

Two Sides of the Same Coin: Bitcoin and Ethics

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New York lawyers may face a set of unique challenges that might distinguish them from lawyers elsewhere while holding a client's cryptocurrency in trust.

Bitcoin and other virtual currencies are the currency du jour. With growing use and legitimacy, Bitcoin is ubiquitous. What was once perceived as the preferred currency of dubious online transactions and shady business dealings is increasingly entering the mainstream, with many commercial enterprises accepting cryptocurrency. Naturally, clients have begun to recognize the benefits and value associated with Bitcoin, but they are also concerned about the potential risks and liabilities involving such transactions. It is only a matter of time before clients turn to their trusted counsel for guidance.

When the lawyer's telephone rings, the client may ask two questions: is it safe to use Bitcoin? Can legal fees be paid with Bitcoin? The securities regulatory field in the United States is adapting quickly to address this burgeoning area of commerce and financial transactions.

Given these fast-moving developments, how should lawyers advise clients regarding the legal, business, financial and operational aspects of Bitcoin? Is it ethical for lawyers to receive Bitcoin as fees for legal services?

Bitcoin vs. Traditional Currency

Bitcoin shares a number of features with traditional currency: It is used as a payment mechanism, transferred from buyer to seller, and circulated in an analogous fashion to traditional currency. Interestingly, Bitcoin's commonalities with traditional currency may be outweighed by the differences. To illustrate, owners of Bitcoin cannot access their Bitcoin account from a financial institution. Additionally, while Bitcoin may be converted to tangible, legal tender, it does not exist in any physical medium, but instead exists in a virtual wallet and can be accessed via a public key and a private key (without ownership of which the applicable Bitcoin cannot be accessed).

Coining Advice

Is it unethical for a lawyer to advise a client on Bitcoin-related issues without having sufficient knowledge and experience in this subject area? Rule 1.1 of the New York Rules of Professional Conduct (the "Rules") requires lawyers to provide "competent representation" to clients. Lawyers need not be experts in their field, however, to satisfy this requirement. Comment [2] to Rule 1.1 states that "[a] newly admitted lawyer can be as competent as a practitioner with long experience" and "[a] lawyer can provide adequate representation in a wholly novel field through necessary study."

Preliminarily, it appears that the regulators may be unclear on precisely how virtual currency should be classified. The Internal Revenue Service categorizes virtual currency as "property" for federal tax purposes, while the Securities and Exchange Commission characterizes some cryptocurrencies as securities and others as not. I.R.S. Notice 2014-21 (Apr. 14, 2014); SEC Public Statement (Mar. 7, 2018). Given the present situation, how should lawyers advise clients who seek guidance regarding virtual currency? It may take some time before there is greater clarity from the regulators.

In any event, Rule 1.1 does not require lawyers to have particular expertise in this novel area of law. Presumably, lawyers should exercise the same professional skills, competency standards and practice

controls as with any other evolving area of law to advise clients on the risks, benefits and best practices. Lawyers are no strangers to emerging practice areas such as cyber security, cannabis, sustainability and climate change – they are nimble in their ability to recognize and adapt to serving the needs of clients in growing niche practices.

Even if lawyers are adequately competent to advise on cryptocurrency issues, could they be at potential risk of violating any laws or regulations by rendering such legal advice? Rule 1.2(d) provides that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.” Comment [12] to Rule 1.2 states, “[Rule 1.2(d)] prohibits a lawyer from assisting a client’s illegal or fraudulent activity against a third person, whether or not the defrauded party is a party to the transaction.”

There is scanty ethical guidance available for lawyers on advising clients on cryptocurrency issues. State bar association ethics committees may be closely monitoring how widely cryptocurrency is used in business transactions where clients seek the advice of counsel, and whether clients are increasingly asking their lawyers to accept cryptocurrency as a form of payment for legal services.

