

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
COMMITTEE ON PROFESSIONAL ETHICS**

**FORMAL OPINION 2019-5: REQUIRING CRYPTOCURRENCY IN PAYMENT FOR LEGAL SERVICES**

**TOPIC:** An agreement to receive cryptocurrency as payment for legal services to be performed; business transactions with clients.

**DIGEST:** A fee agreement requiring a client to pay a lawyer for legal services in cryptocurrency is subject to Rule 1.8(a) of the New York Rules of Professional Conduct (the “Rules”) if the client expects the lawyer to exercise professional judgment on the client’s behalf in negotiating the agreement. If so, the lawyer must comply with the procedural requirements of Rule 1.8(a).

**RULES:** 1.8(a); 1.5(a)

**QUESTION:** Is a fee agreement requiring the client to pay for legal services in cryptocurrency a business transaction governed by Rule 1.8(a)?

**OPINION:**

This opinion addresses whether a lawyer’s fee agreement providing for payment of a legal fee in cryptocurrency is governed by Rule 1.8(a), which regulates “business transactions” between lawyers and clients. As discussed below, we conclude that if payment in cryptocurrency is required by the terms of the agreement and not an optional method of payment, the fee agreement is a “business transaction” within the meaning of Rule 1.8(a) and that the lawyer and the client have differing interests in negotiating the agreement. Therefore, if the client expects the lawyer to exercise professional judgment on the client’s behalf in the transaction, the lawyer must comply with the procedural requirements of Rule 1.8(a).

**I. BACKGROUND ON CRYPTOCURRENCY**

Cryptocurrency has been described as a form of virtual “currency” that exists in electronic form. Cryptocurrency is employed as a means of peer-to-peer exchange whereby users log transfers on an electronic distributed “ledger book” known as the “blockchain” which records the transfer of the cryptocurrency from the sender to the recipient. A record of all changes is stored on each node of the blockchain network, and any additional change must be confirmed against existing copies of the record. Several options for cryptocurrency storage exist, but one common means is a software “wallet,” where the owner of the cryptocurrency has a “public key” which is similar to an account number and a “private key” which is a code known only to the sender and used to transfer the cryptocurrency from sender to recipient.

Unlike actual currency such as U.S. dollars, cryptocurrency is not backed by any government. Any transaction to convert cryptocurrency to actual currency can involve a number of variables. For instance, depending on the type of cryptocurrency being exchanged, certain processing fees may apply. Also, the market for cryptocurrency has been volatile, with

significant surges and drops in any given month. Thus, an agreement to value a transaction in cryptocurrency or convert cryptocurrency into traditional currency on a certain date carries potential risks for both sides. Finally, the regulatory scheme for cryptocurrency is unclear and state and federal agencies are largely still determining how to best regulate cryptocurrency.<sup>1</sup>

Notwithstanding the market volatility and regulatory inconsistency, cryptocurrency as a medium of payment has rapidly made inroads to a number of marketplaces. As a result, some law firms are considering accepting (or have already agreed to accept) certain cryptocurrencies, such as bitcoin, as payment for legal services. *See, e.g., Sara Merken, More Law Firms are Accepting Bitcoin Payments* (ABA BNA Sept. 6, 2017).

## **II. IS AN AGREEMENT TO RECEIVE CRYPTOCURRENCY IN EXCHANGE FOR LEGAL SERVICES SUBJECT TO RULE 1.8(A)?**

Consider the following three fee arrangements:

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.

Each of these arrangements is subject to Rule 1.5(a), which forbids a lawyer from charging an excessive or illegal fee. The question we address in this Opinion is whether these fee arrangements are also subject to Rule 1.8(a), which governs business transactions between a lawyer and client.

Rule 1.8(a), which is derived from judicial decisions under the common law of contracts,<sup>2</sup> provides as follows:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

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<sup>1</sup> For instance, the U.S. Internal Revenue Service treats cryptocurrency as “property” rather than cash, while the U.S. Securities and Exchange Commission has taken the position that certain applications of blockchain technology might be securities under prevailing law. *See, e.g.,* [https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11#\\_ftn5](https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11#_ftn5); and <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>. (All websites cited in this opinion were last visited on July 11, 2019.)

<sup>2</sup> *See* Joseph M. Perillo, *The Law of Lawyers’ Contracts is Different*, 67 Fordham L. Rev. 443, 486-87 (1998).

