

DILEMMA: Charging Electronic Payment Fees

Recent changes in the trust account rules allow lawyers to expand client payment options and pass along the fees to clients. This is what you need to know before charging your clients fees for electronic payments.

BY TIMOTHY J. PIERCE

Question

Now that it is easier for law firms to accept electronic payments for advanced fees, my law firm wants to expand the payment options available to our clients. In looking into the details, it seems the costs associated with electronic payments can be significant and can vary quite a bit depending on the type of payment. We would therefore like to pass on the costs of the fees associated with the electronic payments to the clients.

If we do charge clients for costs associated with electronic payment of our fees, do the disciplinary rules require that we charge the precise fee charged by the payment processor, or can we just impose a flat rate?

Discussion and Answer

With the changes to the trust account rule (SCR 20:1.15) on July 1, 2023, lawyers are now free to accept electronic transfers into and out of standard IOLTA trust accounts. This means that lawyers can now accept electronic payment methods, such as Paypal, Venmo, or credit cards, for payment of advance fees directly into trust accounts, as well as payments of earned fees directly into operating accounts.

The changes also permit lawyers to hold clients responsible for transaction fees associated with such payments, regardless of the account into which the payment is deposited (the previous version of the rule did not permit lawyers to pass on these costs if the payment was deposited into certain accounts).

Specifically, the Wisconsin Comment to SCR 20:1.15(f)(1) states:

“Electronic payment systems, such as credit cards, routinely impose charges on vendors

when a customer pays for goods or services. That charge may be deducted directly from the customer’s payment. Vendors who accept credit cards routinely credit the customer with the full amount of the payment and absorb the charges. Before holding a client responsible for these charges, a lawyer should disclose this practice to the client in advance, and assure that the client understands and consents to the charges. This disclosure should be in writing if necessary to comply with SCR 20:1.5(b). In addition, the lawyer should ensure that holding the client responsible for transaction costs does not violate the terms of service of the payment system provider or other law.”

Lawyers are thus now free to accept electronic payments of both earned and advanced fees and pass associated costs to clients regardless



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of the account into which the payment is deposited. (For a full discussion of the July 1, 2023, changes, see “2023 Amendments to the Trust Account Rule: Electronic Transactions Permitted,” 96 Wis. Law. 10 (June 2023).)

The trust account rule, however, does not answer the question at hand.

What Is a Reasonable Fee?

SCR 20:1.5(a) states that a “lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses” and ABA Comment [1] explains:

“A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.”

In Case You Missed It

Check out these Ethical Dilemma topics from recent issues of *InsideTrack* and *Wisconsin Lawyer*:

- **Dilemma: CLE Shenanigans May Be Dishonest Conduct.** While it is rare, lawyers do get disciplined for dishonest conduct in connection with CLE reporting. The takeaway: don’t procrastinate getting your required CLE credits. (96 Wis. Law. 35 (Dec. 2023)).
- **Ethical Dilemma: GALs and Conflicts Now Clarified with Ethics Opinion EF-23-02.** New Wisconsin Formal Ethics Opinion EF-23-02 confirms that lawyers acting as guardians ad litem (GALs) are bound by the disciplinary conflicts rules just as other lawyers are. This opinion offers general guidance when analyzing conflicts that might arise from a lawyer’s work as a GAL. (96 Wis. Law. 31 (Oct. 2023)). **WL**

Clearly, the rules do not require that a lawyer charge the *precise* amount of a cost; rather, the amount charged to a client for costs must be *reasonable*.

But if the rules do not require that the precise amount of costs be charged, what is a reasonable amount for costs? As discussed in ABA Formal Ethics Opinion 93-379 (1993), lawyers may not use costs as a source of profits, so a lawyer may not mark up costs for the purpose of profiting from costs charged to clients. This means that for a cost charged to the client to be reasonable, while it need not be precise, it should reasonably reflect the actual cost incurred by the lawyer.

An example of this is the perhaps somewhat outdated practice of charging clients per page for physical photocopies. It is almost impossible to know the precise amount of cost incurred by a law firm to produce the photocopy, but the per-page cost should reasonably reflect the approximate cost incurred by the firm to produce it (and many firms did just that).

Conclusion: A Best Practice

A law firm that wants to pass on to clients costs associated with electronic payments at a flat rate should do the following:

- Disclose to clients in advance that a surcharge will be applied to

electronic payments and the amount of the surcharge.

- Ensure that the disclosure is in writing if the total cost to the client of the matter is likely to exceed \$1,000 [SCR 20:1.5(b)].

- Be prepared to explain why the surcharge reasonably reflects the costs incurred by the firm and that it is not being used to generate profits for the firm.

Obviously most firms will choose to include a clause in their engagement agreements and choose a number that represents an average of the fees imposed by the types of payments the firm accepts, such as PayPal, Venmo, and credit cards.

Of course, there is nothing that prevents a firm from choosing to pass on the precise amount of a fee associated with an electronic payment, but that is not necessarily required by the disciplinary rules. **WL**

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