



Committee on Professional Ethics

Opinion 91-1

Topic: Conflict of interest; representation of differing interests.

Digest: May a lawyer for a creditor represent a debtor of that creditor in a bankruptcy or other debt-compromising proceeding?

Code: EC 5-14; EC 5-15; EC 5-16; DR 5-105, DR 5-108

QUESTIONS

1. May a lawyer who represents a creditor represent a debtor of that creditor in a bankruptcy proceeding or other debt compromising proceeding if the lawyer did not theretofore represent the creditor in connection with a specific debt that may possibly be discharged or compromised in the bankruptcy or other debt-compromising proceeding in question?
2. May a lawyer represent a debtor in a bankruptcy or other debt-compromising proceeding which seeks to discharge or compromise the debt of a former client of the lawyer?

OPINION

It would be improper for a lawyer to accept or continue employment as the lawyer for a debtor where a debt which could possibly be discharged or otherwise compromised in a bankruptcy or other debt-compromising proceeding is that of another client of the lawyer, even if the lawyer did not theretofore represent, or will not thereafter represent, the creditor in connection with one or more specific debts sought to be discharged or otherwise compromised by the debtor.

It would be equally improper for a lawyer to accept or continue employment on behalf of a creditor in connection with the collection of debts owed by another client of the lawyer.

A lawyer may, however, with the consent of the former client after full disclosure, represent a debtor who seeks to discharge or compromise a debt of a former client of the lawyer, if any confidences or secrets of the former client which have not become generally known or are not otherwise permitted to be disclosed under DR 4-101(C) are to be used. If no such confidences or secrets are to be used, the consent of the former client is not required. Extreme caution should be used in making determinations concerning the foregoing situations; however, and better judgment would require the lawyer not to take on or continue employment in order to avoid the appearance of impropriety.

DR 5-105 of the Code of Professional Responsibility mandates that a lawyer decline proffered employment if his or her exercise of independent professional judgment on behalf of an existing client will be affected adversely, or

is likely to be so affected; or if it would likely involve the lawyer in representing "differing interests". "Differing interests" is defined by the Disciplinary Rules as including "every interest that will adversely affect either the judgment or the loyalty to a client, whether it be a conflicting, inconsistent, diverse, or other interest." See EC 5-14; EC 5-15; and EC 5-16.

Under former Canon 6 of the Canons of Professional Ethics, which was far less encompassing in scope than its successors, DR 5-105 and DR 5-108 of the present Code of Professional Responsibility, it was held that it would be a proscribed conflict of interest for a lawyer to represent a bankrupt and a creditor of that bankrupt in the same proceeding. *New York State Bar Association Opinion # 97 (January 30, 1969)*. The federal courts have held that the present disciplinary rule (DR 5-105) absolutely disqualifies a lawyer from representing a bankrupt in opposing an involuntary petition filed against the bankrupt where the lawyer also represents various creditors of the bankrupt--especially where the lawyer has advised or could potentially advise creditors not to join in the involuntary proceedings, which would deprive the creditor or creditors who filed the bankruptcy petition with a bankruptcy remedy. *In Re Braten*, 73 B.R. 896 (U.S. Bankruptcy Ct., S.D.N.Y. 1987). Such multiple employment or representation was held by the court to constitute "a flagrant violation of The Code of Professional Responsibility" from an ethical viewpoint, as the independent judgment exercised on behalf of one client was found necessarily to affect the lawyer's representation of another client. *Id.* at 899.

The foregoing rules should be deemed to apply to other types of debt—compromising proceedings, whether in the federal court system or the state court system. The distinction is without a difference.

DR 5-108, however, allows a lawyer to represent a debtor who seeks to discharge or otherwise compromise the debt of a former client of the lawyer, so long as no confidences or secrets gained during the representation of the former client are to be used. If such confidences or secrets are to be used, and they have not become generally known or are otherwise not authorized to be disclosed under DR 4-101(c), the consent of the former client must first be obtained, after full disclosure. Extreme caution should be used in making determinations concerning the foregoing situations; however, better judgment would require the lawyer not to take on or continue employment in order to avoid the appearance of impropriety.

A lawyer may represent or continue to represent clients in attempting to collect debts owed to the clients, whether by Judgment or otherwise; but if approached by one who wishes to discharge or otherwise compromise the same in bankruptcy or other proceedings, the lawyer may not accept the employment proffered by the proposed debtor. There the same problems which arose in *In Re Braten*, *supra*, would obtain.

CONCLUSION

For the reasons hereafter stated, the questions posed is answered in the negative.
