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

ISSUE: If an attorney represents an individual as a debtor in a simple, no-asset Chapter 7 bankruptcy filing, while simultaneously representing one or more of the individual's creditors in unrelated matters, is the attorney required by rule 3-310(C)(3) to obtain informed written consent from both parties?

DIGEST: Simultaneous representation of a debtor in a simple, no-asset Chapter 7 bankruptcy filing and that debtor's creditors in unrelated matters does not create adversity triggering the informed written consent requirement of rule 3-310(C)(3), 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 an *in rem* proceeding that focuses on the orderly distribution of the debtor's assets and the discharge of debts.[1/]

AUTHORITIES INTERPRETED: Rules 1-100, 1-650, 3-310 and 3-500 of the Rules of Professional Conduct of the State Bar of California.[2/]

Business and Professions Code section 6068(m).

STATEMENT OF FACTS

Attorney participates in a pro bono program[3/] sponsored by a non-profit agency ("Agency") helping individual debtors prepare for and commence Chapter 7 bankruptcy proceedings. The Agency prescreens potential clients, which includes a review of debts, assets and income, to ensure there are no facts indicating that the matter is anything other than a simple, no-asset bankruptcy.[4/] 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 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 paper work to file a Chapter 7

[1/] Although this opinion discusses bankruptcy case law, rules, statutes, and matters within a Bankruptcy Court's discretion, the Committee does not opine on such matters; rather, its opinions are limited to ethical rules and related authorities.

[2/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

[3/] While the analysis and conclusions of this opinion are not limited to a pro bono representation context, other contexts would require discussion of fee sharing and of third-party prescreening. This opinion does not address these topics.

[4/] 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. For purposes of this opinion, a simple, no-asset bankruptcy is one in which there are no non-exempt assets, no filed objections to discharge from any creditor, and no reasonably foreseeable objections to discharge from any creditor.

proceeding. In still others, Attorney represents a client in the Chapter 7 proceeding through the section 341(a)[5/] meeting of creditors.[6/]

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 ("Creditor-Client"). May Attorney proceed to represent Debtor-Client through the section 341(a) meeting of creditors despite his concurrent, unrelated representation of Creditor-Client, without securing the informed written consent of both parties pursuant to rule 3-310(C)(3)?

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)(3) 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 Attorney's concurrent representation of both Debtor-Client and Creditor-Client constitutes a conflict that would require the informed written consent of both clients.

The Committee recognizes that rule 3-310(C)(3) is intended to govern adversity involving concurrent client conflicts. However, there are situations in which ostensible adversity does not trigger the policies that 3-310(C)(3) is intended to promote and implement.[7/] Further, as we observed in Cal. State Bar Formal Opn. No. 1989-108, in certain adversity referred to as an "issues conflict" or "positional conflict," where an attorney represents two clients whose interests in the issue are adverse but who are not directly adverse (within the meaning of rule 3-310), disclosure to both clients is not required but would be prudent.

Ethics opinions from other jurisdictions, as well as some provisions of the Bankruptcy Code, while not binding, are informative as to whether or not written consent is required in this specific hypothetical.[8/] The Committee is not

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[5/] Unless otherwise indicated, all references to Bankruptcy Code sections in this opinion are available at 11 U.S.C. §§ 101 et seq.

[6/] 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 the effects of the bankruptcy and the nature of the assets and debts.

[7/] For example, in the insurance tripartite relationship, the financial interests of a carrier as an indemnifier may not be sufficient to trigger rule 3-310(C)(3) when an opposing lawyer also represents a carrier in an unrelated matter. See Discussion to rule 3-310:

> In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[8/] See rule 1-100(A) ("Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."); *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799]; *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].

aware of any cases or opinions directly on point in California. Ethics opinions by both the Association of the Bar of the City of New York[9/] and the Boston Bar Association[10/] addressed this question in the context of pro bono projects.[11/] 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 written consent from his or her clients.

The New York City opinion concluded 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.[12/] Thus, a lawyer may represent a debtor-client in such a proceeding even though he concurrently represents a creditor of that debtor-client in an unrelated matter, provided that the case remains a simple, no-asset bankruptcy (e.g. no creditor objects to the debtor-client's discharge of debt).[13/] 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 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

[9/] 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.

[10/] Boston Bar Association Ethics Committee Opinion 2008-01, available at: http://www.bostonbar.org/docs/ethics-opinions/opinion-2008-1.pdf?sfvrsn=3.

[11/] 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.

[12/] 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, Cmt.(a).* 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 . . . .").

