



Dated: August 05, 2016
The following is SO ORDERED:


David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re	Case No. 14-23043-K
LaRhonda Kaye Robertson	Chapter 7 (Originally Filed Under Chapter 13)
Debtor.	
SSN: xxx – xx – 9728	

**MEMORANDUM RE COURT-GENERATED FORM “ORDER PROVISIONALLY
SUBSTITUTING COUNSEL;” THE “OBJECTION” THERETO FILED BY THE DEBTOR’S
ORIGINAL ATTORNEY OF RECORD; AND THE “RESPONSE” TO THE “OBJECTION”
FILED BY THE DEBTOR’S SECOND ATTORNEY COMBINED WITH NOTICE OF THE
ENTRY THEREOF**

INTRODUCTION

This Memorandum arises out of a chambers conference that discussed/addressed an “Objection” filed by Darrell L. Castle, Esquire (“Mr. Castle”), the original Chapter 13 attorney of record herein for the above-named debtor, LaRhonda Kaye Robertson (“Ms. Robertson”), to a court-generated form “Order Provisionally Substituting Counsel” (“the Order”) after an attorney, other than Mr. Castle, filed a “Notice of Conversion”¹ on behalf Ms. Robertson that converted this case from Chapter 13 to a case under

¹ See 11 U.S.C. § 1307(a) and Fed. R. Bankr. P. 1017(f)(3).

Chapter 7 of the Bankruptcy Code without first obtaining consent from Mr. Castle to substitute counsel. Brad George, Esquire (“Mr. George”), the attorney seeking to be substituted for Mr. Castle as Ms. Robertson’s counsel of record, subsequently filed a “Response” to Mr. Castle’s “Objection.”

After a meeting in chambers on August 2, 2016, both Mr. George and Hollis Craft, Esquire (“Ms. Craft”),² achieved a mutual and well-reasoned consensual agreement regarding all of these matters. Moreover, Ms. Craft and Mr. George have submitted a consent order resolving the three matters referred to above that was signed by the court on August 5, 2016.

Based on an initial request of Mr. Castle arising out of his “Objection” and upon the court’s own consideration of these matters, this court³ writes the following informational “Memorandum” for the consideration and benefit of the local bar of the Western District of Tennessee in order for the bar to review and further contemplate these important matters as well as to suggest possible best procedural practices for future consideration in similar matters confronted by the bankruptcy bar.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The background facts and judicial/procedural history of these matters may be briefly summarized, in relevant part, as follows. On March 21, 2014, Ms. Robertson, filed an original voluntary Chapter 13 petition seeking relief under the Bankruptcy Code. At the time the Chapter 13 case was filed, Mr. Castle was engaged as the attorney of record who filed the Chapter 13 petition on behalf of Ms. Robertson. The Chapter 13 plan was subsequently confirmed on May 23, 2014. Following a “Motion to Dismiss for Failure to Pay” filed by the Standing Chapter 13 Trustee, George Stevenson, Esquire (“Mr. Stevenson”), a Rule 1017(f)(3) “Notice of Voluntary Conversion” was filed by Mr. George on behalf of Ms. Robertson. Neither a consent order substituting counsel, a motion on behalf of Ms. Robertson seeking to substitute

² Ms. Craft is an attorney in Mr. Castle’s Law Firm and appeared in court and at the chambers conference on behalf of Mr. Castle.

³ See Fed. R. Bankr. P. 9001(4): “‘Court’ or ‘judge’ means the judicial officer before whom a case or proceeding is pending.”

counsel, or a motion by Mr. Castle to withdraw as the attorney of record were filed prior to the filing of the “Notice of Voluntary Conversion.”

