**Chapter 7 Trustees – Ethical Considerations**

**David P. Leibowitz**
**Lakelaw**
**420 W. Clayton Street**
**Waukegan, IL 60085**
**847 249 9100**
**dleibowitz@lakelaw.com**

**Presentation to the Bankruptcy Section of the Minnesota State Bar Association**

Debtor's counsel may be surprised to learn the extent to which Chapter 7 trustees have formally considered their ethical obligations in this role above and beyond their ethical responsibilities within their particular professions. Most debtors' counsel know that not every trustee is an attorney. In fact, it is not required for one to be an attorney in order to be appointed as a chapter 7 trustee. Rather, a college degree or a satisfactory level of experience is all that's legally required.

The National Association of Bankruptcy Trustees has adopted a Canon of Ethics, which is reproduced below in its entirety.

## NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

## CHAPTER 7 TRUSTEE CANON OF ETHICS

A Chapter 7 Trustee is committed to excellence in the administration of bankruptcy cases and to carry out all duties with the utmost integrity, diligence, and professionalism. Parties are entitled to service that adheres to the highest standards of professional, moral, and ethical conduct. As a fiduciary, a Trustee occupies a significant position of trust and responsibility and is accountable to all in the bankruptcy system and the public at large.

### Integrity of the Bankruptcy System

1. A Trustee shall at all times promote and defend the integrity of the bankruptcy system.

2. A Trustee shall exercise independent fiduciary judgment in the administration of any bankruptcy case.

3. A Trustee shall comply with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the local rules and orders of the districts in which they practice, the Handbook for Chapter  Trustees published by the Executive Office for United States Trustees, and state law as required.

4. A Trustee shall exercise due care to preserve and protect the interests of all parties.

5. A Trustee shall encourage debtors, creditors, attorneys, other professionals, petition preparers, and other participants in the bankruptcy process to diligently perform their bankruptcy and professional obligations.

6. A Trustee who observes conduct by debtors, creditors, attorneys, other professionals, petition preparers, or parties in interest that is fraudulent, abusive, or criminal, shall report any such conduct to the appropriate authorities.

**Professional Conduct as Trustee**

7.  A Trustee shall not accept or continue an appointment in a case if the Trustee is not competent to perform the required duties.

8.  A Trustee shall act with full candor to the court and shall not make any knowingly false statement.

9.  A Trustee shall act with good faith and fair dealing.

10.  A Trustee shall perform all responsibilities diligently.

11.  A Trustee shall investigate, identify, and administer assets in a timely and thorough manner to maximize the value of the estate.

12.  A Trustee shall conduct a meaningful meeting of creditors with a decorum that conveys the significance of the proceedings, dignity and respect for the participants, and sensitivity to the diversity of the participants.

13.  A Trustee shall exercise due care regarding property in the Trustee's control.

14.  A Trustee shall make decisions that are in the best interests of the estate.

15.  A Trustee shall not have ex parte contacts with the judge concerning matters affecting a particular case or proceeding except as permitted by law.

16.  A Trustee may have direct contact with a party represented by an attorney without consent of the attorney, unless prohibited by law.

**Disinterestedness and Conflicts**

17. A Trustee shall promptly resign from any case in which the Trustee is an insider, creditor, or an equity security holder of the debtor, or in which the Trustee has an interest materially adverse to the bankruptcy estate.

18. A Trustee shall not accept or continue an appointment that may adversely affect representation of a bankruptcy estate without resolving all adverse effects.

19. A Trustee shall not sell or transfer estate property to the Trustee, the Trustee's employees, or any parties with whom the Trustee has a connection that might affect or appear to reasonably affect the ability of the Trustee to perform responsibilities in an unbiased manner.

20. A trustee shall only invest funds of a bankruptcy estate in a financial institution approved by the United States Trustee, but not in any financial institution or other investment in which the Trustee has any ownership interest or control.

**Administration of Office and Supervision of Employees**

21. A Trustee shall maintain and actively participate in an appropriate and comprehensive system of office operations and internal accounting to track case administration and progress, account for all estate property, and generate accurate reports.

