

Today's Guide for Practicing Attorneys: Accepting Cryptocurrency for Attorney's Fees

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Introduction

SAM IS AN ATTORNEY at a midsize firm in San Francisco, California. A potential client, Mr. X, meets with her to hire an attorney who will help him get his business started, a business accelerator and crowdfunding platform that will help finance early-stage startups by using cryptocurrency and blockchain technology. Bitcoin, like other “cryptocurrency,”¹ is leading the change in the startup business community. Mr. X was an early adopter, initially investing millions of dollars in Bitcoins in June 2011, when they were worth \$15.59 each.² Today, a Bitcoin is worth \$ 5,267.14. Mr. X's wealth is tied to cryptocurrencies and he wants to hire Sam's firm. Mr. X offers to pay five Bitcoins (\$30,752.15) per month for an indefinite period of time. The senior partner James is ecstatic and wants to go for it. Sam offers to conduct extensive research to ensure there are no conflicts or potential violations of an attorney's professional responsibilities. James contends that he saw no issues with accepting Mr. X's cryptocurrency and argues that two consenting adults are free to contract and decide on the form of payment. Sam sits idly, and utters the words, “reasonableness of fees under American Bar Association's Model

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1. For the purpose of this paper, the term “Bitcoin” refers to a type of “cryptocurrencies,” which may be used interchangeably throughout this paper, and will be used to describe all digital or virtual currencies such as Ethereum, ZCash, Ripple, Cardano, Litecoin, Stellar, Neo, Monero, and Tron to name a few. Cryptocurrencies are associated with the internet that uses cryptography, the process of converting legible information into an almost uncrackable code, to track purchases and transfers that are entered into a Digital Ledger Technology (DLT).

2. Complete Bitcoin Price History Chart + Related Events (2009 - 2018), 99BITCOINS, <https://99bitcoins.com/price-chart-history/>, (last visited March 21, 2019) [<https://perma.cc/4V32-5KG4>].

Rules of Professional Conduct (“Model Rule”) 1.5.” James pauses and asks for a memo.

This article discusses Model Rule 1.5 and the various concerns associated with accepting cryptocurrencies as a form of payment.

I. Background on Cryptocurrency

Cryptocurrencies are strictly electronic and utilize cryptography to secure transactions.³ Bitcoin was the first globally accepted and successful cryptocurrency.⁴ It was developed and published in 2008 under the pseudonym of Satoshi Nakamoto.⁵ Bitcoin was designed to overcome various issues of centralization and vulnerability to government regulation.⁶ Nakamoto’s invention addressed the issue related to transferring money online and the need for a trusted third-party intermediary, such as a credit card processor or PayPal, and to prevent double spending, or alteration to the transaction.⁷ This solution lies within the blockchain, which creates a decentralized peer-to-peer payment network (“network”).⁸ A cryptocurrency depends on this network of participants to maintain a huge database of valid cryptocurrency that are used to verify transactions.⁹ Generally, a blockchain is “an incorruptible digital ledger of economic transactions that can be programmed to record not just financial transactions but virtually everything of value.”¹⁰ This system ensures a transaction cannot be spent twice nor the

3. Joseph W. Guzzetta, *How Bitcoin Works: A Technological Description Of Blockchain-Based Cryptocurrencies For Non-Technical Lawyers*, 59 ORANGE CTY. LAW. (Oct. 3, 2017), <http://www.severson.com/guzetta-jw-october-2017-bitcoin-works-technological-description-blockchain> [https://perma.cc/EDP2-6C6E].

4. Sarah Jane Hughes & Stephen T. Middlebrook, ADVANCING A FRAMEWORK FOR REGULATING CRYPTOCURRENCY PAYMENTS INTERMEDIARIES, 32 YALE J. ON REG. 495, 537 (2015).

5. Kevin Werbach & Nicolas Cornell, CONTRACTS EX MACHINA, 67 DUKE L.J. 313, 324 (2017).

6. Hughes & Middlebrook, *supra* note 4.

7. Jerry Brito & Andrea Castillo, *Bitcoin: A Primer for Policymakers*, RESEARCH GATE, Aug. 2013, at 4-13, https://www.researchgate.net/profile/Andrea_Castillo11/publication/269707314_Bitcoin_A_Primer_for_Policymakers/links/54944a280cf20c4f741ecfd1/Bitcoin-A-Primer-for-Policymakers.pdf?origin=publication_detail [https://perma.cc/6ZZY-7YM5].

