

Issues Outline Draft #1 for December 3, 2021 Meeting

21-0007 – Cryptocurrency

I. POTENTIAL WAYS TO FRAME THE ISSUE(S)

What are the ethical considerations when a lawyer accepts virtual currency from a client, payor or opposing party as payment for legal services or fees, or to facilitate payment of a settlement?

May an attorney ethically accept virtual currency as payment for past or future legal services? Incurred or future expenses?

If so, under what circumstances and what must the lawyer do to comply with his or her ethical obligations when accepting payment of fees or expenses in virtual currency?

II. AUTHORITIES

A. California Rules of Professional Conduct/State Bar Materials

Rule 1.1 (Competence)

Rule 1.4 (Communication with Clients)

Rule 1.5 (Fees for Legal Services)

Rule 1.6 (Confidential Information of a Client)

Rule 1.7 (Conflict of Interest: Current Clients)

Rule 1.9 (Duties to Former Clients)

Rule 1.8.1 (Business Transactions with a Client and Pecuniary Interests Adverse to the Client):

Rule 1.8.6 (Compensation from One Other Than Client)

Rule 1.15 (Safekeeping Funds and Property of Clients and Other Persons)

Rule 5.4 (Financial and Similar Arrangements with Nonlawyers) –

Bus. & Prof. Code § 6068(e)(1) (maintaining client confidences)

Client Trust Accounting Handbook

27 **B. Out-of-State Ethics Opinions**

28 **1. Nebraska Ethics Advisory opinion for Lawyers No. 17-03 (September 2017)**

29 This opinion provides an overview of digital currencies and related use and regulation, and
30 advises the following:

31 (1) “[T]here is no per se rule prohibiting payment of earned legal fees with convertible virtual
32 currency since it is a form of property.” Lawyer may accept digital currencies for legal services.
33 To “assure” that the fee “remains reasonable” under Neb. Ct. R. Prof. Cond. § 3-501.5(a) (which
34 prohibits unreasonable fees), Lawyer should mitigate the risk of volatility and unconscionable
35 fees by “(1) notifying the client that the attorney will not retain the digital currency units but
36 instead will convert them into U.S. dollars immediately upon receipt; (2) converting the digital
37 currencies into U.S. dollars at objective market rates immediately upon receipt through the use of
38 a payment processor; and (3) crediting the client's account accordingly at the time of payment.”
39 The notifications “can be best accomplished by including [them] in the fee agreement”
40 “Under this framework, the client is properly informed, the use of bitcoins as payment would not
41 result in unconscionable fees to the attorney and the receipt of bitcoins as payment to the
42 attorney would conform to the Nebraska Code of Professional Conduct.”

43 (2) Lawyer may accept digital currencies as payment from third-party payors “as the payment
44 prevents possible interference with the attorney's independent relationship with the client
45 pursuant to Neb. Ct. R. of Prof. Cond. §3-501.7(a) or the client's confidential information
46 pursuant to Neb. Ct. R. of Prof. Cond. §3-501.6 by implementing basic know-your-client
47 ("KYC") procedures to identify any third-party payor prior to acceptance of payments made with
48 digital currencies.”

49 (3) Lawyer may hold “digital currencies in escrow or trust for clients or third parties pursuant to
50 Neb. Ct. R. of Prof. Cond. §3-501.15(a) so long as the attorney holds the units of such currencies
51 separate from the lawyer's property, kept with commercially reasonable safeguards and records
52 are kept by the lawyer of the property so held for five (5) years after termination of the
53 relationship. Because bitcoins are property rather than actual currency, bitcoins cannot be
54 deposited into a client trust account created pursuant to Neb. Ct. R. §§ 3-901 to 3-907 (Trust
55 Fund Requirements for Lawyers).” If a lawyer accepts digital currency as “a retainer to be drawn
56 on when fees are earned in the future, the lawyer must immediately convert the [digital currency]
57 into U.S. dollars”

58 Due to the volatility of digital currencies, clients and parties “should be advised that the property
59 held in trust or escrow will be held and not converted into U.S. dollars or other currency.
60 Records of that notice and the records of the separate wallet used to store the [digital currency]
61 would be maintained by the lawyer.” The lawyer must take reasonable security precautions (e.g.,
62 encryption of the private key; cold storage of the wallet) due to security concerns and the fact
63 that there is no bank or FDIC insurance to reimburse a holder if a hacker steals them.

