Informal Opinion 19-01

February 21, 2019

Question:

A justice court judge has asked whether a full-time judge may also serve as a bankruptcy trustee appointed by a federal bankruptcy court. The issue is whether a bankruptcy trustee is considered to be a fiduciary position under rule 3.8 of the Utah Code of Judicial Conduct. Full-time judges may not serve in fiduciary positions.

Answer:

A bankruptcy trustee is a fiduciary position under rule 3.8 and therefore a full-time judge may not serve as a bankruptcy trustee.

Discussion:

Rule 3.8(A) states that a "judge shall not accept appointment to serve in a fiduciary position, except as a fiduciary for the estate, trust, or person of a member of the judge's family." The Application section of the Code states that the provision applies to full-time judges, but does not apply to part-time justice court judges. The Code defines a full-time justice court judge as one who "serves in a court whose judicial weighed caseload measure . . . shows the need for at least 1.0 judges."

The justice court judge who has requested the opinion is a part-time judge. The judge has served as a bankruptcy trustee for nearly twenty years. The judge's workload has been increasing. There is a chance that in the future the judge will be considered a full-time judge and rule 3.8 will then apply. The judge asks for an opinion on whether he can serve as a full-time judge and a bankruptcy trustee.

Rule 3-109(3)(A)(i) of the Utah Rules of Judicial Administration states that the "committee may interpret statutes, rules, and case law as may be necessary to answer a request for an opinion." The committee therefore looks to the Code of Judicial Conduct, statutes, bankruptcy case law, and other sources to determine whether a bankruptcy trustee is a fiduciary position. A review of these sources leads to the conclusion that a bankruptcy trustee is a fiduciary position under rule 3.8.

Black's Law Dictionary defines a fiduciary as, among other things, "[a] person or institution who manages money or property for another and who must exercise a standard of care in such management activity imposed by law or contract." The Terminology section of the Code of Judicial Conduct states that a fiduciary "includes relationships such as executor, administrator, trustee, personal representative, holder of a power of attorney or guardian." Although the definition includes trustees, it is evident that not every trustee is in a fiduciary position. For

example, rule 3.7(A)(6) permits a judge to serve as a trustee of a civic organization. A trustee on a board of trustees for a civic organization typically does not perform duties similar to those performed by other defined fiduciary positions, such as executor or personal representative. Therefore, in order to determine whether a bankruptcy trustee is a fiduciary under rule 3.8, the duties of the trustee must be examined. Rule 3.8 will apply if a bankruptcy trustee is one who manages money or property for another and in performing those duties is required to exercise a particular standard of care.

Utah Code § 22-1-1 includes "trustee in bankruptcy" in the definition of "fiduciary." The United States Bankruptcy Code describes the duties of a bankruptcy trustee. 11 USC § 323(a) states that a "trustee in a case under this title is the representative of the estate." 11 USC § 704 describes the duties of a trustee in a Chapter 7 bankruptcy. A bankruptcy trustee must "collect and reduce to money the property of the estate for which such trustee serves," "be accountable for all property received," "investigate the financial affairs of the debtor," "furnish such information concerning the estate and the estate's administration as is requested by a party in interest," and "make a final report and file a final account of the administration of the estate with the court and with the United States trustee." 11 U.S.C. § 704(a)(1), (2), (4), (7), and (9). The applicable statute for bankruptcy trustees in Chapter 11 proceedings, 11 U.S.C. § 1106, imposes many of these same responsibilities on a bankruptcy trustee. A bankruptcy trustee in both Chapter 7 and Chapter 11 bankruptcies manages an estate for the debtor, creditors, and other beneficiaries.

Decisions from the bankruptcy courts confirm that a bankruptcy trustee is a fiduciary position. "Bankruptcy trustees are fiduciaries and the obligations imposed on them in administering bankruptcy estates are fiduciary obligations." *In re NSCO, Inc*., 427 B.R. 165, 174 (D. Mass 2010). See also *In re Hunter*, 553 B.R. 866, 872 (D. N. Mex. 2016) ("Bankruptcy trustees are fiduciaries and owe estate beneficiaries the duties of loyalty and care."); and *In re Morris Senior Living LLC*, 504 B.R. 490, 491 (N.D. Ill. 2014) ("A bankruptcy trustee owes fiduciary duties to the debtor's estate and its creditors.") There is no question that a bankruptcy trustee is a fiduciary position. The committee will nevertheless examine whether there are aspects of the position that place it outside the scope of rule 3.8.

The committee could consider a bankruptcy trustee to be outside the Code of Judicial Conduct if the federal government is the de facto fiduciary, with the bankruptcy trustee not being personally accountable. In *In re Continental Coin Corp*, 380 B.R. 1, 6 (C.D. Cal. 2007), the court stated:

> [I]t is important to understand that a bankruptcy trustee is neither identical to an individual who serves as a trustee in the private sphere nor to a corporate director. Courts have at least tacitly recognized this by providing some level of protection to bankruptcy trustees who would have been personally liable had they performed the same acts as trustees in a non-bankruptcy setting or as a corporate director.

The court's reasoning in this case provides some support for the idea that a bankruptcy trustee might not be the type of fiduciary contemplated by the Code of Judicial Conduct. But the California court also recognized that the lack of personal accountability is not absolute. Bankruptcy trustees have "some level of protection," but there can be both professional and personal consequences for failing to perform fiduciary duties.

As noted above, 11 USC § 704 states that the bankruptcy trustee is "accountable for all property received." The Tenth Circuit Court of Appeals has held:

> A trustee in bankruptcy is not [to] be held personally liable unless he acts willfully and deliberately in violation of his fiduciary duties. A trustee in bankruptcy may be held liable in his official capacity and thus surcharged if he fails to exercise that degree of care required of an ordinarily prudent person serving in such capacity, taking into consideration the discretion allowed.

Sherr v. Winkler, 552 F.2d 1367, 1375 (10th Cir. 1977). This language indicates that a bankruptcy trustee is obligated to perform duties under certain standards. Not only is a bankruptcy trustee liable in an official capacity and can be "surcharged" for failing to perform those duties, a bankruptcy trustee can be held personally liable for deliberately failing to perform the duties of a bankruptcy trustee.

The committee remains open to the idea that there may be certain positions that are considered fiduciary for some purposes, but not others. However, considering the specific language of the Code of Judicial Conduct, there would need to be compelling reasons for this committee to determine that a particular fiduciary position is not of a type contemplated by the Code. Based on the authorities cited above, it is inescapable that a bankruptcy trustee is a fiduciary and there is no basis for concluding that the position is of a type outside the scope of rule 3.8. Thus, a full-time judge may not serve as a bankruptcy trustee. If a part-time judge becomes a full-time judge, the judge must comply with rule 3.8 as soon as reasonably practicable, and in no event later than one year after becoming a full-time judge.