NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1248 (11/23/2022)

Topic: Dispute over credit card payment for legal services

Digest: If a client disputes a credit card payment of legal fees by requesting a chargeback, the lawyer may dispute the chargeback by providing information to the credit card provider about the services rendered, including the disclosure of the retainer agreement and client invoices if (a) the information is not confidential; (b) the client gives informed consent to disclose the confidential information, or (c) absent consent, the lawyer reasonably believes that the disclosure of confidential information is necessary to establish or collect the lawyer's lawfully earned fee. Such disclosures should be limited or redacted to reveal only what is objectively reasonable to rebut the chargeback request and prove the lawyer's entitlement to his fee. Participation in the resolution of the chargeback dispute initiated by the client does not relieve the lawyer of his obligations pursuant to the New York State Fee Dispute Resolution Program.

Rules: 1.6

FACTS:

1. The inquirer receives credit card payments from clients for services rendered. When clients who make credit card payments later dispute the lawyer's services by seeking a "chargeback," the credit card provider allows the lawyer an opportunity to dispute the chargeback by providing information about the services rendered.

QUESTION:

2. In a dispute with a client who has requested a "chargeback" for credit card payments to the lawyer, may the lawyer provide information, such as the retainer agreement and invoices, to the credit card provider to establish the lawyer's entitlement to payment for the lawyer's legal services?

OPINION:

3. It has been recognized for nearly a half century that lawyers may accept credit card payments for legal services. In N.Y. State 362 (1974), we concluded: "The use of credit cards to pay for legal fees is an innovation which should not be discouraged where the participating lawyer complies with the appropriate safeguards . . . [because] it fills a need for a segment of the public that conceivably might not otherwise have access to legal services." Among the necessary safeguards are the protection of clients' confidential information.

4. After making a credit card payment, a client may assert that the lawyer did not render the services for which the client paid, or that the lawyer did not render the services competently and may request a "chargeback" from the credit card provider. In that event, the credit card provider may withhold or withdraw payment to the lawyer. However, the credit card provider may decline to charge back the disputed payment if the lawyer provides satisfactory information about the

services rendered. The inquirer asks whether providing information such as the retainer agreement and invoices would violate the duty of confidentiality.

5. Rule 1.6(a)(1) establishes the basic duty of confidentiality. It provides, subject to exception:

> A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless . . . the client gives informed consent, as defined in Rule 1.0(j).

6. The list of exceptions to nondisclosure is set forth in Rule 1.6(b). One of these exceptions is that "A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee." *See* Rule 1.6(b)(5)(ii).

Would the disclosure of the retainer agreement or client invoices constitute disclosure of confidential information?

7. The first question we must address is whether a retainer agreement or client invoices are "confidential information" within the meaning of Rule 1.6(a). Our professional conduct rules define confidential information somewhat differently, and slightly more narrowly, than the rules of most other states. Rule 1.6(a) provides in pertinent part:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

8. Under this definition, information about the fact and nature of the lawyer's representation, and the fact that services were rendered, may or may not be confidential, depending on the circumstances. Information in invoices about the general nature of services performed is not invariably either privileged, likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential. On the one hand, even the existence of a lawyer-client relationship is sometimes confidential information under Rule 1.6(a). See N.Y. State 1088 (2016) ("The client is more likely to find that disclosure of the fact of a current or prior representation by a lawyer is embarrassing or detrimental where the representation involves or involved criminal law, bankruptcy, debt collection or family law."). On the other hand, there may be contexts where the information to be provided to the credit card provider is not privileged, its disclosure would not embarrass or prejudice the client, and the client has not requested that it be kept confidential. Whether nonprivileged information about the general nature of the lawyer's services is confidential "will depend on the client and the specific facts and circumstances of the representation." Id.

If the retainer agreement and invoices are confidential information, has the attorney secured the client's informed consent to their disclosure?

9. If a lawyer determines that the retainer agreement and client invoices are confidential information, he may nonetheless disclose them with client consent pursuant to Rule 1.6(a)(1) in accordance with the definition of informed consent set forth in Rule 1.0(j), which provides:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the

> lawyer has adequately explained to the person the material risks or the proposed course of conduct and reasonably available alternatives.

10. Rule 1.0(j) offers guidance on the content of disclosures the lawyer should make to obtain informed consent. Here, we will also offer guidance on the timing of those disclosures. A lawyer has two basic choices—at the time the dispute arises, or before the dispute arises. Thus, a lawyer may ask the client to give informed consent for the lawyer to disclose confidential information to the credit card provider at the time the dispute arises so that the credit card provider can address the dispute based on fuller information. To obtain informed consent at that juncture, the lawyer should explain the limited purpose of the disclosure to the client, along with the lawyer's assessments of any risk of further disclosure associated with providing the confidential information to the credit card provider. If appropriate, the lawyer might also describe any redactions the lawyer proposes to make to the retainer agreement and the invoices where the redacted information is not necessary or relevant to the resolution of the dispute. Alternatively, a lawyer may obtain the client's informed consent to disclose confidential information to a credit card company in the event of a requested charge back in advance of the dispute (e.g., in the retainer agreement), and the lawyer may rely on that advance consent unless and until the client withdraws that consent (which the client is free to do). Cf. N.Y. State 1061 (2015) ("If the client revokes consent, the revocation will prohibit the lawyer to make future reports of the client's payment status to the System but will not require the lawyer to remove any past reports to the System.").

