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DEAR FORUM:

In order to attract new clients in the cryptocurrency space, I raised the prospect of accepting cryptocurrency as payment for legal fees with our firm's management committee. I think that offering clients a cryptocurrency payment option will make us more attractive to some clients that are participating in the growing cryptocurrency marketplace and help present ourselves as a technologically savvy and knowledgeable law firm.

If our firm decides to accept cryptocurrency as payment for legal fees, are there any ethical issues we should be aware of before proceeding? Are there any prohibitions on a firm accepting cryptocurrency payments? Is the payment of cryptocurrency by a client to a law firm for legal services already rendered the equivalent of a wire payment? Are there any specific requirements for holding the client's cryptocurrency in our law firm trust accounts? At some point, could we require a client to pay with cryptocurrency? Are there any other issues concerning cryptocurrency payments that we should consider?

Sincerely,
Al T. Coyne

DEAR AL T. COYNE:

As its popularity continues to grow, an increasing number of law firms have begun to consider accepting cryptocurrency, and particularly bitcoin, as payment for legal fees. Cryptocurrencies are digital assets that are designed to be used, like any currency, as a medium of exchange to purchase goods and services. Unlike traditional government currency, however, cryptocurrencies are not regulated by a central banking system, but instead typically rely on a public ledger that permanently records each and every transaction. As a result, many regard the cryptocurrencies as providing an innovative alternative to traditional currency, and accepting cryptocurrency as legal fees may be an effective way for practitioners and law firms to signal their modernization and technological prowess.

However, it is important to note at the outset that not all cryptocurrencies are created equal. While bitcoin has emerged as the most successful and widely used cryptocurrency, the popularity of this new technology has resulted in the release of hundreds of different others, the vast majority of which are poorly understood and highly illiquid and risky. Therefore, in keeping with most commentators and ethics opinions in this area of the law, this article will primarily focus on ethical concerns relating to bitcoin.

Formal Opinion 2019-5 of the New York City Bar Association Committee (NYCBA) on Professional and Judicial Ethics (the "Committee") tells us that law firms are not prohibited from accepting bitcoin as payment for legal services. *See id.* ("where the client is simply given the option of paying in cryptocurrency . . . the fee arrangement is, in our view, an ordinary one"); accord Neb. Advis. Op. No. 17-03, Sept. 11, 2017 ("[T]here is no per se rule prohibiting payment of earned legal fees with convertible virtual currency since it is a form of property.") Specifically, the Committee has opined that so long as payment by bitcoin is optional to the client, the transaction is "an ordinary one" that is not subject to New York Rule of Professional Conduct 1.8(a), which governs "business transactions" between attorneys and clients and subjects them to higher scrutiny. The Committee reasoned that where payment by bitcoin is optional, "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 different interests." *Id.* Under this scenario, a client's payment by bitcoin for legal services already rendered is arguably no different, ethically speaking, than a foreign client paying their legal bill in foreign currency, or as your question correctly presumes, a wire transfer. *See* Ronald D. Rotunda, Bitcoin and the Legal Ethics of Lawyers, Verdict, Legal Analysis and Commentary from Justia, November 6, 2017 (hereinafter "Rotunda, Bitcoin and the Legal Eth-

ics of Lawyers") ("Why treat bitcoin so differently from other forms of payment? For example, there is no ethics issue if you drafted a simple contract for a foreign visitor and she offered to pay €500 instead of $590 in cash. You can accept the Euros or not. There is always the issue [of] whether the fee is reasonable, but that is not a function of the manner of payment.")

