

1 **STATE BAR OF CALIFORNIA**
2 **STANDING COMMITTEE ON**
3 **PROFESSIONAL RESPONSIBILITY AND CONDUCT**

4
5 **FORMAL OPINION INTERIM NO. 21-0007**
6

7
8 **ISSUES:** May a lawyer accept cryptocurrency as payment for past or future legal
9 services, expenses, or costs, or hold cryptocurrency in trust?
10

11 **DIGEST:** Cryptocurrency is becoming an increasingly popular form of payment for
12 goods and services in the United States and the world. This Opinion
13 addresses the ethical implications of lawyers accepting cryptocurrency as
14 payment for past and future legal services. We conclude that
15 cryptocurrency should be regarded as property, not funds, and a lawyer
16 may accept cryptocurrency as payment for past legal services, incurred
17 expenses and costs, flat fees deposited into operating accounts, and true
18 retainers that do not require the lawyer to hold the property in trust.
19 Regarding payment of future fees and costs, a lawyer may accept
20 cryptocurrency as payment provided the lawyer complies with the rules
21 concerning business transactions with clients, safeguarding client property,
22 and conscionability of the fee.
23

24 **AUTHORITIES**

25 **INTERPRETED:** Rules 1.1, 1.5, 1.8.1, 1.15, and 1.16 of the Rules of Professional Conduct
26 of the State Bar of California.¹
27

28 **INTRODUCTION**
29

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

32 (<https://www.forbes.com/advisor/investing/cryptocurrency/what-is-cryptocurrency/>). The U.S.
33 Internal Revenue Service defines “virtual currency” as “a digital representation of value that
34 functions as a medium of exchange, a unit of account, and/or a store of value.” (*Id.*).
35

36 Despite its name, virtual- or crypto-currencies are not currency in the traditional sense. Unlike
37 fiat currencies, cryptocurrencies generally exist in electronic form in digital “wallets,” have no
38 centralized or controlling government, bank, or other authority to manage or support them, and
39 are not backed by tangible assets. Public keys allow the public to identify a wallet and send
40 currency to it whereas private keys provide the holder with access to the wallet to transact with
41 the cryptocurrency. Algorithms manage and validate transactions (and the creation of new
42 “coins”) which are recorded in a distributed ledger (e.g., blockchain). Transactions in

¹ 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.

CLEAN

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 2022.² 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. This is no more evident by the recent bankruptcy of FTX, one of the world’s largest cryptocurrency exchanges, which lost \$30 billion in assets in a matter of weeks.³

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.⁴ 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.

This Opinion is provided to assist lawyers who accept or require cryptocurrency as payment for fees, costs, or expenses in understanding their ethical obligations.⁵ Future developments, such as regulation or changes in the state of the technology, may alter the opinions expressed herein.

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

³Thomas Barrabi, *FTX Files for Bankruptcy as CEO Sam Bankman-Fried Resigns in Disgrace*, *New York Post* (November 11, 2022) at <https://nypost.com/2022/11/11/ftx-files-for-bankruptcy-as-ceo-sam-bankman-fried-resigns/>

⁴ 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).

⁵ 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).

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)

The New York City Bar Association issued Formal Opinion 2019-5 regarding the propriety of requiring payment of legal services in cryptocurrency in a legal services agreement. In this regard, the Committee determined that if payment as set forth in the fee agreement is required and not an optional form of payment, the transaction is considered a business transaction with a client subject to Rule 1.8 of the New York Rules of Professional Conduct.

Formal Opinion was limited in its scope to the applicability of Rule 1.8 to the payment of fees with cryptocurrency and specifically noted that issues implicating other rules may arise, such as safeguarding the cryptocurrency to comply with rule 1.15, competency relating to cybersecurity protections, and compliance with the laws regarding anti-money laundering.⁶

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).

⁶ NYCBA Formal Opinion 2019-5, fn. 9.

