

State Bar Proposes Opinion on Credit Card Payments

ETHICS: Bar Association Committee opposes opinion in its original form.

Attorneys who accept credit card payments from their clients better listen up, because the State Bar of California has something to say about the issue. The State Bar's Committee of Professional Responsibility and Conduct (COPRAC) has proposed an ethics opinion considering the ethical propriety of an attorney accepting credit card payments from a

client for the payment of earned fees, fees not yet earned (advance fees), and advances for costs and expenses.

The opinion digest states: "An attorney may ethically accept payment of earned fees from a client by credit card. In doing so, however, the attorney must discharge his or her duty of confidentiality. Likewise, an attorney may ethically accept a deposit for fees not yet earned from a client by credit card, but must discharge his or her duty of confidentiality,

"By contrast, an attorney may not ethically accept a deposit for advances for costs and expenses from a client by credit card because the attorney must deposit such advances into a client trust account and cannot do so initially because they are paid through a merchant account subject to the credit card issuer's control and invasion."

The full opinion can be found under the "Public Comment" section at www.calbar.ca.gov. Click on "2007" to access a current list.

Ross G. Simmons, co-vice chair of the San Diego County Bar Association's Legal Ethics Committee, said that a "significant percentage of California attorneys" accept payment of fees and reimbursement of costs and expenses by credit card.

Simmons, along with LEC member Professor David McGowan, explained that the opinion sets client convenience and ease of payment against the lawyer's duty to protect client's funds.

"As written, that makes the first issue [payment of earned fees] in the opinion a trivial one, since the attorney is entitled to payment of earned fees, and the client is paying the fee using credit," Simmons said. "The second and third issues [payment of advance fees, and advances for costs and expenses] are more challenging, since attorneys are expected to safeguard funds they have not yet earned, or expenses not yet advanced or incurred."

The dynamic of the third party – the card issuing bank – makes the Rules complicated to apply, he added.

After reviewing the opinion, the Bar Association's Legal Ethics Committee did not approve the State Bar's conclusions.

In a letter to COPRAC written by Simmons and McGowan, the SDCBA states, "In our view, the opinion is analytically underdeveloped, such that it is not pos-

"In our view, the opinion is analytically underdeveloped, such that it is not possible to determine the merit of its conclusions with a productive level of certainty."

~ Legal Ethics Committee letter to COPRAC

sible to determine the merit of its conclusions with a productive level of certainty."

The SDCBA is concerned that the opinion does not thoroughly explore the idiosyncrasies of credit card transactions, and that "the factual underpinning upon which it has been built appears underinclusive and imprecise."

"The conclusions reached may or may not be correct," the letter states. "We merely generally observe that the shortcoming in factual development, and related and unrelated frailties in analysis, render the proposed opinion unconvincing."

The LEC did give tentative feedback on the proposed opinion, as some committee members agreed with some of the opinion's conclusions; the letter states that these members agreed in some part with the conclusions that earned fees as well as advance fees may be paid by credit card.

The biggest conflict, however, was on the opinion's third issue of credit card payment for advance costs and expenses.

"In our view, if the opinion approached the advance costs question in the same practical way it approached the advance fee question, the opinion would conclude that all three types of payments may be made by credit card," the letter states.

The opinion's third conclusion is based on Rule 4-100 of the State Bar's Rules of Professional Conduct, which states that all funds received or held for the benefit of clients must be deposited in a trust account. The LEC pointed out that this rule does not prohibit those funds stopping off in a merchant account first, as a credit card transaction would require.

"If the lawyer moved the funds into a trust account as soon as practicable it is hard to see how any harm is done," the letter

states. "The opinion might make clear that a lawyer following this approach would assume the risk of harm if harm were done, but that is a different question from whether the approach is conceptually proper.

"Beyond this... we disagree with the opinion on practical grounds. The purpose of Rule 4-100 is to keep lawyers from treating client property as their own. That purpose is fully served if the lawyer segregates funds at the earliest opportunity."

The LEC concluded that the opinion's disapproval of credit card payments for advance costs would likely limit significantly its approval of credit card payments for advance fees.

"Most work involves costs and expenses, and advance fees (as opposed to true retainers) imply that future work is to be done. Most advance fee payments therefore will include some amount – broken out or not – calculated to cover such costs and expenses," the letter explains.

Since attorneys who do accept credit card payments would be subject to disciplinary action, the LEC believes the opinion may give lawyers an incentive to disguise or not keep track of advance fees and expenses in order to avoid claims of unethical conduct.

"Obscuring the basis of fees does nothing to help clients, and in fact might dampen price competition," the letter concluded.

Although the deadline for public comment on the proposed opinion is January 2, the LEC still plans to provide a supplemental comment after the stated deadline. Individual members of the SDCBA are invited to submit their own comments to the Office of Professional Competence, Planning and Development of the State Bar of California, 180 Howard Street, San Francisco, CA 94105.

San Diego's Only

"TOP 50"

ATTORNEY - MEDIATOR

MARKUS ♦ KRUIS

♦ MEDIATION ♦

Accord & Satisfaction™

www.agreement.com

619.239.2020

BAR REPORT

NEWS AND EVENTS OF THE SAN DIEGO COUNTY BAR ASSOCIATION

December 13, 2006 Volume 12, Number 12

LETTERS: Bar Report welcomes letters to the editor. They should be brief and may be edited. To be considered for publication, a letter must be signed and include a telephone number. It should be sent to Bar Report, San Diego County Bar Association, 1333 Seventh Avenue, San Diego, CA 92101, or faxed to (619) 338-0042. Send e-mail to bar@sdcb.org.

ADVERTISING: The Bar Report includes limited display and classified advertising. For information on display and classified advertising placement and inserts, contact the Bar Center at (619) 231-0781 or fax to (619) 338-0042 or by e-mail at bar@sdcb.org.

PUBLICATION: The Bar Report is published monthly by the San Diego County Bar Association. Reproduction of the Bar Report in any form, in whole or in part, without permission of the SDCBA is strictly prohibited. © 2005, all rights reserved. The views expressed herein do not necessarily represent the opinions of the San Diego County Bar Association.

JILL L. BURKHARDT
President
president@sdcb.org

SHEREE L. SWETIN
Executive Director
sswetin@sdcb.org

LAWRENCE MARTINEZ
Communications Director
lmartinez@sdcb.org

MEGAN RUDEBECK
Editor
mrudebeck@sdcb.org

STEVE MOSEMAN
Advertising Manager
smoseman@sdcb.org

ACCIDENT SPECIALISTS

Head, Neck and Spine Center of San Diego

■ Chiropractic Care ■ Massage
■ Physical Therapy

8950 Villa La Jolla Drive, Ste. B 212
La Jolla, CA 92037

⑤ & LA JOLLA VILLAGE DRIVE

858-558-3111 www.lajolladc.com



Brandon W. Goldstein, D.C.