- (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The threshold question under Rule 1.8(a) is whether a lawyer and client (or prospective client) are entering into a (i) "business transaction;" (ii) where the lawyer and the client have differing interests; and (iii) the client expects the lawyer to exercise professional judgment on the client's behalf in the transaction. If so, the lawyer must meet the procedural requirements in the rule. *See* NYCBA Formal Op. 2000-3 (2000) ("[Rule 1.8(a)] interposes a threshold inquiry before requiring the lawyer to undertake the disclosure and other prescribed remedial measures."). The principal question here is whether and, if so, when an agreement for a legal fee to be paid in cryptocurrency is a "business transaction" under Rule 1.8(a).

**a. Is the Acceptance of Cryptocurrency as a Legal Fee a "Business Transaction" under Rule 1.8(A)?**

In general, a "business transaction" is any business or commercial arrangement between a lawyer and a client. Typical business transactions subject to Rule 1.8(a) include partnerships and joint ventures between a lawyer and client. Commercial sales or other acquisitions of property – for example, a lawyer's purchase of a client's boat, or a client's purchase of a lawyer's car – also constitute business transactions under the rule. Procedural requirements for the client's protection are required in such situations because of the risk that the lawyers, exploiting their superior knowledge, may take unfair advantage of the client's trust. Of course, in some situations, the client will not be at an unfair advantage, but the rule is designed for the generality of cases.

An accompanying Comment recognizes, however, that the rule "does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client," and the rule's procedural requirements "are unnecessary and impracticable." Rule 1.8, Cmt. [4B].

Further, the rule "does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship." Rule 1.8, Cmt. [4C]. This is true notwithstanding that "every fee arrangement with a client is in a literal sense a business transaction with that client," NYSBA Ethics Op. 913 (2012), because ordinary fee agreements

are relatively easy to understand, do not entail complex negotiation, and do not involve a significant risk that the client will repose misplaced trust in the lawyer to protect the client's interests. Rule 1.5, governing fee agreements, is deemed sufficiently protective.

In addition to Rule 1.5, however, Rule 1.8(a) may apply to a fee agreement when a lawyer acquires an interest in a client's business "or other nonmonetary property as payment of all or part of the lawyer's fee." *See, e.g.*, NYSBA Ethics Op. 1156 (2018) (agreement for lawyer to take a security interest in client's property to satisfy legal fees upon sale of property is a business transaction under Rule 1.8(a)); NYCBA Formal Op. 2003-03 (2000) (taking stock as a legal fee is a business transaction under Rule 1.8(a)); NYCBA Formal Op. 88-7 (1988) (a lawyer's acceptance of a mortgage interest in a client's home to secure payment of a fee constitutes a business transaction with a client requiring compliance with DR 5-104(A), the predecessor to Rule 1.8(a)); N.H. Bar. Assoc. Ethics Adv. Op. 2017-18/01 (2017) (concluding that New Hampshire's version of Rule 1.8(a) (which tracks ABA Model Rule 1.8(a)) governs agreements where a client agrees to pay a lawyer's fee in "goods or services" instead of currency); *see also* *Murstein v. Caporella*, 619 F. App'x 832 (11th Cir. 2015) (refusing to enforce stock-for-fees retainer agreement on public policy grounds because the agreement violated Florida's version of Rule 1.8(a)); *In re Pace*, 2015 WL 6728007 (W.D.N.C. Nov. 2, 2015) (agreement for lawyer to take a lien on client's tangible property as security for legal fee is subject to Rule 1.8(a)).

In the first of the three scenarios described above, the perhaps-unrealistic situation in which 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). This is not an ordinary fee agreement, such as one where the client agrees to pay a flat fee or hourly fee in U.S. dollars. It is one in which the lawyer and the client must negotiate potentially complex questions, and in which an unsophisticated client may therefore place unwarranted trust in the lawyer to resolve these questions fairly or advantageously to the client. The variables associated with payment in cryptocurrency include the rate of exchange on any given day, any associated fees when converting cryptocurrency to currency, whether (and when) cryptocurrency must be converted into cash, the exchange to be used, the type of cryptocurrency being used (or whether the payment would be in a single cryptocurrency or a combination of cryptocurrencies), and how any dispute will be handled in the event of a disagreement between the lawyer and the client related to these issues.