64 Note: Opinion is at least in part based on designation of the currency as property. *See* IRS
65 Notice 2014-21, <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

66 **2. Receipt of Virtual Currency in Law Practice – North Carolina State Bar 2019**
67 **Formal Ethics Opinion 5**

68 “Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services,
69 provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied. A lawyer may
70 not, however, accept virtual currency as entrusted funds to be billed against or to be held for the
71 benefit of the lawyer, the client, or any third party.” Digital currency may not be accepted as an
72 advance payment or to pay a settlement because it is not suitable to be held in trust.

73 A lawyer may receive compensation from a third party for the benefit of a client as long as the
74 client provides informed consent, there is no interference with independent judgment or the
75 client-lawyer relationship, and the information obtained by the lawyer in the course of the client-
76 lawyer relationship remains confidential.

77 **No Advance Payments with Virtual Currency**

78 Digital currency is property and cannot be deposited into a trust account or fiduciary account and
79 is subject to safe-keeping requirements. “The methods in which virtual currency are held are not
80 yet suitable places of safekeeping for the purpose of protecting entrusted client property under
81 Rule 1.15-2(d).” The reference in the rule to “a safe deposit box or other suitable place of
82 safekeeping” shows that a suitable location is one that “ensures confidentiality for the client and
83 provides exclusive control for the lawyer charged with maintaining the property, as well as the
84 ability of the client or lawyer to rely on institutional backing to access the safeguarded property
85 through appropriate verification should the lawyer’s ability to access the property disappear (be
86 it through misplacement of a physical key, or the lawyer’s unavailability due to death or
87 disability).” The opinion acknowledges that, in time, changes in the noted conditions (e.g.,
88 volatility, accessibility, security) might warrant reconsideration of the opinion.

89 **Flat Fees in Virtual Currency are Subject to Rule 1.8(a)**

90 “A flat fee is a ‘fee paid at the beginning of a representation for specified legal services on a
91 discrete legal task or isolated transaction to be completed within a reasonable amount of time[.]’
92 2008 FEO 10. With client consent, a flat fee is considered ‘earned immediately and paid to the
93 lawyer or deposited in the firm operating account[.]’ *Id.* Rule 1.5(a) prohibits a lawyer from
94 making an agreement for, charging, or collecting an illegal or clearly excessive fee. Comment 4
95 to Rule 1.5 states that ‘a fee paid in property instead of money may be subject to the
96 requirements of Rule 1.8(a) because such fees often have the essential qualities of a business
97 transaction with the client.’ Rule 1.8(a) prohibits a lawyer from entering into a business
98 transaction with a client unless the following provisions are met:

99 (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to
100 the client and are fully disclosed and transmitted in writing in a manner that can be reasonably
101 understood by the client; (2) the client is advised in writing of the desirability of seeking and is
102 given a reasonable opportunity to seek the advice of independent legal counsel on the
103 transaction; and (3) the client gives informed consent, in a writing signed by the client, to the
104 essential terms of the transaction and the lawyer's role in the transaction, including whether the
105 lawyer is representing the client in the transaction.” Rule 1.8(a)(1) – (3).

Other Legal Issues

“This opinion does not reach the legal issues surrounding an individual’s receipt of and transacting in virtual currency. Before transacting in virtual currency, lawyers should apprise themselves of the legal ramifications surrounding the use of virtual currency, including potential tax and criminal implications. As with other forms of payment, lawyers should take the appropriate steps to ensure any virtual currency received is not the product of or otherwise connected to illegal activity.”

Note: Opinion is based on designation of the currency as property. See IRS Notice 2014-21, <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

3. NYCBA FORMAL OPINION 2019-5: REQUIRING CRYPTOCURRENCY IN PAYMENT FOR LEGAL SERVICES (July 11, 2019).

“A fee agreement requiring the client to pay cryptocurrency in exchange for legal services is subject to Rule 1.8(a) if the client expects the lawyer to exercise professional judgment on the client’s behalf in the transaction. In that case, the lawyer must comply with the procedural requirements of Rule 1.8(a)(1)-(3) before entering into the fee agreement.”

