

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2014-3: NEW YORK ATTORNEY MAY NOT CHARGE CLIENT'S CREDIT CARD ACCOUNT AFTER CLIENT DISPUTES BILL

TOPIC: Credit Cards

DIGEST: When a client has previously granted an attorney advance authorization to charge the client's credit card account for the amount of the attorney's bills, but the client later disputes all or part of a particular bill, the attorney may not thereafter charge the client's credit card account for the disputed portion of the bill.

RULES: 1.15

QUESTION: When a client has granted a lawyer advance authorization to charge the client's credit card account for amounts billed in the future, but the client later disputes all or part of a particular bill, may the lawyer charge the credit card account for the disputed portion of the bill?

OPINION

It is now well established that attorneys are permitted under the New York Rules of Professional Conduct (the "Rules" or "New York Rules") to accept payment by credit card, as long as they comply with various ethical requirements, including protecting confidential information (as required by Rule 1.6) and avoiding excessive legal fees and expenses (as required by Rule 1.5). This position was recently reaffirmed by the Bar Association of Nassau County, Committee on Professional Ethics, in its Opinion 13-5 issued on December 11, 2013.¹

The question presented here is whether a lawyer, who has received advance authorization to charge a client's credit card account for the amount of the lawyer's bills, may charge the client's credit card account for a particular bill after the client has disputed all or part of that bill. In the opinion of this Committee, once a client disputes the amount of a lawyer's bill, the lawyer should not charge the client's credit card account for the disputed portion of the bill without the client's consent.

Rule 1.15 contains various provisions designed to protect "Client Funds" and other "Property." The Rule makes clear that these protections arise from the lawyer's role as the client's "fiduciary." Rule 1.15(a). Consequently, a lawyer "must not misappropriate such funds or property or commingle [them] with his or her own" funds or property. *Id.* A lawyer who has been entrusted with a client's credit card information, along with authority to make charges

¹ Nassau County Opinion 13-5 (2013) provides useful background on the evolution of New York's acceptance of credit card payments for legal fees and costs. It concludes that an attorney "is permitted to accept client payments by credit card" under the New York Rules, "provided the attorney observes certain caveats and restrictions" noted in the opinion. We add that the use of credit cards may also subject lawyers to regulation under certain federal and state laws (such as consumer protection and data breach notification statutes), which are matters of law outside the scope of this Committee's jurisdiction.

against the credit card account, holds that information as the client's fiduciary. As a general matter, charging the client's credit card account after the client has disputed the fees violates this trust. Such a practice is analogous to a lawyer taking possession of disputed funds being held in escrow for the client's benefit, a practice that is explicitly prohibited under Rule 1.15(b)(4). That provision applies when a lawyer holds in an escrow account "funds belonging in part to a client" and "in part currently or potentially to the lawyer." In that circumstance, if the client disputes the lawyer's entitlement to a portion of those funds for his fee, "the disputed portion *shall not be withdrawn* until the dispute is finally resolved." Rule 1.15(b)(4) (emphasis added).

If the lawyer is not permitted to withdraw disputed funds from escrow, it follows that the lawyer may not charge disputed amounts against a client's credit card account, which is sensitive information belonging to the client that the lawyer holds in trust and which provides the lawyer with access to a client's personal funds. The lawyer may charge the client's credit card for the portion of the bill that the client does not dispute, but may not charge the card for any portion that the client does dispute.

CONCLUSION:

Under the New York Rules of Professional Conduct, an attorney may not charge a client's credit card account for any disputed portion of a bill, even if the client has previously given advance authorization to charge the client's credit card account for legal fees.