

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 12-0004**

ISSUE: In a limited and properly prescreened engagement, may an attorney represent an individual as a debtor in a no-asset Chapter 7 bankruptcy filing, while simultaneously representing one or more of the individual's creditors in unrelated matters, without violating his or her ethical obligations?

DIGEST: Representation of an individual in connection with a no-asset Chapter 7 bankruptcy filing while simultaneously representing one or more of the individual's creditors in unrelated matters does not create a conflict of interest, provided that the engagement is limited and certain intake procedures are employed to ensure that the Chapter 7 proceeding in which the attorney is involved is a simple *in rem* proceeding that focuses on the discharge of debts.

**AUTHORITIES
INTERPRETED:**

Rules 1-100, 1-650, 3-310, and 3-500 of the Rules of Professional Conduct of the State Bar of California^{1/}

Business and Professions Code section 6068(m)

STATEMENT OF FACTS

Attorney participates in a *pro bono* program^{2/} sponsored by a non-profit agency ("Agency") helping individual debtors prepare for and file Chapter 7 bankruptcy proceedings. The Agency prescreens potential clients, including a review of debts, assets and income, to ensure that there are no facts indicating that the matter is anything other than a simple, no-asset bankruptcy.^{3/} The agency also assesses whether the potential client has any claims against any creditor, or whether any creditor may have a claim other than the debt against the potential client. Once prescreened, Attorney reviews a client's financial situation and confirms that a Chapter 7 bankruptcy is an appropriate remedy for such client. The assessment includes reviewing the amount and nature of the client's assets, income and debts and determining if bankruptcy is the best way to resolve the financial difficulties for the client. In some cases, the engagement ends at that point. In others, Attorney prepares the necessary paperwork to file a Chapter 7 proceeding. In still others, Attorney represents a client in the Chapter 7 proceeding through the Section 341(a) meeting of creditors.^{4/}

^{1/} Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

^{2/} While the analysis and conclusions of this opinion do not apply only to *pro bono* representation, other contexts would require discussion of fee sharing and of third-party prescreening. This opinion does not address these topics.

^{3/} In a Chapter 7 bankruptcy proceeding, the debtor is required to turn certain property over to the bankruptcy trustee so that the property can be sold and the proceeds used to pay off the debtor's debts. Such property is referred to as "non-exempt" property or assets. Property that the debtor is allowed to retain is referred to as "exempt" property or assets. See, e.g., Bankruptcy Code Section 522. A no-asset bankruptcy is one in which there are no non-exempt assets.

^{4/} Following the filing of a petition under Chapter 7 of the Bankruptcy Code, the United States Trustee conducts a meeting (the "Section 341(a) meeting") at which the debtor appears and creditors may appear. The purpose of the meeting is to allow the Trustee and the creditors to question the debtor about his or her understanding of effects of the bankruptcy and the nature of the assets and debts.

Attorney is engaged by one such individual (“Debtor-Client”) through the *pro bono* program. Attorney is aware that he currently represents one of Debtor-Client’s creditors in an unrelated matter. May Attorney proceed to represent Debtor-Client through the Section 341(a) meeting of creditors despite the apparent potential or actual conflict of interest with one such creditor?

DISCUSSION

Attorneys are often limited in their ability to provide legal services due to conflicts of interest with their existing clients or with existing clients of their firm. Even if the matters are unrelated, an attorney generally may not represent a client in a matter adverse to another current client. Rule 3-310(C) (Avoiding the Representation of Adverse Interests); *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. Rule 3-310(C) provides that a lawyer shall not “[r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter” without the informed written consent of each client. The question here is whether the fact that Attorney represents both Debtor-Client and one of the client’s creditors constitutes the type of conflict that would require informed written consent of both clients.

The Committee is not aware of any California cases or opinions directly on point; however, opinions from other jurisdictions have addressed this issue. (Rule 1-100(A)).^{5/} Ethics opinions by both the Association of the Bar of the City of New York^{6/} and the Boston Bar Association^{7/} addressed this question in the context of *pro bono* projects.^{8/} Both opinions came to the conclusion that in the typical case a conflict does not arise when a *pro bono* attorney represents an individual on a limited basis in connection with the filing of a Chapter 7 petition while simultaneously representing one or more of the individual’s creditors in unrelated matters, negating the need for the lawyer to obtain consent from his or her clients.

The City of New York opinion held that the filing of a Chapter 7 proceeding does not invoke the same kind of adversity as would litigation because it is an *in rem* proceeding.^{9/} The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics stated:

Unlike the commencement of litigation – which by definition is brought directly against one or more parties on behalf of another party with an adverse interest – the commencement of a typical Chapter 7 case is an *in rem* proceeding that triggers the

^{5/} Rule 1-100(A) reads, in relevant part: “Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.”

^{6/} The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2005-01, available at <http://www.nycbar.org/ethics/ethics-opinions-local/2005-opinions/808-1-pro-bono-consumer-bankruptcy-representation>.

