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February 2, 2012



Honorable Gerald W. VandcWalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard Ave
Bismarck, ND 58505-0530

Re: Proposed Amendments to Rule 1.15, Rules of Professional Conduct, Regarding Credit Card Payments for Unearned Fees

Dear Chief Justice Vandewalle:

The Joint Committee on Attorney Standards recently concluded its reviewed of issues regarding the acceptance of credit card payments for legal fees and costs. The Committee's review began with a consideration of SBAND Ethics Opinion 09-05, which thoroughly discussed ethical issues associated with a lawyer's acceptance of credit card payments for unearned fees. The Opinion essentially concluded that acceptance of credit card payments, placing the funds in the lawyer's general operating account, and then transferring the funds to the client trust account involved a violation, however fleeting, of the black-letter limitations imposed under Rule 1.15 of the Rules of Professional Conduct. There are also risks associated with placing credit card payments in the client trust account in the event a chargeback occurs, which may compromise other clients' trust funds. The Opinion reluctantly concluded that while a commingling of fees may occur by placing payments in the operating account, the ethical issue is limited if the payments are transferred to the trust account in a very short time. With this background, the Committee discussed over several meetings whether Rule 1.15 should be amended to address this issue or whether the Ethics Opinion could serve as adequate guidance. The Committee also reviewed rules and ethics opinions from other jurisdictions, most of which were ably reviewed in the Opinion. The Committee ultimately concluded that rule amendments were appropriate.

The Joint Committee proposes amendments to Rule 1.15(b) to provide language essentially consistent with the approach identified in the Ethics Opinion. Credit card and electronic funds transfer payments for unearned fees may be placed in the operating account as long as the funds are promptly transferred to the client trust account. Related amendments are proposed to Comment [2] to emphasize the limited nature of this permissible commingling of funds.

The Committee approved the proposed amendments for submission to the Supreme Court pending review and comment by the Board of Governors. The Board of Governors has reviewed the amendments and voted to support adoption of the amendments. I am pleased, therefore, to submit the proposed amendments to the Supreme Court for its consideration.

Sincerely,

Michael G. Sturdevant, Chair
Joint Committee on Attorney Standards

MGS/
cc: Penny Miller, Clerk of the Supreme Court
Jim Ganje

PROPOSED AMENDMENTS RELATING TO ACCEPTANCE OF CREDIT CARD PAYMENTS

RULE 1.15 SAFEKEEPING PROPERTY

1 (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in
2 connection with a representation separate from the lawyer's own property. Funds shall be deposited
3 in one or more identifiable interest bearing trust accounts in accordance with the provisions of
4 paragraph (f). Other property shall be identified as such and appropriately safeguarded. Complete
5 records of such account funds and other property shall be kept by the lawyer in the manner
6 prescribed in paragraph (h).

7 (b) A lawyer may accept credit card payments or electronic funds transfer payments for
8 unearned fees as temporary deposits into the lawyer's general operating account if the funds in which
9 a client or a third-party has an interest are promptly transferred from the general operating account
10 to the client trust account. A lawyer may deposit the lawyer's own funds in a client trust account only
11 for the purpose of paying bank service charges; and fees associated with credit card payments; or
12 wire transfers electronic funds transfer payments related to that account, but only in an amount
13 necessary for that purpose.

14 (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been
15 paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

16 (d) Upon receiving, in connection with a representation, funds or other property in which a
17 client or third person has an interest, a lawyer shall promptly notify the client or third person. Except
18 as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall
19 promptly deliver to the client or third person any funds or other property that the client or third
20 person is entitled to receive and, upon request by the client or third person, shall promptly render a
21 full accounting regarding such property.

22 (e) When, in the course of representation, a lawyer is in possession of property in which two
23 or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate
24 by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the

1 property as to which the interests are not in dispute.

2 (f) Each trust account referred to in paragraph (a) shall be an interest bearing trust account
3 in an eligible financial institution selected by a lawyer in the exercise of ordinary prudence. An
4 eligible financial institution is a bank, savings bank, trust company, savings and loan association,
5 savings association, credit union, or federally regulated investment company authorized by federal
6 or state law to do business in North Dakota and insured by the Federal Deposit Insurance
7 Corporation, the National Credit Union Share Insurance Fund, or the Federal Savings and Loan
8 Insurance Corporation. Interest bearing trust funds shall be placed in accounts in which withdrawals
9 or transfers can be made by the depositing lawyer or law firm without delay, subject only to any
10 notice period which the depository institution is required to reserve by law or regulation.

