2021 Virtual Annual Spring Meeting

Top Ten Bankruptcy Ethics Traps and How to Avoid Them

Hon. Janet S. Baer
U.S. Bankruptcy Court (N.D. Ill.); Chicago

Susan M. Freeman
Lewis Roca Rothgerber Christie LLP; Phoenix

James T. Markus
Markus Williams Young & Hunsicker LLC; Denver

Gregory M. Taube
Nelson Mullins Riley & Scarborough, LLP; Atlanta

American Bankruptcy Institute – 2021 Virtual Annual Spring Meeting

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Hon. Janet S. Baer
United States Bankruptcy Judge
Northern District of Illinois

Susan M. Freeman
Lewis Roca
SFreeman@LRRC.com

James T. Markus
Markus Williams Young & Hunsicker LLC
jmarkus@markuswilliams.com

Gregory M. Taube
Nelson Mullins
greg.taube@nelsonmullins.com

1. Friend and Foe – How close is too close for comfort?

RPC 1.7(a)(2) (concurrent conflict of interest if there is a significant risk that the representation will be materially limited by … a personal interest of the lawyer, unless the lawyer reasonably believes they will be able to provide competent and diligent representation, the representation is not prohibited by law, and the client provides written informed consent)

Section 327 generally requires that professionals may only be approved for employment by the trustee if they "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." And, Rule 2014 requires disclosure of "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. In applying Section 327 and Rule 2014, at least when the professional is an attorney, the standards for considering whether an interest may disqualify the applicant, include the applicable rules of professional conduct. *See, e.g., Century Indemnity Company v. Congoleum Corp.*, 426 F.3d 675, 687 (3rd Cir. 2005). So, all professionals should take note of a recent ethics opinion issued by the American Bar Association's Standing Committee on Ethics and Professional Responsibility, entitled "Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel." ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 494 (2019) (hereinafter "ABA Formal Op. 494").

ABA Formal Op. 494 provides guidance for applying RPC 1.7(a)(2), which requires that a lawyer obtain informed consent in writing when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

For lawyers considering whether a friendship may be disqualifying, ABA Formal Op. 494 provides further guidance on the meaning of "a personal interest of the lawyer" in the context

of a lawyer's relationship with opposing counsel. This opinion expands on an earlier opinion regarding judicial conduct that considers personal interests arising from friendships. *See* ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 488 (2019) (hereinafter "ABA Formal Op. 488"). The earlier opinion recognizes that friendship may be disqualifying and states that "'Friendship'" implies a degree of affinity greater than being acquainted with a person . . . the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others."

ABA Formal Op. 488 drew some broad distinctions as follows:

> "[Lawyers who] exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues . . . [or] share confidences and intimate details of their lives."

* * *

> "By contrast, friendships that might require disclosure to the affected clients but will not ordinarily require consent from clients include lawyers who "once practiced law together [and] may periodically meet for a meal when their busy schedules permit or, if they live in different cities, try to meet when one is in the other's hometown."

Although friendship does not necessarily give rise to an irreconcilable conflict, opposing professionals who are friends must consider whether their friendship is so close that it presents a significant risk of materially limiting the representation of their clients. ABA Formal Op. 494. If they reasonably believe they can provide competent and diligent representation and the clients provide informed consent, they can continue the representation. *Id.* In light of ABA Formal Op. 494, lawyers applying for employment in bankruptcy cases should consider whether to disclose any friendships with other lawyers in the case.

Until a bankruptcy court interprets ABA Formal Op. 494, bankruptcy professionals who are considering this issue may find guidance in prior decisions dealing with disclosure requirements arising from various personal relationships among bankruptcy professionals. *See, e.g., In re Fibermark, Inc.,* 2006 WL 723495 (Bankr. D. Vt. 2006) (distinguishing between connections with professionals "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") *see also In re Universal Bldg. Products,* 486 B.R. 650, 664 n. 16 (Bankr. D. Del. 2010) (finding deficient disclosure of connection with intermediary soliciting prospective committee members' support for counsel in violation of professional conduct rules); *see also In re Diva Jewelry Design, Inc.,* 367 B.R. 463, 466 (Bankr. S.D.N.Y.2007) (meaningful difference between "a familiarity and working relationship" from past cases

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causing one person to recommend another for a position and a “promise, agreement or ‘quid quo pro’ in connection with [one professional’s] introduction or recommendation” of someone for a bankruptcy position or “later retention” of that professional); *see also In re GSC Group, Inc.,* 502 B.R. 673, 730-33 (Bankr. S.D.N.Y. 2013) (discussing bankruptcy law restrictions on fee sharing in part because of trafficking in roles in bankruptcy cases, and subjecting professionals to outside influences which may deprive them of requisite independence).

2. Be Careful Who you “Friend”

RPC 3.5 (lawyer shall not seek to influence a judge or other official by means prohibited by law)

RPC 8.4 (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, engage in conduct prejudicial to the administration of justice, or state or imply an ability to influence improperly a government official)

Judges as “Friends”.

The standards for attorneys being “friends” with judges on social media varies widely. The more restrictive and narrow view, as followed in Florida, prohibits judges from “Friending” attorneys who appear in front of them on a regular basis. The Fla. Jud. Ethics Adv. Committee entered Opinion 2009-20, permitting judges to join social organizations, noting that a judge cannot avoid “…friendships outside their judicial responsibilities….” However, the Florida Judicial Ethics Adv. Committee expressly prohibited judges from “Friending” attorneys who may appear in front of them on a regular basis, reasoning that a judge who “friends” members of the bar appearing in front of the judge conveys or permits others to convey the impression that those members are in a special position to influence the judge. One Florida court has held that a trial judge presiding over a criminal case had to recuse himself because he was friends with the prosecutor on social media. See *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012).

Other states, such as California, Connecticut, Kentucky, Maryland, New York, Ohio, South Carolina and Tennessee are more liberal and allow judges to participate in social media, but caution that they must consider their ethical obligations on a case-by case basis. *See Calif. Judges Assoc. Jud. Ethics Committee Opinion Number 66 (November 23, 2010); See Connecticut Committee of Judicial Ethics Op. 2013-06; Kentucky Judicial Ethics Opinion JE-119; Maryland Judicial Ethics Committee Op. 2012-07; New York Judicial Ethics Committee Op. 13-39 and 08-176; Ohio Judicial Ethics Committee Op. 2010-7; South Carolina Judicial Ethics Committee Op. 17-2009; and Tennessee Judicial Ethics Committee Op. 12-01*.

“Friending” a party or witness to gain information

RPC 8.4 prohibits a lawyer from, among other things, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In February 2019, the Pennsylvania Supreme Court suspended a district attorney for a year and a day for, among other things, creating a fake social media persona and Facebook page and recommending that her staff use it to “befriend

defendants or witnesses" and "snoop" around. *Office of Disciplinary Counsel v. Miller*, Case No. 32 DB 2017, 19, 26-43 (Pa. Feb. 8, 2019).