Lawyers who accept bitcoin and other cryptocurrencies for legal fees must also take into account several ethical and other issues. For example, under Rule 1.5 of the New York Rules of Professional Conduct (RPC), an attorney may not charge a client an excessive or illegal fee. RPC 1.5. While this rule applies to all forms of payment, unique considerations arise with cryptocurrency, which has historically experienced "extraordinary price fluctuations." Kevin LaCroix, Why Law Firms Should Never Accept Their Fees in Cryptocurrency, The D&O Diary, June 11, 2018 (hereinafter "Lacroix, The D&O Diary"). By way of example, in August 2017, the cost of one bitcoin was approximately $4,764. One year later in August 2018, that price increased to around $7,013.97, and even further to around $9,487.96 in August 2019. Bitcoin Price Index from August 2017 to August 2019 (in U.S. dollars), Statista (last visited Sept. 11, 2019). Given these significant price fluctuations, "an arrangement for payment in bitcoin for attorney services could mean that the client pays $200 an hour in one month and $500 an hour the next month, which the client could very easily allege as unconscionable. Conversely, if the market value of the digital currency used as a payment quickly fell, the attorney would be underpaid for services." Neb. Advis. Op. No. 17-03, Sept. 11, 2017. To help address this risk and ensure compliance with the RPC, attorneys who accept bitcoin as payment should do so while continuing to measure their fees in U.S. dollars. *See id.;* RPC 1.5.

With respect to your question about holding a client's bitcoin in your law firm's trust account, New York ethics opinions provide little guidance. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019) (declining to address "whether, and how, a lawyer may properly hold cryptocurrency in trust"). Nevertheless, the RPC and relevant commentary provide some insight. First, strictly speaking, an attorney cannot presently hold bitcoin, or any cryptocurrency, in a law firm trust account in accordance with his or her ethical obligations. RPC 1.15 requires such accounts to be held at regulated banking institutions that provide dishonored check reports, such as national and state banks and credit unions. However, these banks currently do not store cryptocurrencies, which is considered more akin to property by both federal regulators and the Committee. *See* Devika Kewalramani & Daniel P. Langley, Two Sides of the Same Coin: Bitcoin and Ethics, New York Law Journal, July 24, 2018 (hereinafter "Kewalramani, Two Sides of the Same Coin") ("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."); NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019) ("In light of [its] complexities, cryptocurrency (despite its name) is presently treated more likely property than currency."). Ethics committees and practitioners from other jurisdictions have noted similar restrictions. *See* Neb. Advis. Op. No. 17-03, Sept. 11, 2017 (opining that "unless converted to U.S. dollars, bitcoins cannot be deposited in a client trust account"); Herrick K. Lidstone, Jr. & Erik K. Schuessler, Accepting Cryptocurrency as Payment for Legal Fees, Ethical and Practical Considerations, Colorado Lawyer, May 2019 (noting that cryptocurrency "cannot be deposited" into client trust accounts in accordance with Colorado Rules of Professional Conduct because "cryptocurrency is considered property, not currency").

Nevertheless, given that bitcoin and other cryptocurrencies are treated as property, New York attorneys are "presumably allowed under the rules to store cryptocurrency in trust," as RPC 1.15 "permits an attorney to hold a client's property in trust as a fiduciary, provided it is not misappropriated or commingled." Kewalramani, Two Sides of the Same Coin; see also Roy Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 158 (2019 ed.) (opining that a lawyer may hold a client's bitcoin in trust); accord Neb. Advis. Op. No. 17-03, Sept. 11, 2017 ("It is permissible to hold bitcoins and other digital currencies in escrow or trust for clients or third parties pursuant to [the Nebraska Code of Professional Conduct.]"). Nevertheless, attorneys should be mindful of the licensing requirements for holding bitcoin in trust on behalf of another. Specifically, 23 N.Y.C.R.R. § 200 (2015) requires that "a person or entity storing, holding, or maintain custody or control of Virtual Currency on behalf of others to obtain a Bitlicense," imposing, in turn, "additional scrutiny involving reporting duty, technology controls, record-keeping requirements." Kewalramani, Two Sides of the Same Coin. While no license is needed for attorneys that merely accept bitcoin as payment for prior legal services, for many practitioners, these additional requirements may tip the scales against holding a client's bitcoin in trust. See 23 N.Y.C.R.R. § 200(c)(2) (2015) (exempting "merchants and consumers that utilize Virtual Currency solely for the purchase or sale of goods or services" from licensing requirement).

