

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
PETITION TO AMEND SUPREME COURT) No. R-08-0030
RULES 42 and 43)
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**ORDER AMENDING
RULES 42 AND 43, RULES OF THE SUPREME COURT
ON A PERMANENT BASIS**

The amendments sought in this petition were adopted on an emergency basis, effective January 1, 2009, to permit lawyers to accept credit card payments for advance fees and costs. A comment period ended May 20, 2009. No comments having been received, upon consideration,

IT IS ORDERED that the amendments to Rule 42, ER 1.15, and Rule 43, Rules of the Supreme Court, be adopted on a permanent basis, as set forth in the attachment hereto.

DATED this day of September, 2009.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution

ATTACHMENT*

RULES OF THE SUPREME COURT

Rule 42. Arizona Rules of Professional Conduct

* * *

ER 1.15. Safekeeping Property

(a) [No change in text.]

(b) A lawyer may deposit the lawyer's own funds in a client trust account ~~for the sole purpose of paying only for the following purposes and only in an amount reasonably estimated to be necessary to fulfill the stated purposes:~~

~~(1) to pay bank-service or other charges or fees imposed by the financial institution on that account, but only in an amount necessary for that purpose that are related to operation of the trust account; or~~

~~(2) to pay any fees or charges related to credit card transactions or to offset debits for credit card chargebacks.~~

(c)-(e) [No change in text.]

Comment [2009 amendment]

For purposes of this rule, "merchant fees" and "credit card transaction fees" are fees that are deducted from the amount of the credit card charge to pay the company that issued the client's credit card, the lawyer or law firm's credit card processing service, and the credit card association (e.g., Visa, MasterCard). Those fees typically include a percentage of the total amount billed plus a fixed fee, which, unless paid by the lawyer or law firm, reduces the amount that can be credited to the client's account. A "chargeback" (or reversal of charges) occurs when a client or former client writes to the credit card company that issued the credit card used to pay a lawyer to dispute the amount that should be paid to the lawyer or law firm. When a client or former client does so, the lawyer's or law firm's account is debited an amount equal to the disputed amount, plus a chargeback fee.

Three methods of accepting credit card payments are permitted: (a) the lawyer or law firm may accept credit card payments for earned fees and the reimbursement of costs or expenses, in which case the funds must be deposited into the lawyer's or law firm's operating or business account (see *infra* for only exception); (b) the lawyer or law firm may accept credit card payments for advance fees, costs or expenses, in which case the funds must be deposited into the lawyer or law firm's trust account; or (c)

* Changes and additions to text are indicated by underscoring and deletions are indicated by ~~strikeouts~~.

the lawyer or law firm may use a credit card processing service that permits the lawyer or law firm to identify the account into which funds from each credit card transaction should be deposited (i.e., the lawyer or law firm must direct the deposit of funds for advance fees, costs or expenses into the trust account and the deposit of funds for account and the deposit of funds for earned fees and the reimbursement of costs or expenses into an operating or business account). Nothing in this rule prohibits lawyers from using one credit card account for the payment of earned fees and reimbursement of costs or expenses (with deposits made into an operating or business account) and another credit card account for the payment of advance fees, costs or expenses (with deposits made into the trust account).

Earned fees and funds for reimbursement of costs or expenses may be deposited into a lawyer's or law firm's trust account only if they are part of a single credit card transaction that also includes the payment of advance fees, costs or expenses. In such case, the earned fees and funds for reimbursement of costs or expenses must promptly be withdrawn from the trust account. When a lawyer or law firm uses a credit card processing service that permits the lawyer or law firm to identify the account into which funds from each credit card transaction will be deposited, earned fees and funds for reimbursement of costs or expenses may never be deposited into the trust account (a separate credit card transaction should be conducted for the payment of any earned fees or the reimbursement of costs or expenses). To further protect client and third-party funds, lawyers and law firms should strive to use a credit card processing service that deposits advance fees, costs and expenses into the trust account but which debits the operating or business account for all fees and charges related to credit card transactions (e.g., merchant or credit card transaction fees, chargebacks and fees associated therewith, other charges or fees related to credit card transactions).