Bar associations have found the action of creating fake social media accounts or friending a party under false pretense to gather what would otherwise seem to be public information to be unethical. The San Diego Bar Association found that friending a potential witness could not be done with the intention to deceive the witness and could be considered an improper ex parte communication. *See* San Diego Cty. Bar Ass'n Legal Ethics Comm., Formal Op. 2011-2. The Pennsylvania Bar Association found that the act of friending a party or witness without disclosing the attorney's identification was an ethical violation. *See* Penn. Bar Ass'n Ethics Comm., Formal Op. 2014-300.

3. Get up close and personal – from afar

RPC 1.1 (competent representation)

RPC 1.3 (diligence)

RPC 1.4 (reasonably consult with clients and keep them updated about their matters)

RPC 1.5 (prohibition on charging or collecting unreasonable fees)

RPC 3.3 (false statement of fact or law to a tribunal)

In re Klitsch, 587 B.R. 287 (Bankr. M.D. Pa. 2018)

While some jurisdictions require "wet" pen to paper signatures, in Pennsylvania an original signature can be electronic under a state statute. The court noted that neither the Code nor the Bankruptcy Rules requires a "wet" signature. It said the real issue is compliance with the verified signature requirements on all documents of Bankruptcy Rules 1008 and 9011. The ECF user's electronic signature on e-filed documents serves as a signature for Bankruptcy Rule 9011 purposes. The debtor's lawyer cannot endorse petitions and schedules for the client. The lawyer's e-signature instead is a statement that the lawyer is in possession of a document signed by the individual debtor prior to the e-filing.

In re Hazlett, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019)

The court held that a bankruptcy lawyer's use of e-signatures obtained through AdobeSign was not sanctionable. Federal Rule of Evidence 1001(d) and Utah's adoption of the Uniform Electronic Transactions Act and Utah District Court Rule 5.1(a) (allowing e-signatures on court documents) supported the reasonableness of the lawyer interpreting "original signatures" in the local rule mandating retention of signatures as including e-signatures.

In re Finn, 2020 WL 6065755 (Bankr. C.D. Ill. Aug. 28, 2020)

The court sanctioned a bankruptcy lawyer after debtors testified at their 341 meetings to multiple investments and transactions not disclosed on their Schedules, and the lawyer admitted he had not actually met with the debtors before filing their cases, communicating

instead by phone or email. The U.S. Trustee argued that meeting with clients by videoconference during the pandemic is acceptable, but disputed that only telephonic and email communications would suffice. The court ordered sanctions because the attorney failed to meet with clients "in person or electronically" to fully discuss their financial problems and to gather and review all required financial information, and wrote that this was a blatant violation of his professional responsibilities. The court said it's important to look people in the eye and observe their facial expressions when trying to get to know them and determine their credibility. The opinion notes that it's extremely difficult to do a thorough job using only phone and email, and this attorney demonstrated he was not capable of doing so.

The court cited to Rule of Professional Conduct 1.1 (competent representation), 1.5 (prohibition on charging or collecting unreasonable fees) and 3.3 (false statement of fact or law to a tribunal); Bankruptcy Rule 9011, and Bankruptcy Code §§707(b) and §526, requiring counsel to review the client's financial documents and other information and resolve inconsistencies and ask questions and tell the clients what information must be provided. The court noted that clients don't understand what "complete" and "necessary" information means, and attorneys need to advise them even if the clients don't ask.

Local Orders

In some jurisdictions, bankruptcy courts have adopted local procedures to address the mechanics of obtaining original signatures during Covid-19 restrictions. For example, in the U.S. Bankruptcy Court for the Northern District of Illinois, local procedures generally require that when an individual other than an ECF Registrant is required to sign a document that is filed electronically, the Registrant shall include a single filing with the document scanned or otherwise electronically replicated of the document's signature page bearing the individual's original signature. It goes on to say once the document has been properly filed, the original signature need not be retained, and the scanned signature may be used with the same force and effect as the original signature. U.S. Bankruptcy Court for the Northern District of Illinois, Administrative Procedures for Case Management/Electronic Case Filing System § II.C.1. By General Order, the court has altered that requirement:

> Original Non- Attorney Signatures. Section II.C.1 of the Administrative Procedures for the Case Management/Electronic Case Filing system is suspended. Electronic signatures using a method like DocuSign will be accepted.

U.S. Bankruptcy Court for the Northern District of Illinois Third Amended General Order No. 20-03 (Court Proceedings During COVID-19 Public Emergency ¶9.

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 498

On March 10, 2021, the ABA released a formal opinion describing relevant model rules and technological considerations lawyers should be alert to when practicing virtually. These include competence, diligence, and communication with clients. In compliance with the duty of

confidentiality, lawyers also must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information and take reasonable precautions when transmitting information related to their representation. This requires familiarity with and use of appropriate and secure technology with firewalls and anti-malware/anti-spyware/antivirus protections, complex and periodically changed passwords, use of virtual meeting platforms and videoconferencing, and encrypted virtual document and data exchange platforms to ensure confidentiality. Lawyers must also make reasonable efforts to ensure their associates and staff comply with the rules, and must maintain a plan to process paper mail and file and receive court documents, docket correspondence and communications, and direct persons who might attempt to contact the lawyer at a physical office how to reach the lawyer.

4. <u>"The Trustee told me to do it" is not a good defense</u>

RPC 1.1 (competent representation)

RPC 1.2 (abide by client's decisions concerning objectives of representation)

RPC 1.4 (consult with client about means to accomplish client's objectives and any relevant limitation on the lawyer's conduct)

RPC 1.5 (prohibition on charging or collecting unreasonable fees)

RPC 2.5 (exercise independent professional judgment and render candid advice)

RPC 3.1 (non-frivolous basis in fact and law for advocacy)

RPC 3.2 (expedite litigation consistent with client interests)

RPC 3.3 (false statement of fact or law to a tribunal)

RPC 3.4 (fairness to opposing party and counsel)

In re Reynolds, 2019 WL 4645385 (D. Utah Sept. 24, 2019), aff'd. 835 Fed.Appx. 395 (10th Cir. 2021)

The bankruptcy court denied compensation to the trustee's counsel for what it held were unnecessary services disproportionate to available proceeds. The court explained:

> The symbiosis between some trustees and their regular counsel is too obvious to miss by any standard except willful blindness. The same trustees routinely hire the same one or two attorneys at all times, regardless of the issue. The trustees become all too willing to pay any rate for any service that the court approves. The attorney will provide fantastic personal service and free the trustee's time for other paying endeavors while the trustee's commission is calculated at a fixed expense...The disconnect is that the American legal system is an adversarial system, and this piece of the bankruptcy system has no adversary. Moreover, the client (the trustee) is not dealing with his or her own money. The front line

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> responsibility for controlling the cost of legal services has been shifted from the trustee to the court. This is not how the system was designed to operate.
>
> The bankruptcy court is simply asking that professionals scrutinize their own fee requests by eliminating duplicative and unnecessary charges, as they would when billing a regular client. In a like manner, the bankruptcy court also asks trustees to monitor professional's services as a private client would do, calling into question unnecessary services and reining in costs when fees grow disproportionate to the available proceeds. This court finds this requirement reasonable and not beyond the bankruptcy's court's discretion. A normal client would not agree to pay for services it found to be unnecessary, duplicative, unreasonable, or without benefit.

