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Professional Ethics Committee

INFORMAL OPINION 2014 - 06
WHEN CLIENT CONSENT IS NECESSARY IN LIMITED SCOPE REPRESENTATION OF
CHAPTER 7 BANKRUPTCY DEBTOR

We are asked whether a lawyer must obtain the informed, written consent of prospective and concurrent clients before agreeing to file a Chapter 7¹ bankruptcy petition and attend the first meeting of creditors under 11 U.S.C. § 341, on behalf of a debtor whose creditors are also the lawyer's concurrent clients in unrelated matters. We are advised that the lawyer's retainer agreement with a Chapter 7 debtor "ordinarily excludes" contested matters and that circumstances giving rise to direct adversity in the context of Chapter 7 filings are "relatively infrequent."² The issue is whether a conflict of interest exists between the lawyer's concurrent clients and the debtor who seeks discharge of his obligations to these clients, requiring analysis under Rule 1.7 of the Rules of Professional Conduct. We opine that no conflict exists if after careful scrutiny the lawyer determines that there is not a significant risk that the debtor client and creditor clients would become directly adverse during the course of the bankruptcy proceeding.

Our analysis begins with a preliminary issue involving mixed questions of law and professional ethics: whether limited scope representation of a Chapter 7 debtor is permissible under Connecticut's Rules of Professional Conduct.³ Subject to the requirements of Rule 1.2, "an

¹ Our opinion is limited to a Chapter 7 proceeding.

² The inquirer also refers to such circumstances as "quite rare." The Committee cautions, however, that when direct adversity does arise in a Chapter 7 case, the very nature of the Chapter 7 debtor's precarious financial position renders the debtor client particularly vulnerable when a conflict mandating counsel's withdrawal develops or becomes known after the representation has begun. For that reason, we emphasize in this opinion the importance, before undertaking the representation, of careful scrutiny of potential conflicts and full disclosure to the debtor client of the risks that potentially follow from a lawyer's withdrawal from representation once begun. Indeed, whether client consent to the representation is necessary turns not on the frequency of situations in which disqualifying conflicts may arise but on the ethical obligation lawyers have to avoid the harm to clients that such conflicts may engender.

³ We are aware of no decisional law from the U.S. Bankruptcy Court for the District of Connecticut that addresses limited scope representation; courts outside Connecticut that address limited scope representation have done so as a matter of local rule and lawyer competence. See, for instance, *In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012); *In re: Egwim*, 291 B.R. 559, 579 (Bankr. N.D. Ga. 2003). Because questions of law fall outside the purview of this

agreement between the lawyer and client regarding the scope of the representation may limit the matters for which the lawyer is responsible.” Comment, Rule 1.1, of the Rules of Professional Conduct. Rule 1.2(c) permits a lawyer to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Accordingly, there is no *per se* ethical prohibition of limited scope representation if the lawyer complies with Rules 1.2(c) and 1.5.⁴ Pursuant to Rules 1.0(f) and 1.2(c), however, the lawyer may not undertake the limited scope representation in the situation set forth by the inquirer—in which the lawyer will cease representation after the first creditors’ meeting, and hence will not be able to aid the client should there be creditor objections or other contested matters (whether or not involving the lawyer’s concurrent clients)—unless (a) the lawyer concludes that the limitation is reasonable, (b) the lawyer has informed the client of its implications and risks, and (c) the client thereafter agrees to the proposed representation.

We now consider the central issue before us: whether a lawyer may undertake limited scope representation of a debtor whose creditors include clients of the lawyer in unrelated matters, without obtaining the written, informed consent of all the clients involved. Bankruptcy is “a statutory procedure by which a debtor obtains financial relief under judicially supervised

Committee, we offer no comment how Connecticut’s Bankruptcy Court may assess the issue of limited scope representation in the situation under discussion. We note that Connecticut has no local Bankruptcy Court Rule regulating limited scope representation, but both the District Court for the District of Connecticut and the Bankruptcy Court for the District of Connecticut “recognize[] the authority of the [Connecticut] ‘Rules of Professional Conduct’ . . . as expressing the standards of professional conduct expected of lawyers practicing in the District of Connecticut.” D. Conn. Local Rule 83.2; Local Rule 1001 (1)(b), of the Bankruptcy Court for the District of Connecticut.

