

STATE BAR ASSOCIATION OF NORTH DAKOTA
DRAFT ETHICS OPINION
Opinion No. 09-05

The Ethics Committee received a request for an opinion regarding use of credit cards for payment of legal services, including a subordinate lawyer's duty to report a potential ethical violation of a supervising lawyer for improper use of credit card payments, and responsibility for following the directives of the supervising attorney.

FACTS

The requesting lawyer is an associate in a law firm. The law firm accepts credit card payments for both already incurred attorney fees and costs and for payment of advance retainers for fees and costs. The supervising lawyer has adopted a procedure in which all credit card payments are deposited into the law firm's general operating bank account. This general operating account is considered the "merchant account" for all credit card payment purposes. The supervising lawyer also promptly transfers any credit card payment for advance attorney fees and costs to the client trust account. The supervising lawyer has directed the requesting subordinate lawyer to follow that procedure.

According to the requesting lawyer, the supervising lawyer has stated that credit card payments for advance fees and costs are put in the general operating account so the account funds can offset any processing fees charged by the credit card company. The requesting lawyer did not indicate whether the law firm was absorbing the credit card processing fees or charging those fees to the client.

The requesting lawyer also is concerned about his responsibility to report ethical misconduct to the Disciplinary Board, if the above process of utilizing the general operating

account for credit card payments of both earned fees and costs and for advance retainers is unethical. And, the requesting lawyer is worried about professional responsibility for following the directives of the supervising lawyer.

In order to process credit card payments, banks require that at least one merchant account be set up into which credit card payments are electronically transferred. Each credit card payment has merchant fees and credit card transaction fees ("a processing fee") attached to it before the payment is made electronically to the merchant account. Usually this is a percentage of the total amount charged. The practical result of the processing fee is that an amount of money less than the client's credit card payment is deposited into the account. In addition, once a credit card payment is made, the client has a certain amount of time within which to dispute a charge. If a dispute occurs, the amount of the credit card payment in dispute (called a chargeback or reversal of charges) and a chargeback fee are electronically withdrawn from the merchant account, pending resolution of the dispute, even if some money has already been spent by the law firm. See Ariz.R.Prof. Conduct ER 1.15, COMMENT (2009 Amendment); and, Ky. Bar Ass'n. Ethics Op. KBA E-426 (2007). In addition, if there is a dispute by the client about the payment, or the client fails to pay their credit card bill, most credit card merchant account agreements require the law firm's cooperation in collection efforts, which may require the lawyer to reveal confidential information about the legal services provided to the client. Colo. Bar Ass'n. Formal Op. 99 (1997).

ISSUES

1. What are the ethical implications of and guidelines for the use of client credit card payments in the provision of legal services in North Dakota?

2. What is a lawyer's duty to report improper credit card payment practices by a supervisory lawyer; and, what is a subordinate lawyer's ethical responsibility for following the supervising lawyer's directive?

DISCUSSION

A. ACCEPTANCE OF CREDIT CARD PAYMENTS

1. Introduction

The Ethics Committee has never issued an ethics opinion on the subject of use of credit card payments by clients for past and future attorney fees and costs. Despite this, it appears that many, if not most, law firms in North Dakota accept credit card payments. This is also true in other states. See George A. Riemer, "Charge It? Credit Cards and Lawyer Trust Accounts," www.osbar.org/publications/bulletin/00july/0007barcounsel.htm.

The use of credit card payments for legal services first appeared as an ethical issue in the late 1960s and early 1970s. The ABA Ethics Committee initially indicated it was only ethical to accept credit cards for payment of sales of merchandise and non-professional services. See ABA Informal Opinions 1120 (1969) and 1176 (1971). In 1974, the ABA Ethics Committee issued Formal Opinion 338 explicitly approving the use of credit cards to pay for legal services. Following that opinion, every state that considered the propriety of use of credit cards for payment of legal services found the practice ethical. Peter Geraghty, "Can You Take The Credit?" www.abanet.org/media/youraba/200903/article10.html . States' ethics opinions, however, differ regarding the mechanics of using credit cards for payment of legal services. The ABA Ethics Committee does not appear to have provided clear directives to its membership on how to best handle credit card transactions related to lawyer services.

Use of credit cards for payment of legal services is not explicitly allowed in the North Dakota Rules of Professional Conduct, but it is allowed by implication. In 2005, the Joint Committee on Attorney Standards amended N.D.R.Prof. Conduct 1.15(b), allowing a lawyer to "deposit the lawyer's own funds in a client trust account only for the purpose of paying bank service charges, fees associated with credit card payments, or wire transfers related to the account, but only in an amount necessary for the purpose." See Minutes of the Joint Committee on Attorney Standards dated 6/14/05 and 9/09/05. (Emphasis added.) Rule 1.15(b), therefore, assumes that it is ethical to use credit cards for payment of legal services in North Dakota. The N.D.R.Prof. Conduct, however, are silent about the details of credit card payments, except that apparently it is acceptable to use a client trust account as a merchant account in certain circumstances and for the lawyer to deposit non-client funds into the client trust account to cover credit card processing fees.

