STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 09-04
July 16, 2009

The Committee received, by letter dated April 20, 2009, a request to determine whether the North Dakota Rules of Professional Conduct prevent Requesting Attorney ("RA") from contacting a represented Bankruptcy Debtor ("Debtor") under the following circumstances.

FACTS

RA is an attorney in private practice. However, RA also acts as a panel bankruptcy trustee appointed by the United States Trustee's Office in the State of North Dakota. RA is currently an interim bankruptcy trustee as defined by 11 U.S.C. §701. If elected by the creditors or the creditors fail to elect a trustee, a panel trustee may serve as the bankruptcy trustee in the case. 11 U.S.C. §702. A bankruptcy trustee need not be an attorney to be eligible to serve as a trustee. 11 U.S.C. §§321, 322.

RA, in his capacity as bankruptcy trustee, asks whether RA may make direct contact with a Debtor who is represented by counsel. The purpose of RA initiating contact with the Debtor is to make his investigation on behalf of the estate. See generally 11 U.S.C. §704. RA wishes to do this occasionally without prior notice.

> The powers and duties of a bankruptcy trustee are extensive. Upon the commencement of a case in bankruptcy, all corporate property passes to an estate represented by the trustee. 11 U.S.C. §§ 323, 541. The trustee is "accountable for all property received," §§ 704(2), 1106(a)(1), and has the duty to maximize the value of the estate, see § 704(1); In re Washington Group, Inc., 476 F.Supp. 246, 250 (MDNC 1979), aff'd *sub nom.* Johnston v. Gilbert, 636 F.2d 1213 (CA4 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3084, 69 L.Ed.2d 954 (1981). He is directed to investigate the debtor's financial affairs, §§ 704(4), 1106(a)(3), and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property, §§ 547(b)(4)(B), 548. Subject to court approval, he may use, sell, or lease property of the estate. § 363(b).

Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 352 (1985).

Specifically, RA asks whether his direct contact, without prior notice, with a Debtor who is represented by counsel violates North Dakota Rule of Professional Conduct 4.2 ("Rule 4.2"). The request presumes that the RA has not sought the agreement for the contact from the Debtor's counsel.

DISCUSSION

The question presented is whether RA, an attorney-trustee, may have communication with parties to the bankruptcy action who are represented by counsel. The question turns on whether in the course of acting as bankruptcy trustee, the RA is representing a client.

A. Rule 4.2.

The relevant rule of Professional Conduct is Rule 4.2: Communication with Person Represented by Counsel. Rule 4.2 states as follows:

> 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 to do so by law or a court order.

(emphasis added).

Rule 4.2 prohibits communication with represented persons about the subject of the representation when the attorney is representing a client. The bankruptcy trustee is the representative of the bankruptcy estate. 11 U.S.C. §323(a). The bankruptcy trustee has the capacity to sue and be sued. Id.(b). Rule 4.2 would apply and prohibit the communication outside of the presence of the Debtor's counsel if the RA acting as a bankruptcy trustee has an attorney-client relationship with a party to the bankruptcy action.

Because the bankruptcy trustee can sue and be sued and the trustee stands in the shoes of the bankruptcy estate, the bankruptcy trustee is a party to the action. In re Markos Gurnee Partnership, 182 B.R. 211 (N. D. Ill. 1995).

> In bankruptcy, it was never doubted that the trustee, rather than the debtor's estate, was the proper party in litigation involving the estate. However, there developed a second principle, at variance with the usual common law rule, that in such litigation, the bankruptcy estate, as a separate entity, was the real party in interest, with the trustee serving merely as a representative.

Id.

Thus, the bankruptcy trustee would not be in an attorney-client relationship with the estate or himself as trustee unless the RA was also acting as legal counsel or attorney for the estate/trustee. See Arizona Ethics Opinion 03-02 (reaching the same result).

This result is consistent with the underlying principle behind Rule 4.2.

> This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by

> those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.

Rule 4.2, comment 1.

The RA, however, must make it clear to all parties and other involved persons that he represents the estate only as a panel or appointed trustee and not as legal counsel for the bankruptcy estate. If RA makes his role clear and is careful to so limit his role, RA would not be interfering with the Debtor's, or other parties', attorney-client relationship. To reach a different result would give non-attorney trustees broader authority to protect the bankruptcy estate than attorney trustees. It is a well established principle that parties may communicate with each other even if they are represented as long as the communication is not the result of attorney misconduct. N.D. Ethics Op. 96-10; see also N.D. Rule of Professional Conduct 8.4 (misconduct for the attorney to act through another to do what would otherwise be misconduct).

CONCLUSION

In conclusion, if the RA has or will have a dual capacity (1) as representative of the estate, and (2) as legal counsel for the representative of the estate, communication with a represented Debtor is prohibited under Rule 4.2. However, if the RA is not representing the bankruptcy estate as legal counsel, and is acting solely as trustee for the bankruptcy estate, Rule 4.2 does not prohibit direct contact with the represented Debtor as long as RA makes it clear to all persons involved in the action that RA is not representing the bankruptcy estate or the trustee as legal counsel and that there is no attorney-client relationship.

This Opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This rule provides:

> A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This Opinion was drafted by Adele Page and unanimously approved by the Committee on July 16, 2009.

