AMERICAN BANKRUPTCY INSTITUTE

Annual Spring Meeting

CONCURRENT SESSION

Ethical Concerns Relating to the Employment of Professionals

Hosted by the Young & New Members and Ethics Committees

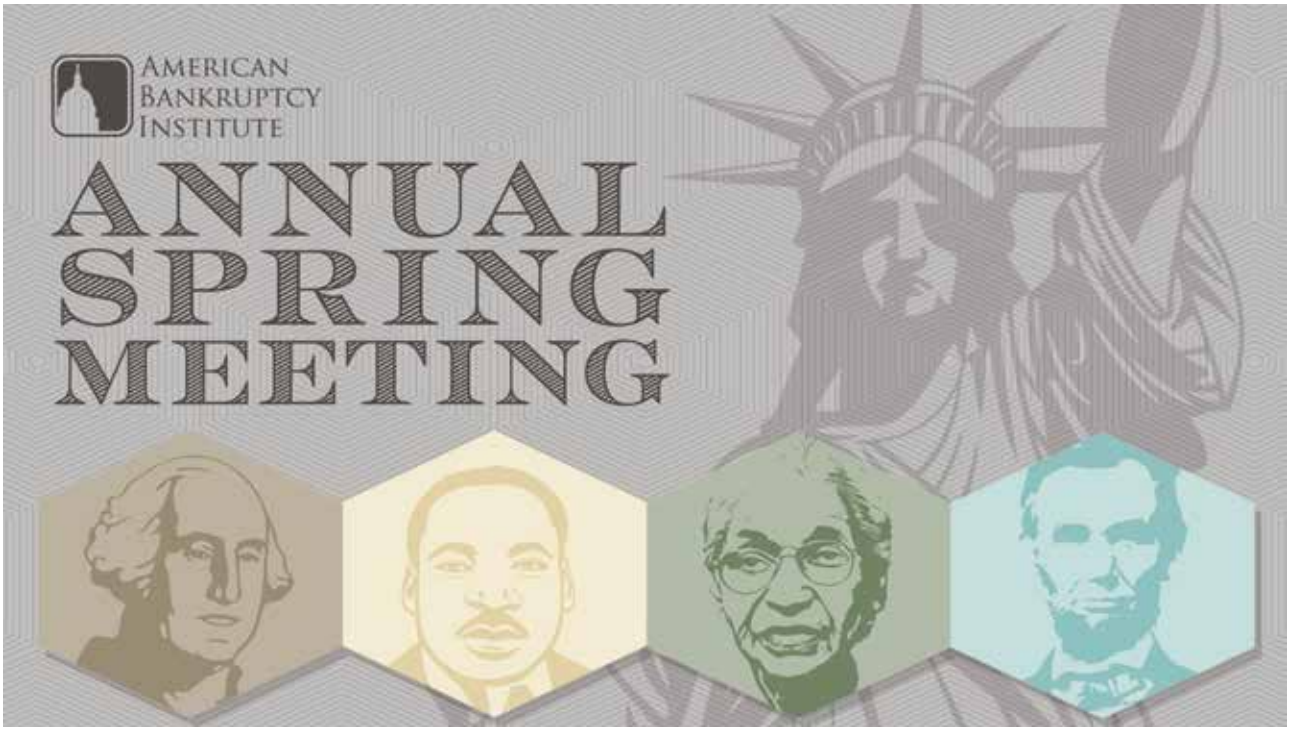
Hon. John T. Gregg
U.S. Bankruptcy Court (W.D. Mich.) | Grand Rapids

Mette H. Kurth
Pierson Ferdinand LLP | Wilmington, Del.

Peter R. Morrison
Squire Patton Boggs | Cleveland

Sarah Primrose
King & Spalding LLP | Atlanta

2025



Ethical Concerns Relating to the Employment of Professionals

April 26, 2025

Speakers

- Hon. John T. Gregg, U.S. Bankruptcy Court (W.D. Mich) – Grand Rapids, MI
- Mette H. Kurth, Pierson Ferdinand LLP; Wilmington, DE
- Peter Morrison, Squire Patton Boggs; Cleveland, OH
- Sarah Primrose, King & Spalding LLP; Atlanta, GA & Miami, FL

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Retention – Fee Sharing

A debt relief company/law firm which does not have an office in Michigan employs a lawyer who has their own law firm in Michigan, as a non-voting, non-equity partner/member of the debt relief company/law firm. The client signed an engagement letter with the debt relief company and paid a retainer to the debt relief company. The debt relief company prepared the petition and asked the Michigan lawyer to file the documents on the docket. As part of the Michigan lawyer's employment agreement, she agreed to be subject to the supervision of attorneys at the debt relief company—none of whom were licensed to practice in Michigan. The employment agreement also provided that the Michigan lawyer would be paid $300 for each chapter 7 case filed, $350 for each chapter 13 case filed, $350 for chapter 13 cases subsequently confirmed, 75% of any supplemental and/or additional fees awarded in a chapter 7 or chapter 13 case, and $700 for any personal referral of a client to the debt relief company who files a bankruptcy case.

