MARYLAND STATE BAR ASSOCIATION
Committee on Ethics

Patricia M. Weaver, Chairperson
4800 Hampden Lane, 6th Floor
Bethesda, Maryland 20814
(301) 951-9360
tweaver@paleyrothman.com

September 21, 2015

Ms. Bonnie Sullivan
Executive Director
Maryland Volunteer Lawyers Service
201 North Charles Street
Suite 1400
Baltimore, Maryland 21201-4118

Re: Ethics Docket 2015-05

Dear Ms. Sullivan:

The Committee on Ethics of the Maryland State Bar Association has considered your inquiry. The enclosed Opinion is being issued after consideration by the Committee. Our Opinion represents the consensus of the Committee although certain Committee members felt strongly to the contrary. Hence, you will also find enclosed a *dissent* authored by Honorable Joan Bossman-Gordan which is joined in by David Gavin.

We thank you for consulting the Committee on this matter.

COMMITTEE ON ETHICS

By: _____
Thomas E. Lynch, III
Member of the Committee

Raul Bhat, Esquire
Hon. Joan Bossmann-Gordon
Timothy Bradford, Esquire
Fred Coover, III, Esquire
Dolores Dorsainvil, Esquire
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MARYLAND BAR ASSOCIATION
COMMITTEE ON ETHICS
ETHICS DOCKET 2015-05

On behalf of a volunteer lawyer program, you have asked this Committee to determine if there is a conflict of interest for a *pro bono* lawyer to represent a low-income client in a "no asset" Chapter 7 bankruptcy matter if the lawyer or other lawyers in that lawyer's firm represent a creditor of the debtor in an unrelated matter. You have advised us that your volunteer program refers clients to experienced bankruptcy lawyers who have volunteered to provide full representation during the bankruptcy process. Your specific request to this Committee is whether the Maryland Rule of Professional Conduct 1.7(a) (Conflict of Interest: General Rule) prohibits such a lawyer from representing a Chapter 7 bankruptcy client if the lawyer or members of his or her firm represent one of the creditors in an unrelated matter.

BACKGROUND

The Committee has considered and discussed your inquiry at several meetings. We recognize that the inquiry you have presented is important to lawyers seeking to provide *pro bono* services in Maryland and, in addition, is very important to your organization and the financially distressed clients that it serves. In reaching the conclusion set forth hereinafter, this Committee has been able to achieve consensus as to the outcome, although there are differences of opinion as reflected in the dissent which is being provided herewith.

In reaching the conclusions detailed hereinafter, the Committee believes it is very important to ensure that there is no misunderstanding about the context in which this inquiry is raised because it is the unique combination of circumstances which drives the outcome. As a consequence, we have set forth below, perhaps in more detail than normal, the circumstances which give rise to your inquiry.

Thus, you have provided the following as context:

Your organization, since its founding in 1981, has provided free legal services to Marylanders of limited means. One of the areas in which your volunteer organization provides representation to financially distressed clients is bankruptcy. You assist income eligible clients (those earning not more than the 50% of Maryland's medium income), with limited assets, by referring such clients to

experienced bankruptcy attorneys who have volunteered to provide full representation during the bankruptcy process without charge. The significance of this program is reflected in the fact that during fiscal year 2014, almost 15% of your client "pool" sought the assistance of your organization for bankruptcy representation. You have made clear to us that prior to referring such a client to a volunteer lawyer, your organization conducts an involved screening of the clients to ensure that each client satisfies the income eligibility requirements. The client also has to meet certain other indicia before you consider referring that prospective client to a *pro bono* lawyer.

Most of your clients in financial distress file Chapter 7 bankruptcy cases which are in the nature of *in rem* proceedings conducted under the statutory framework of the United States Bankruptcy Code for the marshalling and distribution of assets and discharge of debt. Virtually all of the Chapter 7 cases filed for clients you refer to voluntary attorneys are "no asset" cases because the clients possess no non-exempt assets for distribution to creditors.