In re Bird, 577 B.R. 365, 374-75 (BAP 10th Cir. 2017)

The debtors' homesteads were subject to liens exceeding their value. But rather than abandoning the property, the trustee entered into stipulations with the IRS as lienholder to carve out $10,000 from the proceeds of any sale otherwise payable to it, and moved to sell the property for only a small amount more than the liens.

The sale proceeds would be subject to the trustee's and his counsel's fees and broker and closing costs. Effectively, the sale would eliminate the debtors' homesteads, leave them with nondischargeable tax claims, and transfer funds to the trustee and his counsel for unnecessary fees without a meaningful distribution to unsecured creditors.

The proposed sale was circumvented by conversion to chapter 13, but the trustee and his counsel sought a fee award for their efforts, which the bankruptcy court denied, and the BAP affirmed on appeal. It held that a trustee's duty to liquidate assets for creditor distributions is limited. When liquidation would result in little to no payment to unsecured creditors, the proper course of action is to abandon the property. The services rendered were not reasonably likely to benefit the estates.

In re McConnell, 2021 WL 203331 (Bankr. N.D. Ga. Jan. 4, 2021)

In this mini-treatise on the duties of counsel for a chapter 7 trustee and standards for such counsel's fee allowance, the court held that the trustee's law firm (owned by the trustee) (i) billed for work that did not involve legal analysis or unique difficulties, (ii) billed for negotiations with regard to the liquidation of assets that did not require legal services, (iii) negotiation of a broker listing agreement with stipulations the court found to be routine in the context of a panel trustee's sale of residential real estate, and (iv) preparation and filing of an application to employ the broker, all of which the court held were within the scope of normal trustee duties. The court also held that the chapter 7 trustee's objection to conversion to chapter 13 was not necessary or beneficial to the estate, and the trustee should have realized this when deciding to object. Under these circumstances, the court held that even the trustee's application to employ his law firm did not benefit the estate. The court disallowed all requested legal fees and all requested trustee quantum meruit compensation, limiting the trustee to his statutory commission.

5. Those Apple shares may get you rich, but they may also disqualify you!

RPC 1.7 (concurrent conflict of interest if there is a significant risk that the representation will be materially limited by … a personal interest of the lawyer, unless the lawyer reasonably believes they will be able to provide competent and diligent representation, the representation is not prohibited by law, and the client provides written informed consent)

RPC 1.8 ((a) lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership or other pecuniary interest adverse to a client unless (1) the transaction and all terms are fair and reasonable and fully disclosed and transmitted in writing, (2) the client is advised in writing of the desirability of independent counsel's advice, (3) the client gives written informed consent to the transaction and the lawyer's role in it; (b) lawyer shall not use information relating to representation of a client to the client's disadvantage without informed consent except as authorized by RPC; (i) lawyer shall not acquire a proprietary interest in subject matter of litigation for the client except a lien for fees; (k) while lawyers are associated in a firm, these prohibitions that apply to any of them apply to all of them)

Mar-Bow Value Partners, LLC v. McKinsey RTS, 578 B.R. 325 (E.D. Va. 2017), aff'd, 736 F.App'x 412 (4th Cir. 2018), cert. denied, 139 S.Ct. 1601 (Mem) (2019)

In 2016, the *Alpha Natural Resources ("ANR")* bankruptcy court granted a Mar-Bow (owned by Jay Alix) motion to compel McKinsey to disclose, among other things, connections with parties identified by the debtors as Interested Parties arising from McKinsey's captive investment firm MIO, but with all disclosures *in camera*. 578 B.R. at 337-38. On appeal of the *in camera* portion of the ruling, the district court dismissed on standing grounds, and the Fourth Circuit affirmed for the reasons stated by the district court, and the Supreme Court denied certiorari.

In 2018, Mar-Bow moved to re-open *ANR,* claiming that McKinsey's partners and employees had invested in first lien lender claims against the *ANR* estate through MIO's investment in Whitebox investment funds – with investments so massive that Whitebox received over 11% of the shares in the NewCo entity that acquired most ANR assets under the confirmed plan. Mar-Bow's motion to reopen *ANR* was supported by the U.S. Trustee, asserting that McKinsey had misled it by claiming that MIO was a "blind trust," and saying that McKinsey had never answered the U.S. Trustee's questions regarding MIO in a forthright and satisfactory manner. The *ANR* court reopened the case, and under a mediated settlement between McKinsey and the U.S. Trustee over disclosure objections only – not fraud on the court or lack of disinterestedness, or criminal liability – McKinsey agreed to pay $15 million, including $5 million for the benefit of the *ANR* estate. Mar-Bow's fraud on the court claim was again dismissed on standing grounds, again upheld on appeal. *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services U.S., LLC*, 469 F.Supp.3d 505 (E.D. Va. 2020).

Underlying Caselaw on Professionals with Interests in Interested Parties

Fiduciaries of a bankruptcy estate are prohibited from holding an interest adverse to the estate "not because such interests are always corrupt but because they are always corrupting." *Mosser v. Darrow*, 341 U.S. 267, 271 (1951). When a professional "has served under an undisclosed disqualifying conflict of interest, the bankruptcy court cannot always assess with precision the effect the conflict may have had either on the results achieved or the results that might have been achieved by following 'the road not taken.'" *Rome v. Braunstein*, 19 F.3d 54, 62-63 (1st Cir. 1994) (quoting *Woods v. City Nat'l Bank & Trust Co. of Chicago*, 312 U.S. 262, 269 (1941)); *see also In re Interwest Bus. Equip., Inc.*, 23 F.3d 311, 317 (10th Cir. 1994) ("We also find it is impossible to know if the terms of the confirmed plans were affected by the joint representation.").

Estate fiduciaries cannot hold or acquire an interest in estate assets or creditors' claims, directly or indirectly. 11 U.S.C. §§101(14)(C)), 327(a). They cannot involve themselves with parties acquiring estate property, or attempting to do so, without becoming disqualified. *In re New River Dry Dock, Inc.*, 497 F. App'x 882, 887 (11th Cir. 2012); *In re W. Delta Oil Co.*, 432 F.3d 347, 356-57 (5th Cir. 2005); *In re Brook Valley VII, Joint Venture*, 496 F.3d 892 (8th Cir. 2007). A professional's employees cannot hold equity interests in interested parties in the case. *E.g. In re Leisure Dynamics, Inc.*, 33 B.R. 121, 122-23 (D. Minn. 1983); *In re Intech Capital Corp.*, 87 B.R. 232, 234-35 (Bankr. D. Conn. 1988); *Matter of Cropper Co., Inc.*, 35 B.R. 625, 630-31 (Bankr. M.D. Ga. 1983).

