APPENDIX "B"

OPINION NO. 08-01
(September 2008)

SUMMARY

A lawyer may accept credit-card payments only for earned fees, earned-upon-receipt retainers, or reimbursement for advanced costs. Such credit-card payments may not be deposited into the lawyer's trust account. A lawyer may not accept payment in advance by credit card for unearned fees or costs not yet advanced. A lawyer may receive a single, non-cash payment from a client consisting of funds belonging partly to the client and partly to the lawyer. Such a payment must occur by check, money order, or electronic-fund transfer, and must be deposited into the lawyer's trust account. After the transaction has cleared the issuing bank, the lawyer's portion must be removed promptly from the trust account.

FACTS

The inquiring lawyer would like to offer clients the option to pay by credit card. To establish an account to accept credit-card payments, it appears that most credit-card providers require designation of a single bank account (called a merchant account), which the credit-card provider may access to debit automatically previously deposited amounts in the event that a cardholder disputes a charge. It also appears that credit-card providers typically allow a cardholder up to 120 days from the date of a transaction to dispute a charge. It further appears that many credit-card providers prohibit charging in advance for services. The inquiring lawyer envisions three possible kinds of credit-card payments: (1) payments for earned fees and/or already incurred costs; (2) advance payment for fees and/or costs not yet earned or incurred; and (3) a combination of earned and unearned fees and/or incurred and future costs.[1]

Similarly, the inquiring lawyer expects his clients to use single checks or money orders to pay earned fees and reimburse the attorney for advanced costs and also to pay anticipated fees and costs in advance.

QUESTIONS PRESENTED

1. May a client pay a lawyer by credit card for earned fees or incurred costs?

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[1] The analysis of this opinion also may apply to Automatic Clearing House (ACH) transactions.

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2. May a client pay a lawyer in advance by credit card for expected costs and fees?

3. Into what account(s) must a lawyer deposit credit-card payments?

4. May a lawyer accept a payment by check or money order consisting of both earned fees or incurred costs and a deposit toward future expected fees or costs, and, if so, into what account must the lawyer deposit the payment?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) the degree of risk assumed by the lawyer.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing.

. . .

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

. . .

(3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms unless the client is simultaneously advised in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

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ER 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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ER 1.15 Safekeeping Property

(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 kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on 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.

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RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 89-10, 99-02

OPINION

Questions 1-3: Credit-card payments

Arizona lawyers have a qualified option to accept credit-card payments. Accepting credit-card payments requires a lawyer to be aware of additional potential ethical problems. *See* Ariz. Ethics Op. 89-10 (Dec. 20, 1989) (approving credit-card payments generally and finding that such payments do not violate client confidentiality rules, inhibit a lawyer's professional independence, or constitute a division of fees with non-lawyers); *see also* Ariz. Ethics Op. 74-27 (Sept. 18, 1974); ABA Formal Op. 00-419 (July 7, 2000).

In Op. 89-10, we opined that "[i]t is ethically proper for a lawyer or law firm to accept credit cards for the payment of legal fees and retainers." We did not, however, discuss ethical restrictions on such payments as a result of requirements commonly imposed on merchants by credit-card providers. The committee understands that the law governing credit-card transactions is largely contractual in nature and, therefore, variations may exist in the manner in which different credit-card providers establish payment and dispute mechanisms. *See* Maggs, *Regarding Electronic Commerce*, 50 Am. J. Comp. L. 665, 678 (2002) ("Private contracts rather than legislative enactments establish most of the rights and duties of cardholders, card issuers, and merchants.") We further understand that credit-card providers generally require a merchant (in this case, a lawyer or law firm) to provide a single account into which the provider will deposit funds following a credit-card payment. Providers maintain the right to access the designated account in order to debit any funds previously deposited in the event that the cardholder disputes a charge. (Cardholders typically have 120 days from the date of a transaction to dispute a charge.) Finally, we understand that many credit-card providers prohibit charging a customer's credit card for future services. This opinion covers the effect of the above-described credit-card transaction parameters on the ethical requirements of a lawyer who wishes to accept credit-card payments. Current or future variations on these parameters might affect the opinions stated herein.[2]

