

**Final**

**Rhode Island Supreme Court  
Ethics Advisory Panel Op. 2023-12  
Issued December 14, 2023**

FACTS

The inquiring attorney wishes to pass on credit card processing fees to his or her clients in both flat fee and hourly billing matters, as well as in situations when the client has paid fees to the inquiring attorney in connection with issuance of payment to a third party. However, the inquiring attorney is unsure whether passing along these expenses would violate the Rules of Professional Conduct.

ISSUE PRESENTED

May the inquiring attorney pass on credit card processing fees to his or her clients in both flat fee and hourly billing matters, as well as in situations when the client has paid fees to the inquiring attorney in connection with issuance of payment to a third party?

OPINION

It is the Panel's opinion that the inquiring attorney may pass on credit card processing fees to his or her clients in both flat fee and hourly billing matters, as well as in situations when the client has paid fees to the inquiring attorney in connection with issuance of payment to a third party, so long as the inquiring attorney clearly communicates his or her intention to do so to the client, in writing, prior to or near the start of the representation.

REASONING

Rule 1.5 of the Rules of Professional Conduct pertains to attorney fees:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Where the fee is not fixed or contingent, billings regarding the fees, costs, and expenses shall be provided to the client on a quarterly basis or as otherwise provided in the agreement.

(1) Limited Scope Representation. In any representation in which the lawyer and the client agree that the lawyer will provide limited scope representation pursuant to Rule 1.2, the limited scope representation agreement shall also include the following:

(i) For limited scope representation matters involving only the provision of drafting services, such as drafting a pleading, motion, or other written submission: identification of the proceeding for which the drafting services are being provided; identification of the specific document(s) that the lawyer will draft for the client; certification that the lawyer will file the document(s) with the court's electronic filing system on behalf of the client; and notification to the client that upon the filing of all the document(s) that the lawyer has been engaged to draft, the attorney/client

relationship between the lawyer and the client shall terminate in accordance with Rule 1.16(d). Any change in the scope of the limited scope representation requires the client's informed consent and shall be confirmed to the client in writing.

(ii) For limited scope representation matters involving court proceedings independent of the provision of drafting services: identification of the proceeding in which the lawyer will file his or her Entry of Limited Appearance; identification of the court event(s) for which the lawyer will appear on behalf of the client; and notification to the client that after the limited scope representation has been completed, the lawyer will file a Notice of Withdrawal of Limited Appearance with the court, which will serve to terminate the lawyer's obligation to the client as a matter of course. Any change in the scope of the limited scope representation requires the client's informed consent, shall be confirmed to the client in writing, and may also require the lawyer to petition the court for leave to file a new Entry of Limited Appearance in accordance with Rule 1.2(d)(2).

(iii) For limited scope representation matters involving court proceedings in connection with or in addition to the provision of drafting services: all the requirements set forth in subsections (i) and (ii), above.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Rule 1.5(a) establishes that both attorney's fees and related expenses charged by lawyers must be "reasonable under the circumstances." Rule 1.5, Comment [1]. With regard to expenses, Comment [1] to Rule 1.5 explains that "[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." Id.

Rule 1.5(b) requires that lawyers convey fee and expense information to new clients in writing prior to or as near as possible to the beginning of the representation. See also Rule 1.5, Comment [2] (noting that "[i]n a new client-lawyer relationship . . . an understanding as to fees and expenses must be promptly established"). The written notice should set forth "the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation." Id.

In this case, the inquiring attorney seeks to pass on credit card processing fees to his or her clients. To comply with Rule 1.5, such an expense must be "reasonable." See Rule 1.5(a). Comment [1] to Rule 1.5 explains with regard to expenses that the lawyer may charge an amount that "reasonably reflects the cost incurred by the lawyer." The Panel concludes that passing on credit card processing fees to clients falls within this framework, as the inquiring attorney is charging his or her clients no more than the amount initially charged to the inquiring attorney to process payments made by credit cards in connection with the representation. At least four (4) other states' attorney ethics authorities have reached the same conclusion in response to identical

inquiries. See e.g., New York State Bar Association, Committee on Professional Ethics Opinion 1258; Alaska Bar Association Ethics Opinion No. 2014-1; Illinois State Bar Association Advisory Opinion No. 14-01; D.C. Bar Ethics Opinion 348.

Second, Rule 1.5(b) requires that the client be made aware of his or her obligation to pay credit card processing fees prior to or as near as possible to the start of the representation. The inquiring attorney should therefore include clear language in his or her written fee agreement form informing the client of this fact so that the client has explicit notice that he or she will be responsible for reimbursing the inquiring attorney for credit card processing fees incurred as a result of the representation.