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Credit Card Payments For Legal Fees

A new ethics opinion might require many lawyers to change how they accept payment for fees and costs

By **ELLEN R. PECK**

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Cali, my clients are clamoring to pay me by credit card!" Every Lawyer, a partner in Thomas & Lawyer, LLP, and California Joan's long-standing client, called for help. "My bookkeeper talked to credit card companies and suggested some procedures but my partner, Dowting Thomas, wants to do things differently. I don't even know if it is ethical to accept credit card payments from clients . . ." Eve's voice trailed off in confusion.

California Joan chuckled. "Eve, I have good news. Last month the State Bar Committee on Professional Responsibility and Conduct published Formal Opinion 2007-172 ("COPRAC Fml. Op. 2007-172") concerning ethical issues in accepting client credit card payments for fees and costs. (To view or download the opinion online, go to www.calbar.ca.gov and link to Attorney Resources>Ethics Information>Ethics Opinions.)

"I understand that typical credit card transactions work like this . . ." Eve offered. "Issuing banks are members of not-for-profit associations of member banks, like VISA, MasterCard, American Express or Discover, that operate a worldwide communication system for financial transfers using credit cards. An issuing bank may issue a credit card to a consumer, by which the consumer can make credit card purchases with participating businesses. In order for a business to accept the consumer's credit card, the business must open an account with a merchant bank. The merchant bank, like an issuing bank, is a member of the associations issuing credit cards such as VISA, MasterCard, American Express or Discover." (*United States v. Ismoila* (5th Cir. 1996) 100 F.3d 380, 385-386)

"But the merchant bank has the account with the business, not the consumer," Cali jumped in. "When the business is electronically connected with a merchant bank, the

business can receive credit card payments by processing the credit card and the business' terminal provided by the merchant bank. When merchant bank accepts the credit card charge, it immediately credits the business for the amount of the consumer's purchase.

The merchant bank then transmits the information regarding the charge to the non-profit association, which then forwards the information to the issuing bank of the purchasing consumer. When the issuing bank authorizes the sale, it notifies the non-profit association and pays the merchant bank at the end of the business day. The issuing bank carries the debt until the cardholder pays the bill." (*Id.*)

Eve remarked, "My bookkeeper told me that the business had to pay fees, typically from 1 to 2 1/2 percent, with American Express having the highest fees. Usually, the fees are deducted automatically on a monthly basis from the business' merchant account by the merchant bank, based upon the total of each consumer's purchases."

"That's not all!" Cali said, "Some contracts between a credit card issuer and a business authorize the credit card issuer, when the consumer disputes a charge, to automatically debit the merchant account electronically."

"If the merchant bank may invade the merchant account at its discretion to impose debits, can I have the credit card payments be deposited directly into my client trust account?" Eve asked.

"You can't," Cali said. "If your merchant account is subject to the credit card issuer's invasion, you can not use it as a client trust account." (COPRAC Fml.Op. 2007-172; see also *Matter of McKiernan* (Rev. Dept. 1995) 3 Cal. State Bar Ct.Rptr. 420 — Professional misconduct to relinquish control of a trust account to a third party by permitting him to deposit and withdraw funds in the trust account without supervising such transactions and by failing to supervise the trust account operations generally.)

"So, I must ethically set up my merchant account to receive credit card payments from clients in connection with my business account?" Eve asked. "Exactly!" Cali answered.

"Suppose that I bill my client for services already performed. Can I ethically accept payment of those earned fees by credit card?" Eve wondered.

"Yes," Cali reassured her, (COPRAC Fml. Op. 2007-172, fn. 4), "provided that you take care to comply with other professional standards."

"Like what?" Eve quizzed Cali.

"One example cited by the opinion involved the description one writes on the credit card charge slip, required by credit card issuers, regarding the goods or services provided. In preparing such a description, you should not disclose confidential information without the client's informed consent. (Bus. & Prof. Code, §6068(e); Rule 3-100, Rls. Prof. Cond., State Bar of California ("CRPC")) Because the fact that you are representing a client may

fall within the protection of the attorney-client privilege, (Cf. *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1005) the opinion suggests that “the description should be general in nature, such as ‘for professional services rendered.’” (COPRAC Fml. Op. 2007-172)

“If I accept credit card payments for earned fees, the client is then subjected to potential interest and late charges imposed by the credit card issuer. Does that involve any implication of charging an unconscionable fee?” Eve inquired.

“If you were attempting to subject a client to interest and late charges,” Cali said, “you would be ethically obligated to obtain a client’s in-formed consent and comply with applicable law, including unconscionable fees prohibited by CRPC 4-200. (COPRAC Fml. Op. 2007-172, fn. 8) However, a client’s voluntary election to pay by credit card, thereby potentially incurring interest and late charges imposed by the credit card issuer, does not constitute a violation of CRPC 4-200.”

“Must I advise the client that the client should determine any interest rates or late charges that may be applicable before using the credit card?” Eve wondered.