Although this Committee does not purport to provide opinions on issues of law, we recognize that Chapter 7 bankruptcy cases, unlike those that are in litigation, are not directed in an adverse way toward any particular creditor. Under the Bankruptcy Code, the debtor's bankruptcy estate almost uniformly is administered by a disinterested Chapter 7 Trustee. Adversary proceedings by creditors may be filed in bankruptcy cases, and we understand that, if an objecting creditor also is represented by the debtor's attorney in other matters, the attorney, at that point, would be required to obtain a conflict waiver under Rule 1.7(b) of the Maryland Lawyers' Rules of Professional Conduct in order to continue in the representation. If no waiver is then obtained, the lawyer would have to withdraw or terminate himself or herself from continuing the representation.

You have made clear to us that your organization, in order to provide bankruptcy representation to the financially distressed population you serve, can only do so by enlisting the services of members of the Maryland bar who volunteer to provide such services without charge. We also understand from your inquiry that lawyers and firms that represent large, institutional creditors in unrelated matters are reluctant to provide volunteer services due to the uncertainty about whether a written conflict waiver is necessary before undertaking the representation. Obtaining such a written conflict waiver is not feasible in many instances because the large institutional clients may be located outside the State of Maryland and/or have a complicated process for evaluating and consenting to waivers. It also is difficult to determine, in many cases, precisely who might "own the debt" at the

time the Chapter 7 proceedings are initiated. You have advised this Committee that you fully expect that the numbers of attorneys who volunteer to represent low income clients in Chapter 7 proceedings would increase should this Committee conclude that the attorneys providing services in a Chapter 7 case in the circumstances you describe, would not be required to obtain a conflict waiver from any potential creditor client to whom the debtor may owe money.

SUMMARY OF CONCLUSIONS

With this as the context and for the reasons more fully detailed hereinafter, it is our opinion that your organization, subject to the limitations detailed below, should be permitted to engage the services of bankruptcy counsel to represent debtors in Chapter 7 proceedings, without obtaining a conflict waiver in advance, even if the attorney or his firm represents a creditor or potential creditor of the debtor in an unrelated matter.

The grounds for our conclusion, and the limiting conditions regarding the representation we are approving, can be summarized as follows:

1. In a "no asset" Chapter 7 bankruptcy proceeding, and in the absence of an adversary proceeding or asserted claim by a creditor, the limited representation the volunteer lawyer is undertaking does not present a conflict of interest prescribed by Rule 1.7(a) because the representation of the debtor client is not directly adverse to another client nor, in our view, is there a significant risk that the representation of the debtor would be materially limited by the lawyer's responsibilities to another client, a former client or by a personal interest of the lawyer.

2. Rather, a Chapter 7 bankruptcy proceeding, unlike litigation, is an *in rem* proceeding not involving the direct adversity contemplated by this Rule, particularly because a Chapter 7 Bankruptcy Trustee will be appointed to oversee disposition of the debtor's assets.

3. This limited representation by the volunteer lawyer, however, may only be undertaken where your organization, in fact, has conducted the detailed screening to ensure the debtor meets the income and other criteria.

4. In addition, as part of the screening process, the volunteer lawyer's representation should not be undertaken unless the volunteer lawyer and the debtor enter into an engagement letter which explains the limited role of the volunteer lawyer and further explains that, if a creditor-client of the lawyer or his firm in fact

becomes involved as an adverse party (not represented by the lawyer or his or her firm) in the Chapter 7 proceeding, the lawyer may have to disqualify himself or herself pursuant to Rule 1.10 (Imputation) unless a conflict waiver is obtained from the creditor. It should also be recognized that in certain circumstances, the conflict may be nonconsentable; that is no conflict waiver can or should be sought. (See Rule 1.7 and Comments [14],[15], [16] and [17] thereunder).