More importantly however, while it may be possible and even permissible to hold a client's bitcoin in trust, doing

so is probably not advisable at this time. As some practitioners have noted, the above-mentioned historic volatility in the value of cryptocurrency simply makes it a bad fit with the concept of law firm trust accounts:

> [O]ne issue is that cryptocurrency appreciates in value over time, unlike cash, so lawyers who accept it from clients may decide they don't want to spend or liquidate.
>
> This is not a problem if a lawyer accepts it as payment for a bill. In that case, the firm can do what it wants with it. But if cryptocurrency is accepted as a retainer, which is money that's placed into a trust and is client money until earned by the lawyer, the situation gets trickier. "Cryptocurrency does not fit with the model for trust funds—lawyers should not accept cryptocurrency as trust money," [Matthew] Roskoski, [general counsel of Latham and Watkins] said.

Melissa Heelan Stanzione, Client Cryptocurrency Payments May Pose Ethical Risks for Lawyers, Bloomberg Law, March 11, 2019 (hereinafter "Stanzione, Client Cryptocurrency Payments").

There are, however, some commentators who believe that these concerns are overblown. Professor Roy Simon has observed that "New York lawyers are not required to deposit fees into a trust account unless they have specifically agreed with their clients that they will do so," and that the risk of fluctuating valuations might be less unique than some think. Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 158 (noting that a lawyer who holds bitcoin in trust "is not responsible for [its] appreciation or depreciation . . . any more than a lawyer is responsible for fluctuation in the price of an antique painting or gold jewelry"); see also Rotunda, Bitcoin and the Legal Ethics of Lawyers ("It's a business decision, not a question of legal ethics, if the informed client and the lawyer agree to shift the risk of volatility to the lawyer."). Regardless of the risk that an attorney may assign to holding a client's bitcoin in trust, "a prudent lawyer will explain the risks to the client and will not hold the Bitcoin in a trust account in cryptocurrency form if the client is unwilling to accept the risks of price volatility." Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 158.

In addition, attorneys also should consider whether holding a client's bitcoin in trust is subject to RPC 1.8(a), which addresses business transactions between attorneys and clients and, where applicable, requires that the transaction be fair and reasonable, with material terms explained to the client in a manner that can be reasonably understood, and written advisement to the client regarding the desirability of seeking independent legal advice in connection with the transaction. RPC 1.8(a); see NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019) (to determine whether a transaction is subject to RPC 1.8(a), the attorney should consider whether the transaction is a business transaction over and above the ordinary payment of legal services, whether the lawyer and client have different interests in the transaction, and whether the client expects the lawyer to exercise professional judgment on the client's behalf in the transaction).

Given the multitude of ethical and practical concerns that arise with holding a client's bitcoin in trust, the most prudent course of action is to obtain the client's consent to immediately convert the bitcoin so that it can be held in U.S. dollars.

With respect to your question of whether your law firm could require a client to pay their legal bill with bitcoin, the short answer is yes, but doing so carries additional ethical obligations under the RPC. Specifically, the Committee has opined that where a law firm requires a client to pay in bitcoin, the fee arrangement does become subject to RPC 1.8(a). NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019); RPC 1.8(a). According to the Committee, this heightened scrutiny is appropriate because bitcoin and other cryptocurrencies are "presently treated more like a property than currency," which in turn raises various complexities "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." NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019). The Committee opined that as a result of these complexities, the transaction becomes more akin to a business transaction than the ordinary payment of legal fees. *Id.* It also stressed the increased risk of diverging interests under the circumstances, since an attorney that requires payment by bitcoin might have an incentive "to delay or speed up the representation" depending on its fluctuating market value. *Id.*