The Rules are also silent about whether the law firm's general operating account can be used as a merchant account to accept credit card payments for attorney fees and expenses that have already been earned and billed. And, the Rules are silent about whether the general operating account can accept credit card advances on fees and costs.

Many ethics committees in other states have struggled with the details of credit card payments for both past and future attorney fees and costs, and whether the general operating account and/or the client trust fund account can function as a merchant account. Most of these states' ethics committees have identified the following issues pertaining to credit card payments:

1. Are credit card payments allowed generally?
2. Can credit cards be used for payment of the following:

- a. Previously earned attorney fees and already incurred costs;
 - b. Non-refundable retainers for attorney fees and costs; or,
 - c. Refundable retainers for future attorney fees and costs?
3. Into what accounts (i.e., general operating or client trust fund) can the above three kinds of payments be made?
4. Can any credit card processing fees be charged to the client?
5. What are client confidentiality issues related to credit card payments?
6. What are client informed consent issues related to credit card payments?
7. Can the lawyer advertise that credit card payments are accepted?

For the reasons already discussed, the Ethics Committee will assume that lawyers in North Dakota can accept credit card payments as long as the lawyer complies with the N.D.R.Prof. Conduct.¹ But, as they say, the devil is in the details.

2. **Can credit card payments be used both for outstanding attorney fees and expenses and for advance retainer attorney fees and expenses?**

a. Introduction

Lawyers have the opportunity to allow client use of credit cards for payment of already incurred attorney fees and expenses and for payment of advances for future attorney fees and expenses. While all modern ethics opinions in other states conclude that credit cards can be used to pay the client's existing bill with a law firm, the same is not necessarily true for using credit cards to make advance payments. See Ariz. Bar Ass'n. Ethics Comm. Formal Op. 08-01 (2008).

¹ Some jurisdictions, however, do not permit accepting credit card payments in certain kinds of cases. See e.g., Chicago Bar Ass'n. Op. 79-4(1979) (cannot use in bankruptcy and divorce); Me. Bar Ass'n. Op. 49(1977)(cannot use for fees and fines); Mont. Bar Ass'n. Op. 3 (1976)(cannot use in bankruptcy matters); Ohio Bar Ass'n. Op. 29 (1976) (cannot use in bankruptcy, criminal, or domestic relations cases); and, Okla. Bar Ass'n. Op. 268 (1972) (cannot finance contingency fee with credit card).

b. Already billed attorney fees and costs

A lawyer's bill for prior performed legal services may include attorney fees and expenses incurred and advanced by the lawyer during representation. Payment for these services could be made with cash, check, property, barter, or credit card. There is nothing inherently unethical about using one form of payment over the other, as long as the charges are reasonable and the client consents to the payment. One might even postulate that a lawyer should accept credit card payments to facilitate the client's access to legal services. See, e.g., N.H. Bar Ass'n. Ethics Comm. Formal Op. 1984-85/1 (1984). The Committee concludes, therefore, that a lawyer can accept credit card payments for already billed attorney fees and costs. What account can be used as the merchant account to accept these payments is discussed later.

c. Non-refundable advance retainer

A non-refundable advance retainer is a payment of a certain lump sum for legal work that is to be performed in the future without regard to the amount of lawyer time expended during the representation of the client. It is considered earned at the time of payment. See Ky. Bar Ass'n. Op. KBA E-426 (2007). The use of non-refundable advance retainers in North Dakota was briefly discussed in Richmond v. Nodland, 501 N.W.2d 759 (N.D. 1993); and, In Re Discipl. Action Against Madlom, 2004 ND 206, ¶ 7, 688 N.W.2d 923, 924. Although the propriety of such a retainer was not decided in either opinion, the Supreme Court did not condemn its use. See 501 N.W.2d at 762 and 688 N.W.2d at 924. It appears that the main ethical limitation on non-refundable retainers is that they be reasonable. Id. and N.D.R.Prof. Conduct 1.5(a). Other states' ethics committees that have considered the ethical implications of the use of credit cards for these payments conclude the practice is ethically permissible. See e.g., Ky. Bar Ass'n. Ethics Op. KBA E-426. The Committee agrees with those states' conclusions.

