

## ETHICS: BE CAREFUL USING CREDIT CARDS FOR FEES

by

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The director's office is sometimes asked about the use of credit cards for the payment of legal fees. Evidence of this can be found in past articles on the topic in this publication as well as in the FAQ section of the Office of Lawyers Professional Responsibility website. The use of credit cards, specifically for the advance payment of legal fees and costs, presents various issues.

When the credit card is being used to pay fees that have already been earned or for reimbursement of expenses already paid, its use does not present the same issues as does advance fee payments or future expenses. This is because money that has already been earned or advanced is the lawyer's and need not be held in trust. Using credit cards in these situations is permissible under the Minnesota Rules of Professional Conduct. More problematic is the use of credit cards for the advance payment of fees or costs because, subject to the exceptions outlined in Rule 1.5(b), those funds need to be held in trust.

Credit card issuers have traditionally required the lawyer to authorize them to be able to reverse transactions (i.e., remove funds from the trust account). However, giving them such authority runs contrary to the requirements of the MRPC. Specifically, Rule 1.15(j) requiring that withdrawals from the trust account be approved by a lawyer.

Every "check, draft, electronic transfer, or other withdrawal instrument or authorization shall be personally signed or, in the case of electronic, telephone, or wire transfer, directed by one or more lawyers authorized by the law firm." Therefore, lawyers could not accept payments from credit card issuers operating under traditional procedures.

Nonetheless, consumers, including those of legal services, have come to expect that they will be able to pay their bills with credit cards. Accordingly, while the director has taken the position that the practice of accepting credit card payments for funds to be held in trust is discouraged, subject to certain conditions, it could be done. Specifically, the director suggested that all credit card transactions be processed through the lawyer's business account and any unearned portion immediately transferred to the lawyer's trust account.

Recently the director has noted advertisements for credit card accounts marketed specifically to lawyers indicating that they are consistent with ABA and state bar guidelines. While not opining on any particular card, the director's office notes that the way in which some of the cards operate appear to be consistent with the MRPC and accordingly, could be used by Minnesota lawyers.

The first requirement is that although the funds are placed directly into the lawyer's trust account, the issuer has no authority to make withdrawals from the account. This avoids the problem under Rule 1.15(j) of permitting someone other than the lawyer from making withdrawals. If there is a "charge back" to the account, i.e., a demand by the credit card provider for the lawyer to make good the loss on a fraudulent or disputed transaction, the money comes from the lawyer's business, or other, non-trust account.

Not only does this avoid violating Rule 1.15(j), it prevents a more practical problem — the inadvertent misappropriation of other clients' funds as the result of a charge back for funds that have already been disbursed.

The second requirement is that all fees associated with the credit card are taken from the non-trust account. It has been the director's position that when using a credit card, the lawyer was required to transfer the full amount of the payment to the trust account and the lawyer could not deduct credit card fees from those funds. By debiting the fees separately, the client receives full credit for the amount of the payment.

Lawyers have a professional obligation to hold the funds of others in trust in a manner consistent with the MRPC. While credit card companies have traditionally not been sensitive to those requirements, this may be changing. However, before deciding whether to accept credit card payments, be sure to confirm that the card issuer is operating in a manner consistent with your obligations under the MRPC.