In light of these complexities, cryptocurrency (despite its name) is presently treated more like property than currency. Just as a lawyer and client would be required to negotiate over several deal-points in an agreement for the lawyer to accept some other form of nonmonetary property (e.g. a piece of land, a painting or a vehicle) in exchange for legal services – which is decidedly a business transaction subject to Rule 1.8(a) – they would be required to negotiate to resolve the questions arising from a cryptocurrency transaction.<sup>3</sup>

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<sup>3</sup> The State of Nebraska – the only other state ethics body so far to address cryptocurrency – similarly concluded that cryptocurrency is "property." Although it did not address the issue directly, the opinion suggested that a lawyer

In the second (and perhaps more realistic) scenario where a lawyer agrees to charge an hourly fee that must be paid in cryptocurrency, there may be fewer complexities to resolve. Even here, however, there are several deal points that the lawyer and client would be required to negotiate including the type of cryptocurrency being used, the rate of exchange, and who will bear responsibility for any processing fees. In light of these variables, the fee agreement contemplated in the second scenario is still not an ordinary one because of the uncertainties and risks to be resolved in the fee agreement (or that may be present if unresolved by agreement).<sup>4</sup>

In the third scenario, however, where the client is simply given the option of paying in cryptocurrency based on some rate of exchange existing at the time, we do not believe that Rule 1.8(a) applies. In this scenario, the fee agreement is, in our view, an ordinary one where the lawyer is simply agreeing as a convenience to accept a different method of payment but the client is not limited to paying in cryptocurrency if it is not beneficial to do so. The lawyer and the client do not have to resolve terms as to which they may have differing interests. Cryptocurrency functions merely as an optional way of transmitting payment. *Cf.* NYSBA Formal Op. 1050 (2015) (recognizing that payment of legal fees by credit card as permissible and generally accepted).<sup>5</sup>

#### **b. Do the Lawyer and the Client Have Differing Interests in the Transaction?**

The next question under Rule 1.8(a) is whether the lawyer and the client have differing interests in the transaction. The “differing interests” requirement in Rule 1.8(a) was carried over from DR 5-104(A) in the New York Lawyer’s Code of Professional Responsibility. By contrast, ABA Model Rule 1.8(a) applies to all “business transaction[s] with a client” regardless of whether the lawyer and client have differing interests.

Rule 1.0(f) defines “differing interests” as “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.” The “differing interests” standard is crucial to Rule 1.8(a) insofar as it

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accepting cryptocurrency may be required to comply with Nebraska’s version of Rule 1.8(a). *See* Neb. Ethics Adv. Op. for Lawyers No. 17-03 (2017) (citing Nebraska version of Rule 1.8(a) and reasoning that “there is no per se rule prohibiting payment of earned legal fees with convertible virtual currency since it is a form of property”).

<sup>4</sup> Our conclusion that an agreement to pay a lawyer’s fee in cryptocurrency constitutes a business transaction is based, in part, on the current state of cryptocurrency and the surrounding uncertainties. If, in the future, the cryptocurrency market achieves a threshold level of stability similar to other regulated currencies, our analysis may change.

<sup>5</sup> The choice to pay in cryptocurrency may have tax implications for the client. But offering a client a choice among methods of payment, including by cryptocurrency, does not mean that the fee agreement is a business transaction. Lawyers do not ordinarily advise clients about the legal or financial advantages and disadvantages of payment options (e.g., check vs. credit card). If a particular client did seek the lawyer’s tax advice regarding a cryptocurrency payment, before giving legal advice the lawyer would have to consider whether the lawyer’s self-interest in receiving payment created a conflict of interest under Rule 1.7.

separates certain run-of-the-mill transactions between the lawyer and the client from those which may require the rule's procedural protections.

Comment [4C] to Rule 1.8 makes this point when discussing arrangements in which a lawyer accepts an interest in a client's business or agrees to receive "other nonmonetary property" as payment for legal services. The Comment recognizes that "[s]uch an exchange creates a risk that the lawyer's judgment will be skewed in favor of closing a transaction to such an extent that the lawyer may fail to exercise professional judgment as to whether it is in the client's best interest for the transaction to close." We acknowledge that a lawyer and client have "differing interests" to some extent in any negotiation over legal fees. However, when the method of payment is something other than standard currency, the lawyer may have a greater ability to negotiate the terms of the transaction to the lawyer's benefit in ways not as readily apparent to the client.

