FLORIDA BAR ETHICS OPINION
OPINION 21-2
March 23, 2021

Advisory ethics opinions are not binding.

A lawyer ethically may accept payments via a Web-based payment-processing service (such as Venmo or PayPal), including funds that are the property of a client or third person, as long as reasonable steps are taken to protect against inadvertent or unwanted disclosure of information regarding the transaction and to safeguard funds of clients and third persons that are entrusted to the lawyer.

RPC: 4-1.1, 4-1.6(a), 4-1.6(e), 4-1.15, 5-1.1(a), (g)

I.   Introduction

The Florida Bar Ethics Department has received several inquiries whether lawyers may accept payment from clients via Web-based payment-processing services such as Venmo and PayPal. This also is an increasingly frequent question on the Bar's Ethics Hotline. Accordingly, the Professional Ethics Committee issues this formal advisory opinion to provide Florida Bar members with guidance on the topic.

Several Web-based, mobile, and digital payment-processing services and networks ("payment-processing services") facilitate payment between individuals, between businesses, or between an individual and a business. Some are specifically designed for lawyers and law firms (e.g., LawPay and LexCharge), while others are not (e.g., Venmo, PayPal, ApplePay, Circle, and Square). These services operate in different ways. Some move funds directly from the payor's bank account to the payee's bank account, some move funds from a payor's credit card to a payee's bank account, and some hold funds for a period of time before transferring the funds to the payee. Service fees differ for various transactions, depending on the service's terms of operation. Some offer more security and privacy than others.

The Committee sees no ethical prohibition per se to using these services, as long as the lawyer fulfills certain requirements. Those requirements differ depending on the purpose of the payment—i.e., whether the funds are the property of the lawyer (such as earned fees) or the property of a client or third person (such as advances for costs and fees and escrow deposits). The two principal ethical issues are (1) confidentiality and (2) safeguarding funds of clients and third persons that are entrusted to the lawyer.

II.   Analysis

A. *Confidentiality*

1.   *The Issue*

The use of payment-processing services creates privacy risk. This arises from the potential publication of transactions and user-related information, whether to a network of subscribers or to a population of users interacting with an application. For example, Venmo users, when making a

payment, are permitted to input a description of the transaction (e.g., "$200 for cleaning service"). Transactions then are published to the feed of each Venmo user who is a party to the transaction. Depending on the privacy settings of each party to the transaction, other users of the application may view that transaction and even comment on it.

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

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

2. *Recommended and Required Actions*

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

---

[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.

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

If, as with Venmo, the service being used permits the recipient to control the privacy setting, the lawyer must select the most secure setting to mitigate against unwanted disclosure of information relating to the representation.

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

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

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

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

B. *Safeguarding Funds of Clients and Third Persons*

1. *The Issue*

A customer's account with most payment-processing services such as Venmo and PayPal does not qualify as the type of bank account in which the trust-accounting rules require the funds of clients or third persons in a lawyer's possession be held. Indeed, with limited exceptions, they are not bank accounts at all, rather they are virtual ledgers of funds trading hands, with entries made by the service in the customers' names.

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

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

2. *Recommended and Required Actions*

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

Rule 5-1.1 applies to funds of clients and third persons that are "in a lawyer's possession" and requires that any such funds be "kept" in a particular type of account. It does not require that the funds be "immediately" or "directly" deposited into a qualifying account. A payee does not acquire possession—access to and control over—funds transmitted via a payment-processing service until the service makes those funds available in the payee's account. If the funds are the property of the lawyer, the lawyer may leave those funds in that account or transfer them to another account or payee at the lawyer's discretion. The lawyer, however, must transfer entrusted funds from the service account into an account at a qualifying banking or credit institution promptly upon their becoming available to the lawyer. By transferring entrusted funds from the service account into a qualified trust account promptly upon acquiring access to and control over those funds, the lawyer complies with the requirement that those funds be *kept* in a qualified account.

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

Depending upon how quickly the funds are released or other factors, a payment-processing service may charge the payee a transaction fee. Unless the lawyer and the client otherwise agree, the

---

[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").

lawyer must ensure that any such fee is paid by the lawyer and not from client trust funds. Likewise, the lawyer must ensure that any chargebacks are not deducted from trust funds and that the service will not freeze the account in the event of a payment dispute. As with the concern for confidentiality, a lawyer must make a reasonable investigation into a payment-processing service to determine whether the service employs reasonable measures to safeguard funds against loss or theft and has the willingness and resources to compensate for any loss.

III. Conclusion

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

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

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

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

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

Note: The discussion about specific applications in this opinion is based on the technology as it exists when this opinion is authored and does not purport to address all such available technology. Web-based applications and technology are constantly changing and evolving. A

---

[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.

lawyer must make reasonable efforts to become familiar with and stay abreast of the characteristics unique to any application or service that the lawyer is using.