Ethical issues in bankruptcy cases involving closely-held enterprises

Conflicts!!!!

- Dual or separate representation of debtor entity & owner-principals?
  - Challenges:
    - Financially exposed and emotionally invested insiders / family members
    - Intertwining of the affairs of owners and entities
    - Actual & potential conflicts where you / your firm are corporate counsel…at the outset… and as the case unfolds
    - But surely, the last thing we need in SME cases is more lawyers….?!

The stakes

Stakes for attorneys

Prohibition / disqualification

Ethics risk

Fees / compensation risk

Reputational risk

Stakes for clients and the bankruptcy system

Balancing efficiency vs. integrity of the system

Upholding client choice of attorney where possible

The ethical spectrum

- At least two schools of thought:
  - How is dual SME/principal representation different from a single firm representation of group entities in a large jointly administered case?
    - OK if no actual conflict of interest and no material potential conflict of interest?
  - If you’re having to sweat the conflicts analysis, doesn’t that tell you it would be prudent to refer out part of the representation?
    - Appearances matter

Retention

- Bankruptcy Code § 327(a):

  "…the trustee [DIP], with the court's approval, may employ one or more attorneys…

  →*that do not hold or represent an interest adverse to the estate, <u>and</u>*

  →*that are disinterested persons*

  to represent or assist the trustee [DIP] in carrying out the trustee's [DIP's] duties under this title"

- "Disinterested persons": see § 101(14)
- Client = Debtor *qua* Trustee/DIP
  - Has fiduciary obligations that pit estate interest vs. owner interest

Main sources of concern

Owner as creditor (e.g. loan accounts)

Owner as guarantor

- Treatment of principal creditor's claim is inversely related to Owner's guarantee liability

DIP as potential claimant vs. Owner

- Clawbacks

Retention

- The § 327(a) requirements of no material adverse interest and disinterestedness must be satisfied at the time the court is asked to approve the retention <u>and</u> on an ongoing basis during the case: see further, § 328(c).

- The § 327(a) requirements are more stringent than the conflicts restraints imposed by most state ethical codes applicable outside of bankruptcy (mainly because DIP is a fiduciary & the estate interest is an amalgam of interests and thus conflict waivers are not straightforward).

Retention: the importance of full & frank disclosure

- Rule 2014 disclosure
- Non-disclosure is itself grounds for disqualification & possible disallowance of fees:
  - *Rome v. Braunstein*, 19 F.3d 54 (1st Cir. 1994) ($62,000 fees disallowed)
  - *In re Park-Helena*, 63 F.3d 877 (9th Cir. 1995) (all fees disallowed where attorney failed to disclose that debtor’s president had paid $150,000 chapter 11 retainer from his personal account)

Retention: exceptions to general rule re prior representation

- Corporate counsel is not *per se* disqualified from serving as general counsel to the DIP: § 1107(b)

- A creditor's counsel is also not *per se* disqualified unless another creditor or the UST objects and there is an actual conflict of interest: § 327(c)

- There is a different standard for special counsel: § 327(e)

7th Circuit / N.D. Ill caselaw

- *In re Crivello*, 134 F.3d 831 (7th Cir.1998) (on the statutory framework & applicable standards)
- *In re Knight-Celotex, LLC,* 695 F.3rd 714 (7th Cir.2012) (pitfalls where seeking to be retained as trustee / trustee's counsel in Chapter 7s of corporate entity and individual principal)
- *In re Diamond Mortgage Corp*., 135 B.R. 78 (Bankr. N.D. Ill. 1990) (case-by-case approach to determining existence of, and remedying, potential conflicts of interest)
- *In re Rusty Jones, Inc.*, 134 B.R. 321 (Bankr. N.D. Ill. 1991) (non-disclosure of extensive pre-petition relationships between lead debtor counsel and debtor's owners found to have adverse interest on facts led to disallowance of fees)
- *In re Tinley Plaza Assocs*., 142 B.R. 272 (Bankr. N.D. Ill. 1992) (non-disclosure of pre-petition retainer was disqualifying)
- *In re American Printers & Lithographers, Inc*., 148 B.R. 862 (Bankr. N.D. Ill. 1992) (debtor application to employ counsel denied where counsel also represented debtor's main lender despite both debtor and lender giving conflict waivers)
- *In re Gluth Bros. Constr., Inc.,* 459 B.R. 351 (Bankr. N.D. Ill. 2011) (wanton disregard for disclosure requirements resulted in fee sanctions even though no actual conflict of interest on facts)
- *In re Rental Systems, LLC*, 511 B.R. 882 (Bankr. N.D. Ill. 2014) (combination of significant risk of divided loyalties to estate and owner interests with serious delays in disclosure led to denial of retention application)