____

Dann Greenwood, Chair

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 09-04
July 16, 2009

The Committee received, by letter dated April 20, 2009, a request to determine whether the North Dakota Rules of Professional Conduct prevent Requesting Attorney ("RA") from contacting a represented Bankruptcy Debtor ("Debtor") under the following circumstances.

FACTS

RA is an attorney in private practice. However, RA also acts as a panel bankruptcy trustee appointed by the United States Trustee's Office in the State of North Dakota. RA is currently an interim bankruptcy trustee as defined by 11 U.S.C. §701. If elected by the creditors or the creditors fail to elect a trustee, a panel trustee may serve as the bankruptcy trustee in the case. 11 U.S.C. §702. A bankruptcy trustee need not be an attorney to be eligible to serve as a trustee. 11 U.S.C. §§321, 322.

RA, in his capacity as bankruptcy trustee, asks whether RA may make direct contact with a Debtor who is represented by counsel. The purpose of RA initiating contact with the Debtor is to make his investigation on behalf of the estate. See generally 11 U.S.C. §704. RA wishes to do this occasionally without prior notice.

> The powers and duties of a bankruptcy trustee are extensive. Upon the commencement of a case in bankruptcy, all corporate property passes to an estate represented by the trustee. 11 U.S.C. §§ 323, 541. The trustee is "accountable for all property received," §§ 704(2), 1106(a)(1), and has the duty to maximize the value of the estate, see § 704(1); In re Washington Group, Inc., 476 F.Supp. 246, 250 (MDNC 1979), aff'd *sub nom.* Johnston v. Gilbert, 636 F.2d 1213 (CA4 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3084, 69 L.Ed.2d 954 (1981). He is directed to investigate the debtor's financial affairs, §§ 704(4), 1106(a)(3), and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property, §§ 547(b)(4)(B), 548. Subject to court approval, he may use, sell, or lease property of the estate. § 363(b).

Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 352 (1985).

Specifically, RA asks whether his direct contact, without prior notice, with a Debtor who is represented by counsel violates North Dakota Rule of Professional Conduct 4.2 ("Rule 4.2"). The request presumes that the RA has not sought the agreement for the contact from the Debtor's counsel.

DISCUSSION

The question presented is whether RA, an attorney-trustee, may have communication with parties to the bankruptcy action who are represented by counsel. The question turns on whether in the course of acting as bankruptcy trustee, the RA is representing a client.

A. Rule 4.2.

The relevant rule of Professional Conduct is Rule 4.2: Communication with Person Represented by Counsel. Rule 4.2 states as follows:

> 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 to do so by law or a court order.

(emphasis added).

Rule 4.2 prohibits communication with represented persons about the subject of the representation when the attorney is representing a client. The bankruptcy trustee is the representative of the bankruptcy estate. 11 U.S.C. §323(a). The bankruptcy trustee has the capacity to sue and be sued. Id.(b). Rule 4.2 would apply and prohibit the communication outside of the presence of the Debtor's counsel if the RA acting as a bankruptcy trustee has an attorney-client relationship with a party to the bankruptcy action.

Because the bankruptcy trustee can sue and be sued and the trustee stands in the shoes of the bankruptcy estate, the bankruptcy trustee is a party to the action. In re Markos Gurnee Partnership, 182 B.R. 211 (N. D. Ill. 1995).

> In bankruptcy, it was never doubted that the trustee, rather than the debtor's estate, was the proper party in litigation involving the estate. However, there developed a second principle, at variance with the usual common law rule, that in such litigation, the bankruptcy estate, as a separate entity, was the real party in interest, with the trustee serving merely as a representative.

Id.

Thus, the bankruptcy trustee would not be in an attorney-client relationship with the estate or himself as trustee unless the RA was also acting as legal counsel or attorney for the estate/trustee. See Arizona Ethics Opinion 03-02 (reaching the same result).

This result is consistent with the underlying principle behind Rule 4.2.

> This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by

> those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.

Rule 4.2, comment 1.

The RA, however, must make it clear to all parties and other involved persons that he represents the estate only as a panel or appointed trustee and not as legal counsel for the bankruptcy estate. If RA makes his role clear and is careful to so limit his role, RA would not be interfering with the Debtor's, or other parties', attorney-client relationship. To reach a different result would give non-attorney trustees broader authority to protect the bankruptcy estate than attorney trustees. It is a well established principle that parties may communicate with each other even if they are represented as long as the communication is not the result of attorney misconduct. N.D. Ethics Op. 96-10; see also N.D. Rule of Professional Conduct 8.4 (misconduct for the attorney to act through another to do what would otherwise be misconduct).

CONCLUSION

In conclusion, if the RA has or will have a dual capacity (1) as representative of the estate, and (2) as legal counsel for the representative of the estate, communication with a represented Debtor is prohibited under Rule 4.2. However, if the RA is not representing the bankruptcy estate as legal counsel, and is acting solely as trustee for the bankruptcy estate, Rule 4.2 does not prohibit direct contact with the represented Debtor as long as RA makes it clear to all persons involved in the action that RA is not representing the bankruptcy estate or the trustee as legal counsel and that there is no attorney-client relationship.

This Opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This rule provides:

> A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This Opinion was drafted by Adele Page and unanimously approved by the Committee on July 16, 2009.

Dann Greenwood, Chair