BOSTON BAR ASSOCIATION ETHICS COMMITTEE
OPINION 2008-01: BANKRUPTCY PRO BONO INITIATIVE

SUMMARY

The Ethics Committee of the Boston Bar Association has been asked to analyze a pro bono initiative (the "Pro Bono Initiative" or the "Initiative") sponsored by the BBA's Bankruptcy Law Section and the Volunteer Lawyers Project.

(I) The Pro Bono Initiative is carefully designed to meet an important need. Volunteer lawyers will help individual pro bono clients determine whether their circumstances warrant filing for Chapter 7 bankruptcy. Where warranted, a volunteer lawyer will assist the pro bono client in preparing and filing a Chapter 7 Petition, and may also accompany him/her to the Section 341 meeting. The lawyer's role will end there. Many of the volunteer lawyers practice with major law firms, which represent financial institutions and other businesses. In any given case, it is quite likely that the volunteer lawyer's firm will already represent, in one or more unrelated matters, a business that is a creditor of the pro bono client. If the volunteer lawyer's bankruptcy assistance were viewed as giving rise to a conflict, then many firms would find it impractical to participate. The Bankruptcy Law Section sought to design the Pro Bono Initiative so that it will screen out any conflict problems.

(II) Several Boston banks have previously granted waivers that cover the proposed Initiative, but these waivers cover only a few of the many potential creditors in a Chapter 7 bankruptcy.

(III) A similar initiative in New York City has been supported by a formal ethics opinion of the New York City Bar Association.

(IV) In our opinion the volunteer lawyer's limited role does not, *per se*, give rise to a conflict of interest, and the Pro Bono Initiative is carefully designed to screen out any special circumstances that could give rise to a conflict.

(A) Rule 6.5 permits the volunteer lawyer to participate in an initial consultation under the auspices of the program.

(B) Absent special circumstances, the lawyer's limited role should not be viewed as representation directly adverse to a creditor under Rule 1.7(a), because the Chapter 7 proceeding is not directed "against" any particular creditor.

(C) The Pro Bono Initiative will screen out any special circumstances where the lawyer's volunteer role might be materially limited by duties to existing clients, under Rule 1.7(b). Among other things, the Pro Bono Initiative will screen out any instance where the pro bono client has a claim or defense against an existing client of the lawyer's firm. Likewise, the Pro Bono Initiative will screen out any instance where the pro bono client owes a debt that is material to an existing client of the lawyer's firm.

Consequently, in our opinion the proposed Pro Bono Initiative is fully consistent with the Massachusetts Rules of Professional Conduct.

ANALYSIS

I. THE PRO BONO INITIATIVE.

The Ethics Committee received a thoughtful letter from the leaders of the BBA's Bankruptcy Law Section, requesting our opinion. We attach a copy as Exhibit 1, because it describes the proposed Pro Bono Initiative in detail.

By way of example, it may be helpful to place in mind the contours of a typical Chapter 7 case. The Bankruptcy Law Section has explained that a typical case could run as follows. (i) An individual has no assets. He/she may have various consumer debts typically arising from credit cards, medical bills, auto loans, utility bills and other consumer items. (ii) The individual will prepare and file a Chapter 7 Petition. (iii) A Chapter 7 Trustee will be appointed. (iv) The Chapter 7 Trustee will ask about the filing in a brief Section 341 meeting (as explained below). (v) The Chapter 7 Trustee will then file a "no asset" report. (vi) Creditors will not object. (vii) The individual's debts will be discharged, and the case will be concluded. Many (although not all) of the cases that would fall under the auspices of the Pro Bono Initiative would likely run in this typical pattern, we are informed.

A. Proposed Scope Of Engagement.

The Initiative proposes as follows:

> The pro bono attorney would meet with the individual, review the individual's situation, counsel the individual regarding filing for bankruptcy and other options, and, where appropriate, assist in the preparation of a Chapter 7 petition and related paperwork for the individual. The representation would be limited – after the assistance with the preparation of the documents necessary for the Chapter 7 filing, the individual would thereafter proceed pro se.

