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What Web3 Means For Lawyers' Ethical Duties

By **Heidi Frostestad Kuehl**

Evolving technologies are one of the greatest issues of our time and continue to affect legal practice at a rapid rate, exponentially changing the structure of law firms and traditional practice.

Cryptocurrency laws and regulations that are emerging in the European Union and the U.S., and the implications of the metaverse as a forum for legal practice and business, are going to be burgeoning in the next three to five years.[1]

Lawyers have a duty under the American Bar Association's Model Rule of Professional Conduct 1.1, Comment 8, to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." [2] This rule was broadly written to include any future technologies that might be necessary for the innovative practice of law after its adoption. [3]

Certainly, important issues like cybersecurity, artificial intelligence, electronically stored information, e-discovery, and now the new Web3 technologies, including cryptocurrency and metaverse practice, could be encompassed by this rule. As a result, attorneys will need to know the risks and benefits associated with the use of these technologies in a variety of legal settings.

Attorneys will also need to keep abreast of cryptocurrency and other Web3-related laws and regulations in the U.S. and abroad, diligently monitoring legislative and regulatory initiatives that will affect their areas of practice.

As the Web3 landscape becomes more sophisticated with widespread use, the legal profession will have to adapt and become ready to evolve into a more tech-savvy group of professionals with the ability to proactively plan for integration into preexisting practices.

Indeed, some law firms have already opened offices in the metaverse, and other firms are creating separate departments for expanded technological practice for clients who demand Web3 services, such as cryptocurrency and bitcoin use and advice on the future of tech-savvy transactions. [4]

Law firms are beginning to invest in metaverse departments and are hiring those with Web3 skill sets and knowledge of sophisticated legal technology. [5] Law firms are also beginning to accept cryptocurrency as payment for legal fees. [6]

With the burgeoning use of these technologies, lawyers must also have knowledge of the risks, including regulatory structures, related to such technologies. [7] Web3 technologies certainly will have benefits for clients that have embraced the metaverse and cryptocurrency, but attorneys are required to appropriately advise their clients of the benefits and risks of these technologies under Rule 1.1, Comment 8. [8]

The current standards for regulating Web3 are murky, but that will likely change soon. The EU recently passed landmark rules to prevent illegal use of unregistered cryptocurrency as part of anti-money laundering regulation, and the U.S. will surely follow. [9]



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In the U.S., two competing cryptocurrency bills are vying for passage in the current congressional session, including the Digital Commodities Consumer Protection Act, which would shift oversight of digital assets like cryptocurrency from the U.S. Securities and Exchange Commission to the U.S. Commodity Futures Trading Commission, and the Lummis-Gillibrand Responsible Financial Innovation Act, which would leave definitions of digital assets mainly to the courts and the SEC.[10]

Many states also have pending or recently passed regulations to guide the use of cryptocurrency in commerce and business. For example, a bill recently passed in Oklahoma defines virtual currency and regulates the use of cryptocurrency and other technologies throughout the state.[11]

The debate over cryptocurrency legislation in the U.S., especially, has been robust.[12] Current and future state laws, such as those regulating the use of cryptocurrency in legal practice, are sure to have definite impacts on our profession.[13]

The SEC is currently the main enforcement mechanism for cryptocurrency in the United States.[14] There were 19 cryptocurrency-related enforcement actions by the SEC in the first nine months of 2021 alone, and the agency has prosecuted others more recently, including Kim Kardashian, who this month was fined \$1.26 million over cryptocurrency promotions.[15]

The SEC rules provide for registration of cryptocurrency in the U.S., so attorneys must take heed of the risks associated with such currencies and follow the federal and state norms.[16]

The IRS, in coordination with the Office of the Comptroller of Currency and the Financial Crimes Enforcement Network under the umbrella of the U.S. Department of the Treasury, is investigating possible tax evasion schemes and other nefarious conduct connected to the use of cryptocurrencies.[17] The IRS is also calling for stricter standards for reporting cryptocurrency use, including reporting any transfers over \$10,000.[18]

Litigation involving non-fungible tokens and use of an artist's or celebrity's image in an NFT also raises new copyright and right of publicity questions for Web3.[19] Certainly, the use of cryptocurrency in the legal industry for transactions such as bill payments, client investments and payments in the metaverse raises a host of new legal and regulatory questions.[20]

Congress and agencies are sure to refine the laws applicable to Web3 transactions soon, as mentioned above, but current congressional and news commentary reveals a certain amount of risk that is akin to a legal Wild West for cryptocurrencies in the U.S. and abroad.

