

## **Ethical duties pertaining to accepting credit card payments**

### **Introduction**

Maintaining and properly servicing a client trust account is fraught with stress even during the most relaxed of times. During the current worldwide pandemic, remote working conditions and restrictions on face to face contact raise additional compliance issues. This article explores procedures and ethical concerns pertaining to accepting payment from clients by credit card.

Are attorneys allowed to receive funds from client via credit card and, if so, are there restrictions on accepting such payments? As is so often the case in the law, it depends.

The California State Bar website provides extensive resources for attorneys in a webpage entitled “Client Trust Accounting Resources.”<sup>1</sup> The page collects applicable rules, statutes, publications, articles, forms, ethics opinions, and online videos.

Fortunately for attorneys seeking to utilize remote forms of payment while in person contact is restricted, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion Number 2007-172 addressing acceptance of funds from a client via credit card.<sup>2</sup>

The Opinion addresses a hypothetical situation where an attorney wants to accept both payment and deposits via credit card for “(1) earned fees, (2) fees not yet earned, and (3) advances for costs and expenses.”<sup>3</sup> The Opinion assumes the attorney will eat any service charges, which necessarily reduces the ultimate amount collected by the attorney.

### **Credit card payments for earned fees**

As to earned fees, the Opinion begins by describing how a credit card payment is processed. Banks which issue credit cards hold membership in “not-for-profit associations of

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<sup>1</sup> Link to the California State Bar Client Trust Accounting Resources webpage:  
<https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Accounting-Resources>

<sup>2</sup> This Opinion interprets former Rules 1-320, 3-100, 3-700, 4-100, and 4-200 of the Rules of Professional Conduct. Those Rules were revised and renumbered effective November 2018. The 2018 revisions do not substantially alter the former Rules interpreted by the Opinion. For the convenience of the reader, the revised Rules are noted throughout this article.

<sup>3</sup> Cal. State Bar Formal Opn. No. 2007-172, p. 1.

member banks that operate a worldwide communication system for financial transfers using credit cards.”<sup>4</sup>

Thus, in order to accept payment by credit card, an attorney must open an account with what is called a merchant bank: a bank which is a member of the same not-for-profit associations, but which only have accounts with businesses rather than consumers.<sup>5</sup>

The merchant bank with whom the attorney establishes an account provides a point of sale terminal to process credit cards.<sup>6</sup> If the transaction is approved at the point of sale terminal, the information regarding the charge is sent to the not-for-profit association, who forwards the transaction to the bank which issued the credit card, which “carries the debt until the cardholder pays the bill.”<sup>7</sup>

Extrapolating from this process, the Opinion holds that because “the merchant bank may invade the funds via chargebacks...in the event the cardholder disputes the charge” a merchant account may not be considered a client trust account.<sup>8</sup>

What does that mean for an attorney seeking to collect earned fees via credit card? A prior California State Bar Formal Opinion contained dicta regarding acceptance of payment via credit card, but did not answer the question.<sup>9</sup> The instant Opinion clarifies an attorney may ethically accept payment of earned fees by credit card, so long as ethical obligations are satisfied.<sup>10</sup>

The duty of confidentiality is paramount. Given the requirement of credit card issuers that each transaction contain a description of the charge, when providing a description “attorneys may not disclose confidential information without the client’s informed consent.”<sup>11</sup> The duty of

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at pp. 1-2.

<sup>6</sup> *Id.* at p. 2.

<sup>7</sup> *Id.* (citing *U.S. v. Ismoila*, 100 F.3d, 385-386 (5<sup>th</sup> Cir. 1996).

<sup>8</sup> *Id.* at p. 2 (citing *F.T.C. v. Overseas Unlimited Agency, Inc.*, 873 F.3d 1233, 1233-1234 (9<sup>th</sup> Cir. 1989).

<sup>9</sup> *Id.* (citing Cal. State Bar Formal Opn. No. 1980-53.

<sup>10</sup> *Id.* at p. 2.

