



Unsecured Trade Creditors Committee

ABI Committee News

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Cut The Middle Man: Court Prohibits Use of Client for Indirect Solicitations

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Representing creditors' committees can be lucrative, and law firms often engage in competitive pitches with other firms when seeking to become creditors' committee counsel. In order to bolster the odds of winning multi-firm "beauty contests," many firms actively solicit votes from committee members, or if the committee is not yet formed, from the potential committee members. While some solicitations are perfectly acceptable, others may violate applicable rules of professional conduct. A recent Delaware decision, *Universal Building Products*, found committee counsel on the wrong side of the disciplinary rules. Understanding the disciplinary rules governing the solicitation of creditors' committees, and knowing how to properly solicit committee representations is critical.

Ethical Solicitations – Model Rule 7.3

In most states, a rule identical or substantially similar to Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct governs the solicitation of creditors' committee members. [\[1\]](#) Model Rule 7.3 states:

A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer.

In the context of creditors' committee solicitations, the plain language of Rule 7.3 prohibits a lawyer from cold-calling creditors with whom the lawyer does not have a significant prior relationship. Even so, the rule allows lawyers to solicit professional employment from prospective clients so long as the prospective clients are friends, family or former clients.

Therefore, it follows that a lawyer may directly solicit committee members if the lawyer has a prior

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professional relationship with the members. [2] For example, in order to exhibit her interest in representing a creditors' committee, a lawyer may discuss her analysis of the debtor's case with all creditors and entities with whom the lawyer has a prior professional relationship. [3] If, on the other hand, the lawyer discussed her analysis to an unfamiliar creditor to influence the creditor's vote, the lawyer may be disciplined.

The language of Rule 7.3 clearly prohibits lawyers from personally soliciting unfamiliar creditors when pitching creditors' committees. On its face, though, Rule 7.3 does not prohibit a lawyer from using clients to solicit unfamiliar committee members. [4] Lawyers may be enticed to circumvent Rule 7.3 by using their clients to solicit creditors on the lawyer's behalf. However, a recent Delaware decision makes it abundantly clear that when Rule 7.3 is read in conjunction with Rule 8.4, [5] Rule 7.3 prohibits lawyers from using third parties, such as current or former clients, to solicit professional employment from unfamiliar committee members. [6]

In re Universal Building Products

In November, 2010, the U.S. Bankruptcy Court for the District of Delaware denied the committee retention applications of two firms chosen by the creditors' committee in the *Universal Building Products* case. [7] When deciding to reject the retention applications, the court noted that the following key facts evidenced the firms' inappropriate solicitation of creditors through a third-party intermediary.

The *Universal Building Products* case involved a significant number of Asian creditors. [8] When the list of the 30 largest creditors was released, the two firms forwarded the list to a consultant named Dr. Liu, who had extensive relationships with many Asian importers. [9] At that time, the firms expressed to Dr. Liu that they hoped to obtain the creditors' committee representation. [10] The firms had a prior relationship with Dr. Liu, but did not know if Dr. Liu had a relationship with any of the thirty largest creditors. [11] At the time, Dr. Liu had no relationships with any of the listed creditors. [12] Even so, he began to cold-call creditors in order to solicit the creditors' proxies. [13] Around the commencement of Dr. Liu's solicitations, the firms learned that Dr. Liu had no relationship with any creditors in the case, [14] but the firms helped Dr. Liu obtain contact information for the creditors and provided legal advice to a number of the creditors. [15] As a result, Dr. Liu eventually solicited proxies from two creditors. [16] He was only able to participate as proxy for one creditor, but arranged with the firms to secure an alternate proxy for the second creditor. [17] The two firms and Dr. Liu ensured that the alternative proxy would vote in favor of retaining the firms. [18] Throughout the proxy-solicitation process, Dr. Liu continuously updated the Firms of the status of his solicitations, and the increasing probability of the firms' retention. [19] In the end, Dr. Liu was able to assert significant enough influence on the committee members to ensure the Firms were chosen to represent the creditors' committee. [20]