Exhibit 1, p. 1. In most cases, the volunteer lawyer would not sign the Chapter 7 petition, which means the lawyer would not independently vouch for the accuracy of the client's representations. Exhibit 1, p. 2.

Often, the pro bono client would also benefit from having counsel present at the Section 341 meeting, and so we address that possibility as well. After a debtor has filed a Chapter 7 Petition, 11 U.S.C. §341 provides creditors an opportunity to examine the debtor under oath, in a setting that is colloquially referred to as the "Section 341 meeting." Ordinarily, the duly appointed Chapter 7 trustee conducts this examination, and ordinarily the creditors do not attend the meeting, even though they receive notice of the meeting and have the right to attend. See, e.g., DeGiacomo, A Practical Guide To Consumer Bankruptcy (MCLE 2007), p. 60. Typically, we are informed, the Chapter 7 trustee examines a large number of debtors one after another in a conference room, asking each debtor standard questions, such as: (i) did you sign the Petition, (ii) are the Schedules accurate, and (iii) have you concealed any assets? The volunteer lawyer can readily predict these questions and can pose them to the pro bono client in advance. If these questions raise any concerns, the volunteer lawyer can withdraw. If these

questions do not raise any concerns, then the volunteer lawyer may accompany the pro bono client to the Section 341 meeting, and this could be very helpful to the pro bono client, who may feel nervous or intimidated.[1]

B. Screening Questions.

During the initial consultation the volunteer lawyer will ask questions designed to identify any special circumstances that might affect an existing client of the lawyer's firm. The volunteer lawyer will ask the pro bono client whether the client has any one dominant creditor that might be disproportionately affected by a bankruptcy filing. In addition the volunteer lawyer will review: (i) whether his/her own firm regularly represents creditors in consumer collection actions; (ii) whether a creditor has commenced a collection action against the pro bono client; (iii) whether the pro bono client is engaged in any litigation in which the other side is represented by counsel; (iv) whether the pro bono client has granted liens or made unusual payments during the previous 90 day preference period; and (v) whether there are any facts indicating that a particular debt could be material to a particular creditor, such as another individual. See Exhibit 1, p. 3. Also, the volunteer lawyer will explore the questions that are likely to be asked at the Section 341 meeting.

These screening questions will ensure that representation of the pro bono client would not be directly adverse to an existing client of the volunteer lawyer's firm, under Rule 1.7(a). Such questions will also screen out any special situation that might materially limit the volunteer lawyer's ability to advise the pro bono client, under Rule 1.7(b).

C. The Issue Presented.

In the example above, suppose the pro bono client owes $2,000 to Bank X, and suppose the law firm represents Bank X in commercial lending, which is wholly unrelated to the pro bono client. Would the Pro Bono Initiative place the volunteer lawyer in a conflict of interest position? In our opinion it would not, for the reasons stated in Part IV below.

II. SOME OF THE BOSTON BANKS HAVE PREVIOUSLY GRANTED WAIVERS, BUT MANY CREDITORS HAVE NOT.

Previously given waivers are helpful to a degree, but in most instances they will not be sufficient to cover the proposed Pro Bono Initiative. In connection with an earlier Boston Bar Association initiative, at least four banks graciously agreed to waive any conflict of interest where a volunteer lawyer provides bankruptcy services to a pro bono client. We were provided with copies of four waiver letters, which have dates ranging from 2001 to 2005. Each of these letters grants a waiver on condition that (in part) the indebtedness owed to the bank by the bankruptcy client is less than or equal to $25,000. These waiver letters tend to confirm that banks do not object to pro bono bankruptcy assistance concerning debts of a small size. However, one of the four banks no longer exists in the same form, and numerous other entities --

[1] Of course, it is up to the volunteer lawyer whether to accompany the pro bono client to the Section 341 meeting, or to cease services after helping to prepare the Petition. Either way, the limited scope of engagement should be set forth in an engagement letter. This will help to avoid any misunderstanding as to the extent of the lawyer's role.

including many from outside Boston -- are creditors of today's Massachusetts consumers. Thus in any particular case, most likely, the work of the volunteer lawyer under the Pro Bono Initiative will not be covered by existing waivers.