Likewise, estate professionals cannot advise investors to acquire estate assets without losing disinterestedness status. *Rome*, 19 F.3d at 61 (The professional's role affords "unique access to inside information concerning the nature and value of [estate] assets, information that [the professional] could have used (or been tempted to use) to enable his other client . . . to submit a better calibrated bid than arm's-length bidders could venture."); *In re Unitcast, Inc.*, 214 B.R. 979, 987-88 (Bankr. N.D. Ohio 1997) (debtor's financial advisor who "performed a wide variety of tasks which largely shaped the companies' financial and operational structure," and also advised a major secured creditor who was to buy the estates' assets under the plan, became non-disinterested on account of the inherent conflict of interest.).

Hidden involvement and concealed profit of a debtor's CEO in a purchase of estate assets has been held a fraud on the court. *In re Intermagnetics Am., Inc.*, 926 F.2d 912, 914-18 (9th Cir. 1991). Failure to disclose disqualifying connections as required by Bankruptcy Rule 2014 has also been held a fraud on the court. *In re eToys, Inc.*, 331 B.R. 176, 188 (Bankr. D.Del. 2005); *see Pearson v. First NH Mortg. Corp.*, 200 F.3d 30 (1st Cir. 1999) (colorable claim for fraud on the court when conflicts of interest were not disclosed in Bankruptcy Rule 2014 statement, justifying discovery and evidentiary proceedings); *Denison v. Marina Mile Shipyard, Inc.*, 2012 WL 75768 *5 (S.D. Fla. Jan. 10, 2012), *aff'd. New River Dry Dock*, 497 F. App'x at 885-86; *In re M.T.G., Inc.*, 366 B.R. 730, 748-53 (Bankr. E.D. Mich. 2007) (all elements of fraud on the court claim met when attorneys failed to disclose potential conflicts of interest, deceiving bankruptcy court), *aff'd*, 400 B.R. 558, 568 (E.D. Mich. 2009); *In re Southmark Corp.*, 181 B.R.

291, 296 (Bankr. N.D.Tex. 1995) ("The court finds that Coopers' failure to fully disclose connections and activities with and regarding Drexel prevented the court from fully performing its function under the Bankruptcy Code and thereby frustrated the purposes of the Code to assure that the professional person employed by the examiner tenders undivided loyalty and provides untainted advice and assistance."); *see also Am. United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, 142-48 (1940) (plan confirmation order vacated pursuant to creditor's petition because fiscal agent authorized to solicit votes was also a creditor and did not fully disclose its interests and benefits it would receive from confirmation).

An officer of the court who "knowingly purchases, directly or indirectly, any property of the estate of which the person is such an officer in a case under title 11…shall be fined under this title and shall forfeit the person's office." 18 U.S.C. §154(1). *In re Chuck's Const. Co., Inc*., 424 B.R. 202 (Bankr. D. S.C. 2010) (whether court applied per se rule or prohibited sales except following arms-length, good faith negotiations and full disclosure (citing authorities for both standards), court could not approve chapter 11 debtor's sale of machinery outside ordinary course of business to professional retained by debtor to assist in selling other equipment).

EOUST'S Disclosure Guidelines on Professionals' Interests in Parties in Interest

On December 4, 2019, the Executive Office for United States Trustee is
sued Principles to guide UST Program enforcement of professionals' obligations to disclose connections with parties in interest in bankruptcy cases.
https://www.justice.gov/ust/file/generalprinciplesdisclosureconflicts.pdf/download It provides in part:

- Professionals must disclose affiliate connections unless they establish that an affiliate is sufficiently separate to excuse disclosure. Separate incorporation isn't enough, when, for example, separate entities belong to an international cooperative.
- Investments by a professional firm's investment affiliates or by their individual professionals may create conflicts just as serious as those crated by working for clients with adverse interests.
  - They must disclose investments in Parties in Interest, including debtors, creditors, DIP lender, bidders
  - This includes direct investments and through third parties
  - There are two alternative tests for investments that must be disclosed: knowledge and control. If the professional firm knew or *could* have known (not should), or the professional controlled or *could* have controlled the selection of the investment, it must be disclosed.
  - The Principles recognize that a typical investment in a diversified mutual fund managed by an independent outside advisor like Fidelity or Vanguard need not be disclosed. But if the professional firm sponsors pooled investments in clients who may be parties in interest, it may be required to be disclosed.
  - The Principles would seemingly apply whether investments are in clients or non-clients, although not spelled out in the example. The UST Office of General Counsel is to

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> be consulted if a UST in any jurisdiction has any questions about application of the principles in specific cases.

The USDOJ website for the U.S. Trustee program currently states:

> In December 2019, the U.S. Trustee Program issued guidance to its staff establishing principles to apply in reviewing the adequacy of disclosures by professionals seeking court approval for employment in chapter 11 bankruptcy cases and in determining whether to object. This internal guidance is essential to ensuring consistent enforcement practices and is available to view here. This memorandum is an internal directive to guide U.S. Trustee Program personnel in carrying out their duties, but the ultimate determination on the obligations of professionals who seek employment under sections 327, 1103, and 1114 and make disclosures under Rule 2014 resides solely with the court. https://www.justice.gov/ust

See also the U.S. Trustee Program Policies & Procedures Manual 3-7.2.4, setting forth the same policy.
https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download

6. Oh the tangled webs that clients weave!

RPC 1.7 (lawyer shall not represent a client if there is a concurrent conflict of interest, which exists if the representation of one client will be directly adverse to another client, unless the lawyer reasonably believes they will be able to provide competent and diligent representation, the representation is not prohibited by law, it does not involve the assertion of a claim by one client against another client represented in the same proceeding, and the client provides written informed consent)

RPC 1.2(c) (a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent)

In multiple cases, courts have allowed a single firm to represent affiliated debtors, despite intercompany indebtedness and ownership affiliation. *E.g. In re International Oil Co.,* 427 F.2d 186 (2d Cir. 1970) (multiple debtor representation is not *per se* disallowed); *In re Adelphia Communications Corp.*, 342 B.R. 122, 124-25, 128 and n.3 (S.D.N.Y. 2006) (conflicts in representing multiple debtors were potential, not actual, and not disqualifying, noting that the bankruptcy court had analyzed in detail the treatment of intercreditor issues in 16 multi-debtor cases and concluded that requiring independent counsel for each debtor would have a material adverse effect on creditor recoveries); *In re Professional Development Corp*., 140 B.R. 467, 469-70, 472-73 (W.D. Tenn. 1992) (DIP counsel could be the same for debtor corporation and its debtor owner; owner scheduled as creditor and later recharacterized debt as capital contribution; potential conflicts from guarantee not disqualifying where interests are aligned); *In re Vanderbilt Associates, Ltd.*, 117 B.R. 678, 681-82 (D. Utah 1990) (conflict from each limited

partnership's claim against general partner depleting funds available for respective partnerships was potential, not actual conflict, and not disqualifying).