Rule 1.8(a) regulates “business transactions” between lawyers and clients. The threshold question under Rule 1.8(a) is whether a lawyer and client (or prospective client) are entering into a (i) ‘business transaction;’ (ii) where the lawyer and the client have differing interests; and (iii) the client expects the lawyer to exercise professional judgment on the client’s behalf in the transaction. If so, the lawyer must meet the procedural requirements in the rule. See NYCBA Formal Op. 2000-3 (2000) (‘[Rule 1.8(a)] interposes a threshold inquiry before requiring the lawyer to undertake the disclosure and other prescribed remedial measures.’).”

The opinion considers three fee arrangement scenarios: (1) flat fee to be paid in cryptocurrency; (2) hourly rate to be paid in cryptocurrency; and (3) hourly rate that *may be paid* in cryptocurrency in an amount equivalent to US Dollars at the time of payment. Rule 1.5(a) which prohibits excessive or illegal fees applies to all of these circumstances.

Scenario #1: This is a “business transaction” within the meaning of Rule 1.8(a) as it is not an ordinary fee agreement and, instead, “the lawyer and the client must negotiate potentially complex questions, and in which an unsophisticated client may therefore place unwarranted trust in the lawyer to resolve these questions fairly or advantageously to the client. The variables associated with payment in cryptocurrency include the rate of exchange on any given day, any associated fees when converting cryptocurrency to currency, whether (and when) cryptocurrency must be converted into cash, the exchange to be used, the type of cryptocurrency being used (or whether the payment would be in a single cryptocurrency or a combination of cryptocurrencies), and how any dispute will be handled in the event of a disagreement between the lawyer and the client related to these issues.” The lawyer and client have potentially differing interests in negotiating the terms relating to cryptocurrency and the lawyer will be expected to exercise professional judgment on the client’s behalf in the negotiations.

Scenario #2: Although this scenario may prevent fewer complexities, it is still unusual and Rule 1.8(a) applies. The lawyer and client have differing interests in negotiating the terms relating to

cryptocurrency and the lawyer will be expected to exercise professional judgment on the client's behalf in the negotiations. For example, professional judgment could be compromised where a lawyer might be incentivized to delay or speed up the representation to be paid at a time when the value of the currency is high.

Scenario #3: Rule 1.8(a) does not apply when the client has the option of paying in cryptocurrency based on some rate of exchange existing at the time. This is an ordinary fee agreement 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 issue of whether a client expects the lawyer to exercise professional judgment on its behalf is a fact-specific inquiry that must be evaluated on a case-by-case basis. The analysis might consider the following factors: the sophistication and expectations of the client, the complexity of the agreement, the relationship of agreement to the services, whether the client has other counsel in the matter (e.g., corporation or entity with a legal department), whether the lawyer is responsible for client matters in the subject area, the client's sophistication in legal matters.

Rule 1.8(a) requires the lawyer to (1) ensure the transaction is fair and reasonable to the client, disclose the terms in writing and in a manner that can be reasonably understood by the client; (2) advise the client in writing about the desirability of seeking separate counsel and giving the client a reasonable opportunity to consult separate counsel; and (3) the client must understand and agree 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. The client must give informed written consent.

4. Acceptance of Cryptocurrency as Payment for Legal Fees – DC Bar Ethics Opinion 378 (June 2020)

"It is not unethical for a lawyer to accept cryptocurrency in lieu of more traditional forms of payment, so long as the fee is reasonable. A lawyer who accepts cryptocurrency as an advance fee on services yet to be rendered, however, must ensure that the fee arrangement is reasonable, objectively fair to the client, and has been agreed to only after the client has been informed in writing of its implications and given the opportunity to seek independent counsel. Additionally, a lawyer who takes possession of a client's cryptocurrency, either as an advance fee or in settlement of a client's claims, must also take competent and reasonable security precautions to safeguard that property." Considers payment in cryptocurrency more akin to property than fiat currency.

Rule 1.5(a) Reasonableness

Rule 1.5 set forth factors to determine reasonableness. Two of the factors reference fees: whether the fees are consistent with customary rates charged in the locality for similar services; and whether a fee is fixed or contingent. Nothing prevents accepting volatile assets and comment 4 states that a lawyer may accept property (such as ownership in an enterprise) as payment; Lawyers are permitted to accepted shares of corporate stock as advance payment on services (see D.C. Bar Legal Ethics Op. 300 (July 2000)).

Opinion 300 provides that a reasonableness determination will consider factors set forth in other opinions. Of particular importance: a lawyer's disclosures and explanation of risk and the extent to which a client's acceptance of the arrangement was informed by its understanding of the financial implications, which may vary depending on the fee arrangement including whether advance payment is made. Reasonableness will depend on the fee agreement itself and whether and how well a lawyer explains particular risks in light of fee structure and inherent volatility.

