

Chapter 3

Fees, Billing and Trust Accounts

The most important aspect of the attorney-client relationship is COMMUNICATION. And nowhere is communication more important than in dealing with legal fees and the attorney-client fee agreement. From the moment that the attorney-client relationship commences, the client *must* be made aware, preferably in writing, of:

- The scope of the representation.
- The type of fee arrangement (hourly? contingency? flat fee?).
- The amount of any advance deposit that is necessary and how it will be drawn against.
- The billing cycle and when payment is expected.
- The amount that it is likely to cost the client.
- In the case of an hourly rate, the exact amount of the hourly rate and, if possible, an estimate of the hours necessary to handle the matter.
- In the case of a flat fee, exactly what will and will not be covered by the flat fee.
- In the case of a contingency fee, the percentage that will be charged by the lawyer and any other deductions that will come out of the recovery in terms reasonably understood by the client.
- The charges for identifiable direct costs/expenses, such as photocopies, long distance calls, and computer research.
- The additional expenses that will or are likely to be incurred on behalf of the client. This should be projected at the commencement of the relationship, if possible. As incurred, the exact amount of the expenses should be reported to and authorized by the client, even in contingency fee contract situations where costs are being advanced by the lawyer.
- Any changes in the basis or rate of the fee or expenses.

After the attorney-client relationship has commenced, the client should be informed preferably in writing of the status of the case on a periodic, preferably monthly, basis and the work being done to earn the fee.

Rule 1.5 of the Rules of Professional Conduct governs fees. It is long and complicated, but starts with an easy-to-understand and basic premise: ***a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.*** This means that the work and effort expended by you on the client's behalf should match the fee and expenses charged by an *objective* standard. The factors determining whether a fee is reasonable are set forth in Rule 1.5(a).

Thus, even in contingency fee or flat fee matters, you should be sure that the file reflects the work that you have done. Keeping time records is the surest way to do that, as is keeping notes and documentation of your work. If you have spent the afternoon at the library, be sure the research makes it into the file. If you talked to someone on the phone, make a memo to the file. Not only will your efficiency be increased by this recordkeeping, but you will be protecting yourself from client complaints and dissatisfaction.

TYPES OF FEE ARRANGEMENTS

Contingent Fee Arrangements

According to Rule 1.5(c), a contingent fee arrangement *must* be in writing, and the writing *must* be signed by the client. The writing *must* provide:

- The method by which the fee is to be determined, including the percentage or percentages that will accrue to the lawyer in the event of settlement, trial or appeal;
- The litigation and other expenses that are to be deducted from the recovery;
- Whether the expenses are to be deducted before or after the contingent fee is calculated; and
- Any expenses for which the client will be liable, whether or not the client is the prevailing party.

A copy of the contract must be given to the client at the time of the agreement. If financial assistance is provided to a client, a copy of Rules 1.8(e) must be given to the client as per Rule 1.4(c).

Contingency fee agreements are specifically prohibited in most domestic relations cases and all criminal matters. They are most commonly utilized in plaintiff personal injury matters, where the courts view the client as unsophisticated and vulnerable. Accordingly, you should explain all the provisions of the contingency fee contract to the client and be sure that she understands the contract. A sample form for a contingency fee contract is included in this chapter.

The entire amount of proceeds of settlements or judgments received by you on behalf of your client, if handled on a contingency fee basis, must be deposited into the trust account and disbursed only in accordance with Rule 1.15 and the contingency fee contract.

Rule 1.5(c) requires that, upon conclusion of a contingent fee matter, you provide the client with a written statement indicating the outcome of the matter and, if there is a recovery, showing the remittance to the client and an itemization of the fees and expenses incurred. If the client has agreed to pay expenses such as court reporters, investigators, health care providers, experts, or others, Rule 1.15(d) requires that those funds be promptly paid from the proceeds of settlement or judgment. Also, you must pay any other person with a claim against the settlement or judgment fund if (a) you have actual knowledge of that person's interest; and (b) the claim is (1) recognized by a statutory lien or privilege; (2) recognized in a final judgment addressing disposition of the claim; or (3) contained in a written agreement (executed by the client or by you on behalf of the client) guaranteeing payment out of those funds or property.¹

If you come into possession of funds or property in which both you and another person (such as a lawyer who previously represented your client in the same matter) claim interests, you must keep the property separate until there is an accounting and severance of both persons' interests. If the amount of both persons' interests is or becomes disputed, then you must keep separate the portion in dispute until the dispute is resolved pursuant to Rule 1.15(e).

