

Can Lawyers Charge Clients for Credit Card Fees?

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To the Forum:

I am a managing partner in a 30-lawyer firm. For several years we have allowed clients to pay us by credit card as an accommodation to facilitate payment of advance retainers and legal fees. Our accountants have reminded me that credit card companies charge processing fees that reduce the amount paid to us. They have suggested that the processing fees should be added to our invoices so that we can recoup that expense and get full payment of our fees. I assume there is nothing improper about attorneys allowing clients to pay by credit card but have concerns about the propriety of passing on processing and service fees to clients. I have read about various changes in the law but, frankly, I am not sure how the rules apply to lawyers.

Is it lawful for a law firm to charge clients for processing fees imposed by credit card companies? Are there ethical rules that apply?

Sincerely,

A. M. Fee Concerned

Dear A. M. Fee Concerned:

History of Credit Card Surcharges

When credit cards first came out, credit card issuers' contracts with merchants often forbade merchants from charging varying amounts to customers who used credit cards and those who used other forms of payment.¹

In 1974, Congress amended the federal Truth in Lending Act in an attempt to safeguard merchants' capability to offer their customers discounts for using cash.² In 1976, Congress passed another amendment to the Truth in Lending Act that prohibited merchants from imposing "surcharges" on customers who use credit cards to pay their bills. Although the statute was renewed in 1981, it lapsed after three years, and the result – at least in New York – was the enactment in 1984 of General Business Law Section 518 as a replacement of the federal statute. But nothing is simple; that was just the beginning of a long story.³

General Business Law Section 518, as originally enacted, stated that "no seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." The statute purported to prohibit sellers from imposing a "surcharge" on customers who chose to pay with a credit card, rather than by cash, check or other similar means.⁴ Many vendors reacted to this prohibition by increasing their prices for goods and services as a way of recouping the fees charged by credit card companies, and in the years that followed the statute became the subject of extensive litigation in the state and federal courts, including the United States Supreme Court.

Expressions Hair Design, et al. v. Schneiderman

In *Expressions Hair Design, et al. v. Schneiderman*, a group of New York business owners filed a lawsuit in the South-

ern District of New York against the attorney general of the State of New York, among others, claiming that General Business Law Section 518 violated their First Amendment free speech rights and sought the statute to be declared unconstitutional.⁵ The Southern District of New York Court held that Section 518 violated the First Amendment because it “draws the line between prohibited ‘surcharges’ and permissible ‘discounts’; based on words and labels, rather than economic realities. So read, the statute clearly regulates speech, not conduct, and does so by banning disfavored expression.”⁶ Ultimately, the district court entered a final judgment declaring Section 518 unconstitutional and permanently enjoined New York from enforcing the statute.⁷

On appeal, the Second Circuit reversed the district court’s ruling, vacated and remanded the case for dismissal of the complaint.⁸ The Second Circuit’s view was that Section 518 does not violate the First Amendment, holding that “prices, although necessarily communicated through language, do not rank as ‘speech’ within the meaning of the First Amendment.”⁹

The Supreme Court granted certiorari and ultimately held that Section 518 improperly regulated speech by controlling how sellers may communicate their prices.¹⁰ “In regulating the communication of prices rather than prices themselves, Section 518 regulates speech.”¹¹

On remand, the Second Circuit certified a question for the New York Court of Appeals to review.¹² The question was “whether a merchant complies with Section 518 so long as the merchant posts the total dollars-and-cents price charged to credit card users.”¹³ The New York Court of Appeals, in a divided court, answered this in the affirmative and concluded that a merchant complies with Section 518 if the merchant posts the total dollars-and-cents price charged to credit card users.¹⁴ The *Schneiderman* saga ended there when the plaintiffs decided to not pursue their claims, and the litigation was eventually discontinued. In the years that followed, credit card surcharge fees became a virtual no man’s land where merchants chose different ways to recoup fees charged by credit card companies.

Amendment to General Business Law Section 518

On Feb. 11, 2024, New York enacted the Credit Card Surcharge Law, which amended Section 518, and states as follows:

5.18.1. Credit card surcharge notice requirement. Any seller in any sales transaction imposing a surcharge on a customer who elects to use a credit card in lieu of payment by cash, check, or similar means shall clearly and conspicuously post the total price for using a credit card in such transaction, inclusive of surcharge, provided however, any such surcharge

may not exceed the amount of the surcharge charged to the business by the credit card company for such credit card use. The final sales price of any such sales transaction, inclusive of such surcharge, shall not amount to a price greater than the posted price for such sales transaction. Nothing in this subdivision shall be deemed to prohibit merchants from offering a two-tier pricing system. For the purposes of this section, “two-tier pricing system” shall mean the tagging or posting of two different prices in which the credit card price, inclusive of any surcharge, is posted alongside the cash price.