DC and NY opinions do not believe Rule 1.8(a) applies when a client pays in virtual currency for services already rendered and costs incurred. In such cases, no "special precautions beyond what is required by Rule 1.5 [are required] because this is a straightforward exchange involving no additional variables or special knowledge."

Rule 1.8(a) Business Transactions with Clients

"We agree with the conclusion of the New York City Bar Association's Committee on Professional and Judicial Ethics that an agreement to accept an advance retainer in cryptocurrency, or an agreement requiring a client to pay future earned fees in cryptocurrency, is subject to Rule of Professional Conduct 1.8(a) governing business transactions with clients." Advance payments or fees calculated in cryptocurrency implicate Rule 1.8 which requires a lawyer who enters into a business relationship with a client to provide the client with written disclosure of the terms of the agreement and a reasonable opportunity to confer with independent counsel, to obtain written, informed consent to the agreement, to ensure that the fee arrangement is fair to the client.

- Fairness: DC and NY rule reflect the fiduciary nature of the lawyer-client relationship requires that dealings be fundamentally fair: "(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless: (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) The client consents in writing thereto."
- The rule is silent on how and when fairness is determined. "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." Thus, "no ethical violation could occur if subsequent events, beyond the control of the lawyer, caused the fee to appear unfair or unreasonable."

- The information a lawyer must disclose under Rule 1.8(a) will vary, but generally a lawyer should disclose billing rates, frequency and a clear explanation of how the client will be billed (e.g., in dollars or cryptocurrency). Other terms might include whether and how frequently cryptocurrency held by the lawyer will be calculated in dollars or otherwise traced-up or adjusted, and whether market changes in valuation will trigger obligations by either party; who is responsible for transfer fees; which exchange platform will be used to determine the value; and who will bear the risk of loss if cryptocurrency accepted by the lawyer in settlement of the client's claims loses value and cannot satisfy third party liens.

Rule 1.15(a) requires that lawyers "appropriately safeguard" the property of clients and third parties and provides that advances of fees and unincurred costs shall be treated as property until earned or incurred. Even if a client consents to a different arrangement, any unearned fee or incurred cost must be returned on termination of the lawyer's services.

Rule 1.1 Competence: Lawyer must keep abreast of benefits and risks associated with technology and have the skill required to exercise reasonable professional judgment and care regarding the use of digital currency. Competence requires the lawyer to understand the risks associated with cryptocurrency and safeguard against the many ways cryptocurrency can be lost or stolen.

C. Ethics Articles/Journal Articles

Articles tend to agree that payment with virtual currency for legal services, whether past or anticipated, is ethically permissible, provided that the fee is not unconscionable, the Lawyer complies with his/her duty to maintain client confidences, the virtual currency is properly safeguarded, and the Lawyer complies with the rules regarding transactions with clients.

For example, *Feature - Getting Paid in Bitcoin*, authored by a California lawyer, lays out the various potential issues involved in accepting virtual currency for payment of legal services. It addresses, among other things, the issues of confidentiality and competence, safeguarding client property, trust accounting, transactions with clients, and date of valuation and offers solutions as to how to address each issue.

The Nebraska Bar opinion recommends that the cryptocurrency be converted to fiat currency upon receipt from the client to avoid any sharp inclines/declines in value. A second article from the New York Law Journal discussed the topic of virtual currency and how larger law firms who accept it as payment, such as Steptoe & Johnson handle it. According to the article, Steptoe & Johnson follow the Nebraska Bar opinion in converting to fiat currency immediately. They set up digital wallets for each client and partner with a third-party vendor that converts the virtual currency because they are not set up from an accounting standpoint to address the volatile fluctuations that virtual currency can experience.

Published articles indicate that as of 2019, a number of large law firms have started accepting bitcoin and other cryptocurrencies as payment for legal services. (See *The American Lawyer*, Quinn Emanuel Says Clients Can Pay in BitCoin.)

There is general consensus in ethics opinions and articles to date about two rules primarily implicated by accepting payment for legal services in cryptocurrency: Rules 1.5 and 1.8 (depending on the jurisdiction, the numbers may vary slightly). (See N. Gigashvili, *The Ethics of Accepting Cryptocurrency as Payment*).