Metaverse lawyering is still emerging in certain jurisdictions in the United States and will also be sure to expand in the next few years.[21] Attorneys will need to grapple with the current lack of laws and regulations in the metaverse and aid the development of standards in this area of innovative practice.[22] Right now, the metaverse law firm or legal department is more obscure, like cryptocurrency or AI were five years ago in their infancy while intersecting with the law.[23]

More forward-thinking and technologically savvy law firms continue to adapt more quickly to these modern legal trends. This will affect corporate and business law firms first and then other legal departments will have expanding cryptocurrency implications based on litigation and enforcement.

The future may not be completely known in this metaverse realm, but law firms will need to evolve and will need to advance to keep up with these burgeoning areas of technology in business law and practice.

To come full circle, though, the ethical rules and technological competence obligations for lawyers under Rule 1.1, Comment 8, stay the same with broader Web3 scope: Lawyers will still have a duty to understand and stay current with new technologies to appropriately glean the risks and benefits of those technologies as they emerge in the next decade.[24]

It will certainly be more challenging, though, as the very nature of a law firm's corporate or commercial practice will be affected in novel ways by the intersection of law and Web3 technologies.

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[1] See World Economic Forum, Cryptocurrency Regulation is Changing: Here is What you Need to Know, <https://www.weforum.org/agenda/2022/07/cryptocurrency-regulation-global-standard/> (7/20/22) and Cryptocurrency Laws and Regulations by State, Bloomberg Law, <https://pro.bloomberglaw.com/brief/cryptocurrency-laws-and-regulations-by-state/>. See also Sheppard Mullin, Are You Ready for Web3.0 and the Legal Issues it Will Bring? (Feb. 2022), <https://www.sheppardmullin.com/assets/htmldocuments/Web3%20Legal%20Issues%20Article%200222.pdf>.

[2] ABA Model Rules of Professional Conduct, Rule 1.1, Comment 8, https://www.americanbar.org/groups/professional_responsibility/publications/model_rule_s_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/.

[3] See Jamie J. Baker, Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society, 69 S. C. L. REV. 557 (2018) and Heidi Frostestad Kuehl, Technologically Competent: Ethical Practice for 21st Century Lawyering, 10 Case W. Res. J.L. Tech. & Internet 1 (2019).

[4] See, e.g., ALM/Law.com, 4 Reasons Law Firms are Entering the Metaverse, <https://www.law.com/legaltechnews/2022/03/28/4-reasons-law-firms-are-entering-the-metaverse/> (3/28/2022), AboveTheLaw.com, Lawyers are Excited About Practicing in the Metaverse, <https://abovethelaw.com/2022/04/lawyers-are-excited-about-practicing-in-the-metaverse/> (4/14/2022), and Rose Law Firm, First Full-Service Law Firm in the Metaverse, <https://www.roselawgroup.com/areas-of-practice/metaverse/>.

[5] See Mark Minevich, The Metaverse and Web3 Creating Value in the Future Digital Economy, Forbes, <https://www.forbes.com/sites/markminevich/2022/06/17/the-metaverse-and-web3-creating-value-in-the-future-digital-economy/?sh=195c55657785> (6/17/2022) and Medium.com, The Rise of the Web3 Requires a New Kind of Legal

Protection, <https://medium.com/logion/the-rise-of-the-web3-requires-a-new-kind-of-legal-protection-here-comes-the-logion-legal-officer-b1515552225d> (10/28/2021).

[6] See McCauley, Nelson, and Simek, NC State Bar, Is It Ethical for Lawyers to Accept Bitcoins and Other Cryptocurrencies? <https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/is-it-ethical-for-lawyers-to-accept-bitcoins-and-other-cryptocurrencies/> (Nov. 2018). See also Dechert LLP, Cryptocurrency and Blockchain Resources Center, <https://www.dechert.com/knowledge/hot-topic/blockchain-technology-and-cryptocurrencies.html>.

[7] ABA Model Rules of Professional Conduct, Rule 1.1, Comment 8, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/.

[8] Id.

[9] See Council of the EU, Press Release, Agreement Reached on European Crypto-Assets Regulation (MiCA), <https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/digital-finance-agreement-reached-on-european-crypto-assets-regulation-mica/> (6/30/2022), EU Parliament, Press Release, Crypto Assets: New Rules to Stop Illicit Flows in the EU, <https://www.europarl.europa.eu/news/en/press-room/20220324IPR26164/crypto-assets-new-rules-to-stop-illicit-flows-in-the-eu> (3/31/2022), and EU Finalizes Legal Text for Landmark Crypto Regulations Under MiCA, <https://www.coindesk.com/policy/2022/09/21/eu-finalizes-legal-text-for-landmark-crypto-regulations-under-mica/> (9/21/2022). See also U.S. Department of Treasury, Financial Stability Oversight Executive Session, <https://home.treasury.gov/news/press-releases/jy0973> (9/23/2022) and PBS, New Cryptocurrency Legislation Arrives As Industry Shakes, <https://www.pbs.org/newshour/economy/new-cryptocurrency-oversight-legislation-arrives-as-industry-shakes> (8/3/2022).

