

42 subscribers or to a population of users interacting with an application. For example, Venmo
43 users, when making a payment, are permitted to input a description of the transaction
44 (e.g., "\$200 for cleaning service"). Transactions then are published to the feed of each
45 Venmo user who is a party to the transaction. Depending on the privacy settings of each
46 party to the transaction, other users of the application may view that transaction and even
47 comment on it.

48 For lawyers, accepting payment through a payment-processing service risks
49 disclosure of information pertaining to the representation of a client in violation of Rule 4-
50 1.6(a) of the Rules Regulating The Florida Bar. Rule 4-1.6(a) prohibits a lawyer from
51 revealing information relating to representation of a client absent the client's informed
52 consent. This prohibition is broader than the evidentiary attorney-client privilege invoked in
53 judicial and other proceedings in which the lawyer may be called as a witness or otherwise
54 required to produce evidence concerning a client. The ethical obligation of confidentiality
55 applies in situations other than those in which information is sought from the lawyer by
56 compulsion of law and extends not only to information communicated between the client
57 and the lawyer in confidence but also to all information relating to the representation,
58 whatever its source. R. Regulating Fla. Bar 4-1.6 cmt. para. [4]. Likewise, a lawyer must
59 make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or
60 unauthorized access to, information relating to the representation. *Id.* R. 4-1.6(e); *see also*
61 *id.* R. 4-1.6 cmt. paras. [24], [25]. The obligation of confidentiality also arises from a
62 lawyer's ethical duty to provide the client with competent representation. *See id.* R. 4-1.1
63 cmt. para. [3]. This includes safeguarding information contained in electronic transmissions
64 and communications. *Id.*

65 Rule 4-1.6(c)(1) permits a lawyer to reveal confidential information to the extent the
66 lawyer reasonably believes necessary to serve the client's interests. Although receipt of
67 payment in connection with legal services benefits the client, the disclosure of information
68 about the payment to a community of users would not. Wide publication of a Venmo
69 payment "for divorce representation" hardly would serve the client's interest.¹

70 2. *Recommended and Required Actions*

71 Payment-processing services typically offer various privacy settings. Venmo, for
72 example, enables users to adjust their privacy settings to control who sees particular
73 transactions. The options are (1) "Public," meaning anyone on the Internet will be able to
74 see it, (2) "Friends only," meaning the transaction will be shared only with the "friends" of
75 the participants to the transaction, and (3) "Private," meaning it will appear only on the
76 personal feeds of the user and the other participant to the transaction. Venmo has a
77 default rule that honors the more restrictive privacy setting between two users: if either
78 participant's account is set to Private, the transaction will appear only on the feeds of the

¹ Revealing to a bank the limited information needed to make a deposit to the lawyer's account serves the client's interest. In addition, financial institutions are subject to federal and state laws regarding disclosure of financial information.

79 participants to the transaction, regardless of the setting enabled by the other participant.²
80 If, as with Venmo, the service being used permits the recipient to control the privacy
81 setting, the lawyer must select the most secure setting to mitigate against unwanted
82 disclosure of information relating to the representation.

83 Venmo is only one example of a payment-processing service. Each application has its
84 unique privacy settings and potential risks. The lawyer should be aware that these options
85 can and likely will change from time to time. Prior to using a payment-processing service,
86 the lawyer must diligently research the service to ensure that the service maintains
87 adequate encryption and other security features as are customary in the industry to protect
88 the lawyer's and the client's financial information and to preserve the confidentiality of any
89 transaction. The lawyer must make reasonable efforts to understand the manner and
90 extent of any publication of transactions conducted on the platform and how to manage
91 applicable settings to preempt and control unwanted disclosures. See R. Regulating Fla.
92 Bar 4-1.6(e); *id.* R. 4-1.1 cmt. para. [3]. The lawyer must take reasonable steps to avoid
93 disclosure by the lawyer as well as by the client, including advising clients of any steps that
94 they should take to prevent unwanted disclosure of information. Although not ethically
95 required, inserting such advice in the lawyer's retainer or engagement agreement or on
96 each billing statement is wise. For example:

97 As a convenience to our clients, we accept payment for our
98 services via certain online payment-processing services. The
99 use of these services carries potential privacy and
100 confidentiality risks. Before using one of these services, you
101 should review and elect the privacy setting that ensures that
102 information relating to our representation of you is not
103 inadvertently disclosed to the public at large.

