VIRGINIA RULES OF PROFESSIONAL CONDUCT 4.2

Communication with Persons Represented by Counsel

- In representing a client, *C*, a lawyer, *L* shall not communicate about the subject of the representation with a person *L* knows to be represented by another *L* in the matter, unless:
  - *L* has the consent of the other *L*, or
  - *L* is authorized by law to do so.

Comment 7 [Adopted from ABA?]

- For organizations, 4.2 prohibits communications with *O* constituent who:
  - Who supervises, directs, or regularly consults with *O's L*
  - Who has power to obligate *O* relating to the matter, *or*
  - Whose act or omission connected to the matter may be imputed for civil and criminal liability.
    - *E.g.*, *Ls* can communicate with non-control group employees/constituents.
- Consent of *O's L* is not required to communicate with a former constituent.
- If *O's* constituent is represented in the matter by his own *L*, consent by that *L* suffices as consent.
  - *Compare* Rule 3.4(h).
- When communicating with *O's* current/former constituent, *L* cannot use evidence-gathering methods that violate *O's* legal rights.
  - *See* Rule 4.4

LEO 1890

- "LEO 1890 generally reaffirmed Virginia's narrow interpretation of Rule 4.2:
  - N/A to former employees of a represented organization,
  - Only restricts *ex parte* communications with a current employee if the employee 'is in the "control group" or is the "alter ego" of the represented organization.'"
    - Two attorneys [William Moffet and Danielle Stone(?)] opposed the Va. State Bar's approval, specifically to the extent it allowed *Ls* to interview any employee of a litigated party without the employer's notice.
- **By vacating LEO 1890**, the Va. S. Ct. may be retreating from the "control group/alter ego view" of Rule 4.2's scope (does that mean a prospective alignment with the Model Rules?)
  - **But—**Comment 7's articulation of that test remains in force.

Petition for the Rule Change found here
One or two pieces about the "saga" of Virginia revision (can't find Part I)

Communication with a represented party

Notwithstanding its brevity and facial clarity, Rule 4.2 has generated extensive analysis, disputes, and differences of opinion as to its proper application. The Rule provides:

> *In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.*

The hypothetical below addresses a common question and implications from the common use of email.

Hypothetical

You represent a client in a highly contested divorce and equitable distribution proceeding. You have been stonewalled in your efforts to engage opposing counsel in settlement discussions; efforts met only by resistance or silence. You conclude, objectively in your view, that opposing counsel is not presenting an accurate picture of the case to his client or discussing with his clients your active efforts to resolve the matter. Your client insists that if her spouse was presented with an appropriate opportunity, a settlement could be reached.

You write counsel an 8-page detailed analysis of all the issues, and close your letter with a very fair settlement offer.

1. Can you copy the opposing party on your settlement correspondence to counsel?
2. Before sending your correspondence, you receive an email from counsel indicating, once again, little desire in settlement. Counsel has cc'd both his client **and** your client on the email. You take your analysis, convert it from a Word document to an email response, intending to include it in a "Reply All" email. Can you include your analysis as a "reply all" email? Has your opposing counsel violated Rule 4.2?

Answer and Analysis

No to question A. An uncooperative opposing counsel or well-founded concern that counsel is not sharing settlement communications does not open the door to efforts at direct communications. See Va. LEO 1323 (addressing in criminal law context a prosecutor's attempt to directly forward a proposed plea); Va. LEO 1890.

You can take some comfort in the fact that opposing counsel has an ethical duty under Rule 1.4 to communicate your offer to his client, and that your own client remains free to communicate with the opposite spouse, unaffected by Rule 4.2. You must take care, however, that you do not use your client as your agent in any communication with the opposing party by "orchestrating," "scripting," or "masterminding" any communications your client has with the opposing spouse. *See,* Rules 4.2 and 8.4(a).

Probably No to question B.

Opposing counsel violated **Rule 4.2** by copying your client on his e-mail to you without your prior consent. That does not "open the door" for you to do the same.

Until recently, there was a *general* consensus that a lawyer including her own client as a copy recipient on an email was not, simply by that act, authorizing a "reply all" response. The reply all was generally seen as an unauthorized direct communication under Rule 4.2. *See* Ill. State Bar Opinion 19-05 (2019); N.C. Bar Formal Ethics Opinion 2012-7(2013). Sending a "reply all" e-mail to opposing counsel's client was seen as the electronic equivalent of copying opposing counsel's client on a letter mailed to opposing counsel. That opposing counsel may have contemporaneous knowledge of your communication with his client is not a substitute for the required "consent" of opposing counsel to the communication. And that advice was generally given by the VSB ethics counsel and offered at CLE presentations.

In 2021, The New Jersey Bar issued an opinion that took an opposite approach. New Jersey opined that email was now an informal communication method, easy to decide who would, and who would not be copied, and opining that when a lawyer includes his or her client as a "copy" recipient, the lawyer is giving implied consent to opposing counsel under Rule 4.2 for a "reply all" response.

In Jan. 2022, the VSB Ethics Committee released a draft LEO (LEO1897) addressing the issue with a stated goal of trying to provide a "bright line" answer to the issue, while trying to respect the purposes and "mischief" underlying Rule 4.2. The draft went out for public comment and remains under consideration.

The hypothetical presents a situation where the use of the opportunity to do a "reply all" could be seen as undermining the purpose of Rule 4.2. Even with implied consent, did counsel go to far in a response so that the implied consent may not be deemed to have been given. Did the reply all response become instead an improper effort at direct communication. The best answer is that the response would be considered improper.

Rule 4.2 is an issue of frequent inquiries and the VSB Standing Committee on Legal Ethics has issued multiple opinions addressing communications with represented persons. A recent compendium opinion was approved by the Virginia Supreme Court addressing multiple points. See LEO 1890, attached as ____. Among the points addressed:

- The rule applies even if the represented party initiates or consents to the communication;
- The rule applies only if the lawyer actually knows that the person is represented by counsel in the same matter;
- Represented parties may communicate directly with each other, but a lawyer may not use the client to circumvent rule 4.2;
- A lawyer may not use an investigator or other third party to communicate directly with a represented party;
- The rule does not apply to communications with former employees of a represented organization;

- The fact that an organization has in-house or general counsel does not prohibit another lawyer from communicating directly with constituents of the organization;
- The inability to communicate with uncooperative opposing counsel or a reasonable belief that opposing counsel has withheld or failed to communicate settlement offers is not a basis for direct communications with a represented adversary.

In approving LEO 1890, the Virginia Supreme Court also issued an amendment to Rule 4.2 and its application in the corporate context. Comment 7, which addressed the use of the control group or *Upjohn* test to determine whether corporate employees fell with the proscription of direct contact, was amended. The comment now sets forth that the Rule prohibits "communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning 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." See 11/18/2019 Order, attached.

Committee Opinion
September 20, 1982

LEGAL ETHICS OPINION 478

CONFLICT OF INTERESTS/ REPRESENTATION OF MULTIPLE CREDITORS.

It is not improper for an attorney to represent several creditors against a single debtor, if, after full disclosure to each creditor, all creditors consent to the multiple representation and concur as to the distribution of any funds collected should the amount be inadequate to pay fully each creditor's claim. [See DR:5-105, EC:5-14 et seq., LE Op. 210, and LE Op. 231.]

Committee Opinion
September 20, 1982

Committee Opinion
October 15, 1984

LEGAL ETHICS OPINION 618 NOTARY/ATTORNEY – NOTARIZING AFFIDAVITS OR SWORN PLEADINGS.

It is improper for an attorney who is qualified as a notary public in Virginia to notarize affidavits or sworn pleadings for a client of the attorney/notary. DR:5-101(B), DR:5-102(A) and LE Op. 382 contain certain prohibitions against accepting or continuing representation when an attorney may become a witness. While there are exceptions to that prohibition, an abundance of caution requires that counsel should not subject himself to the possibility of being called as a witness in regard to an affidavit or sworn pleading notarized by him acting in his capacity as an authorized notary public in Virginia.

