

MCLE ARTICLE AND SELF-ASSESSMENT TEST

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by LISA MILLER

GETTING PAID IN BITCOIN

Attorneys accepting cryptocurrency as payment should be sensitive to the fact that the regulatory landscape is likely to change in the near future

The Internet is filled with news reporting on digital assets (cryptocurrencies such as Bitcoin, Ethereum, Ripple, and many others). What does this burgeoning market mean for California attorneys considering accepting cryptocurrency as compensation for legal services? California's new ethics rules offer some guidance. Counsel likely may accept payments in the form of cryptocurrency so long as counsel adjusts the law firm's trust accounting procedures to comply with the requirements of the State Bar of California and also track, protect, and manage digital asset deposits and payments.

Digital assets—including cryptocurrencies—are Internet-based intangible assets that can be used to transfer value between and among parties.¹ Digital assets exist solely within digital environments. They are self-contained collections of binary data, composed exclusively of numeric values of zero or one.² "Digital tokens," such as cryptocurrencies, are one example. Cryptocurrency has commercial utility because digital assets are uniquely identifiable (they can be counted and classified) and generally have value attributed to them, which supports use in commercial transactions.

The intrinsic monetary value of cryptocurrency is its immutable entry on a public ledger (the "blockchain").

These fundamental aspects are the primary reason that entities, e.g., law firms and their clients, acquire and hold cryptocurrency. The most recognized cryptocurrency is the digital token known as Bitcoin.

Cryptocurrency uses cryptography (a form of encoding) to authenticate transactions. Cryptocurrency has no generally accepted physical presence, and no central authority administers the currency, thus it is not backed by any government and is not legal tender in any jurisdiction. It also is not issued by or redeemable at most U.S. financial institutions. Cryptocurrency has value only because other individuals agree that it does. The authenticity data of a particular cryptocurrency or transaction involving cryptocurrency exists on the blockchain.

Each owner of cryptocurrency has a unique "public key," which is cryptographically linked to the owner's "private key."³ Private keys are always kept secret, for they are how cryptocurrency transactions are mathematically "signed" and transferred. Tracking these keys is cumbersome, so cryptocurrency owners use software (a "wallet") to manage their public and private keys. These programs exist on personal computers, smartphones, or in the cloud.

Every cryptocurrency transaction is identified by the unique, individual public key and recorded on the

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Cryptocurrency



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blockchain. These transactions generally take a few minutes to complete. Once written to the blockchain, the transaction cannot be reversed.

Although linking a specific public key to an individual or law firm is not easy, it can be done. For this reason, counsel's ethical obligations of confidentiality to the client are implicated.

Counsel likely may ethically accept cryptocurrency as compensation for legal services so long as counsel understands the technology of digital assets and handles the technology proficiently.

Bitcoin Merchant Service Providers

Some attorneys who accept Bitcoin as payment for legal services may want to rely on a Bitcoin merchant service provider (BMSP) to track tax accounting and record-keeping issues.⁴ The BMSP is a third-party business that accepts payments in cryptocurrency and provides dollars (or other recognized currency) to the law firm. If desired, some BMSPs can settle with law firms in cryptocurrencies. The BMSP initiates the cryptocurrency transfer, notifies the law firm when the transaction is complete, and settles with the law firm on a prearranged schedule by electronically transferring funds to the law firm's designated bank account. BMSPs enable clients to pay counsel with cryptocurrency, although neither counsel nor counsel's law firm ever receives or holds cryptocurrency. This reduces the accounting and record-keeping slog associated with the tax authority regulations and State Bar requirements.