5.18.2. Any seller who violates that provision of this section shall be liable for a civil penalty, recoverable in an action or proceeding brought in a court of competent jurisdiction not to exceed five hundred dollars for each such violation. The provisions of this subdivision may be enforced concurrently by the director or commissioner of a municipal consumer affairs office, or by the town attorney, city corporation counsel, or other lawful designee of a municipality or local government, and all money collected thereunder shall be retained by such municipality or local government.

This amendment attempted to create transparency and protect consumers. Essentially, this amendment purported to limit credit card surcharges to the amount charged to the business by the credit card company. It also states that businesses should post either: (1) the total price of an item or service including the credit card surcharge; or (2) a two-tiered pricing option, which reflects the credit card price alongside the cash price.

Understanding the difference between surcharging and what Section 518 refers to as two-tier pricing (which is cash discounting/dual pricing) is very important. Surcharging is the imposition of an additional fee on customers who elect to pay with a credit card instead of cash, check or other payment methods. Cash discounting/dual pricing requires businesses to list out both the credit card price and the cash price, and the customers are offered a discount for paying cash rather than with a card. Notably, Section 518 does not apply to debit cards.

With respect to penalties, businesses violating Section 518 may face civil penalties of up to \$500 for each offense. Enforcement of Section 518 can be done by municipal consumer affairs offices, town attorneys, city corporation counsels or other designated local government entities.

The enactment of the amendment of Section 518 was announced by Governor Hochul, who cautioned retailers on what they can and cannot do.¹⁵ To summarize, retailers should either list the higher credit card price next to the lower cash price or include the surcharge in the credit card price and let customers know that they will receive

a cash discount.¹⁶ Simply stating that certain service or processing fees will be included in the total bill is in violation of the statute.¹⁷

So how does all of this apply to law firms?

What Is a Law Firm Supposed To Do?

For the last 50 years, under certain circumstances, New York lawyers have allowed clients to use credit cards to pay legal fees.¹⁸ The New York Rules of Professional Conduct do not specifically address clients paying law firms with credit cards, but there are a few ethics opinions that must be considered.

Rule 1.5(a) of the Rules of Professional Conduct states that “[a] lawyer shall not . . . charge . . . an excessive . . . fee or expense.” This rule also lists a non-exhaustive list of factors to consider when determining whether a fee is excessive.

An ethics opinion published on June 7, 2023 – prior to the amendment of Section 518 – permits lawyers to charge a fee for the use of a credit card and states that “[p]rovided the attorney complies with Rule 1.5, nothing prohibits a lawyer from increasing the invoiced amount for legal services by an equal amount to the merchant processing fee incurred when accepting credit card payments.”¹⁹

In an earlier ethics opinion, in addition to permitting attorneys to pass on to a client the credit card company’s processing fee for payment of the firm’s advance payment retainer by credit card, the opinion also permitted the attorney to charge an additional nominal amount to compensate for the added merchant processing fee incurred on that processing fee upcharge.²⁰ This ethics opinion analyzed lawyer billing of certain expenses, for example, to recover for expenses reasonably incurred in connection with the client’s matter for services performed in-house, and compared that to the credit card processing fee.

This opinion concluded that “the lawyer may charge the client a nominal amount over the actual processing fee charged by the credit card company as a matter of administrative convenience, as long as (i) the lawyer discloses the up-charge and the client consents to it in advance of its imposition, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment



retainer and the processing fee charged (including the up-charge) are reasonable in the circumstances.”²¹ With respect to client fees after the advance retainer, the ethics opinion states that the same principles regarding the merchant processing fees apply.

The result is that lawyers can ethically charge clients a service or processing fee when they pay legal fees by credit card. But the catch is that they must also comply with Section 518. In our view the amended statute is ambiguous and may suffer from the same constitutional defects as the original legislation. It seems more applicable to retailers and does not give us a clear-cut answer, especially for service-oriented businesses such as law firms.

As long as the service fee is properly disclosed by providing for separate charges for the legal fee and the service fee, law firms should be in compliance with Section 518. We suggest that law firms use language such as the following in engagement letters and invoices issued to clients:

The firm accepts payment by credit card. Payments made by credit card will be subject to a service fee of 2.99% of the payment amount. When payments are made by credit card there will be two transaction numbers generated, one for the payment amount and one for the service fee.

