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FEATURE ARTICLE

Legal Ethics & Cryptocurrency

Over the past decade, the use of so-called cryptocurrency has increased substantially for business transactions and for personal investment. Not surprisingly, lawyers have been involved in these developments, and this has raised a number of ethical issues. A number of jurisdictions have issued advisory opinions on the subject, including Nebraska (Advisory Opinion No. 17-03), New York City (N.Y. Formal Opinion 2019-5), North Carolina in 2019 (Formal Opinion Oct. 25, 2019), the District of Columbia (Opinion 378), Virginia (Draft Opinion 1898), and Ohio (Opinion 2022-07).

The opinions issued by these various jurisdictions deal with a number of questions:

1. Is it ethical for a lawyer to accept cryptocurrency as payment for services?
2. If a lawyer accepts cryptocurrency as payment for services is it subject to Rule 1.8(a) as a business transaction between a lawyer and a client?
3. If a lawyer accepts cryptocurrency as payment for services, may the lawyer retain the payment as cryptocurrency and, if she may retain it, when and how is it to be valued?
4. May cryptocurrency be deposited in a lawyer's trust account?
5. How is Rule 1.15 on protection of client property to be applied to cryptocurrency?
6. May a lawyer hold cryptocurrency on behalf of a client for escrow and other purposes?

We will look at how these advisory opinions answer each of these questions below.

Before looking at the answers to these questions, it is useful to look at some definitions of cryptocurrency. N.Y. C. Op. 2019-5 defines it in this manner:

> Cryptocurrency has been described as a form of virtual "currency" that exists in electronic form. Cryptocurrency is employed as a means of peer-to-peer exchange whereby users log transfers on an electronic distributed "ledger book" known as the "blockchain" which records the transfer of the cryptocurrency from the sender to the recipient. A record of all changes is stored on each node of the blockchain network, and any additional change must be confirmed against

> existing copies of the record. Several options for cryptocurrency storage exist, but one common means is a software "wallet," where the owner of the cryptocurrency has a "public key" which is similar to an account number and a "private key" which is a code known only to the sender and used to transfer the cryptocurrency from sender to recipient.
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> Unlike actual currency such as U.S. dollars, cryptocurrency is not backed by any government. Any transaction to convert cryptocurrency to actual currency can involve a number of variables. For instance, depending on the type of cryptocurrency being exchanged, certain processing fees may apply. Also, the market for cryptocurrency has been volatile, with significant surges and drops in any given month. Thus, an agreement to value a transaction in cryptocurrency or convert cryptocurrency into traditional currency on a certain date carries potential risks for both sides. Finally, the regulatory scheme for cryptocurrency is unclear and state and federal agencies are largely still determining how to best regulate cryptocurrency.

The definition provided by Ohio in Op. 2022-07 is:

> Unlike actual currency such as U.S. dollars, cryptocurrency is not backed by any government. Any transaction to convert cryptocurrency to actual currency can involve a number of variables. For instance, depending on the type of cryptocurrency being exchanged, certain processing fees may apply. Also, the market for cryptocurrency has been volatile, with significant surges and drops in any given month. Thus, an agreement to value a transaction in cryptocurrency or convert cryptocurrency into traditional currency on a certain date carries potential risks for both sides. Finally, the regulatory scheme for cryptocurrency is unclear and state and federal agencies are largely still determining how to best regulate cryptocurrency.

Some of the essential aspects of cryptocurrency that are different from fiat currency (currency issued by a sovereign government) is the fact that is privately created, has no governmental backing, does not exist in a traditional physical form, and has a changing value that depends upon volatile markets.[1]

The first question presented by the advisory opinions is whether a lawyer

1 Although fiat currencies have changing values as compared to other fiat currencies, their values do not change in their own jurisdiction except when the government itself chooses to alter the value of the currency. Cryptocurrency values change based not upon government intervention, but, rather, market fluctuations.

may accept cryptocurrency in payment for legal services or in escrow for client. With the exception of North Carolina, all jurisdictions noted above answered "yes."[2]

The second question is whether, if a lawyer may accept a client payment in cryptocurrency, that payment is a transaction subject to Rule 1.8(a). Rule 1.8(a) requires that when a client enters into a "business" arrangement with a client, the lawyer must ensure that certain client protections are in place and that the transaction is fair to the client. Generally, the opinions answer that an agreement to pay future fees to a lawyer or paying an advance fee to a lawyer in cryptocurrency does fall within the purview of Rule 1.8. The New York City opinion gives the most detailed analysis of this issue. It poses three hypotheticals involving advance payments:

1. The lawyer agrees to provide legal services for a flat fee of X units of cryptocurrency, or for an hourly fee of Y units of cryptocurrency.

