

Is It Ethical for Lawyers to Accept Bitcoins and Other Cryptocurrencies?

by James M. McCauley, Esq., Sharon D. Nelson, Esq. and John W. Simek



Cryptocurrency Baseline

Bitcoins are digital currency — and yes, lawyers are beginning to accept them from clients. They are also known as virtual currency or cryptocurrency since cryptography is used to control the creation and transfer of bitcoins. They use peer-to-peer technology with no central authority or banks. The issuance of bitcoins and the managing of transactions are carried out collectively by the network.

Cryptocurrencies are created by a process called mining — by becoming a miner of cryptocurrencies, you make money (not much unless you are a major league miner). We won't go into all of the technology that is used to create and verify the transactions since it will probably make your head hurt. Mining is accomplished by executing complicated mathematic operations that take a lot of processing power. Hence the new phe-

nomenon of cryptojacking in which miners hijack the computing resources of unknowing victims so they can mine cryptocurrencies. And yes, your network could be victimized and there is little chance you would know unless so much power is used that your network slows down!

Today there are a lot of different cryptocurrencies. Bitcoin is still one of the most well-known and popular. However, other cryptocurrencies such as Ethereum, Bitcoin Cash, Monero, Litecoin, Ripple, Dash, and others are gaining in popularity. They promise to scale better than Bitcoin and to provide stronger anonymous protections. As of April 26, 2018, the amazing number of different cryptocurrencies is 1,759 according to investing.com's current list located at <https://www.investing.com/crypto/currencies>. With all the various "flavors" of digital currencies, we're sure you'll find one to your liking.

All cryptocurrency transactions are recorded in a computer file called a blockchain, which is synonymous to a ledger that deals with conventional money. Users send and receive bitcoins and other cryptocurrencies from their mobile device, computer or web

application by using wallet software. You can even use cloud services to host and manage your wallet(s). Frankly, we prefer to have direct control and keep our wallet(s) stored on local devices. Of course, don't forget to back up your wallet(s).

We won't get into all the technical and legal issues surrounding cryptocurrencies. Suffice it to say that these virtual currencies are here to stay and have value, although they remain extremely volatile. In the U.S., cryptocurrencies are regarded as property rather than cash, with all the consequent tax implications.

Ethical issues

Let's deal with some of the ethical issues concerning the acceptance of cryptocurrencies. Nebraska is the only state we are aware of that has issued an ethical opinion specifically for Bitcoin usage. Nebraska's opinion states that lawyers may accept payments in digital currencies but must immediately convert them into U.S. dollars. Any refund of monies is also made in U.S. dollars and not in digital currency.

It is well known that an attorney can't access client funds until they are earned, hence the existence of trust accounts. Also, an attorney can accept property as payment, but there must be a valuation for the property. This is where accepting digital currencies could get a little muddy. The Virginia rules require that a fee for legal services must be "reasonable." If attorneys receive digital currency, they should immediately convert and exchange it to actual currency AND put it in their escrow account. This effectively (and actually) puts a value on the cryptocurrency, which is exactly the process described in the Nebraska opinion. As part of the reconciliation and billing process, the lawyer would just note wording stating the number of bitcoins or other cryptocurrency and the market value at conversion. What the Nebraska opinion **did not** address is the handling of transaction fees, which can be rather substantial. The majority of lawyers will use an exchange to convert the cryptocurrency into cash. Who pays the fee for this conversion? And what if the client insists that the lawyer hold an advanced fee payment in bitcoin, instead of converting it to US currency? If Bitcoin increases in value who gets the windfall—the lawyer or the client? Who bears the risk if Bitcoin drops in value?

Criminal defense lawyers, of course, can face potential ethical and even criminal issues if clients pay them with assets they are determined to have acquired through illegal conduct. And yet, almost invariably, when we hear about lawyers accepting bitcoins as payment, the lawyers involved are criminal defense attorneys. For all the talk of "privacy" and the frequent inability to prove the connection between illegal conduct and bitcoins, it is clear that federal authorities believe the bitcoins are used to keep criminal activities financially untraceable. On the other hand, many legitimate businesses in the United States and Europe accept Bitcoin, including Dish Network, Overstock.com and Expedia.

Holding Cryptocurrencies

What if the lawyer wants to keep the cryptocurrency for their own use? Can they just keep the cryptocurrency in their own electronic wallet and deposit cash in the trust account on behalf of their client? The answer to this question depends on whether the bar considers bitcoin "funds" or "property" which a client entrusts to the lawyer. See Rule 1.15. Client "funds" belong in a trust account but client "property" must be safe kept by the lawyer. Since a lawyer cannot deposit bitcoin in a trust account, describing it as "funds" is a problem.

