

COMMITTEE ON ATTORNEY ADVERTISING
APPOINTED BY THE NEW JERSEY SUPREME COURT

OPINION 30

Written Solicitation to Represent Clients in Bankruptcy

Introduction

Complaints about sales pitches which solicit potential clients to file petitions in bankruptcy have come to the Committee's attention with increasing frequency. The Committee is publishing this Opinion to describe illustrative abuses in certain client solicitations and to set forth future bankruptcy solicitation requirements within the Rules of Professional Conduct that govern written solicitation for professional employment.

Some attorneys have been aggressively marketing their availability as bankruptcy counsel by reciting a litany of possible disastrous consequences where the only information available to the soliciting attorney is that the prospective client has been sued. The attorney has no information as to the validity of the suit or the likelihood that either party will prevail, the nature or magnitude of the action, the financial condition of the individual, whether he or she is solvent or insolvent, what income the prospective client has, whether the reason for non-payment of the alleged debt is financial inability or a legal defense, what the person's budgetary needs are, or any information as to the prospective client's finances. Often, attorneys make these solicitations knowing only that a public record indicates a suit to be in progress.

The names of prospective clients are obtained by these attorneys from public record, directly or through the services of an outside agency which specializes in obtaining names of defendants in civil actions, as permitted by Rule 1:38. Many of the letters and attached advertising pieces reviewed by the Committee contain blanket statements purporting to set forth the advantages of bankruptcy, particularly the benefits of Chapter 13 of the Bankruptcy Act. None of the letters reviewed by the Committee, however, set forth the pitfalls or personal obligations inherent in a bankruptcy filing.

These solicitations are invariably formulaic and many of the solicitations, and enclosed information pieces, seem to be virtual copies of each other. The solicitations show a complete lack of knowledge as to the unique problems of the individual debtor and the appropriateness of bankruptcy for the person solicited. Many of the attorney statements have the effect, obviously intended, of creating concern, and even fear, in the civil action defendants that they will lose their homes if they fail to avail themselves of the talents of the soliciting attorney.

Representative Abuses

Overreaching and improper statements which have come to the Committee's attention include:

- “Court records indicate that you are being sued. If you do not act quickly, you could very likely lose your property or home.”
- “Whether you know it or not, Court records indicate that a FORECLOSURE action has been filed against YOU. If you do nothing you may

lose your home ... **YOUR HOME IS AN IMPORTANT INVESTMENT AND YOU HAVE A RIGHT TO LEGAL REPRESENTATION.**”

- “Court records indicate that a **FORECLOSURE** action has been filed against YOU ultimately seeking to sell your home at a **FORECLOSURE SALE**. You do not have to lose your home, there are legal remedies available to you to **STOP THE FORECLOSURE** and keep your house ... **YOU NEED NOT LOSE YOUR SINGLE MOST IMPORTANT INVESTMENT, BUT YOU MUST ACT SOON.**”

- **“YOUR MORTGAGE COMPANY HAS FILED A FORECLOSURE ACTION AGAINST YOU.** In order to save your home you must act quickly and you must do so having been given the right advice... Time is limited.”

- “Court records show that a **FORECLOSURE ACTION** was filed in the Superior Court of New Jersey naming you as a party defendant. You must take **immediate action** – if you don’t, you may lose your property.”

- “State Court records reveal that your property may be in the process of a mortgage or tax foreclosure, which may eventually be sold at a **SHERIFF’S SALE.**”

These unsolicited letters, sent to individuals unknown to the attorney, often exert pressure to seek immediate representation by: (a) portraying the defendants’ assets, invariably their home, as being in immediate jeopardy of loss, which may not be the circumstance, or (b) indicating that the attorney has a particular expertise and is better equipped than other attorneys in the legal community to successfully represent the unknown individual defendant.

Illustrations of approaches in category (b) are:

- “In order to save your home you must act quickly and you must do so having been given the right advice. I have been helping people just like you save their homes and improve their overall financial condition for the past XX years.... Others may want to charge you a consultation fee while making promises they can’t keep.”
- **“My law practice is exclusively devoted to debtor relief and I have developed an expertise in assisting homeowners in saving their property.”**
- “The **Law Firm of XXX** has been in business since XXX helping people just like you. Only an attorney can properly assist you in this situation and **stop SHERIFF SALES, TAX LIENS.**”
- “If you wish to meet with an experienced attorney to discuss your options with regard to the above information, contact me to schedule a **free, no obligation** appointment. I urge you to **compare my experience, reasonable fees, and personal attention.**”
- “One print advertisement proudly heralds in bold print **YOUR BANKRUPTCY SPECIALIST.**”

Virtually all of the letters, including brochures and enclosures, include a highlighted list of the supposed benefits of Chapter 13 and Chapter 7 of the Bankruptcy Act. These aggressively emphasized benefits are displayed in such a way as to leap from the page, giving the reader the impression that

bankruptcy benefits are universally available and applicable to all debtors. Qualifying words such as “may” or “can,” when present, are often de-emphasized to influence the prospective client that bankruptcy is the only prudent course of action. When the solicitation is made to people in the vulnerable position of many who are faced with the possibility of a judgment for money damages, these solicitation letters appear to promise guaranteed legal relief through the bankruptcy process.