Lawyers and law firms, however, must be clear regarding committing to accepting these potential risks and deciding who shoulders the financial risk associated with these Internet intermediaries. These risks should be addressed before deciding to accept payment via cryptocurrency. Similar to other internal costs, counsel who pay vendor fees to enable cryptocurrency payments likely may pass BMSP-related charges to clients, so long as the retainer language is clear.⁵

Before retaining a BMSP, law firms should check the requirements of the U.S. Department of the Treasury Financial Crimes Enforcement Network (FinCEN), which analyzes financial transactions to combat financial crime—including money laundering—and terrorism. Before engaging a BMSP, counsel can check if it is registered with FinCEN, complies with its requirements, and provides a written anti-money laundering policy. Counsel can also determine if the BMSP is licensed as a "money transmitter" in the appropriate

states. Licensed money transmitters are required to post a bond or pledge collateral. With or without a BMSP agreement, counsel must understand the basic technology associated with cryptocurrency and the transfers of these assets.⁶

Safeguarding Blockchain Confidences

California-licensed attorneys are under an overriding duty to protect client confidences, and should feel just as protective of the confidentiality of counsel's own work product.⁷ Financial information, however, is necessarily exposed on the blockchain—this transparency is an attractive and fundamental aspect of cryptocurrency. This aspect of accepting cryptocurrency payments nevertheless highlights the issue of protecting client confidences in the context of the attorney-client relationship.

Public keys facilitate cryptocurrency transfers among online accounts and are visible on the blockchain. When counsel initiates a transaction, a unique public key-private key set is created. These keys are the backbone of cryptocurrency security. Only the account-holder (counsel) knows the private key that authorizes transactions. If counsel loses a private key, the cryptocurrency is lost. Cryptocurrency transactions mutually reveal public online addresses to participants (in a manner similar to bank account numbers).

Once the transaction is approved, funds move to the payee's public address (a hashed version of a payee's public key). This transaction is communicated to the blockchain, where individuals at computers ("distributed nodes") confirm the validity of the transaction, finalize it, and record it on the blockchain. Transactions recorded on the blockchain are viewable on the Internet.⁸

Similarly, if counsel refunds cryptocurrency via the blockchain, the public keys are apparent to all visitors to the blockchain. Amounts of cryptocurrency moving among parties are readily ascertainable, but the names of the parties participating in the transaction and the work performed by counsel are not directly revealed on the blockchain.

Counsel should always examine the privacy protections that the BSMP (if one is in place) uses as part of the cryptocurrency transactions. Counsel should consider what information the BSMP is demanding regarding counsel's client and what practices regarding collecting and disclosing personal information it maintains about counsel's clients. Counsel should closely examine and share with the client the BSMP's privacy practices.

Counsel should include appropriate language in the retainer agreement to

adequately inform clients regarding the processes and risks of transacting business using cryptocurrency. The State Bar of California Standing Committee on Professional Responsibility and Conduct in Formal Opinion No. 2010-179 considered confidentiality and competence when counsel manipulate client data via electronic technology. Counsel must protect at "every peril" clients' confidential information, so the Bar focused on what is reasonable under the circumstances.⁹ Counsel should ensure that communications are secure, outline risks and security measures counsel will be employing, and obtain informed advance written consent regarding particular technology (e.g., e-mail).¹⁰ Language in the retainer agreements of law firms that accept payment for legal services in cryptocurrency should be reasonably complete, accurate, and understandable to a reasonable client regarding the law firm's cryptocurrency payment transactions.¹¹

Retainer agreement language should include disclosures explaining the transaction and, if relevant, the role of the BMSP. Clients should have enough data to understand the law firm's digital transaction processes and the fact that the client might be paying a BMSP, and not the lawyer or the law firm. Counsel may want to notify clients via the retainer that cryptocurrency lacks the consumer protections that clients might ordinarily expect. Law firms can review the federal government's Consumer Financial Protection Bureau's advisory regarding virtual currency to guide their disclosures.¹²

Avoiding Unconscionable Fees

Counsel may accept payment for legal services via cryptocurrency so long as the fee the client pays is not unconscionable or otherwise improper. An unconscionable fee is one that is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience."¹³

As of November 1, 2018, new ethics Rule 1.5 (Fees for Legal Services), generally succeeding former Rule 4-200, states:

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee. (b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.¹⁴

Fee agreements must be reasonable and written in a way that does not discourage clients from asserting their rights against