Divided Loyalties: The Problems of a Single Creditors' Committee Representing Creditors of Jointly Administered Estates Holding Conflicting Interests

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The Appointment of Additional Committees is Governed by 11 U.S.C. § 1102(a)

- Section 1102(a)(1) provides that after the order for relief "the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors … as the United States trustee deems appropriate."
- Section 1102(a)(2) provides that upon request of a party in interest, "the court ***may*** order the appointment of additional committees of creditors ... if necessary to ***assure adequate representation*** of creditors."
- The Bankruptcy Code does not define "adequate representation."

Are Single Committees Conflicted in Jointly Administered Cases?

- A Committee appointed under §1102(a) owes a fiduciary obligation to its constituency.
  - Must protect the rights of both minority and majority creditors – whether or not a member of a particular group is included in its membership.
  - Since committees represent the interests of all unsecured creditors, courts recognize that conflicts among the committee's members are common.
  - Despite the inherent or inevitable conflicts, single committees are commonplace in jointly administered cases.
- Does an actual or potential conflict evidence that the existing committee provided inadequate representation?

Thorny Issues for Single Committees in Jointly Administered Cases

- Can a single committee adequately represent creditors in jointly administered cases where:
  - There are substantial inter-debtor claims or transfers.
  - There is a likelihood of substantive consolidation.
  - The committee is not comprised of creditors that have claims against every estate.
  - There is only one operating debtor among the estates.
  - There are many estates (e.g., mega cases with dozens of debtors).
- Are the creditors of each estate entitled to undivided loyalty?

Minority View: Separate Committees Required

- **Separate committees required as a matter of law**. *In re White Motor Credit Corp*., 18 B.R. 720 (Bankr. N.D. Ohio 1980).
- **Single committee presumed improper**. *In re Lee*, 94 B.R. 172, 180 (Bankr. C.D. Ca. 1989) citing *In re Parkway Calabasas, Ltd*., 89 B.R. 832, 835 n. 3 (dicta).
  - Where creditors of the debtors have dealt with such debtors as an economic unit (which may be reflected in guaranties and subordination agreements);
  - Where there is a substantial overlap of creditors;
  - Where the affairs of the respective debtors (as reflected in inter-debtor accounts, jointly owned assets, guarantees, subordination agreements, or shared officers, directors or owners) appear to be substantially entangled;
  - Where assets have been transferred from one debtor to another in transactions that are not at arms' length; and
  - Where piercing of the corporate veil of one of the debtors is necessary or advisable to protect the rights of creditors of another debtor.

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Majority View: Case by Case Analysis

- Section 1102(a)(2) expressly provides the court with discretion to conduct an independent review.
- The appointment of an additional committee is considered an extraordinary remedy given that:
  - The formation of a committee is intended to represent the differing interests and concerns of all creditors.
  - The decision is typically first reviewed by the United States Trustee.
- The movant has the burden of proving that the appointment is necessary to ensure "adequate representation."
- Courts are generally reluctant to appoint additional committees.

Majority View: Case by Case Approaches

- Most bankruptcy courts reject a presumptive rule in favor of a case by case analysis:
  - Adequate representation by the existing committee is based on the nature of the case and the composition of the committee.
  - Neither conflict of interests analysis nor the consideration of the class and characteristics of the debt are necessarily determinative.
  - Courts balance multiple factors and considerations whether a single committee provides adequate representation.
- An evidentiary hearing may be necessary.