Which account can be used to accept credit card payments for non-refundable advance retainers is discussed later.

d. Refundable advance retainer

A refundable advance retainer is payment of a lump sum of money for legal services to be performed in the future. The retainer can only be drawn by the lawyer when it is earned and only in the amount earned. Any amount not earned by the lawyer must be refunded to the client at the conclusion of the legal matter. See id. All states' ethics committees that have issued ethics opinions on this subject, with the exception of Alaska, Arizona, California, and Vermont, have concluded that it is ethically permissible to accept credit card payments of refundable advance retainers, as long as the client's credit card agreement allows such advance payments and steps are taken to protect the integrity of client funds. See, Colo. Bar Ass'n. Formal Op. 99 (1997); D.C. Ethics Opinion 248 (2009); Fla. Bar Ass'n. Op. 76-37 (1976); Iowa Bar Ass'n. Op. 03-05 (2003); Ky. Bar Ass'n. Formal Op. E-172 (1977) and Ky. Bar Ass'n. Formal Op. KBA E-426 (2007) (but cannot draw funds until chargeback period expires); Mass. Bar Ass'n. Op. 78-11 (1978) (but discourages use for advances); Mich. Bar Ass'n. Op. RI-34 (2008) (but cannot draw funds until chargeback period expires); Neb. Bar Ass'n. Formal Op. 95-4 (1995); N.H. Bar Ass'n. Ethics Comm. Formal Op. 1993-94/18; N.M. Bar Ass'n. Advisory Op. 2000-1 (but, it is considered ill advised to do so); N.C. Bar Ass'n. Formal Op. 97-9 (1998); Ore. Bar Ass'n. Formal Op. 2005-172; and, Utah Bar Ass'n. Op. 97-06; but see, Alaska Bar Ass'n. Op. 85-5; Ariz. Ethics Bar Ass'n. Op. 08-01 (2008) (but, now allowed by rule change); Cal. Bar Ass'n. Op. 2007-172 (2007); and, Vt. Bar Ass'n. Advisory Op. 89-10 (1989).

N.D.R.Prof. Conduct Rule 1.15(b) surely implies that it is permissible to accept credit card payments of advance retainers, because under the Rule lawyers are allowed to place their

own funds into a client trust account for the limited purpose of offsetting client credit card fees. Since generally only client funds can be placed in a client trust account, and Rule 1.15(c) requires that advance retainers be placed in a client trust account, the Rule amendment contemplated placement of credit card payments for advances into the client trust fund. The ethical dilemma, however, is that a chargeback is not a credit card fee. When a chargeback occurs, the entire amount in dispute, which could be the whole of the credit card advance retainer payment, is pulled out of the general operating or client trust account automatically with a chargeback fee. If the advance is placed in a client trust fund, and a portion of the retainer is already spent, other client funds would be drawn out automatically to pay for the chargeback. This is very problematic ethically.

3. Into what accounts may credit card payments be deposited?

a. Introduction

There are a number of choices when designating the merchant account for acceptance of credit card payments. The choice, however, must comply with N.D.R.Prof. Conduct 1.15. Rule 1.15 states in part:

- (a) A lawyer shall hold 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. Funds shall be deposited in one or more identifiable interest bearing trust accounts in accordance with the provisions of paragraph (f). ...
- (b) A lawyer may deposit the lawyer's own funds in a client trust account only for the purpose of paying bank service charges, fees associated with credit card payments, or wire transfers related to that account, but only in an amount necessary for that purpose.
- (c) A lawyer shall deposit into a client 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 spirit of Rule 1.15 is to prohibit the co-mingling of lawyer funds and client funds.

See, In re: Discipl. Action Against Robb, 2000 ND 146, ¶ 9, 615 N.W.2d 125, 127. In practice,

in order to avoid co-mingling, a lawyer must have both a general office operating account and one or more client trust accounts. This generally works fine for cash and check payments, but credit card payments are different because of the possibility of chargebacks. As a result, ethics opinions in other states have struggled with which account or accounts can be the "merchant account."

Many states' ethics opinions suggest that the solution is to have more than one merchant account. The most logical solution is to designate the lawyer's general operating account as one merchant account for acceptance of credit card payments for already earned fees and expenses; and, also designate the client trust fund as a merchant account for acceptance of refundable advance retainers. See Ore. Bar Ass'n. Formal Op. 2005-172 (2005). Some banks or credit card processors, however, may not allow more than one merchant account. Id. Therefore, some states suggest utilizing a separate trust fund account to accept only credit card payments. See N.C. Bar Ass'n. Formal Op. 97-9 (1998); and, Wis. Rules of Prof. Conduct SCR 20:1.15(e)(4)(h) (requiring the lawyer to create a "credit card trust account" for the purpose of accepting all credit card payments). Trying to manage more than one merchant account, however, could be time consuming, complex, and expensive. And, a separate account to accept credit card payments for both already earned fees and for advances will no doubt result in co-mingling of funds.

Some banks allow chargebacks and other credit card fees to be taken from an account different than the merchant account. For example, if an advance retainer is placed into the trust account, some merchant agreements allow any chargebacks and processing fees be taken out of the lawyer's general operating account. Ore. Bar Ass'n. Formal Op. 2005-172 (2005).

These various credit card practices are not within the scope of an ethics opinion. Identifying what is the best ethical practice when using credit cards requires lawyers to become

familiar with their bank's credit card practices and the merchant account contract with the bank. The various scenarios are beyond the scope of this opinion. Once that is known, however, there are some basic guiding ethical principles the lawyer should adopt when accepting credit card payments.

b. Previously earned fees and expenses and non-refundable retainers.

