

STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT

FORMAL OPINION INTERIM NO. 21-0007

**ISSUES:** May a lawyer accept cryptocurrency as payment for past or future legal services, expenses or costs, or hold cryptocurrency in trust?

**DIGEST:** Cryptocurrency is becoming an increasingly popular form of payment for goods and services in the United States and the world. This Opinion addresses the ethical implications of lawyers accepting cryptocurrency as payment for past and future legal services. We conclude that cryptocurrency should be regarded as property, not funds, and a lawyer may accept cryptocurrency as payment for past legal services, incurred expenses and costs, flat fees deposited into operating accounts, and true retainers that do not require the lawyer to hold the property in trust. However, because the safekeeping requirements applicable to entrusted property cannot be satisfied, a lawyer may not accept or hold cryptocurrency in trust whether as advance fees or otherwise.

**AUTHORITIES**

**INTERPRETED:** Rules 1.1, 1.5, 1.8.1, 1.15, and 1.16 of the Rules of Professional Conduct of the State Bar of California.<sup>1</sup>

**INTRODUCTION**

Forbes defines virtual currency (also known as “cryptocurrency”) as “a digital, encrypted, and decentralized medium of exchange.”

(<https://www.forbes.com/advisor/investing/cryptocurrency/what-is-cryptocurrency/>). The U.S. Internal Revenue Service defines “virtual currency” as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.” (*Id.*).

Despite its name, virtual- or crypto-currencies are not currency in the traditional sense. Unlike fiat currencies, cryptocurrencies generally exist in electronic form in digital “wallets,” have no

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<sup>1</sup> Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of the Professional Conduct of the State Bar of California.

centralized or controlling government, bank or other authority to manage or support them, and are not backed by tangible assets. Public keys allow the public to identify a wallet and send currency to it whereas private keys provide the holder with access to the wallet to transact with the cryptocurrency. Algorithms manage and validate transactions (and the creation of new “coins”) which are recorded in a distributed ledger (e.g., blockchain). Transactions in cryptocurrency are pseudonymous as they are linked to addresses (keys), rather than individuals or entities, and typically occur over the internet or through crypto exchanges, which convert some cryptocurrencies into fiat currencies.

The IRS generally treats cryptocurrencies as property, stating: “The sale or other exchange of virtual currencies, or the use of virtual currencies to pay for goods or services, or holding virtual currencies as an investment, generally has tax consequences that could result in tax liability.” (*Id.*) The regulatory landscape is evolving and the determination of whether cryptocurrency transactions fall within the jurisdiction of certain regulators, such as the Securities and Exchange Commission, is not always clear and might involve technical and fact-specific inquiries.

Recent reports indicate that the value of cryptocurrency in existence today exceeds \$2 trillion and there are more than 12,000 cryptocurrencies, with the number of currencies doubling from 2021 to 2022.<sup>2</sup> The market for cryptocurrencies is rapidly evolving, highly volatile, and subject to myriad risks including but not limited to market volatility, exchange fees, theft or loss of keys, security weaknesses and compromise of the blockchain, market manipulation, computing capacity, difficulty tracing funds, and legal and regulatory uncertainty.

Given the growth of cryptocurrency, it is unsurprising that it is an increasingly common form of exchange used in connection with legal services and transactions. This raises ethical challenges for lawyers that have been addressed by several bar associations.<sup>3</sup> Several of those opinions concluded that accepting cryptocurrency as payment for monies owed (services rendered or expenses due) is ethically permissible subject to compliance with the relevant ethics rules. However, there is some disagreement on whether cryptocurrency should be accepted for payment of advance fees or otherwise held in trust for clients.

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<sup>2</sup> Jake Frankenfield, *Cryptocurrency*, <https://www.investopedia.com/terms/c/cryptocurrency.asp>; *How Many Cryptocurrencies Are There?* | *The Motley Fool* (Lyle Daly, Feb 25, 2022).

<sup>3</sup> See, e.g., Nebraska Ethics Advisory Opinion for Lawyers No.17-03 (September 2017); Receipt of Virtual Currency in Law Practice, North Carolina State Bar 2019 Formal Ethics Opinion 5; Requiring Cryptocurrency in Payment for Legal Services, New York County Bar Association (July 11, 2019); Acceptance of Cryptocurrency as Payment for Legal Fees, D.C. Bar Ethics Opinion 378 (June 2020).