Examples of this type of undue influence have included:

“STOP THE FORECLOSURE ACTION AGAINST YOU”

“STOP THE REPOSSESSION OF YOUR CAR”

“STOP UTILITY SHUT OFF”

“STOP CREDITOR HARASSMENT”

“WIPE OUT, OR REDUCE CREDIT CARD DEBT”

“HOW CHAPTER 13 PROTECTS YOU

1. Sheriff’s Sales are stopped.
2. Mortgage foreclosure is stopped.
3. Auto repossession is stopped.
4. Utility shut offs are stopped.
5. Levy’s, attachments are stopped.
6. Creditor harassment is stopped.”

“IMMEDIATELY STOP THE FORECLOSURE AND REQUIRE THE MORTGAGE COMPANY TO ACCEPT YOUR MONTHLY PAYMENTS AGAIN”

“STOP CREDITOR’S HARASSING PHONE CALLS AND LETTERS”
DEMANDING PAYMENTS AND THREATENING SUITS.”

“STOP LAWSUITS AND LEVIES AGAINST YOU AND YOUR
PROPERTY”

“STOP UTILITY SHUTOFFS”

“REINSTATE your driver’s license”

“STOP ALL CREDITORS’ TELEPHONE CALLS”

“STOP PROPERTY AND WAGE ATTACHMENTS”

“STOP UTILITY SHUTOFF”

“EASE SUPPORT ARREARS’ PAYMENTS”

“REINSTATE DRIVERS’ LICENSES”

STOP AUTOMOBILE REPOSSESSIONS”

STOP LAW SUITS”

STOP THE FORECLOSURE AND GAIN PEACE OF MIND. CALL
ME TODAY.

Conclusions

The overall tone, design and content of these letters soliciting clients to seek legal representation and file a bankruptcy petition have the capacity to cause alarm, great concern and even fear. These attorneys boldly assert the potential benefits of their representation in bankruptcy without hinting at any of the concerns or pitfalls of these complex and far-reaching legal proceedings. Attorneys who send these letters have invariably attempted to exert pressure by reciting potential consequences and benefits when they are no more than

guessing as to whether their “solutions” are applicable to the recipient of the solicitation. The civil action defendant may have a valid defense, the complaint may be in error, the defendant may make payment and cure the claimed default, or use alternative options available under the Fair Foreclosure Act, or the amount in controversy may be modest and capable of satisfaction. These solicitation letters many times violate *R.P.C. 7.3(c)(2)* by use of coercion, duress or overreaching; *R.P.C. 7.1(a)(2)* by raising unjustified expectations; or *R.P.C. 7.1(a)* by making false or misleading communications or by omitting necessary facts. The disclosures required by *R.P.C. 7.3(a)(5)* in many of these solicitation letters appear in an inconspicuous manner.

Future Requirements

In the future, attorneys who seek clients by written solicitation from defendants in civil actions, including foreclosure actions, for which a bankruptcy proceeding is a possible resolution, must:

- 1) personally verify the accuracy of all statements contained in the solicitation letter, including the name and address of the addressee, and the specific nature of the litigation which must be recited in the body of the letter;
- 2) advise the prospective client that his or her name and the nature of the litigation was obtained by an appropriate inquiry under Rule 1:38;
- 3) provide the salutation to the individual to whom the letter is being sent;
- 4) include information sufficient to inform an unsophisticated individual, as required in the Fair Debt Collection Practices Act, of the potential

pitfalls and disadvantages of a bankruptcy proceeding. An illustration of an acceptable disclosure, if made in a sufficiently conspicuous manner, is as follows:

NOTICE

The decision to file bankruptcy is a serious choice. Bankruptcy is not for everyone. It is a drastic remedy that can affect your credit for many years and will affect your ability to use the bankruptcy code at a future time when you may need it more. The majority of chapter 13 plans are never successfully completed and the funds paid do not cure the mortgage arrears or allow redemption of property. Upon filing a bankruptcy you may lose control of your property and you may not dismiss a bankruptcy proceeding without court approval once it is filed. The decision of when to file a bankruptcy is also crucial and dependent on your individual circumstances. Be sure to discuss the potential pitfalls of bankruptcy as well as its advantages with any professional you are considering.

5) not attempt to indicate a special relationship, expertise, experience or knowledge which will or may provide a more favorable result than other licensed New Jersey attorneys;

6) not raise unjustified expectations or use language or format susceptible of unduly enticing a person because of possible economic or personal consequences of a judgment; and

7) not raise false hope for relief inapplicable to the individual person's circumstances.