Moreover, we note that the approaches to, and analyses concerning, limited scope representation in the bankruptcy context referenced in this opinion proceed on various theories and suggest the law is evolving. For instance, following publication of Boston Bar Ass’n Ethics Opinion, 2008-01 (2008), which permitted limited scope representation without distinction as to the nature of the lawyer’s compensation, the U.S. Bankruptcy Court for the District of Massachusetts amended its Rules to prohibit limited scope representation when counsel is retained for a fee, while permitting *pro bono* limited scope representation in this context. Indeed, because *pro bono* representation as specifically addressed in Ass’n of the Bar of the City of New York Comm. on Prof’l and Jud. Ethics, Formal Op. 2005-01 (2005) is not before this Committee, we have not followed the precise analysis set forth in that opinion. And since competence analysis must be undertaken with a view to the particular jurisdiction’s rule on *that* issue, a differently phrased competence rule may require a different analysis leading to a different conclusion, for which reason we have not considered dispositive, but nevertheless valuable, the guidance provided on this issue contained in other state bar association decisions.

⁴ We note the collateral ethical obligation under Rule 1.5, of the Rules of Professional Conduct that any fee charged for the proposed limited representation must be reasonable, giving due consideration to the client’s financial vulnerability, as discussed in n. 2, *supra*.

reorganization or liquidation of his assets for the benefit of creditors,” BLACK’S LAW DICTIONARY at 156 (8th ed. 1999) (“Bankruptcy”). “In a typical Chapter 7 liquidation case, the trustee appointed by the Bankruptcy Court collects the nonexempt property of the debtor, converts that property to cash, and distributes the cash to the creditors,” *id.*, citing David G. Epstein, *et al.*, BANKRUPTCY 1-5 at 8-9 (1993), under a set of statutorily prescribed criteria that limit creditors’ bases to object to (or except a particular debt from) Chapter 7 discharge.

That bankruptcy law limits the nature of and opportunities for creditor objections does not by itself obviate any ethical obligation under Rule 1.7. To the contrary, if filing the debtor’s petition or representing him at the first creditors’ meeting can be construed as advocating a position that is “directly adverse” to the interests of the lawyer’s concurrent clients, the representation would be prohibited under Rule 1.7(a)(1), unless the lawyer first obtains the written, informed consent of each of the affected clients.⁵ Although direct adversity can be properly evaluated only in the context of the particular matter under consideration, the touchstone of direct adversity is the nature of the clients’ relationships to the rights in issue. A lawyer’s representation of one client is “directly adverse to another client” if the representation of one client will have an effect on the rights of the other. “Thus, absent consent a lawyer may not act as advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.” Comment to Rule 1.7.

The first question we address is whether filing a petition on behalf of a Chapter 7 debtor puts the lawyer in a position “directly adverse” to the debtor’s creditors. We note that bankruptcy is an *in rem* proceeding structured to progress in accordance with statutorily prescribed schedules that do not permit discretion in their application to the parties, see State Bar of California Standing Comm. on Prof’l Responsibility and Conduct, Proposed Formal Op. Interim No. 12-0004 (2012). In preparing a Chapter 7 petition, the lawyer does not advocate the debtor’s rights against his creditors. Rather, the lawyer assembles data according to a prescribed schedule that identifies the debtor’s obligations, in order to permit a Bankruptcy Court to determine whether the debtor qualifies for relief. If the debtor qualifies, the court appoints a trustee to marshal the assets (the “*res*”) of the bankruptcy estate, prioritize competing claims, exempt assets for the debtor’s benefit, and pay to creditors the balance of the estate in accordance with priorities defined by law. While the debtor’s and the creditors’ rights to assets are adjudicated in a bankruptcy proceeding, these rights are limited to the assets of the estate, and in most Chapter 7 cases, there is no dispute about the applicable facts and law. Thus, unlike a civil complaint in which a plaintiff asserts certain claims about the rights, duties and obligations of the parties, which the defendant will likely dispute, the Chapter 7 petition schedules the debtor’s obligations in accordance with statutory formula for potential implementation by a court-appointed third party (the bankruptcy trustee) for the mutual benefit of the debtor and his creditors. We conclude that merely filing the Chapter 7 petition is not, using the terminology of Rule 1.7(a)(1), advocating the debtor’s rights against the lawyer’s concurrent creditor clients in a manner that is “directly adverse” to them

⁵ Rule 1.7(b)(4) provides that notwithstanding a concurrent conflict of interest, the lawyer may undertake the representation if “each affected client gives informed consent, confirmed in writing.” In addition, the lawyer must “reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client.” Rule 1.7(b)(1).

