

JULY 2022

YOUR ETHICS EXCLUSIVE

CARR MALONEY'S QUARTERLY
LEGAL ETHICS NEWSLETTER

TABLE OF CONTENTS

Virginia State Bar Actions on Rule Changes and Legal Ethics Opinions

Recently Adopted and Pending Approval

Legal Ethics Opinion 1897:

Replying All to an Email When the Opposing Party
is Copied

Comment by Stephen Rutigliano

Legal Ethics Opinion 1898:

Accepting Cryptocurrency as an Advance Fee for
Legal Services

Comment by Stephen Rutigliano

Legal Ethics Opinion 1899:

Use of Conversion Clause in Flat Fee Agreements

Comment by Stephen Rutigliano

Congratulations to Dennis J. Quinn on his
three years of service as Chair of the Virginia
State Bar's Standing Committee on Legal
Ethics

Upcoming Events: "11th Annual Avoiding
Legal Malpractice Seminar 2022"



DENNIS J. QUINN

Legal Ethics Practice Group Leader

dennis.quinn@carrmaloney.com
(202) 310-5519

CHAIR, VIRGINIA STATE BAR
STANDING COMMITTEE ON LEGAL
ETHICS, 2019- PRESENT

ELECTED MEMBER, VIRGINIA
STATE BAR COUNCIL, 2012- 2020

FACULTY MEMBER, VIRGINIA
STATE BAR HARRY CARRICO
PROFESSIONALISM COURSE, 2012-
2015

MEMBER, VIRGINIA STATE BAR
LEGAL MALPRACTICE INSURANCE
COMMITTEE, 2013- 2016



Actions on Rule Changes and Legal Ethics Opinions

- ▶ [Proposed | Legal Ethics Opinion 1899, Use of Conversion Clause in Flat Fee Agreements. Comments due by June 30, 2022.](#)
- ▶ [Proposed | Amendments to Clients' Protection Fund Rules. Approved by VSB Council.](#)
- ▶ [Proposed | Legal Ethics Opinion 1898, Cryptocurrency. Approved by VSB Council.](#)
- ▶ [Adopted | Paragraph 20. Maintenance of Trust Accounts; Notice of Election Requirements. Amended by the Supreme Court of Virginia March 16, 2022. Effective July 1, 2022.](#)
- ▶ [Proposed | Legal Ethics Opinion 1897, Replying All to an Email When the Opposing Party is Copied. Approved by VSB Council](#)
- ▶ [Adopted | Amendments to Clients' Protection Fund Rules. Approved by Council February 26, 2022.](#)



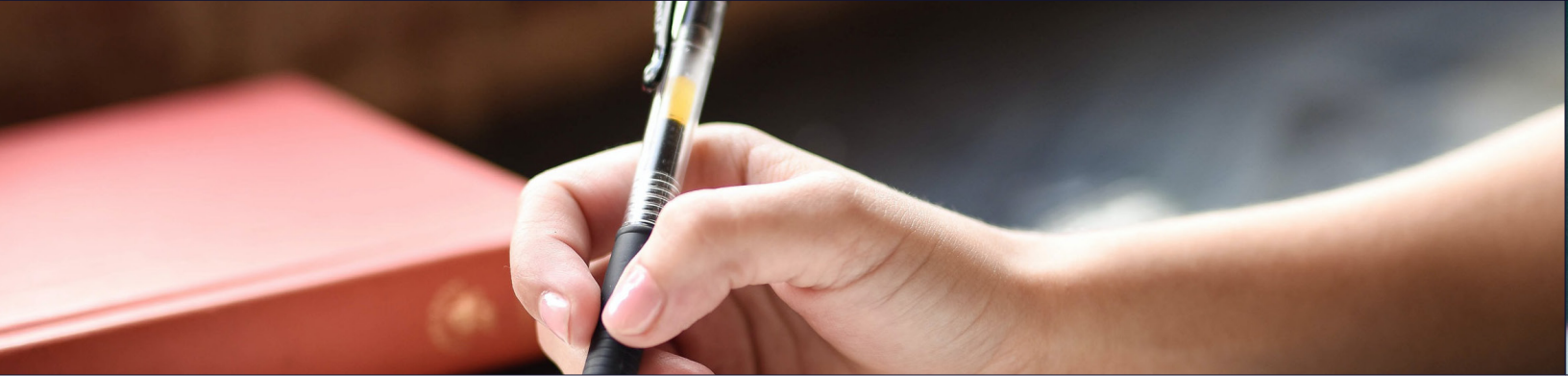
LEGAL ETHICS OPINION 1897 Rule 4.2

Replying All to an Email When the Opposing Party is Copied

BY STEPHEN RUTIGLIANO

The Standing Committee on Legal Ethics determined that an attorney who “replies-all” to an email from opposing counsel where the opposing party is also a recipient of the email does not violate Rule 4.2. Virginia’s Rule 4.2 prohibits communications by a lawyer about the subject matter of their representation with a person the lawyer knows to be represented in the matter unless the other lawyer provides consent. A divide exists between jurisdictions on whether a lawyer, by copying their client on an email, provides consent to communication by opposing counsel. The Committee, while opining that the best practice is for an attorney not to copy his or her client on emails to opposing counsel, concluded that the sending lawyer is giving implied consent to communication by including their client in the “to” or “cc” field of an email addressed to opposing counsel. Thus, replying to all is not a violation of Rule 4.2.

The Virginia State Bar Council approved LEO 1897 on June 16, 2022. It is now pending action by the Supreme Court of Virginia.