Committee Opinion
October 15, 1984

Editor's Note. – L E Op. No. 618 is modified by L E Op. No. 742.

Committee Opinion
April 20, 1990

LEGAL ETHICS OPINION 1340

CONFLICT OF INTERESTS – MULTIPLE REPRESENTATION: REPRESENTING CORPORATION AND EMPLOYEES WHEN CORPORATION WILL BE ASSIGNED A PORTION OF THE EMPLOYEES' RECOVERY.

You have asked the Committee to consider the propriety of representing multiple clients who may have differing interests in a civil suit against a third party when one of the clients has requested an assignment against the other two clients of a portion of the settlement proceeds awarded to each. The assignment would serve as consideration for the one client, Corporation X's, agreement to pay for the other two clients', Employees A and B, criminal legal fees and settlement with third party, Landlord, in order to avoid any criminal prosecution. The following contains a synopsis of the pertinent facts as you have presented them in your inquiry.

An attorney represents Corporation X and its sole stockholder and president. A dispute arose between Corporation X and Landlord regarding the lease for the occupancy of certain demised premises, resulting in Corporation X having to leave the premises. Subsequently, the Landlord filed a suit in circuit court ("Landlord and Tenant Action") and Attorney is retained by Corporation X to represent its interest in the suit. After commencement of the action and while Corporation X was moving out of the premises, Landlord caused two employees, of Corporation X, A and B, to be arrested for trespass and destruction of property. Attorney is likewise retained by the employees to represent them in the criminal matter for which Corporation X agreed to be initially responsible for the payment of the legal fees.

For several months prior to the arrests, Landlord and Corporation X had been engaged in on-going settlement discussions in an effort to resolve their dispute. Following the arrest of the employees, it became apparent that if Corporation X would accept the Landlord's settlement demands requiring Corporation X to pay to Landlord a certain sum, the Landlord would not pursue the criminal charges against the employees and would request that the Commonwealth Attorney's Office *nolle prosequi* the pending criminal charges. Corporation X acquiesced to the offer and the criminal charges against Employees A and B were *nolle prosequi*.

Now Employees A and B have retained Attorney to pursue independent civil claims against Landlord for false arrest, malicious prosecution and abuse of process. In addition, the president of Corporation X has expressed a desire to pursue a separate claim against the Landlord for defamation and slander which action may or may not be filed concomitantly with the employees' claims. Subsequent to the dismissal of the criminal charges, Corporation X also expressed the desire to have an assignment of a portion of any proceeds received by the employees in their contemplated civil action against the Landlord. Employees A and B are not opposed to reaching a reasonable arrangement with Corporation X to assign a portion of any recovery from their civil action against Landlord to Corporation X because of X's earlier agreement to pay A and B's criminal legal fees

and because of X's willingness to settle the "Landlord and Tenant Action" on unfavorable terms in order to avoid criminal prosecution of the employees. Furthermore, one of the employees also owes Corporation X a sum of money for a prior debt.

You wish to know whether the request by Corporation X for an assignment of a portion of the employee's recovery raises a conflict of interest under DR:5-105(B) and, if so, could the conflict be waived if the parties consent after full and adequate disclosure pursuant to DR:5-105(C). Secondly, you would like to know whether such an agreement between Corporation X and Employees A and B assigning a portion of the recovery of A and B's action to X is proper in light of § 8.01-26 of the Code of Virginia which prohibits the assignment of a right of action for personal injury.

The appropriate and controlling disciplinary rules relative to your inquiry are, as you have noted, DR:5-105(B) and (C), and DR:7-101(A). Disciplinary Rule 5-105(B) and (C) provide that a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except that the lawyer may represent multiple clients *if it is obvious that he can adequately represent the interest of each client*. The lawyer must first obtain the clients' consent to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

While you have stated in the inquiry that the clients have potential differing interests since Corporation X would want a greater share of the proceeds and the employees would want to minimize that share as much as possible, you also stated that all have consented to allow the attorney to mediate and negotiate an agreement in which the share would be acceptable to the parties. It would be ethically improper, however, for Attorney to represent Corporation X or Employees A and/or B if a dispute should arise during the course of such mediation. If the attorney can adequately represent the interests of each, and, if he can exercise his independent judgment on behalf of each so that an acceptable assignment agreement between the parties can be reached, this Committee believes that it is ethically permissible to represent the employees in their independent actions and Corporation X who will have a vested interest in any recovery from the civil action. The Committee believes that presumably all parties would desire to recover the most favorable settlement, and it is not obvious, from the facts of the inquiry, that the attorney cannot adequately represent the interest of each once an agreement of the portion assigned to X from each employee is determined.

The Committee directs your attention to LE Op. 894 in which the Committee opined that it is not improper for an attorney to assist in a recovery on behalf of a corporate entity when the entity is adverse to the attorney's client in litigation and has assigned its rights against the individual from whom recovery may be made to attorney's client. This was based on the theory that if the individual was found liable to attorney's client for the monies alleged to have been misappropriated, the client could in turn be found liable to the corporate entity for these same monies. This Committee believes that the potential conflict between the entity and client would have been cured with consent from each after

adequate and full disclosure. Thus, the attorney upon obtaining such consent may adequately represent the interests of each. Obviously, if any circumstances should arise wherein the employees institute an action against Corporation X in this matter, or if the employees offer as a defense any grounds which may be negative to the corporation, such multiple representation would then be improper.

The second issue you have presented concerning the propriety of the attorney assisting in negotiating an agreement between Employees and Corporation X whereby a portion of the recovery from employees' civil claim, if any, would be assigned to X is a legal question. The Committee believes, however, that if Virginia Code § 8.01-26 allows an assignment of the settlement proceeds from a personal injury action, then the Code of Professional Responsibility does not preclude the attorney from exercising those rights under statutory law on behalf of his clients. Disciplinary Rule 7-101(A) provides in part that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.

Therefore, the Committee opines that the instant multiple representation of the Employees and Corporation X in the Employees' civil action against Landlord, where X will be assigned a portion of the recovery, may be permissible if, after obtaining consent from each, the attorney can adequately exercise his independent judgment and represent the interests of each client in negotiating an equitable assignment to Corporation X. The propriety of such an assignment is based solely on whether statutory or case law permits the activity.

Committee Opinion
September 13, 1990

LEGAL ETHICS OPINION 1377

CONFLICT OF INTEREST – MULTIPLE REPRESENTATION: REPRESENTING ONE CO-DEFENDANT AFTER OBTAINING ADVERSE INFORMATION FROM OTHER DEFENDANT.

You have advised that Attorney was retained by the insurer of Trucking Company and its employee, Driver, in an accident case which resulted in a wrongful death suit including a count for negligent entrustment of the vehicle by Trucking Company to Driver. You have indicated that after Attorney filed Grounds of Defense on behalf of both Trucking Company and Driver, the Attorney learned of a number of traffic violations prior to the instant accident which Driver contends she reported to her employer, Trucking Company. However, Trucking Company denied that most of the violations had been reported by Driver. You have stated that Attorney withdrew as counsel for Driver and has continued to represent Trucking Company.