If the retainer agreement and invoices are confidential information, and the attorney has not secured the client's informed consent to their disclosure, is disclosure "reasonably necessary to establish or collect a fee"?

11. If the client has not consented to allow the lawyer to disclose the retainer agreement, the lawyer's invoices, or other confidential information relevant to the dispute, the lawyer must determine whether an exception to the duty of confidentiality applies. As noted, one of those exceptions is Rule 1.6(b)(5)(ii), which will permit disclosure to the credit card company "to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee."

12. The fee collection exception will apply sometimes, but not always. For example, it will not apply if the lawyer can allay the client's concerns and persuade the client to withdraw the objection or resolve the dispute, thereby obviating the need to persuade the credit card company that the charge is legitimate. To that end, the lawyer may, where practicable, seek to resolve the dispute, based on full or partial payment, explaining to the client that if an agreed resolution is not reached, the lawyer will submit information about the representation to the credit card provider to the extent reasonably necessary to establish and collect the lawyer's fee. See Rule 1.6, cmt. [14] ("Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure."). Whether direct communication with the client for the purpose of compromising the fee or withdrawing the chargeback request is "practicable" will turn on many factors, including the availability of the client and the client's willingness to engage in a discussion, as well as the credit card company's deadline for the lawyer to respond to the chargeback request. The Rule 1.6(b)(5)(ii) exception will apply either if no resolution of the fee dispute is reached with the client or if the client does not withdraw the dispute. But even if the exception applies, the lawyer may submit to the credit card company only such information as the lawyer "reasonably believes necessary" to dispute the chargeback and release the funds to pay the lawyer's legitimately earned fee in accordance with the fee agreement.

13. If the lawyer invokes the exception in Rule 1.6(b)(5)(ii) to provide documents such as a retainer agreement or invoices, the lawyer must first redact information that the lawyer does not reasonably believe necessary to establish or collect the lawyer's fee. See Rule 1.6, Cmt. [14] ("[A]

disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose"); N.Y. State 1118 (2017) ("The inquirer may disclose confidential information reasonably necessary to collect a fee, but must take all reasonable measures, such as redaction . . ., to limit the disclosure of confidential information to information that is objectively reasonable to prove his entitlement to his fee.").

Does the chargeback review procedure relieve the attorney from compliance with the New York State Fee Dispute Resolution Program?

14. The New York State Fee Dispute Resolution Program (the "Program") "provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation." See 22 NYCRR Part 137.0. The Program applies to civil matters where the dispute involves an amount that is $1,000 or more but less than $50,000 (see 22 NYCRR § 137.1 (a) & (b)(2)) "whether or not the attorney has already received some or all of the fee in dispute." See 22 NYCRR § 137.2(a). Where, as here, "the attorney and client cannot agree as to the attorney's fee," the Program requires that the attorney forward by certified mail or personal service a "Notice of Client's Right to Arbitrate." See 22 NYCRR § 137.6(a). The Program has rules concerning the contents of that notice, additional arbitration procedures, and the conduct of the hearing. See generally 22 NYCRR §§ 137.6 & 137.7. The Program also provides the opportunity for judicial de novo review of an arbitration award. See 22 NYCRR §§ 137.8,

15. Although the inquirer may here dispute the chargeback request by providing information to the credit card provider in conformance with this opinion, the chargeback dispute process initiated by the client does not relieve the inquirer from his obligations under the Program. Notice of Client's Right to Arbitrate should, therefore, be provided to the client in accordance with the Program requirements contemporaneously with contesting the chargeback.

CONCLUSION:

14. If a client disputes a credit card payment of legal fees by requesting a chargeback, the lawyer may dispute the chargeback by providing information to the credit card provider about the services rendered. The disclosure may include the retainer agreement and invoices to the client if (a) the information is not confidential; or (b) if the information is confidential but (i) the client gives informed consent to disclose the confidential information, or (ii) the client does not give informed consent, but the lawyer reasonably believes that the disclosure of confidential information is necessary to establish or collect the lawyer's fee. Such disclosures should be limited or redacted to reveal only what is objectively reasonable to rebut the chargeback request and prove the lawyer's entitlement to his fee. Participation in the resolution of the chargeback dispute initiated by the client does not relieve the lawyer of his obligations pursuant to the New York State Fee Dispute Resolution Program.

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