AMERICAN BANKRUPTCY INSTITUTE

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Ethics Jeopardy

Ira L. Herman, Moderator
Blank Rome LLP; New York

Prof. Nancy B. Rapoport
University of Nevada William S. Boyd School of Law; Las Vegas

Claire Ann Richman
Steinhilber Swanson LLP; Madison, Wis.

Hon. Eugene R. Wedoff (ret.)
Oak Park, Ill.

CONCURRENT SESSION

2019

Who Is the Client (And Related Ethics and Professionalism Issues)?

Prepared By: Ira L. Herman, Esq.

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I. Introduction

Bankruptcy law practitioners are subject to the same ethical rules as non-bankruptcy law practitioners.

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I. Introduction

General Applicability

- As the threshold matter, **all attorneys are bound by the ethical code or rules in force in the jurisdiction where they practice law**, regardless of the type of law they practice.
- For example, **counsel may *never* comingle his or her own funds with client funds**.*

* (See ***In re Jiminez***)

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I. Introduction

"Wait, those weren't lies. That was spin!"

Ethical considerations for an attorney representing a debtor or debtor in possession, also **derive from the client's statutory responsibilities under Chapter 11**.

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I. Introduction - Competence

- **Rule 1.1 (a) of the Rules of Professional Conduct provides:**

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

- ***Stay within your area of competence!***

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I. Introduction - Diligence

- Rule 1.3 of the Rules of Professional Conduct provides:

"A lawyer shall act with reasonable diligence and promptness in representing a client."

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I. Introduction - Diligence

Complaints alleging neglect and lack of diligence can be effectively minimized by implementing the following helpful tips:

- Monitor your caseload to avoid an overload.
- From the outset, develop a reasonable timeline to complete the representation.
- Avoid procrastination! Watch for the early warning signs of 'procrastination' and confront them head on.
- Touch every file in your office periodically.
- Delegate to staff those support efforts that will assist you.

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II. Ethical Obligations – Retention of Counsel

- When does the attorney/client **relationship begin**?
- The use of **engagement letters** in this regard—

"And if you don't have an attorney, we've got millions of them."

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II. Ethical Obligations – Retention of Counsel

CONFIRM YOUR FEE ARRANGEMENT:

- **Rule 1.5 (b) of the Rules of Professional Conduct provides:**

"The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

- **Money issues are often the root of a disciplinary complaint.**

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II. Ethical Obligations – Retention

Be **very** aware of the rules concerning the improper **solicitation** of clients.

"Are these just guidelines, or are they actual new policies?"

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II. Ethical Obligations – Retention

- **HANDLING FEES AND BILLING:**
- It is **not permissible** to provide for a *non- refundable fee* in any fee agreement with clients. The Rules of Professional Conduct and the Supreme Court jurisprudence make it abundantly clear what lawyers are permitted to charge, collect and/or retain fees only if they are earned.
- **Provisions in a fee agreement which provide for a so-called 'non-refundable fee' are not only unenforceable, but are violations of the Rules.**

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II. Ethical Obligations – Retention

- **Rule 1.5 of the Rules of Professional Conduct sets out the types of fee arrangements which are ethically permissible, including the following:**
  - **Retainers**
  - **Fixed Fee or Minimum Fee**
  - **Advance Deposits For Future Fees/Costs**
  - **Contingency Fee Agreements**

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II. Ethical Obligations – Retention of Counsel

When does the attorney/ client **relationship end**?

- The termination of the attorney-client relationship can occur because the subject matter of the representation has come to an end, or because before its completion the attorney or client decides to cease the relationship. In both instances, certain duties exist and extend beyond the final date of active engagement

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II. Ethical Obligations – Retention of Counsel

- **Ask**:
  - What are my continuing **obligations** to the client?
  - Do I have to defend adversary proceedings or respond to motion practice (a "Contested Matter")?
- Consider the use of **engagement letters** in this regard to set boundaries—

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II. Ethical Obligations – Retention of Counsel

- Rule 1.16 of the Rules of Professional Conduct speaks to the ethical duties associated with declining or terminating representation of a client.
- Rule 1.16 lists reasons available to the lawyer to terminate the representation of a client.
- The key is to avoid a disciplinary complaint in the process.

