit the client to appreciate the significance of the matter in question. Colo. RPC Preamble, Scope and Terminology. 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. The mere fact of the representation or the identity of the client may itself be confidential or privileged information that the client would not want revealed. The lawyer should explain to a client that the use of a credit card necessarily involves some disclosure of confidential information, and should explain what information relating to the representation will be disclosed.

While every credit card company has its own internal policies, which the lawyer using credit cards should review, generally credit card companies require the merchant (i.e., the lawyer) to provide on the charge slip a brief description of the nature of the product or service for which the charge is made. Any person who later handles the charge slip may become aware of any information contained on the slip. A lawyer should so advise the client and obtain from the client the client's knowing consent to such disclosure. A lawyer can further better preserve client confidences if the description on the charge slip goes

no further than to state that the charges are made for “services and expenses,” “fees and expenses” or some other general description.

Some agreements require the merchant to cooperate with the credit card company or bank and to provide them with any information about the services the lawyer performed in the event of a dispute with the client. A lawyer cannot divulge confidential information to the credit card company for this purpose except in compliance with Colo. RPC 1.6(c).

Under Colo. RPC 1.6(d), “A lawyer shall exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using such [confidential] information” It is questionable whether any measures employed by the lawyer will always protect the client from disclosures that could be made by employees of the credit card company or banks who handle the charge slips. Consequently, there may be some instances where there is such heightened need for confidentiality that a credit card should not be used to pay the lawyer.¹

Conflicts of Interest and Professional Independence

Colo. RPC 1.7(b) states that “A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.”

Generally, in connection with the representation of a client, the lawyer’s personal interest is to be paid. This fact, in and of itself does not constitute a conflict of interest.

Colo. RPC 1.8(f) states that “A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consent after consultation; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.” By its express terms, Rule 1.8(f) applies to a lawyer who accepts payments by credit card, and the lawyer must comply with it.

Without in any way intending to create an exhaustive list, the committee would alert lawyers to other situations where conflicts or other ethical issues may exist and a lawyer’s independence may be compromised.

Where a lawyer has the right to charge a client’s account in the event the client is delinquent on payments, the provisions of both Colo. RPC 1.8(a) and 1.8(b) are implicated.

Second, the lawyer must know and understand the terms of the lawyer’s contract with the credit card company.² Some credit card companies’ standard form agreements have provisions stating, among other things, that services must have been rendered prior to the submission of the charge, which would prohibit the lawyer from using the credit card for a “retainer”³ for services yet to be rendered. As a practical matter, it may be difficult if not impossible, for a lawyer to use credit cards as payment for services yet to be rendered under the terms of many credit card agreements.

Some agreement prohibit a lawyer from reimbursing any unused fees paid by credit card in the form of cash and instead require the refund to take the form of a non-cash credit draft. Some agreements also require that any payments made to the lawyer by the company be made through an approved Settlement Account over which the credit card company has substantial control, including the right to make withdrawals, deposits and other adjustments. In that event, the lawyer may be advised to maintain a separate trust account for credit card payments to comply with Rule 1.15(a).

Operating regulations of some credit card companies provide the client with “chargeback rights” for enumerated reasons which may include “services not performed” or similar reasons. These operating regulations usually provide for some arbitration process, as between the card issuing bank and the acquiring bank, to determine the merits of the chargeback. A lawyer electing to accept the client’s use of a credit card cannot attempt to assert such arbitration or other provisions of the credit card company’s operating regulations as a means of limiting the lawyer’s liability to the client without full compliance with Rule 1.8(h).

In addition to being familiar with the credit card agreement and operating regulations, a lawyer accepting credit cards should also be aware of federal and state consumer credit laws which may be applicable to credit card transactions. It is beyond the scope of this committee's authority to advise lawyers as to legal, rather than ethical issues, but lawyers should be aware that the acceptance of credit cards poses legal as well as ethical issues.

In connection with a representation, a lawyer shall hold property of clients separate from the lawyer's own property. Rule 1.15(a). The credit card payment, if a payment for services rendered or reimbursement for expenses, may be placed into the attorney's own account. If, however, it is an advance fee payment, the funds must be placed into a separate account as the same is defined in Colo. RPC 1.15(d). If the charged amount is placed into a COLTAF account, Rule 1.15(e)(1) seems to allow for the charging fee (the percentage of the total transaction deducted by the charging institution as profit) to be deducted by the bank from the full charge. If placed into the lawyer's account, however, or a separate, interest bearing account for the client, the issue of payment of charging fees is one which the lawyer and client will need to address to avoid misunderstandings.

The limitations on sharing of legal fees with nonlawyers set forth in Rule 5.4 are designed to protect the lawyer's professional independence of judgment on behalf of the client. Because no partnership involving the practice of law has been formed with the issuing institution, the lawyer may comply with Rule 5.4(b) so long as the card issuer is not permitted to direct or regulate the lawyer's professional judgment in rendering legal services to the client.

Advertising

Just as the right of a lawyer to advertise has been the subject of controversy, so has the right of a lawyer to advertise the acceptance of credit cards. Different ethics opinions have expressed conflicting views as to the circumstances under which acceptance of credit cards may be advertised, if at all.

The committee is of the view that many of these opinions are of limited utility today. Commencing with the seminal case of *Bates v. Arizona State Bar Association*, 433 U.S. 350 (1977), the ability of professional governing bodies to regulate advertising has been limited, and the law in this area continues to evolve. The issue of lawyers advertising has been previously addressed by this committee in its Formal Opinion No. 76 ["Lawyer Advertising Guidelines," 16 *The Colorado Lawyer* 2205 (Dec. 1987)] and the committee believes that advertising the acceptance of credit cards is governed by the same principles as other forms of lawyer advertising.

Rule 7.1 disallows any false or misleading communications about a lawyer or the lawyer's services. Such communications are false or misleading if they contain material misrepresentations of fact or law or omit facts necessary to make the statement, when considered as a whole, not materially misleading; when they are likely to create unjustified expectations; or when they compare the lawyer's services with those of another lawyer unless the comparison can be factually substantiated.

Pursuant to Rule 7.2, and court decisions related thereto, advertising should have, as its purpose, the provision to the public of information regarding available legal services. The dissemination of information concerning lawyer's fees, including prices for specific services, as well as payment and credit arrangements for the same, help expand the public's knowledge concerning such information. So long as the requirements of Rules 7.1 and 7.2 are met, advertising the acceptance of credit cards as payment for legal services is permitted.

NOTES

1. A lawyer's duty to maintain confidentiality applies irrespective of the method of payment used. Many of the issues discussed herein are also implicated when payment is made by check or electronic funds transfer.

2. It is customary that all merchants who utilize credit cards for payment, including lawyers, enter into detailed, standardized agreements with the credit card company. These standardized agreements usually incorporate the credit card company's operating regulations.

3. The committee is not defining what constitutes a "retainer."