

LEGAL ETHICS OPINION 1585

CONFLICT OF INTEREST - FIDUCIARY  
RELATIONSHIP: TRUSTEE OR  
FORMER TRUSTEE-IN-BANKRUPTCY  
BRINGING ACTIONS AGAINST  
DEBTORS FOR FRAUDULENT  
TRANSFERS.

You have presented a hypothetical situation in which a Virginia attorney, a Chapter 7 bankruptcy trustee for Corporation A, also is the Chapter 7 bankruptcy trustee for individuals X and Y. In his capacity as trustee for Corporation A, the trustee has an obligation to locate and preserve assets for the benefit of creditors.

You indicate that the attorney has learned of the existence of a scheme by which significant assets of Corporation A were concealed and fraudulently diverted from the bankruptcy estate of A, through a series of banking transactions involving X, Y, and other individuals. You further indicate that action needs to be taken against X, Y, and others on behalf of Corporation A.

Finally, you advise that no attorney-client relationship exists between the attorney/trustee and A, X, or Y and it is likely that the fraudulently transferred assets can be traced to identifiable property.

You have asked the committee to opine under the facts of the inquiry:

- (1) whether the attorney, acting as trustee for Corporation A, may commence an action against X and Y and others, including the bankruptcy estates of X and Y, of which he is trustee;
- (2) whether, if the attorney resigns as trustee for X and Y, the attorney-trustee, on behalf of Corporation A, may bring an action against X, Y, and others, including the bankruptcy estates of X and Y, of which he formerly was trustee;
- (3) whether, if the attorney-trustee discloses the above circumstances to the court, and the court specifically authorizes the attorney-trustee to bring the action on behalf of Corporation A, the court approval otherwise renders the ethical issue moot; and
- (4) whether the attorney must resign as trustee in all three cases because of the imminent conflict among the debtors.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105(B) which states that a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR:5-105(C) [which provides for full disclosure and consent by all clients]; and DR:5-105(D) which provides that a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the

Committee Opinion  
June 14, 1994

interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

The committee responds to your inquiries relative to the facts presented as follows:

(1) The committee has previously opined that if an attorney, acting in a fiduciary capacity, violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney-client, the attorney may be properly disciplined pursuant to the Code of Professional Responsibility See LE Op. 1301, LE Op. 1325, LE Op. 1335, LE Op. 1442, LE Op. 1449, LE Op. 1487.

The committee is of the opinion that had the attorney been representing Corporation A and Individuals X and Y, it would have been improper and violative of DR:5-105(B) for the attorney to commence an action against X and Y for the benefit of Corporation A. Thus, the attorney, acting as trustee for Corporation A, may not commence an action against X and Y and others, including the bankruptcy estates of X and Y of which he is a trustee.

(2) The committee is of the opinion that it would be improper, under DR:5-105(D), for the attorney to resign as counsel for X and Y and bring an action, on behalf of Corporation A, against them, without full disclosure to, and consent from, X and Y. Thus, the committee believes it would be improper for the attorney, as trustee for X and Y, to take such action on behalf of Corporation A.

(3) The committee believes that court approval of the attorney/trustee's proposed action would not render the ethical issue moot. The committee has previously opined that even if an act is not prohibited by Virginia or federal law, engaging in such conduct may still be prohibited under the Code of Professional Responsibility. See LE Op. 1217, LE Op. 1324, LE Op. 1448; *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). Additionally, the Disciplinary Rules are mandatory in character and represent the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. See Preamble to the Virginia Code of Professional Responsibility. Therefore, the court's authorization does not represent the final determination as to the ethical issue presented.

(4) whether the attorney must resign as trustee in all three cases because of the imminent conflict among the debtors.

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Committee Opinion  
June 14, 1994

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The committee is of the opinion that had the attorney been representing Corporation A and Individuals X and Y, it would have been improper and violative of DR:5-105(B) for the attorney to commence an action against X and Y for the benefit of Corporation A. Thus, the attorney, acting as trustee for Corporation A, may not commence an action against X and Y and others, including the bankruptcy estates of X and Y of which he is a trustee.

(2) The committee is of the opinion that it would be improper, under DR:5-105(D), for the attorney to resign as counsel for X and Y and bring an action, on behalf of Corporation A, against them, without full disclosure to, and consent from, X and Y. Thus, the committee believes it would be improper for the attorney, as trustee for X and Y, to take such action on behalf of Corporation A.

(3) The committee believes that court approval of the attorney/trustee's proposed action would not render the ethical issue moot. The committee has previously opined that even if an act is not prohibited by Virginia or federal law, engaging in such conduct may still be prohibited under the Code of Professional Responsibility. See LE Op. 1217, LE Op. 1324, LE Op. 1448; *Gunter v. Virginia State Bar*, 238 Va. 617 (1989). Additionally, the Disciplinary Rules are mandatory in character and represent the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. See Preamble to the Virginia Code of Professional Responsibility. Therefore, the court's authorization does not represent the final determination as to the ethical issue presented.

(4) The committee believes that the attorney must resign as trustee in all three cases. The committee is of the view that in order to act as trustee for Corporation A, it would be necessary for the attorney to use the information learned as to X and Y's banking transactions. Since the attorney/trustee is prohibited from using such information, the committee opines that the attorney's continued position as trustee for the Corporation would be compromised. The committee believes that the attorney/trustee cannot both act as trustee for Corporation A and protect the confidentiality afforded X and Y.

Committee Opinion  
June 14, 1994