The Michigan lawyer filed a Rule 2016 Statement which disclosed a flat fee of $3,810 for legal services and indicated that the Michigan law firm received $1,500 before the case was filed, leaving an unpaid balance of $2,310. The Rule 2016(b) Statement also states "[t]he undersigned has not shared or agreed to share, with any other person, other than with members of the undersigned's law firm or corporation, any compensation paid or to be paid ...." The Michigan lawyer signed the statement and did not mention the debt relief agency.

Despite this assertion on the 2016(b) Statement, Debtors' Statement of Financial Affairs states that the Debtors paid the debt relief agency, not the Michigan law firm, $1,835 for attorney's fees and the bankruptcy filing fee in August 2020. The debt relief agency asserts that it received this payment from the Debtors and, consequently, paid the Michigan lawyer for her work.

Question: Did the Michan lawyer violate Rule 2016 in filing its statement and engage in improper fee sharing with the debt relief agency?

- A. Yes
- B. No
- C. Maybe

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Retention – Prior Representation of Creditors

The Chapter 22 Club filed for Chapter 11 bankruptcy and sought to retain Last Resort Legal LLP as their counsel. ConsentSure Insurance, the Chapter 22 Club's liability insurer, objected to the retention, claiming that Last Resort Legal had a conflict of interest due to its prior representation of ConsentSure in reinsurance disputes. The Bankruptcy Court approved Last Resort Legal's retention, and ConsentSure appealed the decision.

Should the court approve Last Resort Legal's retention as counsel for the Chapter 22 Club?

A. Yes, because Last Resort Legal's prior representation of ConsentSure does not create an actual conflict of interest.

B. No, because Last Resort Legal's prior representation of ConsentSure creates a conflict of interest.

C. We need more information.

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Retention – Prior Representation of Creditors: Follow Up Question

What should the court's primary consideration be in considering Last Resort Legal's retention?

A. The firm's reputation and size.

B. The effectiveness of the ethics screen and the lack of related matters in the bankruptcy case.

C. The firm's previous success in similar cases.

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Retention – Prior Representation of Creditors Follow Up Question

What measures could Last Resort Legal take to address the potential conflict?

- A. Ignored the potential conflict and proceeded with representation.
- B. Implemented an ethics screen between the restructuring and reinsurance teams.
- C. Disclosed all confidential information to both teams.

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Retention Disinterestedness: Scenario 1

Filing Company, a file cabinet manufacturer hit with the double whammy of file digitalization and a reduction in commercial offices space post-pandemic, seeks to hire Conflix Freese Trustus LLP to represent it in its chapter 11 filing. Filing Company's proposed counsel is concurrently representing one of its secured creditors in unrelated matters. This creditor held approximately 79% of the pre-petition debt, stemming from a transaction executed less than a year before the bankruptcy filing. The official committee of unsecured creditors raised concerns regarding the law firm's representation of Filing Company as the transaction with the secured creditor was likely to become a central issue — the resolution of which could result in millions of dollars of additional recovery to unsecured creditors. The committee further submitted that the law firm's retention was prohibited under § 327(a) and requested that the bankruptcy limit its representation to matters not involving the creditor. The U.S. Trustee agreed with the committee and requested that the court deny the law firm's representation in its entirety. Conflix Freese Trustus LLP maintains that its retention should be approved because potential conflicts were waived in the engagement letters and work for the secured creditor has a minimal economic impact on this mega firm. Who is right?

A. Conflix Freese Trustus LLP since Filing Company has the unfettered right to counsel of its choosing.

B. Conflix Freese Trustus LLP because the future conflict was waived by sophisticated parties and the work for the secured creditor was minimal in terms of economic impact.

C. The Committee in arguing that the representation should be limited to matters not involving the creditor.

D. The U.S. Trustee because Conflix Free Trustus LLP cannot be disinterested because of its representation of the secured creditor and thus should not be approved to represent Filing Company.

