

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS**  
**NO. 17-03**

**I. Questions Presented**

- A. May an attorney receive digital currencies such as bitcoin as payment for legal services?
- B. May an attorney receive digital currencies from third parties as payment for the benefit of a client's account?
- C. May an attorney hold digital currencies in trust or escrow for clients?

**II. Summary of Opinion**

- A. An attorney may receive and accept digital currencies such as bitcoin as payment for legal services. In order to assure that the fee charged remains reasonable under Neb. Ct. R. Prof. Cond. § 3-501.5(a), which prohibits charging unreasonable fees the attorney should mitigate the risk of volatility and possible unconscionable overpayment for services by (1) notifying the client that the attorney will not retain the digital currency units but instead will convert them into U.S. dollars immediately upon receipt; (2) converting the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) crediting the client's account accordingly at the time of payment.
- B. An attorney may receive digital currencies as payment from third-party payors so long as the payment prevents possible interference with the attorney's independent relationship with the client pursuant to Neb. Ct. R. of Prof. Cond. §3-501.7(a) or the client's confidential information pursuant to Neb. Ct. R. of Prof. Cond. §3-501.6 by implementing basic know-your-client ("KYC") procedures to identify any third-party payor prior to acceptance of payments made with digital currencies.
- C. An attorney may hold bitcoins and other digital currencies in escrow or trust for clients or third parties pursuant to Neb. Ct. R. of Prof. Cond. §3-501.15(a) so long as the attorney holds the units of such currencies separate from the lawyer's property, kept with commercially reasonable safeguards and records are kept by the lawyer of the property so held for five (5) years after termination of the relationship. Because bitcoins are property rather than actual currency, bitcoins cannot be deposited into a client trust account created pursuant to Neb. Ct. R. §§ 3-901 to 3-907 (Trust Fund Requirements for Lawyers).

### **III. Statement of Facts**

Bitcoin and similar computer program protocols are essentially shared ledger books maintained by networked computers. These protocols are often referred to as “digital currencies.” Digital currency that has an equivalent value in real currency, or that acts as a substitute for real currency is referred to as “convertible” virtual currency. Bitcoin is one example of a convertible virtual currency. Bitcoins can be digitally traded between users and can be purchased for, or exchanged into, U.S. dollars, Euros and other real or virtual currencies. Notice 2014-21, 2014 I.R.B. 938 (4/14/14) entitled I.R.S. Virtual Currency Guidance.

Bitcoin exists on a decentralized peer-to-peer network on the Internet. It is “open source”, which means that anyone with the requisite skill can obtain the computer program, review the programming code, evaluate it, use it or create their own version of the software. Bitcoins are stored in a computer file known as a “wallet”. A person sending bitcoins to another person uses a “public key”, a series of letters and numbers comprising the address to where the funds should be sent. The sender then utilizes a “private key”, a code that authorizes the ledger book to make a change that debits the sender's wallet and credits the receiver's wallet.

Bitcoin has an advantage over traditional methods of transmitting value in that there are virtually no fees associated with transfer. Transfers are instant and the shared digital ledger book keeps track of all transactions while also preventing “counterfeiting”.

Bitcoin and protocols using similar transactions are not anonymous. They have often been referred to as pseudonymous because it is possible, although difficult, to trace the identity of someone sending bitcoins on the network.

Bitcoin is used by both legitimate businesses and criminals. Legitimate businesses enjoy the ability to quickly receive “digital cash” that guarantees payment without the risk of chargebacks or credit card fees. Criminals, such as the ones that operated the website known as Silk Road, found that their operations were not entirely anonymous. Law enforcement agencies have been able shut down such sites while also arresting the operators and customers of the sites.