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II. Ethical Obligations – Retention of Counsel

Charles Barsotti, *The New Yorker Book of Lawyer Cartoons*

- Counsel is **obligated to provide legal services** when retained.
- This obligation **cannot be delegated** to a non-attorney.*

*(See ***In re Santiago***)

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II. Ethical Obligations – Retention of Counsel

Non-bankruptcy **"conflict of interest"** rules are premised on the litigation model where parties are pitted **directly** against each other.

"Are you ready for a conflict of interest?"

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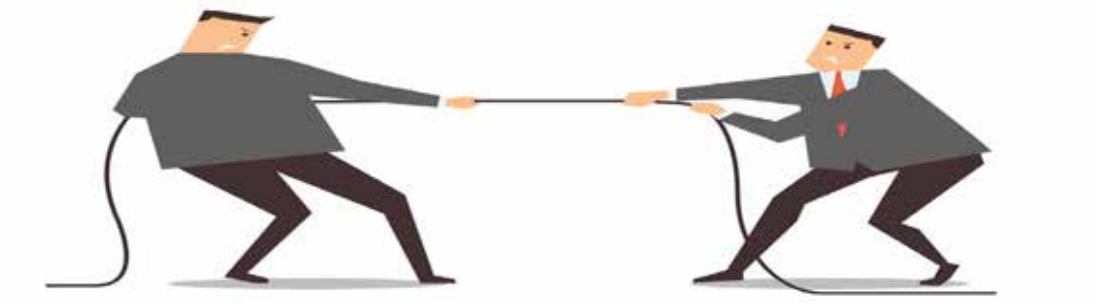
II. Ethical Obligations – Retention of Counsel

- This may not be so in a multiparty bankruptcy case under Chapter 7, 9, 11, or 15.
- The very definition of "conflict" is different in this multiparty context, as the interests of different parties are not always pitted **directly** against each other or they even may be aligned.



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II. Ethical Obligations – Retention of Counsel

- The client **is** important!
- Basic concepts applicable to bankruptcy counsel – such as the duty of loyalty, independent judgment, and even who **the** client is – are drawn from the applicable non-bankruptcy law sources.

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II. Ethical Obligations – Retention of Counsel

You work for THE CLIENT

•Rule 1.4 of the Rules of Professional Conduct provides:

"A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;

Reasonably consult with the client about the means by which the client's objectives are to be accomplished;

Keep the client reasonably informed about the status of the matter;

Promptly comply with reasonable requests for information; and

Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the RPC or other law."

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II. Ethical Obligations – Retention of Counsel

- **The alleged failure by attorneys to communicate with their client is the single most frequent complaint filed against lawyers.**

Q: How many lawyers does it take to change a light bulb?
A: None, they'd rather keep their client in the dark.

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III. Conflicts

- Under Rules 1.7, 1.8, 1.9 and 1.10 of the Rules of Professional Conduct, a lawyer has an obligation to avoid conflicts of interest.
- It is **NEVER** permissible to represent opposing sides in the same litigation or legal matter;
- Likewise it is not permissible to take on a representation against a current client, even when the matters are distinct except, where there exists a 'waivable conflict' and the waiver is obtained in writing after securing informed consent.

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III. Conflicts

- Conflicts Between Two or More Current Clients (Model Rule 1.7B).
- Business and other Conflicts

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III. Conflicts

C. Imputed Disqualification

- The Model Rules provide that **where an individual attorney is disqualified, the entire firm also is disqualified**, based upon the notion of shared confidences.
- All is not lost!
  - as the expansive reading of the Model Rule would be burdensome for attorneys at large firms, many courts have treated the rules as creating a rebuttable presumption.
- One way to rebut the presumption is by **using screening devices** to protect client confidences within a firm.