This Opinion is provided to assist lawyers who accept or require cryptocurrency as payment for fees, costs or expenses in understanding their ethical obligations.<sup>4</sup> Future developments, such as regulation or changes in the state of the technology, may alter the opinions expressed herein.

## OPINIONS OF OTHER STATE BARS

### 1. Nebraska Ethics Advisory Opinion for Lawyers 17-03

Nebraska was the first bar association to address cryptocurrency as a form of payment for legal services. Nebraska concluded that it was ethically permissible for a lawyer to do so provided the cryptocurrency was immediately converted to fiat currency upon receipt.

### 2. New York - Requiring Cryptocurrency in Payment for Legal Services, New York County Bar Association (July 11, 2019)

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### 3. North Carolina State Bar Formal Ethics Opinion 5

North Carolina addressed the issue of cryptocurrency as a form of payment for legal services in 2019. North Carolina agreed with the D.C. Bar that cryptocurrency as payment for a flat fee earned upon receipt was permissible provided the fee was not excessive and complied with Rule 1.8 concerning business transactions with clients.

However, the North Carolina Bar differed with D.C. Bar on the issue of cryptocurrency as an advance fee to be billed against by the lawyer. In this regard, the North Carolina Bar concluded that it was not ethically permissible because the lawyer could not deposit the cryptocurrency into a client trust account and could not properly safeguard the cryptocurrency consistent with its safeguarding Rule 1.15-2.

### 4. District of Columbia Bar Association Ethics Opinion 378

The District of Columbia Bar Association issued an opinion in 2019 regarding cryptocurrency as a form of payment for legal services. The D.C. Bar concluded that payment in cryptocurrency for past fees earned or costs incurred does not implicate the ethical rules regarding business transactions with a client “beyond what is required by Rule 1.5 because this is a straightforward exchange involving no additional variables or special knowledge.” D.C. Bar Ethics Opinion 378 (June 2020).

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<sup>4</sup> NOTE: Advance expenses – trust acct implications (see comment 2); Termination and refund. (See comment 3); Writing requirements (see comment 5 and BP 6147 and 6148).

Regarding payment for advance fees, the D.C. Bar concluded the “payment of fees in cryptocurrency is more akin to payment in property than payment in fiat currency.” D.C. Bar Ethics Opinion 378 (June 2020). Thus, given the volatility of cryptocurrency, the D.C. Bar concluded that the ethical rule regarding business transactions with client was triggered when cryptocurrency is held by the lawyer as an advance fee against services to be performed because “the lawyer and client are entering into a potentially adverse pecuniary relations under Rule 1.8” due to the “Considerable uncertainty about the future value of the cryptocurrency at the time the fee will be earned.”

The D.C. Bar concluded that a lawyer could use cryptocurrency as a form payment for an advance fee on service yet to be rendered provided “so long as the fee agreement between the lawyer and client is objectively fair and reasonable, complies with Rules 1.5 and 1.8, and the lawyer possesses the requisite knowledge to competently safeguard the client’s digital currency.”<sup>5</sup>

## APPLICABLE RULES

### 1. Competence (Rule 1.1)

Rule 1.1 provides that “a lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.” Competence requires “the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.” If a lawyer does not have sufficient learning and skill, he or she may acquire it before performance is required or associate with or, as appropriate, consult “another lawyer whom the lawyer reasonably believes to be competent.” Rule 1.1(c). The lawyer also has “a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.” Rule 1.1, Comment 1; *see also* ABA Comment [8] to Model Rule 1.1 (same).

### 2. Fees for Legal Services (Rule 1.5)

#### a. Unconscionable Fee

Rule 1.5(a) provides that “[a] lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.” Rule 1.5(b) provides that unconscionability is “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.” Rule 1.5(b). It also sets forth a non-exclusive list of factors to consider in determining the

<sup>5</sup> Nebraska Ethics Advisory Opinion for Lawyers No.17-03 (September 2017).

unconscionability of a fee, including “the amount of the fee in proportion to the value of the services performed,” “the relative sophistication of the lawyer and the client,” “the nature and length of the professional relationship,” “whether the fee is fixed or contingent,” and “whether the client gave informed consent to the fee.”<sup>6</sup> *Id.*

#### b. Advance Fee

An advance fee is “an agreement whereby the [client] pays, in advance, for some or all of the services that the attorney is expected to perform on the [client’s] behalf.”<sup>7</sup> As the legal services are rendered, the lawyer can draw from this fee. Thus, until the legal services have been provided, the advance fee must remain in the lawyer’s client trust account.<sup>8</sup> Rule 1.15(a).