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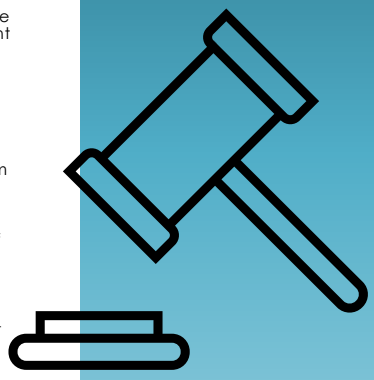
Retention – The Unauthorized Practice of Law



A Chicago based law firm entered "partnership agreements" with local Alabama lawyers to file the bankruptcy case and attend the Section 341 meeting of creditors. The Chicago firm labels these local Alabama lawyers as "partners" of the Chicago law firm and lists them as such on the firm website. These Alabama attorneys have their own separate law practices, utilize a different CM/ECF case filing password for their own practices, and a separate one for cases filed on behalf of the Chicago law firm. The local attorneys sign a limited partnership agreement that provides they have no right to participate in the management of the Chicago law firm and have no ownership interest or voting rights in that firm. The limited partnership agreement expressly contemplates that personnel in the Chicago office will be practicing law in Alabama. The partnership agreement provides, in part, as follows:

Firm shall be the initial point of contact for all new Client calls, and shall (i) schedule and confirm retention appointment, (ii) prepare intake forms, disclaimers and agreements for Clients to sign at a retention meeting, (iii) field all Client calls and creditor/opposing counsel calls, (iv) collect/process all Client payments; including fee payments and costs to be paid out of each Client's trust account, (v) unless otherwise agreed with Partner in writing, prepare initial drafts of all legal documents to be filed with local courts in Partner's jurisdiction, subject to Partner's review, comment, revision and final approval, including bankruptcy petitions, schedules and forms, state court lawsuit pleadings and discovery documents/requests/ answers, and any and all other documents related in any way to representation of a Client in any of Firm's legal matters. Client call shall be forwarded to Partner in the event that any such Client require state-specific legal advice or Client's inquiry requires speaking directly with Partner.

- **Question:** Is the Chicago firm engaged in the unauthorized practice of law in Alabama?
- A. Yes
- B. No
- C. Maybe

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Retention – Prior Representations Deja Vous

The trustee for Team Chaos LLP filed an application to retain Stayner, Cramdown, and Payne LLP as general bankruptcy counsel. Certain defendants objected to the retention, claiming that Stayner, Cramdown, and Payne's prior representation of Dire Straits Shipping, Inc., a creditor of the debtor, created a conflict of interest. Dire Straits Shipping, Inc. was a former client of Stayner, Cramdown, and Payne, and the firm had represented Dire Straits in various unrelated matters before the bankruptcy case.

Should the court approve Stayner, Cramdown, and Payne's retention as general bankruptcy counsel for the trustee?

A. Yes, because Stayner, Cramdown, and Payne's prior representation of Dire Straits does not create an actual conflict of interest.

B. No, because Stayner, Cramdown, and Payne's prior representation of Dire Straits creates a conflict of interest.

C. We need more information.

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Retention Disinterestedness: Scenario 2

Dis-Dress Company, a financially distressed clothing retailer, seeks to hire bankruptcy help from the law firm of Canwe Dothis & Howe LLP. The law firm represented (1) Dis-Dress Company's directors and officers in shareholder and derivative litigation, and (2) a shareholder that owned 43% of the debtors' common stock in matters unrelated to the chapter 11 case. The law firm obtained waivers from both the debtors and the shareholder consenting to the representation of the other party. The U.S. Trustee objected to the law firm's retention, arguing that the shareholder's influence over the debtors' decision-making, coupled with the law firm's financial ties to the shareholder (representing 0.8% of the law firm's billings and 1.4% of collections, totaling nearly $14 million in revenue), posed an insurmountable conflict. Canwe Dothis & Howe LLP is convinced that the representation is proper and cites 327(c) in support. Who is right?

A. Canwe Dothis & Howe LLP since Dis-Dress Company has the right to counsel of its choosing and the law firm secured waivers.

B. Canwe Dothis & Howe LLP because of 327(c) which states that "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest."

C. The U.S. Trustee because there was an actual conflict of interest.

D. None of the above.

Retention – Actual Conflict of Interest

An individual debtor, Ty Atkinson and his ex-wife were engaged in divorce litigation for years prior to the Debtor's bankruptcy filing. Mr. Atkinson was originally represented in his divorce by Thompson Mobley and Mitchell, LLP ("TMM"). Prior to his bankruptcy, the Debtor and his ex-wife agreed on a property settlement, which included a future plan to sell the Debtor's shares in Atk Corp., the company he owns 50/50 with his ex-wife. The final decree was entered in the divorce and TMM concluded its engagement on divorce matters for Mr. Atkinson.