Bitcoin and other digital currencies are subject to extensive regulation in the United States. The U.S. Commodity Futures Trading Commission (CFTC), Department of the Treasury and the IRS consider Bitcoin to be property and subject to capital gains taxes. FinCEN and the Department of the Treasury regulate Bitcoin exchangers and money transmitters through authority granted by the Bank Secrecy Act and other statutes. FinCEN requires money transmitters to be registered and implement know-your-client (KYC) and anti-money laundering (AML) procedures. In addition to the Federal

framework, each state regulates money transmitters. Some states, including the State of New York, recently adapted their money transmitter statutes to provide for this new technology, allowing for the receipt of digital currencies by merchants but requiring regulatory compliance for businesses selling to consumers. Nebraska's Money Transmitter Act at Neb. Rev. Stat. §8-2701, *et. seq.*, as passed in year 2013 arguably regulates money transmitters who use digital currencies. However, no Nebraska court or administrative body has yet publicly ruled as to whether a money transmission license is required to sell digital currencies and transmit them to buyers.

The price of bitcoins has been volatile. It is traded on dozens of various digital currency exchanges throughout the world. The price fluctuated from approximately \$7.00 per bitcoin in January of 2013 to over \$1,200.00 by December of 2013. Bitcoin sometimes fluctuates in value as much as ten percent (10%) per day. The price of a bitcoin has recently increased substantially. As of August 30, 2017, the price of a bitcoin was \$4,627.77. The price of a bitcoin has been measured objectively using the market prices at various exchanges that sell bitcoins. One such organization, Coindesk, publishes a constant Bitcoin Price Index that considers the weighted average price of a bitcoin at exchanges that meet certain objective requirements such as minimum volume of trade. In year 2015, the New York Stock Exchange created the NYSE Bitcoin Index with the listing "NYXBT".

Presently there are a large number of Bitcoin payment processors including Coinbase (San Francisco), Bitpay (Atlanta) and Circle (New York). These services claim to eliminate the volatility risk by maintaining consistent exchange rates based on an objective value presented by various exchanges. Of the most established payment processors, Coinbase is licensed by the Nebraska Department of Banking and Finance as a money transmitter under Nebraska's Money Transmitter Act.

A growing number of law firms in other jurisdictions accept bitcoins as payment for services, although it is unknown if they undertook any effort to determine whether such policy is allowed through their respective Bar Associations' Codes of Conduct.

#### **IV. Applicable Rules of Professional Conduct**

##### **A. § 3-501.5(a), (b). Fees.**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

**B. § 3-501.6. Confidentiality of information.**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

(c) The relationship between a member of the Nebraska State Bar Association Committee on the Nebraska Lawyers Assistance Program or an employee of the Nebraska Lawyers Assistance

Program and a lawyer who seeks or receives assistance through that committee or that program shall be the same as that of lawyer and client for the purposes of the application of Rule 1.6.

**C. § 3-501.7. Conflict of interest; current clients.**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

**D. § 3-501.8. Conflict of interest; current clients; specific rules.**

(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:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and 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.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

**E. § 3-501.15. Safekeeping property.**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

## **V. Discussion**

### **A. Receiving Payments in Digital Currencies as Payment for Services.**

Comment 4 of the Neb. Ct. R. Prof. Cond. § 3-501 expressly allows accepting property in payment of services. Therefore, there is no *per se* rule prohibiting payment of earned legal fees with convertible virtual currency since it is a form of property. However, Nebraska attorneys must be careful to see that this property they accept as payment is not contraband, does not reveal client secrets, and is not used in a money-laundering or tax avoidance scheme; because convertible virtual currencies can be associated with such mischief.

According to Neb. Ct. R. of Prof. Cond. §3-501.5(a), there is a prohibition on unreasonable fees. The values of bitcoins and other digital currencies often fluctuate dramatically. An arrangement for payment in bitcoin for attorney services could mean that the client pays \$200.00 an hour in one month and \$500.00 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 payment quickly fell, the attorney would be underpaid for services.

To mitigate or eliminate the risk of volatility, it is possible to value or convert bitcoins and other digital currencies into U.S. dollars immediately upon receipt. The conversion rate would be market based such as from an exchange or based upon the New York Stock Exchange Price Index, for example. In this way, the bitcoins would serve to credit the client's account and there would be no risk to the client of value fluctuation. As part of this process, a law office would need to disclose to the client that the firm would not be retaining the bitcoins but converting them to cash upon receipt. Through this method, the client is informed that an increase in the value of their bitcoins will not additionally fund their outstanding account. In addition, clients need not be concerned if the value of the bitcoins they sent for payment suddenly dropped.