In one scenario, the lawyer has performed legal services and incurred expenses on behalf of a client, and the lawyer has billed the client. The client wants to pay the bill with a credit card. There are three possible choices for depositing the credit card payment: (1) put the payment in the lawyer's general operating account; (2) put the payment in the client trust account; or, (3) put the payment in a separate client trust account dedicated to accepting only credit card payments. Ethics opinions in other states all agree that the lawyer can accept the credit card payment for already earned fees and costs, if it gets deposited into the lawyer's general operating account. The payment is considered property of the lawyer because it has already been earned by the lawyer. It should not be deposited into the lawyer's trust account, which is only for the purpose of holding client funds or funds that belong to both the client and others. Depositing the payment in a third merchant account for already earned fees and costs could be problematic ethically, if advance retainers are also deposited into the account, because that account would mix both client and lawyer funds. Therefore, assuming the lawyer's general operating account is a merchant account, accepting credit card payments for already earned fees and advanced expenses in that account is ethical.

If the scenario is changed so that the lawyer has asked for a non-refundable retainer, the lawyer can also accept a credit card payments deposited into the general operating account of the lawyer because the credit card payment is for attorney fees and expenses already earned and is

not the property of the client. The use of a trust account or third merchant trust account would be unacceptable because the payment is not client funds.

c. Refundable advance retainers.

Rule 1.15(c) requires that all advance retainers be placed in the client trust account. The Rule doesn't differentiate by the kind of payment, such as cash, check, electronic transfer, or credit card payment. It seems, therefore, that depositing an advance retainer paid by credit card into a general operating account would be a per se violation of Rule 1.15(c). Most states' ethics opinions require that advance retainers paid by credit card be placed in a client trust account, since the money is unearned. See Colo. Bar Ass'n. Formal Op. 99 (1997); Fla. Bar Ass'n. Op. 76-37 (1976); Iowa Bar Ass'n. Op. 03-05 (2003); Ky. Bar Ass'n. Formal KBA Op. E-426 (2007); Mass. Bar Ass'n. Op. 78-11 (1978); Mich. Bar Ass'n. Formal Op. RI-344 (2008); Mo. Bar Ass'n. Op. 20000202 (2000); Neb. Bar Ass'n. Formal Op. 95-4 (1995); N.H. Ethics Comm. Formal Op. 1984-85/1; N.M. Bar Ass'n. Advisory Op. 2000-1 (but, ill advised to accept); N.C. Bar Ass'n. Formal Op. 97-9 (1998); Ore. Bar Ass'n. Formal Op. 2005-172; and, Va. Bar Ass'n. Op. LEO 1848 (2009).

Some states, however, find this practice unethical. The California Bar Association Ethics Committee was so worried that a lawyer may not have funds available to pay a chargeback, which would compromise other client trust funds, that it prohibited credit cards from being used to pay advance retainers. Accord, Alaska Bar Ass'n. Op. 85-5; Ariz. Bar Ass'n. Op. 08-01 (2008) (obviated by Ariz. Supreme Court rule); and, Wis. Bar Ass'n. Formal Op. E-75-1 (1975)(now changed by Wis. Supreme Court rule).

A similar opinion was issued in Arizona. Ariz. Bar Ass'n. Formal Op. 08-01 recognized that it was ethical for lawyers to accept credit card payments for earned fees and "earned-upon-

receipt" (non-refundable) retainers, as long as the payments were put into the lawyers' general operating account. The Arizona ethics opinion, however, stated that it was unethical to use credit cards for refundable advance retainers because they would have to be placed in the lawyers' trust account, from which "chargebacks" could occur. It was determined that this possibly would compromise the integrity of other clients' funds held in the trust account, if a client's advance had been partially or fully spent. The opinion also concluded that since the advance retainer was client, not lawyer, money it could not be placed in the lawyer's general operating account. In effect, this prohibited a lawyer in Arizona from accepting credit card payment of an advance retainer.

Shortly after this ethics opinion was issued, the Supreme Court of Arizona amended ER 1.15 on an emergency basis, allowing lawyers under certain circumstances to accept credit card payment for advance fees and costs. See Ariz. Ethics Rules ER 1.15(b)(2)(2009) (allowing lawyers to put their own funds into a client trust account to offset fees and charges related to credit card transactions, including chargebacks). The 2009 COMMENT to Rule ER 1.15 is very detailed and describes the specifics related to credit card transactions for lawyer services. Some of the highlights are: (1) advances can only be placed in a client trust account; (2) lawyers should strive to use only companies that allow fees and chargebacks to be charged to the lawyer's general operating account; (3) if that is impossible, a lawyer must monitor the account carefully and keep an amount of personal funds in the trust account to cover any fees or chargebacks; and, (4) if the trust account is short due to a chargeback, the lawyer has only three days to deposit funds to cover the shortfall.

North Carolina also allows the trust account to be used for credit card payments of already earned attorney fees and expenses if only one merchant account is allowed by the bank.

See N.C. Bar Ass'n. Formal Op. 97-9 (1998).

