

1 (This is a DRAFT opinion and is subject to revision or withdrawal until finalized by the Ethics
2 Committee – September 15, 2011)

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4 LEGAL ETHICS OPINION 1861 MAY A LAWYER SERVING AS A BANKRUPTCY
5 TRUSTEE COMMUNICATE WITH THE DEBTOR
6 WITHOUT CONSENT BY THE DEBTOR’S LAWYER?
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9 In this hypothetical, a Virginia lawyer is appointed to serve as trustee in a Chapter 7
10 bankruptcy case. The trustee’s duties are established by 11 U.S.C. §704, and include
11 investigating the debtor’s financial affairs and, if advisable, opposing the discharge of the debtor.
12 The trustee is authorized to retain counsel to represent the estate, but typically does not do so
13 unless the proceeding becomes contested. The debtor in this case is represented by a lawyer who
14 has not consented to the trustee communicating directly with the debtor.
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16 QUESTION PRESENTED

- 17 1. Does Rule 4.2 prohibit a bankruptcy trustee, who is also a lawyer, from communicating
18 directly with a debtor who is represented by counsel?

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20 APPLICABLE RULES AND OPINIONS

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22 The applicable *Rule of Professional Conduct* is Rule 4.2.¹
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24 ANALYSIS

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26 The lawyer/trustee in this situation is neither a party to the case nor representing a client.
27 His function is to “collect and reduce to money the property of the estate for which he serves,
28 and to close up the estate as expeditiously as is compatible with the best interests of parties in
29 interest.”² He acts as the representative of the bankruptcy estate and has the capacity to sue and
30 be sued.³ Thus, he acts as a fiduciary⁴, although he will be named as a party to the action if he is
31 sued as representative of the estate.
32

33 A lawyer acting as a fiduciary may be disciplined for actions taken in that role if the same
34 actions would have warranted discipline if the relationship had been a traditional attorney-client

¹ Rule 4.2 Communication With Persons Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of 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.

² 11 U.S.C. §704(a)(1).

³ 11 U.S.C. §323(a), (b).

⁴ *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 355 (1985).

35 relationship.⁵ In LEO 1585, the Committee applied this standard to a lawyer/trustee who faced a
36 conflict of interest between two bankruptcy estates/debtors for which he was serving as trustee.
37 The Committee applied the conflict of interest rules, despite the fact that the lawyer was serving
38 only as trustee to both parties, and opined that the trustee must resign as trustee in both cases in
39 order to comply with his ethical responsibilities.

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41 In light of the purposes of Rule 4.2⁶, and especially because of the fact that a
42 lawyer/trustee may be in a position to take advantage of a debtor if he is permitted to
43 communicate with the debtor without the presence of the debtor's counsel, the Committee opines
44 that a lawyer who serves as a bankruptcy trustee may not communicate with a represented debtor
45 unless the debtor's lawyer consents or the communication is authorized by law. Examples of
46 communications that are authorized by law are notices that, by statute or court rule, must be sent
47 to the debtor personally, or a scheduled and noticed proceeding such as a meeting of creditors
48 pursuant to 11 U.S.C. §341.

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50 This opinion is advisory only and is not binding on any court or tribunal.
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⁵ See LEOs 1301, 1325, 1335, 1442, 1449, 1487, 1585.

⁶ As Comment [8] explains, the rule is designed to protect uncounselled persons from being taken advantage of by opposing counsel and to preserve the attorney-client relationship.