Critics of cryptocurrency as payment for legal services cite several concerns, including: (1) inadequate regulatory oversight; (2) converting cryptocurrency can be complicated and problematic; (3) cryptocurrency is more susceptible to identity theft or cyberattack; (4) it has volatile price history and may result in the fee becoming unreasonable; and (5) it is more difficult to safeguard. (See J. Reed, *Why Lawyers Shouldn't Accept Fees in Cryptocurrency* (Law 360)).

D. Other Sources

1. Deidre A. Liedel, *The Taxation of Bitcoin: How the IRS Views Cryptocurrencies*, 66 Drake L. Rev. 107, 111-12 (2018).
2. Carol Goforth, *The Lawyer's Cryptonary: A Resource for Talking to Clients about Crypto-transactions*, 41 Campbell L. Rev. 47, 112-13 (2019).
3. See, e.g., Sara Merken, *More Law Firms are Accepting Bitcoin Payments* (ABA BNA Sept. 6, 2017).
4. I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014).
5. According to a November 2019 article, Quinn Emanuel Urquhart & Sullivan, Perkins Coie, Steptoe & Johnson LLP, Frost Brown Todd, and “a slew of smaller firms as well as solo practitioners have embraced the payment structure” of cryptocurrencies. Samantha Stokes, *Quinn Emanuel Says Clients Can Pay In Bitcoin*, available at <https://www.law.com/americanlawyer/2019/11/05/quinn-emanuel-says-clients-can-pay-in-bitcoin/?slreturn=20200016135954>
6. The lawyer bears the burden of proving that the transaction was fair and the client was adequately informed, and ambiguities will be construed in favor of the client. See, e.g. *In re Martin*, 67 A.3d 1032, 1041 (D.C. 2013) (“[A]ny ambiguity in the [contingent fee] agreement would be interpreted against Martin, who drafted the agreement. See *Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000) (stating that ambiguities in contracts will be ‘construed strongly against the drafter.’ ”)).
7. ABA Opinion 00-418.
8. Any “different arrangement” must be fair to the client. “At a minimum, a lawyer must explain to the client ‘the basis for this arrangement and . . . how [the client's] rights are protected by the arrangement.’ ” *In re Mance*, 980 A.2d 1196, 1207 (D.C. App. 2009), as amended (Oct. 29, 2009) (quoting *In re Sather*, 3 P.3d 403, 410 (Colo. 2000) (en banc)).
9. Restatement (Third) 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 the facts later develop.”).

10. Foundation for Interwallet Operability, *Blockchain Usability Report* (February 2019), <https://fio.foundation/wp-content/themes/fio/dist/files/blockchain-usability-report-2019.pdf> ('While the blockchain industry has grown dramatically over the last year, usability is clearly still an ongoing struggle and the use of blockchain in actual commerce and utility is still very limited. Blockchain transactions are, by definition, immutable. With immutable transactions, users must have extremely high confidence that transactions are occurring as intended, with the right counter party, for the right amount and for the right type of token. Today – blockchain is still far from achieving that high standard.').

III. POTENTIAL HYPOTHETICALS/QUESTIONS

May a Lawyer accept virtual currencies as payment for legal services already performed?

Yes. The typical scenario would be the lawyer has been retained by client on an hourly basis. The lawyer performs legal services for the client and then submits a bill to the client for those legal services.

In this instance, the lawyer may accept virtual currency as payment for this outstanding invoice provided the legal services agreement states such form of payment will be accepted, the valuation date to be used for converting the virtual currency to fiat currency, and who will bear the costs of converting the virtual currency to fiat currency. Rule 1.8.1 (business transaction with client) is not implicated under this scenario because there is no ownership, possessory, security or other pecuniary interest obtained by the lawyer that is adverse, or potentially adverse, to the client under this scenario. Payment is being made for past legal services and no monies are being held for future legal services by the lawyer, thereby creating a possessory interest by the lawyer that would implicate Rule 1.8.1.

May a Lawyer charge Client a flat fee, paid in virtual currency, for anticipated legal services?

Yes, provided the fee is not unconscionable pursuant to Rule 1.5 and the lawyer complies with Rules 1.6 (confidentiality), 1.8.1 (business transactions with clients), 1.15 (safekeeping funds and property of clients), and 1.16 (declining or terminating representation).