5. This result, this Committee believes, represents the appropriate reconciliation of policies the Maryland Lawyers' Rules of Professional Conduct and the Court's rules seek to promote; namely, encouraging pro bono representation of needy clients while ensuring that any actual conflicts of interest, if they come to exist, are understood, appreciated and avoided.

ANALYSIS

Our analysis necessarily must begin with the language of the applicable Rule. In that regard, Rule 1.7(a) Conflict of Interest: General Rule provides as follows:

> "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A 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 or by a personal interest of the lawyer."

In that your inquiry is limited to a specific request that we opine as to the proscriptions of Rule 1.7(a), we understand you are asking this Committee to determine if the lawyer, by undertaking the representation on a volunteer basis, for the Chapter 7 debtor will be acting directly adverse to another client under the circumstances you have described or if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client, or a third person or by a personal interest of the lawyer.

You are not asking this Committee to determine if this circumstance could be addressed and rectified by obtaining a waiver of conflict under Rule 1.7(b), which is one potential solution to avoid any potential ethical concern that could arise under the circumstances.

In this context, and with support from authorities in other states that have addressed a similar inquiry to yours, this Committee is of the opinion that, under the limited circumstances we describe in this opinion, much like those described in the New Jersey Supreme Court in its opinion cited hereinafter, a limited representation may be undertaken by the *pro bono* lawyer without obtaining a conflict waiver; recognizing, however, that the limitations on the engagement (including the distinct potential that the lawyer would have to disqualify himself or herself if another client of his or her firm surfaces in the bankruptcy and presents an adversary claim pursuant to Rule 1.10 Imputation of Conflicts of Interest and declines to give a waiver) must be made known and must be understood by the *pro bono* client at the time the representation commences.

We reached this conclusion, although recognizing that there is a tension which exists in the Rules of Professional Conduct, where a lawyer is faced with conflicting priorities and responsibilities under the ethical rules, and we believe, under the very limited circumstances we have described here, the policies underlying the Rules support providing the *pro bono* representation, subject to the limitations we have described.

In that regard, Rule 6.1(a) of the Maryland Lawyers' Rules of Professional Conduct specifically provides that "[a] lawyer has a professional responsibility to render *pro bono* publico legal service." Although this Rule makes clear that it is aspirational, the comments thereunder emphasize that this aspiration is one we should all take very seriously; stating as follows:

> "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged."
> (Rule 6.1, Comment [3]).

Moreover, Rule 6.5 of our Rules and the comments thereunder recognize the special nature of the limited representation provided by volunteer lawyers through legal service entities. Rule 6.5 specifically provides as follows:

"(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only *if the lawyer knows* that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer *knows that another lawyer associated with the lawyer in a law firm is disqualified* by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule. (Amended September 8, 2011, effective January 1, 2012)." (Emphasis added).

In addition, our Rules, and specifically Rule 1.2 of the Rules of Professional Conduct, contemplate that a lawyer and a client may specify in an engagement the limited circumstances under which a lawyer will act for the client with full understanding and appreciation on both sides of those limitations with informed consent of the client. *See* Rule 1.2(c).

Further, the Rules Committee and the Maryland Court of Appeals have approved a Rule (Maryland Rules of Procedure, Amended Rule 2-131) which specifically contemplates that a lawyer may enter a limited appearance under certain circumstances in a discrete matter or judicial proceeding so long as the other elements of the Rules are complied with. That Rule became effective on July 1, 2015.

These Rules, taken together, in the view of this Committee, constitute a substantial encouragement to lawyers in this State to undertake *pro bono* representation of otherwise unrepresented clients in the absence of an actual known conflict even if the scope of that representation may have to be limited by a potential of a conflict of interest which could arise in the future.