[13/] To the extent a lawyer believes at the outset there is a reasonable likelihood that any creditor will object to the debtor-client's discharge under 11 U.S.C. § 727, then it is not a simple, no-asset bankruptcy and, accordingly, is outside the scope of this opinion. As the New York City opinion notes, "it is extremely rare for an objection to be made to the discharge of debt in Chapter 7 cases." Moreover, under the hypothetical facts of this opinion, the pre-screening process is designed, and thus would be expected, to ferret out any likelihood of an objection to discharge that existed in a particular case.

The Committee notes there may be other actions a creditor takes, beyond an objection to discharge, that could give rise to a conflict requiring consent or even withdrawal. For example, as noted by the New York City Bar Association, where the debtor-client has only a single creditor (i.e., the creditor-client), and that creditor was on the verge of commencing a collection action against the debtor-client, the Chapter 7 filing "could have at least the appearance of being more directly aimed at that particular creditor." New York City Opinion 2005-01. The Committee does not attempt in this opinion to list all actions a creditor might take, other than objecting to the discharge, that could be considered directly adverse to the debtor-client.

> estate, the decision to do so is made by the court-appointed Chapter 7 trustee, not by the Chapter 7 debtor or his counsel.
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> The Chapter 7 statutory framework is one specifically intended to strike a fair balance between the rights of debtors and creditors, [citations] and, together with other provisions of the Bankruptcy Code, to ensure equality of treatment for creditors holding claims of equal priority. [Citations.] As a result, both debtors and creditors alike can be said to derive substantial benefit from the availability of Chapter 7 proceedings.
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> 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.

The Boston opinion cited extensively to the New York City 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 Code, particularly section 327(c):[14/]

> 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. The "Bankruptcy Code contemplates that attorneys will, in unrelated matters, have multiple representations involving creditors and the debtor." [Citations.] . . . .
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> 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.
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> . . . 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.

Neither the New York City nor the Boston opinion expressly 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 for old debts." *Central Virginia Community College v. 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 re Soileau* (5th Cir. 2007) 488 F.3d

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[14/] 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."

302, 307 [48 Bankr.Ct.Dec. 68]; *Shawhan v. Wherritt* (1849) 48 U.S. 627, 643. As the Supreme Court explained in *Gardner v. New J*ersey (1947) 329 U.S. 565, 574 [67 S.Ct. 467]: "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res."[15/]

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, the 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. 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.

The Bankruptcy Code provides support for this conclusion in a similar situation. Under section 327, 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, 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 s[ection] 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*." (Emphasis added.) 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 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. [Footnote omitted.]" See also *In re Fondiller, supra,* 15 B.R. at p. 893.

In *In re Dynamark, Ltd.* (Bankr. S.D.Cal. 1991) 137 B.R. 380, the court found that there was no conflict preventing a law firm from representing both the creditor and the debtor.[16/] The opinion stated: "In the instant case, [the attorney] continues to represent [the creditor] on matters totally unrelated to the Chapter 11 proceeding. Thus, any potential conflict that may exist is too remote to warrant disqualification on these grounds."[17/] (*Id.* at p. 381.)

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 the informed written consent of both clients.[18/]

[15/] The term "res" is also from Latin and means "a thing," and is the subject of an *in rem* proceeding.

[16/] Note that the law firm did secure informed written consent, but that fact was not controlling in the court's decision.

[17/] But see, *In re Envirodyne Industries, Inc.* (Bankr. N.D. Ill. 1993) 150 B.R. 1008, 1018 [23 Bankr.Ct. Dec. 1762] (disagreeing with *Dynamark's* [137 B.R. at p. 381] use of a balancing approach to arrive at its result that "no actual conflict or adverse interest has surfaced which would outweigh the debtor's right to counsel of his choice.").

[18/] While the Committee finds that no conflict exists under rule 3-310(C) requiring informed consent, written notice is required under rule 3-310(B). Rule 3-310(B)(1) requires written notice to the client when a lawyer has "a legal, business, financial, professional, or personal relationship with a party or witness in the same matter . . . ."

CONCLUSION

If a potential debtor-client is adequately prescreened through a pro bono program like the one in our hypothetical facts to ensure that a simple, no-asset Chapter 7 bankruptcy proceeding is an *in rem* proceeding that focuses solely on the discharge of debts, a lawyer may represent the debtor-client, without first obtaining written consent, even if the attorney concurrently represents one or more creditors of the debtor-client in unrelated matters, so long as the proceeding remains a simple, no-asset Chapter 7 bankruptcy.

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 July 2, 2014. A copy of these resources is on file with the State Bar's Office of Professional Competence.]*

(Footnote continued…)

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.