Coins for Fees

Are lawyers ethically prohibited from accepting fees other than in traditional currency? Under Rule 1.5, a lawyer may accept fees from the client, provided they are not excessive or illegal. Legal fees need not be solely in currency; the rules seem to allow lawyers to accept fees in property, such as “an ownership interest in an enterprise,” if the property is not the subject matter or cause of action of the litigation at issue. Rule 1.5, Comment [4].

Thus far, only the Nebraska bar has issued guidance for Nebraska attorneys accepting Bitcoin as payment for legal services (the “Nebraska Opinion”), Nebraska Ethics Advisory Opinion, 17-03 (2017). The Nebraska Opinion’s analysis relies on assuming Bitcoin is property, as opposed to currency, and applies a somewhat different analysis than if it were to relate to currency. It notes that cryptocurrency may be accepted as payment for legal services if the lawyer ensures doing so would not constitute charging unreasonable fees, by (1) notifying the client that they will not retain the digital currency units but will convert them into U.S. dollars immediately upon receipt; (2) converting the digital currencies into U.S. dollars at objective market rates immediately upon receipt through a payment processor; and (3) crediting the client’s account accordingly at the time of payment.

The Nebraska Opinion cautions that any third-party payment of a client’s fee in Bitcoin does not interfere with the lawyer’s independent relationship with the client or the client’s confidential information. Finally, it observes that Bitcoin may be held in trust for clients, provided it is held separately from the attorney’s other property, kept safe and proper records maintained.

Commentators were quick to critique the Nebraska Opinion, noting as inapposite its characterization of Bitcoin as a unique legal ethics issue, Ronald D. Rotunda, *Bitcoin and the Legal Ethics of Lawyers*, Verdict (2017). The critics view the issues lawyers normally face in accepting Bitcoin as payment – whether from the client or from a third-party payor or holding in trust – as no different from those that may relate to any form of payment.

While today, using Bitcoin as payment of legal fees may be a bit new and novel, paying legal fees with something other than cash or currency is not new or novel. Ethics opinions issued by bar associations in New York have previously opined on whether lawyers may accept stock or equity interests in a client in

exchange for legal services to be performed, and have concluded that it is not unethical to do so, with certain caveats. See N.Y. City Bar. Op. 2000-3 (2000); N.Y. State Bar Op. 913 (2012).

Cryptocurrency-Keepers

New York lawyers may face a set of unique challenges that might distinguish them from lawyers elsewhere while holding a client's cryptocurrency in trust. Rule 1.15 allows a New York lawyer to hold a client's property in trust as a fiduciary, provided it is not misappropriated or commingled. New York has recently passed virtual currency regulations, however, which may give New York-admitted lawyers pause when engaged in this fiduciary practice: N.Y. Comp. Codes R. & Regs. tit. 23, § 200 (2015). These regulations require a person or entity "storing, holding, or maintaining custody or control of Virtual Currency on behalf of others" to obtain a Bitlicense. Not only are prospective Bitlicensees required to apply for and maintain such a license, they are further subjected to additional scrutiny involving reporting duties, technology controls, and record-keeping requirements.

New York lawyers are therefore presumably allowed under the rules to store Bitcoin in trust – or, rather, store the requisite key on the computer ledger for accessing the Bitcoin. Doing so, however, will involve adhering to the Bitlicense regulations, while complying with applicable ethical obligations under Rule 1.15. It is not yet clear how the ethical rules and the Bitlicense regulations may interact with each other and whether there are potential inconsistencies between them that could place a New York-admitted lawyer at risk of violating the rules, the Bitlicense regulations or both.

Bitcoin: A Bit of Ethics, a Bit of (Un)common Cents

While Bitcoin itself has caused quite a stir, the ramifications for legal ethics alone may not be that cataclysmic. However, bar associations in New York and elsewhere (other than Nebraska) have yet to signal how they will treat Bitcoin. While New York lawyers have their own unique hurdles to jump over, it appears that they may take some comfort that, on the ethics track, this fast developing area of law probably encounters many of the same ethical dilemmas as other niche practices opening their doors down the block.

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