III. THE NEW YORK CITY BAR ASSOCIATION RECENTLY SUPPORTED A SIMILAR INITIATIVE.

The New York City Bar Association recently undertook a similar initiative. Its ethics committee provided extensive analysis in its Formal Opinion 2005-01. (A copy may be found at http://www.nycbar.org/Ethics/eth2005-1.htm.) The New York City Opinion is well reasoned, but it does not cite governing authority that is applicable in Massachusetts. Accordingly, we have undertaken our own analysis under the Massachusetts Rules of Professional Conduct.[2]

IV. ANALYSIS UNDER THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT.

A. The Proposed Initial Consultation Is Permitted By Rule 6.5.

Much of the proposed initial consultation may be accomplished at a single-day meeting. During this initial consultation the volunteer lawyer will explore with the pro bono client whether a bankruptcy filing is or is not appropriate in view of the pro bono client's personal financial circumstances. This step is addressed by Rule 6.5 of the Massachusetts Rules of Professional Conduct, which provides as follows:

> Rule 6.5
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> (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:
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> (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.

Rule 6.5 permits the initial consultation under the auspices of the Pro Bono Initiative, unless "the lawyer knows that the representation of the client involves a conflict of interest." Thus we believe there is no need for a lawyer to run a conflict check before attending the initial consultation. However, we do urge the volunteer lawyer to gain familiarity with his/her firm's representation of lenders, so that he/she will be in a position to detect and screen out any special circumstances that could give rise to a conflict otherwise.

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[2] In addition to the Rules of Professional Conduct, where a lawyer is handling bankruptcy matters, the lawyer must also comply with the bankruptcy code and rules. See e.g., In re Creative Restaurant Management, 139 B.R. 902, 909, 911 (Bankr. W.D. Mo. 1992). It is beyond our scope to consider whether these require any additional safeguards, but it appears that the Bankruptcy Law Section has given careful consideration to them.

An argument could be made that Rule 6.5 permits all of the proposed Pro Bono Initiative, since most of the Rule's requirements are clearly met. First, the lawyer will be acting "under the auspices of a program sponsored by a nonprofit organization." Second, the lawyer will be providing "short-term limited legal representation." Third, there will be no "expectation" of "continuing representation" after the Chapter 7 filing and the Section 341 meeting, and in particular there will be no expectation that the lawyer will represent the pro bono client in responding to any objection by a creditor.

Nonetheless, we are not certain that the Pro Bono Initiative meets the spirit of subsection (1) of Rule 6.5. In those cases where the volunteer lawyer assists in preparing a Chapter 7 petition, the lawyer's effort may continue over the course of several days (or longer if the lawyer goes to the Section 341 meeting). The volunteer lawyer would have time to run a conflict check in these cases. Depending on the results -- and depending on further analysis -- the volunteer lawyer could be in position to "know" that the representation at least potentially "involves a conflict of interest." As a result, we are not fully confident that Rule 6.5 fully covers the proposed Initiative, and so we go on to consider whether there is any potential for a conflict of interest under Rule 1.7.

B. With Special Circumstances Screened Out, Filing The Chapter 7 Petition (And Going To The Section 341 Meeting) Does Not Constitute Representation Directly Adverse To A Creditor Under Rule 1.7(a).

Rule 1.7(a) provides as follows:

> Rule 1.7(a)
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> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
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> (2) each client consents after consultation.

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? Where 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 directed "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.

