

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF PROPOSED
LEGAL ETHICS OPINION 1897**

APPENDIX TO PETITION OF THE VIRGINIA STATE BAR

Stephanie E. Grana, President
Karen A. Gould, Executive Director
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**VIRGINIA STATE BAR
COUNCIL MEETING
SHERATON OCEANFRONT HOTEL
VIRGINIA BEACH, VIRGINIA
THURSDAY, JUNE 16, 2022**

AGENDA

**9:00 a.m. Council Meeting – Sheraton Ocean Grand Ballroom
Virginia Beach**

| I. Reports and Presentation of Resolutions | Tab |
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| B. Executive Director's report – Karen A. Gould, Executive Director | 2 |
| C. Financial report – Crystal T. Hendrick, Finance/Procurement Director | 3 |
| D. Bar Counsel's report – Renu M. Brennan, Bar Counsel | 4 |
| E. Judges and Lawyers Assistance Program report – Tim Carroll, Executive Director | 5 |
| F. Conference of Local and Specialty Bar Associations report - Roy V. Creasy, chair | 6 |
| G. Diversity Conference report – David D. Masterman, chair | 7 |
| H. Senior Lawyers Conference report – Gary C. Hancock, vice chair | 8 |
| I. Young Lawyers Conference report – Kristopher R. McClellan, President | 9 |
| J. VSB law office management proposal – David Neumeyer, chair, Practice Management Advisory Task Force | |
| K. Special Committee on Lawyer Well-Being report – Leonard C. Heath, Jr., chair | |
| L. Executive Director Search Task Force report – Lisa A. Wilson, vice chair | |
| M. Opportunity for questions, comments, ideas | |

II. Action Items

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| B. Approval of resolutions honoring Jay B. Myerson and The Myerson Law Group, P.C. – Stephanie E. Grana, president-elect | 11 |
| C. Approval of resolution honoring Justice Donald W. Lemons – Jay B. Myerson, President | 12 |
| D. Approval and presentation of resolution to retiring executive director Karen A. Gould – Jay B. Myerson | 13 |
| E. Approval of Nominating Committee report – Brian L. Buniva, chair | 14 |
| - Executive Committee | |
| - MCLE Board | |
| - Clients’ Protection Fund Board | |
| - Judicial Candidate Evaluation Committee | |
| - Council members at Large | |
| - ABA House of Delegates | |
| F. Clients’ Protection Fund Board rule revisions – Brian D. Lytle, CPF Rules Subcommittee chair, and Peter M. Mellette, CPF Rules Subcommittee member | 15 |
| G. LEO 1897, “Replying to all...” – Dennis Quinn, chair, Standing Committee on Legal Ethics | 16 |
| H. LEO 1898, Cryptocurrency – Dennis Quinn, chair, Standing Committee on Legal Ethics | 17 |

II. Notice of Upcoming Receptions, Dinners & Meetings

12:00 noon, Thursday, September 8, 2022, lunch and Executive Committee meeting, 3rd Floor Conference Room, Bank of America Building, 1111 E. Main St., Richmond.

12:30 p.m., Thursday, October 20, 2022, Executive Committee meeting, The Boar’s Head Resort, 200 Ednam Dr., Charlottesville.

6:30 p.m., Thursday, October 20, 2022, Council dinner, The Boar’s Head Resort, 200 Ednam Dr., Charlottesville.

9:00 a.m., Friday, October 21, 2022, Council meeting, The Boar’s Head Resort, 200 Ednam Dr., Charlottesville.

Council Agenda

June 16, 2022

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12 noon, Friday, February 25, 2023, Executive Committee lunch and meeting, 3rd Floor Conference Room, 1111 E. Main St., Bank of America Building, Richmond.

6:30 p.m., Friday, February 25, 2023, Council reception and dinner, Virginia Museum of Fine Arts, 200 N. Arthur Ashe Blvd., Richmond.

9:00 a.m., Saturday, February 26, 2023, Council meeting, Omni Richmond Hotel, 100 S. 12th Street, Richmond.

12 noon, Thursday, April 20, 2023, Executive Committee lunch and meeting, 3rd Floor Conference Room, 1111 E. Main St., Bank of America Building, Richmond.

**ALL unfinished business of the Legal Ethics Committee is confidential, pursuant to SCV Rule Part 6, Section IV, Paragraph 10.*

**VIRGINIA STATE BAR
STANDING COMMITTEE ON LEGAL ETHICS**

Thursday, January 20, 2022

10:00 a.m.

