NORTON ROSE FULBRIGHT

Blockchain Law

Lawyers accepting virtual currency: New money, old rules

Robert A. Schwinger, *New York Law Journal* — September 29, 2020

In his column on Blockchain Law, Robert A. Schwinger explains how some states have begun to consider whether legal ethics rules impose any restrictions or limitations on attorneys' ability to take payment in the form of cryptocurrency, or to hold such assets in escrow or trust.

As Bitcoin and other virtual currencies, cryptocurrencies and digital assets become more commonly used in ordinary commercial transactions, it is perhaps inevitable that attorneys increasingly will seek or be asked to take payment in this form, or to hold such assets in escrow or trust. Some states thus have begun to consider whether legal ethics rules impose any restrictions or limitations on attorneys' ability to do so. In recent years, ethics opinions addressing such questions have been issued in Nebraska, New York and most recently Washington, D.C. In addition, regulatory requirements beyond the rules of legal ethics can also sometimes affect what attorneys can and cannot do in this area.

Nebraska

A September 2017 Nebraska ethics opinion presented three questions for review: (1) may an attorney receive digital currencies such as bitcoin as payment for legal services; (2) may an attorney receive digital currencies from third parties as payment for the benefit of a client's account; and (3) may an attorney hold digital currencies in trust or escrow for clients? The opinion concluded that all are permissible, though with some caveats. Neb. Ethics Advisory Opinion for Lawyers, Op. 17-03 (2017).

While the Nebraska opinion determined that attorneys may receive and accept digital currencies such as bitcoin as payment for legal services, it cautioned that additional safeguards should be in place. Noting that digital currency values can often "fluctuate dramatically," it observed that clients may as a result end up over- or underpaying for legal services in violation of ethical prohibitions against charging a client unreasonable fees, such as Neb. Ct. R. Prof. Cond. § 3501.5(a) (equivalent of ABA Model Rule 1.5(a)), if the digital currency's value were to increase post-payment. The Nebraska opinion thus recommended that, in order to mitigate the risk of value fluctuation and possible unconscionable overpayment for services, attorneys should:

> "(1) notify[] the client that the attorney will not retain the digital currency units but instead will convert them into U.S. dollars immediately upon receipt; (2) convert[] the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) credit[] the client's account accordingly at the time of payment."

The opinion concluded that these additional measures would allow attorneys to accept digital currency as payment without the risk of "unconscionable fees" in violation of Rule 3501.5.

Robert A. Schwinger is a partner in the commercial litigation group at Norton Rose Fulbright US LLP.
Devlin Healey, a litigation associate at the firm, assisted in the preparation of this article.

The Nebraska opinion also concluded that an attorney may receive digital currencies as payment from third-party payers. As with traditional payment methods, such payments made by third parties must prevent possible interference with the attorney's independent relationship with the client, as provided in Neb. Ct. R. Prof. Cond. § 3501.7(a) (equivalent to ABA Model Rule 1.7), and with the client's confidential information as provided in Neb. Ct. R. Prof. Cond. § 3501.6 (equivalent to ABA Model Rule 1.6). The Nebraska opinion advised lawyers to implement basic know-your-client ("KYC") procedures to identify any third-party payer prior to acceptance of payments made with digital currencies, in order to ensure compliance with these rules.

Finally, the Nebraska opinion concluded that an attorney may hold digital currencies in escrow or trust for clients or third parties under Neb. Ct. R. Prof. Cond. § 3501.15(a) (equivalent to ABA Model Rule 1.15). The opinion cautioned that the attorney must hold the digital currency separate from the attorney's property and must keep it with commercially reasonable safeguards, including keeping records of the property so held for five years after termination of the relationship. Because digital currency that is held in trust or escrow rather than used for payment for legal services will not immediately be converted into U.S. dollars or other currency, the opinion reasoned that the client should be so advised—except that client trust accounts, which reflect retainers to be drawn upon for future fees, require digital currency to be converted to U.S. dollars or other currency (citing Neb. Ct. R. §§ 3901 to 3907 (concerning trust fund requirements for lawyers)). In addition, because there is no bank or FDIC insurance to reimburse for digital currency lost to hackers, attorneys must take reasonable precautions to ensure security of the digital currency placed in trust, such as using private key encryption, multiple private keys, and/or use of offline "cold storage" for the keys.

