



New York State Bar Association  
Committee on Professional Ethics

Opinion 1134 (10/6/17)

**Topic:** Attorneys' fees: Use of credit card to secure payment in domestic relations matter

**Digest:** Whether an attorney may use a client's credit card to secure payment of fees and expenses in a domestic relations matter presents a question on the meaning of 22 NYCRR Part 1400, which is an issue of law beyond this Committee's jurisdiction.

**Rules:** 1.5(d)(2).

## FACTS

1. The inquiring attorney represents parties in domestic relations matters. The attorney's standard retainer agreement complies, on the inquirer's view, with the provisions of 22 NYCRR 1400, which is a court rule requiring that engagement letters in domestic relations matters contain certain features. The inquirer now wishes to add to the inquirer's standard form of engagement a provision that, if any amount for which the client has been billed remains unpaid for a period of more than twenty days, then the attorney is authorized to charge the client's credit card, the pertinent information on which the client has previously supplied the lawyer, for the full unpaid amount.

## QUESTION

2. May an attorney's retainer agreement in a domestic relations matter authorize the attorney to charge the client's credit card for any amount for which the client has been billed but which remains unpaid more than twenty days after issuance of the bill?

## OPINION

3. In N.Y. State 1112 (2017), we determined that a lawyer's retainer agreement may provide (a) that the client could secure payment of the lawyer's fee by credit card, and (b) that the lawyer could bill the credit card the amount of any unpaid legal fees, costs, or disbursements that the client failed to pay within twenty days after issuance of the lawyer's bill for those amounts, as long as the charge complies with requirements set forth in our prior opinions, including that the client is expressly informed of the right to dispute any of the lawyer's bills (and to request arbitration if court rules so require) before the lawyer charges the client's credit card, and that no charge is made for any disputed portion of the lawyer's bill. We did not address the implications of this conclusion with court rules governing fee arrangements, including those that apply in domestic relations matters. We now conclude that such court rules take precedence over the New York Rules of Professional Conduct (the "Rules") as interpreted in that Opinion.

4. Our role is limited to interpreting the Rules; we do not opine on issues of law. Rule 1.5(d)(2) provides that a “lawyer shall not enter into an arrangement for, charge or collect” a fee that is, among other things, “prohibited by law or rule of court.” Thus, whether the lawyer’s proposed use of a credit card to secure payment in a domestic relations matter depends on whether the practice would violate a law or rule of court.

5. In domestic relations matters, the New York courts have mandated certain client protections not necessarily applicable in other matters. Most notable of these is 22 NYCRR 1400.5, which says in relevant part:

(a) An attorney may obtain a confession of judgment of promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee only where:

- (1) the retainer agreement provides that a security interest may be sought;
- (2) notice of an application for a security interest has been given to the other spouse; and
- (3) the court grants approval for the security interest after submission of an application for counsel fees.

6. For us to resolve the lawyer’s inquiry would require us to decide whether the inquirer’s proposed credit card arrangement constitutes a “security interest” within the meaning of this court rule. Under Rule 1.5(d)(2), whether a lawyer may include the proposed language in an engagement letter in a domestic relations matter depends on whether the language violates 22 NYCRR 1400.5. This question is solely an issue of law beyond our jurisdiction to decide.

## **CONCLUSION**

7. A lawyer may secure payment of legal fees and expenses in a domestic relations matter unless doing so violates a law or rule of court, which is a question of law beyond the jurisdiction of this Committee to resolve.

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