Via MS Teams

AGENDA

I. APPROVAL OF MINUTES

II. LEGAL ETHICS OPINIONS

- A. LEO 1893 – Conflicts in representation of parent and minor child
- B. LEO 1894 – Conflicts in joint representation of multiple minor children;
aggregate settlements
Comment received from: Rogers (LGA)
- C. LEO 1897 – Reply all to emails (Rule 4.2)
- D. LEO request – Accepting cryptocurrency for legal fees
- E. LEO proposal/discussion topic – guidance on when flat fees are earned and
how to handle premature termination of flat fee representation

III. ADJOURNMENT



Virginia State Bar

Seeking Public Comment

1111 East Main Street, Suite 700
 Richmond, Virginia 23219-0026
 Telephone: (804) 775-0500

 Facsimile: (804) 775-0501 TDD (804) 775-0502

MEDIA CONTACT: James M. McCauley, Ethics Counsel

RELEASE DATE: January 21, 2022

VIRGINIA STATE BAR'S STANDING COMMITTEE ON LEGAL ETHICS SEEKING PUBLIC COMMENT ON LEGAL ETHICS OPINION 1897

RICHMOND - Pursuant to Part 6, § IV, ¶ 10-2(C) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1897, replying all to an email when the opposing party is copied.

This proposed opinion addresses whether a lawyer who receives an email from opposing counsel, with the opposing party copied in the "to" or "cc" field, violates Rule 4.2 when he replies all to the email. The committee concludes that this conduct does not violate Rule 4.2 because the sending lawyer has given implied consent to the communication with her client by including the client on the email. A lawyer who does not wish to give such consent should separately communicate with her client, such as by forwarding the email to the client.

Inspection and Comment

The proposed advisory opinion may be inspected at the office of the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, Virginia

LEO 1897

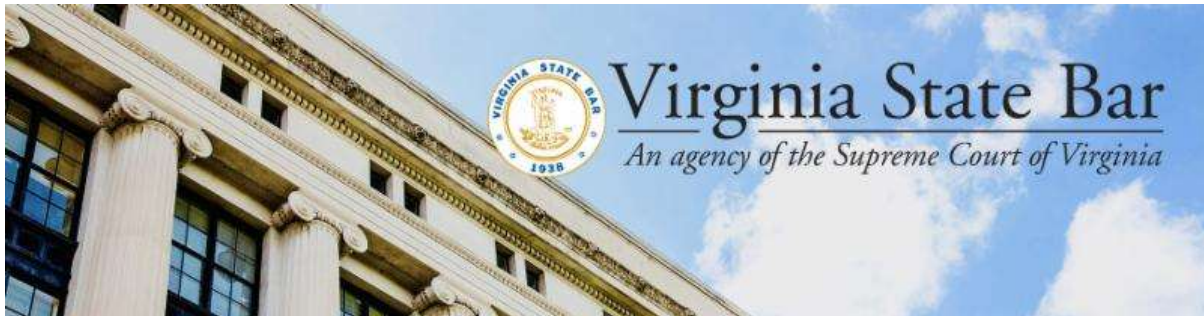
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23219-0026, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at 804-775-0557, or can be found at the Virginia State Bar's website at <http://www.vsb.org>.

Any individual, business, or other entity may file or submit written comments in support of or in opposition to the proposed opinion with Karen A. Gould, Executive Director of the Virginia State Bar, not later than **February 28, 2022**. Comments may be submitted via email to publiccomment@vsb.org.

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Governance

The Supreme Court of Virginia is seeking lawyers for **Med Mal Review Panels**.

The Supreme Court of Virginia **approved LEO 1896 and amended its Rules**.

The VSB Disciplinary Board will hear **Jeremy Clyde St. James Sharp**'s reinstatement petition on March 25, 2022.

Get on the Ballot for Bar Council Elections

Bar Council, the Virginia State Bar's governing body, will hold its annual elections by electronic ballot in April for terms beginning July 1.

Virginia lawyers who wish to be on the ballot must be active members in good standing of **their circuit** as of March 15, 2022.

Join the Disciplinary System: The Standing Committee on Lawyer Discipline seeks active, in-good-standing lawyers and non-lawyers to apply for disciplinary district committee vacancies.

The Supreme Court of Virginia issued a **Thirty-fourth COVID-19 Order**.

Ethics

The VSB seeks comment on proposed **LEO 1893** concerning conflicts representing minors in personal injury cases.



VSB seeks comment on proposed **LEO 1897** concerning issues of "replying all" to an email with the opposing party copied.

We are seeking an **Assistant Ethics Counsel** for our office in Richmond. See below for two other VSB positions.

Discipline

Disciplinary hearings are public meetings and may be viewed as they occur by following the **disciplinary docket**.

Recent disciplinary system actions:

Judy Raye Moats, license revoked, effective January 25, 2022.

Christopher Matthew Reyes, license revoked, effective January 27, 2022.

Edward Allen Malone, license revoked, effective January 28, 2022.

Robert Hasbrouck Nutt II, license suspended, effective January 21, 2022.

John Carter Morgan Jr., license suspended, effective January 25, 2022.

Gregory Thomas Casker, public reprimand, effective December 29, 2021.

Daymen William Xavier Robinson, public reprimand, effective Jan. 5, 2022.

Thomas Page Cheeley, public reprimand, effective January 18, 2022.

Brian Randolph Moore, public admonition, effective January 20, 2022.

Private discipline

2 private admonitions, 1 private reprimand



The VSB disciplinary department seeks an **Assistant Bar Counsel** in Richmond. [More information.](#)

The VSB is hiring a **Director of Regulatory Compliance** to oversee the Membership and MCLE components of the Bar's mission to protect the public and regulate the profession. [More information.](#)

Compliance

Attorneys have until 4:45 pm EST March 15, 2022, to report hours for 2021 MCLE compliance and to pay any outstanding MCLE delinquency fees. Use the [2021 MCLE Form 1](#) or Notice of Noncompliance to report remaining hours.