Such a process should include (1) notifying the client that the attorney will not retain the digital currency units but instead will convert them into U.S. dollars immediately upon receipt; (2) converting the digital currencies into U.S. dollars at objective market rates immediately upon receipt through the use of a payment processor; and (3) crediting the client's account accordingly at the time of payment. Providing the client the notifications described in this opinion can best be accomplished by including the appropriate notifications in the fee agreement between lawyers and client. Under this framework, the client is properly informed, the use of bitcoins as payment would not result in

unconscionable fees to the attorney and the receipt of bitcoins as payment to the attorney would conform to the Nebraska Code of Professional Conduct.

**B. Receiving Payments in Digital Currencies from Third-Party Payers.**

Any time a client arranges for a third party to pay the client's attorney fees the attorney must keep in mind his or her obligations under the Nebraska Code of Professional Conduct. The Code allows an attorney to accept payment from a third party only if the arrangement would not interfere with the attorney's independence or relationship with the client (Neb. Ct. R. of Prof. Cond. §§3-501.7(a), 3-501.8(f)) nor interfere with the client's confidential information (Neb. Ct. R. of Prof. Cond. §3-501.6).

The dilemma faced by an attorney in identifying a third-party payer is that the use of bitcoins is pseudonymous and often close to anonymous. An attorney should comply with the requirements by use of standard Know Your Client ("KYC") procedures when receiving payments from third parties. Most Bitcoin payment processing services require the disclosure of the user's identity. Bitcoin payment processors including Coinbase (San Francisco), Bitpay (Atlanta) and Circle (New York) require the payer to complete a KYC form in order to use their service for payment. In any other situation, the attorney should request sufficient KYC information from the third-party payer prior to acceptance of the digital currency payment.

**C. Receiving and Holding Digital Currencies in Trust or in Escrow.**

It is permissible to hold bitcoins and other digital currencies in escrow or trust for clients or third parties pursuant to Neb. Ct. R. of Prof. Cond. §3-501.15(a). This Rule allows attorneys to store property as well as currency on behalf of a client. The property must be held separate from the lawyer's property, be properly safeguarded and records must be kept by the lawyer of account funds or other property for five (5) years after termination of representation. Bitcoins are treated as property for federal tax purposes.

Due to the volatility in the value of bitcoins and other digital currencies, the client and parties should be advised that the property held in trust or escrow will be held and not converted into U.S. dollars or other currency. Records of that notice and the records of the separate wallet used to store the bitcoins would be maintained by the lawyer. The shared nature of the blockchain allows anyone, including the client or regulators, to verify the amount of bitcoins and any transactions regarding the separate wallet maintained by the attorney.

Due to security concerns, an attorney opting to receive client payments in Bitcoin or storing them on behalf of clients, whether in trust or in escrow, must take reasonable security precautions. There is no bank or FDIC insurance to reimburse a Bitcoin holder if a hacker steals them. Once lost, bitcoins could be gone forever. Reasonable methods could include encryption of the private key required to send the bitcoins. Another method may include utilization of more than one private key (known as a “multi-signature account” or “multi-sig”) for access to the bitcoins. Other reasonable measures may include maintenance of the wallet in a computer or other storage device that is disconnected from the Internet (also known as “cold storage”), a method that would also allow for off-line storage of one or more private keys.

However, unless converted to U.S. dollars, bitcoins cannot be deposited in a client trust account created pursuant to Neb. Ct. R. §§ 3-901 to 3-907 (Trust Fund Requirements for Lawyers). Thus, if a lawyer receives bitcoins intended to reflect a retainer to be drawn upon when fees are earned in the future, the lawyer must immediately convert the bitcoins into U.S. dollars in accord with section V(A) of this opinion.

Dated: September 11, 2017.