“You can if you want to, but the opinion said you have no ethical obligation to do so,” Cali told a relieved Eve.

“By accepting credit card payments for earned fees and then paying service charges to the credit card issuer, will I be fee splitting with a non-lawyer?” Eve queried queasily.

“The opinion reasoned that a service charge debit, to facilitate the payment and receipt of funds owed to you, does not frustrate any of the purposes of CRPC 1-320: ‘to protect the integrity of the attorney-client relationship, to prevent control over the services rendered by attorneys from being shifted to lay persons, and to ensure that the best interests of the client remain paramount.’ Therefore, accepting credit card payments does not constitute unlawful fee splitting,” Cali replied.

She added, “You may also ethically absorb a service charge debited by the credit card issuer, so long as you are careful to discharge your duty of confidentiality to clients.”

“I assume that, consistent with the ethical issues we have discussed, I can also accept credit card payments for costs and expenses I have advanced and which have been incurred by the client,” Eve said.

“You are correct,” Cali answered.

“If there are no other ethical issues in accepting payments for earned fees, my partner, Dowting Thomas, just walked in and wants to be on the call too,” Eve said.

“One of the most important issues in our practice is advance fees not yet earned. Is it ethical to accept advances for fees not yet earned by credit card?” Eve asked while her partner settled in.

“Yes,” Cali answered, “COPRAC opined that an attorney may ethically accept payment from a client by credit card, for fees not yet earned, so long as the deposit does not include advanced payment for potential costs and expenses.”

“I thought we were ethically required to place advanced fees in our clients’ trust account. If the merchant account is connected to our business account, with credit card payments for advanced fees being deposited in that business account, aren’t we violating trust account duties?” Dowting Thomas probed.

Cali countered, “Generally, CRPC 4-100 has been interpreted by the courts to ethically permit, but not require, the deposit of unearned fees paid in advance into a clients’ trust account. (COPRAC Fml. Op. 2007-172, fn. 11) Since you are not required to deposit unearned fees paid in advance into a clients’ trust account, you may accept such a deposit through a merchant account established as your general business account for your law office.”

“You said ‘generally.’ There are undoubtedly exceptions?” Dowting asked dubiously.

“Examples of exceptions are in federal bankruptcy proceedings in California (*In re Dividend Development Corporation, a California corporation, Debtor* (1992) 145 B.R. 651, *In re GOCO REALTY FUND I* (1993) 151 B.R. 241, 23 Bankr.Ct.Dec. 1703, *In re Montgomery Drilling Co.* (Bankr. E.D. Cal.1990) 121 B. R. 32) or where a lawyer and a client contractually agree that the unearned fees paid in advance will be deposited into a clients’ trust account (*Securities and Exchange Commission v. Interlink Data Network of Los Angeles Inc.* (9th Cir. 1996) 77 F.3d 1201, 1204-1205). In these examples, acceptance of credit card payments would not be proper, since a merchant account cannot be a trust account and alternatively, the credit card funds cannot be deposited into the general account,” Cali said.

“Are there any risks in maintaining the unearned fees paid in advance by credit card in the general account?” Eve pondered.

“Yes,” Cali responded. “If you are terminated by a client before you have fully earned the fees paid in advance, CRPC 3-700(D)(2) requires you to promptly refund any part of a fee paid in advance that has not been earned. If the funds are in the general account, there is a risk that they will be spent and unavailable for a prompt refund.”

“To avoid this risk, after the funds are deposited in a merchant account by a credit card issuer, such fees may ethically be transferred into your clients’ trust account. Then, if you withdraw the fees when they are earned and fixed (see COPRAC Fml. Op. 2006-171), you can ensure that any unearned fees are available for refund in the event you are asked by a client for the refund,” Cali opined.

“I suppose that, as with payments for earned fees, we may ethically absorb service charges debited by the credit card issuer relating to payments for unearned fees paid in advance,” Dowting assumed.

“Yes,” Cali said.

“Well,” Dowting went on, “what about whether we may ethically accept client credit card payments as a deposit for advances for costs and expenses.”

“No,” Cali said. “Credit card payments for advances for costs or ex-penses may not ethically be accepted.”

“This makes no sense. What’s the rationale?” Dowting was even more dubious. “Here is why you may not ethically accept credit card payments for advances of costs and expenses:

“First, the credit card issuer deposits the funds into a merchant account, which, as we have previously discussed cannot be a trust account;

“Second, CRPC 4-100(A) expressly requires advances for costs and expenses to be deposited into your clients’ trust account;

“Third, you must take reasonable care to protect the funds deposited into a clients’ trust account; and

“Fourth, if you had the merchant account as your clients’ trust account, there is a risk that before you could assert control over the funds, the credit card issuer may invade the funds in the merchant account, thereby putting the funds at risk beyond the attorney’s protection.

“For these reasons, you may not ethically accept any payment or deposit from a client by credit card, whether for earned fees or fees not yet earned, if the payment or deposit includes advances for costs and expenses,” Cali concluded.