Because a credit-card provider typically will allow the designation of only a single account as the merchant account, a lawyer desiring to accept credit-card payments must first decide whether to designate the lawyer's trust account, the operating account, or a third account for receipt of credit-card funds. In Ariz. Ethics Op. 99-02 (April 1999), the committee determined that non-refundable fees and lawyer fees deemed earned-upon-receipt are property of the lawyer at the time they are paid. Likewise, payments for past services become lawyer property when paid. Thus, any payment (whether by credit card, check, money order, electronic-fund transfer, or cash) that consists entirely of earned or earned-upon-receipt fees must be deposited directly into

[2] This opinion is not intended to cover each possible provision or variation of credit-card merchant agreements. Other provisions also might raise ethical issues or could result in an arrangement that meets ethical requirements.

the lawyer's operating account, or into a separate account, but not into the trust account. Similarly, any payment consisting of the client's reimbursement to the lawyer for advanced costs belongs to the lawyer and must not be deposited into the lawyer's trust account. Therefore, to the extent that a lawyer's objective is to enable payment by credit card of earned fees, earned-upon-receipt fees, or reimbursement of advanced costs, the lawyer must designate the operating account, or a separate account, as the credit-card provider's merchant account. We find no ethical prohibitions against the use of credit-card transactions for this purpose.[3]

Payment of earned fees or earned-upon-receipt retainers must be distinguished from deposits toward future costs and fees, which are client property. *See* Ariz. Ethics Op. 99-02. Arizona lawyers may accept payment of anticipated fees or costs, provided such payments are deposited directly into the client trust account and remain in the trust account until they are earned. Advance payments by cash, check, money order, or electronic-fund transfer are acceptable.

Use of credit cards for payment of advance fees or expected costs is not ethically permissible in Arizona for several reasons. We understand that some credit-card providers contractually prohibit charging a client's credit card for future services. If a lawyer enters into an agreement with a credit-card provider with such a restriction, the lawyer is ethically required to respect the contract. *See* ER 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation); *accord* Colo. Ethics Op. 99 (May 10, 1997) (whether acceptance of credit-card payments for advance fees is permissible depends on whether the agreement with the credit-card provider allows charging for advance services).

Even if such a restriction does not exist, however, other restrictions generally imposed by credit-card providers nevertheless result in a prohibition against the use of credit cards for advance payments. Specifically, as discussed above, credit-card providers generally require designation of a single account for receipt of credit-card funds and retain the right to access that account in order to debit an amount equivalent to any deposit that the cardholder disputes within a designated period of time. The right of access renders designation of the lawyer's trust account ethically impermissible.

In Arizona, once a lawyer earns fees that the client has paid in advance, the lawyer must promptly transfer the earned portion from the trust account to the operating account. ER 1.15(a) establishes the fundamental premise that client funds belong in a client trust account and the lawyer must not add any of the lawyer's funds or property to that account.[4] Moreover, "normally it is impermissible to commingle the lawyer's own funds with client funds." ER 1.15, cmt. 2. In Op. 99-02, the committee confirmed that payments representing lawyer property "should not be placed in a trust account where they will commingle with client funds."

The Rules of the Arizona Supreme Court make it mandatory that funds owned either entirely by the client or by both the lawyer and the client "shall be deposited" in a trust account. Rule 44(a),

[3] This opinion is not intended to address any ethical considerations relative to lawyer's fees or costs generally, such as the requirement that fees charged must be reasonable, consistent with a written fee agreement, and include the required disclaimer for earned-upon-receipt fees or retainers. ER 1.5(a), (b), (d)(3).

[4] A stated exception to this rule is for bank service charges on a client trust account, which the lawyer may pay by depositing funds into the trust account. *See* ER 1.15(b).

Ariz.R.Sup.Ct.; *see also* Rule 44(a)(2), Ariz.R.Sup.Ct. (funds belonging to both the client and the lawyer "must be deposited" in the trust account).[5] Thus, establishment of a separate merchant account to receive credit-card payments of advance fees, or funds partially owned by both the client and the lawyer, is not acceptable under the Supreme Court rules, even if the lawyer expeditiously transfers client funds into the trust account.

Rule 44(a)(2) also provides that the portion of the deposit belonging to the lawyer "may be withdrawn [from the trust account] when due." Rule 44(a) does not specify when the lawyer must take funds belonging to the lawyer out of the trust account. We previously opined that fees earned upon the occurrence of a defined subsequent event, such as the filing of a case, should be transferred out of the trust account once the event occurs. Op. 99-02 at 10. The occurrence of the event marks a change in ownership of the funds, necessitating the removal of those funds from the trust account at that time. One such event is the performance of legal services that result in earned fees. Once fees are earned, there should be no delay in transferring earned fees from the trust account to the operating account. *Accord* N.C. Ethics Op. 247 (April 4, 1997) (stating that a single deposit consisting of both earned and unearned fees should be deposited in the lawyer's trust account and the earned fees should be withdrawn "promptly").