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.”⁷

5. Ohio Board of Professional Conduct Opinion 2022-07

More recently, the Ohio Board of Professional Conduct issued Opinion 2022-07 regarding the question of whether a lawyer may accept and hold cryptocurrency in escrow.⁸ The Board concluded that the lawyer may hold cryptocurrency in escrow for a client or third party through a law-related business provided the lawyer has the requisite competence to do so and employs appropriate safeguards against loss.

Notably, unlike other jurisdictions addressing payment in cryptocurrency, the Ohio Board did not address the implications of rule 1.8 largely because the opinion was limited to the lawyer providing escrow services unrelated to the representation of a client. Rather, the focus was on the record-keeping and safeguarding requirements of rule 1.15, which is instructive when taken into consideration with opinions from other jurisdictions where the focus has been on payment of legal fees with cryptocurrency.

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

⁷ Nebraska Ethics Advisory Opinion for Lawyers No.17-03 (September 2017).

⁸ Ohio Board of Professional Conduct, Opinion 2022-07 (Aug. 5, 2022)

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 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.”⁹ *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.”¹⁰ 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.¹¹ 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

⁹ 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.”

¹⁰ *T.R. Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 6-7.

¹¹ State Bar of California, *Handbook on Client Trust Accounting for California Lawyers* (2022 ed.), p. 14.

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 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.¹²

¹² 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

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) 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

clients; Disclosure]; Fam. Code, §§ 2033-2034 [Attorney lien on community real property].) 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.

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." Rule 1.15(e) addresses the records that must be maintained in accordance with paragraph (d)(3).¹³

c. Record-Keeping

Rule 1.15(d) also provides that the lawyer: "(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

¹³ 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* 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."

CLEAN

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.”

Rule 1.15(d)(3)-(7).

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., Nebraska, and New York City 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”); Neb. Ethics Adv. Op. for Lawyers No. 17-03 (2017); *Acceptance of Cryptocurrency for Legal Fees*, D.C. Bar Ethics Op. 378; *Requiring Cryptocurrency in Payment for Legal Services*, NYCBA Formal Op. 2019-5. The rules do not expressly prohibit accepting property or other assets, even volatile and risky ones, as payment for past or future fees. 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. A Lawyer Can Accept Cryptocurrency for Payment of 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,

CLEAN

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 NYC 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."¹⁴ 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.¹⁵ 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.

¹⁴ Cal. Rule Prof. Cond., rule 1.5(b).

¹⁵ 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).

363
364 **2. A Lawyer Can Accept Payment in Cryptocurrency for Advance Fees, Costs and**
365 **Expenses; Certain Flat Fees (Entrusted Property)**
366

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

380
381 a. **The Lawyer Must Comply with Rule 1.8.1**
382

383 While there is no prohibition under the rules for payment of fees with property, the lawyer must
384 nonetheless comply with rule 1.8.1 if the lawyer intends on accepting cryptocurrency as payment
385 for future legal services. The situation would be akin to receiving stock in consideration for legal
386 services or taking a security interest in the client’s property to secure future fees. See, e.g.,
387 *Brockway v. State Bar* (1991) 53 Cal.3d 51, 64 citing *Hawk v. State Bar* (1988) 45 Cal.3d 589,
388 598-601 [“It is settled that [former] rule 5–101 applies where an attorney secures payment of a
389 fee by taking a promissory note secured by a standard deed of trust on a client’s real property.”]
390

391 Consequently, in accepting cryptocurrency for future legal services, the terms must be fair and
392 reasonable. Furthermore, the lawyer must disclose in writing: (1) the terms of the transaction; (2)
393 the lawyer’s role in the transaction; and (3) the client has the right, and reasonably opportunity, to
394 seek advice of independent counsel. Finally, the client must provide informed, written consent to
395 the terms of the transaction.
396

397 In light of the nature of cryptocurrency, the minimum disclosures required of the lawyer to comply
398 with rule 1.8.1 are:
399