22. A Trustee shall have a system in place to timely respond to reasonable inquiries on behalf of debtors, creditors, attorneys, the court, and other interested persons.

23. A Trustee shall have a system in place to screen new cases for lack of disinterestedness and to identify circumstances that arise during the case creating a lack of disinterestedness.

24. A Trustee shall timely file all required reports and shall cooperate with required government audits and examinations.

25. A Trustee shall supervise the work of employees and be responsible for their work product.

**Employment of Professionals**

26. A Trustee shall employ competent professionals who are disinterested, unless otherwise authorized by law.

27. A Trustee shall supervise the work of employed professionals.

**Gifts, Speaking, and Contributions**

28. A Trustee shall not receive anything of value if it is intended or offered to influence the official actions of the Trustee in the performance of the Trustee's duties and responsibilities.

29. A Trustee shall not give anything greater than a nominal value to a Judge, employee of the U.S. Trustee program, or employee of the United States Courts.

30. A Trustee may accept reimbursement of expenses and a reasonable honorarium for speaking at educational seminars or conferences.

31. A Trustee may not solicit for charitable or political purposes in any manner resulting in the reasonable perception that it is intended to or would have the effect of influencing the official actions of the Trustee.

**Personal Conduct**

32. A Trustee shall demonstrate integrity and good character.

33. A Trustee shall display proper temperament.

34. A Trustee shall not violate a disciplinary rule to which the Trustee is subject.

35. A Trustee shall not engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or illegal conduct involving moral turpitude.

36. A Trustee shall act at all times in a manner that promotes public confidence in the bankruptcy system.

37. A Trustee shall be free of prejudice and the appearance of prejudice against any individual entity, or group of individuals or entities.

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## II. May A Chapter 7 Trustee Directly Contact or Communicate with a Debtor Represented by Counsel?

A Chapter 7 trustee may directly contact or communicate with a Debtor represented by counsel unless that conduct is prohibited by applicable state law regulating the Trustee's profession. At least two state bar ethics advisory opinions support this position. The opinions from the California Bar and the Arizona Bar are directly on point. An opinion from the Utah Bar is generally on point.

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While it is permitted for a chapter 7 trustee to directly contact a debtor represented by counsel, it is improper for the chapter 7 trustee to do so once he or she is appointed to represent himself or herself in the matter. It is inadvisable for the trustee to do so when acting as a party in an adversary proceeding or contested matter before the court. However, there is no prohibition from the trustee doing so when acting solely in the role of trustee.

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**Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Ethics Op. 1989-110**

**ISSUE:**

Is it proper for a bankruptcy trustee, who is a member of the State Bar of California, to communicate directly with parties to the bankruptcy proceeding who are represented by counsel?

**DIGEST:**

Such communication is not prohibited.

**AUTHORITIES INTERPRETED:**

Rule 2-100 of the Rules of Professional Conduct of the State Bar of California.

**ISSUE**

Many individuals appointed as trustees in bankruptcy proceedings are also members of the State Bar. Frequently, the other parties are represented by counsel, and, in some cases, the trustee will retain counsel. Whether the trustee is or is not represented by counsel, he or she often will wish to communicate directly with other parties, e.g., the debtor or particular creditors. We have been asked whether, in the absence of a party's attorney's consent, such communication is proper.

**DISCUSSION**

Rule 2-100(A) of the Rules of Professional Conduct provides that "[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter unless the member has the consent of the other lawyer."

The Discussion following rule 2-100 states:

> Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. *Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or*

*indirectly communicating on his or her own behalf with a represented party*. . . . (Emphasis supplied.)[1]

Although a trustee may be an attorney, his or her role as trustee is as the representative of the estate of the debtor - i.e., a party to the proceeding who has the capacity to sue and be sued.[2] Hence, under the clear language of both the rule and Discussion, the Trustee, as a party, is permitted to communicate directly with other parties to the proceeding.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility or any member of the State Bar.