#### c. True Retainer

Rule 1.5(d) provides: “A lawyer may make an agreement for, charge, or collect a fee that is denominated as ‘earned on receipt’ or ‘non-refundable,’ or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.” Unlike an advance fee, a true retainer must be deposited into the lawyer’s operating account upon receipt.

#### d. Flat Fee

Rule 1.5(e) provides, “A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the

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<sup>6</sup> These factors include the amount of the fee in proportion to the value of the services; the sophistication of the lawyer and client; whether the fee is fixed or contingent; and whether the client gave informed consent to the fee: “(1) whether the lawyer engaged in fraud\* or overreaching in negotiating or setting the fee; (2) whether the lawyer has failed to disclose material facts; (3) the amount of the fee in proportion to the value of the services performed; (4) the relative sophistication of the lawyer and the client; (5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (7) the amount involved and the results obtained; (8) the time limitations imposed by the client or by the circumstances; (9) the nature and length of the professional relationship with the client; (10) the experience, reputation, and ability of the lawyer or lawyers performing the services; (11) whether the fee is fixed or contingent; (12) the time and labor required; and (13) whether the client gave informed consent\* to the fee.”

<sup>7</sup> *T.R. Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 6-7.

<sup>8</sup> State Bar of California, *Handbook on Client Trust Accounting for California Lawyers* (2022 ed.), p. 14.

performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.”

Significantly, a flat fee can be deposited into the lawyer’s trust account or operating account. If the lawyer wants to deposit the advance fee into his or her operating account, he or she must comply with Rule 1.15(b) requiring the lawyer or law firm to disclose[] to the client in writing (i) that the client has a right to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed. If the fee is greater than \$1,000, then the client must consent in writing. See Rule 1.15(b)(1), (2).

### **3. Business Transactions with a Client and Pecuniary Interests Adverse to a Client (Rule 1.8.1)**

Rule 1.8.1 prohibits a lawyer from entering into “a business transaction with a client, or knowingly acquir[ing] an ownership, possessory, security or other pecuniary interests adverse to a client,” unless each of the below requirements is met:

(a) the transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer’s role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner that should reasonably have been understood by the client;

(b) the client either is represented in the transaction or acquisition by an independent lawyer of the client’s choice or the client is advised in writing to seek the advice of an independent lawyer of the client’s choice and is given a reasonable opportunity to seek that advice; and

(c) the client thereafter provides informed written consent to the terms of the transaction or acquisition, and to the lawyer’s role in it.<sup>9</sup>

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<sup>9</sup> Potentially Relevant Comments to Rule 1.8.1:

[1] A lawyer has an “other pecuniary interest adverse to a client” within the meaning of this rule when the lawyer possesses a legal right to significantly impair or prejudice the client’s rights or interests without court action. (See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68 [14 Cal.Rptr.3d 58]; see also Bus. & Prof. Code, § 6175.3 [Sale of financial products to elder or dependent adult clients; Disclosure]; Fam. Code, §§ 2033-2034 [Attorney lien on community real property].)

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

Rule 1.15 provides that a lawyer must provide for the safekeeping of funds and property of clients and other persons.

**a. Safekeeping Funds**

Rule 1.15, subdivisions (a) and (b), govern whether a lawyer must deposit an advance fee into a trust account:

(a) All funds received or held by a lawyer or law firm\* for the benefit of a client, or other person\* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written\* consent of the client, in any other jurisdiction where there is a substantial\* relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided: (1) the lawyer or law firm\* discloses to the client in writing\* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii)

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However, this rule does not apply to a charging lien given to secure payment of a contingency fee. (See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].)

[2] For purposes of this rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition; and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[5] This rule does not apply to the agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 1.5. This rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by rules 1.5 and 1.15.

that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and (2) if the flat fee exceeds \$1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing\* signed by the client.