104 The foregoing is just an example. Variations to fit the circumstances may be appropriate.

105 These confidentiality obligations apply to any payment that relates to the lawyer's
106 representation of a client, regardless of the purpose of the payment.

107 **B. Safeguarding Funds of Clients and Third Persons**

108 1. *The Issue*

110 A customer's account with most payment-processing services such as Venmo and
111 PayPal does not qualify as the type of bank account in which the trust-accounting rules
112 require the funds of clients or third persons in a lawyer's possession be held. Indeed, with

² See Venmo Help Center, "Payment Activity & Privacy" available at <https://help.venmo.com/hc/en-us/articles/210413717-Payment-Activity-Privacy>.

113 limited exceptions, they are not bank accounts at all, rather they are virtual ledgers of
114 funds trading hands, with entries made by the service in the customers' names.

115 Rule 5-1.1(a)(1) of the Rules Regulating The Florida Bar establishes the fundamental
116 anti-commingling requirement that a lawyer hold in trust, separate from the lawyer's own
117 funds, funds of clients or third persons that are in a lawyer's possession in connection with
118 a representation ("entrusted funds"). It requires that all such funds, including advances for
119 fees, costs, and expenses, "be kept in a separate federally insured bank, credit union, or
120 savings and loan association account maintained in the state where the lawyer's office is
121 situated or elsewhere with the consent of the client or third person and clearly labeled and
122 designated as a trust account."

123 All nominal or short-term entrusted funds must be deposited in an IOTA account. R.
124 Regulating Fla. Bar 5-1.1(g)(2).³ The IOTA account must be with an "eligible institution,"
125 namely, "any bank or savings and loan association authorized by federal or state laws to
126 do business in Florida and insured by the Federal Deposit Insurance Corporation, any
127 state or federal credit union authorized by federal or state laws to do business in Florida
128 and insured by the National Credit Union Share Insurance Fund, or any successor
129 insurance entities or corporation(s) established by federal or state laws, or any open-end
130 investment company registered with the Securities and Exchange Commission and
131 authorized by federal or state laws to do business in Florida." *Id.* R. 5-1.1(g)(1)(D).

132 2. *Recommended and Required Actions*

133 The Committee concludes that it is permissible for a lawyer to accept entrusted funds
134 via a payment-processing service. To avoid impermissible commingling, the lawyer must
135 maintain separate accounts with the service, one for funds that are the property of the
136 lawyer (such as earned fees), which normally would be deposited in the lawyer's operating
137 account, and one for entrusted funds (such as advances for costs and fees and escrow
138 deposits), which when in a lawyer's possession are required to be held in a separate trust
139 account. The lawyer must identify the correct account for the client or third party making
140 the payment.

141 Rule 5-1.1 applies to funds of clients and third persons that are "in a lawyer's
142 possession" and requires that any such funds be "kept" in a particular type of account. It
143 does not require that the funds be "immediately" or "directly" deposited into a qualifying
144 account. A payee does not acquire possession—access to and control over—funds
145 transmitted via a payment-processing service until the service makes those funds available
146 in the payee's account. If the funds are the property of the lawyer, the lawyer may leave
147 those funds in that account or transfer them to another account or payee at the lawyer's

³ "Nominal or short-term" describes funds of a client or third person that the lawyer has determined cannot earn income for the client or third person in excess of the costs to secure the income. R. Regulating Fla. Bar 5-1.1(g)(1)(A). That determination involves consideration of several factors, such as the amount of the funds and the period of time that the funds are expected to be held. *See id.* R. 5-1.1(g)(3); *see also id.* R. 5-1.1(g)(1)(C) (definition of "IOTA account").