Often lawyers who enter into contingent fee contracts with their clients do not feel the need to send an engagement letter also. Unfortunately, most contingent fee contracts do not cover all of the issues that are addressed in an engagement letter. A sample contingent fee contract is included, but it does not necessarily provide the client with a complete outline of the scope of representation, conflicts of interest, and a plan for communication. Accordingly, even the contingent fee arrangements should begin with both the contract and a letter which outlines what you plan to do and how you plan to communicate about it.²

¹ The foregoing discussion pertains to disbursement of funds obtained pursuant to a contingent fee contract. There are special rules which apply to funds or property in which the client and/or third persons have an interest. These rules are discussed more fully in Property Belonging to Third Persons, *infra*.

² There is a conflict between the statute governing contingent fee contracts, La. Rev. Stat. § 37:218, on the one hand, and the Rules of Professional Conduct and prevailing Louisiana jurisprudence, on the other hand. La. Rev. Stat. § 37:218 states that a contingent fee contract may stipulate that neither the attorney nor the client may, without the other's written consent, settle, compromise, release, discontinue, or otherwise dispose of the suit or claim. According to the statute, any settlement, compromise, discontinuance, or other disposition of the suit or claim by either the attorney or the client, without the other's written consent, is null and void; and the suit or claim shall be proceeded with as if no such settlement or disposition has been made. This provision of the statute is in direct contravention to Rule 1.2 of the Rules of Professional Conduct, as well as the Supreme Court's decision in *Hayes v. Saucier Dairy Products*, 373 So. 2d 102 (La. 1978), and *LSBA v. Edwins*, 329 So. 2d 437 (La. 1976). In *Hayes*, the Supreme Court interpreted La. Rev. Stat. § 37:218 as merely establishing a privilege guaranteeing payment of a fully-earned contingent fee to an attorney discharged without cause. However, the Supreme Court recognized that the statute could not and does not prevent the client from discharging his attorney, with or without cause, at any time, pursuant to Rule 1.2. The *Hayes* Court also reaffirmed its exclusive authority conferred by the Louisiana Constitution to regulate the practice of law (first recognized in *Edwins*), confirmed that the Rules of Professional Conduct have the force and effect of substantive law, and declared that only legislative enactments which aid its inherent powers to regulate attorneys' practices will be approved by the Court. Therefore, the clause in La. Rev. Stat. § 37:218 which purports to nullify any settlement reached by the client without the attorney's approval is perhaps unenforceable.

Fee Disputes

You should have a plan or standard practice for handling fee disputes when they arise. It is wise to specify the method of resolving the fee dispute in the engagement letter or the contract. The authors recommend that you include an agreement whereby any fee disputes will be handled by the Legal Fee Dispute Resolution Program, a quick and inexpensive program administered by the Louisiana State Bar Association, subject to the discussion below. (See LSBA Fee Dispute Program.)

The Supreme Court, in *Hodges v. Reasonover*, 2012-0043 (La. 7/2/12), 103 So. 3d 1069, has held that a binding arbitration clause between an attorney and client does not violate the Rules of Professional Conduct, provided that the clause does not limit the attorney's substantive liability, provides for a neutral decision maker, and is otherwise fair and reasonable to the client. As the client must give informed consent, as defined in Rule 1.0(e), the attorney has the obligation to fully explain to the client the possible consequences of entering into an arbitration clause, including the legal rights the client gives up by agreeing to binding arbitration. Without clear and explicit disclosure of the consequences of a binding arbitration clause, according to the *Hodges* Court, the client's consent is not truly "informed." At a minimum, the attorney must disclose the following legal effects of binding arbitration, assuming they are applicable:

- Waiver of the right to a jury trial;
- Waiver of the right to an appeal;
- Waiver of the right to broad discovery under the Louisiana Code of Civil Procedure and/or Federal Rules of Civil Procedure;
- The fact that arbitration may involve substantial upfront costs compared to litigation;
- The explicit nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims;
- The fact that the arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities; and
- The fact that the client has the opportunity to speak with independent counsel before signing the contract.