[10] See Digital Commodities Consumer Protection Act of 2022 (S. 4760), <https://www.congress.gov/bill/117th-congress/senate-bill/4760/text?r=1&s=3> and Lummis-Gillibrand Responsible Financial Innovation Act (S. 4356), <https://www.congress.gov/bill/117th-congress/senate-bill/4356/text>. See also Jones Day, Commentary, Proposed Stabenow-Boozman Bill Falls Short in Bringing Regulatory Certainty to Digital Assets Space (August 2022), <https://www.jonesday.com/en/insights/2022/08/proposed-stabenowboozman-bill-falls-short> and CNBC, Here's What's In Biden Framework to Regulate Crypto (9/16/2022), <https://www.cnbc.com/2022/09/16/heres-whats-in-biden-framework-to-regulate-crypto.html>.

[11] See Global Legal Insights, Blockchain and Cryptocurrency Laws and Regulations 2022, <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa>, and National Conference of State Legislatures, Cryptocurrency 2022 Legislation, <https://www.ncsl.org/research/financial-services-and-commerce/cryptocurrency-2022-legislation.aspx>. See also Oklahoma H.B. 3279, http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20FLR/HFLR/HB3279%20HFLR.PDF, and Oklahoma H.B. 4046, http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/hB/HB4046%20INT.PDF.

[12] See NY Times, Cryptocurrency Chiefs go to Congress for Landmark Hearings, <https://www.nytimes.com/2021/12/08/business/house-financial-services-crypto.html> (12/8/2021) and Pending Cryptocurrency Legislation in the 117th Congress

(2021-2022), <https://www.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%2C%22search%22%3A%22cryptocurrency+%22%2C%22congress%22%3A117%7D>.

[13] See National Conference of State Legislatures, Cryptocurrency 2022 Legislation, <https://www.ncsl.org/research/financial-services-and-commerce/cryptocurrency-2022-legislation.aspx>.

[14] SEC Release, SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit, <https://www.sec.gov/news/press-release/2022-78> (5/3/2022).

[15] See SEC Cryptocurrency Enforcement: Q3 2021 Update, Cornerstone Research, <https://www.cornerstone.com/insights/reports/sec-cryptocurrency-enforcement-q3-2021-update/> (11/3/2021) and Washington Post, Kim Kardashian to Pay \$1.26 Million in SEC Crypto Case, https://www.washingtonpost.com/business/2022/10/03/sec-kardashian-crypto/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most&carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-ln-tr%2F3817fbe%2F633b0963f3d9003c5803cd93%2F59976822ae7e8a2839f627ee%2F31%2F72%2F633b0963f3d9003c5803cd93&wp_cu=c4dbbaaf853b82b5765d72f52a03483a%7C570E7C529F692E93E0530100007F042C (10/3/2022).

[16] Id. See also Gary Gensler, Remarks, SEC.gov <https://www.sec.gov/news/speech/gensler-aspen-security-forum-2021-08-03> (8/3/2021).

[17] See <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa>.

[18] See CNBC, U.S. Treasury Calls for Stricter Compliance with IRS, <https://www.cnbc.com/2021/05/20/us-treasury-calls-for-stricter-cryptocurrency-compliance-with-irs.html> (5/20/2021).

[19] See Bloomberg Law, NFT Litigation Raises Novel Copyright Questions, <https://news.bloomberglaw.com/ip-law/nft-litigation-raises-novel-copyright-questions> (9/27/2022) and CNBC, IRS is probing the dark web to look for cryptocurrency and NFT tax evasion, says IRS commissioner, <https://www.cnbc.com/2021/04/14/irs-is-probing-the-dark-web-to-look-for-cryptocurrency-nft-tax-evasion.html> (4/14/2021).

[20] See Law.com, <https://www.law.com/dailyreportonline/2021/11/22/its-insane-how-lawyers-are-cashing-in-on-the-cryptocurrency-practice-area/> and Ropes and Gray, <https://www.ropesgray.com/en/practices/Cryptocurrency>.

[21] See Law.com, Will the Metaverse Help Young Lawyers Break New Ground, <https://www.law.com/international-edition/2022/06/13/will-the-metaverse-help-young-lawyers-break-new-ground/> (6/13/2022).

[22] See <https://www.forbes.com/sites/martinboyd/2022/05/16/regulating-the-metaverse-can-we-govern-the-ungovernable/?sh=280ba2471961> (5/16/2022) and DLA Piper, Exploring the Metaverse: What Laws Will Apply? <https://www.dlapiper.com/en/us/insights/publications/2022/02/exploring-the-metaverse/> (2/2022).

[23] Id.

[24] ABA Model Rules of Professional Conduct, Rule 1.1, Comment 8, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/.