Once the lawyer transfers funds from the trust account, however, the client may still have a right to dispute the charges with the credit-card provider. Therefore, if the trust account were the designated credit-card merchant account, the provider could have the ability to access the trust account and withdraw an amount equivalent to the amount the client has disputed even after the lawyer has removed the earned portion of the funds. Because the original funds would no longer be in the trust account, the funds withdrawn by the credit-card provider would not be the same funds and, therefore, could be funds belonging to other clients. For this reason, we conclude that the potential danger to the property of other clients created by the credit-card provider's right of access precludes use of the trust account as the designated merchant account for credit-card transactions involving payment of expected fees or costs. Furthermore, while the period of time available to a cardholder to dispute a charge may vary according to contract, we conclude that the opportunities for a client to dispute a charge generally are long enough to make them incompatible with the lawyer's prohibition against commingling lawyer property and client property in the trust account.

We recognize that some other ethics committees that have considered the ethical implications of credit-card transactions have concluded that advance payments of fees by credit card can ethically be deposited into the lawyer's trust account under certain conditions. Ore. Ethics Op. 2005-172 (Aug. 2005) concluded that credit-card deposits of advanced fees into the trust account are permissible, provided the lawyer promptly deposits personal funds into the trust account to cover any debits by the credit-card company resulting from the credit-card company's accessing the account as a result of a disputed charge. The North Carolina State Bar, in 97 Ethics Op. 9 (Jan. 16, 1998), concluded that credit-card deposits of advance fees and costs into the trust account are acceptable "provided the lawyer takes appropriate steps to protect the funds of other

[5] Rule 44(a)(2) states: "Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited [in the lawyer's trust account], but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved."

clients on deposit in the trust account." Specifically, North Carolina requires lawyers to attempt to negotiate agreements with credit-card providers that allow for "chargeback" debits to be taken from another account or, in the alternative, to order an inter-account transfer into the trust account to cover any funds debited from the trust account through a chargeback by the credit-card provider. If neither of these options proves possible, the lawyer must set up a third trust account to receive credit-card deposits, then transfer any client funds into the lawyer's "primary" trust account. Finally, if all of these safeguards prove impracticable or fail, the lawyer "is ethically compelled to arrange for a payment (from his or her own funds or from some other source) to the trust account sufficient to cover the chargeback in the event that a chargeback jeopardizes the funds of other clients on deposit in the [trust] account."

We respectfully disagree with this approach. In our opinion, a lawyer's fiduciary duty to safeguard client property in the trust account requires stricter controls than the Oregon and North Carolina solutions. We conclude that the credit-card company's right of access creates a degree of risk, when associated with a lawyer trust account, that cannot be overcome by relying on the lawyer to remain vigilant about the possibility of access and then acting promptly to deposit the lawyer's own funds into the trust account to replace funds withdrawn by the credit-card company. Nor do we believe it is within our jurisdiction to opine that Arizona lawyers may negotiate contractual arrangements with credit-card companies on a case-by-case basis that involve a credit-card company's right to access the lawyer's trust account under any circumstances.

We reach the same conclusions with respect to any credit-card payment that covers both earned and unearned fees.

Our opinion is consistent with the opinion the State Bar of California Standing Committee on Professional Responsibility and Conduct reached in its Op. 2007-172 (2007). In California, advance fees are not considered client property; therefore, contrary to Arizona, deposit of advance fees into the trust account is permissible but not mandatory. The California opinion allows credit-card payments for advance fees *provided the advance fees are not deposited into the lawyer trust account.* The opinion prohibits, however, advance payment of costs by credit card because, in California, such payments are client property that must be deposited into the lawyer trust account. The California opinion, therefore, is consistent with this opinion, because it also disallows any credit-card payment of client-owned funds into a lawyer trust account due to the credit-card provider's right of accessing that account.