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When a client gives a lawyer bitcoin, it is "property" not actual currency, but Rule 1.15 requires a lawyer to safeguard client property. This means making sure your digital "wallet" is secure and backed up. If the lawyer wants to keep the bitcoin and give the client the equivalent value in cash, those funds must go into the trust account if the bitcoin was payment of an advanced fee. This would require the client's consent and would be subject to the business transaction rule under Rule 1.8(a),

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requiring that the terms of the transaction be fair and reasonable, confirmed in writing and that the client be advised to seek independent counsel before entering into the agreement.

One legal ethicist, the late Professor Ronald D. Rotunda, disagreed with the Nebraska Bar’s Ethics Opinion 17-03 that says the lawyer must convert the cryptocurrency immediately into US currency. See “Bitcoin and the Legal Ethics of Lawyers,” dated November 6, 2017, on *Justia’s Verdict* blog at <https://verdict.justia.com/2017/11/06/bitcoin-legal-ethics-lawyers>. Professor Rotunda correctly explains how bar opinions have allowed that, subject to certain requirements, lawyers may accept from their clients’ stock and tangible property in lieu of cash for payment of legal fees even if the stock or property might fluctuate in value after the lawyer has accepted it. In Rotunda’s view, bitcoin is like gold in the sense that it is worth whatever people are willing to pay for it.

The Nebraska opinion requires that lawyers “mitigate the risk of volatility and possible unconscionable overpayment for services” by not retaining the digital currency and by converting it “into U.S. dollars immediately upon receipt.” To Rotunda, it is a business decision rather than an ethics decision if the client wants to shift the risk of volatility to the lawyer. If a client and lawyer agree to pay the lawyer with stock in lieu of currency and the original value is reasonable at the time the parties contracted, the fact that the stock goes up or down in value does not make the acceptance of the stock unethical. The bar opinions “look back” to the time that payment was accepted to determine whether the payment was “reasonable,” and the lawyer may suffer a loss or a windfall, as the case may be. These bar opinions do not require that the lawyer sell the stock immediately to convert it to cash. In some initial public offerings, there may be “blackout periods” in which the lawyer is prohibited from selling the stock. That the bitcoin might drastically drop in value, resulting in the lawyer being underpaid, is not an ethics issue either, according to Rotunda. Lawyers are educated adults and can make the call to sell or keep the bitcoin and accept that risk.

Rotunda may have a point if the client pays the lawyer in bitcoin for past legal services. In that case, the lawyer has earned the fee and the bitcoin becomes the property of the

lawyer. The lawyer can accept risk with respect to his or her own property. That the bitcoin cannot be deposited into a bank account is not an ethics issue if the bitcoin is payment toward an earned fee. Even if the client paid the fee in cash, a lawyer cannot deposit an earned fee in a trust account because that would be commingling. The ethics rules do not require the lawyer to deposit an earned fee in an operating account either. The lawyer could deposit the cash directly into a personal checking account.

If the client gives the lawyer bitcoin as an “advance fee,” however, there are some problems. Rule 1.15 requires that a lawyer safe keep property that the client has entrusted to the lawyer. An “advanced fee” is property of the client until the lawyer has earned it, per Legal Ethics Opinion 1606. If bitcoin plummets dramatically in value, and the client discharges the lawyer before the work is completed, the lawyer will not have kept safe sufficient funds or property to make a refund of the unearned fee as required by Rule 1.16(d); or, if the lawyer accepts bitcoin in settlement of a client’s claim, and the bitcoin loses value, the lawyer is unable to pay the client or to discharge third-party liens as required by Rule 1.15(b). The lawyer may discharge these obligations with other funds or property, but in doing so the lawyer would be making payments “out of trust” and not in compliance with the rules.

Another problem arises out of the fact that the bar’s regulation of trust accounts and recordkeeping has not kept pace with technology and does not contemplate cryptocurrency. Lawyers are required to keep records of trust account transactions that are auditable and verified through an approved financial institution’s records and statements. No regulatory bar is currently equipped to audit Bitcoin transactions and storage.

The future

Unless some serious security measures are built into Bitcoin, we wouldn’t recommend that you invest any serious wealth with the virtual currency. Certainly, some virtual currencies are better protected than others, but you still might want to think long and hard about accepting Bitcoin or other cryptocurrency as lawyers. The bulk of people we know regard bitcoins as “shady money” and they may well regard lawyers accepting bitcoins as “shady lawyers.” Will Bitcoin be legitimized one day in the eyes of average Joes and Janes? Maybe — but not soon.



Jim McCauley is the ethics counsel for the Virginia State Bar where he has been employed for almost 29 years, and teaches Professional Responsibility at the T.C. Williams School of Law in Richmond, Virginia.



Sharon D. Nelson is the president of Sensei Enterprises Inc., a legal technology, cybersecurity, and digital forensics firm based in Fairfax. (703) 359-0700 www.senseient.com.



John W. Simek is vice president of Sensei Enterprises Inc., a legal technology, cybersecurity, and digital forensics firm based in Fairfax. (703) 359-0700 www.senseient.com.