2. The lawyer agrees to provide legal services at an hourly rate of $X dollars to be paid in cryptocurrency.

3. The lawyer agrees to provide legal services at an hourly rate of $X dollars, which the client may, but need not, pay in cryptocurrency in an amount equivalent to U.S. Dollars at the time of payment.

The opinion notes that under the New York version of Rule 1.8(a), an agreement for payment in cryptocurrency would constitute a business transaction under Rule

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2 The North Carolina opinion permits lawyers to take a "flat fee" in cryptocurrency, but prohibits a lawyer from taking cryptocurrency as an advanced payment:" A flat fee is a "fee paid at the beginning of a representation for specified legal services on a discrete legal task or isolated transaction to be completed within a reasonable amount of time[.]" 2008 FEO 10. With client consent, a flat fee is considered "earned immediately and paid to the lawyer or deposited in the firm operating account[.]" Id. Rule 1.5(a) prohibits a lawyer from making an agreement for, charging, or collecting an illegal or clearly excessive fee. Comment 4 to Rule 1.5 states that "a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client…" and "An advance payment is "a deposit by the client of money that will be billed against, usually on an hourly basis, as legal services are provided[.]" 2008 FEO 10. The advance payment is "not earned until legal services are rendered" and therefore must be deposited in the lawyer's trust account, with the unearned portion of the advance payment refunded to the client upon termination of the client-lawyer relationship. Id.

1.8(a) in the first and second hypotheticals, but not in the third:[3]

> In the third scenario, however, where the client is simply given the option of paying in cryptocurrency based on some rate of exchange existing at the time, we do not believe that Rule 1.8(a) applies. In this scenario, the fee agreement is, in our view, an ordinary one where the lawyer is simply agreeing as a convenience to accept a different method of payment but the client is not limited to paying in cryptocurrency if it is not beneficial to do so. The lawyer and the client do not have to resolve terms as to which they may have differing interests. Cryptocurrency functions merely as an optional way of transmitting payment. Cf. NYSBA Formal Op. 1050 (2015) (recognizing that payment of legal fees by credit card as permissible and generally accepted).

The District of Columbia opinion and draft Virginia opinions generally follow and

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Virtual currency is property and not actual currency; accordingly, virtual currency cannot be deposited in a lawyer trust account or fiduciary account in accordance with Rule 1.15-2. Instead, virtual currency – and all other non-currency property received as entrusted property – must be "promptly identified, labeled as property of the person or entity for whom it is to be held, and placed in a safe deposit box or other suitable place of safekeeping." Rule 1.15-2(d)… The methods in which virtual currency are held are not yet suitable places of safekeeping for the purpose of protecting entrusted client property under Rule 1.15-2(d). Rule 1.15-2(d)'s reference to "a safe deposit box or other suitable place of safekeeping" demonstrates that the "suitable place of safekeeping" referenced in the Rule is one that ensures confidentiality for the client and provides exclusive control for the lawyer charged with maintaining the property, as well as the ability of the client or lawyer to rely on institutional backing to access the safeguarded property through appropriate verification should the lawyer's ability to access the property disappear (be it through the lawyer's misplacement of a physical key, or the lawyer's unavailability due to death or disability). The environment in which virtual currency presently exists, however, does not afford similar features that allow clients to confidently place entrusted virtual currency in the hands of their lawyers."

cite the New York City opinion.[4]

The third question, regarding when and how cryptocurrency is to be valued to comply with the reasonableness requirements of Rule 1.5 and the fairness requirements of Rule 1.8(a), also requires looking at several hypothetical situations. The difficulty with valuation is caused by the volatility and market-based value of cryptocurrencies.

The New York City opinion explains the dangers posed by market volatility in cryptocurrency:

> The lawyer's interest is in negotiating terms that are most favorable to the lawyer and the client holds the opposite interest. There may also be differing interests even after the representation commences. Because cryptocurrency can be subject to drastic market fluctuations, the lawyer may have an interest in conducting the representation so as to maximize the value of the client's payment in cryptocurrency. The fact that the value of the lawyer's fee paid in cryptocurrency could change from day-to-day could compromise the lawyer's professional judgment on behalf of the client in the representation: for instance, the lawyer could have an incentive to delay or speed up the representation in order to be paid at a time when the value of cryptocurrency is at a high and the lawyer could immediately convert that cryptocurrency to cash. By the same token, the client has an opposing interest in making payments at a time when the value of cryptocurrency is lower. The same is not necessarily true of an ordinary transaction where the lawyer agrees to accept government-issued currency in exchange for legal services.