You have asked the Committee to opine as to the propriety of Attorney continuing the representation of Trucking Company in light of his former representation of Driver.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:4-101(B), regarding preservation of client's confidences and secrets, and DR:5-105(D), regarding representation of one client impairing professional judgment on behalf of another client. Disciplinary Rule 4-101(B) provides that, barring the circumstances enumerated in DR:4-101(C) and (D), a lawyer shall not knowingly reveal a confidence or secret of his client; and shall not use a confidence or secret of his client to the disadvantage of the client or his own or a third person's advantage, unless the client consents. Disciplinary Rule 5-105(D) provides that a lawyer shall not represent a new client in a matter that is the same or substantially related matter to that of a former client if the interest of the new client is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

The Committee has previously opined that it is improper for an attorney to continue to represent either Client A or Client B in a matter once they became adverse to each other, and, as such, the attorney must withdraw from representing both clients. (See LE Op. 371.) Prior LE Op. 441 also found that the mere fact that a lawyer had formerly represented a person who is now the adverse party in a suit brought by the lawyer on behalf of another client, did not warrant the lawyer's disqualification on ethical grounds. However, a violation of DR:4-101(B) could result if the lawyer possessed confidential information which he had obtained from his first client.

Since, as you have stated in the facts of the inquiry, the underlying basis of the suit includes a charge of negligent entrustment of the vehicle by client/Trucking Company to former client/Driver, it appears to the Committee that the issue of whether the Trucking Company knew of Driver's prior traffic violations is a central issue to the defense of the wrongful death action against Trucking Company. The Committee believes that given the conflicting interests between the former and current client, the Attorney may not continue the representation of Trucking Company unless he has obtained the informed consent of former client/Driver after full disclosure of the effect on the exercise of his professional

judgment on behalf of the adverse client and provided that the attorney has not gained any information that could be construed to be a confidence or secret from Driver which could result in a violation of DR:4-101(B).

Committee Opinion
September 13, 1990

Committee Opinion
September 1, 1992

LEGAL ETHICS OPINION 1483

TERMINATION OF REPRESENTATION - CONFLICT OF INTEREST – MULTIPLE REPRESENTATION: CONTINUED REPRESENTATION, BASED ON ABILITY TO ADVANCE COSTS AND FEES, OF SOME, BUT NOT ALL, PLAINTIFFS WHO HAVE OBTAINED FOREIGN JUDGMENTS.

You have presented a hypothetical situation in which an attorney represents five plaintiffs. You indicate that, in the same suit in U.S. District Court involving these plaintiffs, the attorney obtained five different judgments, in different amounts, against a U.S. citizen and his wife, a noncitizen. In order to attempt to enforce the judgment against the defendants, who are located in a foreign country, a considerable amount of cost and foreign attorneys' fees must be advanced to the foreign attorneys. You advise that three of the plaintiffs are willing to advance their proportionate shares, based on the amounts of their judgments; one is unwilling to advance any funds; and the fifth plaintiff is unable financially to advance funds.

You have asked the Committee to opine, under the facts of the inquiry, (1) whether it is ethical for the attorney to represent the three paying plaintiffs only, and (2) how to distribute the proceeds, in the event the judgment collected is insufficient to pay all claims.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:2-108(D), which provides that, upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering all papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned; and DR:5-105(A, B, and C) which permits a lawyer to accept or continue multiple employment, where the exercise of his independent professional judgment in behalf of one client will be or is likely to be adversely affected by his representation of another client, only if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of such potential effect.

As to your inquiry whether the attorney may represent only the paying plaintiffs, the Committee believes that a suit to enforce the judgment would begin a new representation, albeit related to the original representation. Since, prior to the representation, no action is before a court to enforce the judgment, leave of court for withdrawal by counsel of record would not be necessary. The Committee has consistently been of the view that nothing contained in the Code of Professional Responsibility requires that an attorney provide representation to all potential clients. See EC:2-28. In the circumstances you hypothesize, the Committee is of the view that the attorney is not obligated to represent the nonpaying plaintiffs. However, the Committee is of the further opinion that the

attorney still has a duty to protect the nonpaying client's interests under DR:2-108(D) and should advise those former clients as to the methods of enforcement of the judgment and any time limitations imposed on such actions.

With respect to the multiple representation of the three creditors, the Committee directs your attention to prior LE Op. 478 which concluded that it is not improper for an attorney to represent several creditors against a single debtor provided that, after full disclosure to each creditor, all creditors consent to the multiple representation and concur as to the distribution of any funds collected should the amount be inadequate to pay fully each creditor's claim.

Committee Opinion
December 14, 1992

LEGAL ETHICS OPINION 1499

CONFLICT OF INTEREST — MULTIPLE REPRESENTATION: CORPORATE ATTORNEY DEFENDING CORPORATION AND SHAREHOLDERS AGAINST SUIT BROUGHT BY SHAREHOLDER/PRESIDENT.

You have presented a hypothetical situation in which Attorney Z is counsel for a Virginia corporation which consists of six shareholders. The attorney represents the corporation in most of its legal affairs and acts as registered agent.

The six shareholders made a written agreement, which includes the corporation as a party, shortly after its incorporation. The agreement covers several areas such as the purchase of stock upon the death of a shareholder. One provision of the shareholder agreement provides that "the shareholders agree that they shall vote their shares and otherwise act so as to provide that the directors of the corporation shall be six in number". The agreement then enumerates the six shareholders as the named six directors.

The agreement then provides "That the officers of the corporation shall be Shareholder X as president and Shareholder Y as vice president and secretary." Shareholder X never had a separate contract for employment as president.

Attorney Z was not counsel for any party at the time the agreement was drawn or for incorporation.

Several years after the agreement, four of the six shareholder/directors who hold 65% of the corporation's outstanding stock, held a board of directors' meeting to replace Shareholder X as president of the corporation. The meeting was properly called and conducted. The four shareholders present held the view that Shareholder X needed to be removed, for cause, due to management conflicts, financial problems and other problems.

Shareholder X may now sue the shareholders in their individual capacities for permitting themselves as directors to remove him as president. If such a suit is brought against the shareholders individually, it may or may not also name the corporation as a defendant.

You have asked the Committee to opine whether, under the facts of the inquiry, Attorney Z may represent the four shareholders, who also constitute the majority of the board of directors that voted Shareholder X out as president, while also representing the corporation.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105, which dictates that a lawyer must refuse to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer; and DR:4-101 which requires a lawyer to preserve the confidences and secrets of a client. Further guidance is available through Ethical Consideration 5-18 [EC:5-18]

which, in pertinent part, exhorts the lawyer to recognize that (1) a lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity, and (2) on occasions when a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity, the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

You state that Attorney Z was not counsel for any party at the time the shareholder agreement was drawn or for incorporation. Assuming that Attorney Z has neither represented Shareholder X nor met with or received confidences as to the corporation or otherwise from Shareholder X, the Committee opines that representation of the corporation and the four shareholders would not be improper under DR:5-105. Thus, under the facts you have presented, which assume that the interests of the shareholders and the corporation are not adverse, it would not be improper for Attorney Z to represent all, even if X files suit and names all as defendants. *See* LE Op. 384, LE Op. 1458.

The Committee cautions, however, that should any potential adversity mature into an actual conflict between the shareholders and the corporation, the dictates of DR:5-105(B) and (C) would require that Attorney Z withdraw from representation of both the shareholders and the corporate entity.

Approved by the Supreme Court of Virginia
April 20, 2022

LEGAL ETHICS OPINION 1894. CONFLICT OF INTEREST: REPRESENTING MULTIPLE INFANT CLAIMANTS BY "NEXT FRIEND."

INTRODUCTION

This opinion addresses the possible conflicts of interest that arise when a lawyer represents multiple children in a tort case against a day care center in which it is alleged that multiple assaults on the children have occurred. When conflicts of interest arise, the principal question is who has the capacity or authority to waive a conflict of interest assuming the conflict of interest is waivable?

HYPOTHETICAL

A lawyer has been approached by the two sets of parents of two unrelated children who they believe were assaulted by an employee at a day care center. The employee has been accused of assaulting multiple children and the lawyer believes that additional parents will likely seek her representation. The lawyer is concerned that the employee and the day care center may not have sufficient assets to adequately compensate all the victims. The lawyer is also concerned that the children, being very young, may have divergent accounts of the employee's actions. The lawyer is concerned that information obtained on behalf of one child might be advantageous to the other child to the detriment of the first. The parents, as likely "next friends," have their own claims for medical expenses and have the same conflict issues as the children.

