Committee Opinion
December 22, 2003

LEGAL ETHICS OPINION 1791 — IS IT ETHICAL NOT TO MEET FACE-TO-FACE WITH YOUR CLIENT IF YOU COMMUNICATE BY E-MAIL OR TELEPHONE INSTEAD?

You have presented a hypothetical in which an attorney has a bankruptcy practice. The attorney begins most representations with a telephone conversation, followed by actual meetings with the clients regarding the many issues associated with a bankruptcy filing. However, in a number of instances, clients may not be able to come into the attorney's office for a face-to-face meeting. In those instances, the attorney provides review and advice via various forms of electronic communication: fax, telephone, and e-mail. Such clients receive an information packet to review and complete. The client completes the packet; the attorney reviews the completed packet and supervises a paralegal in the preparation of the necessary documents. If the client can not come in for a meeting at that point, the attorney will send the client the prepared documents and then review them with the client over the telephone. The client is then directed to provide a notarized signature for the documents and then to forward them to the attorney. Additional client questions are handled in a similar manner. In these cases, the first face-to-face meeting between the attorney and the clients may be at the §341 hearing.[1]

Under the facts you have presented, you have asked the committee to opine as to whether electronic communication, without in-person meetings, can be sufficient to fulfill an attorney's duties of communication and competence. The applicable rules of professional conduct with regard to your request are as follows:

> RULE 1.1 Competence
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> RULE 1.4 Communication
>
> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

The duty of competence is triggered in every attorney/client relationship. The comments discussing the duty created by Rule 1.1 focus on three areas: legal knowledge and skill,

[1] A "§341 hearing" is a scheduled meeting of creditors pursuant to §341 of the Bankruptcy Code. *See*, 11 U.S.C.A. §341.

thoroughness and preparation, and maintaining competence (i.e., continuing legal education). *See* Rule 1.1, Comments 1-6. At issue here is whether the attorney in this hypothetical is being sufficiently thorough and is properly prepared with respect to the "electronic communication" portion of his practice. Comment 5, in pertinent part, states the following:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

The focus of this language is on the content of the lawyer's efforts: has the lawyer sufficiently reviewed and analyzed the information and become sufficiently familiar with the pertinent law so as to be able to pursue the legal objectives of the client. Neither the rule, nor the comments, prescribes precise means for the provision of legal services.

The lawyer in this hypothetical operates under procedures that include review of the client's information and interaction with the client regarding the responsibilities and consequences of filing a bankruptcy petition. Whether that procedure involves the provision of competent legal services depends on the content, not the method of communication; what does determine competency in this situation is whether the attorney reviews the proper materials and law, imparts to the client all necessary information, receives necessary direction from the client as to the client's objectives, and provides appropriate legal advice as a result. Although there is no per se requirement, the committee concludes that nothing in Rule 1.1 requires those items be accomplished via in person contact. Moreover, Rule 1.2 provides that the attorney should consult with the client as to the means to be used during the representation. So long as the requisite information is given, received, analyzed and acted upon, the attorney has met his duty of competency. There is no *per se* requirement that an attorney actually be in the physical presence of his client to provide competent legal services.

A second ethical duty at issue in this request is the duty of communication. In every attorney/client relationship, the attorney has a duty to communicate with his client during the course of the representation. To fulfill that duty, the attorney must ensure that the client has "sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be imputed." Rule 1.4, Comment 1. Each of the three paragraphs of Rule 1.4 outlines *content* areas of communication, rather than the method of communication. The rule focuses on communicating the status of the matter, information necessary for informed decision-making, and pertinent facts in the matter. The rule in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*.

The committee finds no *per se* requirement in the rules that information be provided to a client in person. Accordingly, the procedures outlined in this hypothetical do not on their face create an ethics violation for this attorney. The attorney may ethically use electronic forms of

communication in working with clients so long as all necessary information is transmitted between the attorney and the client.[2]

This committee opines that the attorney in the hypothetical is not precluded by the ethics rules from providing legal services to his clients via electronic communication so long as the content and caliber of those services otherwise comport with the duties of competence and communication.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

[2] The committee notes that a source of concern in the materials provided with this request is a line of authorities finding that particular bankruptcy attorneys provided less than adequate representation due to lack of client contact. *See,e.g.*, *In re Pinkins*, 213 B.R. 818 (Bankr. E.D. Mich. 1997); *In re Jerrels*, 133 B.R. 161 (Bankr. M.D. Florida 1991). The committee notes that those cases are distinguishable from the present situation. Factually, the focus of the discussion in those opinions is that there was almost no contact of any sort between attorney and client. For example, in *Pinkins*, client contact was with a legal assistant rather than with the supervising attorney and in *Jerrels*, there was no contact with the client. This line of authority does not change the committee's conclusions in this opinion.