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# YOUR ETHICS EXCLUSIVE

CARR MALONEY'S QUARTERLY  
LEGAL ETHICS NEWSLETTER

## TABLE OF CONTENTS

### “Virginia Supreme Court Changes Course on No-Contact Rule”

By Dennis J. Quinn and Corey Zoldan

### Media and News Mentions

Dennis Quinn quoted in Virginia Lawyers Weekly Article “**State Bar Votes to Reduce Assessments, Penalties.**” Dennis discussed Legal Ethics Opinion 1878 which deals with a successor lawyer’s obligations to a client in a contingency case and which was passed by Bar Council at the February meeting.

### Upcoming Events

#### “Common Ethics Issues for Small and Medium Size Firms”

*Presented By: Carr Maloney’s Legal Ethics Counseling  
Practice Group*

#### Virginia CLE’s “10th Annual Legal Malpractice Seminar 2021”

*Presented By:  
Eileen Garczynski, Ames & Gough / McLean  
Dennis Quinn, Carr Maloney / Washington, DC*



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# “Virginia Supreme Court Changes Course on No-Contact Rule”

By Dennis J. Quinn and Corey Zoldan

The Supreme Court of Virginia recently made a significant change to Rule 4.2 of the Rules of Professional Conduct, one year after endorsing the original language of the same rule.

In January of 2020, the Supreme Court adopted Legal Ethics Opinion 1890, which the Virginia State Bar Council approved in October of 2019. LEO 1890 is a compendium opinion summarizing earlier opinions addressing Rule 4.2 of the Rules of Professional Conduct. Rule 4.2, also known as the “no-contact” rule, prohibits lawyers from communicating with represented parties regarding the subject matter of the representation. Virginia’s version of Rule 4.2 differed from the ABA Model version of the rule in Comment 7, as it endorsed the “control test” for attorneys contacting employees whose employers are represented by counsel. Specifically, Section 8 of the LEO stated: “*Ex parte* communications are permitted with employees of a represented organization unless the employee is in the ‘control group’ or is the ‘alter ego’ of the represented organization.” Both the Rule and Comment 7 had been in place since Virginia adopted the Rules of Professional Conduct in 2000.

Four months after adopting LEO 1890, in April of 2020, the Supreme Court vacated its earlier Order approving LEO 1890 without further commentary, and advised the Virginia State Bar that it was willing to reconsider approving the opinion without Section 8 and revising Comment 7 consistent with the ABA commentary. Then on January 6, 2021, the Supreme Court approved the revised Rule and commentary.

The distinction between the two versions of Comment 7 is significant, and all practitioners need to be aware of the change. The control test generally states that a lawyer is permitted to contact employees of an organization represented by counsel as long as that employee was not an officer or someone who could

commit or bind the organization to specific courses of actions or omissions. In other words, a lawyer is permitted to contact a lower-level employee, or even a manager, of a represented organization, but is prohibited from contacting an officer.

Under the new version of Rule 4.2, an attorney is prohibited from contacting “a constituent of an organization who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter, or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.” This group clearly includes more potential employees than the control group test, and greatly restrict a lawyer’s access to employees of a represented employer.

The bottom line for Virginia attorneys is to tread carefully when contacting employees of a potential adversary, as the new rule and commentary further restrict what may have been a permissible conversation under the control group test. The best practice is to go through opposing counsel before attempting contact with any current employee.

For more information about the ethical issues discussed in this article, or for legal ethics counseling, contact Dennis Quinn at 202-310-5519 or [djquinn@carrmaloney.com](mailto:djq@carrmaloney.com).



## Media and News Mentions

### **Dennis Quinn quoted in Virginia Lawyers Weekly Article “State Bar Votes to Reduce Assessments, Penalties.”**

**Dennis discussed Legal Ethics Opinion 1878 which deals with a successor lawyer’s obligations to a client in a contingency case and which was passed by Bar Council at February 2021 meeting.**

To read the full article on Virginia Lawyers Weekly, [please click here.](#)



## Stay Tuned for Announcements on these Upcoming Events

### “Common Ethics Issues for Small and Medium Sized Firms”

Carr Maloney will be hosting its first ever legal ethics seminar titled, “Common Ethics Issues for Small and Medium Sized Firms” presented by Carr Maloney’s Legal Ethics Counseling Practice Group discussing practical advice to help those who attend focus on problem areas that so often lead to complaints. This informational session will cover the following topics:

- What’s a conflict of interest and what isn’t
- Choose your clients wisely
- Non-engagement letters
- The basics of engagement agreements
- Handling a client’s money: the ins and outs of trust accounts

Stay connected for an invite to the event by [signing up for Carr Maloney’s legal ethics alerts and newsletter.](#)

# “Virginia CLE’s 10th Annual Legal Malpractice Seminar 2021”

Date: September 17, 2021, 11:00 AM- 1:00 PM

Credits: 2.0 Ethics Credit Hours

Malpractice suits not only cost firms money, they also rob the firm’s leadership of valuable time they need to spend with clients or to address other management issues. They can also inflict enduring damage to a firm’s reputation. This course is designed to educate attorneys on measures that can be taken to better serve the interests of their clients; and to encourage lawyers to establish and maintain standards in their law practice to meet their responsibilities to their clients. During this 2-hour interactive seminar, Eileen Garczynski and Dennis Quinn will provide both new and experienced practitioners with an overview of the most common legal malpractice claims (and related risks, such as cyber, management, and employment-related claims), and how to avoid them. They will also explain how to avoid the errors that frequently occur and how to respond appropriately to risky situations with a dive deep into the ethical issues associated with these risks. Attendees should be able to come away from this session with ways to reduce risk while also making the firm eligible for favorable Lawyers’ Professional Liability Insurance pricing and coverage.

Topics of discussion will include:

- Update on Legal Malpractice Claim Statistics
- Most likely types of legal malpractice claims arising out of the economic downturn and how to avoid them
- Lateral hires and associate training issues during and Post-Covid
- Identifying potential conflicts of interest among affiliated companies
- Recognizing which clients to take and which to avoid
- Tips for better engagement and disengagement letters
- Protecting client confidences and communications
- Technology and cybersecurity concerns for attorneys working from home
- Lawyer well-being post pandemic

Stay connected for an invite to the event by [signing up for Carr Maloney’s legal ethics alerts and newsletter.](#)