8. *Id.*

9. *European Central Bank, Virtual Currency Schemes* 23-24 (2012), available at EUROPEAN CENTRAL BANK, <http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf> [https://perma.cc/4LCN-93SW].

10. Don Tapscott, *SXSW Preview: What's the Next Generation Internet? Surprise: It's All About the Blockchain!*, LINKEDIN (Mar. 12, 2015), <https://www.linkedin.com/pulse/whats-next-generation-internet-surprise-its-all-don-tapscott> [http://perma.cc/3EX3-8TWW].

balances retroactively altered.¹¹

Since its inception in 2008, cryptocurrencies have revolutionized our thinking of currencies. They are not controlled by a centralized authority, like a bank, rather, they rely on cryptographic technology to facilitate accounting and recordkeeping (the blockchain).¹² Cryptocurrencies are not “held” anywhere—there is no cryptocurrency or Bitcoin “wallet,” instead, you download an app on your mobile device. You then can buy, hold, or sell by exchanging your fiat currency for a cryptocurrency.¹³ Cryptocurrency balances are kept in a public key and a private key, which are a long string of numbers and letters linked through the mathematical encryption algorithm used to create them.¹⁴ A cryptocurrency is just a chain of digital signatures which, when decoded, provides an entire transactional ledger.¹⁵

II. Unique Cryptocurrency Characteristics Cause Headaches Under the Model Rules

As early as 2013, a number of big law firms began accepting Bitcoin as a form of payment.¹⁶ This trend is expected to continue as attorneys try to attract clients by accepting cryptocurrencies for payment. In doing so, an attorney should not violate Model Rule 1.5. Specifically, an attorney should not charge her clients unreasonable fees.

Pursuant to Model Rule 1.5 (a), “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”¹⁷ Model Rule 1.5 also specifies several factors to consider in determining whether attorney’s fees are reasonable. Relevant factors will be

11. Derek A. Dion, Note, *I’LL GLADLY TRADE YOU TWO BITS ON TUESDAY FOR A BYTE TODAY: BITCOIN, REGULATING FRAUD IN THE E-ECONOMY OF HACKER-CASH*, 2013 U. ILL. J.L. TECH. & POL’Y 165, 168 (2013).

12. Beth Noveck & Victória Alsina, *MORE THAN A COIN: THE RISE OF CIVIC CRYPTOCURRENCY*, FORBES (Mar. 27, 2018), <https://www.forbes.com/sites/bethsimonenoveck/2018/03/27/more-than-a-coin-the-rise-of-civic-cryptocurrency/#2cb386c36b68> [http://perma.cc/J45V-BRVD].

13. Mark Edwin Burge, *APPLE PAY, BITCOIN, AND CONSUMERS: THE ABCS OF FUTURE PUBLIC PAYMENTS LAW*, 67 HASTINGS L.J. 1493, 1524 (2016).

14. Ryan Surujnath, *Off the Chain! A Guide to Blockchain Derivatives Markets and the Implications on Systemic Risk*, 22 FORDHAM J. CORP. & FIN. I. 257, 266 (2017).

15. Bryce Suzuki, Todd Taylor & Gary Marchant, *Feature: Breathe: Blockchain: How It Will Change Your Legal Practice*, 54 AZ ATTORNEY 12, 15 (Feb. 2018).

16. Sarah Mui, *Do You Or Your Law Firm Accept Bitcoin Or Other Cryptocurrency For Payment?*, ABA J., http://www.abajournal.com/news/article/do_you_or_your_law_firm_accept_bitcoin_or_other_cryptocurrency_for_payment (Jan. 31, 2018, 1:00 PM) [https://perma.cc/DE3A-2M5R].

17. Model Code of Prof’l Conduct r. 1.5 cmt. 9, (Am. Bar Ass’n. 2018) https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/ [http://perma.cc/ZGR6-26GY].

discussed as they relate to the use of cryptocurrencies.

A. The Value of Cryptocurrency is Highly Volatile

The volatility of a cryptocurrency's value is a concern when accepting cryptocurrency for attorney's fees because the client often will overpay (or underpay) for their legal services. According to Model Rule 1.5, attorney's fees should be reasonable. The issue on reasonableness of fees is realized when the value of payment shifts dramatically in favor of the attorney. For example, Mr. X pays his attorney one cryptocurrency on September 30, 2018, valued at \$6,624.79, three days later, the price decreases to \$6,485.92. Here, the attorney's work could be comparable to the market price. Since it is the value the client implicitly agreed to when he made the payment with cryptocurrency—the client does not feel he overpaid.