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1. Accepting cryptocurrency for legal services is per se unethical because cryptocurrency is not embodied in tangible tokens.
True.
False.
2. Attorneys cannot ethically accept cryptocurrency because commercial transactions involving compensation for legal services must always be completed using currency backed by a government.
True.
False.
3. Cryptocurrency has value only because financial regulators all agree that it does.
True.
False.
4. Cryptocurrency transactions recorded on the blockchain do not implicate counsel's ethical duty to maintain client confidences because transactions on the blockchain are private and confidential.
True.
False.
5. "Private keys," the mechanism by which cryptocurrency transactions are "signed" and completed, necessarily prevent counsel from accidentally revealing client confidences.
True.
False.
6. Cryptocurrency users, including lawyers and their clients, should assume that cryptocurrency transactions are publicly viewable, potentially implicating protecting client confidences.
True.
False.
7. Financial information is exposed on the blockchain, which can implicate counsel's ethical obligation to protect client confidences.
True.
False.
8. It is unethical for counsel's retainer agreement to include clauses addressing issues raised by counsel's acceptance of cryptocurrency as compensation for legal services.
True.
False.
9. Counsel is not ethically prohibited from accepting payment in cryptocurrency for legal services.
True.
False.
10. If counsel and client need to distribute a single bitcoin to get counsel compensated for legal services, client and counsel could, for ethics rules purposes, become co-owners of a valuable asset.
True.
False.
11. Barter as payment for legal services requires that a client use a currency recognized by the U.S. government.
True.
False.
12. Counsel who accept cryptocurrency as compensation for legal services must be able to process refunds for clients.
True.
False.
13. When the cryptocurrency that counsel has accepted as compensation for legal services becomes worthless during the course of the representation, counsel could be in a posture of conflict with the client.
True.
False.
14. Cryptocurrency is easily deposited into traditional client trust accounts.
True.
False.
15. Attorneys who accept property as compensation for legal services must clearly label that client property and maintain it in a "place of safekeeping."
True.
False.
16. If counsel holds client property in trust as compensation for legal services, counsel must keep complete records of each item of property held, including the person on whose behalf the property is held, the date counsel received the property, the date of distribution, and the person to whom distributed.
True.
False.
17. Because cryptocurrency is not recognized as currency by the Internal Revenue Service, it is not taxable.
True.
False.
18. Cryptocurrency markets are subject to such significant regulatory uncertainty that attorneys cannot ethically use it in their practices.
True.
False.
19. Law enforcement sometimes monitors cryptocurrency transactions for illegal activity.
True.
False.
20. The regulatory landscape for digital assets, including guidelines on how lawyers can ethically manage commercial transactions using cryptocurrency, is likely to change in the near future.
True.
False.



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ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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3. True False
4. True False
5. True False
6. True False
7. True False
8. True False
9. True False
10. True False
11. True False
12. True False
13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False

counsel.¹⁵ Counsel must demonstrate the propriety of counsel's fees.¹⁶

The focus of the analysis is comparison of fees charged to value received; the experience, reputation, and ability of the attorney; and the informed consent of the client to the fee.¹⁷ High fees are not synonymous with "unconscionable" fees, but high fees may be "unreasonable."¹⁸

Reasonable Fee

Relevant to the issue of volatility of the value of cryptocurrency, a "reasonable" fee may never exceed the contract rate.¹⁹ As with many contract terms, the relevant exchange rate date is negotiable, but the resulting agreement must not cause an unconscionable or illegal result.²⁰ Counsel may not realize a benefit for failing to comply with the law and allowing a fee greater than the amount the attorney negotiated and expected to receive.

Although a contract amount may be reasonable, the fee may, retrospectively, be found "unreasonable" based on the services performed.²¹ Courts may refuse to enforce these agreements, or the fees may be reduced.²²

Although digital asset markets are known for their value volatility, the issues can be addressed via the ordinary rules of contract, and, if needed, the application of new Rule 1.5.²³ Counsel and client can agree on which day they value the asset, and for how long that valuation applies, as memorialized in their agreement. They can also agree to a range of value for the purposes of construing their agreement.