Lawyers are responsible for knowing whether the company issuing a client's credit card allows charges for future services. If the company issuing a client's credit card does not permit the client to use the card for payment of future services, then the lawyer may not accept payment for advance fees or anticipated costs or expenses using that credit card.

Lawyers and law firms are permitted to place their own funds into their trust accounts in very limited circumstances. Lawyers and law firms that accept payment by credit card for advance fees, costs or expenses must at all times maintain sufficient funds of their own in their trust accounts to ensure that no bank or credit card fees or charges results in the conversion or misappropriation of funds belonging to clients or third parties. A lawyer violates this rule by failing to make the required deposit within three business days of receipt of notice or actual knowledge that a chargeback has been made to the trust account. When lawyers and law firms are required to maintain their own funds in their trust accounts to reimburse the account for trust account and credit card fees and charges, such funds must be deposited into their trust accounts before such fees or charges are imposed. Lawyers and law firms must maintain in their trust accounts sufficient funds of their own to pay fees and charges related to operation of the trust account, and to pay all credit card fees and charges (e.g.,

merchant and credit card transaction fees, chargeback fees, minimum monthly transaction fees, address verification fees). Lawyers and law firms must make a reasonable determination of the amount of their own funds that may appropriately be kept in their trust accounts to pay trust account and credit card fees and charges. Lawyers who maintain an unreasonable amount of their own funds in their trust accounts will be subject to a finding of misconduct. Lawyers and law firms that use credit card processing services that debit all chargebacks and credit card fees and charges from an operating or business account are not required to maintain their own funds in their trust accounts since no client or third-party funds will be at risk due to debits from the trust account.

When credit card funds are appropriately deposited into a trust account, the merchant or credit card transaction fees paid by the client as part of the credit card transaction must remain in the trust account until those funds are debited from the account. A lawyer or law firm, however, may agree to pay merchant or credit card transaction fees for the client. In that event, the lawyer or law firm must have funds of their own in their trust account in an amount at least equal to the merchant or credit card transaction fees before conducting the transaction. A failure to do so will result in the conversion or misappropriation of client or third-party funds when the merchant or credit card transaction fees are debited from the trust account.

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Rule 43. Trust Accounts

(a) Duty to Deposit Client Funds and Funds Belonging to Third Persons; Deposit of Funds Belonging to the Lawyer. Funds belonging in whole or in part to a client or third person in connection with a representation shall be kept separate and apart from the lawyer's personal and business accounts. All such funds shall be deposited into one or more trust accounts that are labeled as such. The location of the trust account shall be controlled by the provisions of ER 1.15(a). No trust account required by this rule may have overdraft protection. No funds belonging to the lawyer or law firm shall be deposited into a trust account established pursuant to this rule except as follows:

1. Funds to pay service or other charges or fees imposed by the financial institution that are related to operation of the trust account, but only in an amount reasonably estimated to be necessary for that purpose may be deposited therein.
2. Funds to pay fees or charges related to credit card transactions or to offset debits for credit card chargebacks, but only in an amount reasonably estimated to be necessary for those purposes may be deposited therein.

23. [No change in text.]

(b) Trust Account Requirements.

1.-2. [No change in text.]

3. Deposits from Credit Card Transactions. A lawyer or law firm may permit funds from a credit card transaction to be deposited into a client trust account for payment of advance fees, costs or expenses, and merchant or credit card transaction fees, but only if the lawyer has sources of funds, other than client or third-party funds, available at the time of the credit card transaction to replace any funds that may be debited from the account due to a credit card chargeback and any associated fees or charges. Permitting the deposit of funds from a credit card transaction into a client trust account for payment of advance fees, costs or expenses, and merchant or credit card transaction fees is at the risk of the lawyer permitting the deposit. If a debit is made from a lawyer's or law firm's trust account due to a credit card chargeback, the lawyer permitting the deposit must, within three business days of receipt of notice or actual knowledge that a chargeback has been made, act to protect the property of the lawyer's or law firm's clients and third persons by depositing into the trust account his or her own funds in an amount equal to the amount of the chargeback that exceeds the client's credit card funds remaining in the trust account, and any fees or charges associated with the chargeback. If within three business days of receipt of notice or actual knowledge that a chargeback has been made a lawyer uses his or her own funds to replace funds debited from the trust account, as set forth above, the lawyer will not be considered to have committed professional misconduct based upon placement of those credit card funds into the client trust account.