11 (1) A lawyer who receives funds of clients or third persons shall maintain a pooled
12 interest bearing trust account for deposit of all such funds received that are nominal
13 in amount or expected to be held for a short period of time. The interest accruing on
14 this account, net of any transaction costs, shall be paid to and administered by the
15 North Dakota Bar Foundation in accordance with Administrative Rule 24 of the
16 Supreme Court of North Dakota. The North Dakota Bar Foundation holds the entire
17 beneficial interest in all interest monies accruing on this account.

18 (2) All funds of a client or third person shall be deposited in the account specified in
19 paragraph (f)(1) unless they are deposited in:

20 (i) a separate interest bearing trust account for the particular client or
21 third person on which the interest, net of any transaction costs, will
22 be paid to the client or third person; or

23 (ii) a pooled interest bearing trust account with subaccounting which
24 will provide for computation of interest earned by each client's or
25 third person's funds and the payment thereof, net of any transaction
26 costs, to the client or third person.

27 (3) In determining whether to use the account specified in paragraph (f)(1) or an
28 account specified in paragraph (f)(2), a lawyer should take into consideration the

1 following factors when deciding whether the funds to be invested may be utilized to
2 provide a positive net return to the client or third person:

3 (i) the amount of interest which the funds would earn during the
4 period they are expected to be deposited;

5 (ii) the cost of establishing and administering the account, including
6 the cost of the lawyer's services and the cost of preparing any tax
7 reports required for interest accruing to a client's or third person's
8 benefit; and

9 (iii) the capability of financial institutions described in paragraph (f)
10 to calculate and pay interest on individual accounts or subaccounts.

11 (4) As to accounts under paragraph (f)(1), a lawyer or law firm shall direct the
12 depository institution:

13 (i) to remit interest or dividends, net of any service charges or fees, on
14 the average monthly balance in the account, or as otherwise computed
15 in accordance with an institution's standard accounting practice, at
16 least quarterly, to the North Dakota Bar Foundation (the foundation);
17 and

18 (ii) to transmit with each remittance to the foundation a statement
19 showing the name of the lawyer or law firm for whom the remittance
20 is sent, the rate of interest applied, and the amount of service charges
21 deducted, if any, and the account balance(s) of the period in which the
22 report is made, with a copy of such statement to be transmitted to the
23 depositing lawyer or law firm.

24 (g) Lawyers who are admitted to practice in a jurisdiction other than the state of North
25 Dakota and lawyers who are associated in a law firm with at least one lawyer who is admitted to
26 practice in a jurisdiction other than the state of North Dakota are exempt from the requirements of
27 paragraph (f) if the lawyer or law firm maintains a pooled interest bearing trust account for the
28 deposit of funds of clients or third persons in a financial institution located outside the state of North

1 Dakota and the interest, net of any service charges and fees, from the account is being remitted to
2 the client or third person who owns the funds, or to a non-profit organization or government agency
3 pursuant to the laws or rules governing lawyer conduct of the jurisdiction in which the financial
4 institution is located. This exemption shall not relieve a lawyer from any of the other obligations
5 imposed by this rule.

6 (h) A lawyer shall maintain or cause to be maintained on a current basis records sufficient
7 to demonstrate compliance with the provisions of this Rule. Such records shall be preserved for at
8 least six years after termination of the representation.

9 (i) A lawyer shall certify, in connection with the annual renewal of the lawyer's license and
10 in such form as the clerk of the supreme court of North Dakota may prescribe, that the lawyer is
11 complying with the provisions of this Rule.

12 (j) The form required in subsection (i) shall also contain a provision for each licensed lawyer
13 to certify (1) whether the lawyer represents private clients; (2) if the lawyer represents private clients,
14 whether the lawyer is currently covered by professional liability insurance; and (3) whether the
15 lawyer intends to maintain such insurance during the next twelve months. A lawyer shall notify the
16 clerk in writing within 30 days if the lawyer's professional liability coverage lapses, is no longer in
17 effect, or terminates for any reason, unless the policy is renewed or replaced without substantial
18 interruption. This information shall be disclosed to the public upon request.