Rule 1.5(b) states in relevant part, "[u]nconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into *except where the parties contemplate that the fee will be affected by later events.*" Under this scenario, the fee is paid for anticipated, or future, legal services. Thus, given the volatile nature of virtual currency, if the lawyer does not convert the flat fee to fiat currency immediately upon receipt, the legal services agreement must clearly state: (1) date of valuation; (2) how often the valuation will occur for accounting purposes; (3) the risks associated with the volatile currency and who bears the risk; (4) the lawyer will use a third party vendor (Bitcoin Merchant Service Providers) to convert virtual currency to cash; (5) who bears the fees associated converting the virtual currency to cash; and (6) how are refunds processed for unused retainers (paid in cash or virtual currency and, if the latter, date of valuation).

344 With regard to Rule 1.6, the lawyer must maintain client confidences. However, “[e]ach
345 owner of cryptocurrency has a unique “public key,” which is cryptographically linked to the
346 owner’s “private key.”¹ Private keys are always kept secret, for they are how cryptocurrency
347 transactions are mathematically “signed” and transferred. Tracking these keys is cumbersome, so
348 cryptocurrency owners use software (a “wallet”) to manage their public and private keys. These
349 programs exist on personal computers, smart-phones, or in the cloud. Every cryptocurrency
350 transaction is identified by the unique, individual public key and recorded on the blockchain.”²

351 Thus, using virtual currency may require the disclosure of the client’s identity.
352 Consequently, the lawyer must advise the client in writing how virtual currency works and how
353 the client’s identity may be revealed. This, of course, implicates Rule 1.1 as well, since the
354 lawyer must be competent in the use, handling, and safeguarding of virtual currency to properly
355 advise his or her client regarding the ramifications of utilizing virtual currency for payment of
356 legal services.

357 Regarding Rule 1.8.1, other ethics opinions addressing use of virtual currency have
358 concluded that payment of future legal fees constitutes a business transaction with a client
359 implicating Rule 1.8.1 because those opinions treat virtual currency as property as opposed to
360 money consistent with IRS regulations. We see no reason to stray from this position in this
361 scenario. Consequently, in addition to the disclosures set forth above regarding Rule 1.5, the
362 lawyer must also: (1) disclose how the virtual currency will be maintained and safeguarded; (2)
363 advise the client to seek the advice of independent counsel and give the client the opportunity to
364 do so; and (3) obtain the client’s writing consent to the terms of the transaction.

365 With respect to Rule 1.15, since virtual currency is not money, the lawyer cannot
366 maintain it in his or her client trust account. However, the lawyer could immediately convert the
367 virtual currency into fiat currency and deposit it into the client trust account provided the client is
368 advised in writing that the lawyer intends on doing so and the client consents in writing. If, on
369 the other hand, the lawyer and client agree that the lawyer will hold the virtual currency until the
370 fee is earned, the lawyer must comply with Rule 1.15(d) regarding accounting and how the
371 lawyer intends on safeguarding the virtual currency. This would entail, as noted above,
372 disclosing in writing in the legal services agreement when the currency will be valued, the risks
373 associated with fluctuating values, the use of third party vendors to convert the virtual currency
374 to fiat currency, who bears the costs associated with converting the currency, how refunds will
375 be processed for any unused funds, and what measures the lawyer will implement to protect the
376 virtual currency (two-factor authentication, encryption, etc.).

377 Finally, regarding Rule 1.16, the lawyer must disclose how any unused fee will be
378 refunded pursuant to Rule 1.16(e)(2). In this regard, the lawyer must disclose in writing in the
379 legal services agreement whether the unused funds will be refunded in cash or virtual currency.

1 Rich Apodaca, Six Things Bitcoin Users Should Know about Private Keys, Bitzuma, <https://bitzuma.com/posts/six-things-bitcoin-users-should-know-about-private-keys> (last viewed Oct. 23, 2018). See also Sudhir Khatwani, Bitcoin Private Keys: Everything You Need To Know, Coinsutra, <https://coinsutra.com/bitcoin-private-key/comment-page-1> (last viewed Oct. 23, 2018).

2 Miller, Lisa, *Getting Paid in Bitcoin*, 41 Los Angeles Lawyer 18 (December 2018)

In determining the value of these unused funds, the lawyer must also disclose in writing when the virtual currency will be valued for purposes of the refund. Given the volatility of virtual currency, the lawyer must also disclose the risks of holding the virtual currency and the possibility that the value will decrease over time such that the client may owe the lawyer money at the end of the representation. By the same token, the lawyer must comply with Rule 1.5 in the event the value increases and refund any money above the agreed upon flat fee.

