## Ethics Opinion No. 86-2

## Service of an Attorney or Firm on a Creditor's Committee Formed Under a Petition in Bankruptcy Filed by a Former Client.

The Committee has been asked whether a law firm may serve on a creditor's committee formed as a result of a petition for relief filed by a former client under Chapter XI of the Bankruptcy Act. The firm is one of the largest creditors due to fees owed by the former client; during the past representation of the client, the firm gained knowledge or had access to the client's financial affairs.

The Committee has concluded that a law firm should not serve on a creditor's committee under these circumstances, unless an informed and effective consent has been obtained from the former client. (endnote 1) Service on a creditor's committee creates a fiduciary duty of the committee members toward the class of creditors represented by the committee; the law firm may not be able to discharge this duty without violating confidences of the former client.

- DR 4-101, Code of Professional Responsibility, provides an exception to the requirement that an attorney maintain confidences of a former client where necessary to collect a fee. DR 4-101 provides in part.
  - (B) Except when permitted under DR 4-101(C) and (D), a lawyer shall not knowingly during or after termination of the professional relationship to his client:
  - (1) Reveal a confidence or secret of his client.
  - (2) Use a confidence or secret of his client to the disadvantage of the client.
  - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
  - (C) A lawyer may reveal:
  - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
  - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
  - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
  - (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee. [Emphasis supplied.]

The Committee believes that the firm may therefore pursue its claims in bankruptcy, and may reveal matters necessary to achieve protection of those claims. However, DR 4-101 would still restrain the firm from revealing matters learned during the course of representation of the former client to the creditor's committee, if those matters were not required to be revealed to protect the firm's claims and would violate DR 4-101(B)(2) or (3). Such limited participation on the creditor's committee may itself be a breach of fiduciary duty owed by the firm to the class of creditors represented by the creditor's committee. [See Re Christian Life Center, etc. (1981, BC ND Cal) 16 BR 35 concerning the fiduciary obligations of the members of creditor's committee.]

Under the facts presented, the Committee has assumed that no professional relationship would exist between the firm and the members of the creditor's committee, although such relationship is possible under the bankruptcy laws. See 11 U.S.C.S. Sec. 1103(a). This situation would be similar to that involving representation of a third party against a former client, where there is a substantial possibility that knowledge gained during the course of that representation is clearly prohibited from disclosure by DR 4-101 and Alaska law. See Aleut Corporation v. McGarvey, 573 P.2d 473 (Alaska 1978) and Burrell v. Disciplinary Board of Alaska Bar Association, 702 P.2d 240 (Alaska 1985).

Adopted by the Alaska Bar Association Ethics Committee on March 11, 1986.

Approved by the Board of Governors on March 21, 1986.

## **Endnotes**

#1: Of course, a law firm may serve on a creditor's committee without debtor consent if no present or former attorney-client relationship existed between the firm and the debtor.