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3 N.Y Rule 1.8(a), as quoted by the opinion states: Rule 1.8(a), which is derived from judicial decisions under the common law of contracts, provides as follows: A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless: (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. Note that the Kansas and Missouri versions of 1.8(a) are somewhat different.

The opinions differ on how this problem should be handled. The Nebraska opinion requires a lawyer to convert the cryptocurrency immediately upon receipt:

> To mitigate or eliminate the risk of volatility, it is possible to value or convert bitcoins and other digital currencies into U.S. dollars immediately upon receipt. The conversion rate would be market based such as from an exchange or based upon the New York Stock Exchange Price Index, for example. In this way, the bitcoins would serve to credit the client's account and there would be no risk to the client of value fluctuation. As part of this process, a law office would need to disclose to the client that the firm would not be retaining the bitcoins but converting them to cash upon receipt. Through this method, the client is informed that an increase in the value of their bitcoins will not additionally fund their outstanding account. In addition, clients need not be concerned if the value of the bitcoins they sent for payment suddenly dropped.
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> Such a process should include (1) notifying the client that the attorney will not retain the digital currency units but instead will convert them into U.S. dollars immediately upon receipt; (2) converting the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) crediting the client's account accordingly at the time of payment. Providing the client the notifications described in this opinion can best be accomplished by including the appropriate notifications in the fee agreement between lawyers and client. Under this framework, the client is properly informed, the use of bitcoins as payment would not result in unconscionable fees to the attorney, and the receipt of bitcoins as payment to the attorney would conform to the Nebraska Code of Professional Conduct.

The draft Virginia opinion takes a different approach:

> At What Point in the Engagement is "Fairness" and "Reasonableness" to be Determined?
>
> This question is important when analyzing the fairness of a fee arrangement in which a volatile asset like cryptocurrency is being

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4 The Virginia draft opinion states that a client payment of an earned fee does not fall under Rule 1.8(a): "Rule 1.8(a) does not apply if the lawyer accepts cryptocurrency as payment for an earned fee." Presumably, in this case the valuation of the payment is done at the time it is made so that there is no volatility as there would be in an advance payment or an agreement to pay in the future.

offered for services not yet rendered. In ABA Formal Opinion 00-418, supra, concerning accepting stocks or partial ownership of a client in lieu of fees the committee opined that:

> For purposes of judging the fairness and reasonableness of the transaction and its terms, the Committee's opinion is that, as when assessing the reasonableness of a contingent fee, only the circumstances reasonably ascertainable at the time of the transaction should be considered.

The District of Columbia Bar agrees with this approach:

> Rule 1.8(a) and the commentary thereto are silent on how fairness is to be determined, and whether it is to be determined only by reference to facts and circumstances existing at the time the arrangement is accepted by the parties, or by reference to subsequent developments (for example, a huge appreciation in the value of the shares received as fees such that the lawyer is effectively compensated at 100-fold the reasonable value of his services). For ethics purposes (and not for purposes of assessing common law fiduciary duties), we believe that the "fairness" of the fee arrangement should be judged at the time of the engagement. In other words, if the fee arrangement is "fair and reasonable to the client" at the time of the engagement, no ethical violation could occur if subsequent events, beyond the control of the lawyer, caused the fee to appear unfair or unreasonable.

See also Restatement (3d) of the Law Governing Lawyers, § 126, Comment e (2000) ("Fairness is determined based on facts that reasonably could be known at the time of the transaction, not as facts later develop.").

> *Therefore, any fee arrangement that charges fees in cryptocurrency, or that allows or requires a client to either provide an advance fee or accept a settlement payment from a party in cryptocurrency, should be assessed for fairness at the time that it is agreed upon, based on the facts then available.*

(Emphasis added.)

As to whether cryptocurrency may be deposited in a lawyer's trust account, the opinions agree that it may not because it is a form of property that banks and other financial institutions do not accept into such accounts. Since the opinions agree that a lawyer may accept cryptocurrency in payment for services or in escrow, but may not be deposited in a trust account, then lawyers accepting cryptocurrency must fully comply with the requirements of Rule 1.15 on protection of client

property. Although states have different versions of Rule 1.15, all agree that lawyers must take reasonable steps to protect the property in their safekeeping and keep it separate from personal or firm property. The intangible nature of cryptocurrency makes this a difficult task.

