

DECRYPTING THE ETHICAL IMPLICATIONS OF BLOCKCHAIN TECHNOLOGY

Adopting a few common-sense measures when deploying blockchain and smart contract technology can help avoid the unauthorized practice of law.

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General Omar Bradley said that “[i]f we continue to develop our technology without wisdom or prudence, our servant may prove to be our executioner.” Blockchain and smart contracts represent potentially transcendent technology. As legal professionals, we like to think that attorneys are guardians of prudence and wisdom. But smart contracts are being created now by developers, often without any advice from attorneys.

Is it wise or even legal for developers to draft smart contracts without attorney oversight? It depends. Adopting a few common-sense measures when deploying blockchain and smart contract technology, however, will help us all avoid the executioner’s axe.

Technology: Blockchain and Smart Contracts

A blockchain is a type of distributed ledger technology (DLT). In 2008, a person or persons using the pseudonym Satoshi Nakamoto penned the white paper entitled “Bitcoin: A Peer-to-Peer Electronic Cash System.” The white paper describes both the cryptocurrency bitcoin, as well as the underlying blockchain technology that would prevent double spending. If an in-



dividual has one dollar bill, he can buy a lottery ticket or a coke, but not both. Likewise, by tracking all bitcoin transactions, the Bitcoin blockchain prevents individuals from paying with a particular bitcoin more than once.

A blockchain is essentially a running ledger of all transactions that have occurred across a network, allowing any number of computers to keep identical records. Commentators have analogized blockchain to Google Docs. A document that has been shared on Google Docs can be edited by a number of different individuals and those edits can be seen by everyone with access. Unlike Google Docs, however, blockchains are disintermediated. The Bitcoin blockchain ledger, for

example, is not stored at a central location or maintained by a central authority. Instead, it is maintained on all the computers that run the Bitcoin blockchain software. Blockchains, moreover, offer security benefits because they are distributed across a network, they can only be changed by a consensus of network members.

A smart contract is a computer program that is stored on blockchain that causes digital assets to transfer between parties under certain conditions. To explain the technology, cryptographer Nick Szabo—who coined the term “smart contract”—analogized smart contracts to a vending machine: Vending machines are programmed to transfer ownership of delicious “assets” (i.e.,

candy bars) once a predetermined amount of money is input.

Blockchain, and smart contracts offer many advantages—security, immutability, transparency, and efficiency—and the technologies have captured both developers' and the public's imagination and attention. Blockchain is no longer just a ledger for recording digital currency; it can be used for everything from securities settlement to supply chain management to identity management.

Prudence: Preventing the Unauthorized Practice of Law

ABA Model Rule of Professional Conduct 5.5 restricts the unlicensed practice of law. Like the ABA, various states have criminalized the unauthorized practice of law.

What precisely constitutes the practice of law, however, is murky, in part, because of the difficulty and ambiguity in defining the "practice of law." The ABA, for example, does not define what constitutes the "practice of law," instead leaving that determination to the various state bar associations that regulate the profession.

A number of states employ a variety of tests to define the practice. Under the amorphous traditional practice test, courts decide on a case-by-case basis whether the conduct in question is the type of act normally performed by a lawyer. The professional judgment test requires a court to analyze whether an activity involves the exercise of legal judgment—for example, whether the activity contemplates the legal consequences of an action. Under the incidental services test, activities that are incidental to the work of another profession, such as the drafting of a document for the sale of real estate by a realtor, are not the practice of law. Finally, the laundry list approach utilizes features of the other tests.

Employing these tests, some authorities have determined that a non-attorney preparing a will or

contract, representing a client in court, determining which form pleading to use, or selecting which terms to include in a legal agreement constitute the unauthorized practice of law. Conversely, the following acts have been deemed not to constitute the unauthorized practice of law: (1) completing contracts or agreements that did not involve the exercise of legal discretion; (2) acting as a scrivener by writing verbatim the information provided by a customer on a contract or form; and (3) collecting claims without resort to the courts.

What has emerged are sometimes-conflicting state-by-state sets of statutes, case law, and guidance as to what constitutes the practice of law. Nevertheless, a number of common features pervade across jurisdictions. If, for example, an individual offers advice or guidance as to the proper course of action or demonstrates the exercise of legal judgment that may constitute the practice of law. Moreover, drafting certain types of contracts—contracts for the purchase or lease of real property, options contracts, and insurance policies—has been held to constitute the practice of law. A number of individuals or companies have explored using blockchain and smart contracts to prepare these very same types of agreements.

Interposing Prudence and Legal Wisdom into Smart Contracts

Smart contracts should not be viewed as synonymous with traditional legal contracts. Rather, they are typically simplistic if/then instructions committed to code. Regardless, many smart contracts will alter parties' rights and responsibilities—for example, by transferring ownership of digital assets—and may constitute an enforceable agreement. In addition, selecting what terms to commit to a smart contract may cause one to exercise legal judgment.

As a result, authorities may find that preparing certain smart contracts constitutes the practice of law. Individuals and companies involved in preparing smart contracts, therefore, would be wise to guard against allegations of engaging in or aiding the unauthorized practice of law by employing a number of common sense measures.

First, nothing prevents individuals from drafting their own smart contracts as long as they are representing themselves. The more complicated those smart contracts become, however, the more they will resemble traditional contracts, in which case, consulting an attorney will be wise.

Second, if one retains a third-party developer to draft a smart contract, that individual should consider consulting an attorney, as well. Outside developers can act as scriveners and translate a customer's desires into computer code. These developers, however, should refrain from opining on which agreements customers should commit to smart contracts or the legal effects of their work. If it is unclear whether drafting a smart contract constitutes the practice of law, parties should consult an attorney for clarification and guidance.

Finally, attorneys should become more conversant in the computer coding languages that will be used to draft these instruments. Alternatively, less tech-savvy attorneys can hire or work with coders, much like attorneys retain foreign language translators today. To properly oversee those developers, the attorneys and coders should test the smart contracts to ensure that they perform as expected.

By following these common-sense steps, all involved can ensure that they do not lose their heads by adopting this exciting new technology.

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