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III. Conflicts

D. Consents and Waivers

- Do it Right!
- One formulation:
  - disclose risks "in such detail that the person can understand the reasons why it might be reasonable to withhold consent"

"I'd like to level with you, Mrs. Ravenscroft, but there's no legal precedent."

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IV. Bankruptcy Code Retention Requirements – Disinterestedness

"Ethically I'm probably at, or perhaps just a bit below, the national average."

A. Introduction

- Section 327(a) of the Bankruptcy Code requires that a professional retained by the debtor may not hold interests, or represent other parties with interests, that are "adverse" to the estate.

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IV. Bankruptcy Code Retention Requirements – Disinterestedness

- In large cases, big firms -- with the capacity to handle such cases – cannot as a general rule meet the section 327(a) requirement. This is the reason for the use of conflicts counsel (and why the Fee Guidelines allow for conflicts counsel)
- The trick is that conflicts on big things shouldn't be "solved" with conflicts counsel--only discrete things
- Orders authorizing employment for main and conflicts counsel should CLEARLY spell out who is doing what

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IV. Bankruptcy Code Requirements Retention – Disinterestedness

"Sure, if you read it that way it says bankruptcy court, but you have to read between the lines like this in order to see our enormous eventual profits."

While creditors and debtors may be ***adverse***, as they have differing economic interests regarding a debt obligation, in a bankruptcy case, their interests may be aligned – **the successful rehabilitation of the debtor**.

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IV. Bankruptcy Code Requirements – Disinterestedness

- Whether counsel's ***connections*** to a creditor give rise to sufficient ***adverseness*** to disqualify the professional from representing a debtor is fact specific.

Bankruptcy Code Requirements

- As analysis in this area of bankruptcy law is highly fact-specific, there exist many hundreds of reported decisions on the issue.

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IV. Bankruptcy Code Requirements – Disinterestedness

- The Bankruptcy Code generally requires professionals to be "disinterested," as set forth in Section 101(14) of the Bankruptcy Code.

Groening, Matt, James L. Brooks, Sam Simon, Alf Clausen, Dan Castellaneta, Julie Kavner, Nancy Cartwright, Yeardley Smith, Hank Azaria, and Harry Shearer. 2007. *The Simpsons*.

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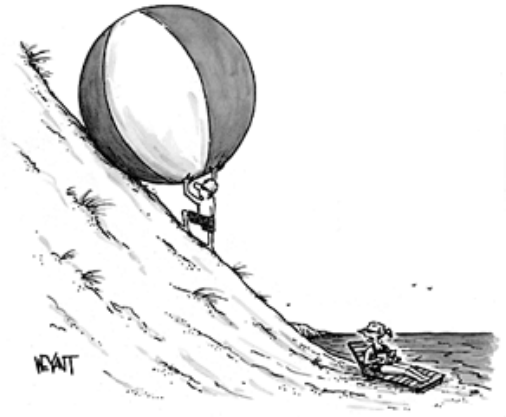
IV. Bankruptcy Code Requirements – Disinterestedness

Counsel's compliance with the **disinterestedness** requirement, under Section 327(a) of the Bankruptcy Code, applies at the time of retention and throughout the case.



"Can't you ever relax?"

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IV. Bankruptcy Code Requirements – Disinterestedness

Does materiality matter?

Maybe.

- some courts say **no!** – see ***Jore***.
- other courts are more lenient – adverse interest must be sufficiently material to create **an "unacceptable risk" of conflicting loyalty**.

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IV. Bankruptcy Code Requirements – Disinterestedness

Read literally together with Section 328(a), Section 101(14) would disqualify any professional from employment by the debtor if the professional –

1. was a creditor, equity security holder, or insider of the debtor;
2. was a director, officer or employee of the debtor within two years prior to the petition date;
3. has an interest materially adverse to the estate "for any other reason."