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[1] "[T]he comments contained in the Discussions of the rules . . . are intended to provide guidance for interpreting the rules and practicing in compliance with them." (Rule 1-100(C) of the Rules of Professional Conduct of the State Bar of California.)

[2] 11 U.S.C. §323.

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**State Bar of the State of Arizona - Formal Opinions 2003-02**

**03-02: Communication with Represented Persons; Bankruptcy Trustee/Ex Parte contact 04/2003**

A lawyer serving as trustee in bankruptcy may directly contact parties in bankruptcy cases who are represented by counsel. The lawyer acting as both the trustee and attorney for the trustee may not have ex parte contact, unless authorized by law to do so.

**FACTS**

The inquiring attorney is appointed as trustee in bankruptcy cases on a regular basis. Lawyers are often appointed as bankruptcy trustees. Similarly, non-lawyers also are appointed to serve as trustees. Each trustee is assigned to many open bankruptcy cases. The trustee in the ordinary course of performance of her duties would have direct personal contact with persons or parties in the bankruptcy case, including debtors, who are represented by counsel in the matter. The trustee is authorized by the Bankruptcy Code to retain counsel with approval of the bankruptcy court, including her firm, but does not retain counsel in the majority of cases. The trustee usually retains counsel to represent the trustee's interest in a dispute, with court approval, under 11 U.S.C. § 327 and Bankruptcy Rule 2014.

In many cases, the trustee must communicate with the debtor on a regular basis - to obtain information, for scheduling purposes, to determine claims, recover and liquidate assets, and on a host of other matters within the trustee's responsibility or discretion. Similarly, the trustee regularly communicates with creditors and other interested parties. In some cases, disputes arise between the trustee, on behalf of the bankruptcy estate, and another party, usually the debtor or creditors. These disputes may give rise to litigation in the bankruptcy case called contested matters or adversary proceedings.

The trustee ordinarily has no personal interest in a bankruptcy case, and serves as a fiduciary to the interests of the debtor, creditors, and other interested parties.

**QUESTION PRESENTED**

May a member of the State Bar of Arizona, who is a bankruptcy trustee, directly contact a person or party in the bankruptcy case who is represented by counsel?

**RELEVANT ETHICAL RULES**

ER 4.2. Communication with Person Represented By Counsel

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.

ER 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.

**RELEVANT ARIZONA ETHICS OPINIONS**

Ariz. Op. 96-02

Ariz. Op. 00-06

Ariz. Op. 02-02

**OPINION**

*Lawyer serving in a different role.*

A lawyer is subject to ethical rules in a number of contexts beyond situations where the lawyer represents a client. E.g., ERs 8.4 (misconduct) and 3.3 (candor toward the tribunal). The question presented here is narrower - what is the restriction on a lawyer-trustee in bankruptcy with respect to ex parte communications with parties represented by counsel?

In Ariz. Op. 2000-06, the Ethics Committee explained that a lawyer appointed solely as guardian ad litem for a juvenile where the juvenile has separate counsel is not in an attorney-client relationship with the juvenile. Therefore, the lawyer was not bound by ER 1.6's ethical duties of confidentiality. The Ethics Committee explained in Ariz. Op. 2000-06that some of the ethical rules may bind an attorney acting in a particular function while other ERs might not apply:

Attorneys routinely function in roles that draw upon their experience in and knowledge of the law, even though they do not act directly as a lawyer. It is undisputed that attorneys are still bound by the Rules of Professional Conduct regardless of whether their primary function includes an attorney-client relationship or whether other attorneys are involved. See Ariz. Op. 96-01(attorney-mediator). The application of a particular ethical rule to an attorney acting in another role depends upon the language of the rule and the conduct involved. See, e.g., Ariz. Op. 93-09 (Rule 1.7 does not apply to attorney-legislator).

Ariz. Op. 2000-06 at 3. The plain language of ER 4.2 prevents a lawyer representing a client from contact with a person or entity represented by counsel absent the other lawyer's consent or legal authorization. The rule prohibits both direct contact as well as indirect contact, such as sending a communication to opposing counsel with a copy to the lawyer's client. Ariz. Op. 02-02.