Rule 1.15(c) provides:

Funds belonging to the lawyer or the law firm\* shall not be deposited or otherwise commingled with funds held in a trust account except: (1) funds reasonably\* sufficient to pay bank charges; and (2) funds belonging in part to a client or other person\* and in part presently or potentially to the lawyer or the law firm,\* in which case the portion belonging to the lawyer or law firm\* must be withdrawn at the earliest reasonable\* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person\* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

#### **b. Safekeeping Property**

Rule 1.15(d), requires a lawyer to promptly identify and label property upon receipt "and place them in a safe deposit box or other place of safekeeping as soon as practicable."<sup>10</sup> Rule 1.15(e) addresses the records that must be maintained in accordance with paragraph (d)(3).<sup>11</sup>

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<sup>10</sup> Rule 1.15(d) provides: "A lawyer shall: (1) promptly notify a client or other person\* of the receipt of funds, securities, or other property in which the lawyer knows\* or reasonably should know\* the client or other person\* has an interest; (2) identify and label securities and properties of a client or other person\* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable; (3) maintain complete records of all funds, securities, and other property of a client or other person\* coming into the possession of the lawyer or law firm;\* (4) promptly account in writing\* to the client or other person\* for whom the lawyer holds funds or property; (5) preserve records of all funds and property held by a lawyer or law firm\* under this rule for a period of no less than five years after final appropriate distribution of such funds or property; (6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and (7) promptly distribute, as requested by the client or other person,\* any undisputed funds or property in the possession of the lawyer or law firm\* that the client or other person\* is entitled to receive."

<sup>11</sup> Rule 1.15(e) provides: "The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what 'records' shall be maintained by lawyers and law firms\* in accordance with subparagraph (d)(3) ...." The standards provide:

"(1) A lawyer shall, from the date of receipt of funds of the client or other person\* through the period ending five years from the date of appropriate disbursement of such funds, maintain: (a) a written\*



**5. Declining or Terminating Representation (Rule 1.16)**

Rule 1.16 governs the obligations of a lawyer in declining or terminating a representation. Specifically, it provides that a lawyer must return client property and unearned fees at the conclusion of a representation:

(1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property .... ; and

(2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Rule 1.16(e)(1-2).

**DISCUSSION**

The Committee agrees with the I.R.S. and the opinions of the D.C. and Nebraska Bars in determining that payment in cryptocurrency is akin to payment in property as opposed to fiat currency. See IRS Notice 2014-21 (“For federal tax purposes, virtual currency is treated as property”); CITES TO OPINIONS OF OTHER BARS. The rules do not expressly prohibit accepting property or other assets, even volatile and risky ones, as payment for past or future fees.

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ledger for each client or other person\* on whose behalf funds are held that sets forth: (i) the name of such client or other person;\* (ii) the date, amount and source of all funds received on behalf of such client or other person;\* (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person;\* and (iv) the current balance for such client or other person;\* (b) a written\* journal for each bank account that sets forth: (i) the name of such account; (ii) the date, amount and client affected by each debit and credit; and (iii) the current balance in such account; (c) all bank statements and cancelled checks for each bank account; and (d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person\* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written\* journal that specifies: (a) each item of security and property held; (b) the person\* on whose behalf the security or property is held; (c) the date of receipt of the security or property; (d) the date of distribution of the security or property; and (e) person\* to whom the security or property was distributed.”

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However, payment in cryptocurrency presents raises unique considerations and risks that will vary based on the nature of fee and the specific terms of the fee arrangement.

### **1. Past Fees, Expenses and Costs; Certain Flat Fees; True Retainers (NO TRUST)**

If a lawyer accepts cryptocurrency as payment for fees, regardless of the nature of the fee in question, the lawyer must have the competence required under Rule 1.1 to understand the risks associated with the technology and ensure that he or she has methods to properly account for, maintain and safeguard the client's property. This requires the lawyer to understand the mechanics of transacting in cryptocurrency and the associated risks, including lack of regulation, volatility, cyber threats and vulnerabilities, key management, and insurability against loss so these issues can be explained to the client so the client can make an informed decision regarding use of cryptocurrency as a form of payment. As with any property, the lawyer must use reasonable care to minimize the risk of loss and the allocation of risk between the lawyer and client must be understood and agreed to.

In the case of a lawyer accepting cryptocurrency for payment of past fees, true retainers or flat fees, the client and lawyer can be relatively certain about the value of the payment at the time of the transaction. The Committee agrees with the NY and DC Bars, which stated that an agreement to accept cryptocurrency as payment for past fees does not implicate ethical rules governing business transactions with clients. See Rule 1.8.1.

