

The Committee has received a request to revisit LEO 186-A (June 18, 1981), which involves the use of credit cards. Specifically, the Committee has been asked to revisit the question of charging clients the transactional fees associated with the use of credit cards. In LEO 186-A, this Committee opined that a lawyer or law firm should not pass along a higher fee to a client for the use of a credit card. The Committee cautioned that a lawyer should resist the temptation to pass through to his clients' charges imposed upon the lawyer by the credit card company whether by means of a discount or by other means.

In addition to LEO 186-A, this Committee has previously opined regarding a lawyer's use of credit cards in LEO 999 (November 13, 1987) where the Committee determined that a lawyer may use one escrow account for the deposit of all credit card transactions even when those deposits include monies for earned and unearned fees. The opinion held that any deposit of earned funds into a lawyer's escrow account is permitted as long as there is prompt withdrawal of these earned fees.

While these previous opinions dealt with specific aspects of credit card use, the evolution and prevalence of the use of credit cards has changed dramatically with the passage of time. Credit cards are much more widely used and accepted and are the preferable payment method by many clients. Because of these issues and unresolved matters this Committee has revisited the use of credit cards and determined that the previous opinions leave several important questions unanswered:

1. May a lawyer legally pass along the transactional/service fees to the client who is using a credit card to pay legal fees?
2. Is it ethical for the lawyer to allow those transactional/service fees to be deducted from the lawyer's escrow account?
3. Is it ethical for the lawyer to allow the credit card company to "chargeback" the payment against the lawyer's escrow account?

APPLICABLE RULES & OPINIONS

The appropriate and controlling rule relative to this hypothetical is Rule 1.15(a)¹ specifically pertaining to the segregation of client funds and lawyer funds.

¹ Rule 1.15 Safekeeping Property

(a) All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs or expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution may be deposited therein; or

Also pertinent to the Committee's analysis is LEO 999, as referenced earlier in the opinion, as well as LEOs 1247 and 1510.

ANALYSIS OF THE QUESTIONS PRESENTED

As the first question involves the legal interpretation of truth and lending regulations, the Committee requested a legal opinion from the Office of the Attorney General as to whether federal or state law permits a lawyer in private practice to pass along the transactional costs/merchant fees to a client when he or she uses a credit card to pay for legal services. If the law permits a lawyer to pass these costs or fees on to the client, are there any legal requirements associated with the imposition of these fees or costs?

The Office of the Attorney General opined that state and federal law do not prohibit a Virginia lawyer from passing through to their client the merchant transaction fees imposed by a credit card issuer. However, based on interpretation of federal law, it is the opinion of the Attorney General that when credit card merchant transaction fees *are passed through to clients*, the transaction fees must be disclosed before the client commits to the transaction since the transaction fees fall within the definition of a "finance charge."² Specifically, the lawyer must disclose the amount of the finance charge prior to the time of honoring the client's credit card and before the client becomes obligated for the lawyer's services.³

The analysis is consistent with this Committee's opinion in LEO 1247 regarding the imposition of finance charges on client's past due accounts. The opinion states that an interest charge may be imposed provided that the client has agreed to the fee amount and the imposition of the charge

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

² "With regard to federal law, my staff reviewed the Federal Reserve Board Regulation Z to the Truth in Lending Act and the Consumer Credit Protection Act (15 U.S.C. § 1601). We did not find any language prohibiting the pass through of the merchant's fee to the consumer. As to Virginia law, we discovered that Virginia Code § 2.2-614.1 allows governmental bodies and agencies to collect revenue via credit cards and pass through additional transaction fees and costs to the consumer, subject to certain conditions. In addition, Virginia Code §46.2-212.1 allows the Department of Motor Vehicles to accept payment of fines and fees by credit card and the Department may add to such payment an amount of no more than four percent of the payment as a service charge for the acceptance of a payment device. Our research on the questions posed by this inquiry, however, is merely preliminary and not exhaustive." Letter from Robert McDonnell, Att'y Gen. of Virginia, to Karen Gould, Executive Director, Virginia State Bar (Oct. 20, 2008) (on file with the Virginia State Bar).

³ "In expanding upon this requirement, the staff of the Federal Reserve Board has commented that:

A person imposing a finance charge at the time of honoring a consumer's credit card must disclose the amount of the charge, or an explanation of how the charge will be determined, prior to its imposition. This must be disclosed before the consumer becomes obligated for property or services that may be paid for by use of a credit card. 12 C.F.R. § 226.9(d)(1)(2008)."