Upon the filing of the notice of conversion, the Clerk of the Bankruptcy Court for this Judicial District entered a court-generated form “Order Provisionally Substituting Counsel,” which was then signed by the court and docketed. [Docket No. 64]. This specific court-generated order apparently is customarily filed when an attorney, other than the original attorney of record, files a “Notice of Voluntary Conversion” without prior consent from the original attorney, without first filing a motion seeking to be substituted as attorney of record for the debtor, or without the original attorney filing a motion to withdraw as the attorney of record (discussed more fully, *infra*). The form order includes the following language:

It appearing to the Court that the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code, but that subsequently a notice of conversion to Chapter 7 was filed by an attorney other than the one who signed the original petition, and thus that the Debtor apparently seeks to substitute counsel, but that no motion was filed with the notice of conversion seeking to substitute counsel; now therefore, the Bankruptcy Court Clerk shall give notice to the original attorney, the subsequent attorney, the Debtor, the Chapter 13 trustee, and the United States trustee; any of these parties may file a written objection and request for hearing within fourteen (14) days of the entry of this order; if no objection is timely filed, the clerk is authorized to substitute counsel for all purposes in the records of this case; the entry of this order shall not stay the administration of this case unless otherwise ordered; and all questions concerning entitlement to professional fees are reserved.

Id. Within the time limitations imposed by the form order, Mr. Castle timely filed an “Objection” essentially expressing concerns, among other things, for potential violations of Rule 4.2 of the Tennessee Rules of Professional Conduct. Mr. Castle states via Ms. Craft that there is a widely held belief among certain members of the bankruptcy bar of the Western District of Tennessee that neither a motion to substitute attorney or a consent order substituting attorney of record is necessary prior to the conversion of a case to another chapter by a second attorney. [Docket No. 68, pg. 2]. Mr. Castle and Ms. Craft

(jointly, “the Castle Firm”), therefore, sought procedural guidance from this court as to the proper steps to be taken regarding substitution of counsel in such converted cases before this court. *Id.*

In response to Mr. Castle’s “Objection,” Mr. George filed a “Response” primarily denying any violation of Rule 4.2 of the Tennessee Rules of Professional Conduct. Furthermore, Mr. George highlighted Ms. Robertson’s absolute right to change attorneys which involves and includes discussing the debtor’s present situation. [Docket No. 71, pg. 1]. Mr. George asserted, inter alia, that requiring substituted attorneys to have prior consent of the original attorney before converting a case from one chapter under the Bankruptcy Code to another on behalf of a debtor could be a difficult task as the original attorney may consider withholding consent as it may not be in his/her best economic interest. *Id.* Mr. George further asserted that there are certain circumstances where time absolutely is of the essence and the substituted attorney must act immediately to protect the debtor and may not have time to obtain prior consent. *Id.*

These matters were scheduled for formal hearing on August 2, 2016, at 9:30 a.m. The court met with both Ms. Craft, on behalf of the Castle Firm, and Mr. George in chambers to informally discuss these issues – essentially at a pre-trial conference. Although, and as previously mentioned, Ms. Craft and Mr. George were exceptionally collegial and professional and ultimately reached a consensual agreement regarding all these matters, the court also felt, as they did, that it would be in the best interest of the local Western District of Tennessee bankruptcy bar to expound on and address this important issue to better explore and perhaps suggest best practices depending on the circumstances for future cases in which these issues might arise before this particular court.

DISCUSSION

Rule 4.2 of the Tennessee Rules of Professional Conduct (2015) states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.

Rule 4.2 is fairly straightforward. It clearly prohibits communication between an attorney and any party knowingly represented by another attorney absent prior consent or a court order.⁴ Here, it is expressly noted that the Castle Law Firm did not seek any specific form of reprimand or sanctions against Mr. George based on the content of Rule 4.2; and the court agrees that perhaps none would be warranted here under a totality of these particular facts and circumstances under 11 U.S.C. § 105(a) and/or Fed. R. Bankr. P. 9011(c).