Remember that there is no such thing as a non-refundable fee. All fees must be reasonably earned. Any funds reasonably in dispute must be placed in the client trust account for safekeeping pending resolution of the fee dispute.

Fee disputes often can be handled as a part of the ongoing communication between the client and the lawyer. A client's inquiries about billing always should be answered promptly and with complete explanations and documentation. Reciprocally, your relationship with the client ought to be such that you can make direct and frank inquiries about when and how payment is to be expected. Such inquiries should be made at the commencement of the representation and continued throughout, so that the client does not get too far behind in payment. Many malpractice claims are the result of dissatisfaction over billing; you can avoid dissatisfaction by practicing good communication skills.

Sometimes lawyers are not precise about the terminology they use when referring to forms of fees or fee payments. That can lead to confusion about when and how client funds can be used by the lawyer. Rule 1.5(f) specifies which payments from clients can be spent by the lawyer immediately upon their receipt, still subject to being earned or refunded, and which payments must be put in trust because they remain client funds until earned.

Retainers, Advance Deposits, and Hourly Fee Agreements

Sometimes lawyers mistakenly call "advance deposits" by the name "retainer." The difference is important, because the money received from the client must be handled differently in the two situations. Advance deposit fee arrangements are governed by Rule 1.5(f)(3).

A true *retainer* is an amount paid by a client on an agreed-upon basis in order to keep a lawyer generally available to the client. When paid, the money may be deposited into the operating account, can be used by the lawyer, subject to possible refund if a dispute arises.

An *advance deposit*, however, is money which the client puts on deposit with the lawyer in order to ensure that future work can and will be paid for. When paid, the money still belongs to the client and must be deposited in the attorney's trust account. The lawyer may only use the money as she works or incurs reasonable expenses and bills for them. At agreed-upon intervals, the lawyer may withdraw a portion of the advance deposit to pay a fee/expense invoice. She may do so without obtaining the prior permission of the client, but she is obliged to make periodic accountings to the client.

Detailed trust account records must be kept. Withdrawals should not be made from the trust account without issuing an invoice to the client, along with notification that money will be or has been withdrawn from the trust account to pay the invoice. The client should be updated on the status of the advance deposit on a periodic basis - ideally monthly.

Hourly fee agreements are often used when it is difficult to determine the amount of time necessary to pursue the legal matter. Detailed records should be kept as to the time spent on the matter, and the client should be invoiced at regular intervals, preferably monthly. Sample hourly fee agreements are included.

Flat Fee, Fixed Fee, or Minimum Fee Agreements

A lawyer may sell her future services for a specified price. For example, you may charge a set amount for handling a divorce or a DWI defense. You may require that the flat fee be paid before you begin to work on the case. The only requirement is that the fee not be “unreasonable” within the framework of Rule 1.5(a). You may still have to justify the amount charged, so time records remain important even in flat fee situations. A sample of a “flat fee” arrangement is included.

A hybrid of fixed or flat fee billing is a “minimum fee” agreement. Generally, this sort of arrangement occurs when the lawyer and the client agree that a matter will be handled until a particular point in the proceeding, or a particular date, or a particular event, for a set fee, fixed or flat. If the matter is resolved by the pre-arranged point, then no additional amount is due from the client. If, on the other hand, the matter is not resolved by that point, then the client is charged (usually hourly) an additional amount for any additional work.

Rule 1.5(f)(2) provides that a flat fee or minimum fee becomes the property of the lawyer when paid and may be deposited into the operating account. The caveat, however, found under subsection (f)(5), is that you must ***immediately refund any amount of an unearned fee when a fee dispute arises***. If there is a disagreement as to what amount of the fee is unearned, you must ***immediately refund to the client the amount, if any, that you and the client agree has not been earned and deposit any and all other amounts in dispute into your trust account*** pending resolution of the dispute. You are specifically prohibited from using retention of the disputed portion of the funds to coerce the client into accepting your contention as to the amount of the fee that is earned.