- 400 • Cryptocurrency is not money that can be deposited into a trust account or
401 operating account;
- 402 • Whether the lawyer intends on converting the cryptocurrency to fiat currency upon
403 receipt or holding it for the duration of the contemplated legal services to be
404 provided;

- If the lawyer intends on maintaining the cryptocurrency in its virtual form, the lawyer must identify when (and how) the cryptocurrency will be valued for purposes of crediting against work performed;
- There may be tax consequences to the client upon conversion from cryptocurrency to fiat currency and the client should consult with a tax expert;
- The third-party service that will convert the cryptocurrency to fiat currency and who will bear the cost of conversion;
- The value of the cryptocurrency may fluctuate while the lawyer maintains cryptocurrency in its virtual form and that, there may not be sufficient value to cover the legal services performed at the time the cryptocurrency is valued, and the client will be responsible for the difference;
- The date of valuation in the event the client terminates the relationship before completion of the contemplated services to be provided by the lawyer to determine whether there is any unused advance fee to be returned to the client pursuant to rule 1.16(e)(2);
- How the lawyer intends on maintaining and safeguarding the cryptocurrency, and whether or not the lawyer maintains insurance that would cover any loss in the event of a cyberattack; and
- How the lawyer will maintain client confidentiality with a digital wallet holding the cryptocurrency.

The breadth of these disclosures may vary depended on the sophistication of the client. This is particularly important in determining the nature and extent of the lawyer's role in advising the client about transacting in cryptocurrency. A less sophisticated client may not understand the nuances of cryptocurrency requiring more lawyer involvement in advising the client on the transaction whereas a sophisticated corporate client with its own general counsel may require little or no involvement by the lawyer.

b. The Lawyer Must Comply with Rule 1.15 Safeguarding and Recordkeeping Requirements

'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).¹⁶ Thus, cryptocurrency is subject to the safekeeping requirements applicable to securities and other properties, which 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."

CLEAN

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.

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. See generally Lisa Miller, *Getting Paid in Bitcoin*, 41 Los Angeles Lawyer 18, 19-20 (December 2018); Carol Goforth, *The Lawyer's Cryptonary: 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.¹⁷ Moreover, because transactions are decentralized and managed in the blockchain, transactions cannot be reversed and are susceptible to cyber manipulation of the blockchain. CITE.

Consequently, the lawyer must have adequate protections in place to safeguard the client's property including, but not limited to, encryption, cold storage wallets, backups of private keys, and dual authentication to name a few, to comply with rule 1.15. See, e.g., Ohio Board Prof. Cond., Op. 2022-07. Moreover, in the event that the lawyer loses a key or an account number, the lawyer must ensure there are secure means of replacing the key, obtaining the account number, or otherwise ensuring the client can access its funds or property.

The lawyer must also maintain accurate accounting records for the cryptocurrency while held in its digital form to comply with rule 1.15. Due to the volatility of cryptocurrency on a daily basis, the lawyer must account for all exchanges and dispositions of the cryptocurrency and disclose when such accountings will be rendered.

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.

¹⁷ 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.

CLEAN

487 A lawyer may also ethically accept or hold cryptocurrency as an advance payment of fees, costs
488 or expenses, for the benefit of a client provided the lawyer complies with rules 1.8.1 and 1.15.
489
490
491

DRAFT

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 lawyer's 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.

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~~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.~~ Regarding payment of future fees and costs, a lawyer may accept cryptocurrency as payment provided the lawyer complies with the rules concerning business transactions with clients, safeguarding client property, and conscionability of the fee.

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.¹

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 centralized or controlling government, ~~bank~~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

¹ 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.

REDLINE

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 2022.² 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. [This is no more evident by the recent bankruptcy of FTX, one of the world's largest cryptocurrency exchanges, which lost \\$30 billion in assets in a matter of weeks.](#)³

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.⁴ 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.