If the volatility of the asset, at the relevant time, is extreme enough to take the payment terms into the realm of unreasonable or unconscionable fees, traditional ethics rules of analysis can be applied, despite the novel aspects of payment via cryptocurrency. Nothing in the cryptocurrency markets is inherently antithetical to counsel's ethically accepting cryptocurrency as payment, assuming the issues of volatility are addressed ethically in the retainer agreement.

Improper Business Arrangement

Counsel may accept cryptocurrency as compensation for legal services so long as he or she guards against accidentally entering into an improper business arrangement with the client, either by a direct barter arrangement with a client or via a third party expected to receive a portion of the legal fees or joint ownership of a single digital asset that is not easily divisible. Some digital assets—especially cryptocurrency—are highly valued in comparison with dollars and not easily divisible. If

counsel and client need to distribute a single bitcoin, for example, it could be split, resulting in client and counsel as co-owners of a single asset, each owning a fraction, arguably making them functionally partners in a business arrangement.

In situations in which attorney and client jointly own a portion of the same cryptocurrency coin or other digital assets, ethics issues are triggered. The fair value of counsel's legal services may not be the exact value of a single unit of, or even multiple units of, the market value of the digital asset in play. If a client transferred only a fraction of a digital asset in exchange for legal services, counsel would co-own the digital asset with the nonattorney client, possibly implicating the rules against splitting legal services fees with a nonlawyer and entering into a business transaction with a client.²⁴

For example, a single bitcoin has recently been valued at upwards of \$6,500. The reasonable value of counsel's services on the relevant contract date is unlikely to be an exact multiple of \$6,500. If a fraction of a bitcoin is transferred as compensation for counsel's services, counsel likely co-owns that bitcoin with the client. This

could trigger counsel's ownership interest in jointly owned property, which is adverse to a client; this implicates new Rule 1.8.1.

New Rule 5.4 (b) prohibits lawyers from forming partnerships or other business entities with nonlawyers if any of the activities are the practice of law.²⁵ Counsel could become a business partner of a nonlawyer through co-ownership of a valuable asset.

Rule 1.8.1 prohibits counsel from entering into business transactions with clients, or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client.²⁶ Rule 1.8.1, Comment 1, indicates that "other pecuniary interest adverse to a client" occurs when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. The interests of these cryptocurrency co-owners could diverge, setting up a prohibited ethics conflict for counsel. This odd development also raises the issues of counsel's owning part of an asset in contravention to the client's interest, or counsel's entering into a business transaction with the client.

"Barter for services" generally connotes the absence of exchange of traditional cur-

Cryptocurrency and U.S. Banks

Account options are slim (to none) as financial institutions based in the United States currently do not allow cryptocurrency transactions directly through customer bank accounts. Nevertheless, a few of them are making some progress:

- ◆ San Antonio-based United Services Automobile Association (USAA) allows Coinbase users to check their Bitcoin balances through usaa.com and the USAA Mobile App. Although USAA does not maintain physical offices in California, it offers a number of ATMs throughout the state.¹

- ◆ The Goldman Sachs Group, Inc. is a New York-based global investment banking, securities, and investment management firm. Goldman serves individuals, businesses, and governments. The firm maintains offices in Los Angeles and San Francisco, as well as all major global financial centers. In 2018, Goldman announced plans for an Altcoin trading desk. As a prerequisite to offering cryptocurrency-related services, it is currently in the process of developing an institutional-grade cryptocurrency custody product.²

- ◆ Simple Bank (Simple Finance Technology Corp.), with headquarters in Portland, Oregon, refers to itself as The Digital Crypto Bank. Internet-only Simple is a U.S.-based direct, branchless, virtual bank. Simple offers FDIC-insured checking accounts through a partnership with one of the largest banks in Europe. It serves customers via online, telephone, mail, and mobile phone banking, as well as ATMs (the STAR network). Simple plans to offer, in 2019, a worldwide cryptocurrency banking platform powered by blockchain technology, accessible online or via a smartphone app. Simple's cryptocurrency banking program will allow any business to easily trade fiat currency for cryptocurrency, and crypto customers will be able to buy any cryptocurrency on the go.³

¹ Financial Account Management, It's Easy to Use Your Non-USAA Accounts, USAA, https://www.usaa.com/inet/wc/account_management_coinbase_landing?adID=VURL_externalaccounts (last viewed Oct. 23, 2018).