LEGAL ETHICS OPINION 1898

Accepting Cryptocurrency as an Advance Fee for Legal Services

BY STEPHEN RUTIGLIANO

The Standing Committee on Legal Ethics was asked to opine on the use of cryptocurrency as payment of legal fees. The Committee concluded that the acceptance of cryptocurrency as an advanced fee or as payment for fees earned is not an ethical violation under Rules 1.5, 1.8, or 1.15. With the increasing popularity of bitcoin and other fiat currencies, more and more businesses are beginning to accept payment via cryptocurrency. Likening cryptocurrency to stocks and other business assets, the Committee concluded that payment of cryptocurrency as an advanced fee constitutes a business transaction subject to Rule 1.8(a). Under Rule 1.8(a), which provides that a lawyer shall not enter into a business transaction with a client or knowingly acquire an interest adverse to a client unless specific requirements are met, namely: 1) the transaction and terms are fair and reasonable to the client and disclosed in writing in a manner the client can reasonably understand; 2) the client is given a reasonable opportunity to seek the advice of independent counsel; and 3) the client consents in writing. The volatility and novelty associated with cryptocurrency present certain risks the lawyer should disclose to their client. Accordingly, the reasonableness of a cryptocurrency transaction is based both on the amount of the fee charged for the legal service and on the adequacy of the lawyer's explanation of these risks. Since lawyers are prohibited from commingling their property and their client's property, a lawyer accepting cryptocurrency as an advanced fee should take reasonable measures to safekeep the crypto from these risks with the care of a professional fiduciary pursuant to Rule 1.15(a). However, lawyers are not required to convert cryptocurrency to US currency or deposit the funds into the lawyer's trust account and may safekeep the client's property in its digital form. Distinguished from an advanced fee, payment of cryptocurrency for fees earned is not a business transaction; therefore, the fee must only be reasonable and adequately explained to the client. See Rule 1.5.

The Virginia State Bar Council approved LEO 1898 on June 16, 2022. It is now pending action by the Supreme Court of Virginia.



LEGAL ETHICS OPINION 1899

Use of Conversion Clause in Flat Fee Agreements

BY STEPHEN RUTIGLIANO

The question presented was whether an alternative fee arrangement in a flat fee agreement when the client prematurely terminates the relationship otherwise comports with the Rules of Professional Conduct. The Standing Committee on Legal Ethics concluded that incorporating a reasonable and adequately explained conversion clause in a flat fee agreement is not an ethics violation. The reasonableness of an alternative fee, as required by Rule 1.5(a), is determined both at the time the agreement is signed and at the time of the lawyer's termination. Moreover, the alternative fee is necessarily capped at the original amount agreed to by the lawyer and client. Generally, in a flat fee agreement context, when a client prematurely terminates a lawyer's representation without cause in breach of the contract, a quantum meruit calculation of the value of the lawyer's services performed is required to determine the amount of the fee earned. See LEO 1606. A conversion clause, or alternative fee arrangement, stipulates the portion of fees the lawyer is entitled to if representation is terminated without cause. In noting a lawyer's duty to adequately explain a fee arrangement to a client under Rule 1.5(b), the Committee concluded that a conversion clause in a flat fee agreement should clarify that it creates an alternate arrangement based on an hourly rate. Alternatively, it is permissible if the conversion clause provides that the attorney earns portions of the flat fee at various points in the representation. Ultimately, the Committee encourages the use of a conversion clause, if reasonable and can be adequately explained, as it provides certainty to the lawyer and client on the fee owed thereby reducing disputes between lawyers and former clients.

LEO 1899 has been submitted for public comment.

Congratulations to Dennis J. Quinn on his 3 years of service as Chair of the Virginia State Bar's Standing Committee on Legal Ethics

The Standing Committee on Legal Ethics meets regularly to consider attorneys' formal requests for advisory opinions seeking guidance on legal ethics and the unauthorized practice of law as well as to analyze and debate proposals to amend the Rules of Professional Conduct and the Unauthorized Practice Rules. The committee adopts proposed advisory opinions or rule amendments for consideration by council and the Supreme Court of Virginia.

Carr Maloney Equity Partner, Dennis J. Quinn served on the Committee for six years and was chair for three. He helped draft numerous LEOs and amendments to the ethics rules and presented them to Bar Council and the Supreme Court of Virginia. Some of these are published in this newsletter. Dennis also serves as Carr Maloney's Legal Ethics Counseling Practice Group Leader.



**CHAIR,
VIRGINIA STATE
BAR'S COMMITTEE
ON LEGAL ETHICS**

2019-2022



UPCOMING EVENTS



11th Annual Avoiding Legal Malpractice Seminar 2022

Malpractice suits not only cost firms money, but 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.

Why attend?

- Examine about the most common causes of legal malpractice claims
- Review about recent disciplinary actions; disbarments; and legal malpractice claim examples and statistics
- Discover ways to avoid malpractice claims
- Understand the ethical issues (and the Rules) associated with a firm's legal malpractice risks
- Be alert to the current cyber, management, and employment risks that exist
- Take advantage of ways to make your firm eligible for favorable pricing and coverage of malpractice insurance

Faculty

- Eileen Garczynski, Ames & Gough / McLean
- Dennis Quinn, Carr Maloney / Washington, DC

Register

Wednesday, September 7, Noon–2:00 p.m. ET

- Live Webcast
- Live Telephone

Monday, October 31, 11:00 a.m.–1:00 p.m. ET

- Telephone with Live Q&A

MCLE Credit: 2.0 (Ethics: 2.0)

Live-Interactive Credit: 2.0

Designation Credit: 2.0 Ethics