19 (k) Lawyer trust accounts, as referred to in paragraphs (a) and (f), shall be maintained only
20 in eligible financial institutions approved by the Disciplinary Board. Every check, draft, electronic
21 transfer, or other withdrawal instrument or authorization must be personally signed or, in the case
22 of electronic, telephone, or wire transfer, directed by one or more lawyers authorized by the law firm.

23 (l) A financial institution, to be approved as a depository for lawyer trust accounts, shall file
24 with the Disciplinary Board an agreement, in a form provided by the Board, to report to the Board
25 if any properly payable* instrument is presented against a lawyer trust account containing
26 insufficient funds, whether or not the instrument is honored. The Disciplinary Board shall establish
27 rules governing approval and termination of approved status for financial institutions, and shall
28 annually publish a list of approved financial institutions. No trust account may be maintained in any

1 financial institution that does not agree to make overdraft notification reports. Any overdraft
2 notification agreement must apply to all branches of the financial institution and may not be canceled
3 except upon three days notice in writing to the Board.

4 (m) The overdraft notification agreement must provide that all reports made by the financial
5 institution be in the following format:

6 (1) in the case of a dishonored instrument, the report must be identical to the overdraft notice
7 customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if
8 a copy is normally provided to depositors;

9 (2) in the case of an instrument that is presented against insufficient funds but which
10 instrument is honored, the report must identify the financial institution, the lawyer or law firm, the
11 account number, the date of presentation for payment, and the date paid, as well as the amount of
12 overdraft created thereby.

13 Reports must be made simultaneously with the notice of dishonor* and within the time provided by
14 law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored,
15 then the report must be made within five banking days of the date of presentation for payment
16 against insufficient funds.

17 (n) Every lawyer practicing or admitted to practice in this State shall, as a condition thereof,
18 consent to the reporting and production requirements of this Rule.

19 (o) Nothing in this rule precludes a financial institution from charging a particular lawyer or
20 law firm for the reasonable cost of producing the reports and records required by this rule.

21 COMMENT

22 [1] A lawyer should hold property of others with the care required of a professional fiduciary.
23 All property that is the property of clients or third persons, including potential clients, must be kept
24 separate from the lawyer's business and personal property. Monies that are the property of clients or
25 third persons, including potential clients, must be held in one or more interest bearing trust accounts.
26 Separate trust accounts may be warranted when administering estate monies or acting in similar
27 fiduciary capacities. The determination of whether funds of a client or third person could be invested

1 to provide a positive net return to the client rests in the sound judgment of each lawyer or law firm.

2 [2] While normally it is impermissible to commingle the lawyer's own funds with client
3 funds, paragraph (b) provides that it is ~~permissible when necessary to pay bank service charges on~~
4 ~~that account~~ the only situations in which it is allowed. Accurate records of the funds must be kept
5 regarding which part is the lawyer's.

6 [3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not
7 required to remit to the client funds that the lawyer reasonably believes represent fees owed.
8 However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The
9 disputed portion of the funds must be kept in a trust account and the lawyer should suggest means
10 for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall
11 be promptly distributed.

12 [4] Paragraph (e) also recognizes that third parties, such as a client's creditor who has a lien
13 on funds recovered in a personal injury action, may have lawful claims against specific funds or
14 other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such
15 third-party claims against wrongful interference by the client. In such cases, when the third party
16 claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the
17 client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute
18 between the client and the third party, but, when there are substantial grounds for dispute as to the
19 person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

20 [5] The obligations of a lawyer under this Rule are independent of those arising from activity
21 other than rendering legal services. When a lawyer holds funds in a capacity other than as a lawyer
22 representing a client, this Rule does not regulate the manner in which those funds are to be held and
23 protected. For example, a lawyer who serves as an escrow agent is governed by the applicable law
24 relating to fiduciaries even though the lawyer does not render legal services in the transaction.

25 [6] Guidance regarding the administration of trust accounts may be available from the Interest
26 on Lawyer Trust Account Committee of the North Dakota Bar Foundation.

27 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards

1 Committee on 04/26/85 and 08/23/85; and Revised by the State Bar Association of North Dakota
2 on 08/29/86 and approved by the Board of Governors on 09/06/86; Minutes of the Joint Committee
3 on Attorney Standards on 11/14/03, 03/18/05, 06/14/05, 09/09/05, 06/10/08, 09/19/08, 11/07/08,
4 12/01/08, 03/19/10, 06/15/10, 09/16/11, 12/09/11, _____.