QUESTIONS

1. Does the lawyer have a conflict of interest when concurrently representing multiple sets of children and their "next friends" against the same tortfeasor?

2. Assuming the answer to Question 1 is "yes," may the conflict of interest be waived, and if so, how?

APPLICABLE RULES AND OPINIONS

RULE 1.7. Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another

client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

RULE 1.8. Conflict of Interest: Prohibited Transactions.

* * *

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

* * *

RULE 1.14. Client With Impairment.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about

> the client, but only to the extent reasonably necessary to protect the client's interests.

Legal Ethics Opinions: 478, 618, 1483, 1725, and 1844.

DISCUSSION

There is at least a potential for conflict of interest between multiple plaintiffs or defendants in litigation, if only because of the possibility of disagreement regarding possible settlement offers. Even if the parties are unlikely to disagree, their circumstances may differ sufficiently that an attorney exercising independent judgment would clearly consider recommending different approaches to settlement and other litigation decisions. If there is a limited pool of money available, there may be a significant risk that the settlement of one of the cases will impact future settlements for other clients of a lawyer even if the settlements of the claims are negotiated separately. On the other hand, Rule 1.7 permits a lawyer to represent multiple parties whose interests are generally aligned, even though subsequent events may require the lawyer's withdrawal.

Built into Question #1 is the assumption that the funds or assets available are not sufficient to compensate fully the claims of all the children's claims against the same tortfeasor. In Legal Ethics Opinion 478 (September 20, 1982) the committee opined that it is not improper for an attorney to represent several creditors against a single debtor, if, after full disclosure to each creditor, all creditors consent to the multiple representation and concur as to the distribution of any funds collected should the amount be inadequate to pay fully each creditor's claim. The committee reaffirmed this opinion in Legal Ethics Opinion 1483 (September 1, 1992). *See also* Legal Ethics Opinion 616 (November 13, 1984).

In this hypothetical it is also possible that the defendant may offer all available proceeds in a lump sum—an aggregate settlement of all of the children's cases. Rule 1.8(g), sometimes called the "aggregate settlement rule" is applicable:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

An aggregate settlement is possible where the defendant has limited funds to settle and it enables the defendant to dispose of multiple cases expediently by avoiding the time and expense of haggling with plaintiffs' counsel over the merits of each individual client's case. This leaves the plaintiffs' counsel with the ethical dilemma of dividing the settlement among the multiple represented clients.

"An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client." *Arthorlee v. Tuboscope Vetco International, Inc.*, 274 S.W. 3d 111, 120 (Tex. App. 2008). Thus, if the lawyer negotiates an individual settlement with the defendant for each represented client, the aggregate settlement rule does not apply. However, the lawyer must still manage the concurrent representation conflict pursuant to the requirements of Rule 1.7. This would require that the lawyer exercise independent professional judgment in the best interests of each client and that the representation of each client is not materially limited by the lawyer's ethical duties to the other clients.

An aggregate settlement may be offered to multiple claimants in a single case or where the claimants have separate claims against the same tortfeasor. But a Rule 1.7 conflict of interest could just as easily occur in separate lawsuits as it could in the same lawsuit. NYC Bar Ethics Op. 2020-3 (October 26, 2020). If settlements are negotiated separately, and there is no explicit or implicit linkage, they do not constitute an aggregate settlement, although the attorney may have disclosure obligations under Rules 1.4 and 1.7 to manage the conflict of interest.

Applying Rule 1.8(g) to the hypothetical in this opinion presents obstacles that the lawyer must surmount. First, each client's case may be different in value, strengths, and weaknesses. Second, it is possible that the clients may have to accept less than what their case is worth. Third, the lawyer cannot advocate in favor of one client against the interests of another client. Fourth, the representation must be transparent with each client's case, with information being shared with the other concurrently represented clients. Finally, all the affected clients must agree to the amount of the settlement and its division. Alternatively, the defendant may propose that the settlement of one child's case is contingent upon settlement of the other children's cases being handled by the same lawyer. This is a form of what some describe as an "interdependent"

settlement, as settlement for each child's case is negotiated separately. Settlements are "interdependent" if: "(1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims; or (2) the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations." NYC Bar Ethics Op. 2020-3.

How should a lawyer proceed when faced with a potential interdependent or aggregate settlement? First, the lawyer cannot even participate in negotiating, let alone accept an aggregate or interdependent settlement without first obtaining the informed consent of each client. Even if an aggregate settlement offer is not on the table, and the lawyer is negotiating each child's case individually, the lawyer's settlement negotiations on behalf of one child is likely to materially impact settlement of the other children's cases being handled by the lawyer. NYC Bar Ethics Op. 2020-3. Rule 1.4(c) requires that "[a] lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter." Ideally, as a matter of best practices, the lawyer should discuss with each potential client the problems and issues with aggregate or interdependent settlements before the lawyer is retained, especially when it is foreseeable from the outset that such issues or problems may arise.

When there are limited funds from which multiple claimants can be compensated, there is a potential for competition between them for their share of the settlement. A lawyer representing multiple claimants in this situation risks becoming an advocate for a larger recovery of one claimant at the expense of the other claimants. Comment [27] to Rule 1.7 explains that ". . . a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them." Thus, with the prospect of only limited funds to recover from the defendant, it may be possible that the multiple clients are generally aligned in interest. The lawyer may reasonably determine that he or she will be able to facilitate an acceptable division of the insurance proceeds among the multiple claimants without advocating against the interests of any of the claimants. As the committee in North Carolina State Bar RPC 251 observed:

> Moreover, to require each claimant to have a separate lawyer to prove liability may result in a duplication of effort and additional expense for the claimants. Therefore, a lawyer may represent multiple claimants provided there are no conflicts with regard to the liability issue and the lawyer obtains informed consent from all the claimants at the beginning of the representation. The disclosure to the claimants must include an explanation of the consequences of limited insurance funds and the possibility that there may be a dispute among the claimants as to the division of the insurance proceeds.

In addition, requiring each claimant to have separate counsel would lead to a "race to the courthouse" with one or more claimants exhausting the defendant's insurance coverage or other sources of recovery, leaving the other claimants without compensation for their injuries.

In addressing Question #2, assuming the conflict can be waived, the committee believes that at the beginning of the multiple representation the lawyer must obtain an informed consent from the next friend of each of the children the lawyer would be representing concurrently. The informed consent must disclose that should an actual conflict arise, the lawyer will withdraw from representing all the affected clients. Rule 1.7(b)(4) requires that this informed consent be memorialized in writing. The informed consent should include disclosures of information known to the lawyer including potential conflicts that can arise in such cases. Before a lawsuit is filed, the next friend of each child may give the informed consent required by Rule 1.7(b). After litigation is commenced, even if it is solely for the purpose of obtaining court approval of the settlement of the children's claims, a guardian ad litem ("GAL") must be appointed for the minor children and the guardian ad litem must give informed consent to the multiple representation and the division of the settlement proceeds among the multiple children-clients. This would not be necessary but for the fact that there are insufficient funds to compensate fully each of the multiple claimants.

Another question is whether a single GAL could adequately represent the interests of all the minor children in this situation or must a GAL be appointed for each? The committee believes the standard for whether a GAL has a conflict in representing multiple children is whether the children's best interests differ so that advocating for one child's best interests is detrimental to another child's best interests. Presumably each child will also be represented by the child's parent or "next friend" who, at the outset, will have given informed consent to the

multiple representation of the children by the lawyer. Essentially, a single GAL faces the same situation our hypothetical lawyer faces with the representation of multiple minor children with differing facts or interests that must be reconciled against a limited fund with which to compensate each child fully. The fact that a child would be entitled to a larger recovery if more funds were available does not necessarily mean a single GAL representing multiple children has an incurable conflict or is incapable of approving and recommending to the court a division of the limited funds in the best interests of all the children. The final decision as to the division of the settlement proceeds or recovery resides with the court.