Pay fees online at the [VSB Portal](#) with a Visa or Mastercard. Review MCLE deadline information [here](#). Contact the MCLE Department if you have questions regarding your MCLE compliance.

Pro Bono / Access to Justice



Want to know what it's really like to provide pro bono service on **Virginia Free Legal Answers**? Join us for an interactive Zoom training on February 22 from 1–3 pm. Veteran volunteers will give you a tour of the website and help you work through hypotheticals based on real questions

they've answered for pro bono clients. 2 hours CLE credit pending, including 1 hour of ethics! Email cgantz@vsb.org to register.

Wellness

The Virginia Judge and Lawyer Assistance Program (VJLAP) has established the **George H. Hettrick Memorial Fund** to raise money for programs that help lawyers struggling with depression, substance use, and other mental health concerns.

[Learn how](#) to donate to VJLAP's Hettrick Fund or get involved with them as a volunteer.



Nominations: Recognize a Deserving Lawyer

Recognize an exceptional young lawyer by nominating them for the **R. Edwin Burnette Jr. Young Lawyer of the Year Award**. The deadline to submit a nomination is **March 25**. View past recipients [here](#).

The Military Law Section is seeking nominations for its **Pro Bono Award**, recognizing members of the Bar who assist military members who protect and serve our nation. Entry deadline: March 1, 2022.

The General Practice Section is seeking nominations for the **34th Tradition of Excellence Award**. The award recognizes an outstanding lawyer who embodies the highest tradition of personal and professional excellence in Virginia and who has devoted a significant amount of time, effort, and/or funds to activities that benefit their community. Entry deadline: April 4, 2022.



The **Conference of Local and Specialty Bar Associations** is seeking nominations for its Awards of Merit, Local Bar Leader of the Year Award, Specialty Bar Leader of the Year Award, and Bar Association of the Year Award. Entry deadline: May 4, 2022.

CLE Opportunities

The 52nd Annual Criminal Law Seminar will be held virtually on February 11, and provides 7.0 hours of CLE, including 1.5 ethics. Presented by webcast or telephone seminar. Agenda and registration information [here](#).



The General Practice Section is hosting a *free* webinar on **Child Support and Enforcement for the General Practitioner**. February 17, 2022, 1-2 pm. [Register here](#).

Mid-Atlantic Women Legal Professionals' Retreat

March 3-6 in Asheville, NC
10 or more CLE credit hours (pending your state)

Register for the **2022 Virtual VSB Techshow** CLE:
A favorite session: 60 Tech Tips in 60 Minutes!
Presented virtually on April 25 with the latest learning in cyber security, tech ethics, e-discovery, and many other tech issues for lawyers.



Virginia Lawyer

Thank you to the Young Lawyers Conference and our excellent writers and advertisers who made the February issue possible.

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The VSB continues to provide essential services to Virginia's lawyers and the public. However, we continue to keep the health and safety of lawyers, employees, and the public at the forefront of our actions. The office remains closed to visitors who have not made prior arrangements until further notice. **We urge the use of [electronic communication](#) to assist us in providing services.** If you need to reach a staff person, please send an email or call the appropriate [contact person](#). We will provide additional updates on our [website](#).

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The Virginia State Bar

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Proposed | Legal Ethics Opinion 1897, replying all to an email when the opposing party is copied. Comments due by February 28, 2022.

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Inspection and Comment

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Any individual, business, or other entity may file or submit written comments in support of or in opposition to the proposed opinion with Karen A. Gould, Executive Director of the Virginia State Bar, not later than **February 28, 2022**. Comments may be submitted via email to publiccomment@vsb.org.

[View proposed LEO 1897](#) (PDF)

Updated: January 21, 2022

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January 21, 2022

VSB Seeks Comment on Ethics of Replying All to Email with Opposing Party

The Virginia State Bar's Legal Ethics Committee seeks public comment on proposed advisory Legal Ethics Opinion 1897: Replying all to an email when the opposing party is copied.

This proposed opinion addresses whether a lawyer who receives an email from opposing counsel, with the opposing party copied in the "to" or "cc" field, violates Rule 4.2 when "replying all" to the email. The committee concludes that this conduct does not violate Rule 4.2 because the sending lawyer has given implied consent to the communication with her client by including the client on the email.

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Updated: Jan 21, 2022



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DAVID P. CORRIGAN
804.762.8017
DIRECT FAX | 804.212.0862
dcorrigan@hccw.com
Respond to: Richmond

February 18, 2022

VIA EMAIL at publiccomment@vsb.org

Karen A. Gould, Executive Director
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026

Re: Proposed Legal Ethics Opinion 1897

Dear Ms. Gould:

Thank you for seeking public comment on proposed advisory Legal Ethics Opinion 1897, regarding replying to all in an email where the opposing party is included.