In a different context, Ariz. Op. 96-02 explained the purpose of the rule:

The purpose of the prohibition on ex parte contacts with a party known to be represented by counsel is to "(1) prevent unprincipled attorneys from exploiting the disparity in legal skills between attorneys and lay people, (2) preserve the integrity of the attorney-client relationship, (3) help to prevent the inadvertent disclosure of privileged information, and (4) facilitate settlement." Lang v. Superior Court, 170 Ariz. 602, 604, 826 P.2d 1228, 1230 (App. 1992), citing Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990).

Ariz. Op. 96-02 at 2. The question presented presumes the other lawyer does not consent, or that the trustee is concerned about the burden imposed by requesting and awaiting consent. The issue, therefore, is whether the trustee's legal responsibility authorizes contact with a represented party without that party's counsel's consent, or whether there is another exception.

*Whether the trustee is representing a client.*

Ethical Rule 4.2 applies only when a lawyer is "representing a client." A bankruptcy trustee, in contrast to a party in litigation or a transaction, does not have an interest in the bankruptcy case or disputes that arise in the case, except perhaps matters concerning the trustee's compensation. On the contrary, a trustee serves as a fiduciary for the competing interests in the bankruptcy case. See Holywell Court v. Smith, 503 U.S. 47, 112 S.Ct. 1021, 1026 (1992). Thus, the trustee is not representing a client in the course of performing his or her duties in a bankruptcy case.

Ethical Rule 4.2 does not prohibit one client from contacting another directly. The official comment to ER 4.2 acknowledges that "parties to a matter may communicate directly with each other . . ." Accord Restatement of the Law Governing Lawyers § 99, cmt. k (2000).

As such, where the lawyer is acting as the trustee, the lawyer-trustee, as a party, may directly contact other parties in the bankruptcy case without their counsel's consent. See Ariz. Op. 2000-06 (attorney guardian may directly contact minor who is represented by counsel).

This is not to say that a lawyer may have ex parte contacts if he or she is a party to a dispute. In two cases, Arizona lawyers were disciplined for such communications. In re Sproull, 2002 Ariz. Lexis. 45 (Supreme Court No. SB-02-0004-D 2002); In re Hohn, 171 Ariz. 539, 832 P.2d 192 (1992). But see Restatement (Third) of the Law Governing Lawyers § 99(1)(b), cmt. e (2000) (arguing that the rule against contact with a represented non-client does not apply where "the lawyer is a party and represents no other client in the matter").

Some communications may be authorized by law.

As indicated, a lawyer may be appointed as counsel to the trustee, including the trustee's law firm. In that case, the lawyer for the trustee is representing a client. Even so, the lawyer may be authorized by law to have certain limited ex parte communications. In the course of performing the duties of the trustee under Bankruptcy Code § 7004, and giving notices under Bankruptcy Rule 2002, for example, counsel for the trustee may be required to send notice to parties identified on a master mailing list even where they are represented by counsel. To the extent such communication is authorized by law, it is outside the prohibition of ER 4.2 and Ariz. Op. 02-02, which prevent a lawyer from sending a represented client a copy of a communication to the client's lawyer. See, e.g., ABA Formal Op. 95-396 (determining that "authorized by law" includes a constitutional provision, statute, or court rule, having the force and effect of law). So too, would a court order.

**CONCLUSION**

The lawyer-trustee may communicate directly with persons who are represented by counsel concerning the subject matter of the bankruptcy case. This direct communication is limited to

situations where an attorney is appointed to act exclusively as a bankruptcy trustee. If the attorney has a dual appointment to act also as attorney for the trustee, then ER 4.2 applies and prohibits ex parte contacts and communications, unless otherwise authorized by law.

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**Utah State Bar Ethics Advisory Opinion Committee: Opinion No. 97-07**

(Approved May 30, 1997)

**Issue:** Is a lawyer, acting as a trustee under the United States Bankruptcy Code, required to maintain bankruptcy estate trust funds in a financial institution that complies with check-overdraft reporting requirements described in Rule 1.15?