Attorneys who serve as GALs are subject to the Rules of Professional Conduct promulgated by the Virginia State Bar as they would be in any other case, except when the special duties of a GAL conflict with such rules. For example, an attorney would follow Rule 1.7 to determine if there would be a possible conflict of interest if the attorney served as GAL. *Advocacy In Motion: A Guide to Implementing the Standards to Govern the Performance of Guardians Ad Litem for Children,* Court Improvement Program, Office of the Executive Secretary of the Supreme Court of Virginia (November 2018) at 12. *See also* Legal Ethics Opinion 1844 (December 18, 2008).

In Legal Ethics Opinion 1725 (April 20, 1999) the committee stated: "[a] lawyer who serves as an infant's GAL, whether or not an attorney-client relationship exists, must act in conformity with the ethical standards governing the avoidance of conflicts of interests that impair independent professional judgment or dilute loyalty." In LEO 1725, the committee also stated an informed consent to a GAL's conflict of interest emanates from the court:

> If a lawyer contemplates being appointed by the court as GAL for a child and senses the potential for a conflict of interest, either because of a personal interest under DR:5-101(A), or a multiple representation under DR:5-105, then the attorney, before appointment, must make the same full disclosure to the court that he or she would make to a *sui juris* client for an informed consent to the representation. . . .
>
> Thus, the committee believes that any necessary consent to a possible conflict must emanate from the court. As stated above, the child is incapable of giving consent to the representation and waiving the conflict. The court, which has the statutory responsibility for supervision of the GAL according to Va. Code § 16.1-266, is the only agency with the authority to consent to such representation. In

> like fashion, the GAL must fully disclose to the court any conflict of interest that may arise after the appointment.

Thus, since the court appoints the GAL, the court serves as the gatekeeper and it is the duty of the court to see that the GAL faithfully represents and protects the child's interests. The court may enforce this duty by removing and appointing another one. LEO 1725.

CONCLUSION

Provided the requirements of Rule 1.7 can be met, a lawyer may represent multiple children against the same tortfeasor even when funds are insufficient to compensate fully the claims held by each represented child. The parents or persons serving as "next friend" may give the lawyer informed consent to the multiple representation. To obtain informed consent, the lawyer must explain any known risks, issues, or problems in the multiple representation, preferably before undertaking the representation. If the prospect of an aggregate or interdependent settlement is under consideration, the lawyer must obtain, via the "next friend," each client's informed consent before negotiating such a settlement. To participate in making an aggregate settlement, the lawyer must obtain the informed consent of all affected clients. Informed consent requires that each client knows and agrees to how the settlement is allocated and what amount shall be distributed to each. If one or more clients disagrees with the settlement, the lawyer may not participate in the aggregate settlement. Similarly, a lawyer should not participate in negotiations to settle one lawsuit that is dependent on, or where there is a significant risk that it will impact, the terms of a settlement of another lawsuit being handled by the lawyer without obtaining written informed consent from each client. Unless the differing interests of those clients who desire to settle can be reconciled with those who do not, the lawyer must withdraw from the representation of all the clients.

Upon filing a petition for a court to approve the settlement, a guardian ad litem must be appointed to waive the lawyer's conflict in representing multiple children and to recommend that the court approve a proposed settlement negotiated on each of the children's behalf by the lawyer. If the children's cases cannot be settled and suit is filed, a guardian ad litem must be appointed to represent the interests of the children.

Approved by the Supreme Court of Virginia
April 20, 2022

LEGAL ETHICS OPINION 1897

Rule 4.2 - Replying all to an email when the opposing party is copied

QUESTION PRESENTED

The question presented is whether a lawyer who receives an email from opposing counsel, with the opposing party copied, violates Rule 4.2 if he replies all to the email, sending the response to both the sending lawyer and her client.

SHORT ANSWER

The committee concludes that the answer is no, Rule 4.2 is not violated. A lawyer who includes their client in the "to" or "cc" field of an email has given implied consent to a reply-all response by opposing counsel.

Applicable Rule of Professional Conduct

> Rule 4.2 Communication With Persons Represented By Counsel
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

ANALYSIS

Ethics opinions from a number of other jurisdictions[1] have concluded that a lawyer copying his client does not on its own provide consent to communication by opposing counsel. While cautioning that it is best practice to blind copy all recipients or separately forward an email to the lawyer's client, the opinions conclude that failing to follow that best practice does not provide consent under Rule 4.2 and that the receiving lawyer must review the list of recipients and remove the opposing party from his response. A recent opinion from New Jersey[2] reaches the opposite conclusion, expressly rejecting the reasoning of those other jurisdictions to find that lawyers who include their clients in the "to" or "cc" field of a group email will be deemed to have provided informed consent to a reply-all response from opposing counsel. The committee believes that a bright-line rule is appropriate here, rather than a "totality of the circumstances" test used in the opinions of other states, for example North Carolina. Both lawyers who are trying to comply with the Rules while practicing law, and the disciplinary process that seeks to impose discipline on lawyers who do

[1] Illinois State Bar Association Opinion No. 19-05 (2019); Alaska Bar Association Ethics Opinion No. 2018-1 (2018); South Carolina Bar Ethics Advisory Opinion 18-04 (2018); Kentucky Bar Association Ethics Opinion KBA E-442 (2017); North Carolina Bar Formal Ethics Opinion 2012-7 (2013); California LEO 2011-181 (2011); New York City LEO 2009-1 (2009).
[2] ACPE Opinion 739 (2021).

not comply with the Rules, benefit from an unambiguous answer to allow lawyers to engage in the communications they are permitted to have while making clear that there are certain communications that are off-limits.

As for what that bright-line rule should be, the committee agrees with the analysis of the New Jersey opinion. By this point in its evolution, email is not analogous to paper letters, and is often treated more like an ongoing conversation than with the formality of written correspondence. The literal mechanics of copying are an important difference as well – there is no option to "reply all" to a written letter, without copying and separately sending a response to each copied recipient. When email is used, the committee believes that the onus should be on the sending lawyer to blind copy all recipients, or separately forward the email to the client, if they do not want a reply-all conversation. As the New Jersey opinion explains:

> Email is an informal mode of communication. Group emails often have a conversational element with frequent back-and-forth responses. They are more similar to conference calls than to written letters. When lawyers copy their own clients on group emails to opposing counsel, all persons are aware that the communication is between the lawyers. The clients are mere bystanders to the group email conversation between the lawyers. A "reply all" response by opposing counsel is principally directed at the other lawyer, not at the lawyer's client who happens to be part of the email group. The goals that Rule of Professional Conduct 4.2 are intended to further – protection of the client from overreaching by opposing counsel and guarding the clients' right to advice from their own lawyer – are not implicated when lawyers "reply all" to group emails.

The committee finds that this analysis of the text and purposes of Rule 4.2 provides appropriate guidance to lawyers and is consistent with the nature of email as opposed to paper communication. A lawyer who includes their client in the “to” or “cc” field of an email to opposing counsel has given implied consent under Rule 4.2 for opposing counsel to reply-all to the message.

LEGAL ETHICS OPINION 1898 ACCEPTING CRYPTOCURRENCY AS AN ADVANCE FEE FOR LEGAL SERVICES

In this opinion the committee considers the ethics issues that arise when a lawyer accepts an advance fee paid by the client in Bitcoin or other cryptocurrency for legal services. For example, a lawyer is hired by a client to pursue a contested divorce against the client's spouse. The lawyer asks for an advance payment or fee of $20,000 to handle the case to completion with a final decree of divorce. The client wishes to pay the advance fee in Bitcoin. The client tenders the current market equivalent in Bitcoin to pay the advance fee of $20,000.