The Ohio opinion, issued in August 2022, discusses how lawyers should protect cryptocurrency they receive:

> There are several recommended methods to safeguard cryptocurrency held in escrow (e.g., cold storage wallets, encryption and back up of private keys, multi-signature accounts) that should be thoroughly researched and carefully considered by lawyers before accepting cryptocurrency. Additionally, a lawyer should inform clients of the apparent and inherent risks of holding and transferring cryptocurrency and explain the steps the lawyer will undertake to safeguard the client's property. Prof.Cond.R. 1.4(a).

The District of Columbia opinion also provides a warning to lawyers:

> In the case of cryptocurrency, competence requires lawyers to understand and safeguard against the many ways cryptocurrency can be stolen or lost. Because blockchain transactions are unregulated, uninsured, anonymous, and irreversible, cryptocurrency is regularly targeted for digital fraud and theft. For example, cryptocurrency online wallets and exchange platforms may be fraudulent; legitimate wallets and platforms may be subject to security breaches; and private keys used to transfer cryptocurrency out of a person's wallet are vulnerable to network-based threats like hacking and malware if stored in a hot wallet (a device or system connected to the internet). Additionally, private keys that are stored in a cold wallet (hardware, offline software, or paper) can be irretrievably lost, in which case the associated digital currency is likely permanently inaccessible. Just as with fiat currency or any client property, a lawyer must use reasonable care to minimize the risk of loss.

The Ohio opinion also warns lawyers who accept cryptocurrency in escrow for clients that they must be concerned about the possibility of participation in illegal activities:

> Because of the relative anonymity of cryptocurrency transactions, the use of a lawyer's escrow services may be sought after by persons seeking to engage in money laundering or other fraud. In order to prevent unknowingly assisting in illegal activity, a lawyer should require a detailed written escrow agreement that identifies the parties

> to the transaction (possibly using know-your-customer identity verification methods) as well as the underlying transaction for which the escrow account will be used. See Prof.Cond.R. 1.2(d)(1).

Any lawyer considering accepting cryptocurrency for any purpose should go back to the original opinions and study them carefully. They should also keep informed of other and new relevant authority in the jurisdictions in which they practice. The ethical implications of accepting cryptocurrency are complex, and the treatment of these issues varies among jurisdictions. We may expect this complexity and variation to cause confusion and problems for lawyers who do not take adequate steps to learn the changing rules in this field.

NEW AUTHORITY

Smartphone Redux

On August 4, 2022, the New York State Bar Association published Opinion 1240, which provides advice on the applicability of Rule 1.6 to the protection of contact lists maintained on lawyer smartphones. The opinion highlights the New York Rule of Professional Conduct 1.6:

> Rule 1.6(c) of the New York Rules of Professional Conduct (the "Rules") requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to" the confidential information of current, former and prospective clients. Rule 1.6(a), in turn, provides that confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney- client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

NYSBA Opinion 1240 is concerned with the security of contact lists maintained on smart phones when those contact lists contain the following information about clients:

> …one or more email addresses, work or residence addresses,

> and phone numbers (collectively sometimes called "directory information"), but contacts often also include additional non-directory information (such as birth date or the lawyer's relationship to the contact).

The concern arises from the fact that many social media and other phone applications request permission from smart phone owners to share contact information contained on the owner's smart phone. Thus, by agreeing to share such information, the owner may be disclosing client confidential information.

When examining this issue, the New York State Bar Association referred to a prior opinion regarding when an attorney's relationship to a client must be kept confidential:

> In N.Y. State 1088 (2016), we addressed whether an attorney could disclose to a potential client the names of actual clients the attorney had represented in the same practice area. To answer that inquiry, we needed to determine, as a threshold matter, whether and under what circumstances the names of current or past clients could be "confidential information," as defined in Rule 1.6(a). We stated, first, that clients' names will be confidential information if the clients have requested keeping their names confidential. See N.Y. State 1088 ¶ 6 (2016). We then opined:
>
> If the client has not requested that the lawyer keep the client's name confidential, then the lawyer must determine whether the fact of representation is generally known and, if not, whether disclosing the identity of the client and the fact of representation is likely to be embarrassing or detrimental to the client. This will depend on the client and the specific facts and circumstances of the representation.

