ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a partner in a 20-attorney firm that handles litigation and transactional matters. Most, if not all, of our work for our clients is done on a billable hour basis. My fellow partners have given me the task of improving our accounts receivable because we are finding that collecting fees from clients has become more and more difficult as time goes on. One of the suggestions made by the managing partner of my firm is to begin accepting credit card payments from clients both for retainer fees and charges for ongoing services. This sounds like a very practical way to get our fees paid. However, I am concerned about any ethical considerations that may arise if my firm begins accepting credit card payments from clients. What ethical considerations should I be aware of if we begin accepting credit card payments from clients? In addition, if we have a client's credit card number on file, what are the circumstances that would allow our firm to take automatic payment deductions from a client's credit card? And if we do take automatic payment deductions from a credit card, are they considered client funds? Last, what if a dispute over the bill ensues?

Sincerely,
Charlie Cautious

Dear Charlie Cautious:

As all of us know, credit cards are probably one of the most convenient methods of paying for goods and services. However, unlike paying by check or wire transfer, the recipients of credit card payments are in the unique position of being able to retain and potentially access pre-existing credit card information so as to provide a continuous means of compensation for services rendered to the card holder and, more specifically here, the client. Although the New York Rules of Professional Conduct (the RPC) do not directly address credit card payments, there are several ethical rules and ethics opinions that have to be considered when an attorney decides to allow clients to use credit cards when paying for legal services.

Rule 1.15(a) prohibits the commingling and misappropriation of client funds or property. The Rule expressly provides that

> [a] lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

Id. In addition, it is important to remember that attorneys have an obligation to protect a client's confidential information (Rule 1.6). A client's credit card information is most likely confidential and must be protected. *Id.* Rule 1.5, which prohibits an attorney from charging or collecting an excessive fee for legal services, is another rule that must be considered. *Id.* Finally, as obvious as this may sound, payment by credit card is not the equivalent of a blank check; when a client's credit card is debited for fees, the firm must always make sure to charge the appropriate fee amount previously billed to the client.

Your question concerning automatic client credit card payments raises a number of issues. First, it all has to start with the engagement letter. We would strongly suggest language in your firm's engagement letter that makes clients aware of the payment arrangements with your firm and, specifically, how credit card payments for legal services rendered are handled by the firm. If you want your client to authorize automatic payment of bills by credit card, the engagement letter should specifically say so.

Second, everyone should understand that retainers and fees paid by credit card will become the property of the law firm and will end up in the firm's operating account. N.Y. State Bar Op. 816 (2007) provides some guidance here. The NYSBA Committee on Professional Ethics (the NYSBA Committee) found that "[i]f the parties agree to treat advance payment of fees as the lawyer's own, the lawyer may not deposit the fee advances in a client trust account, as this would constitute impermissible commingling." *Id.* More recently, the NYSBA Committee found that "advance payment retainers may be treated either as client-owned funds, to be kept in the lawyer's escrow account, or as lawyer-owned funds, subject to the lawyer's obligation to reimburse the client for any portion ultimately not earned in fees." *See* N.Y. State Bar Op. 893 (2013).

On the issue of whether credit card payments may be deemed "client funds," we wish to focus your attention first on the matters arising when such payments are made in connection with a retainer. As we have noted previously in this *Forum*, attorneys should be highly discouraged from depositing retainer fees into escrow accounts or even client trust accounts. *See* Vincent J. Syracuse, Matthew R. Maron and

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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Peter V. Coffey, *Attorney Professionalism Forum: Rules Governing Escrow Accounts, Retainers, and Communication With Clients Regarding Fees*, New York State Bar Association Journal, Vol. 85, No. 1, January 2013. More often than not when an attorney deposits retainers into an escrow account, the attorney may lose track of what are retainer funds and what are client escrow funds, and before you know it the attorney is dipping into his or her account because the attorney believes these really are his or her retainer funds when in fact they are not. This sort of commingling could be viewed as a misappropriation of client funds. *Id.* Retainers deposited in an escrow account are arguably client funds. They are "off limits" to the lawyer once the client says "no, you cannot pay yourself from the retainer," thus sacrificing the whole idea of having a retainer. *Id.* With regard to subsequent fee payments made by automatic payment deduction from a credit card, as stated above, your engagement letter should clearly specify your firm's procedures for collecting payments by this method.

So what happens if a client gives a lawyer permission to set up automatic bill payment by credit card, and then ends up disputing the bill? The answer is *no*; the lawyer cannot use the client's credit card to pay the bill. This catch-22 was recently addressed by the New York City Bar Association's Committee on Professional Ethics. Its answer to the bar was that "under the [RPC], 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." *See* N.Y City Bar Op. 2014-3 (the City Bar Opinion). The City Bar Opinion reminds us of a lawyer's role as the client's fiduciary and extends the fiduciary responsibility of an attorney to matters involving credit card payments for legal services rendered. *Id.*, citing Rule 1.15(a). Furthermore, the City Bar Opinion goes on to state that "[a] lawyer who has been entrusted with a client's credit card information, along with authority to make charges against the credit card account, holds that information as the client's fiduciary" and that "charging the client's credit card account after the client has disputed the fees violates this trust." *Id.* Most important, the City Bar Opinion analogizes such acts as similar to those of 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). *Id.*, *see supra*.

In sum, attorneys accepting credit card payments should operate with extreme caution if a fee dispute with a client occurs. As Professor Roy Simon noted, "Rule 1.15 is the longest and most strictly enforced rule in New York's Rules of Professional Conduct." *See* Simon's New York Rules of Professional Conduct Annotated at 786 (2014). As we have explored at length previously in this *Forum*, any missteps by an attorney in this arena will almost certainly result in disciplinary consequences. *See* Syracuse, Maron and Coffey, *supra*. In essence, credit card payments for disputed fees must be treated with the same care as any other client funds entrusted to an attorney.