As a practical matter, you may take and use any fee that is fixed, flat, or minimum. However, you should do so only if you have the ability to deposit an equivalent amount immediately in trust should a dispute arise. Should the lawyer be discharged prior to completion, the unearned portion of the fee should be promptly returned. Retaining the unearned portion after discharge would be unreasonable under Rule 1.5(a) and may subject the lawyer to discipline.

Ideally, attorneys in flat fee arrangements should obtain their client's informal consent to the scope of the representation in writing, signed by the client, which directly addresses what particular services the lawyer is agreeing to perform.

True Retainers

Rule 1.5(f)(1) defines the old-fashioned “true retainer.” This is a sum of money paid by a client in order to ensure the lawyer's general availability to the client, such as serving as a bank's general counsel. The fee is not necessarily related to any particular matter or litigation. When paid, this fee becomes the property of the lawyer and may be deposited into the operating account and spent.

The “true retainer” relationship is somewhat unusual in this day and age. If you enter into such an agreement with the client, you must be sure to clarify, in writing, what services are to be expected in exchange for the general availability retainer and when “retainer” work ceases and “hourly” work commences. (As “true retainers” are rare, an example has not been provided in this Practice Aid Guide). Any hourly work should also be separately formalized with an engagement letter or contract signed by you and your client.

Division of Fees Among Lawyers

A division of fees between lawyers who are not in the same firm may be made only if:

- (1) The client agrees in writing to the representation by all of the lawyers involved and is advised in writing as to the share of the fee that each lawyer will receive;
- (2) The total fee is reasonable; and
- (3) Each lawyer renders meaningful legal services for the client in the matter. (See Rule 1.5(e).)

Other Points

- Be sure to obtain the client's signature on the contract and obtain any advance deposit *before* commencing the representation.
- Be sure any contract includes details about who will perform the services: you, your partner, an associate, a paralegal, or all of the above.
- Be sure any arrangements to advance costs are carefully spelled out, are understood by the client, and comply with the Rules of Professional Conduct.
- Be sure any potential conflicts of interest are spelled out in the contract and are consented to in writing, signed by the client. Remember that some conflicts cannot be addressed by client consent. (See Rules 1.7 and 1.13.)
- Make sure to detail who is responsible for payment of the fee. If a family member or friend is responsible for paying the client's fee, then get her signature on the contract. But regardless of who pays the fee, remember that your client is the one who makes the decisions about her case. (See Rule 1.8(f).)
- Be sure to specify when payment is due.
- Specify when termination of the contract is acceptable, such as failure to pay the fee, non-cooperation of the client, or other good cause per Rule 1.16(b).

Funds Advanced for Costs

An advance deposit by the client to the lawyer for payment of costs and expenses remains the property of the client and must be placed in the attorney's trust account until costs and expenses are actually incurred. You may expend these funds as costs and expenses accrue, without specific authorization from the client. However, you must render to the client a periodic accounting for these funds as is reasonable under the circumstances, for example, a bill or invoice.

You must determine that sufficient funds for each particular client are on deposit in the trust account *prior to* each and every withdrawal. Therefore, you should either verify that client's trust account balance prior to writing the check, or write the check out of the operating account and transfer the funds out of the client's trust balance, if adequate funds are on deposit. If adequate funds are not on deposit in trust to cover the check, then you must obtain another advance from the client for the difference or advance the difference from your own funds.

For example, XYZ has advanced \$500 toward costs to Lawyer. Last month, Lawyer spent \$300 on investigative fees and deducted that amount from the deposit. This month, Lawyer is filing suit on XYZ's behalf. The filing and service fees will total \$250. Because this amount exceeds XYZ's trust balance of \$200, Lawyer could write the check out of her operating account and bill XYZ for the \$50 difference. However, Lawyer may withdraw the \$200 trust balance to partially reimburse her operating account. Upon receipt of the remaining \$50 from the client, Lawyer may deposit those funds directly into her operating account. Alternatively, lawyer could write a \$200 check for suit from the trust account and write a \$50 check from her operating account, billing XYZ for that \$50.