² David Meyer, "Fake News." *Goldman Sachs Denies Report About Its Cryptocurrency Trading Desk That Sent Bitcoin Plunging*, *FORTUNE*, Sept. 7, 2018, available at <http://fortune.com/2018/09/07/bitcoin-goldman-sachs-cryptocurrency-trading-fake-news>.

³ A worldwide banking Platform on a Blockchain Network, Simple Bank, Bitcoin Forum, <https://bitointalk.org/index.php?topic=3563816> (last viewed Oct. 23, 2018).

rency; it is a contract by which parties trade for value and do not pay with money. Bartering is trading goods or services directly for other goods or services, without using money or similar unit of account or medium of exchange.²⁷ Under these circumstances barter contemplates an agreement in which counsel provides legal service and the client provides items of value, not recognized as currency, in place of a fee. This is expected to include cryptocurrency. In the context of attorney and client, bartering agreements are not considered standard commercial transactions, which would be exempt from the requirements of ABA Rule 1.8(a) and, presumably, the new California rule 1.8.1.

ABA Model Rule 1.8(a), equivalent to new California rule 1.8.1, addresses bartering for legal fees as a business transaction with a client. The rule applies a “reasonableness” standard, which means counsel should consider a thorough discussion with the client, including a suggestion that the client seek advice from another lawyer and obtain written client consent.

Generally, California attorneys rendering legal services may not participate in business or financial transactions with clients; standard commercial transactions, separate from legal services, are the exception. Attorney compensation via barter implicates

consideration of whether this type of payment is a “standard commercial transaction” under the *Restatement (Third) of the Law Governing Lawyers*.²⁸ Payment for legal services via barter involves rendering legal services, so it falls outside of the safe harbor of standard commercial transactions.²⁹ Therefore, lawyers and law firms accepting digital assets, instead of a traditional fee in the form of some fiat currency, must comply with Rule 1.8.1.

Considering the prohibitions on counsel’s entering into a business arrangement with clients, based on digital asset barter activity, counsel should discuss with the client and include verbiage in the retainer acknowledging the possible volatility of the asset and ensure that the client had a chance to learn the value range of this volatile digital asset on some realistic basis.

Refunds to Clients via Digital Assets

Counsel may accept digital assets in exchange for legal services so long as he or she has adequate processes in place allowing timely refunds of unearned sums. These provisions should be included in the retainer agreement signed by the client. The terms should address whether refunds to the client are contemplated via traditional fiat currency or via a designated cryptocurrency. If by cryptocurrency counsel should

delineate the date of valuation to address possible volatility in the market between the time the client paid the attorney via digital assets and the date the refund would need to be made, and in what form.

The discussion also should address refundable retainers and return of unearned fees held in the trust account. Issues include how counsel anticipates determining the exchange rate and how counsel discloses this data to the client. Counsel should disclose how the exchange rate applied to the client’s cryptocurrency transaction is calculated and what if any fees are involved. This information should be discussed with the client, be disclosed in writing, and be fair.

Devaluation of Cryptocurrency

Counsel may ethically accept cryptocurrency from clients as legal fees, but counsel must make arrangements to address the possibility that the digital asset may become worthless during the representation. When the digital asset becomes worthless, counsel is in a posture of conflict with the client. In situations in which cryptocurrency could drop precipitously in value, counsel should keep in mind how this could test an advocate’s duties of competence³⁰ and loyalty³¹

When counsel accepts as compensation an item of property, rather than a govern-

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ment-regulated legal currency, counsel shoulders the risk of extreme swings in value. As a result, counsel could eventually be providing legal services for very little compensation. Nevertheless, Rule 1.1 directs that lawyers shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence. This includes the mental and emotional ability necessary for the performance of such service.