For purposes of this opinion, cryptocurrency also means virtual or digital currency.

Questions Presented

1. What are the ethical obligations of a lawyer who accepts cryptocurrency as an advance fee for payment for legal services?

2. May the lawyer keep the cryptocurrency in its digital form, or must it be converted to US Currency and deposited in the lawyer's trust account as required by Rule 1.15(a) of the Virginia Rules of Professional Conduct?

3. Is the lawyer's acceptance of cryptocurrency as an advance fee payment a "business transaction" subject to Rule 1.8(a) of the Virginia Rules of Professional Conduct?

4. What actions must the lawyer take to safekeep cryptocurrency that has been delivered to the lawyer as an advance fee?

Short Answers

1. A lawyer may accept cryptocurrency as an advance fee for services yet to be performed. However, the lawyer must ensure that the fee arrangement is reasonable, objectively fair to the client, and has been agreed to by the client only after being informed of its implications and given the opportunity to seek the advice of independent counsel, all of which is confirmed in writing. In addition, if the lawyer accepts cryptocurrency as an advance fee, the lawyer must also take competent and reasonable security precautions to safekeep the client's property.

2. Yes, the lawyer may keep the cryptocurrency in its digital form and is not required to convert payment into US currency and deposit the funds in the lawyer's trust account pursuant to Rule 1.15(a) of the Virginia Rules of Professional Conduct.

3. Yes, the lawyer's acceptance of cryptocurrency as an advance fee payment is a "business transaction" subject to Rule 1.8(a) of the Virginia

Rules of Professional Conduct. However, Rule 1.8(a) does not apply if the lawyer accepts cryptocurrency as payment for an earned fee.

4. If cryptocurrency is used to pay an advance fee, the lawyer should safekeep cryptocurrency as client property with the care of a professional fiduciary and take reasonable security measures to safekeep the client's property from theft, loss, destruction or misdelivery.

Applicable Rules of Professional Conduct

> Rule 1.1 (Competence): A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> ***
>
> Rule 1.5 (Fees)
>
> (a) A lawyer's fee shall be reasonable.
>
> (b) The lawyer's fee shall be adequately explained to the client.
>
> ***
>
> Rule 1.8 (Conflict of Interest; Special Rules)
>
> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

***

Rule 1.15 (Safekeeping Property)

Comment [1]: A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. For purposes of this Rule, the term “fiduciary” includes personal representative, trustee, receiver, guardian, committee, custodian, and attorney-in-fact. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if funds, in one or more trust accounts.

Prior Relevant Virginia Legal Ethics Opinions

Legal Ethics Opinion 1593 (April 11, 1994); Virginia Legal Ethics Opinion 1489 (November 16, 1992); Virginia Legal Ethics Opinion 1041 (February 19, 1988); Virginia Legal Ethics Opinion 1564 (February 15, 1995).

Discussion

Cryptocurrency is used as a medium of exchange via a peer-to-peer computer network that is not reliant on or controlled by any central authority such as a government or bank, to uphold, maintain or verify it. Cryptocurrency is given the name because it uses encryption to verify transactions. Advance coding is used in storing and transmitting cryptocurrency data between wallets and to public digital ledgers. Cryptocurrency is not currency in the traditional sense and while various names have been given to classify or categorize it (i.e., commodities,

securities, as well as currencies), it is generally viewed as a distinct asset class. In 2014, the IRS issued Notice 2014-21, 2014-16 I.R.B. 938, explaining that cryptocurrency is taxed as property for Federal income tax purposes.

Cryptocurrency does not exist in physical form and is not issued by any central authority. It is a tradeable digital asset, or digital form of money, built on blockchain technology that exists only online. An advance payment by a client to a lawyer in cryptocurrency cannot be deposited into the lawyer's trust account. As of 2021 there were over ten thousand cryptocurrencies. Some popular currencies are Bitcoin, Ethereum, Litecoin and Dogecoin. Bitcoin, first released as open-source software in 2009, is the first decentralized cryptocurrency. Each cryptocurrency works through "distributed ledger technology," typically a blockchain, that serves as a public financial transaction database.

Holders or owners of cryptocurrency may use digital (hot) wallets or hardware (cold) wallets to store and secure cryptocurrency. Cryptocurrency may be purchased through an exchange using real currency and then stored in a wallet until the owner is ready to use it. Cryptocurrency may be used to send payments to individuals and businesses for goods and services, but it is not yet a form of payment that has mainstream

acceptance. It is also held as a speculative and volatile investment that can increase or decrease rapidly in value. Because cryptocurrencies are driven by supply and demand, and have no central issuer or regulatory authority, they can fluctuate in value unpredictably from day to day or even minute to minute. Thus, an agreement to value a transaction in cryptocurrency or convert cryptocurrency into traditional currency on a certain date carries potential risks for both sides.

Considering a cryptocurrency's extreme fluctuation, any transaction in which it is used as an advance payment to a lawyer involves a great deal of risk undertaken by the lawyer and/or client as to the ultimate value of the legal services for which the parties have contracted. Unless an agreement between the lawyer and client is reached on when the value of the cryptocurrency payment is determined, the lawyer could, for example, receive an inappropriate windfall due to an extreme overpayment—an excessive and unreasonable fee for the value of the legal service. Because *all* fee agreements must be reasonable and adequately explained to the client, Rule 1.5(a) and (b) are applicable to lawyers who accept cryptocurrency as payment for legal fees.

Despite its market volatility, cryptocurrency as a medium of payment has rapidly made inroads to several marketplaces. As a result, some law

firms are accepting or considering accepting certain cryptocurrencies, such as Bitcoin, as payment for legal services. *See*, e.g., Sara Merken, "More Law Firms are Accepting Bitcoin Payments," ABA BNA Lawyers Man. Prof. Conduct (Sept. 6, 2017); Melissa Stanzione, "Client Cryptocurrency Payments May Pose Ethical Risks for Lawyers," ABA BNA Lawyers Man. Prof. Conduct (May 11, 2019).

Given the extraordinary nature of the transaction, the committee agrees with three other state bar ethics opinions that the client's payment *of an advance fee* using cryptocurrency "has the essential qualities of a business transaction with the client" subject to the requirements of Rule 1.8(a). North Carolina State Bar Ethics Opinion 2019-05 (October 25, 2019); D.C. Bar Ethics Opinion 378 (June 2020); New York City Bar Ass'n Ethics Opinion 2019-5 (July 11, 2019).

As Rule 1.15 indicates, a lawyer is not limited to accepting money for payment of a legal fee and may instead accept property as payment for legal services. This committee has previously opined that a lawyer may accept property, for example stock in the client's company, as payment of the lawyer's advance fee on services to be rendered. Virginia Legal Ethics Opinion 1593 (April 11, 1994). Applying DR-5-104 of the Code of

Professional Responsibility, the predecessor to Rule 1.8(a), the committee stated:

> An attorney may, under DR 5-104(A), provide legal services to a corporation in consideration of the stock issued so long as he feels his independent professional judgment will not be affected by his status as a stockholder, the client consents after full disclosure by the lawyer of the potential conflicts of interest, and provided that the transaction is not unconscionable, unfair or inequitable when made.

See also Comment [4], ABA Model Rule 1.5:

> A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

All three state bar ethics opinions cited above conclude that the lawyer's acceptance of cryptocurrency as payment of an advance fee is more in the nature of accepting *property* from the client rather than fiat currency. When a client is using cryptocurrency to pay an advance fee for future services, the reasonableness of the transaction is based not only on the amount of the fee charged by the lawyer for the legal service, but also on how well the lawyer has explained to the client the financial risks considering the agreed upon fee and the volatility of cryptocurrency.