Majority View: Case by Case Approaches

- Courts consider a number of many factors including:
  - The ability of the committee to function;
  - The nature of the case;
  - The standing and desires of the various constituencies;
  - The ability for creditors to participate without an official committee and the ability to recover expenses per §503(b);
  - The possibility that different creditor classes would be treated differently under a plan and need representation;
  - The motivation of the movants;
  - The cost incurred by the appointment of additional committees; and
  - The tasks that a committee or a separate committee is to perform.
- No one factor is necessarily dispositive.
- *See, e.g., In re McLean Indus., Inc.*, 70 B.R. 852 (Bankr. S.D.N.Y. 1987); *In re Enron Corp.*, 270 B.R. 671 (Bankr. S.D.N.Y. 2002) aff'd 2003 WL 22327118 (S.D.N.Y. 2003)

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Majority View: Case by Case Approaches

- Bifurcated Approach
  - First, is the appointment of an additional committee necessary to assure the movants are adequately represented under the prior factors?
  - Second, if inadequate, should the court exercise its discretion to appoint an additional committee under the circumstances based on:
    - The cost associated with the appointment;
    - The timing of the application and whether appointment will delay the case;
    - The potential for added complexity; and
    - The presence of other avenues of creditor participation.

The Ability of the Committee to Function

- Is the committee hopelessly divided, unable to take a position on key issues and ineffective?
- Is there evidence of a breach of fiduciary duty?
  - The mere presence of conflicts does not necessarily demonstrate inadequate representation.
  - Courts recognize that conflicts are inherent because creditors have different interests.
    - Liquidation vs. reorganization
    - Debt vs. trade vendors
    - Senior vs. subordinated debt
    - Inter-estate claims
- Have there been occasions where an abstaining or dissenting member advocated a position before the court that is contrary to that of the committee?
- Is the committee dominated by one group of creditors that another group has no say in the decision making process – i.e., do conflicts of interest disenfranchise particular groups of creditors?

Nature of the Case

- Large, complex cases may indicate a need for additional committees representing divergent interests.
- Would the additional committees intensify conflict and result in further discord, litigation and delay in the case?
- Can the issues of substantive consolidation and inter-company debts be adequately addressed by the ability of all parties to be heard and participate (e.g., ad hoc committees or other creditors) or addressed by other fiduciaries such as an examiner?

The Standing, Desires and Interests of the Various Constituencies

- Is the representation of the various creditor bodies adequate?
  - Creditors of the various jointly administered debtors.
  - Different classes of creditors (e.g., unsecured debt, vendors, etc.)
- The committee need not exactly replicate the creditor body.
- Is potential litigation over substantive consolidation speculative or actual?
  - Has the committee taken a position on the issue?
  - Will sophisticated creditors take positions before the court on the issue?
  - Who is paying for the party taking the position – the Estates or the Creditor?
  - Are there other fiduciaries, such as examiners, that will evaluate the substantive consolidation or questionable transactions?

What Does it All Mean?

- Does the state of the law and the cases match the actual legal considerations?

- Have Courts merely chosen the practical path rather than dealing with the real legal issues?

- Is there a difference in the legal outcome for Committee “Conflicts” and Debtor “Conflicts,” what is the difference and should there be one?

- Does the world of mega cases with multiple debtors dictate the practical approach in order for the cases to reach resolution?

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Professionals' Disclosure Obligations in Everyday Chapter 11 Cases: Lessons from 'That Case.'

Robert J. Keach

Bernstein Shur Sawyer & Nelson

The Cautionary Tale

U.S. v. Gellene, 182 F.3d 578 (7th Cir. 1999)

John G. Gellene, a partner at the law firm of Milbank Tweed Hadley & McCloy ("Milbank") in New York, represented the Bucyrus-Erie Company ("Bucyrus") in its Chapter 11 bankruptcy. Mr. Gellene filed in the bankruptcy court a sworn declaration that was to include all of his firm's connections to the debtor, creditors and any other parties in interest. The declaration failed to list the senior secured creditor and related parties. Mr. Gellene was charged with two counts of knowingly and fraudulently making a false material declaration in the Bucyrus bankruptcy case, in violation of 18 U.S.C. § 152, and one count of using a document while under oath, knowing that it contained a false material declaration, in violation of 18 U.S.C. § 1623. Although Mr. Gellene admitted that he had used bad judgment in concluding that the representations did not need to be disclosed, he asserted that he had no fraudulent intent. After a six-day trial, on March 3, 1998, the jury returned guilty verdicts against Mr. Gellene on all three counts. Mr. Gellene was sentenced to 15 months of imprisonment on each count, to run concurrently, and was fined $15,000. [The 7th Circuit would affirm the conviction and sentence].