After reviewing the proposed opinion, the Ethics Committee of the Local Government Attorneys of Virginia, Inc. ("LGA") has determined that the proposed LEO does not have any impact unique to the practice of local government law. Therefore, the Committee has no comment on this proposed LEO. However, we do appreciate the continuing opportunity to provide comments on proposed Legal Ethics Opinions and Rule changes.

Very truly yours,

David P. Corrigan
Chair, LGA Ethics Committee

cc: Michelle Robl, Esq., LGA President (via email)
Andy Herrick, Albemarle County Deputy County Attorney (via email)

RICHMOND

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DC METRO

1900 DUKE ST. | SUITE 210 | ALEXANDRIA, VA 22314

COMMENTS ON PROPOSED LEO 1897

BY JOHN CROUCH

Draft LEO 1897's reasons for having a bright-line rule are excellent, and well put. But the bright-line rule should be against communicating with represented opposing parties, not for it. In this case, simply "reply" instead of "reply all." And "*consent ... means actual consent.*" (Kentucky Bar Association Ethics Opinion KBA E-442 (2017), citing New York City LEO 2009-1 (2009)).

The purpose of the Rule 4.2 is protecting clients, not lawyers. The question is not whether opposing counsel is negligent in cc'ing a client. The question is whether the consent exception to Rule 4.2 applies: can a lawyer reasonably assume consent to her communicating directly with the opposing party if she receives an email from opposing counsel that ccs opposing counsel's client?

We work every day under the assumption that lawyers have not authorized us to communicate with their clients, except when they have explicitly said so, in which case they have usually limited the contexts, topics, time, and/or manner of such communication. We may also assume their consent if they communicate in a situation that makes it obvious and unavoidable, such as proposing a four-way meeting, Zoom or conference call, or discussing the case with us in the courthouse hallway with the client standing right there. In those implied-consent situations, the lawyers are continuously present and are able to pause or end the conversation at any time, and to tell clients when to speak and when not to. If I am in a deposition or a four-way collaborative divorce meeting, and the other lawyer leaves the room for a few minutes, I know that her permission to communicate about the case does not apply in her absence, and I must chat with the clients about the weather or sports or something.

Those implied-consent situations involve everyone being present (electronically or physically) at the same time. (In California, the first circumstance that may indicate implied consent is whether the other attorney is present. California LEO 2011-181 (2011)). I cannot envision any situation where an e-mail would reasonably be implied consent.

How many of us have ever tried to start a free-for-all open discussion of the case between all counsel and parties, by sending an email? Who would do that in such an uncontrolled, asynchronous, and easily-misunderstood medium as email? Who would want such a freeferall to include her own client, but not the other client? So how is it reasonable to assume that other lawyers are consenting to all that?

MISUNDERSTANDING THE TECHNOLOGY

The Opinion characterizes the contrary opinions from other states as imposing a burden on lawyers to “review the list of recipients and remove the opposing party from his response.” The situation does not actually require any such thing. To comply with Rule 4.2, all that a lawyer needs to do is to not “reply all,” and instead, to just “reply,” which is easier and is the normal, reflexive way of answering an email. In contrast, there are media in which reply-all is the default, and difficult to avoid, such as text messaging apps and social media, and 20th-century chat rooms. Those media also lack cc and bcc functions. They are usually lighter in tone and topic. Not coincidentally, lawyers do not use those media for negotiations with opposing counsel.

Even aside from Rule 4.2 considerations, it seems sloppy and dangerous to send any email without taking reasonable care to see who you are sending it to. If you just hit “reply,” you know that. If you then deliberately add people to the cc line, you know who you’re adding. If you choose to “reply all” and there is a “recipient list,” you had better examine it to see who you are broadcasting to.

Some other states’ opinions say there is “a duty to inquire whether the opposing counsel’s client should be included in the reply.” But there is no need for that. If the other lawyer wants her client to see your reply, she’ll forward it to him. If there’s some extraordinary reason why she needs him to see your reply before she can do that, she’ll ask you to reply-all. If you still want to inquire, you can inquire – it’s easier than running through a multifactor balancing test, and 100% more accurate.

“Even though we conclude that consent ... may be implied, we do not mean to suggest that the consent requirement of the rule be taken lightly nor that it is appropriate for attorneys to stretch improperly to find implied consent. Further, even where consent may be implied, it is good practice to expressly confirm the existence of the other

attorney's consent, and to do so in writing.”
California LEO 2011-181 (2011), FN 4

CUSTOM AND USAGE IN THE INDUSTRY

The New Jersey opinion (ACPE Opinion 739 (2021)) describes emails with ccs as “group emails.” That may be consistent with “the customary usages of that technology” in New Jersey, but to apply that description to communication between Virginia opposing attorneys is anachronistic. There are a few areas of life that still include somewhat informal and group-based email communication, but our work for our clients is not one of them. The New Jersey opinion indicates that lawyers there include so many people in email negotiations that “parsing through the group’s email recipients” is onerous. But here in Virginia, we do not resolve cases by consulting large, radically communal, semi-anonymous groups of people on the internet in freewheeling bull sessions.

