

You have indicated that an attorney represented two Corporate Clients in litigation against three Debtor/Defendants arising out of the latter's fraudulent conduct. Following the entry of a judgment against the Debtor/Defendants, they filed Chapter 11 bankruptcy petitions. You advise that, prior to those filings, the Debtor/Defendants undertook to transfer to their wives two groups of property for no consideration, each group of which is allegedly of sufficient value to satisfy the judgment. Two of the three Debtor/Defendants have since converted their petitions to Chapter 7, while the third remains in Chapter 11 and Trustees have been appointed in all cases.

You have further indicated that, because of the attorney's extensive familiarity with the issue involving fraudulent transfers of property, the Chapter 11 Trustee, who is himself an attorney, requested that the attorney enter an appearance as counsel to the Trustee in connection with litigation against the Debtor/Defendants and their wives arising out of the fraudulent conveyances. Attorney secured the consent of Corporate Clients as well as the Chapter 11 Trustee as to any conflict of interest and was appointed by the Bankruptcy Court as counsel for the Trustee for the purpose of instituting litigation regarding the fraudulent conveyances. The facts you have provided indicate that lawsuits were instituted on behalf of Trustee/Client while settlement negotiations were conducted by attorney on behalf of Corporate Client in the corollary matter. Furthermore, you indicate that, prior to the first scheduled trial brought on behalf of the Trustee/Client regarding the fraudulent conveyances, Trustee/Client advised the attorney that he had settled the pertinent claims with the adverse attorney representing the Debtor/Defendants in those matters. Finally, you advise that attorney never authorized the adverse attorney to discuss settlement with Trustee/Client and, in fact, was unaware that settlement discussions were being conducted or that adverse attorney was representing to Trustee/Client that he was being too heavily influenced by attorney's firm. Based upon the settlement reached, Trustee/Client directed attorney to remove the actions from the trial docket and the attorney-client relationship was then severed.

You have asked the Committee to opine whether, under the facts of the inquiry, it was proper for adverse attorney to conduct settlement negotiations with Trustee/Client without authorization from attorney appointed to represent Trustee/Client. You have not requested that the Committee consider any questions related to the issue of dual representation and any subsequent conflict of interest.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:7-103(A)(1), which precludes a lawyer, in the course of his representation of a client, from communicating on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. (See also Ethical Consideration 7-15 [EC:7-15].)

The Committee has previously opined that, where the disciplinary rules bar direct contact between an attorney and an adverse party who is represented by counsel, neither the fact that the attorney is representing himself nor the claim that the adverse party's attorney is wrongfully withholding information from the adverse party would constitute an exception to the rule. (LE Op. 521, LE Op. 1323.) Furthermore, the Committee has also opined that the plain language of DR:7-103(A)(1), which requires the "prior consent of the lawyer representing such other party" (emphasis added), makes no provision for any agreement of a party to override such prerogative of the lawyer. (LE Op. 1326.) The

Committee has recently opined that it would not be improper for an attorney to make direct contact with a previously represented party, following the entry of a final order in prior litigation, only where the attorney (1) knows the representation has ended through discharge by the client or withdrawal by the attorney or (2) is authorized by law to do so. (LE Op. 1389)

In the circumstances you present, the Committee is of the opinion that the fact that the Trustee/Client is himself an attorney does not abrogate the requirement that the adverse attorney conform to the requirements of DR:7-103(A)(1). It is the Committee's opinion that, unless and until the Trustee/Client's attorney has been discharged or permitted to withdraw, all communication by the adverse attorney, related to the representation, may only be undertaken with the prior consent of the Trustee/Client's attorney unless specific statutory provisions permit direct communication.

Thus, the Committee is of the opinion that direct communication by the adverse attorney with the Trustee/Client, without prior consent of the attorney representing the Trustee, is improper and violative of DR:7-103(A)(1).

Committee Opinion
September 16, 1991