Rule 1.8(a) recognizes the fiduciary relationship between attorney and client, requiring that a business transaction with the client must be fair and reasonable. The Rule requires that:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

Is the Acceptance of Cryptocurrency as an Advanced Legal Fee a "Business Transaction" under Rule 1.8(a)?

In general, a "business transaction" between attorney and client is any business or commercial transaction other than the contract of representation. *See* Comment [1], ABA Model Rule 1.8 ("does not apply to ordinary fee agreements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.").

Also, as Comment [1] to Virginia Rule 1.8 explains:

> Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In

> such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

For example, if a lawyer obtains a loan from a client while representing that client, that situation is subject to the "business transaction rule." Virginia Legal Ethics Opinion 1489 (November 16, 1992). *See also* Virginia Legal Ethics Opinion 1593, *supra* (attorney accepting stock in client's company for payment of legal fees); Virginia Legal Ethics Opinion 1041 (February 19, 1988) (attorney going into partnership with friend and drafting partnership agreement; assuming friend relied on attorney's services and professional judgement); Virginia Legal Ethics Opinion 1564 (February 15, 1995) (referral of real estate client to lawyer-owned company for title and settlement services). *See also* ABA Formal Opinion 00-418 (July 7, 2000) (acquiring ownership interest in client company, i.e., stock, while performing legal services for client company).

The transaction proposed in this opinion is not an ordinary fee agreement or a standard commercial transaction. Instead, as the New York City Bar Association's Ethics Committee observes:

> It is one in which the lawyer and the client must negotiate potentially complex questions, and in which an unsophisticated client may therefore place unwarranted trust in the lawyer to resolve these questions fairly or advantageously to the client. The variables associated with payment in cryptocurrency

> include the rate of exchange on any given day, any associated fees when converting cryptocurrency to currency, whether (and when) cryptocurrency must be converted into cash, the exchange to be used, the type of cryptocurrency being used (or whether the payment would be in a single cryptocurrency or a combination of cryptocurrencies), and how any dispute will be handled in the event of a disagreement between the lawyer and the client related to these issues.

At What Point in the Engagement is "Fairness" and "Reasonableness" to be Determined?

This question is important when analyzing the fairness of a fee arrangement in which a volatile asset like cryptocurrency is being offered for services not yet rendered. In ABA Formal Opinion 00-418, *supra*, concerning accepting stocks or partial ownership of a client in lieu of fees the committee opined that:

> For purposes of judging the fairness and reasonableness of the transaction and its terms, the Committee's opinion is that, as when assessing the reasonableness of a contingent fee, only the circumstances reasonably ascertainable at the time of the transaction should be considered.

ABA Formal Op. 00-418 at 4. The DC Bar agrees with this approach:

> Rule 1.8(a) and the commentary thereto are silent on how fairness is to be determined, and whether it is to be determined only by reference to facts and circumstances existing at the time the arrangement is accepted by the parties, or by reference to subsequent developments (for example, a huge appreciation in the value of the shares received as fees such that the lawyer is effectively compensated at 100-fold the reasonable value of his services). For ethics purposes (and not for purposes of assessing common law fiduciary duties), we believe that the "fairness" of the fee arrangement should be judged at the time of

> the engagement. In other words, if the fee arrangement is "fair and reasonable to the client" at the time of the engagement, no ethical violation could occur if subsequent events, beyond the control of the lawyer, caused the fee to appear unfair or unreasonable.

See also Restatement (3d) of the Law Governing Lawyers, § 126, Comment e (2000) ("Fairness is determined based on facts that reasonably could be known at the time of the transaction, not as facts later develop.").

Therefore, any fee arrangement that charges fees in cryptocurrency, or that allows or requires a client to either provide an advance fee or accept a settlement payment from a party in cryptocurrency, should be assessed for fairness at the time that it is agreed upon, based on the facts then available.

What Disclosures to the Client does Rule 1.8(a) Require?

At the very least, Rule 1.8(a) requires the lawyer to disclose to the client the risks associated with accepting cryptocurrency as payment of an advance fee and how those risks will be addressed. Particularly, what happens if the value of the cryptocurrency rises above or falls below the actual currency value of the legal services agreed upon by the parties? The information that a lawyer must disclose will vary, of course. However, as the DC Bar Ethics Committee recommends:

> a lawyer accepting cryptocurrency should consider including a clear explanation of how the client will be billed (i.e., in dollars or cryptocurrency); whether and how frequently cryptocurrency held by the lawyer will be calculated in dollars, or otherwise trued-up or adjusted for accounting purposes and whether, upon that accounting, market increases and decreases in the value of the cryptocurrency triggers obligations by either party; how responsibility for payment of cryptocurrency transfer fees (if any) will be allocated; which cryptocurrency exchange platform will be utilized to determine the value of cryptocurrency upon receipt and, in the case of advance fees, as the representation proceeds (i.e., as fees are earned) and upon its termination; and who will be responsible if cryptocurrency accepted by the lawyer in settlement of the client's claims loses value and cannot satisfy third party liens.

Safekeeping Client Property under Rule 1.15—Competently Safeguarding Cryptocurrency

Comment [1] to Virginia Rule 1.15 states that a lawyer should safekeep the property of clients and third parties with the care required of a professional fiduciary. The rule also requires segregation of client and third-party property from the property of the lawyer. As a fiduciary, the lawyer may not commingle, misappropriate, or convert to the lawyer's personal use property that has been entrusted to the lawyer under Rule 1.15.

The first Rule of Professional Conduct, Rule 1.1, requires that a lawyer must act competently in representing a client. Ancillary to that rule, Comment [6] states that the lawyer "should pay attention to the benefits

and risks of relevant technology." Applying these principles, several points require discussion.

Before accepting cryptocurrency by a lawyer, the duty of competence requires the lawyer to have the knowledge and skill to understand the risks associated with this technology, and safeguard against the many ways cryptocurrency may be stolen or lost. D.C. Bar Ethics Opinion 378, *supra*. "Because blockchain transactions are unregulated, uninsured, anonymous, and irreversible, cryptocurrency is regularly targeted for digital fraud and theft." *Id.*

Unlike traditional funds deposited in a lawyer's trust account, cryptocurrency is not FDIC insured. Cryptocurrency online wallets and exchange platforms may be fraudulent. Even legitimate online wallets and platforms may be hacked. Transactions stored on a digital (hot) wallet connected to an online network may be vulnerable to malware and hacking.

The private key is very important, because if lost or stolen, the cryptocurrency is likely permanently inaccessible. The user must keep the private key secret, not share it with anyone and store it in a safe place. Some recommend a "cold wallet" to store cryptocurrency more securely. However, even "cold wallets" (offline software, hardware or paper) may be lost, stolen, damaged or destroyed and therefore the lawyer must exercise

reasonable care to protect them. Some recommend purchasing a hardware wallet to store cryptocurrency and avoiding using digital wallets that are connected online.

When accepting cryptocurrency for "safekeeping" under Rule 1.15, the lawyer-client agreement should specify that the cryptocurrency remains the property of the client until earned by the lawyer – as does the appreciation or loss on the cryptocurrency. The agreement should address responsibility for the safekeeping, discuss the safekeeping mechanism(s), and allocate responsibility for security and responsibility for storage costs and risk of loss – whether loss of value or actual loss of the property through hacking or loss of the key. Since property held for safekeeping under Rule 1.15 remains property of the client, the client should be specifically allowed to cause the lawyer to sell the cryptocurrency (whether to prevent market losses, appreciate gain in value or otherwise), and to determine the procedures the lawyer should use in doing so.