Funds Advanced to the Client by the Lawyer

The question of cost advances on behalf of clients used to be a particularly difficult one in Louisiana. For years, many considered it unethical and improper to provide financial assistance to clients. The decision in *Louisiana State Bar Association v. Edwins*, 329 So. 2d 437 (La. 1976), qualified the general rule and allowed financial assistance under certain circumstances. The Rules of Professional Conduct were amended in 2006 to settle the question.

Rule 1.4(c) provides that a lawyer who gives any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e). Rule 1.8(e) is very lengthy, detailed and specific. Please read it carefully and understand it fully before rendering financial assistance to a client. A call to LSBA Ethics Counsel may be helpful if you are unclear regarding its meaning and limitations.

Other Important Information About Trust Accounts and Handling of Client Funds

- All lawyers who will take possession of any money belonging to a client, no matter how insignificant the amount, are required to maintain a trust account in a bank or other financial institution in the state in which her office is located. Only attorneys who never handle client funds, such as government or corporate attorneys, are not required to maintain a trust account.
- Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.
- Commingling of your funds with those of your client is a serious disciplinary violation.
- There is only one exception to the commingling rule: you may deposit a nominal amount of your 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. If possible, have the bank tie the trust account to your operating account and sweep the service charges from your operating account.
- Although there is a one-year/three-year prescriptive/peremptive period, set forth in La. Rev. Stat. § 9:5605, for legal malpractice actions by the client against an attorney, there is a limited 10-year prescriptive period applicable to the filing of a disciplinary complaint where the mental element is merely negligence. There is no prescriptive period applicable to the filing of a complaint against an attorney accused of fraudulent conduct or where the mental element was “knowing” or “intentional”.
- Funds in a trust account must be subject to withdrawal upon request and without delay.
- Best practice is to pay the client first, then any third parties (court reporters, health care providers, etc.), then yourself. Never withdraw your fees until after the client has received her share and approved all disbursements. However, you should then always pay yourself promptly to avoid commingling your funds with those of other clients.
- Also, upon termination of representation, you must refund any advance payment of the legal fee, costs or expenses that have not been earned or incurred.
- You must keep complete records of client funds and other client property and must preserve those records for a period of **five years** after termination of the representation.
- Do not be tempted to “borrow” a client’s funds, no matter how nominal or for how short a period of time. This is a disciplinary violation, even if repaid within the next hour. The possible consequences are not worth the risk.
- Issuance of NSF checks drawn on a lawyer’s trust account creates a suggestion of conversion of client funds.
- A draft or check deposited into a lawyer’s trust account should clear the account on which it is drawn prior to any disbursements of the trust funds. The risk that a draft may not clear should not be borne by other clients. For a lawyer to take advantage of a “float” of funds in her trust account belonging to other clients constitutes conversion of the other clients’ funds.
- All trust account checks must be personally signed by a lawyer.
- A non-lawyer should handle and distribute clients’ money only under close supervision.
- Note that all bank overdrafts are reported to the Office of Disciplinary Counsel, subject to Rule XIX, Section 23.D.
- Lawyers are not permitted to use debit cards for their trust accounts or issue checks payable to cash. See Rule 1.15(f).

Property Belonging to the Client and/or Third Persons

Funds or property coming into your possession in which the client and/or a third person claim an interest are subject to special rules, as are funds or property in which both you and a third person claim an interest in the course of representation. The former situation is governed by Rule 1.15(d); the latter is governed by Rule 1.15(e).

Funds in Which Your Client and/or a Third Person Claim an Interest

Upon receiving funds or other property in which a client and/or a third person has an interest, you have five distinct obligations to the client and/or third person:

- **Segregation.** You must keep the funds or other property separate from your funds or property. Funds must be kept in a client trust account maintained in Louisiana or the state where your office is located, or may be kept elsewhere if the client or third person consents. Other types of property must be identified as such and appropriately safeguarded.
- **Notification.** You must promptly notify the client and/or third person of receipt of the funds or other property. However, you should also notify the client or third person that the funds will not be available for disbursement until the check actually clears the bank, which normally occurs within three (3) to five (5) business days following its deposit into your trust account.
- **Delivery.** You must promptly deliver to the client and/or third person any funds or other property to which they may be entitled.
- **Accounting.** Upon request by the client or third person, you must promptly render a full accounting regarding the funds or property.
- **Recordkeeping.** You must keep complete records of account funds and other property for five years after termination of the representation.