34. Disbursement Against Uncollected Funds. A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited-risk uncollected deposits enumerated in paragraph A below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled by the issuer's bank, and credited without recourse to the lawyer's trust account.

A. Certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients and third persons owning trust account funds that may be affected by such disbursements. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit under any of the following circumstances, if the lawyer has other sources of funds, other than client or third party funds, available at the time of disbursement to replace any uncollected funds:

(i)-(iv) [No change in text.]

In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon obtaining receipt of

notice or actual knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed, the lawyer will not be considered guilty of to have committed professional misconduct based upon the disbursement of uncollected funds.

B. [No change in text.]

45. Methods of Disbursement. [No change in text.]

(c)-(j) [No change in text.]

Comment [2009 amendment]

In an attempt to balance the need to safeguard client and third-party property and encourage access to legal services to those who need them, lawyers may allow funds from credit card transactions to be deposited into their client trust accounts for advance fees, costs or expenses, and merchant or credit card transaction fees related thereto. Lawyers who choose to accept credit card payments for advance fees, costs or expenses must comply with the procedures and requirements in this rule.

For purposes of this rule, "merchant fees" and "credit card transaction fees" are fees that are deducted from the amount of the credit card charge to pay the company that issued the client's credit card, the lawyer or law firm's credit card processing service, and the credit card association (e.g., Visa, MasterCard). Those fees typically include a percentage of the total amount billed plus a fixed fee, which, unless paid by the lawyer or law firm, reduces the amount that can be credited to the client's account. A "chargeback" (or reversal of charges) occurs when a client or former client writes to the credit card company that issued the credit card used to pay a lawyer to dispute the amount that should be paid to the lawyer or law firm. When a client or former client does so, the lawyer's or law firm's account is debited an amount equal to the disputed amount, plus a chargeback fee.

Three methods of accepting credit card payments are permitted: (a) the lawyer or law firm may accept credit card payments for earned fees and the reimbursement of costs or expenses, in which case the funds must be deposited into the lawyer's or law firm's operating or business account (see *infra.* for only exception); (b) the lawyer or law firm may accept credit card payments for advance fees, costs or expenses, in which case the funds must be deposited into the lawyer or law firm's trust account; or (c) the lawyer or law firm may use a credit card processing service that permits the lawyer or law firm to identify the account into which funds from each credit card transaction should be deposited (i.e., the lawyer or law firm must direct the deposit of funds for advance fees, costs or expenses into the trust account and the deposit of funds for earned fees and the reimbursement of costs or expenses into an operating or business account). Nothing in this rule prohibits lawyers from using one credit card account for the payment of earned fees and reimbursement of costs or expenses (with deposits made into an operating or business account) and another credit card account for the payment of advance fees, costs or expenses (with deposits made into the trust account).

Earned fees and funds for reimbursement of costs or expenses may be deposited into a lawyer's or law firm's trust account only if they are part of a single credit card transaction that also includes the payment of advance fees, costs or expenses. In such case, the earned fees and funds for reimbursement of costs or expenses must promptly be withdrawn from the trust account. When a lawyer or law firm uses a credit card processing service that permits the lawyer or law firm to identify the account into which funds from each credit card transaction will be deposited, earned fees and funds for reimbursement of costs or expenses may never be deposited into the trust account (a separate credit card transaction should be conducted for the payment of any earned fees or the reimbursement of costs or expenses). To further protect client and third-party funds, lawyers and law firms should strive to use a credit card processing service that deposits advance fees, costs and expenses into the trust account but which debits the operating or business account for all fees and charges related to credit card transactions (e.g., merchant or credit card transaction fees, chargebacks and fees associated therewith, other charges or fees related to credit card transactions).

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have funds of their own in their trust account in an amount at least equal to the merchant or credit card transaction fees before conducting the transaction. A failure to do so will result in the conversion or misappropriation of client or third-party funds when the merchant or credit card transaction fees are debited from the trust account.

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