^{7/} Boston Bar Association Ethics Committee Opinion 2008-01, available at <http://www.bostonbar.org/docs/ethics-opinions/opinion-2008-1.pdf?sfvrsn=3>.

^{8/} Rule 1-650 (Limited Legal Services Programs) clarifies and limits the application of rule 3-310 in some short term, limited legal settings, ordinarily in *pro bono* cases. The limitation provided for in rule 1-650 does not apply in this hypothetical, both because the representation exceeds initial advice and brief service and because Attorney knows of the conflict.

^{9/} The term “*in rem*” is from Latin, and means “against or about a thing” (and is distinguishable from the Latin “*in personam*,” which means “directed toward a particular person”). A proceeding *in rem* is “one ‘against all the world.’ In this type of proceeding, the court undertakes to determine all claims that anyone has to the thing in question.” *Restatement 2d of Judgments*, §6. See also *Woodruff v. Taylor* (1847) 20 Vt. 65, 73 (“A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject matter itself...”).

automatic operation of a statutory framework for marshaling and distributing assets and discharging debt. Under that statutory framework, to the extent the debtor has non-exempt assets, those assets are distributed among the creditors in accordance with statutorily mandated criteria. To the extent debt is discharged (assuming no objection has been made to its discharge), that action likewise occurs by automatic operation of statute. In addition, to the extent adversary proceedings are brought by the Chapter 7 estate, the decision to do so is made by the court-appointed Chapter 7 trustee, not by the Chapter 7 debtor or his counsel.

The Chapter 7 statutory framework is one specifically intended to strike a fair balance between the rights of debtors and creditors, and, together with other provisions of the Bankruptcy Code, to ensure equality of treatment for creditors holding claims of equal priority. As a result, both debtors and creditors alike can be said to derive substantial benefit from the availability of Chapter 7 proceedings.

In light of the structure and purpose of the Chapter 7 statutory framework, we think it is reasonable to conclude that in the typical Chapter 7 case, there is no adversity between debtor and creditor sufficient to trigger the restrictions of DR 5-105 [the New York disciplinary rule on conflicts of interest] unless and until a creditor objects to the discharge of a debt or otherwise takes action that is directly adverse to the debtor. [citations omitted]

Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2005-01.

The Boston opinion cited extensively to the City of New York opinion, but addressed it under Massachusetts rules rather than the (former) New York rules. In addition, the Boston opinion included an analogy to other sections of the Bankruptcy Act, particularly Section 327(c).^{10/}

Congress expressly addressed the question -- with respect to a later stage of a Chapter 7 proceeding -- whether representation by a lawyer should be viewed as giving rise to a disqualifying conflict of interest. After the Chapter 7 Petition has been filed, a trustee is appointed. The trustee reviews the assets of the bankruptcy estate and pursues or defends any claims the estate may have. The trustee may retain an attorney. [citations omitted]

Congress provided in Section 327(c) that unless there is an objection, a lawyer may proceed to represent the trustee of the bankruptcy estate, even though the lawyer also simultaneously represents a creditor (in an unrelated matter). In the view of Congress, such a scenario does not, per se, present a disqualifying conflict of interest. By inference, the lawyer's representation of the trustee is not viewed as a representation directly adverse to the creditor.

Since the Chapter 7 trustee may later engage an attorney who simultaneously represents one of the creditors (in an unrelated matter), it seems natural that when the debtor initiates the Chapter 7 process, likewise, the debtor may engage an attorney who simultaneously represents one of the creditors (in an unrelated matter). Thus Section 327(c) teaches us, by analogy, that the scenario under consideration does not present a per se conflict of interest.

Boston Bar Association Ethics Committee Opinion 2008-01.

^{10/} Section 327(c) states: "In a case under Chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is an objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest."

Neither the City of New York nor the Boston opinion relied on the *pro bono* nature of the services being provided. Rather, they both reached this result based on the nature of a Chapter 7 Bankruptcy proceeding. “Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor’s property, the equitable distribution of that property among the debtor’s creditors, and the ultimate discharge that gives the debtor a ‘fresh start’ by releasing him, her, or it from further liability of old debts.” *Central Virginia Community College v. Bernard Katz* (2006) 546 U.S. 356, 363-64 [126 S.Ct. 990]. Absent specific claims between the debtor and one or more creditors, the focus of the case is the bankruptcy estate, not the individual parties. The goal is the gathering of the assets and debts, and the orderly and equitable distribution of the non-exempt assets (if any) to the creditors. The proceeding is essentially *in rem*, rather than adversarial. See *Central Virginia Community College, supra*, 546 U.S. at p. 362 (“Bankruptcy jurisdiction, at its core, is *in rem*.”) See also *In the Matter of Soileau* (5th Cir. 2007) 488 F.3d 302, 307 [48 Bankr.Ct.Dec. 68]; *Shawhan v. Wherritt* (1849) 48 U.S. 627, 643 [12 L.Ed. 847]. As the Supreme Court explained in *Gardner v. State of New Jersey* (1947) 329 U.S. 565, 574 (1947), “The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res.”^{11/}