Allowing an additional law firm or firms to represent the debtor in matters that the main law firm cannot undertake due to conflicts is a common and long-accepted way to allow a debtor to reorganize with its counsel of choice while honoring applicable ethics rules. *See* The Use of Conflicts Counsel in Business Reorganization Cases, FINAL REPORT OF THE ABI NATIONAL ETHICS TASK FORCE at 38 (Lois R. Lupica and Nancy B. Rapoport eds., American Bankruptcy Institute 2013) ("ABI Ethics Task Force Final Report"), available at https://abi-org-corp.s3.amazonaws.com/materials/Final_Report_ABI_Ethics_Task_Force.pdf; *Tri-State Fin., LLC v. Lovald*, 525 F.3d 649, 655-56 & n.5 (8th Cir. 2008) (Trustee's attorney had no conflict of interest because "[t]he Trustee employed a different attorney to represent the estate in challenging any claim by [the general bankruptcy attorney's creditor client]"); *In re Blinder, Robinson & Co.*, 131 B.R. 872, 879-81 (D. Colo. 1991) (affirming with reservations bankruptcy court ruling that independent counsel to consider a claim by creditor client rendered SIPA counsel disinterested); *see also In re eToys, Inc*., 331 B.R. 176, 192 (Bankr. D. Del. 2005) (DIP counsel should have promptly filed disclosure affidavit and let another, disinterested professional handle matter involving creditor client); *In re National Century Financial Enterprises, Inc*., 298 B.R. 112, 118 (Bankr. S.D. Ohio 2003) (conflicts counsel representation in any matter where the interests of its clients may be adverse enabled law firm to represent committee without conflicts of interest).

In re M&P Collections, Inc., 599 B.R. 7 (Bankr. W.D. Ky. 2019)

The court held that a law firm was not disqualified from serving as DIP counsel to multiple debtors in jointly administered chapter 11 cases merely because of inter-company debt. They were liquidating cases, with insufficient funds to fully satisfy the claims of priority creditors. It was extremely unlikely there would be any distribution on inter-company claims. The firm received $35,000 from one client to fund a $25,000 retainer for that debtor and a $10,000 retainer for the other debtor.

Mere creditor status is not disqualifying under §327(c), and multiple courts have held that the presence of intercompany claims between debtors represented by the same firm does not automatically warrant disqualification. There is only a potential conflict until and unless there are funds available to pay unsecured creditors. Such potential conflicts are not disqualifying. And the two debtors were operating to achieve a common goal, not to obtain an advantage over each other, so there was no active competition between the interests of the two where one could only be served at the expense of the other. DIP counsel was directed that if an actual conflict were to arise, the firm should notify the court. The firm should take no action on any inter-company dispute, but instead notify the court and U.S. Trustee, and the court would determine what, if any, remedies should be put into place.

7. <u>All for one or one for all? – watch out for those fiduciary duties</u>

In re Farrell, 2019 WL 6719101 (Bankr. C.D. Cal. Nov. 15, 2019)

In the event of a conflict between a committee member's own interests and the interests of its constituent group, most courts have held that the creditors' committee member's obligation to all creditors need not take priority over its own claim, as long as the member is not taking advantage of inside information learned as a committee member or violating court orders. *See, e.g. In re El Paso Refinery, L.P.*, 196 B.R. 58 (Bankr. W.D. Tex. 1996) (courts should not decree that whenever a committee member's business interests conflict with committee interests the duties to the committee prevail, or committee participation will be chilled); *In re Seaescape Cruises, Ltd.*, 131 B.R. 241 (Bankr. S.D. Fla. 1991) (committee member's stay lift motion not a breach of fiduciary duty); *In re Rickel & Associates, Inc.*, 272 B.R. 74 (Bankr. S.D. N.Y. 2002) (cause of action stated for committee member use of inside information to advance personal interest to detriment of other creditors).

In *Farrell*, the debtor's ex-wife served on the creditors committee in his chapter 11 case while the divorce court was still determining community property division and spousal support issues. She provided useful information about the debtor's assets to the committee, and a chapter 11 trustee was appointed. The trustee expressed concern about the ex-wife's potential first-priority status, and the impropriety of administering disputed assets solely for her benefit. The ex-wife misled the trustee until committee and trustee fee applications were filed, when she objected that estate property would be insufficient to pay them after paying her highest-priority claim.

The court held that the ex-wife breached her fiduciary duties as a committee member by concealing her intentions to lure estate professionals into serving her interests free of charge. If they had known at the outset, the trustee and committee could have pressed for case dismissal, or sought a carve-out for professionals and unsecured creditors. The court equitably subordinated the ex-wife's first priority spousal support claim to administrative professional fees that would not have been incurred. It reserved for future ruling after additional briefing the extent of equitable subordination to general unsecured claims.

8. <u>No money, no shoes, no service?</u>

RPC 1.5 (no unreasonable fees; scope of representation and basis of fees shall be communicated to client in writing before or within a reasonable time after commencing representation)

RPC 1.7 (concurrent conflict of interest if there is a significant risk that the representation will be materially limited by … a personal interest of the lawyer, unless the lawyer reasonably believes they will be able to provide competent and diligent representation, the representation is not prohibited by law, and the client provides written informed consent)

RPC 1.8 (lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership or other pecuniary interest adverse to a client unless (1) the transaction and all terms are fair and reasonable and fully disclosed and transmitted in writing, (2) the client is advised in writing of the desirability of independent counsel's advice and has a reasonable opportunity to do so, (3) the client gives written informed consent to the transaction and the lawyer's role in it)

Installment arrangements do not per se create a conflict of interest, but upon the petition filing, an attorney with a prepetition fee arrangement becomes a self-interested creditor in conflict with the debtor client, who is seeking a discharge of prepetition obligations. Counsel has a conflict insofar as client is entitled to unbiased advice about the automatic stay and discharge of such obligations and reaffirmation options. *See Walton v. Clark & Washington, P.C.*, 454 B.R. 537 (Bankr. M.D. Fla. 2011). Circuits are divided on permissible solutions. *E.g. In re Hines*, 147 F.3d 1185 (9th Cir. 1998) (postpetition payment for prepetition services stayed, but not payment for postpetition services, and attorney had undischarged claim in quantum meruit to reasonable compensation for postpetition services); *Bethea v. Robert J. Adams & Assoc.*, 352 F.3d 1125 (7th Cir. 2003) (disapproving *Hines*); *Rittenhouse v. Eisen*, 404 F.3d 395 (6th Cir. 2005) (debts for prepetition legal fees are dischargeable); *In re Wagers*, 514 F.3d 1021 (10th Cir. 2007) (prepetition retainer may not be used for postpetition Chapter 7 services). Chapter 13 filings are vulnerable to abuse by attorneys seeking to advance their own interests in collecting fees, and may be subject to dismissal as bad faith filings unless the court is persuaded that special circumstances justify Chapter 13 over Chapter 7. *See In re Puffer*, 674 F.3d 78 (1st Cir. 2012); *In re Brown*, 742 F.3d 1309 (11th Cir. 2014).