The concurrent conflicts of interest addressed in Rule 1.7(a), however, extend beyond the situation of present direct adverseness. Rule 1.7(a)(2) provides that a concurrent conflict of interest also exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client” In our view, even filing the petition would present a concurrent conflict of interest under this prong if the lawyer knows that there is a significant risk that one or more of the lawyer’s clients who are creditors of the debtor will interpose an objection to the bankruptcy or that some other situation will arise in which there will be direct adversity between the debtor and the lawyer’s creditor clients. Moreover, it is not enough that the lawyer be initially unaware that such circumstances may arise. The lawyer must undertake, or ensure that someone else has undertaken, careful scrutiny of the debtor’s situation, including the identity and the nature of the claims of the debtor’s creditors. In the context of undertaking a new Chapter 7 representation, careful scrutiny would include, at the client intake stage, examination and consideration of the prospect that another client represented by counsel and/or counsel’s law firm could become involved in contested aspects of the putative debtor client’s bankruptcy case.⁶ If after such scrutiny the lawyer is confident that there is not a significant risk of future adversity between the debtor and the lawyer’s creditor clients, the lawyer may undertake the representation of the debtor without first obtaining written consent from the debtor and creditor clients.

But if scrutiny reveals a significant risk that the debtor and one or more of the lawyer’s creditor clients will become directly adverse,⁷ then the requirements of Rule 1.7(b)—which include obtaining the written, informed consent of both the debtor and the creditor clients—must be met before the lawyer represents the debtor even in a reduced scope representation limited to filing the petition and the first creditors’ hearing under 11 U.S.C. § 341. We note that the pro bono debtor-representation programs approved in recent opinions from Boston, New York, California,

⁶ By way of illustration, and by no means intended as an exhaustive list, such matters may include: (1) an objection by the creditor client under Bankruptcy Code Section 523(a) to the dischargeability of the creditor’s debt; (2) an objection by the creditor client under Bankruptcy Code Section 727(a) to debtor’s discharge; (3) an objection by the creditor client under Bankruptcy Rule 4003(b) to the debtor’s claim that certain property is exempt from the reach of creditors; (4) a claim by the debtor under Bankruptcy Code Section 522(f) that a lien held by the creditor client on property of the debtor be avoided as impairing the debtor’s claimed exemption; (5) an objection by the debtor under Bankruptcy Rule 3007 to the creditor client’s claim; (6) a creditor client seeking examination of the debtor’s affairs under Bankruptcy Rule 2004 or Bankruptcy Code Section 343; and (7) the debtor requiring advice regarding reaffirmation of the creditor client’s debt under Bankruptcy Code Section 524 and Bankruptcy Rule 4008.

⁷ Objections to discharge capable of assertion at the first creditors meeting may render the debtor’s interests directly adverse to his creditors, and create potential risk that the lawyer’s duties to one client will be materially limited by his obligations to another. Thus, if any of the objecting creditors are also concurrent clients of the lawyer whose continued representation would require the lawyer’s advocacy against the debtor, the lawyer would be required to withdraw precisely at a point in the proceedings when the debtor client is particularly vulnerable. See n. 2, *supra*.

and New Jersey⁸ specifically provide for scrutiny to identify this form of concurrent conflict of interest, and where such a conflict as we have defined it would occur, those programs decline to assign the lawyer to prepare and file the debtor's petition.

In sum, we conclude that a lawyer may accept a representation to prepare and file a Chapter 7 debtor's petition and to represent the debtor at the first creditors' meeting without written consent from each affected client, provided that the representation does not involve a concurrent conflict of interest within the meaning of Rule 1.7(a), and provided that the fee charged for preparing the petition complies with the mandates of Rule 1.5. We emphasize, however, that if, after careful scrutiny, the lawyer reasonably anticipates that the debtor and one or more of the lawyer's concurrent creditor clients will become directly adverse in the bankruptcy proceeding, such anticipated adversity would present "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Rule 1.7(a)(2). In such a situation, representation of the debtor in a Chapter 7 bankruptcy case—even limited scope representation—is not permitted unless the lawyer complies with all conditions set forth in Rule 1.7(b). These include that (1) the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," (2) the lawyer provides information to each client concerning the risks of concurrent representation, and (3) each affected client provides "informed consent, confirmed in writing."

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Vice-Chair, Professional Ethics Committee
Connecticut Bar Association
September 26, 2014

⁸ The opinions of the Boston Bar Association and the New York City Bar Association are cited in note 3, *supra*. The opinion of the California Ethics Committee is cited in text *supra*. The recent opinion of the New Jersey Supreme Court approving a similar pro-bono program for Chapter 7 debtors is *In the Matter of Opinion No. 17-2012 of the Advisory Committee on Professional Ethics*, 2014 WL 4147820, 2014 N.J. 652 (N.J. Sup. Ct. July 2, 2014).