D.C. Bar Ass'n. Op. 348 (2009), on the other hand, allows credit card advances to be placed in either account; but, if the lawyer uses the trust account, the lawyer must ensure that a chargeback is not allowed against the trust fund account. The District of Columbia Bar Association's rationale for allowing payment of an advance retainer first into the lawyer's general operating account then transferring to the client trust account, is that it is an effective way of diverting the possibility of chargeback and processing fees being taken against other client funds held in the trust fund. As already discussed, the Florida Supreme Court's solution was to amend Rule 1.15 to allow, but not require, lawyers to place substantial lawyer funds permanently in the client trust fund for the purpose of covering processing fees and chargebacks. This results in *per se* co-mingling of funds, which could be long term. The use of the general operating fund as a brief stop over point to accept credit card advances avoids putting other client trust funds in jeopardy due to chargebacks; and, it eliminates the need to put lawyer funds into the client trust account. This procedure appears to best protect the integrity of client funds and has the least amount of co-mingling.

As already stated, N.D.R.Prof. Conduct 1.15(b) allows co-mingling of funds in a trust account to cover the cost of credit card "fees." The Rule, however, does not address the issue of chargebacks. A strict reading of Rule 1.15(b) would suggest that placing advance retainers paid by credit card payments into a client trust fund would be inappropriate since there is no authority for the lawyer to pay the chargeback. If credit card advance retainers also cannot be put in the general operating account, the result would be that advance retainers paid by credit card would be unethical in North Dakota. Yet, one must assume that Attorney Standards Committee knew that not only credit card processing fees were an issue, but also that chargebacks were an issue.

In other words, the Attorney Standards Committee had no problem with that practice as long as the lawyer promptly covered the chargeback with personal funds.

There are a number of ways to avoid the ethical dilemma caused by potential chargebacks to the client trust account. These have been discussed in ethical opinions from other states: (1) deposit the payment into the client trust account and monitor the account closely and promptly cover any chargeback from general operating funds; (2) deposit the payment into the trust account, but always keep a certain cushion of lawyer money in the account to cover processing fees and chargebacks; (3) deposit the payment into the client trust account, but do not draw on the client's funds until the time for the client to dispute the charge has passed; or, (4) deposit advance retainer credit card payments into the general operating account and promptly transfer the payments to the trust account.

- (1) Closely monitor the client trust account and promptly cover the chargeback with lawyer funds.

Rule 1.15(b) seems to suggest that the practice of depositing a credit card payment of a refundable advance retainer into a trust account is ethical, as long as the lawyer immediately deposits the chargeback amount in the trust account or takes other precautions to ensure that other clients' trust funds are not overdrawn or placed in jeopardy. A lawyer who fails to do this would be subject to discipline due to inappropriate administration of the client's trust fund. This would be similar to the lawyer depositing personal funds into the client trust account to cover credit card processing fees. This practice, however, seems to be fraught with risks to other client funds deposited in the client trust account, especially if the lawyer does not have funds to cover the chargeback or the credit card processing fee.

- (2) Keep a cushion of lawyer money in the trust account to cover processing fees and chargebacks.

This practice is suggested by Ariz. R. of Prof Conduct ER 1.15 (COMMENT 2009 Amendment). However, the practice would require permanent co-mingling and would appear to be ethically improper.

- (3) Deposit the advance retainer credit card payment into the client trust account and wait to draw out earned fees and expenses until the chargeback period expires.

As already described, the practice of depositing an advance retainer credit card payment into the trust account is fraught with an ethical risk that other client trust funds could be expended for an improper purpose. As a result, some states require the lawyer to wait until the chargeback period expires before earned fees and expenses can be drawn out of account. See Ky. Bar Ass'n. Ethics Op. KBA E-426 (2007); DC Bar Ass'n. Op. 348 (2009); and, Mich. Bar Ass'n. Op. RI 344 (2008). The problem with this practice is that it slows down the transfer of earned fees and costs to the general operating account. The time period within which a dispute may be made can be substantial. See DC Bar Ass'n. Op. 348 (2009). The reason for an advance retainer, which is to have certainty and promptness in attorney fee and expenses collection, would be defeated to the detriment of the law firm's cash flow. This practice would, however, ensure that the potential for a chargeback does not risk other client funds held in the trust account; but, it would result in co-mingling for a substantial period of time.

The specifics of chargeback deadlines and procedures are not within the purview of an ethics committee. A lawyer who uses the client trust fund as a merchant account for advance retainers should become familiar with chargeback banking practices and adopt a withdrawal of

funds policy consist with it. The only other option would be to have the client use a credit card check or obtain a cash advance on the credit card for the amount of the advance retainer and place that amount in the client trust account. See N.M. Bar Ass'n. Advisory Op. 2000-1 (2001). The problem with this, however, is that credit card companies usually charge a much higher interest rate for use of credit card checks and cash advances and may have limits on the cash advance amount.

- (4) Deposit the advance credit card payment into the law firm's general operating account and promptly transfer it into the client trust account.