Thereafter, the Debtor formally used the general counsel of ATK Corp. as his personal counsel. During this time, the Debtor and his ex-wife reached an agreement to sell the Debtor's interest in Atk Corp. to a third party. The transaction dragged on without closing and Mr. Atkinson and his wife ended up in state court to enforce the sale of his share in ATK Corp. TMM represented the Debtor in this litigation and also resumed representing him in his divorce.

Mr. Atkinson then filed for bankruptcy. Through the petition date, Mr. Atkinson had paid TMM $25,000 for divorce related matters and has a prepetition claim for $100,000. In addition to representing the Debtor, TMM has also represented ATK Corp. in labor and employment matters. ATK Corp is also a creditor of the Debtor.

The Debtor now seeks to employ TMM as special counsel under 11 U.S.C. § 327(e) to advise the Debtor and bankruptcy counsel on matters related to the Debtors business affairs. The United States Trustee has objected to this retention on the basis that TMM has a conflict of interest. Neither TMM nor the Debtors disclosed TMM's backstory and relationships with the parties in the initial retention application. Rather, it was disclosed upon objection by the US Trustee and other parties in interest.

Question: Which of the following is true as it relates to TMM's retention?

A. The Court may not approve the TMM retention because TMM is not disinterested.
B. The Court should permit the TMM retention because TMM does not have a direct conflict of interest.
C. The Court may not approve the TMM retention because TMM's disclosure was not adequate.
D. Both A and C.

Retention – Outstanding Prepetition Fees

Shaky Ground Restaurant Chain has reached out to the Second Time Firm to represent it in a Chapter 11 filing. The Second Time Firm previously represented Shaky Ground in a Chapter 11 filing that didn't move forward. Molly Secondguesser, an associate at Second Time, has uestioned whether the firm can represent Shaky Ground again. Rod Knowitall, a partner at Second Time, doesn't see any issue and has accepted the representation. The problem arises because the Second Time Firm is still owed fees from the first filing, thus making the firm a creditor.

Who is right?

A. Molly Secondguesser—the firm can't represent the same client twice!

B. Rod Knowitall—the client has the absolute right to hire counsel of its choosing.

C. We need more information.

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Retention – Outstanding Prepetition Fees: Follow Up Question

What should the Second Time Firm do to resolve the conflict?

- Continue representing Shaky Ground without any changes.
- Waive the pre-petition claim for unpaid fees.
- Seek court approval without disclosing the unpaid fees.
- Obtain payment from non-debtor insiders and seek employment under Section 327(e).

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Retention: Disclosure Issues

Savin Time & Moolah LLP utilizes a boilerplate disclosure of connections when filing retention applications. Savin Time & Moolah LLP reasons that the boilerplate covers all situations and is economical for the client since it is quickly put together and efficient. Does this work?

A. Yes! It is the most efficient way for the firm's retention to get approved so that the firm can focus its attention to substantive client matters.

B. No. Disclosures need to be thorough and blanket boilerplate language is not sufficient.

C. We need more information.

D. Yes, if it is a small case.

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Faculty

Hon. John T. Gregg is a U.S. Bankruptcy Judge for the Western District of Michigan in Grand Rapids, appointed on July 17, 2014. He currently serves on the Bankruptcy Appellate Panel for the Sixth Circuit. Previously, Judge Gregg was a partner with the law firm of Barnes & Thornburg LLP, where he focused on corporate restructuring, bankruptcy and other insolvency matters. Judge Gregg served as chair of the education committee of the National Conference of Bankruptcy Judges for 2022, serves on ABI's Board of Directors, and is a Fellow of the American College of Bankruptcy, and he is a member of the American Law Institute. He is a frequent writer and speaker on bankruptcy and other commercial issues, and he has written and co-edited numerous secondary sources, including *Collier Guide to Chapter 11*, published by LexisNexis; *Strategies for Secured Creditors in Workouts and Foreclosures*, published by ALI-ABA; *Issues for Suppliers and Customers of Financially Troubled Auto Suppliers*, published by ABI; *Michigan Security Interests in Personal Property*, published by the Institute of Continuing Legal Education; *Handling Consumer and Small Business Bankruptcies in Michigan*, published by the Institute of Continuing Legal Education; *Interrupted! Understanding Bankruptcy's Effects on Manufacturing Supply Chains*, published by ABI; and *Receiverships in Michigan*, published by the Institute of Continuing Legal Education. Judge Gregg received his B.A. in 1996 from the University of Michigan and his J.D. in 2002 from DePaul University College of Law.

