

New York State Bar Association
Committee on Professional Ethics

Opinion 1109 (11/15/16)

Topic: Use of Pre-Paid Debit Cards to Transmit Funds to Clients

Digest: A lawyer may use a fully-loaded pre-paid debit card to pay a client funds to which the client is entitled, provided that the lawyer, upon adequate disclosure of the relative merits of the payment method, follows the client's instructions.

Rules: 1.15(c)(4), 1.15(e), 1.4(a), 1.4(b), 1.0(j).

FACTS

1. The inquirer represents clients in personal injury actions under contingency fee arrangements. The amounts in controversy in many of the lawyer's matters tend to be small, as are the amounts obtained in those cases in which the lawyer achieves a settlement. The majority of the lawyer's clientele consists of unsophisticated consumers of legal and financial services lacking in both economic wherewithal and any sustained relationship with a financial institution such as a banking or checking account. As a result, the inquirer explains, the clients resort to check-cashing service companies, which, for a fee, will redeem the check and pay the client-customer.
2. The inquirer would like to offer clients the choice between receiving the client's settlement (or judgment) proceeds by a pre-paid debit card rather than by check. If the client opts for the card, then the client would receive a card fully loaded with the total amount owed the client. The firm would charge no fee for this option, nor retain any amount due the client. The law firm would remit the entire amount due the client to the account of the card-issuing entity.

QUESTION

3. May a lawyer give a client the option of receiving payment of money due the client by a fully-loaded pre-paid debit card rather than by check?

OPINION

4. Judgment and settlement checks often are made out to the lawyer and the client. In many cases, the lawyer deposits the check in an attorney trust account, withdraws the amount to which the lawyer is entitled and issues a check in favor of the client in the amount to which the client is entitled. The client then must cash the check to gain access to the funds. Clients who do not have a banking relationship often use a check-cashing service. They may then maintain funds on a pre-paid debit card.

5. A study by the Federal Deposit Insurance Corporation (FDIC) found that

approximately 28% of U.S. households either do not have bank accounts or are underbanked. FDIC, *2013 National Survey of Unbanked and Underbanked Households* (Oct. 2014). Although in the past, the demographic of these households tended to be economically challenged, the increasing popularity of technological options has attracted many younger adherents to supplant conventional cash for other forms of currency. See K. S. Rogoff, *The Curse of Cash* (Princeton U. Press 2016). We make these observations not to endorse any trend but to recognize its existence.

Alternative Financial Services

6. A very brief and general description of the alternatives may be useful to place the inquiry in context.

7. The New York Department of Financial Services (“DFS”) describes cash-checking as a “business that charges consumers a fee for cashing a check, draft or money order.” In New York, the providers of these services must be registered and are subject to assorted regulations. NY Banking L §367 (2012). The DFS has regulations on the amounts that may be charged. See 3 NYCRR §400.11. As of March 2016, the maximum check cashing fee that may be charged to an individual is 2.01% of the face amount of the check.

8. According to the Consumer Financial Protection Bureau (“CFPB”), a pre-paid debit card is a card used to access money a consumer has loaded onto the card in advance. Most cards allow the consumer to spend money on the card at merchants that accept the card or to withdraw cash from an ATM. See CFPB website, at http://www.consumerfinance.gov/askcfpb/search/?selected_facets=category_exact:pre-paid-cards. Each card has its own set of rules and fees. It often is difficult to ascertain the terms of the cards before purchase. Some issuers offer no-fee cards; many charge fees that may be opaque to the consumer, especially those unsophisticated in their use. Fees include some or all of the following: monthly usage or transaction fees, reload fees, bill payment fees, ATM withdrawal fees, balance inquiry fees and inactivity fees. Even where the issuer provides for free ATM withdrawals at certain ATMs, these may not be the locations most convenient to the holder.

9. Pre-paid cards may be issued by firms that are not financial institutions. Although the DFS licenses non-bank issuers of prepaid debit cards, many widely used debit cards are issued by banks that are not New York State-chartered and therefore are not regulated by the DFS. Although the CFPB recently finalized regulations that will provide added protections to consumers of prepaid debit cards, those regulations will not become effective until October 1, 2017. <http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/prepaid-accounts-under-electronic-fund-transfer-act-regulation-e-and-truth-lending-act-regulation-z/>. At present, these cards offer consumers fewer safeguards than bank-issued debit cards linked to a checking account.

The Rules of Professional Conduct

10. The issue, then, is simple: Is there anything wrong with a lawyer using a fully-loaded pre-paid debit card to disburse client funds to a client if the client gives informed consent?

11. We do not think so. Rule 1.15(c)(4) of the New York Rules of Professional Conduct (the “Rules”) says that a lawyer must “promptly pay or deliver to the client or a third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.” The inquiry here does not implicate any issues about third parties, client entitlement, or other questions that Rule 1.15(c)(4) may occasionally raise. The lawyer is holding money that unquestionably belongs to the client, and the sole issue, one of first impression, is whether the lawyer may transfer those funds to the client with a fully-loaded pre-paid debit card rather than a check.

12. We believe that Rule 1.15(c)(4)’s direction that the lawyer pay funds due the client “as requested by the client” obligates the lawyer to seek the client’s consent before using a pre-paid debit card to do so, as the inquirer intends to do. We believe, too, that Rules 1.4(a)(1)(i) & 1.4 (a)(2), and Rule 1.4(b) – each concerned with communicating with the client about matters material to the representation which require the client’s informed consent as defined in Rule 1.0(j), including matters relating to settlement – obligate the lawyer to explain to the client, in the words of Rule 1.0(j), “the material risks of the proposed course of action and reasonably available alternatives.” This means, at a minimum, that the lawyer should be prepared to explain to the client the options available for payment, and the relative risks and rewards of each, including the charges associated with each option. If the client is thus informed, we see nothing in the Rules that would prohibit a lawyer from remitting settlement funds to a client by means of a fully-loaded pre-paid debit card.

13. We note that Rule 1.15(e) says that all “special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party, by bank transfer.” Thus the lawyer is obligated to assure that the card issuer will accept transfers by one of these means, and, if a wire transfer is used, then the client must approve of the transfer in writing.

14. We also are aware that some issuers of prepaid debit cards may compensate persons who assist in the issuance of cards. *See* J. Silver-Greenberg and S. Clifford, “Paid via Card, Workers Feel Sting of Fees,” N.Y. Times (July 1, 2013) at p. A1. If the lawyer were being compensated by the card issuer for steering customers, the lawyer would have a personal conflict of interest within the meaning of Rule 1.7(a). *See* N.Y. State 1086 (2016) (an attorney may not accept a fee or commission from an investment firm for

referring the client to such firm where the money to be invested arises from an engagement in which the lawyer represented the client because the fee creates a non-consentable conflict.)

CONCLUSION

15. A New York lawyer may use a fully-loaded pre-paid debit card to pay a client funds to which the client is entitled, provided that the lawyer, upon disclosure of the relative merits of the payment method, follows the client's instructions.

(33-16)