However, since cryptocurrency's value is volatile—an increase in favor of the attorney may upset the client. For instance, a cryptocurrency could be worth \$5,267.14 today and \$7,785 just a few days later. The increase of \$1,534.00 for the same work and services appears unfair for the client.

First, the volatility of the cryptocurrencies' value is concerning since the value could change dramatically day by day. This volatility issue touches on Model Rule 1.5, subdivision (3), which states that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee [where] [t]he factors to be considered in determining the reasonableness of a fee include... the fee customarily charged in the locality for similar legal services."¹⁸ Specifically, since the value of a cryptocurrency fluctuates dramatically, using its value, when it is high, would be unreasonable when its value is above what is customarily charged by other attorneys in the same locality, for the same type of work and time spent. Moreover, although two consenting adults agree to the form of the payment, neither have a say as to how the value changes. Therefore, the injured party will often be the client because the price of a cryptocurrency tends to go higher more often than not.

Additionally, Model Rule 1.5, subdivision (7), factors the "experience, reputation, and ability of the lawyer or lawyers performing the services"¹⁹ in determining reasonableness of attorney's fee. Here, when this factor is applied to the increased value of cryptocurrency, above the initial value when it was paid by the client to the attorney, it will show that the attorney has been overcompensated for his services. This further supports that the fees were unreasonable because the fee is higher; yet, the skills, experience, and reputation of the attorney did not change.

18. *Id.*

19. *Id.*

Therefore, since the value of a cryptocurrency is highly volatile, a client paying for attorney's fees with cryptocurrency will unreasonably benefit the attorney because its value tends to increase rather than decrease. Thus, accepting cryptocurrency could violate Model Rule 1.5.

B. Many Cryptocurrencies Are Non-Traceable And/Or Anonymous

Another potential issue with accepting cryptocurrency is tracing the source of the payment to ensure that the cryptocurrency did not come from any illicit activity. To avoid this risk an attorney would need to investigate the potential client—this will be an added cost even before taking on the case.

Additionally, a client may have a third party paying her attorney's fees with cryptocurrency. Although this is not prohibited under the Model Rule, the current California Rule of Professional Conduct Rule 3-310(F)²⁰ prohibits an attorney from accepting payment from a third party unless such arrangement would not interfere with the attorney's independence or relationship with her client, the client's confidential information is protected, and the client provides informed written consent.²¹ This further complicates the acceptance of cryptocurrency for legal services, since it would require identifying the source of the payment and ensuring that the payor did not obtain the cryptocurrency through illegal acts. Although it does not violate any Model Rule, it is an additional step an attorney must take to avoid violating a Rule.

C. Cryptocurrencies and the “Wallet”

Cryptocurrencies are kept in “wallets” which are apps in a mobile device and therefore, should be treated and protected like cash. As a result, an attorney accepting this form of payment should take extreme precautions to protect her “wallet,” because once it is lost, you cannot get it back, just like cash.²² Unlike having a centralized institution, like a bank, if one loses his/her wallet, a quick call to the bank or credit card company can freeze any activities, and if fraudulent spending occurs, the victim can get their money back. With cryptocurrencies, there is no bank that will reimburse a lost Bitcoin, nor protect it from hackers.

20. Cal. R. Prof. Conduct 3-310, CALBAR, <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules/Rule-3-310> (last visited Oct. 11, 2018) [<https://perma.cc/67TM-KDXS>].

21. *Id.*

22. Suji, Velu, *How To Keep Your Cryptocurrency Safe: 7 Must Have Wallets*, BLOCKGEEKS, (May 1, 2017), <https://blockgeeks.com/cryptocurrency-safe/> [<https://perma.cc/4CHH-PAVL>].

Conclusion

Despite the cryptocurrency's dark history, their legitimacy as an alternative form of payment have taken center stage these past few years. Many in the financial-technology sector, and startups have embraced this form of currency and cryptocurrencies are increasingly being accepted by big and small law firms across the United States.

In regard to our hypothetical client, James, the senior partner, should not accept Mr. X's offer to pay with cryptocurrency without doing his due diligence.