

**ALASKA BAR ASSOCIATION
ETHICS COMMITTEE
OPINION NO. 2000-2**

**The Effect of Confidential Settlement Agreements on Precluding
Further Representation for Subsequent Clients**

The Ethics Committee has been asked to determine whether a lawyer who has represented a creditor, settled the claim, and whose creditor-client has signed a confidentiality agreement with the debtor agreeing not to disclose information from the settlement, may subsequently represent another creditor against the same debtor. It is the opinion of the Ethics Committee that a lawyer is not precluded from representing a subsequent client against the debtor in the circumstances outlined below so long as the attorney abides by the confidentiality requirements of Alaska Rule of Professional Conduct 1.6. Additionally, it is the opinion of the Ethics Committee that an attempt to use a settlement agreement to preclude an attorney from representing subsequent creditors might violate Alaska Rule of Professional Conduct 5.6.

RELEVANT FACTS

The specific fact scenario presented to the Ethics Committee involves an attorney who has represented a creditor against a particular debtor in the past. As a part of the original settlement agreement between the parties, the creditor and debtor “agree not to divulge any information contained in or concerning the terms of this agreement to third parties, except as may be necessary for the execution of this agreement or as required by law.” Thereafter, the terms of the settlement are complied with between the parties.

Later, the creditor’s attorney is retained by another creditor in proceedings against the same debtor. The creditor attorney’s demand letter is met with a response that the attorney must withdraw based upon the confidentiality clause of the original settlement agreement. The letter from the debtor’s attorney in essence states that this new representation by the creditor’s attorney would necessarily require the disclosure, at least implicitly, of the settlement negotiations with the debtor. This disclosure, the letter continues, breaches the confidentiality provisions of the settlement agreement, subjecting the first creditor to legal action. The debtor’s attorney also alleges that this representation would violate Rules of Professional Conduct 1.7 and/or 1.9.

ANALYSIS

1. Rule of Professional Conduct 1.6 Precludes the Creditor's Attorney From Revealing the Discussions and Terms of the Prior Settlement to the Second Creditor.

Although the debtor's attorney's letter assumes that the creditor's attorney will necessarily be compelled, in the course of his representation of the second creditor, to disclose settlement results from prior negotiations with the first creditor, it is not clear that this assumption is correct or proper. Under Alaska Rule of Professional Conduct 1.6, the principle of confidentiality is set forth. This rule states:

(a) A lawyer shall not reveal a confidence or secret relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) or Rule 3.33(a)(2). For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "*secret*" means *other information gained in the professional relationship* if the client has requested it be held confidential or *if it is reasonably foreseeable that disclosures of the information would be embarrassing or detrimental to the client*. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information. (Emphasis added.)

This rule prohibits the disclosure of client "secrets" including information gained through a professional relationship with a client when it is reasonably foreseeable that disclosures would be "detrimental to the client." In this case, the information covered by the confidential settlement agreement would constitute a client "secret" which could not later be disclosed to another client or anyone else for that matter without violating this rule, since its disclosure could result in breach of the original settlement agreement and possibly legal action against the first creditor.

Any further limitations on the attorney's representation are thereafter governed by Alaska Rule of Professional Conduct 1.7 and 1.9 as set forth in the analysis below.

2. Rule of Professional Conduct 1.7 Does Not Preclude the Attorney From Representing the Second Creditor.

The debtor's attorney claims that representation of the second creditor by the attorney violates Rule of Professional Conduct 1.7. The Ethics Committee disagrees. This rule states in pertinent part:

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

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation...

The facts of this scenario are not clear regarding the terms of the original settlement and whether there are ongoing obligations owed by the debtor to the first creditor at the time the attorney begins his representation of the second client. For purposes of this opinion, it is assumed that no such continuing obligations exist. Under these circumstances, the second creditor will not be "directly adverse" to the first creditor because there are no ongoing obligations owed by the debtor to the first creditor which might be impacted by the second creditor's claim. Additionally, since the lawyer is no longer working for the first creditor, the lawyer's representation of the second creditor should not be

“materially limited” by the lawyer’s responsibilities to the first creditor. This is a decision that must of course be analyzed by the attorney with regard the facts and circumstances of each individual case.

If these circumstances are then met, the Ethics Committee does not believe that representation of the second creditor by the attorney violates Rule of Professional Responsibility 1.7.

3. Rule of Professional Conduct 1.9 Does not Preclude the Attorney From Representing the Second Creditor.

Again, the debtor’s attorney claims that representation of the second creditor by the attorney will violate Rule of Professional Conduct 1.9. The only relevant provision of this rule states as follows:

(a) 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 interests of the former client unless the former client consents after consultation.

This rule is designed to ensure that a lawyer’s duties of loyalty and confidentiality as to the matter in which the lawyer represented a client continue after the termination of the attorney-client relationship. Under the facts of this case, however, the attorney’s representation of the second creditor does not violate the Rule of Professional Conduct 1.9 because the second creditor’s interests are not materially adverse to the first creditor’s interest. Again it is assumed for the purposes of this opinion that there are no ongoing obligations owed by the debtor to the first creditor at the time the attorney begins his representation of the second client.

4. Rule of Professional Conduct 5.6 Precludes an Attempt by a Party From Restricting an Attorney’s Right to Practice.

The Ethics Committee believes it is important to note that an attempt by the debtor’s attorney to preclude an attorney from representing subsequent creditors under these circumstances might be construed as a violation of Rule of Professional Conduct 5.6. This rule states in part that a lawyer shall not participate in offering or making “an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between

private parties.” If the debtor’s attorney construes the confidential settlement as precluding further representation by the creditor’s counsel, then the debtor’s attorney may have violated this rule by drafting or negotiating this contractual arrangement.

CONCLUSION

In summary, it is the opinion of the Ethics Committee that the terms of the confidential settlement agreement do not preclude the attorney from representing the second creditor. The attorney is precluded under Rule of Professional Conduct 1.6 from disclosing the discussions or the terms of the settlement agreement between the first creditor and the debtor with the second creditor.

Approved by the Alaska Bar Association Ethics Committee on February 3, 2000.

Adopted by the Board of Governors on March 10, 2000.