Congress established a special procedure when it created Chapter 7. The Bankruptcy Law Section has explained that a Chapter 7 bankruptcy is an *in rem* proceeding. See Exhibit 1,

p. 2. Filing the Chapter 7 Petition initiates a process that is designed to gather the assets and debts of the debtor into a bankruptcy estate, where they are allocated so as to "strike a fair balance" among creditors. See In re Frasier, 294 B.R. 362, 366 (Bankr. D. Colo. 2003); see also In re Welzel, 275 F.3d 1308, 1318-19 (11th Cir. 2001); United States v. Spicer, 57 F.3d 1152, 1156 (D.C. Cir. 1995). The City of New York Bar Association summarized:

> The commencement of a typical Chapter 7 case is an *in rem* proceeding that triggers the automatic operation of a statutory framework for marshaling and distributing assets and discharging debt. Under that statutory framework, to the extent the debtor has non-exempt assets, those assets are distributed among the creditors in accordance with statutorily mandated criteria. To the extent debt is discharged (assuming no objection has been made to its discharge), that action likewise occurs by automatic operation of statute. In addition, to the extent adversary proceedings are brought by the Chapter 7 estate, the decision to do so is made by the court-appointed Chapter 7 trustee, not by the Chapter 7 debtor or his counsel.

New York City Bar Formal Opinion 2005-01, p. 3. See http://www.nycbar.org/Ethics/eth2005-1.htm.

Congress expressly addressed the question -- with respect to a later stage of a Chapter 7 proceeding -- whether representation by a lawyer should be viewed as giving rise to a disqualifying conflict of interest. After the Chapter 7 Petition has been filed, a trustee is appointed. The trustee reviews the assets of the bankruptcy estate and pursues or defends any claims the estate may have. The trustee may retain an attorney. The "Bankruptcy Code contemplates that attorneys will, in unrelated matters, have multiple representations involving creditors and the debtor." 1 Collier On Bankruptcy ¶ 8.03[9][b] at p. 8-54 (15th ed. 2008 rev.). 11 U.S.C. Section 327 provides as follows (emphasis added):

> 11 U.S.C. § 327
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> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons to represent or assist the trustee in carrying out the trustee's duties under this title.
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> . . .
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> (c) In a case under Chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States

> trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
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> . . .
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> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

Congress provided in Section 327(c) that unless there is an objection, a lawyer may proceed to represent the trustee of the bankruptcy estate, even though the lawyer also simultaneously represents a creditor (in an unrelated matter). In the view of Congress, such a scenario does not, *per se*, present a disqualifying conflict of interest. By inference, the lawyer's representation of the trustee is not viewed as a representation directly adverse to the creditor.

The volunteer lawyer in the Pro Bono Initiative will have an analogous role. However, the pro bono engagement will be much more limited than representation of a trustee under 11 U.S.C. § 327. The volunteer lawyer will represent the pro bono client only for a short time, and only for the initial steps of the Chapter 7 proceeding. Since the Chapter 7 trustee may later engage an attorney who simultaneously represents one of the creditors (in an unrelated matter), it seems natural that when the debtor initiates the Chapter 7 process, likewise, the debtor may engage an attorney who simultaneously represents one of the creditors (in an unrelated matter). Thus Section 327(c) teaches us, by analogy, that the scenario under consideration does not present a *per se* conflict of interest. [3]

Courts have addressed various objections in cases under 11 U.S.C. § 327. "Most courts agree that an adverse interest must rise to a certain level of materiality to create a conflict of interest that would disqualify a professional representing a debtor under the Bankruptcy Code." 1 Collier On Bankruptcy ¶ 8.03[9][b] at p. 8-53 (15th ed. 2008 rev.).[4] Some courts have ruled that a potential for conflicts may in some instances warrant disqualification, but they reject a *per se* rule. In re Martin, 817 F.2d 175, 182-183 (1st Cir. 1987) (depending on the particular circumstances, a lawyer may or may not be permitted to obtain a security interest from the

[3] The analysis would be very different in a litigation engagement. If a pro bono client asked a volunteer lawyer to bring suit against a business, then of course the volunteer lawyer would need to run a conflict check. And if the proposed defendant turned out to be a client of the law firm, then the volunteer lawyer would face a conflict of interest -- even if the firm represented the business only in unrelated matters.