If counsel accepts cryptocurrency as compensation, counsel should understand and accept at the start of the representation that significant volatility in value could occur. If the asset's value drops sufficiently, this could create a reluctance by some businesses to expend further resources on the client's behalf. In this type of situation in the representation context, counsel's and clients' interests could diverge. Counsel should be especially sensitive to these potential conflicts in the context of cryptocurrency compensation analyses and client-informed consent. To address these potential ethics challenges, counsel should factor this possibility into the firm's business analysis when deciding whether to accept cryptocurrency. Counsel should provide a clear, documented explanation to clients regarding the possibility of this volatility, with reasonable assurances regarding com-

petence and loyalty. Therefore, counsel should discuss the risks presented by cryptocurrency's price volatility with the client before counsel agrees to accept it as payment for legal representation. If the client seems to be unable to fully grasp the risks associated with cryptocurrency, counsel must educate the client to ensure that the client gives informed consent to the fee arrangement, and this discussion should be memorialized in the retainer.

Trust Accounting Procedures

Counsel may accept payments in cryptocurrency so long as counsel adjusts the law firm's trust accounting procedures to comply with the requirements of the State Bar of California and to track, protect, and manage cryptocurrency deposits and payments. Safekeeping of cryptocurrency presents unique technical challenges that counsel should understand before holding cryptocurrency in trust for clients. New Rule 1.1 requires that counsel must perform legal services with "competence," meaning the learning and skill, and mental, emotional, and physical ability reasonably necessary to render legal services.

In Ethics Opinion 2010-179, the State Bar of California directed that counsel educate themselves about security issues before transmitting or storing confidential

client information. A similar duty can be expected when transmitting or storing client's cryptocurrency.

However, cryptocurrency, as property rather than currency, is not easily deposited into traditional trust accounts. Under Rule 1.15, attorneys must clearly label client property and maintain it in a "place of safekeeping."³² Regarding client property held in trust, counsel must keep a record of: 1) each item of property held, 2) the person on whose behalf the security or property is held, 3) the date of receipt of the security or property, 4) the date of distribution, and 5) the person to whom distributed. Cryptocurrency assets might be memorialized on an external (thumb) drive, for example. Proper safekeeping might include deactivating the "delete" function on this external drive, so no cryptocurrency value could be accidentally deleted off the memory stick. The thumb drive would then need to be labelled, placed in a properly climate-controlled environment, and logged into the same location in which other property is logged. A duplicate drive might also be created, labelled "copy," and maintained in a different location.

Another alternative is for the law firm to establish a separate digital wallet for each client making advance payments via cryptocurrency. To better protect crypto-

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currency client trust accounts, counsel can enable multifactor authentications on the accounts, securely maintain private keys, and regularly back up data.

Tracking for Tax Purposes

While counsel likely may ethically accept cryptocurrency as payment for legal services, counsel also must competently track this income stream for tax payment purposes. Counsel may not fail to pay taxes on the equivalent value of cryptocurrency based on a mistaken belief that these assets are outside of ordinary tax bill calculations.

According to IRS guidance, for federal tax purposes, cryptocurrency is property and not foreign currency. For tax purposes, cryptocurrency should be treated as property, so the general tax principles that apply to property transactions govern the tax treatment of cryptocurrency.

Generally, when counsel acquire property, counsel must record the fair market value of the property (presumably, the value at the time of recordation).³³ This amount is the owner's "basis" in the property. If the asset is later exchanged and the fair market value has increased, the owner has a taxable gain. If the sale price is less than the taxpayer's basis, the taxpayer realizes a loss. Regarding cryptocurrency, if counsel accepts cryptocurrency valued at \$500, then buys a good or service with that same cryptocurrency when the value has increased to \$550, counsel has a \$50 gain.

If counsel accepts numerous cryptocurrencies as part of multiple transactions each month, and the cryptocurrency's value fluctuates during the month that counsel is holding the cryptocurrency, counsel's basis in each individual cryptocurrency will vary, depending on the value at the time of each transaction. Also, when counsel cashes out some cryptocurrency for dollars, counsel will have to decide both how much cryptocurrency to sell and which particular cryptocurrency to cash in. Exchanging a particular cryptocurrency and not another one held by the law firm directly affects the size of the taxable gain or reportable loss.