This Opinion is provided to assist lawyers who accept or require cryptocurrency as payment for fees, ~~costs~~costs, or expenses in understanding their ethical obligations.⁵ Future developments,

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

³Thomas Barrabi, *FTX Files for Bankruptcy as CEO Sam Bankman-Fried Resigns in Disgrace*, *New York Post* (November 11, 2022) at <https://nypost.com/2022/11/11/ftx-files-for-bankruptcy-as-ceo-sam-bankman-fried-resigns/>

⁴ 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).

⁵ 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).

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)

~~INSERT~~

The New York City Bar Association issued Formal Opinion 2019-5 regarding the propriety of requiring payment of legal services in cryptocurrency in a legal services agreement. In this regard, the Committee determined that if payment as set forth in the fee agreement is required and not an optional form of payment, the transaction is considered a business transaction with a client subject to Rule 1.8 of the New York Rules of Professional Conduct.

Formal Opinion was limited in its scope to the applicability of Rule 1.8 to the payment of fees with cryptocurrency and specifically noted that issues implicating other rules may arise, such as safeguarding the cryptocurrency to comply with rule 1.15, competency relating to cybersecurity protections, and compliance with the laws regarding anti-money laundering.⁶

3. North Carolina State Bar Formal Ethics Opinion 5

North Carolina addressed the issue of cryptocurrency as a ~~from~~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

⁶ NYCBA Formal Opinion 2019-5, fn. 9.

exchange involving no additional variables or special knowledge.” D.C. Bar Ethics Opinion 378 (June 2020).

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 ~~an~~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.”⁷

5. Ohio Board of Professional Conduct Opinion 2022-07

More recently, the Ohio Board of Professional Conduct issued Opinion 2022-07 regarding the question of whether a lawyer may accept and hold cryptocurrency in escrow.⁸ The Board concluded that the lawyer may hold cryptocurrency in escrow for a client or third party through a law-related business provided the lawyer has the requisite competence to do so and employs appropriate safeguards against loss.

Notably, unlike other jurisdictions addressing payment in cryptocurrency, the Ohio Board did not address the implications of rule 1.8 largely because the opinion was limited to the lawyer providing escrow services unrelated to the representation of a client. Rather, the focus was on the record-keeping and safeguarding requirements of rule 1.15, which is instructive when taken into consideration with opinions from other jurisdictions where the focus has been on payment of legal fees with cryptocurrency.

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

⁷ Nebraska Ethics Advisory Opinion for Lawyers No.17-03 (September 2017).

⁸ Ohio Board of Professional Conduct, Opinion 2022-07 (Aug. 5, 2022)

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 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.”⁹ *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.”¹⁰ 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.¹¹ 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,

⁹ 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.”

¹⁰ *T.R. Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 6-7.

¹¹ State Bar of California, *Handbook on Client Trust Accounting for California Lawyers* (2022 ed.), p. 14.

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 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.¹²

¹² 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

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) 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

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].) 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~~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.

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."¹³ Rule 1.15(e) addresses the records that must be maintained in accordance with paragraph (d)(3).¹⁴

~~¹³ 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."~~

¹⁴ 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* 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).

c. Record-Keeping

Rule 1.15(d) also provides that the lawyer: “(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.”

Rule 1.15(d)(3)-(7).

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, and New York City 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”); Neb. Ethics Adv. Op. for Lawyers No. 17-03 (2017); Acceptance of Cryptocurrency for Legal Fees, D.C. Bar Ethics Op. 378; Requiring Cryptocurrency in Payment for Legal Services,

(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.”

NYCBA Formal Op. 2019-5 ~~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. 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. **A Lawyer Can Accept Cryptocurrency for Payment of 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 NYC 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~~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."¹⁵ However, transacting in

¹⁵ Cal. Rule Prof. Cond., rule 1.5(b).

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.¹⁶ 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. A Lawyer Can Accept Payment in Cryptocurrency for 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.”).

a. The Lawyer Must Comply with Rule 1.8.1

While there is no prohibition under the rules for payment of fees with property, the lawyer must nonetheless comply with rule 1.8.1 if the lawyer intends on accepting cryptocurrency as payment for future legal services. The situation would be akin to receiving stock in consideration for legal services or taking a security interest in the client’s property to secure future fees. See, e.g., *Brockway v. State Bar* (1991) 53 Cal.3d 51, 64 citing *Hawk v. State Bar* (1988) 45 Cal.3d 589, 598-601 [“It is settled that [former] rule 5–101 applies where an attorney secures payment of a fee by taking a promissory note secured by a standard deed of trust on a client’s real property.”]