May a Lawyer accept virtual currency from a third party payor as payment for the benefit of a client's account?

Yes, provided the lawyer complies with Rule 1.8.6

May a Lawyer accept virtual currency as an advance payment for an hourly-billed representation?

Yes. See discussion above regarding flat fee.

May a Lawyer hold virtual currencies in trust or escrow for Client(s)?

If trust means client trust account, no if we agree that virtual currency is property per IRS regulations.

As for escrow, yes, provided it is an "other place of safekeeping" contemplated by Rule 1.15(d)(2). Since virtual currency has a public and private key on the blockchain and maintained by a digital wallet, this would likely satisfy the "identify and label securities and property" component of Rule 1.15(b)(2). The lawyer would also need to ensure that measures are implemented and disclosed to the client as to how the lawyer will ensure the client's digital wallet will be protected from hackers and loss (encryption, two-factor authentication, etc.)

May a Lawyer permissibly maintain a digital wallet for each client paying a retainer for anticipated future legal services with virtual currency?

Yes. Since virtual currency has a public and private key on the blockchain and maintained by a digital wallet, this would likely satisfy the "identify and label securities and property" component of Rule 1.15(b)(2). The lawyer would also need to ensure that measures are implemented and disclosed to the client as to how the lawyer will ensure the client's digital wallet will be protected from hackers and loss (encryption, two-factor authentication, etc.) all of which must be disclosed to the client in writing in the legal services agreement.

Since it is a retainer, the lawyer must also comply with Rule 1.8.1 as set forth above regarding a flat fee arrangement.

May a Lawyer convert a retainer paid in virtual currency for anticipated future services into fiat currency immediately upon receipt from Client.

Yes, provided the client is advised in writing in the legal services agreement that the lawyer that the lawyer will not hold the virtual currency and will immediately convert the virtual currency to fiat currency upon receipt and credit the client's trust account in that amount. The

client must be advised in writing. Along these same lines, the client must be advised in writing that the lawyer will use a third party vendor to convert the virtual currency to fiat currency, the costs associated with the conversion, and who will bear the costs of the conversion.

IV. OTHER ANALYSIS

Would we agree/disagree with prior ethics opinion conclusions? Is there new ground to tread?

We would likely agree with other ethics opinions regarding accepting virtual currency for payment of past legal services performed and expenses incurred provided the legal services agreement clearly sets forth when and how the virtual currency is to be valued and, if appropriate, converted into fiat currency and who bears the associated risk and cost.

We may be inclined to allow that a retainer for future legal services could be paid with virtual currency provided the legal services agreement is clear regarding: (1) date of valuation; (2) how often the valuation will occur for accounting purposes; (3) the risks associated with the volatile currency and who bears the risk; (4) use of third party vendors (Bitcoin Merchant Service Providers) to convert virtual currency to cash and who bears the fees associated therewith; (5) how are refunds processed (paid in cash or virtual currency) for unused retainers; (6) how the lawyer intends to safeguard the virtual currency during the representation; (7) the potential tax consequences; and (8) client is advised to seek independent legal counsel regarding the arrangement. Given that virtual currency is considered property under current IRS regulations, we would likely agree that payment in virtual currency for anticipated legal services would be considered a business transaction subject to Rule 1.8.1.

Additionally, there would be no disagreement regarding the implications of Rules 1.1 regarding the lawyer or firm's competence to handle virtual currency as payment for legal services, Rule 1.6 regarding confidentiality implications given the nature of virtual currency and how it works, and Rule 1.15 regarding the safeguarding of virtual currency. We would also want to evaluate KYC requirements.

We may differ with the approach taken by the New York Bar Association that indicated it was permissible for the Lawyer and Client to agree on units of cryptocurrency per hour for hourly billing matters. While theoretically not unethical, it seems that it is an ethical trap for the Lawyer from an accounting perspective given the volatility of virtual currency and when the currency is to be valued, to name a few issues. This approach would seem to implicate Rule 5.4 given that virtual currency does not maintain a static value and any such agreement for an hourly rate would almost always equate to partial virtual currency being used. In other words, it would seem highly unlikely that an hourly rate charged by a law firm would equate to an even number of virtual currency units. Since virtual currency is not divisible, the currency is jointly owned by the client and the lawyer.