From a purely ethical standpoint, considering the bright line that client funds and lawyer funds should not be co-mingled, the practice of putting credit card advance retainers into the general operating account appears technically unethical. Yet, this may be the most logical approach, because it results in the least long term co-mingling of client and lawyer funds and the potential risk of a chargeback is shouldered by lawyer, not client, funds. See Cal. Bar Ass'n. Op. 2007-172 (2007).

As already described, the District of Columbia obviates this ethical dilemma by allowing deposits of advance retainers paid by credit card into a general operating account after the client consents to the practice in writing. See D. C. Bar Ass'n. Ethics Op. 348 (2009). If this method is used, the lawyer would have to immediately transfer the advance retainer to the client trust account. Id. While there is a technical co-mingling of funds, it is only for a brief moment to protect the integrity of the trust account. Rule 1.15(a) states: "A lawyer shall hold property of a client... separate from a lawyer's own property." (Emphasis added.) In other words, the credit card advance is not "held" in the general operating account. Rule 1.15(c) requires a "deposit"

into the client trust account, but does not mention when the deposit should occur or from where it should occur. When the lawyer's general operating account is used merely as a pass through account to accept credit card advance retainers, and if the advance is immediately "deposited" into the client trust account, the lawyer is "holding" the property separate from the lawyer's own property. This would appear to be the best practice ethically, and it is most practical from a business standpoint. However, if the transfer is not made immediately from the general operating account to the client trust fund, the lawyer would clearly be in violation of the rule prohibiting co-mingling of funds. It appears, therefore, that the practice of the requesting lawyer's supervising lawyer is a fleeting technical violation of Rule 1.15, but it may be the most logical practice. Moreover, the N.D.R.Prof. Conduct should be interpreted and applied as "rules of reason." See N.D.R.Prof. Conduct, Preamble and Scope, Scope [1]. This approach to depositing advance retainer credit card payments appears to be the most reasonable approach.

- (5) A single credit card payment for both past billed attorney fees and costs and for an advance retainer.

Some states' ethics opinions frown upon the practice of accepting a single credit card payment for both earned and advance fees and expenses because it is a per se co-mingling of funds. Instead, two credit card payments are suggested, but two payments will each have a separate processing fee. A single payment will be less expensive for the client or lawyer, depending on who is paying the credit card processing fee. The Committee will defer offering an opinion about this issue, since it was not raised by the requesting lawyer.

- (6) Conclusion for acceptance of advance retainers by credit card payment.

In conclusion, there is no clear ethical choice regarding into which account

advance refundable retainers should be placed. Ethics opinions in other states have reached different results. If the advance retainer was paid by cash, check, or electronically, Rule 1.15 would require the money to be deposited in the client trust fund. But, because of processing fees and the potential for chargebacks, the practice of depositing of credit card payments into client trust accounts is not so clear cut ethically. This practice has the potential for longer periods of co-mingling than when using the lawyer's general operating account as a pass through. Yet, using the lawyer's general operating account as an advance retainer pass through appears to be prohibited by Rule 1.15(c). Thus, using either the lawyer's general operating account or the client trust account has some inherent ethical issues if things go wrong. It would be helpful to lawyers if Attorney Standards or the Supreme Court adopted clear practice guidelines for credit card payments.

In the meantime, the Committee believes the lawyers should have some guidance about how to accept advance retainers paid by credit card. The best practice would be to get the bank/credit card processor to chargeback only the lawyer's general operating account when the deposit is made into the trust account. If this will not be allowed, the most ethical approach would be to deposit advance retainers into the client trust account, but not allow any withdrawal of money from the account for earned fees and expenses until the chargeback period expires. This seems impractical from a business standpoint, however. The better practical approach when chargebacks cannot be taken from a different account, appears to be to deposit any advance retainers paid by credit card into the law firm's general operating account, with a prompt, if not immediate, transfer of any unearned funds to the client trust fund. In the event a chargeback occurs, the lawyer's general operating account would bear the financial risk, not other client's trust funds deposited into the client trust account. The co-mingling would be for a very limited

time period, because the lawyer would not hold client funds long term. This is a fleeting technical violation related to co-mingling, but this practice would be a reasonable application of the ethics rules. The Arizona approach, which requires use of the client trust fund for advances, on the other hand, assures that there will be long term co-mingling of both client and lawyer funds in the client trust account.

4. Who should pay the credit card processing fee?

N.D.R.Prof. Conduct, 1.15(b) allows a lawyer to place the lawyer's own funds into the trust account to pay "fees associated with credit card payments." The lawyer, therefore, can ethically absorb the processing fees. Rule 1.15(b), however, does not answer the question whether the lawyer can charge the processing fees to the client.