In re Hazlett, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019)

This case thoroughly discusses the legal and ethical issues of bifurcated fee arrangements for chapter 7 debtors and factoring client fee payments, and clients using electronic signatures. A debtor lacking funds to pay an up-front cash retainer was offered two alternative payment arrangements by a firm named Capstone Law:

> (1) "$500 Down" – a $500 prepetition agreement to prepare and file the petition and application for installment filing fees, after which the debtor would have the options of (a) proceeding *pro se*, (b) hiring another attorney to complete the case, or (3) entering into a postpetition fee agreement with Capstone to complete the case, at a cost not stated in the opinion; or
>
> (2) "Zero-Down" – a prepetition arrangement with the same postpetition options, but $0 for prepetition work, and pay 10 monthly installments of $240 – the option chosen by the client (which ended up being $207/month for a $2,000 fee plus filing fees).

The opinion does not quote the disclosures, explanations and warnings to the client, but says they were extensive, including some 50 paragraphs of ink-initialed instructions prepetition, and more postpetition. The bankruptcy papers were e-signed by the debtor using AdobeSign, with the attorney maintaining a log of documents emailed to the debtor, reviewed by him, and when he signed and returned them. Capstone made timely filing fee installment payments as part of the postpetition fee agreement. It received monthly payments through automatic withdrawals from an account of the debtor's non-filing spouse. The debtor filed a consent to Capstone's factoring relationship with a collection agent. The bankruptcy case proceeded smoothly, with Capstone representing the debtor at the 341 meeting, otherwise assisting the debtor in all tasks, no adversary proceeding filings, the debtor receiving a full discharge, and the no-asset case being closed.

On a motion of the U.S. Trustee, the case was reopened. The trustee moved for cancellation of the fee agreement, fee disgorgement, and monetary sanctions. The court's analysis discusses the challenges faced by debtors and their counsel when the debtors can't afford an up-front retainer. The court held that the bifurcated fee arrangement is not prohibited by the Code or state rules of professional conduct, and helped the debtor. In doing so, the court distinguished Capstone's agreement to represent the debtor during the entire case, contingent on signing the postpetition agreement, from problematic "unbundling" where debtors are left on their own. The court explained that its decision was informed by the analysis and opinions in Utah Ethics Advisor Opinion Committee Opinion 17-06 issued August 16, 2018.

The court found that use of bifurcated fee agreements in consumer chapter 7 cases are not *per se* prohibited or unfair, and do not *per se* implicate ethical issues. They may be employed where (1) it is in the best interests of the client; (2) the attorney provides appropriate disclosures, options and explanations; (3) the client gives informed consent in writing; and (4) the fees and costs are reasonable and necessary. It held that Capstone's arrangement did not violate the Utah Bankruptcy Court's Local Rule 2091-1 on the scope of required representation. Disclosure of all aspects of the compensation agreement is mandatory, and subject to review under §329.

The court also held that Capstone's factoring arrangement with BK Billing, which had the right to collect all fees in exchange for immediate payment to Capstone of $1,800 (a 25% discount), is discouraged, given the concerns raised in the Utah ethics opinion and in *In re Wright*, 591 B.R. 68 (Bankr. N.D. Okla. 2018). The court found the arrangement in *Hazlett* did not justify the imposition of sanctions, however, as it generally complied with the principles stated in the ethics opinion.

In a subsequent opinion, the court held that Capstone did not violate the automatic stay and should not be sanctioned under §362(k), because the attorneys' fees collected arose under a postpetition agreement. *In re Hazlett*, 2019 WL 5290219 (Bankr. D. Utah Oct. 17, 2019).

9. Fee jumping – Look before you leap and watch out for the steps!

RPC 1.1 (competent representation)

RPC 1.5 (prohibition on charging or collecting unreasonable fees)

RPC 1.7 (concurrent conflict of interest if there is a significant risk that the representation will be materially limited by … a personal interest of the lawyer, unless the lawyer reasonably believes they will be able to provide competent and diligent representation, the representation is not prohibited by law, and the client provides written informed consent)

RPC 3.3 (false statement of fact or law to a tribunal)

The payment of attorney's fees to a chapter 13 debtor's counsel through the chapter 13 plan can be done in many ways. Many jurisdictions have outlined a priority scheme or arrangement that aims to get counsel paid more quickly than other creditors. However, absent such a scheme, there are serious issues that may arise if the debtor's attorney structures the plan to put that attorney before other secured lenders (fee jumping) or structures the plan to pay an unusually low payment to a secured lender until the attorney is paid in full and then steps up the secured payments after the fees are paid.(step plan)

See for example, *In re Cleveland Carr*, 584 B.R. 268 (N.D. Il. 2018) where the court found that the debtor's attorney had a fiduciary obligation to deal fairly and make a full disclosure to his client as to compensation prior to entering into the court approved retention agreement. Specifically, the court found that counsel had a duty to disclose that, because attorney's fees would be paid ahead of or concurrently with the debtor's auto lender, an early dismissal of the chapter 13 case might or would, depending on when exactly the dismissal happened, significantly impair the debtor's ability to keep his or her vehicle.

Also see, *In re Talecia Gilliam*, 582 B.R. 459 (Bankr. N.D. Il. 2018) where, in a case similar to *Carr*, *Id*, the court found that there is no question that the additions of such fee provisions are asserted for the benefit of the attorneys alone, not the debtors in whose plans they are contained and are, therefore, an act of self-dealing. If such arrangements were in another chapter of the code, counsel would be in danger of disqualification. But, because the disinterestedness standard does not appear to apply in chapter 13 cases, instead the inquiry of whether these fee arrangements will be allowed, is an inquiry under section 330 regarding benefit to the debtor's estate. And, the court found that these plans are generally harmful to debtors by causing in some instances slower rate of payment to secured creditors, thus leaving debtors in a much more vulnerable position in the event of dismissal with very little benefit to the bankruptcy estate. Thus such fee arrangements generally are not in the best interest of the debtor and may cause actual harm to the debtors. Also see, *In re Monique A. Jimmar*, No. 17-11666 (unpublished) (Hunt) (N.D. Il 4/24/18).

10. <u>Abracadabra: You appear – you are counsel</u>

RPC 1.1 (competent representation)

RPC 1.2(c) (a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent)

RPC 1.4 (consult with client about means to accomplish client's objectives and any relevant limitation on the lawyer's conduct)

RPC 1.5 (prohibition on charging or collecting unreasonable fees)

RPC 2.5 (exercise independent professional judgment and render candid advice)

RPC 3.1 (non-frivolous basis in fact and law for advocacy)

RPC 3.2 (expedite litigation consistent with client interests)

RPC 3.3 (false statement of fact or law to a tribunal)

RPC 3.4 (fairness to opposing party and counsel)

In re Gross, 2019 WL 3731535 (BAP 9th Cir. Aug. 7, 2019)

The court defined "appearance counsel" as an attorney other than counsel retained to represent the debtors in their cases, who for a fixed fee agrees to represent the debtors solely for the purpose of a court appearance. It noted that appearance counsel often appear at routine hearings in bankruptcy cases without adverse results, but they typically are ill-prepared to address any issues that arise requiring an understanding of the history of their clients or their bankruptcy cases. In *Gross*, appearance counsel attended a chapter 13 plan confirmation hearing. The chapter 13 trustee did not file written objections to the amended plan, but raised concerns about the debtors' chapter 13 eligibility for the first time, and appearance counsel was unable to adequately address the new issues. Nor did he specifically request a continuance or a chance to amend the plan or argue about the trustee's factual computation errors. Appearance counsel suggested that regular counsel should have an opportunity to brief the debt limit issue. The court ruled that the debtors had seven days to convert to chapter 7 or the case would be dismissed.

