



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1050 (3/25/15)

Topic: Legal expenses; Credit Card Processing Fees

Digest: A lawyer may charge a client, as an administrative convenience, a nominally greater amount than the processing fees imposed on the lawyer's account by a credit card company in connection with the client's payment by credit card of the lawyer's advance payment retainer, as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the amount of the up-charge is nominal, and (iii) total amount of the advance payment retainer and the processing fees (including the up-charge) are reasonable under the circumstances.

Rules: 1.5(a) & (b)

FACTS

1. A law firm wishes to accommodate clients who want to pay the firm's advance payment retainers by credit card. (For a description of advance payment retainers, see N.Y. State 816 (2007), ¶3.) The law firm wishes to have its clients pay the credit card company's processing fee for such credit card payments. Those processing fees vary from 2.75% to 3.2% of the amount paid. The law firm is concerned that it will not be able to recoup the entirety of the processing fee if it passes along to the client the precise amount of the initial processing fee, since the client is likely to want to pay even the processing fee by credit card.

2. For example, if the client pays an advance payment retainer of \$10,000 by credit card, the law firm would pass along to the client for payment the credit card processing fee of 2.75%, *i.e.*, \$275.00. If the client wants to pay the amount of that processing fee by credit card as well, then there will be a 2.75% credit card processing fee on the payment of that fee, *i.e.*, \$7.56. If the client wants to pay that processing fee on the processing fee by credit card, there will be another processing fee passed along to the client, and so on.

3. The law firm wants to know whether it can charge a single charge for credit card payment of its advance payment retainer that is slightly higher than the actual credit card processing fee. Specifically, it wants to know whether it is ethically permissible to charge its clients a single fee of 3% to cover the credit card company's processing fee of 2.75% and a flat fee of 3.5% to cover the credit card company processing fee of 3.2%. In the example above, the application of that single fee of 3% instead of the triple application of 2.75% would result in the law firm's receiving \$300.00 instead of a reimbursement of approximately \$283.00 (\$275.00, plus \$7.56, plus \$.21), roughly a \$17.00 up-charge (\$300.00 payment from client minus \$283.00 charged by the credit card company).

QUESTION

4. May a law firm charge its clients who wish to pay its advance payment retainer by credit card an amount that is greater than the processing fee the credit card company actually imposes on the law firm?

OPINION

5. For more than 40 years, it has been recognized that in certain circumstances New York lawyers may allow their clients to pay their attorneys' fees by credit card. *See, e.g.*, N.Y. City 2014-3; Nassau County 13-5 (2013); N.Y. State 763 (2003); N.Y. State 362 (1974), as modified by N.Y. State 763 (2003). Those opinions establish that lawyers may accept credit card payments of their fees as long as (i) the amount of the fees is reasonable, (ii) the lawyer complies with the duty to protect the confidentiality of client information, (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client, (iv) the lawyer notifies the client before charges are billed to the credit card and offers the client the opportunity to question any billing errors, and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R., Part 137. *See* N.Y. State 763 (2003) and nn. 3 & 4.

6. In N.Y. State 763 (2003), this Committee considered whether a collection lawyer could deduct, from a settlement payment due the lawyer's client, charges imposed by a merchant credit card bank on the lawyer when the third party debtor made the settlement payment by credit card. The Committee stated: "With regard to charges by the merchant credit card bank incurred in consequence of the firm's credit card program, such charges may be deducted from the sum remitted to the client if this arrangement is part of the understanding with the client; otherwise these charges should be deducted from the firm's operating account and not passed on the client." N.Y. State 763 also noted South Carolina Opinion 98-08 for the proposition that the attorney may pass on the administrative fee as long as the total fee is "objectively reasonable." *See* New York Rules of Professional Conduct (the "Rules") 1.5(a) ("A lawyer shall not . . . charge . . . an excessive . . . fee or expense"); Rule 1.5(b) ("A lawyer shall communicate to a client . . . the basis or rate of the fee and expenses for which the client will be responsible").

7. Since 2003, ethics opinions from bar associations in other states have reached similar conclusions. *See, e.g.*, Hawaii Opinion 45 (2003); Kentucky Opinion 426 (2007); District of Columbia Opinion 348 (2009).

8. Thus, with respect to the credit card company processing fees at issue here, it is clear that the lawyer may pass along for payment by the client the actual amount of the processing fees imposed on the lawyer by the credit card company as long as (i) the client has been advised of those charges and has agreed to pay them in advance of their imposition, and (ii) the processing fees, along with the amount of attorneys' fees paid, are reasonable in amount.