[4] The term "adverse interest" encompasses "two or more entities … [possessing] mutually exclusive claims to the same economic interest, thus creating either an actual or potential dispute between the rival claimants," and also encompasses "any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant." In re Nat'l Distributors Warehouse Co., Inc., 148 B.R. 558, 560 (Bankr. E.D. Ark. 1992). See also In re American Printers & Lithographers, Inc., 148 B.R. 862, 864 (Bankr. N.D. Ill. 1992).

debtor); In re Dynamark, Ltd., 137 B.R. 380, 381 (Bankr. S.D. Ca. 1991) (no actual conflict for firm representing both the creditor and the debtor, because chance of debtor and creditor competing was too remote); compare In re Filene's Basement, Inc., 239 B.R. 850, 858 (Bankr. D. Mass. 1999) (in a factual situation quite different from the Pro Bono Initiative, merely the possibility of creditor bringing a suit against the debtor's selected law firm was sufficient to disqualify the law firm from representing the debtor). Other courts have disqualified a law firm where they found an actual conflict. See e.g., Meespierson, Inc. v. Strategic Telecom, Inc., 202 B.R. 845, 848 (Bankr. D. Del. 1996) (creditor had a material claim against the debtor's estate); In re American Printers & Lithographers, Inc., 148 B.R. 862, 864 (Bankr. N.D. Ill. 1992) (debtor owed creditor three million dollars); In re Grieb Printing Co., 297 B.R. 82, 86 (Bankr. W.D. Ky. 2003)(lawyer acting as trustee of bankruptcy estate had an obligation to maximize the estate's claim as a creditor in a second bankruptcy, and therefore he should not have represented another client that was seeking to reduce the size of the second estate by pressing a disputed claim to insurance proceeds). Material claims were involved in all of the cases where disqualification has been ordered. These cases are very different from the proposed Pro Bono Initiative, because the proposed Chapter 7 filings will not be material to any existing client of the volunteer lawyer, and because the Initiative will screen out any special circumstances that could possibly give rise to direct adversity.

Our research did not disclose any case under 11 U.S.C. § 327 where (a) the lawyer represented a debtor in bankruptcy; (b) the debtor owed a non-material debt to a creditor; (c) the lawyer or the lawyer's firm simultaneously represented that same creditor in an unrelated matter; and (d) the lawyer was disqualified for a conflict of interest.

Having addressed the case law under the analogous provisions of U.S.C. § 327, we return to the question at hand. So far as our research discloses, no court has ever criticized a lawyer for violating Rule 1.7(a), where all the lawyer did was to file a Chapter 7 Petition (and attend a Section 341 meeting) while simultaneously representing one of the creditors (in an unrelated matter).[5] Under the proposed Pro Bono Initiative, where any special circumstances have been screened out, we believe that the limited role of the volunteer lawyer does not give rise to a conflict of interest.

[5] We did note only one case where a lawyer was suspended for committing misconduct in the course of filing a Chapter 7 petition, and that case was very different from the Initiative proposed here. See In the Matter of Disciplinary Proceedings Against Krueger, 709 N.W.2d 857 (Wis. 2006). The debtor owed money to the attorney at the time the petition was filed. Thus the attorney himself held an interest adverse to the client he was representing in the bankruptcy case (a situation that would not occur as part of the Pro Bono Initiative). Moreover, the attorney did not disclose this debt on the Schedules to the Petition, and did not disclose it to the bankruptcy trustee. The attorney committed various other acts of misconduct as well, none of which bear on the Pro Bono Initiative.

C. The Proposed Initiative Takes Appropriate Steps To Identify And Avoid Any Special Circumstances Where The Lawyer's Ability To Act Could Be Materially Limited Under Rule 1.7(b).