<sup>11</sup> *Id.* at p. 3 (citing Cal. Bus. & Prof. Code §6068(e), Rules of Prof. Conduct 3-100). Rule 3-100 is now Rule 1.6.

confidentiality may be satisfied by using a general description, such as “for professional services rendered.”<sup>12</sup>

What about potential fees and interest charged to the cardholder by the issuing bank? Do these implicate Rule 4-200’s<sup>13</sup> prohibition against charging an unconscionable fee? The Opinion says no, instead allocating that risk to the client’s personal choice to use a credit card to pay an attorney for earned fees.<sup>14</sup> “The attorney may choose to advise the client that the client’s credit card issuer sets interest rates and late charges...but is not ethically obligated to do so.”<sup>15</sup>

Similarly, Rule 1-320<sup>16</sup> prohibiting sharing of fees with a non-attorney is not implicated in acceptance of a payment for earned fees via credit card.<sup>17</sup> The Opinion sets forth that “[a] service-charge debit, which amounts to the attorney’s payment for a convenient method of receiving funds owed to the attorney, does not frustrate the purpose of Rule 1-320, and for that reason does not come within the rule’s proscription.”<sup>18</sup>

So, accepting payment for earned fees by credit card is allowed, provided ethical duties are satisfied. What about a classic retainer as opposed to a deposit for future fees?

A classic retainer, where a client pays a fee to ensure an attorney’s availability over a set period of time, is included in the definition of “earned fees,” and thus subject to the discussion above.<sup>19</sup> But what about accepting a deposit for fees not yet earned?

#### Credit card payments for fees not yet earned

Rule 1.15 (formerly Rule 4-100) mandates an attorney has an ethical obligation to place all funds held or received for a clients’ benefit into a trust account.<sup>20</sup> “This ethical obligation is not qualified, conditional, or avoidable, and therefore does not allow the attorney, with or without the client’s consent, to take such actions as depositing client funds initially into an

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<sup>12</sup> *Id.* (noting holding in *Hooser v. Sup. Ct.*, 84 Cal.App.4th 997, 1105 (2000) (stating that even the fact that an attorney is representing a client may fall within the protection of the attorney-client privilege)).

<sup>13</sup> Rule 4-200 is now Rule 1.5. All further references to “rules” refer to the Rules of Professional Responsibility.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Rule 1-320 has been incorporated into Rule 5.4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* Rule 1-320 has been incorporated into Rule 5.4.

<sup>19</sup> *Id.* at p. 1 (citing *Baranowski v. State Bar*, 24 Cal.3d 153, 164, fn. 4 (1979)).

<sup>20</sup> *Id.* at p. 4 (citing Rule 4-100(A) (now renumbered as Rule 1.15.)).

account other than a client trust account and subsequently transferring them into a client trust account if or when reasonable or practicable.”<sup>21</sup>

A parallel ethical obligation to “take reasonable care to protect client funds” which is “both personal and nondelegable” also applies.<sup>22</sup>

However, as interpreted by the courts, Rule 4-100 (now Rule 1.15) allows an attorney to ethically deposit fees not yet earned into a client trust account, but it is not required.<sup>23</sup>

“If an attorney were required to deposit fees not yet earned into a client trust account, the attorney would not be permitted to accept such a deposit from a client by credit card *to the extent that the card issuer deposits funds into a merchant account that is subject to invasion.*”<sup>24</sup>

“That is because, to that extent: (1) the credit card issuer deposits the funds into a merchant account; (2) the attorney, however, must deposit the funds into a client trust account; (3) the attorney must take reasonable care to protect the funds deposited in a client trust account; and (4) before the attorney can assert control over the funds, the merchant bank may invade the funds in the merchant account, thereby putting the funds at risk beyond the attorney’s protection.”<sup>25</sup>

The saving grace here is the interpretation of Rule 4-100 (now Rule 1.15) to allow, but not require, that unearned deposits from a client be placed in a trust account. Thus, because immediate deposit to a trust account is not required, “the attorney may accept such a deposit by credit card, resulting in a deposit into a merchant account.”<sup>26</sup>

Finally, is there a difference between accepting a credit card payment for fees (earned or unearned) and accepting a credit card payment as a deposit for costs and expenses? Yes, and while it’s a subtle distinction, it’s an important one.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (quoting Cal. State Bar Formal Opn. No. 2005-169).