Because the determination of this issue is fact-specific and client-specific, the New York State Bar Association perceived a danger of violating Rule 1.6 if a lawyer were to share her contacts list with an "app."

Upon identifying the potential for a Rule 1.6 violation, the New York State Bar Association offered guidance regarding an attorney's obligations and what factors to weigh in carrying out those obligations:

> Insofar as clients' names constitute confidential information, a lawyer must make reasonable efforts to prevent the unauthorized access of others to those names, whether stored as a paper copy in a filing cabinet, on a smartphone, or in any other electronic or paper form. To that end, before an attorney grants access to the attorney's

> contacts, the attorney must determine whether any contact – even one – is confidential within the meaning of Rule 1.6(a). A contact could be confidential because it reflects the existence of a client-attorney relationship which the client requested not be disclosed or which, based upon particular facts and circumstances, would be likely to be embarrassing or detrimental to the client if disclosed. N.Y. State 1088 (2016).
>
> Some relevant factors a lawyer should consider in determining whether any contacts are confidential are: (i) whether the contact information identifies the smartphone owner as an attorney, or more specifically identifies the attorney's area of practice (such as criminal law, bankruptcy law, debt collection law, or family law); (ii) whether people included in the contacts are identified as clients, as friends, as something else, or as nothing at all; and (iii) whether the contact information also includes email addresses, residence addresses, telephone numbers, names of family members or business associates, financial data, or other personal or non-public information that is not generally known.
>
> If a lawyer determines that the contacts stored on his smartphone include the confidential information of any current or former client, the lawyer must not consent to give access to his contacts to an app, unless the attorney, after reasonable due diligence, including a review of the app's policies and stated practices to protect user information and user privacy, concludes that such confidential contact information will be handled in such a manner and for such limited purposes that it will not, absent the client's consent, be disclosed to additional third party persons, systems or entities. See N.Y. State 820 (2008).
>
> If "contacts" on a lawyer's smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client's consent.

The Kansas and Missouri versions of Rule 1.6 contain language that is similar to the New York version. Subsections (a) and (c) of Kansas Rule of Professional Conduct 1.6 state:

> (a) A lawyer shall not reveal information relating to representation

> of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Subsections (a) and (c) of Missouri Rule of Professional Conduct 4-1.6 state:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.

Although the Kansas and Missouri versions of Rule 1.6 are somewhat different from NY's version, the underlying reasoning of NYSBA Opinion 1240 may be applied by Kansas and Missouri authorities in similar situations. Thus, it would be wise for lawyers to formulate policies about lawyer and staff use of smartphones, keeping client contact information on these phones, and using "apps" that request to share contact information so as not to violate client confidentiality under Rule 1.6 in their jurisdiction.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles Drawn from *The Current Index to Legal Periodicals*

1. *Norman J. Shachoy Symposium: Practical Ethics in Corporate Law: The Science, Instruction and "Real-World" Application*, 66 Vill. L. Rev. 947 (2021).

Corporate practitioners will benefit from this interesting symposium.

2. Deborah Pearlstein, *Lawyering the Presidency*, 110 Geo. L.J. 899 (2022).

Pearlstein provides a compelling discussion for anyone who thinks about the role of Executive Branch legal counsel.

3. Fiona Kay & Robert Granfield, *When altruism is remunerated: understanding the bases of voluntary public service among lawyers*, 56 Law & Soc'y Rev. 78 (2022).

We should always remember that the law is a profession in the public interest.

4. Steve Johnson, *Federal Tax Ethics Rules and State Malpractice Litigation*, 75 Tax Law. 125-186 (2021).

This is an important article for tax lawyers.

5. Douglas R. Richmond, *Appellate Sanctions Against Lawyers*, 73 Baylor L. Rev. 562 (2021).

Richmond uses his expertise to tackle the important issue of sanctioning lawyers for misconduct in prosecuting or defending appeals.

A BLAST FROM THE PAST

Excerpt from Bolte, *Ethics for Success at the Bar*

> No attorney can follow the guidance of a rule of which he is ignorant and since his duties are so complex and his liabilities so numerous, it is needless to say that he certainly not succeed at the Bar without a thorough knowledge of the Bar's code of ethics and the laws governing him and a conscientious effort to follow those rules in all things.

Edwin Bolte, *Ethics for Success at the Bar* 86 (1928).

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