The Statutes and Rule

11 USC § 327. Employment of Professional Persons

(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.

11 USC § 101(14)

The term “disinterested person” means a person that–

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

Rule 2014. Employment of Professional Persons.

(a) Application for and Order of Employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

The Classics

In re Leslie Fay Companies, Inc., 175 B.R. 525 (Bankr. S.D.N.Y. 1994)

If it is plausible that the representation of another interest may cause the debtor's attorneys to act any differently then they would without that other representation, then they have a conflict and an interest adverse to the estate.

Rule 2014 disclosure requirements are to be strictly construed.

…

All the facts that may have any bearing on the disinterestedness of a professional must be disclosed. Consistent with the duty placed on the professional, it is the responsibility of the professional, not of the court, to make sure that all relevant connections have been brought to light.

…

So important is the duty of disclosure that the failure to disclose relevant connections is an independent basis for disallowance of fees or even disqualification.

In re Granite Partners, L.P., 219 B.R. 22 (Bankr. S.D.N.Y. 1998)

Undefined by the Bankruptcy Code, an “adverse interest” has come to mean either (1) the possession or assertion of any economic interest that would tend to lessen the value of the bankruptcy estate or create an actual or potential dispute with the estate as a rival claimant, or (2) a predisposition of bias against the estate.

…

More generally, it includes any interest or relationship, however slight, “that would even faintly color the independence and impartial attitude required by the Code and Bankruptcy Rules.”

…

The “materially adverse” standard incorporated in the disinterestedness test and the “interest adverse to the estate” language in section 327(a) overlap.

…

In re Granite Partners, L.P. (cont'd)

To this extent, the two prongs of section 327(a) are duplicative, and form a single test to judge conflicts of interest.

…

Thus, the professional has a disabling conflict if it has "either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors—an incentive sufficient to place those parties at more than acceptable risk—or the reasonable perception of one."

…

The scope of disclosure is much broader than the question of disqualification.

…

The applicant and the professional must disclose all connections and not merely those that rise to the level of conflicts.

In re Fibermark, Inc., 2006 WL 723495 (Bankr. D. Vt. 2006)

[Rule 2014] is very broad and was enacted to implement the appointment of professionals under §327, §1103, and §1114 of the Bankruptcy Code, and in particular to provide a mechanism for ensuring the disinterestedness of such professionals. The questions are how far is it reasonable to assume the rule was intended to go and by what factors, if any, the strict construction of the rule should be tempered.

Courts have an obligation to construe Rule 2014 very strictly because it is the courts' responsibility to determine whether a professional shall be disqualified due to their connection to a party in interest.

In re Fibermark, Inc. (cont'd)

The decision by the drafters of the Bankruptcy Rules to use the term "connections" in Rule 2014(a) is indeed "an unfortunate one." 9 L. King, *Collier on Bankruptcy*, ¶ 2014.05 (15th ed.2005). It is difficult to comprehend how the drafters intended this to be enforced without any clarification as to the definition of the terms, its breath or the time period covered. As Chanin indicated at oral argument, the bankruptcy bar in the Northeast is a small one, thereby making it more likely than not that those bankruptcy practitioners at the larger firms of that region have all had some form of contact with one another over the course of their careers. The Rule states that "all connections" to the parties in interest must be disclosed. Thus, the UST's interpretation of the plain language of the statute is not unfounded. It can indeed be argued that the "connections" a professional had with entities that are parties in interest in the instant case, by virtue of parallel involvement in other cases, no matter how remote, must be disclosed under Rule 2014.