The debtors' chapter 13 counsel instead moved for relief under Civil Procedure Rules 59 and 60, alleging denial of due process by not being given a reasonable or adequate opportunity to address the trustee's objections. The bankruptcy court denied the motion and dismissed the case. The BAP ruled this was an abuse of discretion, including because the chapter 13 trustee admitted the debtors were indeed eligible for chapter 13.

In re Schatz, 601 B.R. 864 (Bankr. D. Conn. 2019)

The court defined appearance counsel as an attorney who appears at proceedings at the request of and on behalf of the debtors' chosen attorney. It noted that they are not generally disclosed to the court or debtor client before their appearance, and often know little or nothing about the case. Both primary and appearance counsel in *Schatz* were sanctioned for noncompliance with Rule 2016(b). They did not work at the same law firm, but shared a mailing address and perhaps office space. Primary counsel's Official Form 2030 disclosed her compensation agreement, and represented that there was no fee-sharing agreement. However, she advised the client that appearance counsel would cover some of the hearings and she would share her retainer with him. She did pay appearance counsel $500, and he appeared at five hearings, where the court deemed him "generally ineffective," repeatedly deferring to the absent primary attorney regarding facts and actions needed to confirm the debtor's chapter 13 plan. Primary counsel told the court that she did not share fees, but paid appearance counsel as an operating expense.

The court noted that the Rule 2016 requirement to disclose fee sharing arrangements except with a member, partner or regular associate of the lawyer's firm tracks the provisions of Code §504, and that "regular associate" is defined in Rule 9001(10). Under that definition, most courts prohibit debtor's counsel from hiring contract attorneys. The practice of undisclosed appearance attorneys creates problems with respect to negotiation and communications among the debtor, creditors and trustee, and can promote a lack of accountability. They rarely are listed as counsel of record, raising questions as to their authority to speak for the debtor. The use of appearance counsel also implicates Model Rules 1.1 (competence); 5.1 (supervisory counsel and client communication).

If primary counsel needs assistance from another attorney, she should require the additional attorney to (1) execute a written retention and fee agreement with the debtor, (2) file a notice of appearance and Form 2030 at the commencement of representation, (3) seek compensation directly from the debtor, and (4) create a document outlining the tasks and responsibilities to be completed by each attorney. Any payments not previously disclosed must be supplementally disclosed within 15 days after payment, under Rule 2016(b).

Additional Relevant Developments

A. *Nunc pro tunc* is nunc so good

In re Benitez, 2020 WL 1272258 (Bankr. E.D.N.Y. Mar. 13, 2020)

In *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S.Ct. 696 (2020), the Supreme Court held that federal courts may enter *nunc pro tunc* orders only to reflect the reality of a decree ordered but not entered. Bankruptcy *nunc pro tunc* employment

retention orders are common, at least back to the date employment approval was sought, because it is impractical if not detrimental to wait for the approval order before providing critical services.

Benitez holds that Code §§327 and 330 require only that employment retention be approved to be eligible for compensation, not that it be approved before the services are rendered. It cites appellate cases recognizing that the Code and Rule 2014 do not explicitly require prior approval. But those cases also hold that the professional must establish not only qualification to serve, but also that extraordinary circumstances must excuse the failure to file a timely application. *See In re Jarvis*, 53 F.3d 416, 419-20 (1st Cir. 1995) and cases cited therein; compare *In re Singson*, 41 F.3d 316, 319-20 (7th Cir. 1994) (excusable neglect standard). Without applying either standard, *Benitez* warns that volunteers and non-disinterested professionals run the risk of inability to seek compensation and the requirement that compensation be reasonable and for actual, necessary services rendered. In this case, the court lacked sufficient information to evaluate whether it was necessary for the trustee to retain legal counsel, whether the delay was reasonable, and whether it provided any net benefit to the estate, so the application was denied without prejudice.

In re Miller, 620 B.R. 637 (Bankr. E.D. Cal. 2020)

The court held it could approve retroactively compensation for valuable but unauthorized services by special litigation counsel in a chapter 7 case. It noted that under Bankruptcy Rule 6003(a), an application for employment cannot be approved during the first 21 days of the case, absent a need to avoid immediate and irreparable harm. The rule contemplates employment orders that provide for an effectively retroactive date of compensation. And retroactive compensation once the professional is employed under §327 has been approved in *In re THC Fin. Corp.*, 837 F.2d 389 (9th Cir. 1988). The court noted that the length of delay in seeking employment approval affects the analysis of extraordinary circumstances – emergency services early in a case are better explained than neglect and inattention. In this case, the court recognized a plausible representation that the debtor forgot about her medical device claim, because she was an octogenarian and communications from counsel in such mass tort cases are oftentimes sparse. The chapter 7 trustee's delay was approximately one year from the case reopening. The court described the neglect as excusable although not ideal.

In re Roberts, 618 B.R. 213 (Bankr. S.D. Ohio 2020)

The court recognized that *nunc pro tunc* employment approval orders are improper. It denied an application to employ special counsel to prosecute a chapter 13 debtor's personal injury claim on behalf of the debtor and estate nine months after the attorney began working on the matter. The court set forth the criteria for delayed approval of counsel's employment:

1. The application must be one which would have been approved originally by the Court,

measured by the requirements of 11 U.S.C. § 327 and Bankruptcy Rule 2014 at or before the time the services were actually commenced;

2. Evidence must appear in the record of the case which demonstrates that the Court and other interested parties had actual knowledge of the legal services being rendered by the applicant;

3. An application ... must be filed as soon as the matter is brought to the attention of the applicant;

4. The party for whom the work was performed approves the entry of the ... order;

5. The applicant has provided notice of the [late] application ... to creditors and parties in interest and has provided an opportunity for filing objections;

6. No creditor or party in interest offers reasonable objection to the entry of the ... order;

7. If the applicant is also seeking compensation at this point, the applicant must have provided notice of the application for fees to any parties in interest, thus providing an opportunity for objections as provided in 11 U.S.C. § 330;

8. A sustainable objection must not be filed to the applicants [sic] request for attorney fees;

9. No actual or potential prejudice will inure to the estate or other parties in interest;

10. The applicant's failure to seek pre-employment approval is satisfactorily explained;

11. The applicant exhibits no pattern of inattention or negligence in seeking judicial approval of employment of professionals, measured in some degree by the applicants [sic] experience in this field of law.