Once upon a time, e-mail was predominantly considered an informal medium. When many of us first heard of it in the 1990s, its early adopters were computer professionals who had participated in dial-in BBSes (Bulletin Board Systems) and narrowly topical Usenet chat forums. Some of their folkways, netiquette and jargon were passed on to new email users. Much early email use by lawyers was on Listservs, which, like BBS and Usenet, were open discussions where all messages and replies went to the entire group, including many strangers. And in those days, when e-mail was considered informal, very few lawyers thought it was an appropriate way to communicate professionally, especially with opposing counsel.

That changed very early in the 2000s. In my field, family law, Virginia lawyers began using email to communicate with opposing counsel. But in doing so, they intentionally retained many of the formal constraints of paper communication. Some firms preferred to send old-fashioned letters as attachments to e-mails. And in e-mails to opposing counsel that our clients are going to see, it is not considered wise to do anything informal, except for being sort of professionally “business-casual” by dispensing with extra window-dressing verbiage and getting straight to the point. But being snarky, or flippant, cursing, typing “LOL” or “ROFL,” and allusions to off-the-court friendship or enmity, are avoided even more than they were in paper letters, because we know e-mail facilitates hair-trigger

responses by opposing counsel and clients. This formality is not just a hidebound relic; it is essential armor for modern communication.

In the Collaborative Law community, which is based on transparent communications, we quickly learned that e-mails among both lawyers and both clients were a horrible way to do business, and we stopped, especially for any substantive discussions.

E-mail is now so far from informality that many courts use it as the only method for some crucial notices and service of pleadings to attorneys -- including U.S. District Court; the Court of Appeals of Virginia; and Circuit Courts in cases where attorneys use truefiling.com. The “informal” frontier of internet communication long ago moved on to text messaging, social media, and other ills that we know not of.

With the cc line, as with most things, we owe its users “such a deference ... as not to suppose they acted wholly without consideration,” as Blackstone put it. If a lawyer puts a client, and, say, a paralegal, on the cc line, shouldn't we assume there is some reason for making them mere ccs, and not the named addressees of the email? Especially if the email includes a salutation indicating whom it is speaking to, as emails between lawyers generally do? Why would a lawyer be using the cc line, other than for its traditional purpose?

At some point I stopped ccing or even bccing clients. But my concern was that a client might inadvisedly, and probably deliberately, reply-all. I never really considered that a lawyer might do that. And nobody told me to stop ccing; it was my own idea. Looking back through my emails from opposing counsels, there are not many who cced their clients in recent years, but those who did are lawyers who are models of professionalism, toughness, advocacy and competence. I never even considered that it would be OK with them for me to include their clients in my replies.

THE PURPOSE OF RULE 4.2

Although Virginia has not adopted the ABA Comments on the Rule's purposes, it has addressed them in LEO 1890, a Compendium Opinion on the Rule:

“The purpose of the no-contact rule is to protect a represented person from “the danger of being ‘tricked’ into giving his case away by opposing counsel's artfully crafted questions,” *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983), and to help prevent opposing counsel from “driving a wedge between the opposing attorney and that attorney's client.” *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990). The presence of a person's lawyer “theoretically neutralizes” any undue influence or encroachment by opposing counsel. *Univ. Patents, Inc. v. Kligman*, 737 F. Supp. 325, 327 (E.D. Pa. 1990).

“Authorities recognize that the no-contact rule contributes to the proper functioning of the legal system by (1) preserving the integrity of the attorney-client relationship; (2) protecting the client from the uncounseled disclosure of privileged or other damaging information relating to the representation; (3) facilitating the settlement of disputes by channeling them through dispassionate experts; (4) maintaining a lawyer's ability to monitor the case and effectively represent the client; and (5) providing parties with the rule that most would choose to follow anyway.”

The proposed Opinion undermines all of the above purposes, because, with multi-party e-mail, both attorneys' continuous *presence* in the communication – which would neutralize “any undue influence or encroachment by opposing counsel,” is not guaranteed, and in fact, is extremely unlikely, and often impossible. E-mail is *asynchronous*.

INFERRING AND INTERPRETING CONSENT

So, if I receive an email from opposing counsel with her client on the cc line, is it reasonable for me to assume she is asking us to start a three-way discussion of the case? If so, is her consent contingent on the assumption that I will add my own client to the conversation, to level the playing field? How far does her consent extend?

Chances are, her client is not as busy as either of the lawyers. If the first reply to her email is from her client, has she consented to my reading it? Has she consented to me replying to it? Chances are, when I first see any of these emails, she might be in court or depositions or doing something other than sitting on the edge of her seat waiting for answers to her email. How many times can her client and I go back and forth in our nominally three-way negotiation without waiting for her to check her email and catch up with what we have worked out?

This is not a bright-line rule. This is “If You Give a Mouse a Cookie ...”. The Opinion just gives us the cookie, saying we can “reply all,” and is silent about how far we can go with it.

Some people have a tendency to “reply all” thoughtlessly. That may mean that the Bar should be merciful to lawyers who thereby violate Rule 4.2. It may mean that it’s somewhat negligent to cc or bcc one’s client. But there is no way that that makes it O.K. to “reply all” to a represented opposing party.

