

RE: Advisory Opinion 94-01
Arkansas Bar Association

DATE: April 14, 1994

SUBJECT: Communication with Adverse Party

Your request for an advisory opinion sets forth the following facts: Pursuant to federal bankruptcy law, the Attorney General appoints a United States Trustee for the State of Arkansas, who in turn establishes and supervises a panel of private trustees who serve in selected Chapter 7 proceedings. Although not required, the trustees on the panel are typically practicing attorneys experienced in bankruptcy matters. The trustee who is appointed frequently hires, with court approval, attorneys who represent or assist the trustee in carrying out the duties assigned to the trustee. Upon behalf of the trustee, the attorney may commence proceedings against an adverse party.

Your question is whether the attorney for the adverse party may communicate directly with the trustee concerning the litigation and settlement of the contested matter, without the knowledge and consent of the lawyer who represents the trustee. The committee's answer to that question is no.

Our analysis begins with Rule 4.2 of the Arkansas Rules of Professional Conduct, which have governed Arkansas attorneys since January 1, 1986. The rule states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 purpose of this rule is to prevent an attorney from bypassing the opposing attorney and obtaining, directly from the opposing party, a concession, an admission or a settlement. The provision applies to all forms and types of judicial proceedings and legal representation. To prevent overreaching and to avoid interference in the trust and confidence placed by the client in the attorney, such direct contact is universally prohibited. Wolfram, Modern Legal Ethics (1986) 612.

Although the trustees are usually attorneys themselves, in proceedings where they have elected to, or are required to, employ counsel, they have in effect become the client. The trustee is entitled to the same protection as any other client, the protection provided by retained counsel.

Accordingly, the attorney for the adverse party should not communicate directly with the trustee. Such communication raises the risk of settlement or other resolution without the guidance of counsel. See Virginia Legal Ethics Opinion 1431 (1991). Conversely, the trustee should not initiate direct communications with the attorney for the adverse party. The trustee has delegated such communications to the retained attorney.

However, it should be noted that Rule 4.2 does not prohibit direct communications

between adverse parties. See Comment to Rule 4.2; Hazard, The Law of Lawyering (2nd ed. 1993) 732. See California State Bar Formal Opinion 1989-110 (bankruptcy trustee, acting as a party, is permitted to communicate directly with other parties).

An obvious alternative is available: upon retaining an attorney for a particular matter, the trustee may alter the traditional terms of the attorney-client relationship. The trustee may notify its attorney that it retains the power to communicate directly with, and to receive communications directly from, the attorney for the adverse party. The resolution of that request falls within the general rubric of the law of contract and the attorney-client relationship. The Rules of Professional Conduct, see Rule 1.2 in particular, anticipate such modification in the normal relationship.

Such a modification of Rule 4.2 to allow direct communications between the trustee as client and the attorney for the adverse party, regardless of the wisdom of such an agreement, is not contrary to any express policy of the Rules. In contrast, some agreements are so contrary to the Rules as to be expressly forbidden regardless of the consent of the parties. See Rule 5.6, Rule 1.5 (d).

The attorney for the adverse party may inquire of the attorney for the trustee whether the trustee has consented to direct communications and has in effect waived the protection of Rule 4.2. The attorney for the adverse party should obtain written consent from the attorney before communicating directly with the trustee.

NOTICE

"This is an opinion only of the Arkansas Bar Association which is a voluntary association of attorneys licensed to practice in the State of Arkansas, and reliance thereon is voluntary and relieves any Association member from liability for the content hereof. This opinion is intended to be the Association's best interpretation of the Model Rules of Professional Conduct as promulgated by the Supreme Court of Arkansas as that code applies to the written facts presented to the Committee."

ARKANSAS BAR ASSOCIATION

By: _____
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Reporter for Professional Ethics
and Grievances Committee