The mere fact that the Clerk's Office in this Judicial District uses this court-generated form "Order Provisionally Substituting Counsel" when a case is converted from one operative chapter to another by an attorney other than the attorney who signed the original Chapter 13 petition, however, does not, ipso facto, relieve a practicing attorney from complying with the Tennessee Rules of Professional Conduct. Thus, in this court's strong opinion, by far, the best practice when seeking a substitution of counsel prior to converting a case from Chapter 13 to Chapter 7 under the Bankruptcy Code would seem to necessitate a determined attempt to obtain a consent order substituting the new attorney of record prior to the filing or at the time of the filing of the Rule 1017(f)(3) conversion. This process/practice also would promote the idea that the debtor is entitled to employ the attorney of his/her choice, while also maintaining the ethical standard of conduct required by the Tennessee Rules of Professional Conduct prohibiting certain communications between an attorney and a represented party.

As discussed at the informal chambers meeting and as mentioned in Mr. George's "Response" to the "Objection" filed by Mr. Castle, certain exigent circumstances indeed may exist in some very rare cases where time truly is of the utmost essence and obtaining prior consent (or the like) can prove to be difficult, burdensome, or simply impossible. As noted earlier, the original attorney of record may for whatever reason be unwilling to provide a consensual agreement substituting counsel. After attempts are unsuccessful to obtain such a consent order, in these particular situations, the court undoubtedly believes the best practice would require the attorney attempting to be substituted as attorney of record to file a

⁴ Of course there are some exceptions to this rule, none of which are seemingly applicable here.

written motion with the court seeking to be substituted as counsel of record and, if the circumstances need be, request an expedited hearing on the motion. *See* 11 U.S.C. § 102(1)(A)-(B). This particular procedure would afford adequate due process/notice to the original attorney, as well as to other interested parties involved in the case, of the debtor's interest in obtaining a new attorney and concomitantly would permit the original attorney to discontinue work or preparation on the case that could potentially be futile (and perhaps even cause an unnecessary fee dispute down the road). Furthermore, this procedure also would, as a by-product, promote and foster unquestioned compliance with Rule 4.2 of the Tennessee Rules of Professional Conduct by allowing the debtor to employ the attorney of his/her choice without anyone running afoul of the communication prohibited by Rule 4.2.

Though the Tennessee-Western Bankruptcy Court Clerk's Office has procedures in place to handle a conversion of a case without the original attorney's consent, this court, as noted earlier, strongly feels that the use of this court-generated form order should be an absolute "last (not first) resort option" at best and should be used only sparingly and only in the most emergent set of circumstances, if at all.⁵ The Western District of Tennessee is home to a most professional and collegial bankruptcy bar. Adopting the foregoing suggestions and taking the above discussed steps not only affords other bankruptcy practitioners the professional courtesy that this Judicial District desires to foster and promote, but also ensures that all ethical standards espoused in the Tennessee Rules of Professional Conduct likewise are unquestionably maintained.

CONCLUSION

Based on the foregoing discussion and analysis, this particular court concludes that the best procedural practice, by far, to use when converting an originally filed case to another operative chapter under the Bankruptcy Code with an attorney that is not the original attorney of record requires that a consent order substituting counsel be prepared and filed with the court prior to filing the Rule 1017(f)(3) "Notice of Voluntary Conversion." In the event a consensual agreement cannot be reached, this court

⁵ The court notes that this specific issue has only occurred 13 times, to date, in 2016 in this Judicial District.

additionally believes the best practice would next require the attorney seeking to be substituted as attorney of record to file a motion on behalf of the debtor seeking the desired substitution, or the debtor's original attorney of record seek, on an expedited basis, leave of court to withdraw as the attorney of record.⁶ These suggested methods seemingly promote and foster not only a professionally courteous and collegial bankruptcy bar, but also ensure that the Tennessee Western bankruptcy bar continues to maintain the highest ethical/professional standards for which it is so well known.

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⁶ Although the court-generated provisional order referred to above serves a practical role in assisting and accomplishing the "speedy" administration of every (converted) case as contemplated in Fed. R. Bankr. P. 1001, nonetheless it clearly is NOT the first or second best practice.

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