However, the fee agreement must be clear that the cryptocurrency is valued at the time of receipt as opposed to the time of converting it to fiat currency, otherwise, Rule 1.15's requirement to safeguard the property is implicated, as well as Rule 1.8.1 regarding business transactions with clients, because until the cryptocurrency is converted, the "funds" are held for the benefit of the client. This can also implicate an unconscionability analysis under Rule 1.5 given the volatility of cryptocurrency.

Thus, for purposes of payment for past fees, flat fees, or true retainers, the fee agreement must disclose in writing that the cryptocurrency will be valued upon receipt by the lawyer by an agreed upon third party, the cryptocurrency will be immediately converted to fiat currency, the third party vendor converting to fiat currency, and who will bear the costs of converting the cryptocurrency to fiat currency.

The determination of whether a fee is unconscionable under Rule 1.5 will involve an analysis similar to one for fees paid in fiat currency and generally 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.”<sup>12</sup> However, transacting in cryptocurrency may present unique risks and implications where the fee will be affected by later events (valuation and conversion to fiat currency sometime in the future) for which informed written client consent is required in order to determine whether the fee is unconscionable.<sup>13</sup> For example, the lawyer should ensure that the client provides informed written consent to the conversion process and any risks associated with the transaction such as the mechanism for determining the value of the cryptocurrency at the time of the deposit, the volatility of the cryptocurrency and allocation of risk between the parties, whether the lawyer has insurance that would cover any loss or theft, and the right to seek independent counsel to review the agreement.

## **2. Advance Fees, Costs and Expenses; Certain Flat Fees (Entrusted Property)**

An advance fee is “a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client’s behalf.” Rule 1.15, Cmt. 2. The rules do not expressly contemplate payment of advance fees with property. Indeed, the rules contemplate the depositing of advance fees into a client trust account: the lawyer and client “may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.” *Id.* The rules also make clear that payment of advance costs and expenses must be held in trust and that, absent special circumstances, flat fees must be deposited into a client trust account. See Rule 1.15, Cmt. 3 (“Absent written\* disclosure and the client’s agreement in a writing\* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer’s trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer’s obligations under paragraph (d) or the lawyer’s burden to establish that the fee has been earned.”).

Further, on termination of the attorney-client relationship, the lawyer must return any unused portion of fees paid in advance. Rule 1.16(e)(2).

Because cryptocurrency is regarded as property, and not fiat currency, it cannot be deposited into the lawyer’s trust account in accordance with Rule 1.15(a).<sup>14</sup> Thus, cryptocurrency is subject to the safekeeping requirements applicable to securities and other properties, which

<sup>12</sup> Cal. Rule Prof. Cond., rule 1.5(b).

<sup>13</sup> Of the 13 factors under Rule 1.5(b), the most significant factors that present significant concerns for lawyers transacting with cryptocurrency include: whether the lawyer has failed to disclose material facts, the amount of fee in proportion to the value of the services performed, and whether the client gave informed consent to the fee. Cal. Rule Prof. Cond., rule 1.5(b)(2), (3) and (13).

<sup>14</sup> NOTE: Research opinions re accepting property as payment.

are set forth in Rule 1.15(b). This rule requires a lawyer to, among other things, “identify and label securities and properties of a client or other person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.”

Rule 1.15 requires a lawyer to safeguard funds and property held on behalf of clients or others, and refers to appropriate manners of safeguarding, including client trust accounts and safety deposit boxes. These locations and manners of safekeeping are well established and provide the lawyer with a secure, insured and/or institutionally backed method to maintain and access funds or property. In the event that the lawyer lose a key or an account number, there are secure means of replacing the key, obtaining the account number or otherwise ensuring the client can access its funds or property.