New York

Two years later, the New York City Bar analyzed whether a fee agreement requiring the client to pay for legal services in cryptocurrency was a business transaction with a client governed by Rule 1.8(a) of the New York Rules of Professional Conduct. N.Y. City Bar Ass'n, Formal Op. 2019-5 (2019). The City Bar opinion concluded that a fee agreement requiring (rather than merely permitting) the client to pay cryptocurrency in exchange for legal services is subject to Rule 1.8(a) if the client expects the lawyer to exercise professional judgment on the client's behalf in the transaction. In that situation, the attorney must comply with the requirements of Rule 1.8(a) before entering into the fee agreement. While noting that such agreements may also raise questions about unreasonable fees under Rule 1.5, the opinion did not address those issues.

The City Bar opinion identified multiple types of fee arrangements possible using cryptocurrency, such as:

1. The lawyer agrees to provide legal services for a flat fee of X units of cryptocurrency, or for an hourly fee of Y units of cryptocurrency.
2. The lawyer agrees to provide legal services at an hourly rate of $X dollars to be paid in cryptocurrency.
3. The lawyer agrees to provide legal services at an hourly rate of $X dollars, which the client may, but need not, pay in cryptocurrency in an amount equivalent to U.S. Dollars at the time of payment.

Rule 1.8(a) applies when the attorney and client or prospective client are "entering into a (i) 'business transaction;' (ii) where the lawyer and the client have differing interests; and (iii) the client expects the lawyer to exercise professional judgment on the client's behalf in the transaction." The City Bar opinion conclude that in the first scenario, where a lawyer "agrees to provide legal services for a flat fee of X units of cryptocurrency, or for an hourly fee of Y units of cryptocurrency," the fee agreement entails a "business transaction" within the meaning of Rule 1.8(a). It noted that cryptocurrency's value fluctuates depending on a number of factors and that "[i]n light of these complexities, cryptocurrency (despite its name) is presently treated more like property than currency." Such a fee arrangement can involve the negotiation of complex questions, which may include the rate of exchange, fees for conversion, type of cryptocurrency, and so on, and "in which an unsophisticated client may therefore place unwarranted trust in the lawyer to resolve these questions fairly or advantageously to the client."

The City Bar opinion likewise concluded that the second scenario, in which "a lawyer agrees to charge an hourly fee that must be paid in cryptocurrency," while involving fewer complexities to resolve, still requires negotiations — "including the type of cryptocurrency being used, the rate of exchange, and who will bear responsibility for any processing fees" — between the attorney and client. It concluded that this scenario too is not a typical fee arrangement and thus should be considered a client business transaction under Rule 1.8(a). In both this scenario and the first, the attorney and the client will have differing interests: the attorney has an interest in being paid when the value of cryptocurrency is high while the client has an opposing interest in making payments at a time when the value of cryptocurrency is lower.

Therefore, concluded the opinion, the attorney in these first two scenarios must adhere to Rule 1.8(a), which imposes three specific requirements before the lawyer can enter into the transaction. First, the attorney must ensure that the transaction is "fair and reasonable to the client" and must disclose the terms of the transaction in writing and "in a manner that can be reasonably understood by the client." Second, the attorney must advise the client, in writing, about seeking separate counsel and must then give the client a reasonable opportunity to consult separate counsel. Finally, the client must understand and agree to "the essential terms of the transaction, and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."

However, in the third scenario, in which "the client is simply given the option of paying in cryptocurrency based on some rate of exchange existing at the time," the City Bar opinion concluded that Rule 1.8(a) does not apply, deeming this to be a typical fee agreement where the attorney has agreed to accept a different method of payment, similar to agreeing to accept payment by credit card. Because the client is not obligated to pay in cryptocurrency if it is not beneficial to the client, the attorney and client do not have to resolve terms as to which they may have differing interests.

Thus, while payment in cryptocurrency can serve as an alternative to a traditional fee arrangement, cryptocurrency's classification as property of uncertain value may trigger Rule 1.8(a) and require additional considerations to be addressed before an attorney can require its use by clients. Interestingly, the City Bar noted in a footnote in its opinion that to the extent its conclusions were based on the present-day potential for volatility in the value of cryptocurrency, the analysis might change if "the cryptocurrency market achieves a threshold level of stability similar to other regulated currencies." The opinion thus leaves open to question whether its conclusions would apply equally to payments made in so-called stablecoins, which are digital assets designed to minimize price volatility as compared to a stable benchmark asset.

