

Trust account debit cards and a footnote on client confidentiality

Electronic case filing and online payment of filing fees have arrived and are well entrenched in the federal court system. We'll likely see this expanding into the state courts soon. Lawyers need to keep abreast of the interrelationship between these developments and traditional ethical duties relating to safekeeping client funds.

Debit card transactions on trust accounts: The federal bankruptcy courts now require electronic filing of bankruptcy cases and online payment of all filing fees via credit or debit card. The same is true with civil filings in Indiana's U.S. District Courts.

Lawyers are permitted to advance filing fees for their clients out of operating funds, *see*, Ind. Prof. Cond. R. 1.8(e). In that event, no trust account questions arise from the use of a debit card that draws funds from an operating

account. But what about the majority of lawyers whose clients pay filing fees in advance? The clients' prepaid filing fees

must be held in trust until applied. *See*, Ind. Prof. Cond. R. 1.15(c).

May lawyers use debit cards to pay client funds for filing fees directly out of trust? The answer has two parts. First, current rules appear to prohibit it. Second, even if the rules were not an impediment, many banks refuse to issue debit cards on trust accounts.

Ind. Admis. Disc. R. 23(29)(a)(5) covers this point. It states: "Withdrawals [from trust] shall be based upon a written withdrawal authorization stating the amount of the withdrawal, the purpose of the withdrawal, and the payee. The authorization shall contain the signed approval of an attorney. Withdrawals shall be made only by check payable to a named payee and not to 'cash,' or by wire transfer. Wire transfers shall be authorized by written withdrawal authorization and evidence[d] by a document from the financial institution indicating the date of transfer, the payee and the amount."

Debit card transactions, being neither checks nor wire transfers, are not an authorized means of

withdrawing funds from a trust account. Moreover, a debit card disbursement may be accomplished without any signed authorization by an attorney. The practice appears to be prohibited under current rules.

In light of the increasing prevalence of online filing fee payments, should Rule 23(29)(a)(5) be amended to permit debit card transactions on trust accounts? One can argue that it should. When a filing fee is paid online to the bankruptcy court clerk, an online receipt is generated that provides a unique transaction number and provides the cause number of the case associated with the debit card payment. All of the necessary information is provided to tie the transaction to a specific client matter. On the other hand, debit cards can be used for other purposes, including ATM transactions, and lawyers should be legitimately concerned that a debit card falling into the wrong hands could result in unauthorized use of client funds. Even if for an otherwise legitimate purpose, a withdrawal of cash from an ATM is a prohibited cash transaction. On top of that, debit or credit cards are never as readily distinguishable as paper checks on different accounts can and should be. The risk of confusion is greater. In an informal survey of my colleagues from other jurisdictions, a clear majority of them prohibit the use of debit cards to directly access funds in a trust account.

Perhaps the prudence of amending the rule should also be assessed in light of the common bank policy to refuse use of debit cards with trust accounts. I interviewed a banker for one of the major banks that maintains a significant presence in Indiana. There apparently is no statute or banking regulation that prohibits banks from issuing debit cards on trust

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accounts. Still, this bank believes that debit card access to funds in a trust account imposes imprudent and unnecessary risks and will not provide one.

Even if debit card transactions on trust accounts were not prohibited by rule, what should a lawyer do if his or her bank will not provide a trust account debit card? There are two options. One is for the law firm to use a firm credit card to make filing fee payments. The bankruptcy court clerk's office does not charge an additional transaction fee for credit card payments. When the monthly credit card bill arrives, it can be paid with a check from the trust account, with the appropriate internal documentation created to reflect the identity of the clients whose funds are being debited to reimburse the credit card account.

The second option is to obtain a debit card on the law firm's operating account and pay online filing fees using operating funds via the debit card. Upon payment, the operating account can be promptly reimbursed by way of a trust check, payable to the law firm, written on client funds already on deposit. Neither approach runs afoul of any ethical standards.

Indiana's client confidentiality exceptions (or the Supreme Court slips one by me): All Indiana lawyers should know by now that just a year ago, Jan. 1, 2005, major new amendments of the Indiana Rules of Professional Conduct went into effect. The rule on client confidentiality had an interesting back story. The ABA Ethics 2000 Commission initially made no recommendations to modify ABA Model Rule 1.6. Later in the ABA's review process, Rule 1.6 was modified to create significant new exceptions to the lawyer's normal duty to maintain the confidentiality of all information relating to a represen-

tation. These exceptions were largely driven by two considerations. First, the old ABA Model Rule had not fared well as a model that the states were willing to adopt. Second, corporate finance scandals of the late 1990s caused a reexamination of the circumstances under which lawyers should have discretion to report client crimes or fraud.

During Indiana's review of the ABA Model Rules, an Indiana State Bar Association committee recommended adopting ABA Model Rule 1.6. The ISBA House of Delegates rejected that recommendation in favor of keeping the traditional Indiana exceptions to client confidentiality. But the Supreme Court rejected the House of Delegates' recommendation and opted to follow the exceptions in ABA Model Rule 1.6 – or so I thought!

Turns out the Supreme Court slipped one by me. In these very pages, I took the position that new Indiana Rule 1.6 was identical to ABA Model Rule 1.6. *See* Donald R. Lundberg, "The Amended Indiana Rules of Professional Conduct: The

Client-Lawyer Relationship – The Rest of The Story," Vol. 48, No. 6 *Res Gestae* 16, 19 (2005). *Wrong!* By mentioning the words "from committing" a second time in Rule 1.6(b)(2), the Supreme Court clearly meant to convey that, just as under the old Indiana rule, lawyers have discretion to reveal a client's threat to commit any future crime in order to prevent it, rather than, as the ABA would have it, just future crimes that are "reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." My thanks to the eagle-eyed Forrest Bowman Jr. of Indianapolis for pointing this out. 🦅