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IV. Bankruptcy Code Requirements – Disinterestedness

- In an attempt to create a bright line for materiality – some courts have drawn **a distinction between "actual" and "potential" conflicts**.
- Other courts have rejected the actual/potential distinction.
- The **actual/potential debate** appears to be an attempt to distinguish between conflicts contingent on future events **having a reasonable likelihood of occurring, on one hand, and those that merely are "hypothetical," "theoretical," or "speculative**."

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IV. Bankruptcy Code Requirements – Disinterestedness

- In the words of the First Circuit:

  "Horrible imaginings alone cannot be allowed to carry the day. Not every conceivable conflict must result in sending counsel away to lick his wounds."

- Nonetheless, it has been suggested that **even purely hypothetical conflicts can be disabling if there is a "reasonable perception" that the professional subject to judicial scrutiny on the issue is not disinterested**.

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IV. Bankruptcy Code Requirements – Disinterestedness: The Jay Alix Protocol

- If you're a CRO, you can serve only in that capacity (as CRO) and can't work in other capacities.
- Same types of disclosures as if you were being hired under sec. 327.
- Limitations on investing in the debtor (3 years after the conclusion of the engagement).
- As an officer of the company, you have specific fiduciary duties.

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IV. Bankruptcy Code Requirements – Disinterestness: The Jay Alix Protocol

- CROs/FAs
- How has the FA role evolved?
- Are people still being hired as CROs, or have FAs taken over that role?
- What market forces are at work?
- How have the courts and positions taken by the OUST influenced the evolution of the CRO and FA roles?

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IV. Bankruptcy Code Requirements – Waivers

C. Conflict Waivers and Consents in Bankruptcy Cases

- A split of authority exists as to whether a client's informed consent within the meaning of the Model Code or Model Rules can operate to cure conflicts of interest in bankruptcy cases.

"My fees are quite high, and yet you say you have little money. I think I'm seeing a conflict of interest here."

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IV. Bankruptcy Code Requirements – Waivers

Waivers

- Market practice regarding advance conflict waivers of adverse representation in unrelated litigation and bankruptcy proceedings.
- Effectiveness of "advance waivers."
- *Sheppard, Mullin v. J-M.*
- *In re Relativity Media LLC*
- Conflict waivers and disinterestedness.
- Practical considerations.
- Disclosure.
- Likelihood of objection to retention or disqualification motion.
- Ethical walls.
- Conflicts counsel.

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IV. Bankruptcy Code Requirements – Special Counsel

- Section 327(e) allows a debtor to retain special counsel not disinterested in all respects.
- Section 1107(b) allows a debtor to retain **a professional who may have represented the debtor prior to the filing of the chapter 11 case, as long as they are otherwise disinterested**.

"Would everyone check to see they have an attorney? I seem to have ended up with two."

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V. Bankruptcy Code Requirements – Disclosure of Connections

A professional seeking to be retained **under Section 327** of the Bankruptcy Code is required to disclose "connections" with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed by the Office of the United States Trustee. **Bankruptcy Rule 2014(a)**.

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V. Bankruptcy Code Requirements – Disclosure of Connections

- Rule 2014(a) means **full disclosure** of all facts bearing upon eligibility to be employed.
- Rule 2014(a) **does not permit professionals to make a unilateral determination** regarding the relevance of particular connections.
- Rule 2014(a) **does not permit professionals to make a unilateral determination** that certain connections to a debtor are too insignificant to disclose.

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V. Bankruptcy Code Requirements – Disclosure of Connections

- Professionals have **a continuing duty** to satisfy the disclosure requirements, and must update their disclosure as new matters arise concerning the disinterestedness of counsel.

- **Harsh Penalties** for Failure to Disclose
  - See **SonicBlue**, **Jore**, **Leslie Fay**,and others.