In the first two scenarios<sup>6</sup> outlined above, the lawyer and the client have differing interests in negotiating the terms of the fee agreement relating to cryptocurrency (among other terms). The lawyer's interest is in negotiating terms that are most favorable to the lawyer and the client holds the opposite interest. There may also be differing interests even after the representation commences. Because cryptocurrency can be subject to drastic market fluctuations, the lawyer may have an interest in conducting the representation so as to maximize the value of the client's payment in cryptocurrency.<sup>7</sup> The fact that the value of the lawyer's fee paid in cryptocurrency could change from day-to-day could compromise the lawyer's professional judgment on behalf of the client in the representation: for instance, the lawyer could have an incentive to delay or speed up the representation in order to be paid at a time when the value of cryptocurrency is at a high and the lawyer could immediately convert that cryptocurrency to cash. By the same token, the client has an opposing interest in making payments at a time when the value of cryptocurrency is lower. The same is not necessarily true of an ordinary transaction where the lawyer agrees to accept government-issued currency in exchange for legal services.

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<sup>6</sup> As noted above, the third scenario is not implicated here because it is an ordinary fee agreement (i.e., not a business transaction) where the lawyer simply agrees to accept a different method of payment as a convenience but the client is not limited to paying in cryptocurrency.

<sup>7</sup> If the cryptocurrency payments are made over time (e.g., on a monthly or quarterly basis), the fair market value of the cryptocurrency may be different each period. Even in a flat fee arrangement, the actual timing of the fee payment can impact the value of the cryptocurrency the lawyer is receiving. Although the same can be true for standard currency, the fluctuations over such a short period of time are generally *de minimus*, absent a catastrophic economic event, as compared to cryptocurrency.

**c. Does the Client Expect the Lawyer to Exercise Professional Judgment in the Transaction for the Protection of the Client?**

The last step in determining whether a business transaction with a client is subject to Rule 1.8(a) is to determine whether the client expects the lawyer to exercise professional judgment on the client's behalf in the negotiations. This requirement traces back to the New York Lawyer's Code of Professional Responsibility, which was based on the ABA Model Code of Professional Responsibility. Although New York's Rule 1.8(a) includes this requirement, it was written out of the current ABA Model Rules. *See* ABA Model R. 1.8(a) ("A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless . . .").

Whether the client expects the lawyer to exercise professional judgment on the client's behalf in the transaction is a fact-specific inquiry that must be evaluated on a case-by-case basis. In NYSBA Ethics Op. 1104 (2016), the State Bar ethics committee reasoned that "Rule 1.8(a) by its terms applies only if the client expects the lawyer to exercise professional judgment for the benefit of the client in the matter. The determination of this issue turns on several factors, including *the sophistication and expectations of the client, the complexity of the [documents], and the relationship of those [documents] to the [legal] services to be provided*" (emphasis added). *See also* NYCBA Formal Op, 2000-3 (2000) (opining in the context of a securities-forfees transaction that "[i]f the lawyer is expected to play any role in advising the client, especially if a client lacks sophistication, the mandates of [Rule 1.8(a)] must be followed."). The State Bar ethics committee identified the following factors relevant to whether a client entering into a business transaction with a lawyer expects the lawyer to exercise professional judgment on the client's behalf:

- (i) whether the client has other counsel in the matter, for example, because it is a corporation or other entity with a legal department,
- (ii) whether the lawyer is responsible for client matters in the subject area, and
- (iii) whether the client is an individual or an entity and the client's level of sophistication in legal matters. We believe it is more likely that an individual client or one that is not sophisticated in legal matters is more likely to rely on a lawyer that does not represent the client in that matter than would be the case with an institutional client.

NYSBA Ethics Op. 1055, n.1.

The lawyer must be mindful of the nature of the relationship with the client and whether the client's behavior suggests that he or she expects the lawyer to exercise professional judgment on his or her behalf in the fee negotiation. For instance, if the client is a sophisticated party who is knowledgeable about cryptocurrency or is represented by separate counsel, it is unlikely that the client expects the lawyer to exercise professional judgment for the client. Indeed, in many instances the client may be more sophisticated than the lawyer on matters relating to cryptocurrency, in which case it would not be reasonable for the client to rely on the lawyer's exercise of professional judgment.