Ky. Ethics Op. KBA E-426 (March 23, 2007) suggests that a lawyer "could avoid the ethical implications of a chargeback by delaying disbursements until after the time a chargeback could occur."[6] The Kentucky opinion, like the Oregon and North Carolina opinions, suggests that lawyers attempt to negotiate an agreement with the credit-card provider "whereby any chargeback would be made against the lawyer's operating account, rather than the trust account to which the funds were deposited." Notwithstanding its discussion of these alternatives, however, the Kentucky opinion warns that "any arrangement that could result in chargeback against another client's funds in a trust account is strictly prohibited." Thus, the Kentucky

[6] We have concluded, however, that such a delay would be unethical in Arizona.

opinion appears to agree with our ultimate conclusion that the trust account cannot be accessed by a credit-card provider.

We recognize the potential advantage to both lawyers and clients to reach an agreement that involves the client's advance grant of authority to the lawyer to charge the client's credit card. In our opinion, Arizona lawyers and clients have three options to consider.

The first option is to designate advance fees paid by credit card as "earned-upon-receipt" or "non-refundable." Fees of this kind belong to the lawyer when received and, therefore, must not be deposited into the lawyer's trust account. Lawyers electing to use this option, however, must take three precautions. First, the fee must be reasonable. Second, the fee agreement must state explicitly that the fee is "earned-upon-receipt" or "non-refundable" and also must contain language, required by ER 1.5(d)(3), that the client "may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to [ER 1.5(a)]." Third, the lawyer must not bill against or credit work performed on an incremental basis against the "earned-upon-receipt" or "non-refundable" fee, as such a practice would be consistent with an advance fee (or retainer) and not with an "earned-upon-receipt" fee.

The second option is for the lawyer and client to enter into an agreement whereby the client allows the lawyer to keep credit-card information on file and charge earned fees and advanced costs against the card on a periodic basis, provided the lawyer has sent an invoice to the client detailing the fees and charges and has allowed the client a reasonable period of time to review and, if possible, communicate any disputes to the lawyer. We believe a period of 10 calendar days after sending the invoice is presumptively reasonable, recognizing that special circumstances or needs may shorten or extend that period. Absent any communication from the client disputing all or part of the invoice, the lawyer may (in accordance with the prior agreement with the client) charge the client's credit card either for the full amount of the invoice or for any undisputed charges contained on the invoice. The lawyer's trust account, however, may not be designated as the merchant account for such credit-card transactions.

If a lawyer elects to use an advanced authorization agreement as described above, it must be stated in a writing communicated to and agreed to by the client, either in the original fee agreement or, if such an arrangement constitutes a change to the lawyer's current billing practice, in a separate agreement. The lawyer must also take precautions to safeguard the confidentiality of the client's credit-card information. *See* ER 1.6 (establishing the lawyer's duty to safeguard client confidences). In accordance with Ariz. Ethics Op. 89-10, the agreement must also state whether the client or lawyer is responsible for paying any additional charges imposed by the credit-card provider.[7]

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[7] If a lawyer changes his or her current practice with respect to credit cards and provides the client with an agreement on the use of credit cards, such an agreement would involve a payment term and, therefore, would not be a business transaction with a client. Accordingly, the requirements of ER 1.8(a) would not apply to the agreement. This does not mean, however, that other changes to client fee agreements could not be subject to ER 1.8(a).

The third option is for the client to take a cash advance on the client's credit card and pay the lawyer in cash. Lawyers should be cognizant, however, that credit-card companies often charge higher interest rates for cash-advance transactions and should discuss that fact with clients before requiring or recommending that the client take a cash advance on a credit card.

Question 4: Single payments of earned and unearned fees

If a client makes a single payment by cash, check, money order, or electronic-fund transfer covering both earned and unearned fees, pursuant to Rule 44(a)(2), Ariz.R.Sup.Ct., the funds must be deposited into the trust account and, after they clear the issuing bank, the portion representing earned fees must be transferred promptly to the operating account. Because such transactions are final and may not be reversed (after the check, money order, or electronic-fund transfer clears the issuing bank), there is no potential risk to the property of other clients in the trust account. Therefore, payment by check, money order, or electronic-fund transfer are the only ethically permissible non-cash methods for an Arizona lawyer to receive single payments for both earned and unearned fees.

CONCLUSION

Credit-card payments are permissible only for receipt of earned fees, earned-upon-receipt fees, or reimbursement for advanced costs. Credit-card payments are impermissible for receipt of advance payment for fees and costs; however, lawyers have other options for the use of credit cards related to future legal services. The only permissible non-cash methods for receiving single payments of both earned and unearned fees (or expected costs) are by check, money order, or electronic-fund transfer.