From: [Astrika Adams](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER Comment on LEO 1897
Date: Wednesday, February 2, 2022 11:04:05 AM

I agree with the VSB's important action in recognizing that counsel should be able to "reply all" to an email from opposing counsel where opposing counsel's client, whether an individual or representatives of a corporate client, are either included in the "to:" line or the "cc:" line.

As the VSB correctly concluded, when counsel includes their clients in the "to:" or "cc:" lines of an email, there is not only an implicit consent that opposing counsel may "reply all", but that the counsel's client(s) visibly included in the email have agreed with their counsel that they want to be included in such email conversation, including responses, in "real time", from opposing counsel.

If counsel only desires to provide "real time" confirmation that an email has been sent to opposing counsel, that counsel could include their client on the "bcc" line. If someone responds "reply all" to an email where individuals, including clients, are included in the "bcc" line, they will not receive the "reply all" email from opposing counsel. Similarly, like VSB noted, counsel can always immediately forward the sent email to counsel's client after it has been sent to opposing counsel.

The benefits of being able to "reply all" to opposing counsel and clients is extremely beneficial in the transactional law setting, where there is not a inherently adverse position taken between the two sets of clients necessarily.

The analogy can be given of a situation where counsel and opposing counsel are in a physical room and counsel's client happens to be present in that room as well. As counsel approaches the opposing counsel and his or her client listens in to what his counsel is saying, it is natural and fair and in accordance with the VSB Rules of Professional Conduct that opposing counsel may respond to the first attorney's comments even if first attorney's client will naturally hear what is being said. Counsel chose to include their client in the physical, or virtual, setting where conversation will naturally be exchanged by and among counsel and opposing counsel.

Clarifying that opposing counsel may "reply all" where others' clients have been visibly included in the original email will also prevent counsel from baselessly claiming improper and unauthorized communication with a represented individual, or entity, simply because counsel is unappreciative of the professional substance of any "reply all" response by opposing counsel.

This clarification does not exempt opposing counsel from responding in a courteous or professional matter, and opposing counsel will still be bound by other VSB Rules of Professional Conduct in such "reply all" response.

From: [Laura Pantazis](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER Comment on Proposed Leo 1897
Date: Tuesday, February 1, 2022 9:35:22 PM

Dear Ms. Gould,

I support the new proposed Leo 1897 regarding "reply all" to an email. This does seem to be an issue that needed clarification and this Leo does that. Thank you.

--

Laura Pantazis
Pantazis Law Office, PLLC
dba Legal Research Services, PLLC
P.O. Box 24
Ruby, VA 22545
Direct Line: (540) 760-3586

From: [Mark Smith](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER Comments to Proposed LEO 1897
Date: Friday, February 18, 2022 8:41:57 AM

I write in support of the legal ethics opinion 1897 as drafted. I believe it is unreasonable to expect opposing counsel to sift through an email address line and cc address line to determine which email address, if any, may belong to an opposing party. This knowledge is likely uniquely known to the opposing party and his lawyer.

As drafted, this rule is simple and avoids the potential situation in which a lawyer might intentionally include their client hoping to create an ethical issue for the other side.

Mark S. Smith, Esq.
Christie, Kantor, Griffin & Smith, P.C.
468 Viking Drive, Suite 212
Virginia Beach, Virginia 23452
Ph.: 757-499-9222
Fax: 757-499-0587
mss@candklaw.net

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From: [Susan Pesner](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Tuesday, February 1, 2022 2:37:36 PM
Attachments: [image001.png](#)

LEO 1897 is very well-reasoned and is a much needed Opinion that I fully support.

Thank you to the Ethics Committee.

Susan M. Pesner

Attorney at Law



Phone: 703-506-9440 ext 222
Fax: 703-506-0929
Email: spesner@pesner.com

Pesner Altmiller Melnick DeMers & Steele PLC
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From: [David Gogal](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Tuesday, February 1, 2022 2:56:12 PM
Attachments: [image003.png](#)
[image004.png](#)

I do believe the most important thing here is to provide a bright-line rule to guide future conduct in email communications.

I don't necessarily agree with the reasoning of proposed LEO 1897, as I would prefer that Virginia follow the vast majority of the other jurisdictions who have concluded that a "reply all" to clients is not proper in the absence of actual consent between counsel, something which is easy to do and common in negotiating commercial transactions. I believe that emails have largely supplanted formal letters as the usual method of communication between counsel and thus, notwithstanding the view of New Jersey, the need for "protection of the client from overreaching by opposing counsel and guarding the clients' right to advice from their own lawyer" remains. For example, under LEO 1897 a "reply all" email could be sent by an opposing counsel to a client intentionally or inadvertently when the client's counsel is on vacation or otherwise not reachable by email.

Notwithstanding my preference to follow the majority rule, if LEO 1897 is approved, I believe we can live with it. The important thing here is that we provide guidance to VSB members, given the differences of opinion on the ethical implications of something we do almost every day, communicate with opposing counsel. If approved, it will be very important for VSB members to consider how they use "to" or "cc" fields and adopt the practice of more regularly using "bcc" or forwarding emails to clients.