In the circumstances described in your inquiry, particularly because your inquiry makes reference to a no asset bankruptcy which is in the nature of an *in rem* proceeding, we believe a limited undertaking of representation by a *pro bono* lawyer is permissible even if a potential conflict could arise because no actual known conflict exists when the representation commences. Of course, if a conflict

arises after commencement of representation, then the volunteer lawyer may have to disqualify himself or herself unless a conflict waiver can then be obtained, which, in some circumstances, may not be possible or even appropriate.

There are those on this Committee who do not share this Opinion. In that regard, Rule 1.7(a) contains specific language which makes reference to a direct conflict. The comments under that Rule can be read to use the words "direct conflict" in a more expansive or less expansive way. Specifically, Comments 1, 2, 3, 6 and 7 could be read expansively to require lawyers to conduct an exhaustive analysis to determine if a directly adverse relationship or circumstance exists between the prospective bankruptcy client and the "lawyer's responsibilities to another client, a former client or a third person for from the lawyer's own interests."

As you suggest in your letter to this Committee, this very broad reading could require a volunteer lawyer, from a large firm that routinely represents creditors, to conduct an exhaustive conflicts check of every conceivable creditor that might exist vis-à-vis the prospective bankruptcy client. In such an instance, few if any of those potential *pro bono* lawyers will then proceed with conducting the analysis or seeking Rule 1.7(b) informed consent. Moreover, some members of this Committee believe that even if no directly adverse conflict exists at the outset because the prospective client ostensibly has no assets against which a creditor would or could proceed, an expansive reading of Rule 1.7 and these Comments could suggest that a significant risk might nonetheless exist that representation of the bankruptcy client could materially limit responsibilities to one of those potential creditor clients because the creditor client might surface as a current or past creditor of the prospective bankruptcy client, and then Rule 1.7(b) waivers could still be required. They suggest, therefore, that the lawyer must identify those known or potential conflicts prior to commencing representation.

The Committee certainly is not insensitive to these concerns, but the majority of the Committee does not believe that the words "directly adverse" in Rule 1.7(a) were intended to be read so broadly as to stifle *pro bono* representation under the limited circumstances detailed herein. In fact, in other language which appears in Comment [6] under Rule 1.7, (which relates to identifying conflicts of interest: direct adversity), states as follows:

> "On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute

a conflict of interest and thus may not require consent of the respective clients."

Moreover, Comments 4 and 5 under Rule 1.7 expressly recognize that conflicts not perceived at the commencement of representation may arise later requiring the lawyer to take action at that time. This language, coupled with the encouragement that exists elsewhere for *pro bono* representation, in our view, means that the lawyer need not go looking to create a conflict which is not apparent given the limited representation.

SUPPORTING AUTHORITIES

The conclusions we are reaching in this opinion find significant support in other jurisdictions. In that regard, the decision of the Supreme Court of New Jersey In re Opinion No. 17-2012 (2014) is persuasive. The volunteer organization in that case, Volunteer Lawyers for Justice ("VLJ"), and its partner volunteer lawyers engaged in what some might fairly term a "best practice" for ensuring the volunteer lawyers complied with the New Jersey conflict of interest rules while simultaneously maximizing their contributions. The VLJ *pro bono* lawyers conducted conflict checks prior to meeting with prospective bankruptcy clients to screen for Rule 1.7 conflicts and then decline to take the case if the conflict check reveals that the firm represents or has represented one of the debtor's creditors in a matter *related* to the debtor. If a creditor the firm represents has brought a lawsuit or collection action *against the debtor* in an unrelated matter, the attorneys also decline the debtor's case. Otherwise, the attorneys generally accept the representation, even if the firm represents one or more of the debtor's creditors in unrelated matters.

Once this assessment was completed, the lawyers would then require the prospective client to review and sign an engagement letter that narrowly limits the lawyer's representation to the Chapter 7 no-asset bankruptcy petition and related Bankruptcy Code section 341 meetings and "informs the debtor that the firm will withdraw from representation if a conflict of interest arises, including if a creditor the firm represents objects to the bankruptcy petition or starts an adversary proceeding against the debtor."