All of the law firm's cryptocurrency must be valued at its "fair market value," according to the IRS, which can be based on prices listed at the online exchanges.³⁴ This does not solve the problem for law firms, however, because prices can fluctuate significantly and daily.

The volume of record-keeping to track the basis in each individual cryptocurrency or part of a cryptocurrency and compute gains and losses makes trade using this type of barter impractical for most law firms. Nevertheless, automated procedures

to calculate exchanges simplify record keeping, and third-party providers who offer these services can help protect lawyers from disadvantageous audit results.

Again, California practitioners likely may ethically accept cryptocurrency as compensation for legal services, so long as they understand and address all the specific ethics concerns raised by cryptocurrency transactions. Areas of special concern include technological competence in understanding cryptocurrency and its transfer, sufficient terms in the retainer agreement regarding cryptocurrency payment transactions, avoiding unconscionable fees, providing refunds (if necessary), protecting confidences, sufficient trust accounting procedures for payments via cryptocurrency, and payment of taxes.

Of special note is the fact that cryptocurrencies are subject to significant regulatory uncertainty. Law enforcement in some jurisdictions study cryptocurrency transactions for signs of possible illegal activity, such as money laundering or sales of contraband. Lawmakers are still working on crafting regulations to govern these assets, so practitioners accepting cryptocurrency as payment should be sensitive to the fact that the regulatory landscape is likely subject to change in the near future. ■

¹ See Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, <https://bitcoin.org/bitcoin.pdf> (last viewed Oct. 23, 2018).

² *Id.*

³ Rich Apodaca, *Six Things Bitcoin Users Should Know about Private Keys*, Bitzuma, <https://bitzuma.com/posts/six-things-bitcoin-users-should-know-about-private-keys> (last viewed Oct. 23, 2018). See also Sudhir Khatwani, *Bitcoin Private Keys: Everything You Need To Know*, Coinsutra, <https://coinsutra.com/bitcoin-private-key/comment-page-1> (last viewed Oct. 23, 2018).

⁴ Stephen T. Middlebrook, *Bitcoin and Other Virtual Currencies in Bankruptcy*, ABA Business Law Section (Apr. 9, 2016), available at https://www.americanbar.org/publications/blt/2014/11/02_middlebrook.html.

⁵ See sample attorney-client fee agreement, available at http://www.calbar.ca.gov/Portals/0/documents/mfa/2015/2015_SampleFeeAgreements2-070115_r.pdf (fee agreement, hourly litigation, par. 6, p. 3), which provides State Bar of California sample retainer language (last viewed Oct. 23, 2018).

⁶ State Bar of Cal., Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. No. 2015-193.

⁷ CAL. R. OF PROF'L CONDUCT R. 1.6 (effective November 1, 2018), available at <https://www.calbar.ca.gov/Portals/0/documents/rules/New-Rules-of-Professional-Conduct-2018.pdf>.

⁸ See, e.g., Latest Blocks, Blockchain, <https://www.blockchain.com/explorer> and Homepage, Etherscan, <https://etherscan.io> (both last viewed Oct. 23, 2018).

⁹ BUS. & PROF. CODE §6068(e)(1); In Re Jordan 12 Cal. 3d 575, 580 (1974).

¹⁰ Los Angeles County Bar Ass'n, Prof'l Responsibility & Ethics Comm., Formal Op. No. 456.

¹¹ See State Bar of California sample fee agreement language regarding e-mail and cloud services, available at <http://www.calbar.ca.gov/Portals/0/documents/mfa>

[/2015/2015_SampleWrittenFeeAgreementInstructions2-070115_r.pdf](http://www.calbar.ca.gov/Portals/0/documents/mfa/2015/2015_SampleWrittenFeeAgreementInstructions2-070115_r.pdf).

¹² Risks to consumers posed by virtual currencies, Consumer Financial Protection Bureau, http://files.consumerfinance.gov/f/201408_cfpb_consumer-advisory_virtual-currencies.pdf (last viewed Oct. 23, 2018).

¹³ Goldstone v. State Bar, 214 Cal. 490 (1931).