Mette H. Kurth is a partner with Pierson Ferdinand LLP in Wilmington, Del., and chairs its Bankruptcy Practice. She focuses her practice on bankruptcy litigation, distressed debt and restructuring, corporate governance, ethics and board advising, creditor and investor representations, debtor/company representations, distressed mergers and acquisitions, and financial sponsor transactions. Named one of the leading bankruptcy and restructuring attorneys in California and Delaware by *Chambers USA*, Ms. Kurth specializes in confrontational negotiations and challenging situations in her client representations involving sophisticated workouts, restructurings, distressed M&A transactions and bankruptcy matters. She completed the ABI/St. John's University School of Law Bankruptcy Mediation Training Program in 2018 and now also serves as a mediator. Ms. Kurth previously practiced at various preeminent bankruptcy boutiques and national law firms. Before practicing law, she was a bank liquidation specialist with the Federal Deposit Insurance Corporation. Ms. Kurth regularly speaks for industry groups and client programs. She has been deeply involved with the national Turnaround Management Association, having served on its national board of directors and executive committee, as vice president of both Conferences and Communications, and in numerous other national and local leadership positions. She also has served in leadership roles with ABI, the Financial Lawyers Conference, the California Bankruptcy Forum and Los Angeles Bankruptcy Forum, and the International Women's Insolvency and Restructuring Conference (IWIRC). Ms. Kurth received her B.A. *cum laude* from Trinity University in 1990 and her J.D. from the University of California, Los Angeles in 1996.

Peter R. Morrison is a partner with Squire Patton Boggs in Cleveland and has a broad and versatile corporate, litigation and finance practice built on extensive experience representing and counseling clients in the corporate insolvency, distressed lending and investing, restructuring and bankruptcy contexts, including in complex chapter 11 cases nationwide. His clients include debtors, creditors'

committees, and secured and unsecured creditors in reorganizations and liquidations. He also represents receivers and secured creditors in receiverships and foreclosure proceedings. Ms. Morrison has significant bankruptcy litigation experience focused on dischargeability contests, declaratory judgment actions, director and officer liability suits, and the prosecution and defense of avoidance actions. His insolvency and restructuring practice is bolstered by his banking and debt-finance experience, which has included the negotiation, documentation and management of secured and unsecured loan transactions, including securitizations, syndicated credit facilities, unitranche facilities, split collateral pool transactions and bridge financings. Mr. Morrison received his B.A. in 2004 from the University of Wisconsin - Madison and his J.D. *cum laude* in 2009 from Case Western Reserve University, where he was a member of the Order of the Barristers and executive notes editor of the *Health Matrix - Journal of Law-Medicine*.

Sarah Primrose is a senior associate with King & Spalding LLP in Atlanta and represents debtors, lenders, investors, secured and unsecured creditors, and other parties in interest in a broad range of restructuring and special-situations matters, including high-profile chapter 11 cases, out-of-court restructurings and bankruptcy-related acquisitions. In addition, she represents litigants in contested matters, adversary proceedings, federal court appeals, and other complex bankruptcy and insolvency litigation. Ms. Primrose's practice spans a number of industries, including energy, health care, technology, manufacturing, retail, real estate, restaurant and hospitality. Prior to joining King & Spalding, she clerked for Hon. James E. Graves, Jr. of the U.S. Court of Appeals for the Fifth Circuit and Chief Judge Paul G. Hyman, Jr. of the U.S. Bankruptcy Court for the Southern District of Florida. Ms. Primrose is a longtime member of the International Women's Insolvency & Restructuring Confederation's Georgia Network (for which serves as a director at large), the Turnaround Management Association's Atlanta Chapter and ABI, for which she co-chairs its Ethics and Professional Compensation Committee. A regular speaker and prolific author, her work has been published in numerous industry journals, law reviews and other publications, and she is the edited of *Best of ABI 2022: The Year in Business Bankruptcy*. Ms. Primrose is an ABI 2022 "40 Under 40" honoree, and in 2020, 2021 and 2022, she was named as one of Yahoo! Finance's HERoes — 100 Future Leaders. She was also named a Rising Star by *Private Debt Investor* in 2022 and was named to *Georgia Trend Magazine*'s "40 Under 40" list in 2020. Ms. Primrose received her B.A. with honors and Phi Beta Kappa from Pennsylvania State University, and her J.D. *summa cum laude* from Michigan State University.