

## Accepting Credit Cards

Lawyers frequently ask whether they can accept credit card payments from clients and, if so, whether they can pass on to clients the credit card surcharges assessed by banks and credit card processors. Accepting credit cards requires extra attention to bookkeeping, particularly when trust funds are involved. Most banks and private credit card processors charge set-up fees, monthly fees, and annual fees in addition to the convenience fee surcharged on each transaction. These fees must be accounted for ethically, in compliance with applicable substantive law and in accordance with your client fee agreement.

Lawyers who accept credit card payments from clients should carefully review OSB Legal Ethics Op No 2005-172. Any credit card payments deposited to the trust account for services already rendered must be withdrawn as soon as possible from the trust account and transferred to the general or office account to avoid commingling earned fees with unearned fees. [See OSB Legal Ethics Op No 2005-172 and George Riemer, “Charge It? Credit Cards and Lawyer Trust Accounts,” *Oregon State Bar Bulletin* 60, no. 9 (July 2000).]

If the bank requires that you designate a single merchant account for all credit card transactions and you accept credit card payments for earned and unearned fees, your merchant account should be a trust account. If you accept credit card payments for earned fees only, designate your business account as the merchant account. OSB Legal Ethics Op No 2005-172.

Credit card surcharges are of special concern. In 2013, the U.S. District Court for the Eastern

District of New York approved the “Payment Card Interchange Fee Settlement,” a class action suit among merchants, Visa, MasterCard, and other defendants involving allegations of excessive credit card surcharges. (For more information, visit the settlement website, <https://www.paymentcardsettlement.com/en>).

Some Oregon law firms have taken the position that the “Payment Card Interchange Fee Settlement” (PCIFS) permits them to pass Visa and MasterCard surcharges through to clients. The PLF does not advise lawyers on substantive law. This includes interpreting the applicability of the PCIFS. Additionally, lawyers should take note of the following comment in OSB Legal Ethics Op No 2005-172: “Some jurisdictions suggest that a lawyer can pass the credit card transaction fee on to the client, if the client agrees. Interpretation of federal and state law on this issue is beyond the scope of this opinion, but we note that charging the client for the transaction fee may implicate Regulation Z of the Truth in Lending Act, 12 CFR pt 226, requiring that the lawyer make certain specific disclosures to the client and offer cash discounts to all clients.” The opinion cites *Consumer Law in Oregon* ch 14 (Oregon CLE 1996 & Supp 2000).

If you elect to pass on credit card surcharges to clients, proceed at your own risk. Keep these suggestions in mind:

- An appeal of the “Payment Card Interchange Fee Settlement” is now pending before the Second Circuit Court of Appeals. For more information, visit the settlement website referred to on the prior page.

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- Credit card surcharges are presently illegal in ten states. Some experts predict this number will grow.

- Conduct your own legal research regarding Regulation Z.

- Conduct your own legal research regarding the prerequisites and limitations that apply to surcharging under the “Payment Card Interchange Fee Settlement.”

For additional background on this issue, see Beverly Michaelis, “Passing on Credit Card Surcharges to Clients,” *Oregon Law Practice Management* (March 2016), available online at <http://oregonlawpracticemanagement.com/2016/03/14/passing-on-credit-card-surcharges-to-clients/>.

The safest practice when accepting credit card payments is to treat the merchant fee or surcharge as a business expense. Arrange for the merchant fee to be deducted from your general office account and the client funds to be deposited in your trust account. If the bank will not deduct fees from your general account, you have two options. First, permit the use of credit cards only for earned fees that you can deposit immediately in the general account. Banks will usually not deposit credit card payments into multiple accounts, so it is important to limit acceptance of such payments to earned fees if you are using the general account.

If you receive retainers or other unearned costs and fees by credit card, the trust account is the proper account for deposit of these payments. You then face the problem of accounting for the merchant fee. One correct but very cumbersome method is to calculate the merchant fee on each transaction and deposit that fee into the trust account on the same day the credit card payment is made. Another approach is to consider using a private credit card processor. Private credit card processors are often more flexible than banks and will usually allow you to deduct merchant fees from the general account for all your transactions, regardless of which account receives your deposit. Many companies offer this service. Choose wisely. Evaluate each company’s reputation, references, rates, and services. If possible, find a credit card processor experienced in serving the legal profession.

Set-up fees, monthly fees, and annual fees assessed by banks and credit card processors are an expense of the law firm and the lawyer’s responsibility. You can choose to build these costs into your billable fee along with credit card surcharges. For a discussion of billing client costs, see David J. Elkanich, Peter R. Jarvis, Roy Pulvers, and Allison D. Rhodes, “Billing Costs,” *Fee Agreement Compendium* (2007). The handbook

is included in BarBooks™ and available at no charge on the OSB website at [www.osbar.org](http://www.osbar.org).

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*Excerpted and adapted from the PLF handbook, A Guide to Setting Up and Using Your Lawyer Trust Account, newly updated in 2016. Also see PLF practice aid “Accepting Credit Cards” at [www.osbplf.org](http://www.osbplf.org) under Practice Management, Forms, Category: Trust Accounting.*