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and *retains the right of prepayment without penalty*. The opinion continues to say that the imposition of finance or interest charges must be reasonable and adequately explained to the client; citing to DR 2-105(A) which is substantially similar to Rule 1.5 (a) and (b); which together require that the fee be reasonable and adequately explained to the client.

In answering question two, as to whether those transactional/service fees may be deducted from the lawyer's escrow account, the Committee looks to Rule 1.15(d) that imposes a general prohibition against the commingling of a lawyer's own funds with client funds. This rule prohibits the practice of "salting" a escrow account. A lawyer cannot for his or her own purposes maintain a sum of money on deposit in his or her escrow account. This Committee has previously noted only two exceptions to the Rule:

1. The bank charges exception permits a lawyer to make deposits of his or her own funds to cover bank charges made for administration of the escrow account. This exception is necessary to prevent invasion of client funds to pay such charges. Rule 1.15(a)(1); *See* LEO 1510.
2. The mixed funds exception. Where an item received by the lawyer includes amounts belonging to the client and amounts to which the lawyer is entitled (such as fees or reimbursement for previously advanced expenses), such an item must be deposited in the escrow account. Rule 1.15(a)(2). *See* LEO 999.

Additional guidance regarding the use of credit cards, earned and unearned fees in relation to the escrow accounting rules and record keeping, had been provided by this Committee previously in LEO 999 and 1510.

In LEO 999, the Committee addressed the mixed funds exception and opined that all funds taken by credit card, whether already earned or unearned, can be deposited into the lawyer's escrow account. The lawyer must disburse any funds belonging to the lawyer into the operating account as soon as the deposit into the escrow account is cleared.

In LEO 1510, the Committee addressed the situations where financial institutions deduct the associated merchant's fees from the operating account while processing deposits only to the lawyer's trust escrow account. This situation provides the lawyer with more control over trust escrow account disbursements, especially by third parties such as the financial institution. While the lawyer may deposit personal funds into the trust escrow account in advance to cover recurring costs, such as merchant fees, it may be difficult to estimate and track the amount of merchant fees that could possibly be incurred, and client funds could be potentially at risk.

Based on this analysis, the Committee opines that where the lawyer remains ultimately responsible for the merchant fees, the lawyer's contract with the financial institution should include an arrangement whereby those fees will be deducted from the lawyer's operating account. When the lawyer contracts with the client at engagement that the client is responsible to pay for the associated merchant fees when using a credit card for payment those fees would be deducted from the total amount of client funds received by credit card from the lawyer's escrow account.

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The Committee is also of the opinion that it is advisable for a lawyer or law firm to establish a standard of practice regarding merchant fee costs associated with credit card use that is disclosed and agreed to by all affected clients. With a standard practice established the lawyer or law firm can then put appropriate recordkeeping and disbursement procedures in place for associated merchant fees to be debited from either the escrow account or operating account. This Committee opines that best practices may be that all associated costs and fees be deducted from the lawyer's operating account so as not to allow the financial institution potential access to funds not belonging to the lawyer.

As to the third question, a lawyer is ethically bound to ensure that any chargebacks that potentially jeopardize other clients' funds are promptly if not immediately covered with the lawyer's own funds. There are several ways to address this type of potential risk or rule violation that occurs without previous notice to the lawyer and puts other client funds at risk. Advisably all chargebacks should be from the lawyer's operating account or an interaccount transfer process by which funds from the operating account are transferred to the escrow account. Otherwise, the lawyer must monitor and personally replace any escrow funds that are subjected to a chargeback.⁴

CONCLUSION

This Committee has previously opined on the use of credit cards by lawyers and law firms. After seeking a legal opinion from the Office of the Attorney General, the Committee opines that a lawyer may pass along merchant fees associated with credit card use to the client with disclosure and consent. These fees may be deducted from the lawyer's escrow account; however, the Committee continues to caution regarding the risks inherent in permitting a financial institution to debit the lawyer's escrow account. When possible, a lawyer should contract with the financial institution that all debits of fees and costs associated with credit card use, including "chargebacks," be made from the lawyer's operating account.

This opinion is advisory only and not binding on any court or tribunal. To the extent that this opinion is inconsistent with Legal Ethics Opinion 186-A that opinion is overruled.

⁴ See, Oregon Bar Op. No. 2005-172.