Given the nature of cryptocurrency and the rapidly changing regulatory environment, there are no well-established safekeeping procedures. Unlike tangible property or traditional securities, cryptocurrency cannot be stored in safety deposit boxes or other insured, regulated or government-backed accounts. Instead, cryptocurrency is typically held in hot or cold digital wallets and accessed by means of the holder’s public and private keys. Digital wallets are susceptible to theft, corruption, loss and various cyber threats. CITES; *See generally* Lisa Miller, *Getting Paid in Bitcoin*, 41 Los Angeles Lawyer 18, 19-20 (December 2018); Carol Goforth, *The Lawyer’s Cryptionary: A Resource for Talking to Clients about Crypto-transactions*, 41 Campbell L. Rev. 47, 112-13 (2019). In addition to these risks, a lawyer’s sharing of a key could put the digital wallet at risk of theft or misappropriation and, in the case where a lawyer did not share such information, the lawyer’s death, unavailability, or mistake could result in an irretrievably lost key or an erroneous transfer causing irreversible loss to the client.<sup>15</sup> Moreover, because transactions are decentralized and managed in the blockchain, transactions cannot be reversed and are susceptible to cyber manipulation of the blockchain. CITE.

Given the lack of established methods and places to safeguard entrusted cryptocurrency consistent with Rule 1.15(d), the Committee concludes that a lawyer may not accept and/or hold cryptocurrency in trust and, therefore, may not accept cryptocurrency as an advance fee, retainer, flat fee requiring safekeeping, or in any other manner requiring the lawyer to hold the property in trust consistent with Rule 1.15(d).

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<sup>15</sup> NOTE: Research rules that would require succession plan/sharing of info in case of lack of availability or death; recordkeeping obligations; purpose of both/public policy.

CONCLUSION

A lawyer may ethically accept cryptocurrency as payment for past fees, costs, and expenses, because such payments are earned at or before the time of payment and the value of the property (cryptocurrency) can be ascertained at the time received by the attorney. Likewise, a lawyer may accept cryptocurrency as payment of true retainers and flat fees because such fees are deposited into the lawyer's operating account and do not require the lawyer to hold the property in trust.

A lawyer may not ethically accept or hold cryptocurrency in trust for a client or third party because current practices do not satisfy the safeguarding standard set forth in Rule 1.15(d). Thus, a lawyer may not accept cryptocurrency as advance payment of fees, costs or expenses, or in any other manner requiring the lawyer to hold the property in trust, such as certain flat fees.

**NOTES**

Freedom to contract v. public policy to safeguard funds for payment etc.

Articulate that value must be determined in advance and set forth in writing.

Informed consent requirements. Independent counsel.

Can a lawyer accept crypto in lawyers wallet and immediately convert? Sophisticated client and clear allocation of risk through time of valuation and “receipt.” Depending on the nature of the fee, the lawyer may need to deposit the converted funds into a trust account or operating account and provide further disclosures. (See Rule 1.5(d), (e); 1.15(b).) While mitigates risks, isn’t it still entrusted property? One could argue similar to receiving property by mail and transferring to a bank account or safety deposit box, but the virtual nature and cyber risks are vastly different (e.g., theft; recoverability; traceability).

If fee transaction is considered legal representation (where 1.8 might be implicated), consider duties to client under 1.8, no limitation of liability, and insurance disclosure requirements.

Expressly exclude KYC requirements (pseudonymous), third-party payor considerations, securities? ETF in crypto a security? Coins designated as securities?



# Ohio Board of Professional Conduct

## OPINION 2022-07

Issued August 5, 2022

### **Lawyer Accepting and Holding Cryptocurrency in Escrow<sup>1</sup>**

**SYLLABUS:** A lawyer may accept and hold cryptocurrency in escrow when related to the representation of a client or for a third party through a law-related business. A lawyer must maintain the requisite technological competence and employ appropriate safeguards against property loss when holding cryptocurrency in escrow.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.

<sup>1</sup> This opinion is limited to the receipt of cryptocurrency to be held in escrow by a lawyer and not for the payment of a lawyer's fees.



# Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

[www.bpc.ohio.gov](http://www.bpc.ohio.gov)

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CHAIR

HON. D. CHRIS COOK

VICE- CHAIR

RICHARD A. DOVE

DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

KRISTI R. MCANAU

COUNSEL

## OPINION 2022-07

Issued August 5, 2022

### Lawyer Accepting and Holding Cryptocurrency in Escrow<sup>1</sup>

**SYLLABUS:** A lawyer may accept and hold cryptocurrency in escrow when related to the representation of a client or for a third party through a law-related business. A lawyer must maintain the requisite technological competence and employ appropriate safeguards against property loss when holding cryptocurrency in escrow.

**APPLICABLE RULES:** Prof.Cond.R. 1.1, 1.2, 1.4, 1.15, 5.7

### QUESTION PRESENTED:

Whether a lawyer may accept and hold cryptocurrencies in escrow for clients and third parties.