As already discussed, there are credit card processing fees associated with each merchant account and credit card transaction. Customarily, most non-lawyer businesses absorb the fees as a cost of doing business. Thus, the actual amount charged to the credit card is credited to the bill, even though the actual payment is less. Most ethics opinions in other states allow the lawyer to either absorb the fee or pass it on to the client with written client consent. See Cal. Bar Ass'n. Op. 2007-172 (2007); Colo. Bar Ass'n. Formal Op. 99 (1997); Ky. Bar Ass'n. Formal Op. KBA E-426 (007); Md. Bar Ass'n. Op. 97-14 (1997); Mo. Bar Ass'n. Op. 20000202 (2000); S.C. Bar Ass'n. Op. 98-08 (1998); Utah Bar Ass'n. Op. 97-06 (1997); and, Va. Bar Ass'n. LEO 1848 (2009).

At least two state ethics committees, however, conclude that the lawyer must absorb the credit card fee and cannot pass it on to the client. See Fla. Bar Ass'n. Op. 76-37 (1976); and, Mich. Formal Op. RI-168 (1993). The Michigan Bar Association ethics committee concluded that charging the client for the fee would be unreasonable and in violation of Rule 1.5(a).

The overwhelming majority of state ethics committees allow the lawyer to charge the processing fee to the client or to absorb the cost. The Committee agrees that the practice does not per se violate the N.D.R.Prof. Conduct. The lawyer must, however, obtain written client consent for the practice after a full informed consent is provided. See Ky. Bar Ass'n. Ethics Op. KBA E-426 (2007) (stating the practice would be so outside the norm in the commercial world that lawyers have an unusually high burden of ensuring the client understands that the service charge will be passed on to the client.) The lawyer may not want to do this, however, considering the prevailing practice of other businesses. See D.C. Bar Ass'n. Op. 348 (2009).

It should be noted that some ethics opinions in other states make specific reference to Truth in Lending laws regarding charging clients for the processing fee. See e.g., D.C. Bar Ass'n. Ethics Op. 348 (2009); Ore. Bar Ass'n. Formal Op. 2005-172 (2005); and, Va. Bar Ass'n. Op. LEO 1848 (2009). This issue is outside the scope of this opinion, but a lawyer desiring to charge the client for the credit card processing fee may want to consider the implications of federal law.

5. Client confidentiality issues.

A lawyer must maintain the confidentiality of client secrets. N.D.R.Prof. Conduct 1.6. Other states' ethics opinions recognize that credit card payment can put client confidentiality at risk when credit card companies require the disclosure of the nature of the legal services charged during collection efforts. See e.g., Del. Bar Ass'n. Comm. Prof. Ethics Op. 1992-6 (1992); and, D.C. Bar Ass'n. Op. 348 (2009). Clients should be informed of this risk and consent to it in writing. However, lawyers should limit disclosures to generalities as much as possible. Id.

6. Informed consent issues.

As already discussed, most states' ethics opinions make client informed consent an

essential component of the ethical use of credit card payments for lawyer services. A lawyer who intends to accept credit card payments should become familiar with clients' credit card billing procedures. The lawyer should inform the client about the usual issues related to the payment of lawyer services with credit cards, such as processing fees, chargebacks, and the account into which the payment will be deposited. The lawyer should obtain the client's consent for the use of credit cards, including into what account the payment will be made, and how processing fees and chargebacks will be handled. Although the N.D.R.Prof. Conduct, do not appear to require that client consent to use of credit card payment be put into writing, the better practice would be to do so.

7. Advertising that credit card payments are accepted.

Many states' ethics opinions pertaining to use of credit cards in payment for legal services discuss advertising that credit cards are accepted. See e.g., Colo. Bar Ass'n. Formal Op. 99 (1997); Del. Bar Ass'n. Prof. Ethics Op. 1992-6 (1992); N.H. Bar Ass'n. Ethics Comm. Formal Op. 1984-85/1 (1984); Utah Bar Ass'n. Op. 97-06 (1997); and, ABA Formal Op. 00-419 (2000). Some older ethics opinions had problems with the practice, but this practice is now considered ethically permissible as long as the lawyer complies with that state's ethics rules related to advertising. The Committee concludes that a lawyer may advertise acceptance of credit card payments as long as the lawyer complies with N.D.R.Prof. Conduct 7.1 and 7.2. The specifics of advertising compliance are beyond the scope of the ethics opinion requested.

B. A LAWYER'S DUTY TO REPORT IMPROPER CREDIT CARD PRACTICES BY A SUPERVISING LAWYER AND ETHICAL RESPONSIBILITY OF A SUBORDINATE LAWYER.

The requesting lawyer inquired about a lawyer's duty to report unethical credit card

payment practices by a supervising lawyer. The lawyer also wondered if Rule 5.2 absolves a subordinate lawyer, who follows the supervising lawyer's directives related to credit card payments.

1. Duty to report.

The duty of a lawyer to report unethical practices by another lawyer is found at N.D.R.Prof. Conduct 8.3(a):

(a) A lawyer who knows that another lawyer has committed a violation of these rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall initiate proceedings under the North Dakota Rules for Lawyer Discipline. (Emphasis added.)