In a typical Chapter 7 proceeding, the individual debtor’s debts are discharged, and the debtor’s non-exempt assets, if any, are distributed to his or her creditors, with little dispute. Under the facts of this opinion, Agency prescreens for scenarios that would make the case atypical, such as the presence of non-exempt assets, active litigation, potential concealment or transfer of assets, claims by Debtor-Client against particular debts or creditors, and facts indicating bad faith on the part of Debtor-Client.^{12/} If Agency detects such scenarios, the case is rejected and the client is referred to an outside attorney. If Attorney detects such scenarios, he or she does not take on the representation (or withdraws from the representation if he or she detects such scenarios after taking on the representation), both under the rules of the program and to prevent conflict problems under rule 3-310(C). In any case, the services provided by Attorney do not include representing the client in true, adversarial actions against creditors. Absent such atypical scenarios, Attorney assisting the Chapter 7 individual debtor would be providing a net benefit to the estate by ensuring accurate and complete documentation of the Chapter 7 petition and ancillary filings.

As noted in the Boston opinion, the Bankruptcy Code provides support for this conclusion in a similar situation. Under Section 327 of the Bankruptcy Code, the court must approve the post-petition hiring of counsel for the debtor or the trustee in a Chapter 11 proceeding. Section 327(a) provides that, with the court’s approval, the trustee “may employ one or more attorneys ... that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee” In *In re Fondiller* (Bankr. 9th Cir. 1981) 15 B.R. 890, 892 [8 Bankr.Ct.Dec. 532], the United States Bankruptcy Appellate Panel of the Ninth Circuit stated: “We interpret that part of [section] 327(a) which reads that attorneys for the trustee may ‘not hold or represent an interest adverse to the estate’ to mean that the attorney must not represent an adverse interest relating to the services which are to be performed by that attorney.” Under Section 327(c), unless there is an objection, an attorney may represent the trustee, even though the attorney simultaneously represents a creditor in an unrelated matter. In the case of *In re McKinney Ranch Associates* (Bankr. C.D.Cal. 1986) 62 B.R. 249, 255 [14 Bankr.Ct.Dec. 670], the bankruptcy court, after an analysis of the history of conflict rules and of Section 327, stated: “The policy behind disqualification for representing potentially conflicting interests provides the key to its extent. The jaundiced eye and scowling mien of counsel for the debtor should fall upon all who have done business with the debtor recently enough to be potential targets for the recovery of assets of the estate. The representation of any such party disqualifies counsel from representing a debtor. Any more remote potential conflict should not result in disqualification.” See also, *In re Dynamark, Ltd.* (Bankr. S.D.Cal. 1991) 137 B.R. 380, 381 (no actual conflict for a law firm

^{11/} The term “*res*” is also from Latin and means “a thing,” and is the subject of an *in rem* proceeding.

^{12/} If such atypical situations do arise, the proceeding on those matters may become adversarial. If the creditor represented by Attorney is involved in such a proceeding, there may be a conflict of interest, requiring Attorney to obtain informed consent from both clients.

to represent both the creditor and the debtor, because the chance of debtor and creditor competing was too remote); *In re Fondiller, supra*, 15 B.R. at p. 893.

Because a simple Chapter 7 proceeding is *in rem*, it is the assets and debts of the debtor that are the party to the case, and in effect not the debtor or creditor directly. If a more complicated matter arises in the bankruptcy proceeding, the normal conflicts rules for representing adverse parties would apply. In the facts of this opinion, there is no adversarial proceeding, and the representation does not create a conflict that would disqualify Attorney from filing the proceeding and appearing at the Section 341(a) meeting without informed consent of both clients.^{13/}

CONCLUSION

If clients are adequately prescreened to assure that a no-asset Chapter 7 Bankruptcy proceeding in which the attorney is involved is a simple *in rem* proceeding that focuses solely on the discharge of debts, an attorney may represent the debtor despite the fact that the attorney represents one or more creditors in unrelated matters.

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 on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[Publisher's Note: Internet resources cited in this opinion were last accessed by staff on August 29, 2013. Copies of these resources are on file with the State Bar's Office of Professional Competence.]

^{13/} While the committee finds that no conflict exists under rule 3-310(C) requiring informed consent, written disclosure is required under rule 3-310(B). Rule 3-310(B) requires written disclosure to the client when a lawyer has "a legal, business, financial, professional, or personal relationship with a party or witness in the same matter..." Attorney in this case has a professional relationship with a creditor, and must disclose that information to Debtor-Client. See also Business and Professions Code section 6068(m) and rule 3-500.