In re Fibermark, Inc. (cont'd)

However, in light of the relatively small community of bankruptcy professionals in each tier of bankruptcy work and the high likelihood of coincident involvement of those bankruptcy professionals, that interpretation could impose an extra and significant burden on applicants, especially with regard to the disclosure of connections to other attorneys and accountants. If the UST's interpretation of the Rule 2014 requirements were adopted, the volume of disclosure, and amount of time required to maintain the records and conduct the case by case investigation, for each appointment could outweigh the benefit of the appointment. Thus, it seems that such an interpretation, if strictly enforced, could have the effect of discouraging qualified professionals from seeking or accepting appointment in bankruptcy cases. This is an important consideration to weigh when assessing how far the net created by the term "connections" should extend.

A distinction must be made between situations and involvement in other cases that are disclosed just because they could conceivably fit within the broadest definition of connections and those that suggest an appearance of a conflict of interest or lack of disinterestedness.

In re Fibermark, Inc. (cont'd)

This Court will weigh an applicant's obligation to disclose connections with other professionals and parties in interest in the case–where such connections are not attorney-client relationships, pecuniary relationships, or adversarial relationships–against the burden that this obligation will impose, on a case by case basis. It will continue to rely on the U.S. Trustee and other parties in interest to move for additional disclosure when those parties have reason to believe that the additional level of disclosure is warranted to ensure the disinterestedness of all professionals appointed in bankruptcy cases. When there is any doubt as to whether the disclosure is necessary, the U.S. Trustee, the Court and the application should err on the side of caution.

Lessons from “That Case”:

- It’s not what you disclose (everything you know or find), but how and where you look and the form of disclosure.
- Show your work; disclose all limitations and conditions (reach back period, exclusions, where you did not look)
- Work with the UST early and often.
- An NDA does not a “confidential client” make, but there are such clients and they can be protected (within reason).
- Use in camera disclosure and disclosure under seal if necessary, but sparingly.
- Keep looking (and disclosing) throughout the case.

Houston Disclosure Protocol: A Best Practices Manual for Where to Search and How to Search for Connections?

“The Protocol recommends that a Proposed Professional obtain the data to support disclosure of Connections by procedures that include, as applicable, a computerized search of client databases, distribution of a questionnaire (a proposed form of which is provided in Exhibit ‘B” to the Protocol), and inquiry of the Proposed Professional’s AMAs (if any), as discussed below.”

Houston Disclosure Protocol (cont'd)

"This Protocol therefore provides general guidance regarding how Proposed Professionals may obtain information and make proper disclosures to support their retention in U.S. bankruptcy cases that are within the scope of this Protocol, but this Protocol does not provide specific guidance for all Proposed Professionals, regardless of their type, size and structure, or in all bankruptcy cases, regardless of their size, scope, or operative facts. This Protocol recognizes that a Proposed Professional may deviate from its suggested data gathering procedures and disclosure recommendations based upon its particular facts and circumstances. No such deviation, *per se,* however, should support a contention that a Proposed Professional is not disinterested or that its retention should not be approved."

Houston Disclosure Protocol (cont'd)

"To be sure, Proposed Professionals cannot disclose unknown Connections, and this Protocol does not suggest that they do so. Instead, this Protocol provides procedures to obtain such knowledge; For purposes of this .Protocol, a Proposed Professional's knowledge of Connections means actual knowledge derived from its new matter intake process and the results of the Proposed Professional's: (a) computer client database check (as described in Paragraph 7, below); (b) any applicable inquiry of its professional personnel (and Unretained Affiliates other than AMAs) by a questionnaire process or otherwise (also as described in Paragraph 7, below); (c) review of the report it receives of its AMA's (if applicable) check for conflicts and Connections (or any other applicable) process; and (d) review of any other process for its Unretained Affiliates (if any, and other than an AMA)."

Houston Disclosure Protocol (cont'd)

"…if a Proposed Professional limits its retention application disclosure to the knowledge of Proposed Professional Personnel, that limitation should be disclosed in the retention application."