### OPINION:

A lawyer maintains an international transactional law practice and frequently holds client or third-party funds in escrow. Many of the lawyer's international clients prefer to use cryptocurrency for business transactions and desire for the lawyer to hold the cryptocurrency in escrow. Because financial institutions do not accept or exchange cryptocurrency, the lawyer is unable to place cryptocurrency in his lawyer's trust account.

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<sup>1</sup> This opinion is limited to the receipt of cryptocurrency to be held in escrow by a lawyer and not for the payment of a lawyer's fees.



Cryptocurrency is a digital, encrypted, and decentralized medium of exchange with an equivalent value in fiat currency. Cryptocurrency relies on blockchain technology, a type of shared peer-to-peer network that stores data in blocks and tracks of all transactions. Cryptocurrency is stored in an electronic format commonly known as a “wallet.” A person receiving cryptocurrency from another person uses a “public key” that identifies where the currency is to be sent. The sender uses a “private key” that authorizes changes in debits and credits to each party’s wallet. Cryptocurrency transactions are largely unregulated, relatively anonymous, and irreversible. The price of cryptocurrency is extremely volatile and subject to market fluctuation. *See generally*, Neb. Ethics Adv. Op. 17-03 (2017), D.C. Bar Ethics Op. 378 (2020).

*Receiving and Holding Digital Currencies in Trust or in Escrow*

Lawyers are required to hold the property of clients or third persons separate from the lawyer’s own property. Prof.Cond.R. 1.15(a). Property in the form of monetary funds must be kept in a separate interest-bearing account in an Ohio financial institution and designated as a “client trust account,” “IOLTA account,” or other identifiable fiduciary title. *Id.* However, only monetary funds may be placed in an interest-bearing account. R.C. 4705.09. Cryptocurrency is treated as property and not as monetary funds by the Internal Revenue Service. IRS Notice 2014-21. Unless cryptocurrency is converted into U.S. funds upon receipt by a lawyer, it cannot be deposited in a client trust account.

Because cryptocurrency is treated as property, the Board concludes that it may be held by a lawyer for clients or third persons in connection with a representation or law related business. A lawyer accepting cryptocurrency is required to segregate client or third-party property from their own property, properly identify the property, and maintain a record of when the property was received, the person or entity for whom the property is held, and the date of any distributions. Prof.Cond.R. 1.15(a). The Board recommends that a lawyer maintain separate records that document all exchanges or other dispositions of cryptocurrency and the value of the cryptocurrency at the time of each transfer or disposition. In addition, a lawyer must also “promptly render a full accounting regarding \* \* \* [the] property,” including cryptocurrency held by the lawyer, when requested by a client or third party. Prof.Cond.R. 1.15(d). Records related to the holding of cryptocurrency must be held by the lawyer for seven years after disposition and may be maintained electronically. Prof.Cond.R. 1.15(a); Prof.Cond.R. 1.15, cmt.[1].

*Technological Competency*

In order to maintain the requisite knowledge and skill required of a lawyer, it is important for the lawyer to keep abreast of the risks associated with the technology used to transfer and hold cryptocurrency in his or her practice. Prof.Cond.R. 1.1, cmt.[8]. Just like other client property, a lawyer storing cryptocurrency in escrow must use reasonable care to minimize the risk of loss to client's or third parties' property. *See* Prof.Cond.R. 1.15,cmt.[1]. More specifically, a lawyer is required to "appropriately safeguard property" in a "suitable place of safekeeping." Prof.Cond.R. 1.15(a). 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).

*Avoiding Participation in Illegal Activity*

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).

*Lawyers Holding Cryptocurrency in Escrow in a Law-related Business*

Some lawyers may be retained to provide escrow services that are unrelated to the representation of a client such as a paymaster for international transactions. When a lawyer serves only as an escrow agent or paymaster through a business that provides a law-related service, the service is not governed by the Rules of Professional Conduct unless the services provided are not distinct from the lawyer's provision of legal services to the client. Prof.Cond.R. 5.7(a)(1). A lawyer providing a law-related service must take reasonable steps to ensure that the business client is aware that the services provided are

not legal services and that the protections of the client-lawyer relationship are unavailable. Prof.Cond.R. 5.7(a)(2).