ADVISORY ETHICS OPINION 2001-03

SYNOPSIS:

An attorney who represented a national retailer ("Retailer") in the bankruptcy arena from 1995-1999 cannot represent individuals seeking Chapter 7 representation who owe money to the Retailer, where the attorney has no consent for such representation from the Retailer and the Retailer has shared confidential information with the attorney.

FACTS:

Requesting attorney represented a Retailer in its efforts to have debtors in bankruptcy either reaffirm their revolving charge debt or to redeem the consumer goods. This representation included representing the Retailer before the Bankruptcy Court in a case challenging a Vermont Bankruptcy General Order concerning redemption agreements. The case included review of a valuation table that was protected information and that was reviewed in camera by the Judge. Since an unfavorable decision was issued in 1999, the Retailer has not requested any additional bankruptcy work by this attorney or any other attorney in Vermont, as far as the requesting attorney knows.

QUESTIONS PRESENTED:

1. Is the attorney prohibited from representing any individual in bankruptcy who owes money under a revolving charge plan to the Retailer?

2. If such a prohibition exists, is it permanent or, if not permanent, how long must it exist?

Relevant Provisions of the Vermont Rules of Professional Conduct

Rule 1.9 Conflict of Interest: Former Client

(1) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation, and

(c) A lawyer who has formerly represented a client in a matter --- shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known.

Rule 1.7 Conflict of Interest: General Rule

(3) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) each client consents after consultation

ANALYSIS:

It should be noted that both the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure also include provisions concerning conflicts of interest which are more stringent than the Rules of Professional Conduct.[1] We need not include an analysis of those federal provisions, however, because the Vermont Rules of Professional Conduct ("VRPC") clearly prohibit representation under these specific facts.

Status as Former or Present Client

There is no per se rule governing when a client becomes a "former client" under VRPC 1.9.[2] In this case, the requesting attorney represented the Retailer on multiple matters over a 4-year time span. While there has been no legal representation for the last year and a half, it may not be a safe assumption that the retailer is a *former* client if the attorney has not formally ended the relationship, especially where no other Vermont lawyer has been retained to do any work for the Retailer.

An attorney may not accept representation adverse to a *present* client, even if the matter is wholly unrelated to the matter in which the attorney represents the first client. **Thus, the requesting attorney cannot represent any debtors against the Retailer if the**

[1] See, In re Roberts, 46 B.R. 815(Banks. D. Utah 1985), aff'd in part & rev'd in part 75 B.R. 402 (D. Utah 1987).
[2] SWS Fin Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392 (N.D. Ill. 1992).

Retailer is still a *present* client.

The status of the Retailer as a former or present client could be clarified by communicating with the Retailer. If the client affirms requesting attorney no longer represents the Retailer then the Rules applicable to *former* clients would apply.

Waivers

Frequently, bankruptcy attorneys will include an explicit waiver in their initial retention letters that they may in the future represent other debtors against a creditor client. This general consent may not be adequate under certain fact patterns where the former client can show it did not fully understand the nature and scope of the waiver. Nonetheless, these waivers by large business clients are generally seen as valid by the courts. The Committee assumes that the requesting attorney does not have such a waiver already in his/her file, but also asserts that the requesting attorney could still request such a waiver in the letter that also clarifies that he is no longer counsel for the Retailer.

Substantially Related Matter

Assuming that the Retailer is a "former client" and that there is no valid waiver, the next question is whether the debtor representation concerns a matter substantially related to the previous retailer representation. If the matter is not substantially related and there is no confidential information that could be used to be disadvantage of the former client, then the requesting attorney could represent debtors against the retailer.

It should be noted in answering the question of what is a substantially related matter that you cannot make the presumption in bankruptcy that previous representation of a creditor means that you can never represent a different debtor against that creditor. Such a prohibition would be too broad a definition of what is a substantially related matter. However, in this case, no more analysis of what would be a substantially related matter is needed, since the facts clearly indicate that the requesting attorney does have confidential information provided by the Retailer.[3]

Confidential Material

The Vermont Rules of Professional Conduct 1.9(c)(1), which disallows use of confidential information to the disadvantage of a former client, creates a complete bar to such representation in this case. The requesting attorney's access to the creditor's valuation table and other materials presented in camera in the previous representation is clearly the type of confidential material contemplated in VRPC 1.9(c)(1).

The requesting attorney's only solution to having a complete and permanent prohibition against representing the Retailer would be to have the passage of time make the particular information seen in camera not useful against the former client, or be able to demonstrate that the information has become generally known. Practically speaking, that would require getting the former client to acknowledge that the material is now outdated and useless, or that it had been publicly distributed.

CONCLUSION:

The requesting attorney needs to clearly establish the Retailer as a former client and that the previously confidential information is no longer relevant and could not be used against the former client. The only possible way to establish such facts would be to contact the Retailer and obtain a release that covers both these conditions.

[3] Islander E. Rental Program v. Ferguson, 917 F. Supp. 504 (S.D. Tex. 1996).