

CHAPTER 13 SYMPOSIUM 2021

SESSION FOUR

My Clients Love Me but Hate Each Other

Moderator: Marie-Ann Greenberg, Esq. - Chapter 13 Standing Trustee Newark Vicinage

Speakers: Hon. Rosemary Gambardella, Michael A. Artis, Esq., Joseph M. Casello, Esq. & Virginia E. Fortunato, Esq.

Delve into and consider your ethical obligations when you have a joint bankruptcy case where after filing your clients initiate divorce proceedings. What to consider, what steps to take, and who can you represent, if anyone?

Rules of Professional Conduct

I. RPC 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;
or

(2) 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, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) 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.

Rule 1.7 prohibits two types of representations:

1. Those will be directly adverse to another current client of the lawyer;
2. Those involving significant risk that the representation will be materially limited by the lawyer's responsibility to another person or former client or to a third party by a personal interest of the lawyer.

The Rule does not specifically ban this representation; however, the representation will be permitted if four conditions are satisfied:

1. Each affected client gives informed consent, confirmed in writing, after full disclosure and consultation;
2. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each client;
3. The representation is not prohibited by law; and
4. 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.

II. What is Informed Consent?

In 2004, the New Jersey Supreme Court adopted the recommendation of the Pollock Commission and added RPC 1.0 to the Rules of Professional Conduct. Subsection (e) defines **informed consent** to mean "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and a reasonably available alternative to the proposed course of conduct." RPC 1(e)

The New Jersey Supreme Court has held an "attorney should be able to advise the client in such a way as to protect the client's interests, utilizing his professional training, ability and judgment to the utmost. Consequently, if any conflicting interest could arise which would stand in the way of that kind of unstinting zeal, then the client must be so informed." In re: Dolan 76 N.J. 1,9 (1978). The Court went on to state that it will not tolerate client consents to a conflict of interest "which are less than knowing, intelligent and voluntary." Dolan at 13. A lawyer claiming that his or

her client consented knowingly and voluntarily to a conflict must show that he or she consulted with the client and informed the client fully of any potential problems inherent in the conflicting representation.

A. When Given

The lawyer must demonstrate that the consultation took place at a stage in the representation that allowed the client sufficient time to consider the information supplied by the lawyer and to reflect on his or her options. Dolan at 13. In Dolan consent was obtained on the day of a closing. The Supreme Court found that the consent was obtained at 11th hour and “amounted to little more than a perfunctory effort” to comply with the requirement.

B. What Needs to Be Disclosed?

In a Chapter 13 setting, once joint debtors have decided to separate or divorce, what issues must be addressed with both clients?

1. Potential for discharging debts owing to one another
2. Ability to fund a plan if one party is required to pay support to the other;
3. Privilege issues;
4. Costs of separate representation;
5. Potential for severing estates:
 - (a). Review of Claims filed
 - (b). Potential Conversion to Chapter 7

III. Reasonable Beliefs of the Lawyer

The rules of professional conduct define reasonable and reasonable belief. Reasonable when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer (RPC 1.0 (i)). Reasonable Belief when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable (RPC 1.0 (j)). These paragraphs place the responsibility on the lawyer to reasonably believe that neither representation will be adversely affected. The lawyer must actually believe that each client can be represented competently and under the circumstances, a reasonable prudent and competent lawyer would hold the same belief. “The lawyer cannot rely upon a subjective belief ...; a reasonably prudent lawyer must be able to draw the same conclusion under the circumstances.” Debevoise Committee Report.

IV. The Representation Is Not Prohibited By Law

Rule 2014 of the Federal Rules of Bankruptcy Procedure do not appear to prohibit representation under these circumstances. The Rule requires a party seeking employment under sections 327, 1103 or 1114 of the Code to make application. Debtor's attorneys in Chapter 13 cases are not retained pursuant to section 327 so it appears that rule may be inapplicable. Rule 2016(b) does not appear to prohibit the representation as it only requires disclosure of compensation.