Conversely, if the lawyer is advising the client about the implications of paying fees in cryptocurrency, then the client certainly would expect the lawyer to provide professional judgment on the client's behalf in the transaction.<sup>8</sup> Even if the lawyer is not directly advising the client about the proposed fee agreement but the client asks the lawyer questions about the transaction which suggest that the client is relying on the lawyer's input to some degree (*e.g.*, if the client asks about the timing of the payments and/or how the value of the cryptocurrency will be assessed), the client may expect the lawyer to protect the client's interests in the transaction. *See* NYSBA Ethics Op. 1051 (2015) (concluding in the context of a mid-representation change to the retainer agreement that "[w]hen the lawyer explains to the client how a court would interpret the existing contract and whether the amendment benefits the client, the client will likely expect the lawyer to be exercising professional judgment for the benefit of the client"). If the lawyer does not intend for the client to rely on the lawyer's exercise of professional judgment related to paying fees in cryptocurrency, the lawyer should make that clear to the client in writing. Even then, however, such a disclaimer must be reasonable under the circumstances and the lawyer should not then change course and give the client a reason to believe that the lawyer is, in fact, providing advice to the client in the transaction.

### III. COMPLIANCE WITH RULE 1.8(A)

Where, as in scenarios 1 and 2 above, accepting cryptocurrency as a legal fee constitutes a business transaction subject to Rule 1.8(a), the lawyer must adhere to Rule 1.8(a)(1)-1.8(a)(3) which imposes three specific requirements before the lawyer can enter into the transaction.

*First*, the lawyer 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." As NYSBA Ethics Op. 913 (2012) noted, whether the terms of a transaction are fair and reasonable to the client "is a fact-specific inquiry for which general rules are of limited aid." That a fee is neither excessive nor illegal under Rule 1.5(a) does not necessarily mean that it is fair and reasonable; Rule 1.8(a) imposes a more demanding standard. Whether the lawyer has disclosed the terms of the transaction to the client in a manner that can be "reasonably understood" by the client will obviously depend on the sophistication of the client as well as the complexity of the transaction. The lawyer should take care in drafting this disclosure and not necessarily rely on standard form language.

*Second*, the lawyer must advise the client, *in writing*, about the desirability of seeking separate counsel and must then give the client a reasonable opportunity to consult separate counsel. *See* Rule 1.8(a)(2). This requirement reflects the heightened scrutiny that courts traditionally give to business transactions between lawyers and clients. *See* Roy D. Simon and

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<sup>8</sup> In this event, the lawyer must also be mindful that a conflict of interest would likely arise under Rule 1.7(a)(2) since the lawyer's self-interest may compromise his or her professional judgment on behalf of the client in advising about the terms of the transaction. *See* NYSBA Formal Op. 1145 (2018) (a lawyer engaged in a business transaction with a client must comply with both Rules 1.8(a) and 1.7(a)). Before proceeding, the lawyer should determine whether such a conflict is consentable under Rule 1.7(b). *See id.*

Nicole I. Hyland, *Simon's New York Rules of Professional Conduct Annotated*, at 511 (2017 ed) (describing history of the “independent counsel” requirement in Rule 1.8(a) and DR 5-104).

*Third*, the client must understand and agree to “the essential terms of the transaction, and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.” The lawyer must secure the client’s “informed consent,” which is defined as “an agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.” The lawyer must then confirm the client’s consent in writing. Thus, any writing under Rule 1.8(a) must ensure not only that the client understands (i) the essential terms of the transaction, (ii) the lawyer’s role in the transaction, and (iii) whether the lawyer is representing the client in the transaction, but also that the client understands the risks involved and the reasonably available alternatives.

Where the lawyer is agreeing at the outset or mid-representation to accept cryptocurrency, the lawyer has discretion whether to include all of the above information in the initial engagement letter or a separate writing. In either event, the lawyer should take great care to ensure that the writing meets all of the specific requirements in Rule 1.8(a) and that any questions concerning the mechanics or substance of the transaction are clearly addressed at the beginning of the transaction.<sup>9</sup>

## **CONCLUSION:**

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

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<sup>9</sup> This Opinion does not address every question of professional conduct relevant to a lawyer’s acceptance of a fee in cryptocurrency. Among the other questions that may be relevant in a given situation are (1) whether, and how, a lawyer may properly hold cryptocurrency in trust either for the client or for the benefit of third parties (*see* Rule 1.15); (2) whether the lawyer has the proper cybersecurity protections and technology controls to maintain cryptocurrency and safeguard against outside attacks (*see* Rule 1.1); and (3) whether the lawyer and the client have complied with all state and federal laws related to cryptocurrency including, but not limited to applicable criminal laws regulating securities and anti-money laundering laws (*see* Rules 1.2(d); 8.4(a)). It would be prudent for a lawyer to consider these issues as well before agreeing to be paid in cryptocurrency.