“Except for the advanced costs issues, this is mostly good news. What can we do about the advances for fees and costs?” Eve asked.

“There are several things that you can do: You can separate advanced fees from advanced costs and expenses. The former can be paid by credit card and the advanced costs and expenses can be paid by cash or check payments and then deposited to the clients’ trust account,” Cali began.

“What if the client does not have the cash to write a check for advanced costs and expenses?” Dowting asked.

Cali listed other alternatives:

■ “You can agree with the client to advance costs and expenses on a monthly basis, provided that the client pay the incurred costs promptly, which could include payment by credit card.

■ “Alternatively, after you transfer advances for fees from the general account to the clients’ trust account, you can ask that the client agree in writing that a portion of the advanced fees be reallocated as advanced costs and expenses.”

■ “After you bill a client for costs and expenses advanced by you, you may ask the client if you can apply the fees paid in advance to the incurred costs. Make sure you obtain the client’s consent in writing to ensure that the client does not forget this authorization later in your relationship.”

“Cali, thanks to this new opinion, we have an understanding of our ethical obligations concerning client payments of fees and costs by credit cards. I think we are ready to start accepting payments,” Eve and Dowting agreed.

About five seconds after Cali hung up the telephone, it rang again. A raspy, barely audible whisper hissed, “Cali, I just read COPRAC Formal Opinion No. 2007-172. I have been taking credit card payments for years. The merchant account is my trust account. I’ve just found out I’ve been doing everything unethical. What do I do?”

Cali, who recognized the voice, said, “Don’t panic! There are many lawyers who, in the absence of guidance from the State Bar, have done exactly what you have. Now that you know what your obligations are, the professionally responsible approach is to come into compliance as soon as possible. Therefore: “

“1. As soon as you possibly can, cancel your merchant account that is connected with your trust account.

“2. Reopen a merchant account in connection with your general business account.

“3. Until you make the switch, stop taking any credit card payments.”

Cali heard the tension release, as the lawyer said, “Thanks, Cali. I am going to call my merchant bank right now and fully comply with the opinion.”

After California Joan hung up, she thought about the changes that many California lawyers might have to make in light of the new opinion. She realized that changing procedures for credit card payments by clients would create some short-term bumps in the road for many practitioners who were already using credit cards. In the long run, she had high hopes that most would appreciate having clear guidance and being on firm ethical ground, rather than the confusion that had existed when there had been no guidance.

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Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

- 1.** If a merchant account enabling client credit card payments directly into a clients' trust account permits the merchant bank to invade the trust account without supervision of the lawyer, it is unethical.
- 2.** A lawyer may be disciplined for relinquishing control of a trust account to a third party, by permitting the third party to deposit in and withdraw funds from a clients' trust account without supervising such transactions and for failing to supervise management of trust account operations in general.
- 3.** It is unethical to set up a merchant account to receive credit card payments from clients in connection with a lawyer's business account.
- 4.** It is unethical to accept payment of earned fees by credit card.
- 5.** The fact that a lawyer is representing a client may fall within the protection of the attorney-client privilege.
- 6.** A statement on a credit card charge slip as "for professional services rendered" is an ethical means of protecting client confidentiality regarding the types of legal services rendered.
- 7.** Because a credit card payment for earned fees potentially subjects a client to interest and late charges imposed by the credit card issuer, such payments are unconscionable and in violation of CRPC 4-200.
- 8.** A lawyer has no duty to warn a client that the client should determine any interest rates or late charges that may be applicable before using the credit card to pay for earned fees.
- 9.** Accepting credit card payments for earned fees and then paying service charges to the credit card issuer involves fee splitting with a non-lawyer in violation of CRPC 1-320.
- 10.** A lawyer may ethically pay the service charge debited by the credit card issuer, as long as the lawyer discharges the duty of confidentiality to clients.
- 11.** A lawyer can never accept credit card payments for costs and expenses that the lawyer has already advanced on behalf of the client.

12. An attorney may ethically accept payment from a client by credit card for fees not yet earned, so long as the deposit does not include advanced payment for potential costs and expenses.

13. Generally, a California lawyer is not ethically required to place unearned fees paid in advance in a clients' trust account.

14. A lawyer may place unearned fees paid in advance in a general business account.

15. There are no risks in maintaining unearned fees paid in advance by credit card in a general business account.

16. After funds paid by a client's credit card are deposited in a merchant account by a credit card issuer, such fees may not ethically be transferred into a clients' trust account.

17. Lawyers may not ethically absorb service charges debited by the credit card issuer relating to payments for unearned fees paid in advance.

18. Credit card payments for advances for costs or expenses may not ethically be accepted.

19. Advances for costs and expenses must be deposited into a clients' trust account upon receipt.

20. When a law practice is electronically connected with a merchant bank, the business can receive credit card payments by processing the credit card at the business terminal provided by the merchant bank.

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