



Ohio Board of Professional Conduct

OPINION 2022-07

Issued August 5, 2022

Lawyer Accepting and Holding Cryptocurrency in Escrow¹

SYLLABUS: A lawyer may accept and hold cryptocurrency in escrow when related to the representation of a client or for a third party through a law-related business. A lawyer must maintain the requisite technological competence and employ appropriate safeguards against property loss when holding cryptocurrency in escrow.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.

¹ This opinion is limited to the receipt of cryptocurrency to be held in escrow by a lawyer and not for the payment of a lawyer's fees.



Ohio Board of Professional Conduct

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APPLICABLE RULES: Prof.Cond.R. 1.1, 1.2, 1.4, 1.15, 5.7

QUESTION PRESENTED:

Whether a lawyer may accept and hold cryptocurrencies in escrow for clients and third parties.

OPINION:

A lawyer maintains an international transactional law practice and frequently holds client or third-party funds in escrow. Many of the lawyer's international clients prefer to use cryptocurrency for business transactions and desire for the lawyer to hold the cryptocurrency in escrow. Because financial institutions do not accept or exchange cryptocurrency, the lawyer is unable to place cryptocurrency in his lawyer's trust account.

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Cryptocurrency is a digital, encrypted, and decentralized medium of exchange with an equivalent value in fiat currency. Cryptocurrency relies on blockchain technology, a type of shared peer-to-peer network that stores data in blocks and tracks of all transactions. Cryptocurrency is stored in an electronic format commonly known as a “wallet.” A person receiving cryptocurrency from another person uses a “public key” that identifies where the currency is to be sent. The sender uses a “private key” that authorizes changes in debits and credits to each party’s wallet. Cryptocurrency transactions are largely unregulated, relatively anonymous, and irreversible. The price of cryptocurrency is extremely volatile and subject to market fluctuation. *See generally*, Neb. Ethics Adv. Op. 17-03 (2017), D.C. Bar Ethics Op. 378 (2020).

Receiving and Holding Digital Currencies in Trust or in Escrow

Lawyers are required to hold the property of clients or third persons separate from the lawyer’s own property. Prof.Cond.R. 1.15(a). Property in the form of monetary funds must be kept in a separate interest-bearing account in an Ohio financial institution and designated as a “client trust account,” “IOLTA account,” or other identifiable fiduciary title. *Id.* However, only monetary funds may be placed in an interest-bearing account. R.C. 4705.09. Cryptocurrency is treated as property and not as monetary funds by the Internal Revenue Service. IRS Notice 2014-21. Unless cryptocurrency is converted into U.S. funds upon receipt by a lawyer, it cannot be deposited in a client trust account.

Because cryptocurrency is treated as property, the Board concludes that it may be held by a lawyer for clients or third persons in connection with a representation or law related business. A lawyer accepting cryptocurrency is required to segregate client or third-party property from their own property, properly identify the property, and maintain a record of when the property was received, the person or entity for whom the property is held, and the date of any distributions. Prof.Cond.R. 1.15(a). The Board recommends that a lawyer maintain separate records that document all exchanges or other dispositions of cryptocurrency and the value of the cryptocurrency at the time of each transfer or disposition. In addition, a lawyer must also “promptly render a full accounting regarding * * * [the] property,” including cryptocurrency held by the lawyer, when requested by a client or third party. Prof.Cond.R. 1.15(d). Records related to the holding of cryptocurrency must be held by the lawyer for seven years after disposition and may be maintained electronically. Prof.Cond.R. 1.15(a); Prof.Cond.R. 1.15, cmt.[1].

Technological Competency

In order to maintain the requisite knowledge and skill required of a lawyer, it is important for the lawyer to keep abreast of the risks associated with the technology used to transfer and hold cryptocurrency in his or her practice. Prof.Cond.R. 1.1, cmt.[8]. Just like other client property, a lawyer storing cryptocurrency in escrow must use reasonable care to minimize the risk of loss to client's or third parties' property. *See* Prof.Cond.R. 1.15,cmt.[1]. More specifically, a lawyer is required to "appropriately safeguard property" in a "suitable place of safekeeping." Prof.Cond.R. 1.15(a). There are several recommended methods to safeguard cryptocurrency held in escrow (*e.g.*, cold storage wallets, encryption and back up of private keys, multi-signature accounts) that should be thoroughly researched and carefully considered by lawyers before accepting cryptocurrency. Additionally, a lawyer should inform clients of the apparent and inherent risks of holding and transferring cryptocurrency and explain the steps the lawyer will undertake to safeguard the client's property. Prof.Cond.R. 1.4(a).

Avoiding Participation in Illegal Activity

Because of the relative anonymity of cryptocurrency transactions, the use of a lawyer's escrow services may be sought after by persons seeking to engage in money laundering or other fraud. In order to prevent unknowingly assisting in illegal activity, a lawyer should require a detailed written escrow agreement that identifies the parties to the transaction (possibly using know-your-customer identity verification methods) as well as the underlying transaction for which the escrow account will be used. *See* Prof.Cond.R. 1.2(d)(1).

Lawyers Holding Cryptocurrency in Escrow in a Law-related Business

Some lawyers may be retained to provide escrow services that are unrelated to the representation of a client such as a paymaster for international transactions. When a lawyer serves only as an escrow agent or paymaster through a business that provides a law-related service, the service is not governed by the Rules of Professional Conduct unless the services provided are not distinct from the lawyer's provision of legal services to the client. Prof.Cond.R. 5.7(a)(1). A lawyer providing a law-related service must take reasonable steps to ensure that the business client is aware that the services provided are

not legal services and that the protections of the client-lawyer relationship are unavailable. Prof.Cond.R. 5.7(a)(2).