Other states have also weighed in on the issues surrounding credit card payments for legal fees. The State Bar of California's Standing Committee on Professional Responsibility and Conduct found that not only may an attorney ethically accept earned fees by credit card, he or she also may ethically accept a deposit for fees not yet earned by credit card but may not ethically accept a deposit made by credit card for advances for costs and expenses. *See* State Bar of Calif. Standing Comm. on Prof'l Resp. and Conduct Formal Op. No. 2007-172 (2007). The District of Columbia Bar also noted the view that credit cards are an acceptable method of paying legal fees on the condition that "the client understands and consents to whatever disclosures to the credit card company are required by the merchant agreement," adding that "the client must also be informed of the actual cost of using the credit card if the lawyer intends to recapture from [the] client" fees intended to be paid to the credit card company. *See* D.C. Bar Ethics Op. 348 (March 2009). This opinion also found that "advance fees and retainers" may be paid by credit card "only if it does not endanger entrusted client funds and only if the lawyer thoroughly understands the merchant agreement and arranges [his or her] affairs so that [he or she] has the ability to meet [his or her] obligation to refund unearned fees." *Id.*

Credit cards obviously make it easier for a lawyer to get paid. But, the catch is that the lawyer must make the extra effort to put in place the appropriate safeguards for acceptance of credit card payments from clients. Although it may require extra time and effort by you, your partners and your firm's accounting staff (or outside bookkeeper), you should establish explicit procedures for handling these sorts of payments to assure compliance with the ethical obligations of both you and your partners.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com),
Tannenbaum Helpern Syracuse &
Hirschtritt LLP

Postscript to the May 2014 *Forum*

Readers of the *Forum* were recently treated to our musings on proper courtroom attire. *See* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum: Appropriate Attorney Dress in the Courtroom,* New York State Bar Association Journal, May 2014, Vol. 86, No. 4. The May 2014 *Forum* generated many positive comments from the bench and the bar about the importance of the issues that we discussed. We are not and do not want to be the "fashion police" of our profession, but we feel constrained to share a recent Indiana court decision (which proves, once again, there is no shortage of material for this *Forum*) where a male attorney showed up in court without socks. When confronted by the judge, the attorney simply told

the judge in open court that he hated wearing socks. This exchange occurred after the judge advised the attorney privately during a break in the proceedings that court rules required that attorneys wear socks. Cutting to the chase, the judge ordered the attorney to wear socks along with a business suit and tie in all court proceedings as "appropriate business attire." The court further opined that if the attorney appeared in court again without socks:

> [H]e will be subject to sanctions from the Court which may include a delay ordered by the Court in presenting his case, fines, continuances of pending proceeding[s] for which costs, fees and expenses may be awarded opposing parties and/or their counsel, or such other sanctions for contempt that the court may impose in order to maintain appropriate decorum during Court proceedings.

See In re Proper Courtroom Attire, Order Directing Proper Attire Be Worn By Todd A. Glickfeld, Case No. 05C01-1408-CB-000005 (Ind., Blackford Cir. Ct., Aug. 26, 2014).

Last, to make matters worse for this fashion-challenged lawyer, the court directed that the "socks" order "be distributed to all members of the [county's] bar . . . ." *Id.*

As we have said previously in this *Forum*, when it comes to proper dress some fashion statements are best left at the door when you enter a courthouse. *See* Syracuse and Maron, *Attorney Professionalism Forum,* May 2014, *supra*.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am an associate at a firm that has maintained a longstanding client relationship with a professional sports league (the League). Recently, the League suspended one of its star players (DD) for two years as a result of an incident where he assaulted his fiancée in a hotel elevator and rendered her unconscious. The player has since filed a legal action against the League in federal court alleging that the League's suspension of him was arbitrary and capricious under the League's personal conduct policy. The League had previously rendered a monetary fine against DD based upon the incident in question, which had been documented in a surveillance video showing DD pulling his unconscious fiancée out of the elevator; it did not show the actual assault.

Earlier this year, I participated in a call along with my supervising partner (SP), the League's assistant general counsel (the AGC), the League's General Counsel (the GC) and another League executive. During the call, the GC advised us of the incident and when SP asked if the incident was recorded, the GC quickly responded that it was in possession of the subject video. My first thought upon hearing this information was to find out if other videotapes of the incident existed. I wrote those thoughts on a notepad and showed them to SP who quickly waved me off during the call. After the conclusion of the call, SP chided me and demanded that I never make such inquiry of the client again.

A few weeks later, I ran into the AGC at a client event. He pulled me aside and informed me that although the GC told my firm that only one videotape of the incident existed, the League in fact had another tape in its possession showing the entirety of the incident (including DD physically assaulting his fiancée). But, he said, he was directed by his superiors never to discuss the existence of the second tape because of the public relations fallout that would almost certainly ensue if the full video ended up in the public realm – as well as the potential legal ramifications for the League.

My firm is preparing to defend DD's lawsuit, which will almost certainly include depositions of League executives. I have been told that the plan is to take the position that the only videotape in existence was the one that was disclosed to the public. What if I told you that I know this information to be false? What are my professional responsibilities? Is there a "reporting up" requirement? With regard to how the SP handled his fact gathering, was he obligated to fully probe the League's GC as to his knowledge of the existence of any and all evidence relevant to the incident? Finally, if it is later determined that SP knowingly failed to make the proper inquiries so as to avoid learning damaging information, could my firm be disqualified from representing the League in the lawsuit brought by DD or possibly sanctioned?

Sincerely,

Tim Troubled