148 discretion. The lawyer, however, must transfer entrusted funds from the service account
149 into an account at a qualifying banking or credit institution promptly upon their becoming
150 available to the lawyer. By transferring entrusted funds from the service account into a
151 qualified trust account promptly upon acquiring access to and control over those funds, the
152 lawyer complies with the requirement that those funds be *kept* in a qualified account.

153 Many banks do not permit linking an IOTA account to an account with a payment-
154 processing service such as Venmo or PayPal. In those situations, the lawyer should
155 establish with the banking institution some type of suspense account to which the account
156 established with the payment-processing service can be linked and into which the
157 payments are transferred, then promptly swept into the lawyer's IOTA account.

158 Depending upon how quickly the funds are released or other factors, a payment-
159 processing service may charge the payee a transaction fee. Unless the lawyer and the
160 client otherwise agree, the lawyer must ensure that any such fee is paid by the lawyer and
161 not from client trust funds. Likewise, the lawyer must ensure that any chargebacks are not
162 deducted from trust funds and that the service will not freeze the account in the event of a
163 payment dispute. As with the concern for confidentiality, a lawyer must make a reasonable
164 investigation into a payment-processing service to determine whether the service employs
165 reasonable measures to safeguard funds against loss or theft and has the willingness and
166 resources to compensate for any loss.

167 **III. Conclusion**

168 In sum, the Committee concludes that a lawyer ethically may accept payments via a
169 payment-processing service (such as Venmo or PayPal), including funds that are the
170 property of a client or third person that must be held separately from the lawyer's own
171 funds, under the following conditions:

172 1. The lawyer must take reasonable steps to prevent the inadvertent or unwanted
173 disclosure of information regarding the transaction to parties other than the lawyer and the
174 client or third person making the payment.
175

176 2. If the funds are the property of a client or third person (such as advances for costs
177 and fees and escrow deposits), the lawyer must direct the payor to an account with the
178 service that is used only to receive such funds and must arrange for the prompt transfer of
179 those funds to the lawyer's trust account at an eligible banking or credit institution, whether
180 through a direct link to the trust account if available, through a suspense account with the
181 banking or credit institution at which the lawyer's trust account is maintained and from
182 which the funds automatically and promptly are swept into the lawyer's trust account, or
183 through another substantially similar arrangement.
184

185 3. Unless the lawyer and client otherwise agree, the lawyer must ensure that any
186 transaction fee charged to the recipient is paid by the lawyer and not from client trust
187 funds. Likewise, the lawyer must ensure that any chargebacks are not deducted from trust
188 funds and that the service will not freeze the account in the event of a payment dispute.

189 The Rules of Professional Conduct are “rules of reason” and “should be interpreted
190 with reference to the purposes of legal representation and of the law itself.” R. Regulating
191 Fla. Bar ch. 4, pmb. (“Scope”). When reasonable to do so, the rules should be interpreted
192 to permit lawyers and clients to conduct business in a manner that society has deemed
193 commercially reasonable while still protecting clients’ interests. Permitting lawyers to
194 accept payments via payment-processing services under the conditions expressed in this
195 opinion satisfies those objectives.⁴

196 **Note:** The discussion about specific applications in this opinion is based on the
197 technology as it exists when this opinion is authored and does not purport to address all
198 such available technology. Web-based applications and technology are constantly
199 changing and evolving. A lawyer must make reasonable efforts to become familiar with
200 and stay abreast of the characteristics unique to any application or service that the lawyer
201 is using.

⁴ The quoted language comes from the Preamble to the Rules of Professional Conduct, which are found in Chapter 4 of the Rules Regulating The Florida Bar. Rule 5-1.1 is part of the Rules Regulating Trust Accounts, which are found in Chapter 5 of the Rules Regulating The Florida Bar). Chapter 5 is incorporated into Chapter 4 by Rule 4-1.15.