The Rule does not differentiate between the duty to report a supervising lawyer's violation versus that of an equal level colleague. The duty to report an ethical violation exists if the lawyer "knows" of a violation that raises a "substantial" question about the lawyer's honesty, trustworthiness, or fitness as a lawyer. The Rule, therefore, does not require the lawyer to report every violation. Only those violations that the profession of law "must vigorously endeavor to prevent" must be reported. See COMMENT [3] to Rule 8.3.

Generally, misuse of client trust funds or inappropriate client trust fund practices would require a disciplinary report. As can be gleaned from this Ethics Opinion, however, the issues related to the use of credit card payments for legal services have significant complexities; and, there are no clear cut rules adopted in North Dakota regarding credit card use despite the uniqueness of credit card payments. The issue of what are ethical credit card practices also depends on the specific facts related to a lawyer's practice, including the merchant account contracts and kinds of legal services a lawyer provides and what kinds of payments are being made by credit card. Without more specific details from the requesting lawyer, the Committee is

unable to specifically state whether there is a duty to report the supervising lawyer. It appears that under the facts provided, however, there is no ethical duty to report the supervising lawyer.

2. Ethical responsibility of a subordinate lawyer.

Regarding the ethical responsibility of the requesting lawyer's own actions, Rule 5.2 would apply. Rule 5.2 states:

- (a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.2(a) does not absolve a lawyer's unethical conduct simply because a supervising lawyer directed the lawyer to act. The supervisory and subordinate lawyer relationship, however, may be relevant in certain situations. See COMMENT [1] to Rule 5.2. If the conduct directed by the supervising lawyer is clearly unethical, the subordinate lawyer has an ethical duty not to follow the supervising lawyer's directive. See COMMENT [3] to Rule 5.2. When the ethics of the supervisor's directive is an arguable question of professional duty, the subordinate lawyer would not be violating the Rules if the subordinate lawyer acts pursuant to the supervisor's directive. Id. Since the ethics issue presented is arguable, it would not be an ethical violation for the requesting lawyer to follow the supervisor's directive regarding credit card payments

CONCLUSION

The requesting lawyer has identified a difficult ethical question. The best ethical practice for accepting credit card payments and into what accounts the payments should be made are not clear cut. Credit card payments of already earned attorney fees and advanced costs, however, should be deposited into the lawyer's general operating account. The best ethical practice for

deposits of advance refundable retainers paid by credit card, on the other hand, are not clear cut. Many states have issued recent ethics opinions toiling over what is the best ethical practice. The practice of the supervising lawyer, as described in the requesting lawyer's letter to the Committee, is identified as the required practice for advance retainers in at least the District of Columbia with client consent. It also appears to be the most practical solution from a business perspective, and it is least likely to result in long term co-mingling of funds and the least likely to risk other client trust funds. But, in most other states, the practice of putting an advance retainer paid by credit card into a general operating account is considered unethical. Those states require that credit card payments of advance retainers be placed into a client trust fund. Yet, because of the possibility of a chargeback, this practice puts other clients' trust funds at risk. Many solutions to this ethical problem result in co-mingling of funds for a substantial period of time. The most ethical solution would be to get the credit card processor/bank to take chargebacks out of the lawyer's operating account. If this is not possible, the lawyer should wait until the chargeback period expires before drawing out earned fees and costs. This is, however, an impractical business practice that impedes the law firm's operating cash flow. The most practicable resolution for credit card payments of refundable advance retainers is to use the lawyers' general operating account to briefly accept deposits of advance refundable retainers with a prompt transfer to the client trust fund account. This is the District of Columbia Bar Association approach.

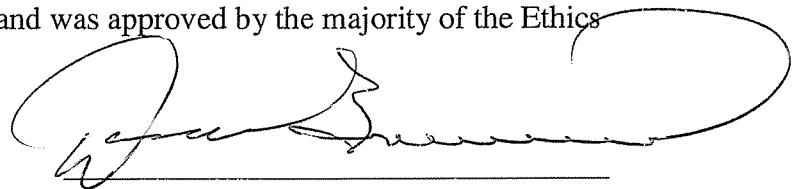
Without clear guidelines from Attorney Standards or the North Dakota Supreme Court, what is the acceptable practice is uncertain. The Committee, however, has offered its opinion about the preferred practice, which is to obtain the written consent of a client to use the lawyer's general operating account for all credit card payments, including advance retainers, with a

prompt transfer of unearned funds into the client trust account. While this may be a fleeting technical violation of the Rules of Professional Conduct, it is a reasonable solution. It appears, therefore, that the requesting lawyer has no duty to report the supervising lawyer's credit card practices under the facts described. Also, under the circumstances it would not appear that the requesting lawyer would be unethical in following the supervisor's directives regarding credit card payments.

This opinion is provided pursuant to North Dakota Rules of Lawyer Discipline 1.2(B), which states:

A lawyer who acts in good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Alvin O. Boucher and was approved by the majority of the Ethics Committee on November 12, 2009.

A handwritten signature in black ink, appearing to read 'Dann Greenwood', written over a horizontal line.

Dann Greenwood, Chair