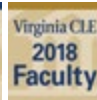
David J. Gogal

Principal



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From: [Debra Powers](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Tuesday, February 1, 2022 9:37:44 PM
Attachments: [image001.png](#)
[image002.png](#)

I say, “Thank you, thank you, thank you!” for this opinion and wish to voice my vehement support for LEO 1897. I think the opinion says it best – “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.”

I have often experienced instances in the past, and with increasing frequency, when I have had to spend my time reviewing a lengthy list of cc: recipients to make certain that an attorney did not include his/her client among the numerous recipients, including staff or associate attorneys that I may not be familiar with or know were involved in the case. It is past time to put the responsibility for this on the attorneys that include clients as copy recipients of email communications with opposing counsel rather than taking the extra seconds to blind copy or forward these communications to them.

Hip, hip, hooray for LEO 1897!

Debra Powers, Attorney at Law

TAYLOR HUGULEY POWERS PLLC

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From: [Ryan A. Brown](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Tuesday, February 1, 2022 5:19:20 PM
Attachments: [signature.asc](#)

To Whom it May Concern:

I am writing in support of draft LEO 1897. Having dealt with this situation numerous times, we often find that our clients are more frustrated when we intentionally remove the opposing parties from an email before replying to the opposing counsel, as it hampers the information flow in group email discussions. Each attorney sending emails can choose whether their clients are on BCC: or CC: and the proposed bright line rule when clients are on CC: will greatly simplify the process of attorneys complying with RPC 4.2.

Sincerely,

Ryan A. Brown, Esq. (VSB# 74041)

--

| | |
|----------------------------------|---|
| Ryan A. Brown, Esq. (he/his/him) | Admitted in Virginia and DC |
| Arlington Law Group | email: rbrown@arlingtonlawgroup.com |
| 1739 Clarendon Blvd. | phone: (703) 842-3025 |
| Arlington, Virginia 22209 | fax: (202) 318-0363 |

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From: [Vicki Francois](#)
To: [publiccomment](#)
Cc: [Vicki Francois](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Tuesday, February 1, 2022 4:49:34 PM
Attachments: [image002.png](#)
[image004.png](#)

Hello:

I agree that the conduct would not violate Rule 4.2 because the sending lawyer has given implied consent to the communication with her client by including the client on the email.

Vicki

Vicki L. Francois (née Wiese), Esquire (she/her)
Trained in Collaborative Law and Practice
Licensed in Virginia and D.C.

Wiese Law Firm, PLC

Note our new physical address:

1506 Franklin Road, S.W. - Suite 101

Roanoke, Virginia 24016

vicki@roanoke.law

Phone: (540) 206-3770

Fax: (540) 206-3771

www.wieselawfirm.com

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From: [Shameka L Harris](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Tuesday, February 1, 2022 4:45:19 PM

I am in complete agreement with the analysis of the Legal Ethics Committee. If an attorney includes their client on an email to an opposing attorney, the sending attorney should understand that "Reply All" might be used, which would result in their client being included on the response.

Shameka L Harris
Senior Litigation Attorney
Cordell & Cordell - Richmond
7231 Forest Avenue Suite 200, Richmond, VA 23226

Direct [\(804\) 923-0058](tel:8049230058) | **Mobile** [\(804\) 869-2370](tel:8048692370) | **Fax** [\(804\) 482-2888](tel:8044822888)
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From: [Jennifer Brown](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Tuesday, February 1, 2022 3:59:55 PM

Ms. Gould:

I support LEO 1897 because this scenario inadvertently causes an attorney to be in ethical space when opposing counsel copies their client in a response knowing the receiving attorney will automatically reply all especially when there are other parties' attorneys included in the email.

If an attorney adds their client to the email, the receiving attorney should not be expected to take the time to scan through each email address to make sure they did not include a represented party given the rapid pace of email responses, and because they are not expecting a new recipient to be added to the email chain.

Thank you.

--

Jennifer M. Brown, Esq.

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From: shavrilak@havrilaklaw.com
To: [publiccomment](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Saturday, February 5, 2022 3:44:22 PM

I respectfully disagree with proposed LEO 1897. The burden should be on the replying party to see who they are copying. It is easy to not click reply all. There is no implied consent to communicate with the opposing party just because their counsel copied them on an email being sent. We are required to keep clients informed and while it may be a better practice to bcc the client or forward it, by openly copying the client on the email the lawyer is no more giving consent to communicate with his or her client than they would be if standing next to the opposing counsel in a hallway at the courthouse. That does not mean you can speak to the client about the case without the lawyer's consent.