However, the obligations to a third person (as opposed to your client)¹ are defined by Rule 1.15(d) as:

- First, you must have actual knowledge of the third person's interest.
- Second, the third person's interest must arise by virtue of one of the following:
 - (1) A statutory lien or privilege;
 - (2) A final judgment addressing disposition of the funds or property; or
 - (3) A written agreement by the client or by you on the client's behalf guaranteeing payment out of those funds or property.

Property in Which Both You and Another Person Claim Interests

When you come into possession of property during a representation in which two or more persons (one of whom may be you) claim competing interests, you must keep the property separate until the dispute is resolved. You must promptly distribute all portions of the property as to which the interests are not in dispute.

A common situation in which this scenario arises is when the client discharges a lawyer and retains another lawyer, both of whom have an interest in a contingent fee. We recommend the use of informal dispute resolution methods, such as the Louisiana State Bar Association Legal Fee Dispute Resolution Program and mediation, as the most efficient and economical ways to handle these issues.

Interest on Lawyer Trust Accounts (IOLTA)

The IOLTA program is a mandatory program requiring participation by most attorneys and law firms. The program requires that a lawyer's IOLTA trust account be interest-bearing and used for any clients' funds which are either nominal in amount or to be held for a short period of time. Neither the lawyer nor the client has access to the earnings from IOLTA accounts. Rather, the Louisiana Bar Foundation administers these funds for the benefit of numerous law-related causes. You may be exempted from the IOLTA program at the discretion of the program administrator by certifying that participation would be economically impractical or if you do not ever handle any client funds (*i.e.*, corporate counsel or assistant district attorney). Even if exempted from the requirement of IOLTA participation, any lawyer who holds any property of clients or third persons must still keep them separate from her own funds in a client trust account. See Rule 1.15(f) for detailed IOLTA rules.

¹ See LSBA Public Ethics Opinion 05-RPCC-004 www.lsba.org/MemberServices/ethicsadvisoryopinions.asp

When A Separate Trust Account May Be Required

In certain cases, where the amount of funds is not nominal and the funds are to be held for a longer period of time, you may open a separate interest-bearing, non-IOLTA trust account for that client's funds so that the client may earn and receive interest. The factors that decide what amount of client's funds is "nominal" are:

- The amount of the deposit, keeping in mind that the deposit should be made into an account which is fully federally insured in the event of failure;
- The amount of interest which would reasonably be expected to be earned during the deposit period;
- Your cost to establish and administer the account, including the cost of preparing any required tax reports for interest accruing to a client's benefit (*i.e.*, Forms 1099); and
- The capability of financial institutions to calculate and pay interest to individual clients.

You may assume that \$50 is a reasonable estimate of the minimum amount of interest that a segregated trust account for an individual client must generate to be practical in light of the costs involved in earning or accounting for any such income. In the end, your "sound judgment" determines whether the funds could be invested to provide a positive net return to the client.

Ledgers and Billing

Even if you have a rock-solid written fee agreement with your client, it means little without the proper office procedures to back it up. Therefore, simple and efficient timekeeping and billing systems must be implemented. Most clients appreciate detailed invoices showing that the lawyer has performed services on the case. Included in this Guide are simple forms for: documenting expenses (ledger sheet); and billing and invoicing the client.

You should keep track of the hours spent in all your legal matters, even if the contract isn't hourly. This will bolster any claim or defense in case a fee dispute or malpractice suit arises. Bill as frequently and as promptly as is practical. This will avoid the client's feeling "ambushed" at the end of a case by receiving a large bill and will promote better communication in the representation.

Accepting Credit Cards for Payment of Fees and Costs

According to LSBA Public Ethics Advisory Opinion 12-RPCC-019, a lawyer may accept credit cards in payment for legal services rendered or advanced for fees and/or costs as long as the lawyer abides by the applicable Louisiana Rules of Professional Conduct, including those pertaining to proper communication with the client, fees and expense charges, confidentiality, and the safekeeping of property. Any merchant agreement between the lawyer and credit card vendor must allow a lawyer to be compliant with the appropriate Rules.