Rule 1.7(b) provides as follows:

> Rule 1.7(b)
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> (b) A lawyer should 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.

Informed by the previous pro bono experience in this area, the Bankruptcy Law Section has carefully crafted the proposed Pro Bono Initiative so that the volunteer lawyer will have a limited role, which is not materially limited by duties to existing clients of the lawyer's firm.

First, the Pro Bono Initiative will be limited to serving individuals who have a financial need (under screening criteria of the Volunteer Lawyers Project). The size of the debts owed by the pro bono client will not be material to most of his/her business creditors.

Second, the volunteer lawyer will only undertake a limited scope of representation. See Exhibit 1, page 1. We concur with the New York Bar that such a limitation on the scope of representation is permitted and appropriate, provided that it is explained to the client. See New York Formal Opinion 2005-01, page 2. An engagement letter should state this explanation.

Third, before the volunteer lawyer goes to the initial consultation, the lawyer should obtain a general awareness of his/her firm's representation of consumer creditors. That way the volunteer lawyer will be ready to spot any potential issues of the types noted below.

Fourth, armed with the answers to screening questions (see Part I(B) above), the volunteer lawyer will be able to evaluate the particular case. The volunteer lawyer should not take on the pro bono representation if the lawyer's firm has represented a creditor in any matter that is related to the particular debt. Likewise, the volunteer lawyer should not take on the pro bono representation if the pro bono client owes a debt that is material to an existing client of the lawyer's firm. Aside from those situations, if the screening questions do not identify any special circumstances, then there is no reason to believe that any existing client of the lawyer's firm would have any objection to the lawyer's volunteer role, and so there is no reason to believe that a reasonable person in the lawyer's position would be materially limited in his/her ability to provide advice to the pro bono client.

Finally, we have also considered whether in any other respect the volunteer lawyer might be materially limited in his/her ability to advise the pro bono client. For example, suppose the volunteer lawyer recognizes that the consumer may have a defense to one of the debts. Does the volunteer lawyer need to stop the consultation, go back to the office, and run a conflict check? We think not, because Rule 6.5 is sufficient to cover the initial consultation. If a Chapter 7 filing

is still the appropriate option -- because the pro bono client has other debts[6] -- then it will be up to the bankruptcy trustee, not the volunteer lawyer, to challenge the contestable debt. Once a Chapter 7 trustee has been appointed, the trustee may object to a contestable debt, and if the objection prevails, then there will be more money left for distribution to the other creditors.

V. CONCLUSION.

The proposed Pro Bono Initiative calls for volunteer lawyers to play a carefully limited role. The Initiative calls for the volunteer lawyer to ask screening questions, which will identify any special circumstances that might involve an existing client of the volunteer lawyer's firm. Absent such special circumstances, in our opinion the proposed representation does not give rise to a conflict of interest. Accordingly, in our opinion the Pro Bono Initiative is permitted under the Massachusetts Rules of Professional Ethics, and it is a welcome service by the bankruptcy bar.

[6] It could also happen that the contestable debt would make the difference between filing for bankruptcy and not filing for bankruptcy. What should the volunteer lawyer do if he/she detects such an issue? (a) If the volunteer lawyer recognizes a conflict during the initial consultation, then the volunteer lawyer should explain that he/she has a conflict and should decline to proceed with the pro bono engagement. (Multiple law firms will participate in the proposed Initiative, and so most likely there will be other volunteer lawyers available who do not face the same conflict.) (b) If the volunteer lawyer does not recognize a conflict during the initial consultation, then the volunteer lawyer may point out that the pro bono client has a potential defense, explaining that the pro bono client will need to contest the issue pro se or else get help from a different program. (c) If the volunteer lawyer wants to represent the pro bono client in contesting the debt (although this is not part of the proposed Pro Bono Initiative), then the lawyer will need to run a conflict check, just as the lawyer would run a conflict check for any pro bono litigation engagement, since contesting the debt would involve representation directly adverse to a particular creditor.