Sandra L. Havrilak, Attorney at Law
The Havrilak Law Firm, P.C.
9990 Fairfax Boulevard, Suite 410
Fairfax, Virginia 22030
(703) 591-1515

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From: [Ann Brogan](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER LEO 1897
Date: Monday, February 7, 2022 4:23:50 PM

Dear Karen, I am writing in support of the proposed opinion. I strongly support the committee's conclusion that establishing an unambiguous bright line is appropriate and in the interest of clients: "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." I agree that attorneys should always give care not to provide implied consent when copying a client on any form of written communication. Back in the day of paper letters, delivered by snail mail, I was trained that the copy to a client should always be by bcc. Having been embroiled in such email conversations, I find it especially frustrating when the initiating attorney includes a client among a laundry list of cc recipients, shares the client's email address, which can be confidential information, and then reprimands the responding attorney for "communicating with my client." This bright line is welcome and appreciated.

The better practice should always be to avoid even the bcc and forward the email separately to the client. I also have been involved in situations where a cc'd or bcc'd client "replies to all" with comments that could be used as party admissions, inconsistent statements, etc.

Regards,
Ann

Ann B. Brogan

DAVEY | BROGAN

(757) 622-0100, Ext. 2 / Fax (757) 622-4924 / Direct (757) 937-5606 / Mobile (757) 536-8205

101 Granby Street, Suite 300 / Norfolk, Virginia 23510

ann.brogan@daveybroganpc.com

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From: [BOBBI JO ALEXIS](#)
To: [publiccomment](#)
Cc: [LEGAL SUPPORT](#)
Subject: EXTERNAL SENDER LEO 1897/public comment
Date: Thursday, January 27, 2022 12:46:19 PM

contribution to public comment:

I support the ethics opinion that when a lawyer receives an email from opposing counsel, with the opposing party copied in the "to" or "cc" field, he/she/they do not violate Rule 4.2 when "replying all" to the email.

I agree this conduct should not violate Rule 4.2 because the sending lawyer has given implied consent to the communication with his/her/their client by including the client on the email.

A lawyer who does not wish to give such consent should separately communicate with the client, such as by forwarding the email to the client.

Thank you for your time and consideration, always.

Sincerest regards,
Bobbi Jo Alexis

Bobbi Jo Alexis (Va. State Bar No. 67902)
Culpeper County Attorney
306 N. Main Street, 2nd Floor
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Attorneys at Law

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*Carl J. Witmeyer, II
Wes B. Witmeyer

Email:
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Wes@witmeyerlaw.com

*fellow, American Academy of Matrimonial Lawyers

February 2, 2022

Virginia State Bar
1111 E. Main Street
Suite 700
Richmond, VA 23219

Re: Proposed LEO 1897

To Whom It May Concern:

I read with interest, the proposed LEO, where a Lawyer writes to the opposing Lawyer but copies their client, and whether or not it would be unethical for the responding Lawyer to use reply all. I do not disagree with the committee's conclusion that it would not be a violation or unethical conduct by replying all. However, the LEO should also address the issues where the receiving Attorney ask that they not include their clients in communication between the opposing counsel, and possibly a Guardian Ad Litem, when the case involves children's representation. If this is requested, I believe the forwarding Attorney should not forward anything that is copied to their client, to the other Attorney, especially to the Guardian Ad Litem.

Thank you and best wishes.

Very truly yours,



Carl J. Witmeyer, II

CJW/mpc

RECEIVED

FEB - 7 2022

VIRGINIA STATE BAR

From: [Monroe A. Windsor](#)
To: [publiccomment](#)
Subject: EXTERNAL SENDER Comment on Proposed LEO 1987
Date: Thursday, June 30, 2022 11:46:08 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)

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I support LEO 1987. I believe that it goes a long way in preventing a “gotcha” ethics violation when a lawyer hits “reply all” to an email. I think that the “gotcha” potential is especially great when the opposing party is copied on an email that is also copied to several lawyers, paralegals, and others. In the “heat of responding,” a lawyer might not realize that the opposing party is in the email group.

In this instance, I believe that there is a better analogy to an email than a letter. I think that the better analogy would be two attorneys talking within earshot of a client outside the courtroom. If opposing counsel starts a conversation within earshot of his or her own client, I do not think that the other lawyer would be accused of communicating with the opposing party by responding.

-Mike Windsor



MONROE “MIKE” WINDSOR

Associate

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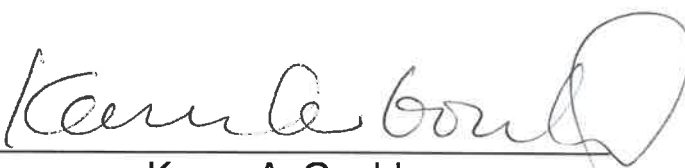
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AFFIDAVIT

I, Karen A. Gould, Executive Director at the Virginia State Bar, do hereby swear and affirm that the foregoing documents are true copies of the original documents on file in the offices of the Virginia State Bar regarding proposed LEO 1897.

Given under my hand this 5th day of July 2022.




 Karen A. Gould

STATE OF VIRGINIA
 CITY OF RICHMOND, to-wit:

I, a Notary Public in and for the Commonwealth of Virginia, do hereby certify that Karen A. Gould, personally known to me, appeared in person before me and was by me duly sworn and thereupon executed in my presence and acknowledged to me the truth and voluntariness of the foregoing Affidavit.

Given under my hand this 5th day of July 2022.



 Notary Public

My Commission Expires: Oct. 31, 2025