B. The Jay Alix Protocol: Still alive and well in Texas?

In re McDermott Int'l., Inc., 614 B.R. 244 (Bankr. S.D. Tex. 2020)

Chapter 11 debtors moved to employ AlixPartners as their financial advisor and its affiliate AP Services LLC to provide a chief transformation officer ("CRO") and support personnel under 11 U.S.C. §§105, 363(b). Both professionals had served in those capacities for several months prepetition. No party objected to the applications, but the U.S. Trustee contended the professionals were statutorily ineligible for employment under §327(a) and should be employed under §363(b), implementing the J. Alix Protocol. That is a protocol for approving a financial advisor as Chief Restructuring Officer or equivalent officer position in the debtor entity, and approving the financial advisory firm as CRO support staff, under Section 363(b) but with comprehensive disclosure requirements that took effect in 2003 and ultimately was added to the U.S. Trustee Program Policy and Practices Manual.

Instead, the court reasoned that the J. Alix Protocol has become a tool to avoid transparency and create inequity, avoiding court oversight and public scrutiny otherwise

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available through the fee application process. The court disagreed that the CRO became an insider due to his prepetition work, and thus disqualified under §327, with his status imputed to the financial advisor and affiliate. The contracts were between the debtor and the entities, and *per se* imputation of an individual's disinterestedness is inappropriate in any event. The entities were not creditors or equity owners or insiders. The court approved both applications under §327(a).

The U.S. Trustee Program Policies and Procedures Manual still provides:

> United States Trustees should comply with the Jay Alix Protocol, which allows for the retention of a crisis manager under 11 U.S.C. § 363, rather than 327. See Manual 3-8.1.1.[sic – 3-7.1.1]

https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download 302.8.3.1; 307.1.1.

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Faculty

Hon. Janet S. Baer is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on March 5, 2012. She also acts on a regular basis as the presiding judge in the Northern District of Illinois for naturalization ceremonies. Previously, Judge Baer was a restructuring lawyer for more than 25 years and was involved in some of the most significant chapter 11 bankruptcy cases in the country. The majority of her practice focused on the representation of large, publicly held debtors in both restructuring and chapter 11 matters, and she also represented companies in commercial litigation matters, including lender liability, fraud, breach of contract and breach of fiduciary duty. Prior to forming her own firm in 2009, Judge Baer was a partner at Kirkland & Ellis LLP, Winston & Strawn and Schwartz, Cooper, Greenberger & Krauss. She is a member of the ABI and NCBJ Boards of Directors, the CARE Advisory Board and the Chicago IWIRC Network Board, as well as several committees. She also is a frequent speaker for ABI, the ABA, the Chicago Bar Association, IWIRC and NCBJ, and she regularly acts as the presiding judge for the Northern District of Illinois in naturalization ceremonies. Judge Baer earned her B.A. from the University of Wisconsin - Madison and her J.D. from DePaul College of Law.

Susan M. Freeman is a partner with Lewis Roca Rothgerber Christie LLP, in Phoenix. In addition to her business bankruptcy law practice, she is an appellate lawyer and has briefed more than 300 civil appeals and argued over 100, many of which are bankruptcy appeals, including a U.S. Supreme Court appeal. Ms. Freeman is a member of the National Bankruptcy Conference and a Fellow and former director, vice president and secretary of the American College of Bankruptcy. She also is the chair of the American Bar Association's Business Bankruptcy Committee and previously chaired several subcommittees. Ms. Freeman is a life member of the American Law Institute and has been a certified specialist in bankruptcy law since 1985. She is a frequent author and lecturer, having authored Chapter 172 of *Norton Bankruptcy Law & Practice* on Professional Responsibility in Bankruptcy Cases and "Are DIP and Committee Counsel Fiduciaries for Their Clients' Constituents or the Bankruptcy Estate? What is a Fiduciary, Anyway?" 17 *Amer. Bankr. Inst. L. Rev.* 291 (Winter 2009). Ms. Freeman is a Fellow and former president of the American Academy of Appellate Lawyers, and co-authored the civil appeals chapter of the *Arizona Appellate Handbook*. She was co-counsel for several law professors on *amicus curiae* briefs in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), and *Central Virginia Community College v. Katz*, 126 S. Ct. 990, 1004 (2006), and she briefed and argued *Hall v. United States of America*, 132 S. Ct. 1882 (2012). Ms. Freeman has been listed since 1989 in *The Best Lawyers in America* for bankruptcy and commercial litigation/appeals, and in *Chambers USA*. She received her B.A. with distinction from Mount Holyoke College and her J.D. from New York University School of Law in 1975, where she was a Root-Tilden Scholar.

James T. Markus is a co-founder and member of Markus Williams Young & Hunsicker LLC in Denver, where he specializes in the representation of debtors, secured creditors, lessors, asset-purchasers, official committees and trustees in workouts, distressed asset sales, restructurings and chapter 11 bankruptcy proceedings. He is a former ABI president, as well as a former director, president and chairman of the American Board of Certification. He also is Board Certified by the American Board of Certification in Business Bankruptcy Law. Mr. Markus is a former president of the Rocky Mountain Chapter of the Turnaround Management Association, is a Fellow in the American Col-

lege of Bankruptcy and is admitted to the Colorado and Illinois State Bars. He also co-founded ABI's Rocky Mountain Bankruptcy Conference and has lectured before ABI, the American Rocky Mountain and Chicago Bar Associations, Equipment Leasing Association, Federal Deposit Insurance Corp., Savings and Community Lender's Association and the Turnaround Management Association. Mr. Markus is an *ex officio* member of ABI's Commission to Study the Reform of Chapter 11 and is rated AV-Preeminent by Martindale-Hubbell, and he has been listed as a "Top Lawyer in Denver Area," "Best Lawyers Lawyer of the Year – Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law," "Colorado Super Lawyer," "Denver Best Lawyer," "Denver Lawyer of the Year-Bankruptcy & Creditor Debtor Rights" and one of "America's Most Honored Professionals." He received his B.S.E. in chemical engineering with high honors from the University of Wisconsin-Madison and his J.D. from the University of Michigan School of Law.

Gregory M. Taube is a partner with Nelson Mullins Riley & Scarborough LLP in Atlanta, where he primarily represents lenders in litigation in state and federal courts, including bankruptcy courts. He is admitted to practice in Georgia and Alabama. Mr. Taube is an active member of ABI and serves as co-chair of its Ethics and Professional Compensation Committee. He also regularly writes and speaks on bankruptcy and creditors' rights issues, and currently serves as vice chair of the board of the Bankruptcy Section of the Atlanta Bar Association. Prior to joining Nelson Mullins, Mr. Taube clerked for U.S. District Judge Daniel H. Thomas of the Southern District of Alabama and U.S. Bankruptcy Judge James S. Sledge of the Northern District of Alabama. He received his B.A. *cum laude* in English in 1988 from the University of South Alabama, and his J.D. *summa cum laude* in 1993 from the University of Alabama School of Law, where he was admitted to the Order of the Coif, was on the Campbell Moot Court Board and Jessup Moot Court Team, and was editor of the *Journal of the Legal Profession*.