The New Jersey Supreme Court, under these circumstances, and overruling an ethics opinion to the contrary, held that the volunteer lawyer does not have a conflict if he represents a low-income Chapter 7 no-asset bankruptcy client (debtor) in a matter where the lawyer's firm also represents a conceivable creditor

of the bankruptcy client but only in an unrelated matter. The Court came to this conclusion because of the generally non-adversarial nature of the Chapter 7 no-asset proceedings, the quality and process of the VLJ and volunteer lawyer's firm conflicts review safeguards to identify directly adverse conflicts, and the strong State policy that favors *pro bono* representation. Decision of the Supreme Court of New Jersey on July 2, 2014 on Petition for Review of a Decision of the Supreme Court Advisory Committee on Professional Ethics. In re Opinion No. 17-202 of the Advisory Committee on Professional Ethics, A-22, September Term 2013, 072810, Reported at 2014 BL 184982 (N.J. July 2, 214). ("The strong policy in favor of *pro bono* legal services therefore informs our decision as well").

Further support for our decision also can be found in Formal Opinion No. 2014-191 from the State Bar of California. In the California Opinion, the authors present a substantially similar fact set as presented to this Committee, and the question presented there was whether an attorney may "proceed to represent Debtor-Client through the [Bankruptcy Code] 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)." After a very thorough review of its own law [which, if anything, contains language broader than our own rule] and precedential opinions, as well as persuasive ethics opinions from Boston and The City of New York that contemplated very similar questions, the California Committee concluded as follows:

> 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.

The Boston Bar Association Ethics Committee also had occasion to address an analogous *pro bono* initiative. After conducting an analysis of its facts in the context of Massachusetts Rules of Professional Conduct 6.5 and 1.7, both substantially the same as MRPC 6.5 and 1.7, as well as the Bankruptcy Code and related commentary, the Boston Committee opined the following:

> "Under Rule 1.7(a), does the proposed pro bono effort – i.e. helping to prepare a Chapter 7 petition and appearing at the Section 341 meeting – constitute representation 'directly adverse' to a creditor? Here there are no special circumstances, we believe not. In reaching this conclusion we note that an analogous question has been addressed by Congress and by the courts applying the Bankruptcy Code. As these authorities necessarily imply, in ordinary circumstances a Chapter 7 Petition is not direct "against" any particular creditor. Thus filing a bankruptcy petition is not like filing a lawsuit on behalf of one creditor against another creditor, and it is not like filing a lawsuit on behalf of a debtor against a creditor."

Our Committee finds these authorities very instructive and supportive of our assessment that such a limited scope no-asset Chapter 7 *pro bono* representation, with the proposed prescreening safeguards implemented and under the circumstances as presented to us, does not create a Rule 1.7 conflict and, therefore, informed written consent is not required at commencement of representation. We do, however, remind the volunteer lawyer that he or she must remain ever vigilant to changing circumstances that might create a 1.7 conflict and require consent or even withdrawal.

CONCLUSION

Thank you for consulting us on this very important opinion.

MARYLAND STATE BAR ASSOCIATION
ETHICS COMMITTEE

Dissenting Opinion 2015-05

The issue presented is whether Maryland Rule of Professional Conduct 1.7(a) (Conflict of Interest: General Rule) prohibits a *pro bono* lawyer from representing Chapter 7 bankruptcy clients if the lawyer or members of his/her firm represent one of the creditors in an unrelated matter.