V. Representation Does Not Involve the Assertion of a Claim by One Client Against Another Client

This final condition makes it clear that a lawyer may not represent the parties on opposite sides of the litigation matter even with the consent of clients. This is perhaps the most troubling to a bankruptcy attorney. Given that upon the filing of a divorce complaint, one client may seek pendente lite support or assert equitable distribution claims or potentially TEVIS claims against the other party, query whether those post-petition claims fall within potential claims that could be discharged in a bankruptcy case and whether those claims would trigger Rule 1.7 (b)(4) in preventing the attorney from continuing representation of both parties.

CASELAW & OTHER HELPFUL RESOURCES TO CONSIDER

See Collier, Family Law and the Bankruptcy Code 1-77 - 80 ¶ 1.08 - Ethics of Representing Both Spouses in Bankruptcy (2010). "Attorneys in bankruptcy cases are held to very high standards of disclosure and loyalty and, as one court pointed out, 'the Bankruptcy Code does not contain provisions allowing a waiver of [conflict of interest] standards, as might be available outside bankruptcy.'" Id. at 1-80.

In re Carr, 224 B.R. 785 (Bankr. D. Idaho 1998) (hearing needed to determine if attorney for debtor's former spouse, who was creditor of the debtor, had conflict that would preclude representing trustee; **In Re Vann**, 128 B.R. 285, 288-290 (Bankr. D. Colo. 1991), *aff'd in part and remanded for limited purpose*, 136 B.R. 863 (D. Colo. 1992), *aff'd*, 986 F.2d 1431 (10th Cir. 1993) (table) (text 1992 U.S. App. Lexis 34727) (attorney ordered to disgorge almost \$125,000.00 in fees and costs for representing the debtor

and non-debtor spouse after spouses were separated and had adverse interests in bankruptcy case).

See Bd. Of Attys. Prof'l Responsibility v. Zablocki, (In re Zablocki) 2001 WI 115, 247 Wis. 2d 994, 635 N.W.2d 288 (2001) (attorney's license suspended for representing wife if divorce, and in representing both parties in joint bankruptcy case without obtaining waiver of conflict of interest from each).

In re Rusty Jones, Inc., 134 B.R. 321, 346 (Bankr. N.D. Ill. 1991) (conflicts of interest standards are applied more strictly in bankruptcy than in other areas of law).

Lundin On Chapter 13 § 26.1 Special Problems for Lawyers in Chapter 13 Cases

14. "Debtors' counsel must be especially sensitive to the conflict issues that arise in the not so uncommon disintegration of a joint Chapter 13 case when spouses separate for divorce." See FN 31. In re Carpenter, No. 10-13256-PB11, 2011 WL 250746 (Bankr. S.D. Cal. Jan., 24, 2011) (Since debtor's spouse's case had been dismissed based on statutory debt limits, any potential conflict for debtor's firm representing both spouses evaporated; law firm was not disqualified in instant case.); In re Josephson, No. 04-60004-13, 2008 WL 113861 (Bankr. D. Mont. Jan. 9, 2008) (Continuing to represent joint debtors after divorce and filing plan amendments without obtaining one debtor's signature or consent violated Bankruptcy Rule 9011; half of fee received was disgorged).

[https://lundinonchapter13.com/NACTT2020/Chapter13CaseLawUpdateSection/26.](https://lundinonchapter13.com/NACTT2020/Chapter13CaseLawUpdateSection/26.1)

1

2007 Formal Ethics Opinion 7 - Adopted July 13, 2007

Continuing Chapter 13 Representation of Husband and Wife After Divorce - 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.

2000 Formal Ethics Opinion 2: North Carolina - Adopted January 18, 2001

Representation of remaining spouse after filing joint Chapter 13 Bankruptcy Petition - Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 Bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the attorney is aware of any fact or circumstances which would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

Freivogel on Conflicts: Waiver/Consent Forms

<http://www.freivogelonconflicts.com/waiverconsentforms.html> - Page 6 of the article provides a sample form re: estate planning - Simultaneous Representation of Husband and wife which could easily be adapted to joint representation of two spouses.

In re Star Broadcasting, Inc., 81 B.R. 835, 17 B.C.D. 1 (Bankr. N.J. 1988) (“In addition to the standards in Section 327(a) and case law interpreting that section, many courts have relied on the Rules of Professional Conduct for guidance in determining whether a conflict of interest exists in a law firm’s representation of parties to a bankruptcy proceeding.”) (“This court recognizes that it would be unreasonable and unnecessarily cumbersome to always require different counsel in related Chapter 11 cases, however, whether such an actual disqualifying conflict exists must be considered in light of the particular facts of each case.” (citation omitted.)