As noted above, transactions within the strictures of RPC 1.8(a) must be "fair and reasonable," and the attorney is required to provide written disclosures to the client that describe the material terms of the transaction in a manner than can be reasonably understood and advise as to the desirability of seeking independent legal counsel for the transaction. See Stanzione, Client Cryptocurrency Payments ("1.8(a) is scary because [the] deal has to be 'reasonable' and 'fair'. . . . How should the lawyer judge a reasonable value for cryptocurrency? The lawyer should recite in the agreement what the fairness considerations are like the risks of depreciations, for instance."); Lacroix, The D&O Diary ("Merely pinpointing the appropriate price for a cryptocurrency is challenging . . . Mark-up's and manipulations can thrive.").

These RPC 1.8(a) considerations are diminished, by comparison, where payment by bitcoin is merely optional. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-5 (2019) ("Where the client is simply given the option of paying in cryptocurrency . . . . 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.").

Finally, law firms considering whether to accept bitcoin also should carefully research the tax implications associated with bitcoin transactions, not to mention the technological and recordkeeping infrastructure that each transaction demands. Lacroix, The D&O Diary ("It's not as if a law firm's controller can stroll across the street and convert cryptocurrency to U.S. dollars, record the data in a firm's accounting software, and be back in time for a partnership meeting . . . [T]he law firm must identify a reliable and trustworthy financial institution to safeguard the cryptocurrency (some sort of digital wallet) and convert the cryptocurrency upon demand.").

As you can see, regulators and ethics committees have not yet fully addressed all of the implications of accepting bitcoin as a form of payment for legal fees. Just like many other cutting-edge issues that we as lawyers face every day, in the end it is up to us as professionals to carefully examine the ethical, regulatory, practical, and other risks associated with this new technology in order to ensure full compliance with our obligations.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM:

My firm is advising a client on a large and sensitive commercial transaction. Early one day, at an hour when few people are in the office, I overheard a loudspeaker-phone conversation between Portier (the partner in our firm who is leading this assignment) and Neuergedanke (a well-known personality in the finance field), who had called Portier. Neuergedanke was excitedly describing the outlines of a significant additional idea that he has to enhance the value of the transaction for our client. Portier cut Neuergedanke off and told him to get lost and not to get anywhere near the transaction, the parties or their advisers. I was surprised because Neuergedanke's innovations are known generally to have real value. Then, later that day, I heard Portier casually mention to another of our own lawyers in the firm's cafeteria that he needed to sit down with him to try to reverse-engineer something.

It bothers me that we may not be serving the client's interests as well as we should, and it bothers me that Portier may be taking advantage of Neuergedanke if the reverse-engineering is designed to steal the idea. What duties do I have to the client and to my firm, both as things stand now and if I am asked later to work on this transaction? If I should be speaking up, how do I handle the matter of just how I heard about all this?

Sincerely,
Les Ismore

UPDATE TO AUGUST 2019 FORUM ON VIRTUAL OFFICES

In our August 2019 Forum on "virtual law offices" (VLO), we advised that "[w]e should all be on the lookout for the inevitable changes that we expect will occur as this area of the law continues to evolve" (Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., August 2019, Vol. 91, No. 6). We weren't kidding! Within days of that Forum going to press, the Appellate Division First Department reversed a decision we discussed and held that membership in the NYCBA's VLO program may satisfy the physical presence requirement for a law office under Judiciary Law § 470, but only if the attorney takes advantage of the program's services. *Marina Dist. Dev. Co., LLC v. Toledano,* 174 A.D.3d 431, 432 (1st Dep't 2019). The First Department held that the attorney in that case, however, did not sufficiently use the VLO program's services to meet the Judiciary Law § 470 requirement because there was no evidence that he used the physical New York office space and his letterhead directed replies to his Philadelphia office. *Id.* As always, stay tuned . . .