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Warnings on non-traditional payment arrangements

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ETHICAL QUESTIONS & DILEMMAS

Most lawyers receive compensation for their work in the traditional form of checks or wire transfers, which are simple to track and record. But what happens when a client wishes to pay for legal services in a non-traditional way?

The lawyer is understandably anxious to be paid for his or her work, or to have the comfort of a retainer assuring compensation for what may be a significant expenditure of effort. However, there are risks and downsides to "non-traditional" payment arrangements that every lawyer must keep in mind.

Cash. Be wary of the client who wishes to pay a retainer or bill for legal services in cash. Although the Rules of Professional Conduct do not expressly prohibit the receipt of cash, many illicit activities are associated with cash, and lawyers are wise to avoid cash payments.

There are also strict statutory and regulatory requirements governing cash transactions. A lawyer who receives cash in excess of $10,000 in either one transaction or two or more related transactions must — within 15 days of receipt — report the matter to the Internal Revenue Service on a so-called Form 8300. 26 U.S.C. §6050I; 31 C.F.R. §1010.330(a). The requirement likely applies even if the attorney holds the cash in an escrow capacity. See Treas. Reg. §1.6050I-1(c)(7).

Failure to file the required report carries significant civil and criminal penalties and may result in attorney discipline. See *In re Jon R. Garlinghouse*, 2006 WL 4041576 (Mass. St. Bar Disp. Bd., Feb. 14, 2006) (indefinite suspension for attorney who willfully failed to file a Form 8300); *In re Robert I. Tatel*, 2002 WL 32254598 (Mass. St. Bar Disp. Bd., Jan. 3, 2002) (suspending attorney for deliberating structuring transaction to avoid having to file a Form 8300).

The Form 8300 report generally must identify the client and give his or her address and Social Security number. Many clients do not understand that cash payments to their lawyer may place the client in an IRS database that is presumably shared with other government agencies. At the very least, this reporting requirement triggers an obligation on the lawyer's part to advise the client accordingly, so that the client can make an "informed decision[ ]." See Mass. R. Prof. C. 1.4(b).

Nearly 20 years ago, now-retired federal District Court Judge Nancy Gertner, then a prominent criminal defense lawyer, challenged the reporting requirement. See *U.S. v. Gertner*, 873 F. Supp. 729 (D. Mass. 1995), affirmed on other grounds, 65 F. 3rd 963 (lst Cir. 1995).

The U.S. District Court held that a lawyer lawfully could withhold the name of the client from whom the cash payment was received, but only if the client was the subject of a criminal proceeding and the required disclosure was likely to incriminate the client in that proceeding. The court made it clear, however, that the report had to be filed in all events.

The reporting requirement also potentially can result in a conflict between the attorney and client if, for example, the client wishes to pay in cash an amount greater than $10,000, but declines to authorize the lawyer to file the Form 8300. It is clearly in the lawyer's interest to comply in full with all legal requirements as to reporting, but it may not always be in the client's interest to do so.

Credit cards. Most attorneys and law firms are now equipped to accept payment of fees by credit cards. Once again, the Rules of Professional Conduct do not prohibit this practice, but there are serious questions raised when retainers are paid by credit card. See generally C. Vecchione, "No Easy Credit" (October 2001), www.mass.gov/obcbbo/credit.htm.

Many lawyers have structured their

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credit card processing arrangements so that credit card payments are deposited in the firm's operating account. A retainer, of course, must be deposited in a trust fund account until it is actually earned and the client has been billed for the services. Mass. R. Prof. C. 1.15(c), (d)(2).

A second problem arises when retainer monies charged on a credit card and deposited into a trust account are later transferred to a lawyer's operating account. If the client later disputes the amount of the bill and instructs its credit card company to "charge back" some amount of the retainer, that money will be withdrawn from the attorney's trust fund account, effectively using trust fund monies belonging to other clients to satisfy the lawyer's own obligation.

That results in a potentially troublesome violation of Rule 1.15(b)'s command that clients' funds be kept separate from the lawyer's and safeguarded.

Further, in any fee dispute involving a credit card company, the attorney must be careful not to disclose any client-confidential information except as permitted by Mass. R. Prof. C. 1.6(b)(2).

In light of these difficulties, the best practice is to limit credit card payments to earned fees.

Other property. In some situations, clients may wish to pay their bills or retainers using property, such as jewelry, artwork, corporate stock or even real estate.

Such arrangements are fraught with difficulty and should be entertained with the greatest of care. For example, a corporation may not issue shares of stock to a lawyer as payment for future legal services. See G.L.c. 156B, §21.

In considering such arrangements, a lawyer must ensure that any property is fairly valued so that its receipt does not constitute a "clearly excessive fee" as proscribed by Rule 1.5(a).

The attorney also should consider whether the fee arrangement implicates Rule 1.8(a), which prohibits a lawyer from entering into a business transaction with a client, or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client unless the terms are "fair and reasonable" and "fully transmitted in writing to the client," the client has an opportunity to consult with other counsel, and the client consents in writing.

These concerns are particularly acute when the fee arrangement is being reached midstream, after the lawyer has been engaged for some time in the representation, so that the parties are no longer bargaining at arms-length. See *In re Discipline of an Attorney*, 451 Mass. 131, 139-40 (2008) (Rule 1.8(a) generally is concerned with business dealings that commence after legal representation has begun). MLW

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