District of Columbia

Most recently, in June 2020, the District of Columbia Bar concluded that attorneys may ethically accept cryptocurrency in place of traditional forms of payment so long as the fee is reasonable. D.C. Bar Ass'n Comm. On Prof'l Ethics, Op. 378 (2020). Echoing the Nebraska and New York City Bar opinions, the D.C. bar opinion determined that Rules 1.5 and 1.8 apply to attorney fee arrangements using cryptocurrency. In addition, the opinion cautioned that Rule 1.1, which governs attorney competence, and Rule 1.15, dealing with the safekeeping of property, are also applicable where cryptocurrency is concerned.

According to the D.C. bar opinion, Rule 1.5's provisions about the reasonableness of fees do not explicitly prevent lawyers from accepting potentially volatile assets as fee payment, citing the acceptance of "ownership interest in an enterprise" as payment as an example. The opinion determined that payment in cryptocurrency is akin to payment in property, in that while the present value can be determined, future value cannot be predicted. As a result, it concluded, the reasonableness of a cryptocurrency fee agreement "will depend not only on the terms of the fee agreement itself and whether or not payment is for services rendered or in advance, but also on whether and how well the lawyer explains the nature of a client's particularized financial risks, in light of both the agreed fee structure and the inherent volatility of cryptocurrency."

Further, the D.C. opinion cited to and agreed with the N.Y. City Bar's 2019 opinion concerning the applicability of Rule 1.8(a) to cryptocurrency fee agreements. It emphasized that in addition to reasonableness, Rule 1.8(a) includes an obligation to ensure fairness to the client. The opinion concluded that the fairness of an arrangement involving a volatile asset like cryptocurrency "should be assessed for fairness at the time that it is agreed upon, based on the facts then available."

Finally, the D.C. opinion concluded that Rule 1.15(a), which addresses how to "appropriately safeguard" a client's property (including monies advanced for fees), applies regardless of how the fees are funded. Therefore, transactions involving cryptocurrency are covered under Rule 1.15(a). However, safeguarding volatile property such as cryptocurrency involves distinct challenges. Lawyers are required under Rule 1.1 to provide competent representation, which includes exercising "reasonable professional judgment regarding the use of technology, including digital currency, within the lawyer's legal practice." Therefore, lawyers must understand how to safeguard cryptocurrency. Lawyers are obligated to use reasonable care to minimize the risk of loss for cryptocurrency as they would any other property of a client, regardless of any unique difficulties this asset class poses.

Considerations beyond ethics

As noted in D. Kewalramani, "Two Sides of the Same Coin: Bitcoin and Ethics," N.Y.L.J. (July 24, 2018), "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" because of New York's "BitLicense" regulations, 23 N.Y.C.R.R. Part 200 (2015). These regulations require a person or entity "storing, holding, or maintaining custody or control of Virtual Currency on behalf of others" to "apply for and maintain … a license," and then to be "further subjected to additional scrutiny involving reporting duties, technology controls, and record-keeping requirements." These regulatory hurdles on top of whatever Rule 1.15 requires as a matter of legal ethics may temper New York lawyers' willingness to hold clients' cryptocurrency in trust.

Lawyers accepting digital currency payments also cannot ignore international monetary sanctions. President Trump's Executive Order 13827 (Mar. 19, 2018) barred U.S. citizens from trading in Petro, a cryptocurrency created by the Maduro regime in Venezuela in an attempt to circumvent U.S. economic sanctions, or any other Venezuelan government-issued cryptocurrency. Thus, even those U.S. lawyers who are is generally willing to be paid in cryptocurrency should not take payment in Petros or other Venezuelan government-issued cryptocurrency.

Conclusion

While digital currencies are a relatively novel form of payment, the old rules—and even some more recently issued ones—still apply. Attorney ethics rules continue to require protection for clients' property even as new technology emerges. Asset classes subject to price volatility, such as many cryptocurrencies, may force attorneys to address considerations far different and more complex than when deciding whether to accept payment by cash, check or credit card. New technologies for assets being held in trust can pose unfamiliar risks for the lawyer holding them. Our profession must continue to feel its way as lawyer-client transactions in digital currencies evolve and proliferate.

NORTON ROSE FULBRIGHT

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3700 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

Law around the world

nortonrosefulbright.com