<sup>23</sup> *Id.* at p. 4 (citing *Securities & Exch. Comm’n v. Interlink Data Network of L.A.*, 77 F.3d 1201, 1205-1207 (9<sup>th</sup> Cir. 1996); Vapnek et al., *Cal. Prac. Guide: Prof’l Resp.* §§ 9:107-9:108 (The Rutter Group 2006)).

<sup>24</sup> *Id.* at p. 4 (emphasis in original).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

### Credit card payments for costs and expenses

“Under rule 4-100, among the ‘funds received or held for the benefit of the clients’ that an attorney is ethically obligated to deposit into a client trust account are ‘advances for costs and expenses.’”<sup>27</sup>

As a result of the requirement that an attorney must directly deposit such funds into a trust account, the attorney “may not ethically accept such a deposit by credit card...*to the extent that the credit card issuer deposits funds into a merchant account that is subject to invasion.*”<sup>28</sup>

Thus, an attorney is precluded from accepting any deposit by credit card for costs and expenses not yet incurred.<sup>29</sup> However, an attorney is ethically permitted to accept reimbursement for costs and expenses via credit card payment because this “does not constitute an ‘advance’ of such costs and expenses, and consequently it need not – and indeed may not – be deposited into a client trust account.

### Conclusion

To sum up, an attorney may accept payment for fees, whether earned or unearned, via credit card so long as ethical obligations are maintained. However, an attorney may not accept an advance deposit for expenses and costs via credit card. Reimbursement by credit card for fees and costs already paid out by an attorney is, however, permissible.

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<sup>27</sup> *Id.* at p. 5 (*citing* Rule 4-100(A) (now renumbered and incorporated into Rule 1.15)).

<sup>28</sup> *Id.* at p. 5 (emphasis in original).

<sup>29</sup> *Id.*

## QUIZ QUESTIONS

1. An attorney may receive earned fees from a client by charging a client's credit card.
2. There are no ethical duties applicable to accepting payment from a client for earned fees via credit card.
3. An attorney cannot accept a classic retainer fee paid to ensure an attorney's availability over a set period of time via credit card.
4. A merchant bank account held by an attorney is secure and is considered a client trust account.
5. An attorney accepting payment for earned fees from a client by charging the client's credit card should only use a general description such as "for professional services rendered."
6. In describing the nature of a charge on a client's credit card, it's permissible for an attorney to simply state the charge is for "legal representation."
7. In describing the nature of a charge on a client's credit card, an attorney should provide a detailed description of the work performed for the client.
8. An attorney has a duty to advise a client paying earned fees by credit card of the potential fees and late charges that may be imposed by the bank which issued the client's credit card.
9. If an attorney accepting payment for earned fees from a client does not advise of the potential fees and late charges that may be imposed by the bank which issued the client's credit card, the attorney may be found in violation of the Rule 1.5 (formerly Rule 4-200) prohibition against unconscionable fees.
10. An attorney cannot pay service charges related to accepting payment of earned fees by credit card because it violates the prohibition of Rule 5.4 (formerly Rule 1-320) regarding sharing of fees with a non-attorney.
11. It is permissible under Rule 1.15 (formerly Rule 4-100) to deposit funds held for the benefit of a client into a non-trust account, so long as the funds are transferred to a client trust account within a reasonable time following the initial deposit.
12. It is permissible under Rule 1.15 (formerly Rule 4-100) to deposit funds held for the benefit of a client into a non-trust account, so long as the funds are transferred to a client trust account as soon as it is practicable to do so.
13. An attorney is permitted to delegate the duty of reasonable care to protect client funds to an individual in a position of trust.
14. It is permissible under Rule 1.15 (formerly Rule 4-100) for an attorney to deposit fees not yet earned into a client trust account.

15. An attorney must deposit fees paid by a client but not yet earned by the attorney into a client trust account.

16. A deposit for unearned fees paid by credit card first passes through a merchant bank account subject to invasion, which precludes an attorney from accepting such a deposit.

17. An attorney can accept an advance deposit for costs and expenses from a client using a credit card.

18. An attorney can accept a reimbursement via credit card for costs and expenses already incurred.

19. If an attorney accepts a reimbursement for costs and fees via credit card, the payment must be placed in a trust account.

20. If an attorney accepts a reimbursement for costs and fees via credit card, it is the attorney's choice whether to place the payment in a trust account.