In general, a conflict of interest exists under MRPC Rule 1.7 when a lawyer represents one client in a matter that is directly adverse to a second client whom the lawyer or the lawyer's firm represents in another matter, even if the two matters are unrelated. The prohibition (absent consent) against undertaking such representation reflects the legal profession's concern that a client may reasonably perceive that the lawyer or law firm is acting disloyally or may be less zealous in pursuing one client's interests, and client trust and confidence in the lawyer or law firm, as well as the profession, will be eroded as a result. By utilizing experienced bankruptcy lawyers, the *pro bono* program is, by implication, providing volunteers who may routinely represent creditors and, therefore, in any given case, it is quite likely that a volunteer lawyer's firm may already represent an entity that is a creditor of the *pro bono* client.

In a bankruptcy proceeding, where a debtor seeks to be legally discharged from financial responsibility for repayment of a debt to a creditor, the debtor's position is directly adverse to that of the creditor. It is reasonable to conclude that there is a significant risk that a lawyer's representation of a creditor client would be materially limited by a lawyer's responsibilities or those of the lawyer's firm to a *pro bono* debtor client.

Maryland's version of Rule 1.7 allows a *pro bono* lawyer to represent a debtor, despite the firm's representation of a creditor of the debtor, notwithstanding a conflict of interest, provided the lawyer obtains informed consent from each affected client, confirmed in writing. *See* Rule 1.7(b)(4). However, pursuant to Rule 1.7(b)(3) should the creditor, while represented by the lawyer's firm, assert a claim against the debtor, then the firm and the lawyer must each withdraw from the representation. Where more than one client is involved, the lawyer's ability to continue to represent any of the clients is determined by the lawyer's ability to comply with duties owed to a former client and at the same time to adequately represent the remaining client or clients.

As indicated in the foregoing opinion, the entire Ethics Committee applauds the efforts of your program and its pro bono lawyers to provide important and needed legal services to those who are unable to afford to pay for them. This Dissenting Opinion is provided out of a concern that the Ethics Committee has placed an undue emphasis on Rule 6.5(a)(1) which specifies that *pro bono* lawyers are subject to Rule 1.7 only if the lawyer ***knows*** that the representation of the client involves a conflict of interest (emphasis added). Such a position lowers ethical standards

for pro bono lawyers and allows them to engage in conduct that otherwise would be prohibited by Rule 1.7.

This is of particular concern due to the fact situation presented by the inquirer stating that the volunteer lawyers provide "full representation" during the bankruptcy process, an inference that the "bankruptcy process" could include an adversarial proceeding before the U.S. Bankruptcy Court. Volunteer lawyers have a responsibility to foresee potential among clients in advance of undertaking *pro bono* representation of a debtor and to obtain informed consent, confirmed in writing, from all affected clients and potential clients. This step minimizes harm to all clients. The best practice for a volunteer lawyer would be to perform the necessary due diligence to identify potential conflicts of interests and to inform the client. Indeed, MRPC 1.1 mandates that a lawyer shall provide competent representation to a client, representation that "requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [5] to Rule 1.1 provides that competent representation requires "meeting the standards of competent practitioners." Such standards include due diligence in checking for conflicts of interest. The Committee's opinion, by putting undue emphasis on Rule 6.5(a)(1), seems to imply that *pro bono* lawyers may ignore due diligence with regard to conflicts of interest.

The better practice, which is in accordance with MRPC 1.2(c) and Maryland Rules of Procedure 2-131, contemplates a limited appearance. Rule1.2(c) specifically provides that "[A] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Limited representation of a client is a useful and recommended tool in pro bono representation in Chapter 7 bankruptcy cases.

In conclusion, this Dissent respectfully opines that under MRPC Rule 1.7(a) there is initially nothing to bar a volunteer lawyer from preparing and filing a petition for a Chapter 7 bankruptcy or accompanying the debtor to a Section 341 meeting, provided that the lawyer obtains written conflict waivers from the lawyer's debtor and creditor-clients. However, in the event a creditor-client objects to the bankruptcy trustee's report or the Chapter 7 matter otherwise comes before a tribunal, the lawyer's continued representation would be prohibited by Rule 1.7(b)(3).

Respectfully submitted,

Hon. Joan B. Gordon