

2007 FORMAL ETHICS OPINION 7

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CONTINUING CHAPTER 13 REPRESENTATION OF HUSBAND AND WIFE AFTER DIVORCE

Adopted: July 13, 2007

*Opinion rules that a lawyer may continue **to** represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied.*

Inquiry #1:

Husband and Wife hire **Attorney A** to file a Chapter 13 bankruptcy petition. While the proceeding is pending, Husband and Wife separate and ultimately divorce. Husband and Wife want **Attorney A** to continue **to** represent them jointly and they want **to** continue **to** pay creditors pursuant **to** the Chapter 13 plan. Husband and Wife have reached an agreement on how they will make the mortgage payment and the Chapter 13 plan payments. They believe that they can resolve amicably any other issues that may come up in the case. **Attorney A** has discussed the potential conflict of interest that might arise due **to** his common representation. Husband and Wife indicated that they cannot afford **to** hire other lawyers and that they consent **to** the common representation.

May **Attorney A** continue **to** represent Husband and Wife under these circumstances until an issue upon which they cannot agree arises?

Opinion #1:

Yes. Rule 1.7(b) permits a lawyer **to** represent two or more clients, despite a concurrent conflict of interest, provided the following conditions can be met:

- (1) the lawyer reasonably believes that the lawyer will be able **to** provide competent and diligent representation **to** each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Assuming the common representation is not prohibited by bankruptcy law and Husband and Wife do not, at this juncture, have any claims **to** assert against each other in the bankruptcy proceeding, **Attorney A** may proceed with the common representation provided he reasonably believes that he can provide competent and diligent representation **to** both Husband and Wife and he has the informed consent of both clients.

Inquiry #2:

Should **Attorney A** get something in writing about the issue?

Opinion #2:

Yes, the consent of each client must be confirmed in writing. Rule 1.7(b)(4). While the signature of the client on the written confirmation of consent is not required by the rule, asking a client **to** sign a statement confirming consent may help the client **to** understand the importance of the lawyer's disclosures relative **to** the conflict and the meaning of the consent.

Inquiry #3:

The law of privilege and disclosure requirements for a bankruptcy proceeding may be different than the ethical constraints on **Attorney A** arising out of the Rules of Professional Conduct. In light of this, is **Attorney A** required **to** ask the bankruptcy court for permission **to** stay in the case?

Opinion #3:

Whether the rules of the bankruptcy court or federal bankruptcy law require **Attorney A** to obtain the consent of the court is a question of law outside the purview of the Ethics Committee. **Attorney A** must examine the court rules and federal law to determine whether the court's consent is required. If it is not required, **Attorney A** may proceed with the common representation subject to the conditions set out in Opinion #1.

To obtain the informed consent of clients to a common representation, a lawyer must "communicate adequate information and explanation appropriate to the circumstances." Rule 0.1(f)(definition of "informed consent.") In the current situation, **Attorney A** must explain to Husband and Wife the effect, if any, that the law of privilege and disclosure requirements in a bankruptcy proceeding might have on the common representation. In addition, **Attorney A** must inform each client of the right to information about the representation. As noted in comment [31] to Rule 1.7, "[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." See 2006 FEO 1.