Assuming the client has the right to direct the lawyer to sell the cryptocurrency, a lawyer should consider and address in the agreement with the client: (1) whether the cryptocurrency should be sold or exchanged in its present state or converted to fiat currency; and, who bears the responsibility for payment of any expenses incurred as a result of any sale,

exchange or conversion; (2) what portion of the sale proceeds will be applied to the advance fee agreed upon by the parties versus what portion will be returned to the client; (3) who bears the risk if the cryptocurrency is sold at a loss or less than the value of the agreed advance fee, i.e., will the client be obligated to replenish any deficiency; and (4) if the direction to sell is incident to the termination of the lawyer-client relationship, what portion of the sales proceeds has been earned by the lawyer and how much the client is owed as a refund. These are some but by no means all of the questions that could arise if the client has directed the lawyer to sell the cryptocurrency.

Once the cryptocurrency can be applied to earned fees, the agreement should state that it becomes the lawyer's property, the lawyer has the risk of gain or loss, and the lawyer makes the decision when and how to sell the cryptocurrency. Any gain recognized by the lawyer on the value will not be credited to the client's future fees.

Many of the same security measures lawyers can be expected to use with cloud-based software and storage apply to handling cryptocurrency. Some important measures include:

- Use a private and secure internet connection and not public wi-fi when making transactions.

- Use a unique and robust password.
- Use two-factor authentication to better secure and verify transactions.
- Keep the security level high and do not install unsecured apps.

Conclusion

A lawyer may accept client property including cryptocurrency offered as an advance payment for the lawyer's services, provided the lawyer's fee is reasonable under Rule 1.5, and this business transaction with the client meets the requirements of Rule 1.8(a), namely, that the transaction is fair and reasonable to the client, the transaction and terms are fully disclosed in writing in a manner the client understands, the client is advised of the opportunity to consult with independent counsel, and the client's consent is confirmed in writing. When cryptocurrency is being held by the lawyer as an advance fee, the requirements of Rule 1.15 regarding safekeeping client property apply and require that the lawyer take reasonable steps to secure the client's property against loss, theft, damage or destruction. When cryptocurrency is used by the client for payment of an earned fee, Rules 1.8(a) and 1.15 do not apply but the lawyer's fee must be reasonable under Rule 1.5.

LEGAL ETHICS OPINION 1899. USE OF CONVERSION CLAUSE IN FLAT FEE AGREEMENTS

QUESTION PRESENTED

When a lawyer represents a client on a flat (or fixed) fee agreement, can the agreement provide an alternative fee arrangement if the representation is prematurely terminated by the client without cause? What, if any, limitations apply to such an alternative arrangement?

PREVIOUS OPINIONS

In Legal Ethics Opinion 1606 (Committee Opinion 1994, Approved by Supreme Court 2016), the committee discussed fixed fees (now more commonly called “flat fees”) as follows:

> 5. Fixed Fee. The term fixed fee is used to designate a sum certain charged by a lawyer to complete a specific legal task. Because this type of fee arrangement provides the client with a degree of certainty as to the cost of legal services, it is to be encouraged.
>
> A fixed fee is an advanced legal fee. It remains the property of the client until it is actually earned and must be deposited in the attorney's trust account. If the representation is ended by the client, even if such termination is without cause and constitutes a breach of the contract, the client is entitled to a refund of that portion of the fee that has not been earned by the lawyer at the time of the termination. LE Op. 681. In such circumstances, what portion of the fee has been earned requires a quantum meruit determination of the value of the lawyer's services in accordance with *Heinzman* and *County of Campbell v. Howard*, 133 Va. 19 (1922).

In Legal Ethics Opinion 1812 (2005), the committee addressed the premature termination of a contingent fee representation, which is also subject to the quantum meruit analysis in the cases identified above. The question presented in LEO 1812 was whether a lawyer can use a so-called conversion clause in a contingent fee agreement, providing that if the representation is terminated prematurely by the client without cause, the fee will be calculated by a method other than quantum meruit. The committee reviewed the existing legal authority and ethics opinions from other states to conclude that "such alternative fee arrangements are permissible in contingent fee contracts so long as the alternative fee arrangements otherwise comply with the Rules of Professional Conduct." Considering that one of the applicable Rules of Professional Conduct is Rule 1.5(a), requiring the fee to be reasonable, the committee further opined that when determining reasonableness, the alternative fee (conversion clause) must be evaluated not only as of the time when the fee agreement was signed, but as of the time that the lawyer's services were terminated, and in the case of a contingent fee, as of when the recovery, if any, was obtained. If the alternative fee is not reasonable at any of those times, the arrangement is impermissible and the lawyer will be left with only a quantum meruit claim.

ANALYSIS

Because, unless there is an agreement otherwise, none of the flat fee is earned until the matter is concluded, a flat fee presents the same dilemmas as a contingent fee if the matter is prematurely terminated. If the representation is terminated without cause by the client, there is no question that the lawyer is entitled to some compensation for the work done in the case to that point, and in the absence of an alternative agreement, the legal doctrine of quantum meruit must be applied to determine the lawyer's entitlement to a fee. However, both lawyers and clients might prefer the certainty of agreeing to an alternative fee arrangement at the outset, so that if the representation is terminated, both sides are clear on the lawyer's entitlement to a fee and the risk of a legal dispute about the amount of the lawyer's fee is reduced.

Contingent fees and flat fees should be treated similarly for these purposes, and the above analysis from LEO 1812 applies to conversion clauses in flat fee cases as well. The mechanics, however, will be different since the flat fee does not involve a potential recovery. First, this means that the reasonableness analysis of a conversion clause arrangement will not evaluate any ultimate recovery, since that concept is irrelevant to a flat fee arrangement. A second difference is that the alternative fee will be

capped by the original agreed-to flat fee; the alternative fee arrangement cannot exceed the flat fee because the essence of the flat fee agreement is that the client will never pay more than the flat fee.

As in LEO 1812, a crucial component of a lawyer's ability to use a conversion clause is the duty to adequately explain a fee arrangement to the client under Rule 1.5(b). The conversion clause at issue in LEO 1812 did not satisfy that rule because it was not clear as to whether it established an alternative hourly fee arrangement or established an hourly rate to be used in a quantum meruit calculation; the latter option would be impermissible, even if clearly stated, because the lawyer's usual hourly rate is not the only factor applied in a quantum meruit analysis. Similarly, in a flat fee context, a conversion clause should not attempt to state what the appropriate quantum meruit analysis is, but rather make clear that the clause creates an alternative fee arrangement based on an hourly, or other metric, as opposed to the flat fee.

Another option, rather than applying an hourly rate in the event of termination, would be to use benchmarks in the agreement providing that portions of the flat fee can be earned at various points in the representation and then use those benchmarks as the basis for a conversion clause. Again, pursuant to Rule 1.5(a) and (b), the amount earned at each

benchmark must be reasonable considering the amount of work to be done in the case, and the arrangement must be adequately explained to the client. Once such an agreement is reached, however, the lawyer can also ask the client to agree that in the event the representation is terminated, the amount of the earned fee will be determined based on the benchmarks that have been reached to that point rather than by quantum meruit.

The committee believes that the use of reasonable and adequately-explained conversion clauses as part of the fee agreement is beneficial to the client and the lawyer when undertaking a flat fee representation. Quantum meruit is a multi-factor legal doctrine that provides a remedy for the lawyer when the representation is terminated without cause, but can only be enforced by legal action against the former client. Legal Ethics Opinion 1878 (2021) describes some of the uncertainties involved in applying quantum meruit to a terminated contingent fee matter, including "the 'unknown' of the recovery to be had, if any" and "other 'unknowns,' such as the balance of work which will actually be required to complete the matter and the extent to which predecessor counsel's legal services will have contributed to the recovery." On the other hand, a reasonable conversion clause can be adequately explained and agreed to by the client at the outset of the representation and provides more certainty to both the

lawyer and the client about what fee will be owed if the representation is not completed.

CONCLUSION

A lawyer's fee agreement with a client may include an alternative fee arrangement or "conversion clause" if the client terminates the representation prematurely and without cause. However, an alternative fee or conversion provision must be reasonable and adequately explained to the client.