Houston Disclosure Protocol (cont'd)

Determination of Whether A Connection Exists

"Proposed Professionals should obtain knowledge of whether Connections exist generally by following the procedures discussed below, subject to adaptations to disclose particular circumstances affecting a particular Proposed Professional and bankruptcy case. Each retention application for. a Proposed Professional should describe the process and procedures it utilized to obtain knowledge of Connections."

"**Interested Party List.** Subject to Paragraph 6 of this Protocol regarding knowledge, Proposed Professionals can reasonably and in good faith rely on the list of IPL Parties, consistent with the description and template attached as Exhibit "A," prepared (and periodically updated, with information derived from the debtor's bankruptcy schedules and otherwise, as described in Exhibit "A" and in Paragraph 10, below) by the debtor."

"Process to Check for Conflicts and Connections. Every Proposed Professional should perform (in connection with its other new matter intake procedures) a process to check such Proposed Professional's client databases for conflicts and Connections with IPL Parties. A Proposed Professional should utilize a process designed to identify Connections adequately in the context of the size and organizational complexity of the Proposed Professional."

Houston Disclosure Protocol (cont'd)

Determination of Whether A Connection Exists (cont'd)

"For entities with a significant number of professionals, this process often utilizes computer software. For Proposed Professionals with a large number of professionals, this Protocol recommends deployment of adequate software within a reasonable time. Pending such deployment, a Proposed Professional may retain an independent third party to assess the adequacy of the alternative procedures the Proposed Professional uses to identify and appropriately disclose Connections."

Houston Disclosure Protocol (Cont'd)

Determination of Whether A Connection Exists (cont'd)

"**Questionnaires.** A Proposed Professional should disclose in its retention application the results from written inquiries of the Proposed Professional's professional personnel (as distinguished from staff, support or administrative personnel), and (to the extent, if any, appropriate) Unretained Affiliates '(if any) controlled by the Proposed Professional regarding: (i) their known equity or debt investments in the debtor (e.g., e(Excluding Third-Party Managed Investments); and (ii) other connections or relationships with the debtor (other than [the] Proposed Professional's proposed engagement), the Bankruptcy Court judges, or United States Trustee personnel."

Houston Disclosure Protocol (Cont'd)

Determination of Whether A Connection Exists (cont'd)

"**Updates.** A Proposed Professional, once retained, has ongoing disclosure obligations. The debtor has the continuing obligation to update the IPL. This Protocol recommends that a debtor update, file and serve the IPL in a manner that clearly identifies changes thereto from prior versions no less frequently than every 90 days, including in connection with the filing of the debtor's schedules and. statements, the passage of the claims bar date, the commencement of adversary proceedings, and filings under Bankruptcy Rule 2019 or by prospective purchasers of the debtor's assets. Estate Professionals should supplement their Rule 2014 disclosures, to the extent necessary as a result of updated IPLs and other developments in the bankruptcy case, including by reason of newly discovered or inadvertently omitted Connections."

In re Alpha Natural Resources, Inc., 556 B.R. 249 (2016) (Use of *In Camera* Review and Limited Access Disclosures to Satisfy Rule 2014)

Mar-Bow's Motion to Compel was not without merit. It raised important questions and issues about the adequacy of the disclosures required for employment of court approved advisors and professionals in large Chapter 11 cases.

The anticompetitive concerns raised by McKinsey RTS had merit as well.

McKinsey RTS, like any other professional consulting firm, has a legitimate interest in protecting the confidentiality needs of its own clients and in safeguarding its interests from unfair competitive actions.

In balancing the competing concerns presented by the Mar-Bow/McKinsey dispute over the implementation of Rule 2014, the Court turned its focus on assuring the disinterestedness of the professionals whose employment it approved. Sections 105(a) 25 and 107(b) 26 of the Bankruptcy Code provided the Court with the means to tailor its enforcement of Rule 2014 to this end.

In re Alpha Natural Resources, Inc. (cont'd)

The Court's Order Compelling Compliance and its Clarification Order were both carefully crafted to permit the Court and a limited number of key parties who were most intimately involved in the Bankruptcy Case to have timely access to all the information necessary to dispel any concerns over the disinterestedness of McKinsey RTS while protecting the legitimate business concerns of McKinsey RTS.