9. Neither N.Y. State 763 (2003) nor the out-of-state ethics opinions cited above have addressed the specific question raised here: If a client wants to pay an advance payment retainer by credit card, may the law firm charge the client more than the processing fee that the credit

card company charges the lawyer. We perceive reasons for and against allowing a lawyer to charge the client an "up-charge" exceeding the credit card company's processing fee to the lawyer. On one hand, the additional processing fee may be determined to the penny mathematically, so the lawyer is not compelled to estimate the total out-of-pocket cost to the lawyer. On the other hand, calculating the processing fee (including the processing fee on any financed processing fee) will cause the lawyer to incur an administrative expense.

10. A number of ethics committees have addressed the question of lawyer billing of expenses. In ABA 93-379 (1993), the ABA Committee concluded that the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house (such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services) if the charge reasonably reflects the lawyer's actual cost for the services rendered, plus a reasonable allocation of related overhead. ABA 93-379 stated, however, that it is impermissible for a lawyer to charge more than the actual cost of such disbursements, plus overhead, unless the lawyer makes full disclosure to and obtains the agreement of the client to the higher charge and the total charge is reasonable. Similarly, in N.Y. City 2006-3, the New York City Bar ethics committee concluded that, unless the client agrees otherwise in the retainer agreement, a lawyer may not charge the client more than the direct cost associated with the outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service.

11. The conclusions of the ABA and New York City opinions are reflected in New York's Comment to Rule 1.5. *See* Rule 1.5, Cmt. [1] ("A lawyer may seek payment for services performed in-house, such as copying . . . either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.")

12. We believe that a similar Rule 1.5 analysis also applies to the lawyer's proposed up-charge. Thus, a lawyer may charge the client more than the processing fee the credit card company imposes on the lawyer as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged (including the up-charge) are reasonable in the circumstances. At what point the up-charge becomes excessive is a matter of fact that depends upon, among other things, the amount of the up-charge, the amount of the advance payment retainer, and the client's opportunity to avoid the up-charge entirely by paying the advance retainer by cash or check.

13. The Committee is aware of at least three prior opinions that have disapproved of interest charges in certain circumstances. In N.Y. City 1997-1, the New York City Bar ethics committee opined that, when a lawyer representing a client in a contingency fee matter borrowed money to pay for the client's litigation expenses, the lawyer was prohibited from charging the client interest in an amount greater than the interest charges the lawyer actually incurred. In N.Y. State 729 (2000), which concerned a lawyer's imposition of an interest charge on disbursements the lawyer was advancing on the client's behalf in a contingency fee matter, this Committee said that a lawyer could not pass along to a client a charge for interest that is greater than the charge the lawyer actually incurred (or, if the lawyer did not borrow funds, greater than the lawyer's actual

or putative cost of funds). In N.Y. State 754 (2002), this Committee concluded that a lawyer borrowing funds to advance expenses in a contingent fee litigation may pass on to the client the interest the lawyer incurs in such borrowing (implying that the lawyer may not charge more than the actual cost incurred). Both N.Y. State 729 and N.Y. State 754 cited N.Y. City 1997-1.

14. These three opinions do not affect the conclusion here that the lawyer may charge the client a nominal amount over the actual processing fee charged by the credit card company as a matter of administrative convenience, as long as (i) the lawyer discloses the up-charge and the client consents to it in advance of its imposition, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged (including the up-charge) are reasonable in the circumstances.

15. In reaching this conclusion, the Committee assumes three things. First, we assume that up-charging the client for the credit card company's processing fee does not in itself violate the law or the credit card contract between the lawyer, on the one hand, and the credit card company or the bank issuing the credit card, on the other. We are aware that the use of credit cards may subject lawyers to regulations under certain federal and state laws, such as consumer protection and data breach notification statutes, but such requirements of law are outside the scope of this Committee's jurisdiction. *See* N.Y. City 2014-3 n.1.

16. Second, we assume that the lawyer satisfies the general ethical conditions for accepting credit card payments by clients (*see* ¶ 5, above).

17. Third, insofar as the lawyer is passing along to the client an up-charge based on the credit card company's processing fee to the lawyer, we assume that an explanation of this up-charge will be included as part of any required written engagement letter under 22 N.Y.C.R.R. § 1215.1. *See* Rule 1.5(b) and N.Y. State 763, n. 6. This disclosure is especially important with respect to the payment of credit card company processing fees, because the lawyer's imposition of such a charge on the client reverses what we understand to be the normal mercantile practice in New York, when the merchant, not the customer, pays the credit card company's processing fee.

CONCLUSION

18. A lawyer may, as an administrative convenience, charge a client a nominal amount over the actual processing fees imposed on the lawyer by a credit card company in connection with the client's payment by credit card of the lawyer's advance payment retainer, as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged, including the up-charge) are reasonable under the circumstances.

(48-14)