Only time will tell how this all turns out. We note that this is the approach taken by the Office of Court Administration, which charges attorneys a separate service fee when attorneys renew their biennial registration and pay by credit card. The notice for this service fee states that “[a] service fee of 2.99% of the total payment amount is assessed on all credit card or debit card payments.”²² Additionally, it was recently reported that some local governments are doing essentially the same thing when credit cards are used to pay taxes.²³ Law firms in the private sector should be able to follow the lead of government entities regarding credit card surcharges.

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Question for the Next Attorney Professionalism Forum

To the Forum:

I am a lawyer at a well-known criminal defense firm. I often write articles in legal journals and am quoted as an expert in criminal law in various notable news publications. Recently, while moderating a CLE program about the admissibility of video recordings of police encounters, I realized an old law school classmate of mine – who is now a judge hearing criminal matters – was filling in for one of the panelists who couldn’t make it at the last minute.

After the CLE was over, the judge and I greeted each other and engaged in typical small talk and briefly caught up on each other’s careers since law school. I complimented the judge on his insights throughout the CLE program, and the judge mentioned that he was excited to be a panelist because this topic has come up frequently over the last few years. The judge praised the questions I asked during the panel discussion, stating that I seemed very knowledgeable about the topic. He then asked if I had time in the next few weeks to join him at the social club at which he is a member so that he could further “pick my brain” about the topic over a game of squash. He emphasized how much he would appreciate “learning

from a pro” about video recordings of police encounters being used as evidence. I told him I would let him know my availability but that I had a busy few weeks coming up. The truth is, I am hesitant to weigh in on the topic to a judge when it is apparent he currently has a case before him involving this topic.

My question for the forum is what are the ethical rules surrounding judges asking other attorneys or legal experts about the law? If an attorney is requested by a judge to provide insights about the law, what is the attorney’s ethical responsibility?

Sincerely,
Ivanna B. Wright

Endnotes

1. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 123 (2d Cir 2015), *vacated and remanded*, 581 U.S. 37 (2017).
2. See Fair Credit Billing Act § 167, Pub.L. No. 93-495, tit. III, 88 Stat. 1500 (1974) (codified in relevant part at 15 U.S.C. § 1666f(a)) (providing that issuers could not “prohibit ...seller[s] from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.”).
3. Katie Coggins, *Playing Word Games With New York’s No Surcharge Law*, 34 *Touro Law Rev.* (2018).
4. General Business Law § 518.
5. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 436 (SDNY 2013), *judgment entered*, 13-CV-3775 JSR, 2013 WL 7203883 (S.D.N.Y. Nov. 4, 2013), *vacated*, 803 F.3d 94 (2d Cir. 2015), *vacated*, 808 F.3d 118 (2d Cir. 2015), *vacated*, 803 F.3d 94 (2d Cir. 2015), *vacated*, 808 F.3d 118 (2d Cir. 2015).
6. *Id.* at 444.
7. *Id.* at 450.
8. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 122 (2d Cir. 2015), *vacated and remanded*, 581 U.S. 37 (2017).
9. *Id.* at 130.
10. *Id.* at 38.
11. *Id.*
12. *Expressions Hair Design v. Schneiderman*, 32 N.Y.3d 382, 382 (2018).
13. *Id.* at 387.
14. *Id.* at 393.
15. *Governor Hochul Announces New Law to Clarify Disclosure of Credit Card Surcharges Goes Into Effect Sunday, February 11*, N.Y.S. Governor, Feb. 6, 2024, <https://www.governor.ny.gov/news/governor-hochul-announces-new-law-clarify-disclosure-credit-card-surcharges-goes-effect-sunday>.
16. *Id.*
17. *Id.*
18. NYSBA Comm. on Professional Ethics, Formal Op. 1050, March 25, 2015; Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B. J. (October 2014).
19. NYSBA Comm. On Professional Ethics, Formal Op. 1258: *Credit Card Fees as an Expense*, June 7, 2023.
20. NYSBA Comm. On Professional Ethics, Formal Op. 1050, March 25, 2015.
21. *Id.*
22. Notice of Credit/Debit Card & eCheck (ACH) Service Fee, <https://www.nycourts.gov/LegacyPDFS/attorneys/NOTICE-OF-CREDIT-CARD-and-eCHECK-SERVICE-FEE-ATTY-REG.pdf>.
23. Lorena Mongelli, *7% Fees on Village Tickets*, *Newsday*, May 12, 2024, at A8.