McKinsey RTS fully complied with the Court's Order Compelling Compliance and delivered the *In Camera* Disclosures to the Court the day before the Confirmation Hearing. The Court thoroughly reviewed the *In Camera* Disclosures, and it was satisfied that McKinsey RTS had complied in good faith with the Order Compelling Compliance and that McKinsey RTS was a "disinterested person" under the Bankruptcy Code.

Mar–Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services US, LLC, 578 B.R. 325 (E.D. Va. 2017)(Naming Names With Consent; Limited Public Disclosure; With *In Camera* Review)

The U.S. Trustee asked the Bankruptcy Court to compel McKinsey to file additional disclosures, including

> a supplemental declaration stating, at a minimum, (a) the identity of the entities on the Interested Parties List ... with which McKinsey RTS and any of its affiliates have a connection ... and (b) a general description of the connection with or work performed for these entities.

The U.S. Trustee expressed concern that McKinsey's "failure to provide complete disclosures may also cast a cloud over the Debtors' restructuring strategy." Because McKinsey had assisted the Debtors in negotiating the terms of a financing agreement and the overall restructuring strategy, the U.S. Trustee argued that the Bankruptcy Court "should order McKinsey to supplement its disclosures so that all interested parties can meaningfully consider whether the Proposed Plan Transactions may be tainted by divided loyalties." Apparently anticipating that McKinsey might cite confidentiality concerns as a reason for limiting its disclosures, the U.S. Trustee asserted that "McKinsey's private contractual agreements do not and cannot supersede the ethics and disclosure requirements of the Bankruptcy Code and Rules."

Mar–Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services US, LLC (cont'd)

[S]ixteen days later, the U.S. Trustee submitted a "Stipulation Resolving Motion of the [U.S. Trustee Motion to Compel]" (the "U.S. Trustee Stipulation").

The same day, pursuant to the U.S. Trustee Stipulation, McKinsey filed a third Supplemental Declaration... The Fourth…Declaration included more detailed information about McKinsey's connection to the Interested Parties. It also disclosed the names of various Interested Parties that McKinsey had "served" in the past two years. [Declarant] swore that McKinsey had only served those clients "on matters unrelated to the Debtors and their chapter 11 cases."

McKinsey still omitted the names of at least three connections, which it identified as "confidential clients." Before filing the Fourth…Declaration, McKinsey "reviewed its confidentiality obligations to each of its clients identified as a Major Stakeholder or Major Competitor and, to the extent necessary, ... request[ed] the consent of such client to disclose its name" in the Fourth …. Declaration. Clients who did not consent to the disclosure of their names were identified as "confidential clients."

Mar–Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services US, LLC (cont'd)

The U.S. Trustee stated that it was satisfied that McKinsey's additional disclosures in the Fourth … Declaration complied with Rule 2014.

The U.S. Trustee recommended that McKinsey make additional public disclosures "[b]ecause Rule 2014 does not define connections, and because transparency is critical to the integrity of the bankruptcy process." The U.S. Trustee recommended that McKinsey make the following additional disclosures:

> 1) "Every name on the list of interested parties provided by the Debtors ("interested parties' list") with whom either McKinsey RTS or personnel borrowed from an affiliate thereof, has a connection and a statement whether any services provided were related to or adverse to the Debtors ... for a period of three years before the petition date";
>
> 2) "Every name on the interested parties' list who was a client of any McKinsey RTS affiliate with respect to 'a direct commercial relationship or transaction' with the Debtors ... for a period of three years before the petition date";

Mar–Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services US, LLC (cont'd)

3) "Every name on the interested parties' list that previously employed McKinsey RTS personnel ... for a period of three years before the petition date"; and,

4) "Every name of a professional on the interested parties' list that represents or represented McKinsey RTS or its affiliates ... for a period of three years before the petition date."

The U.S. Trustee asserted that "[t]he disclosures made to date, with the additional disclosures recommended here, will satisfy Rule 2014."

The same day, McKinsey filed the… [Fifth… Declaration]. The Fifth… Declaration "provide[d] th[e] disclosure" that the U.S. Trustee recommended.