¹⁴ CAL. R. OF PROF'L CONDUCT R. 1.5, available at http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.5-Exec_Summary-Redline.pdf (red-line comparison of new Rule 1.5 (effective as of November 1, 2018) vs. former CAL. R. OF PROF'L CONDUCT R. 4-200).

¹⁵ See Ojeda v. Sharp Cabrillo Hosp., 8 Cal. App. 4th 1, 17 (1992); Los Angeles County Bar Ass'n, Prof'l Responsibility & Ethics Comm., Formal Op. No. 489.

¹⁶ Clark v. Millsap, 197 Cal. 765, 785 (1926).

¹⁷ Shaffer v. Superior Ct. (Simms), 33 Cal. App. 4th 993, 1002 (1995).

¹⁸ Aronin v. State Bar of Cal., 52 Cal. 3d 276 (1990).

¹⁹ BUS. & PROF. CODE §§6147-6148. As with many contract terms, the exchange rate measurement date can be the product of negotiation. But the resulting agreement must not work to produce an unconscionable or illegal result. See CIV. CODE §§1635-1663.

²⁰ CIV. CODE §§1635-1663; Hefferman v. Bitton, 882 F. 2d 379, 383-84 (9th Cir. 1989) (the date of sale of property is when the party contracts to sell the property rather than the date of ultimate conveyance).

²¹ People v. Pinedo, 60 Cal. App. 4th 1403, 1406 (1st Dist., 1998) (citing People ex rel. Dept. of Transp. v. Yuki, 31 Cal. App. 4th 1754, 1769-71 (6th Dist., 1995) (quoting former CAL. R. OF PROF'L CONDUCT R. 4-200(B) factors)).

²² Isrin v. Superior Ct., 63 Cal. 2d 153 (1965) (contingent-fee agreements should be construed by application of rules relating to fiduciaries).

²³ Formerly CAL. R. OF PROF'L CONDUCT R. 4-200.

²⁴ New CAL. R. OF PROF'L CONDUCT R. 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client succeeds CAL. R. OF PROF'L CONDUCT R. 3-300 as of November 1, 2018.

²⁵ Effective November 1, 2018, succeeding CAL. R. OF PROF'L CONDUCT R. 1-310, 1-320, and 1-600.

²⁶ See Fletcher v. Davis, 33 Cal. 4th 61, 68 (2004).

²⁷ "Barter," The Free Dictionary, <https://legal-dictionary.thefreedictionary.com/barter> and Barter Law and Legal Definition, USLegal, <https://definitions.uslegal.com/b/barter> (both last viewed Oct. 23, 2018).

²⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §126, cmt. c.

²⁹ *Id.* at §126(a).

³⁰ CAL. R. OF PROF'L CONDUCT R. 1.1, as of November 1, 2018, succeeding CAL. R. OF PROF'L CONDUCT R. 3-110.

³¹ Flatt v. Sup.Ct. (Daniel), 9 Cal. 4th 275, 289 (1994) (attorneys, as fiduciaries, owe a duty of loyalty to their clients).

³² Effective Nov. 1, 2018, succeeding CAL. R. OF PROF'L CONDUCT R. 4-100.

³³ The IRS discusses cryptocurrency in IRS Reminds Taxpayers to Report Virtual Currency Transactions, available at <https://www.irs.gov/newsroom/irs-reminds-taxpayers-to-report-virtual-currency-transactions>, which addresses I.R.S. Notice 2014-21, available at <https://www.irs.gov/pub/irs-drop/n-14-21.pdf> (both last viewed Oct. 23, 2018).

³⁴ When computing gross income, lawyers who accept cryptocurrency must calculate fair market value (in U.S. dollars or another real currency that can be converted into U.S. dollars) as of the date of receipt (I.R.S. Publication 525, Taxable and Nontaxable Income; Notice 2014-21). If the cryptocurrency is exchange-listed, with rates based on market supply and demand, the exchange rate value must be calculated in a reasonable manner, consistently applied (www.irs.gov/pub/irs-drop/n-14-21.pdf).