See In re Nolan, Case No. 04-35987, 1, 15, 17 (Bankr. D.N.J. July 10, 2006) (unpublished opinion) (dual representation of husband and wife in separate and simultaneous filings). “This court recognizes that the potential for conflicts in dual representation alone is not enough to find that the representation is improper.” **See In re BH&P, Inc.**, 949 F.2d 1300, 1316-17 (3d Cir.1991) (In a case addressing conflict of interest issues with regards to estate Trustee and Trustee’s professionals, Third Circuit stated: “denomination of a conflict as ‘potential’ or ‘actual’ and the decision concerning whether to disqualify a professional based upon that determination in situations not yet rising to the level of an actual conflict are matters committed to the bankruptcy court’s sound exercise of discretion.”). “Attorneys often represent both husband and wife in separate bankruptcy filings and may even represent ex-spouses in their separate filings without a conflict arising. However, when the facts of the case show that there an actual conflict, such representation is problematic. And while it is also true that in certain situations a conflict may be waived by the parties after full disclosure and informed consent, waiver of a conflict is not available in all instances. *RPC 1.7(b).*”

“These same concerns are present when an attorney seeks to represent ex-spouses filing separate bankruptcy petitions. One spouse is likely to have a claim against the other for money owed pursuant to the divorce agreement. In such a situation, the conflict could not be waived since *RPC 1.7(b)(4)* requires that ‘the representation does not involve the assertion of a claim by one client against another client.’”

A Caution about Severing Your Chapter 13 Case from Your Spouse. Blog Post by the Law Offices of Chance M. McGhee, 8207 Callaghan Road, Suite 250, San Antonio, TX 78230. The article provides a very good general discussion re: Conflicts of interest from coming divorce, the need to withdraw or require independent advice, and severing cases.

<https://www.chancemcgheelaw.com/sanantoniobankruptcyblog/2017/09/01/a-caution-about-severing-your-chapter-13-case-from-your-spouse/>

APPLICABLE BANKRUPTCY CODE SECTIONS

1. Obligations under 11 U.S.C §329 and F.R. Bankr. P. 2016(b):
 - a. fees must be reasonable, and value must be given to client;
 - b. pursuant to D.N.J LBR 2016-5(b), a chapter 13 debtor's attorney may charge a standard fee of up to \$4,750, and supplemental fees must be sought by fee application using the appropriate form;
 - c. an attorney must file with the petition Local Form *Disclosure of Chapter 13 Debtor's Attorney Compensation* within 14 days after the order for relief and must include whether the attorney has shared or agreed to share the compensation with any other entity; and
 - d. a supplemental attorney disclosure statement must be filed and transmitted to the U.S. Trustee within 14 days after any payment not previously disclosed.

2. Obligations under the "Debt Relief Agency" Code Provisions:
 - a. 11 U.S.C §526 - restrictions on debt relief agencies;
 - b. 11 U.S.C §527- disclosures; and
 - c. 11 U.S.C §528- requirements for debt relief agencies:
 - i. Yes, you must have a written contract or retainer agreement; and
 - ii. Yes, you must have the informed consent of each client in writing if you want to continue representation of husband and wife after divorce.

3. Obligations pursuant to Rule 9011:
 - a. an attorney must make a reasonable inquiry into the client's financial affairs and must research the facts and the law;

4. Obligations pertaining to CM/ECF procedures and the attorney's duty to obtain a wet signature on all electronically filed documents;

5. State ethical obligations pursuant to State Rules of Professional Conduct
 - a. RPC 1.1 - competency;
 - b. RPC 1.3 - diligence;
 - c. RPC 1.4- communication;
 - d. RPC 1.7 - conflict of interest;
 - e. RPC 3.3 - candor towards the tribunal;

6. Other Issues that may arise:
 - a. D.N.J. LBR 1015-1. Joint Administration
 - b. Should the joint case be severed?
 - c. Should the joint case be converted?
 - d. Should the joint case be dismissed?