Consequently, in accepting cryptocurrency for future legal services, the terms must be fair and reasonable. Furthermore, the lawyer must disclose in writing: (1) the terms of the transaction; (2) the lawyer’s role in the transaction; and (3) the client has the right, and reasonably opportunity, to

¹⁶ 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).

REDLINE

seek advice of independent counsel. Finally, the client must provide informed, written consent to the terms of the transaction.

In light of the nature of cryptocurrency, the minimum disclosures required of the lawyer to comply with rule 1.8.1 are:

- Cryptocurrency is not money that can be deposited into a trust account or operating account;
- Whether the lawyer intends on converting the cryptocurrency to fiat currency upon receipt or holding it for the duration of the contemplated legal services to be provided;
- If the lawyer intends on maintaining the cryptocurrency in its virtual form, the lawyer must identify when (and how) the cryptocurrency will be valued for purposes of crediting against work performed;
- There may be tax consequences to the client upon conversion from cryptocurrency to fiat currency and the client should consult with a tax expert;
- The third-party service that will convert the cryptocurrency to fiat currency and who will bear the cost of conversion;
- The value of the cryptocurrency may fluctuate while the lawyer maintains cryptocurrency in its virtual form and that, there may not be sufficient value to cover the legal services performed at the time the cryptocurrency is valued, and the client will be responsible for the difference;
- The date of valuation in the event the client terminates the relationship before completion of the contemplated services to be provided by the lawyer to determine whether there is any unused advance fee to be returned to the client pursuant to rule 1.16(e)(2);
- How the lawyer intends on maintaining and safeguarding the cryptocurrency, and whether or not the lawyer maintains insurance that would cover any loss in the event of a cyberattack; and
- How the lawyer will maintain client confidentiality with a digital wallet holding the cryptocurrency.

The breadth of these disclosures may vary depended on the sophistication of the client. This is particularly important in determining the nature and extent of the lawyer's role in advising the client about transacting in cryptocurrency. A less sophisticated client may not understand the nuances of cryptocurrency requiring more lawyer involvement in advising the client on the transaction whereas a sophisticated corporate client with its own general counsel may require little or no involvement by the lawyer.

~~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).~~

b. The Lawyer Must Comply with Rule 1.15 Safeguarding and Recordkeeping Requirements

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).¹⁷ Thus, cryptocurrency is subject to the safekeeping requirements applicable to securities and other properties, which 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~~loss, and various cyber threats. ~~CITE;~~ 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.¹⁸ 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).~~ Consequently, the lawyer must have adequate protections in place to safeguard the client's property including, but not limited to, encryption, cold storage wallets, backups of private keys, and dual authentication to name a few, to comply with rule 1.15. See, e.g., Ohio Board Prof. Cond., Op. 2022-07. Moreover, in the event that the lawyer loses a

¹⁷ ~~NOTE: Research opinions re accepting property as payment.~~

¹⁸ 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.

REDLINE

key or an account number, the lawyer must ensure there are secure means of replacing the key, obtaining the account number, or otherwise ensuring the client can access its funds or property.

The lawyer must also maintain accurate accounting records for the cryptocurrency while held in its digital form to comply with rule 1.15. Due to the volatility of cryptocurrency on a daily basis, the lawyer must account for all exchanges and dispositions of the cryptocurrency and disclose when such accountings will be rendered.

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 also not ethically accept or hold cryptocurrency as an advance payment of fees, costs or expenses, for the benefit of a client provided the lawyer complies with rules 1.8.1 and 1.15. ~~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 ~~lawyer's~~ lawyer's 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?~~ securities.