In general, before contracting with a vendor or credit card company to allow your firm to accept credit cards, study the merchant agreement carefully to make sure there are no obligations which would require you to violate the Rules, and communicate to the client any special fee arrangements which may be required by his use of a credit card.

In doing so, consider the following:

- Do you intend to charge the clients for the "transaction fee" associated with the use of the credit card? If so, have you obtained the necessary informed consent to do so?
- Does the credit card merchant require disclosures of any confidential information to process the charge; and if so, has the client provided informed consent as to that disclosure?
- Have you considered whether to link the credit card merchant agreement to an operating account or a trust account, given that the funds may be required to be held in trust?
- If you elect to link the credit card to a trust account, have you provided that any "charge backs" must only come from the operating account to avoid unintentional conversion of other clients' funds in the trust account?

Because the credit merchant agreement is a special circumstance requiring the client's informed consent, you should communicate with the client, preferably in writing, the obligations of the client and lawyer under the merchant agreement.²

If you treat this transaction fee as an overhead expense, you must make arrangements to treat the net remittance received from the credit card company, after deduction of its fee, as a remittance in satisfaction of the entire amount charged to the client's credit card. If you intend that the client still must pay the difference between the original charge amount and the remittance received, which is the "transaction fee," then you must be certain to comply with Rule 1.8(e)(3) and obtain the client's informed consent for such a charge.

For example, if the client uses a credit card to pay a \$500 advance deposit subject to a 2% transaction fee, which you treat as an overhead expense, that transaction fee should be deducted from your operating account in order that the client receives the full \$500 trust balance as a result of the credit card transaction. However, if you intend for the client to bear the expense of the transaction fee, with the client's informed consent, you could reflect that the original trust balance of \$500 has been reduced to \$490 to account for the transaction fee. Be aware, though, that some credit card vendors prohibit the lawyer from passing such transaction fees along to the client, in which case this option is not available to you, and you must elect to treat the transaction fee as an overhead expense. Likewise, if the credit card company only charges a monthly charge for a credit card processing machine, rather than charging a fee per transaction, then the monthly charge is a non-recoverable overhead cost which may not be passed on to the client.

If you are unable to negotiate with the credit card company an agreement to use generic service descriptions, such as "services rendered," then you must comply with Rule 1.6(a) by advising the client of the required disclosures and obtaining the client's informed consent. You should also advise the client that if there is a dispute regarding charges among the client, you and the credit card company, confidential information may not be protected due to exceptions contained in Rule 1.6(b)5.

If earned fees or costs have been transferred from your trust account to your operating account, and later the client disputes the fees or costs, a "charge back" by the credit card company against your trust account may result in a failure to safeguard or conversion of other clients' funds in violation of Rule 1.15. On the other hand, if your credit card processing account is only linked to your operating account, you would violate Rule 1.15 by putting advance deposits paid by credit card directly into your operating account because they have not yet been earned. If the client pays by credit card sums owed to you for past work performed, expenses incurred, or a flat fee, the funds may be deposited directly into your operating account, since those funds become your property when paid.

The Rules of Professional Conduct Committee, as well as these authors, recommend that you link both your trust account and your operating account to the credit card account so that funds charged to a client's credit card may be placed into the correct account. The contract between you and the credit card company should also provide that any "charge back," disputed transaction, or costs associated with use of the credit card will be charged solely to your operating account.

² See La. Rules of Professional Conduct 1.0(e), 1.4 and 1.5(B).

Additional Resources

- Foonberg, Jay G., *The ABA Guide to Lawyer Trust Accounts* (American Bar Association, 1996) or check out the book via the LSBA Lending Library www.lsba.org/PracticeManagement/LendingLibrary.aspx.
- *The Louisiana Lawyer and Other People's Money* (Louisiana Bar Foundation, 1998) or check out the book via the LSBA Lending Library www.lsba.org/PracticeManagement/LendingLibrary.aspx.
- LSBA Ethics Opinion 05-RPCC-004 Safekeeping the Property of Clients and Third Parties <http://files.lsba.org/documents/ethics/safekeepingproperty.pdf>.