After considering the aforementioned facts, the court denied the firms' retention applications for violations of Rule 7.3's implicit prohibition of the use of third-party solicitations. [21] The firms argued that they never asked Dr. Liu to solicit creditors on their behalf, and therefore could not have engaged in solicitations prohibited by Rule 7.3. [22] The court made clear that a direct request for solicitations is unnecessary. [23] The firms' acts alone evidenced their participation in what amounted to a coordinated effort to solicit creditors. [24] As stated by the court, the two firms violated rule 7.3 because even after learning "that Dr. Liu did not represent any creditor on the list, the Firms actively encouraged and assisted him in his efforts to solicit creditors to get their proxies to attend the formation meeting and

vote for counsel." [25] Simply put, a lawyer may be disciplined for "acting in concert" with a client to solicit unfamiliar creditors, even when the lawyer never expressly asked the client to solicit creditors on the lawyer's behalf. [26]

Soliciting a Client's Contact

Rule 7.3 suggests that for a solicitation to be appropriate, the *lawyer* must have a prior relationship with the solicited entity. [27] For instance, the express language of the rule states that a solicitation is acceptable when the solicited party has a "prior professional relationship *with the lawyer.*" [28] It is common practice to use clients to solicit individuals with whom the client has a professional relationship. As evidenced by the *Universal Building Products*, using a client in the aforementioned manner would probably be appropriate. [29] The court found fault with the firms' cooperation with Dr. Liu's solicitations only *after* the firms learned that *Dr. Liu* did not have a professional relationship with any creditor in the case. [30] If he had a professional relationship with a creditor, it stands to reason that the solicitation of that creditor on behalf of the Firms would have been acceptable.

Even so, lawyers are warned to use caution when coordinating with a current or former client to solicit creditors. The express language of Rule 7.3 indicates that the solicited party must have a significant relationship with the lawyer. Although courts may allow the use of clients to solicit creditors familiar to the clients on the lawyer's behalf, the potential for discipline remains.

1. See, generally, *Montejo v. Louisiana*, 129 S.Ct. 2079, 2088 (2009) (nearly every state has adopted the model rules, in whole or in part); Tex. Disciplinary R. Prof. Conduct 7.03; Delaware R. Prof. Conduct 7.3; New York R. Prof. Conduct 7.3.

2. See *In re Universal Building Products*, No. 10-12453, 2010 WL 4642046, at *7 (Bankr. D. Del., November 4, 2010).

3. See *id.*

4. Model R. Prof. Conduct 7.3 specifically states that "a *lawyer* shall not" directly solicit, but does not address whether a lawyer's clients, family, or close friends may solicit on the lawyer's behalf.

5. Model R. Prof. Conduct 8.4(a) states that "it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

6. *Universal Building Products*, 2010 WL 4642046, at *6 (citing *In re O'Keefe*, 877 So.2d 79 (La. 2004) (disbarring attorney for hiring runners to solicit clients on attorney's behalf)). The term "Court" refers to the United States Bankruptcy Court for the District of Delaware.

7. *Id.* at 1.

8. *Id.* at 2.

9. *Id.*

10. *Id.*

[11. *Id.*](#)

[12. *Id.* at 3.](#)

[13. *Id.*](#)

[14. *Id.*](#)

[15. *Id.*](#)

[16. *Id.*](#)

[17. *Id.* at 4.](#)

[18. *Id.*](#)

[19. *Id.* at 2-4.](#)

[20. *Id.* at 4.](#)

[21. *Id.* at 6.](#)

[22. *Id.* at 7.](#)

[23. *Id.* at 6-7.](#)

[24. *See id.*](#)

[25. *Id.* at 6.](#)

[26. *Id.*](#)

[27. *See Rule 7.3.*](#)

[28. *Id.*](#)

[29. *See Universal Building Products*, 2010 WL 4642046, at *6.](#)

[30. *Id.*](#) When explaining its reasoning for disqualifying the Firms, the Court repeatedly notes that Dr. Liu did not have a professional relationship with any creditors prior to his solicitations during the bankruptcy case. For example, the Court stated that the Firms "were acting in concert to cold-call creditors that Dr. Liu *did not represent* for the purpose of being retained by them...." *Id.* at 7 (emphasis added). Similarly, when delivering its opinion the Court stated, "[w]hat the Court finds improper in this case is that once [the Firms] learned *that Dr. Liu did not represent any creditor* on the list, they actively encouraged and assisted him in his efforts to solicit creditors...." *Id.* at 6 (emphasis added). It stands to reason that, had Dr. Liu had a professional relationship with a creditor, the Firms would have been entitled to solicit their vote through Dr. Liu.