**Opinion:** No. A lawyer, acting as a trustee under the United States Bankruptcy Code, is not required to maintain funds in a financial institution that complies with the check-overdraft reporting requirements of Rule 1.15, because the administration of such bankruptcy funds is not the practice of law.

**Facts:** Pursuant to 11 U.S.C. § 1302, the United States Trustee appointed a lawyer as a Chapter 13 trustee for the District of Utah.**1**As a Chapter 13 trustee, the lawyer is a fiduciary for Chapter 13 estates created upon filing a petition for relief under Chapter 13 of the Bankruptcy Code. On behalf of the Chapter 13 estate, the trustee receives money from Chapter 13 debtors. The trustee is bonded, submits regular reports and is audited on a regular basis by the United States Trustee.

**Analysis:** Utah Rule of Professional Conduct 1.15 now requires a lawyer to enter an agreement with any financial institution where that lawyer has client or third-party trust funds. Under the agreement, the financial institution will report any non-sufficient checks or check overdrafts to the Office of Attorney Discipline.**2**

However, most of the Rules of Professional Conduct govern a lawyer's actions only in the providing of legal services or in the practice of law. For example, an attorney's direct-mail advertising of mediation and arbitration services is not prohibited under Rule 7.3 since mediation and arbitration services are not the practice of law.**3**This is true of Rule 1.15. Rule 1.15 states that the rule applies only to property "in connection with a representation." The Comment to Rule 1.15 also suggests that Rule 1.15 only applies in the practice of law.**4**

The administration of a Chapter 13 trust is not the practice of law. The Bankruptcy Code does not require that a bankruptcy trustee be a lawyer.**5**The bankruptcy trustee has no attorney-client relationship with either the debtor or with any of the creditors. The bankruptcy trustee does not act as an advocate for or represent any of the parties. Therefore, a lawyer practicing as a Chapter 13 trustee is not required to conform with the requirements of Rule 1.15 in maintaining Chapter 13 funds.

Provisions other than Rule 1.15 exist to protect Chapter 13 funds. As a bankruptcy trustee, the lawyer must be bonded.**6**The United States Trustee regularly audits the lawyer, and the lawyer submits periodic reports to the United States Trustee. Finally, a lawyer acting as a trustee, even a Chapter 13 trustee, is still subject to Rule 8.4 for any misconduct in the handling of trust funds.**7**

This opinion that Rule 1.15 does not govern the Chapter 13 trustee's actions applies only to the supervision of bankruptcy trust funds. If the lawyer, acting as a bankruptcy trustee, also maintains a non-bankruptcy estate trust fund for a client or a third party, that fund may be subject to Rule 1.15.

**Footnotes**

1.Although this opinion involves a Chapter 13 trustee, the analysis and result would be the same for other bankruptcy trustees.

2.A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution which agrees to report to the Office of Disciplinary Counsel in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Utah Rules of Professional Conduct 1.15(a) (as amended, effective Nov. 1, 1996).

3.Utah Ethics Adv. Op. 97-03, 1997 WL 223849 (Utah St. Bar).

4.The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transactions.

Utah Rules of Professional Conduct 1.15, cmt. ¶ 4.

5.11 U.S.C. § 321 (1994); *In re Construction Supply Corp.*, 221 F. Supp. 124 (E.D. Va. 1963).

6.11 U.S.C. § 322 (1994).

7.A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.
Utah Rules of Professional Conduct 8.4, cmt. ¶ 3.

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**Applicability of these Principles to Minnesota**

The Minnesota Code of Professional Conduct appears to be substantially identical to that extant in Arizona. Unless there is a substantial differentiation between the interpretation in Arizona from that to be expected in Minnesota, one would expect the same opinion and result in Minnesota. Judge Steven Rhodes of Michigan has also prepared an interesting article which I would like to call to your attention. The citation to this is *The Fiduciary and Institutional Obligations of a Chapter 7 Trustee*, 80 Am. Bankr. L.J. 147 (2006).