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V. Bankruptcy Code Requirements – Disclosure of Connections

- The harsh result of **Jore** should not be ignored, although the court reached its decision after concluding that it was bound by the strict disclosure standards articulated by the Ninth Circuit.
- ". . . a violation is enough to disqualify a professional, deny compensation and order disgorgement of fees regardless of whether the undisclosed connections were materially adverse to the estate or **de minimus**."
- Fortunately, the Ninth Circuit rule requiring disclosure of all connections "no matter how **de minimus**," has not been adopted elsewhere.

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V. Bankruptcy Code Requirements – Disclosure of Connections

SonicBlue and the Failure to Disclose

- Counsel represented SonicBlue from filing in 2003 until 2007, when it came to light that the firm had failed to disclose a pre-bankruptcy letter to three hedge funds stating that the law firm would repay the hedge funds in full, should SonicBlue file for bankruptcy relief.
- Attorneys for Debtor's Counsel later described the letter as a "scrivener's error."

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V. Bankruptcy Code Requirements – Disclosure of Connections

SonicBlue's estate sued bankruptcy counsel for malpractice and breach of fiduciary duty, **demanding**

a) the return $4.2 million in fees, and
b) $11 million in damages.
c) Counsel agreed to **pay $7.6 million and forgo the $2.4 million** in outstanding fees.

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V. Bankruptcy Code Requirements – Disclosure of Connections: Alix v. McKinsey – Case Study

- In May of 2018, **Jay Alix (individually) filed suit in the USDC SDNY against McKinsey, et. al.,** alleging numerous knowing and fraudulent violations of various bankruptcy and non-bankruptcy criminal statutes bankruptcy civil statutes, and bankruptcy rules to support an alleged pattern of racketeering activity and various RICO Enterprises

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V. Bankruptcy Code Requirements – Disclosure of Connections: Alix v. McKinsey – Case Study

- In addition to the RICO claims, there are **allegations of breach of contract, promissory estoppel, and tortious interference with Jay Alix's business expectancy.** The suit seeks compensation for actual damages caused to Alix as a McKinsey competitor that allegedly was not hired (instead of McKinsey) and an injunction prohibiting future similar allegedly illegal practices.

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V. Bankruptcy Code Requirements – Disclosure of Connections: Alix v. McKinsey – Case Study

- **McKinsey** has filed motions to dismiss the complaint alleging among other things that Jay Alix as a business competitor has not been directly injured by the alleged disclosures, that **Jay Alix's** allegedly flawed interpretation of the bankruptcy rules does not support either their alleged inaccuracy or serve as a predicate act for the sweeping racketeering allegations in the complaint and there has been insufficient allegations concerning causation of the alleged damages to Alix Partners.
- In an August 18, 2019 order, Judge Furman dismissed Alix's RICO claims and did not give Alix the opportunity to amend. The Judge then called for additional briefing on whether he still has jurisdiction over Alix's state law claims for breach of contract and tortious interference, among others.

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V. Bankruptcy Code Requirements – Disclosure of Connections: Alix v. McKinsey – Case Study

- In an August 18, 2019 Order, Judge Furman dismissed Alix's RICO claims and did not give Alix the opportunity to amend. The Judge then called for additional briefing on whether he still has jurisdiction over Alix's state law claims for breach of contract and tortious interference, among others.

- The litigation is ongoing, and the disposition of the non-RICO claims is still **TBD.**

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V. Bankruptcy Code Requirements – Disclosure of Connections: UST v. McKinsey – Case Study

- **The U.S. Trustee separately sought to reopen the ANR bankruptcy case** after Jay Alix had filed a motion to reopen. **Alix also objected to McKinsey's pending application in Westmoreland Coal,** based on allegedly insufficient disclosures.

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V. Bankruptcy Code Requirements – Disclosure of Connections: UST v. McKinsey – Case Study

- The ***ANR*** and ***Westmoreland*** bankruptcy judges ordered the parties to mediation before Bankruptcy Judge Marvin Isgar.
- The U.S. Trustee and McKinsey reached a settlement as to all McKinsey-related bankruptcy cases, **in exchange for $15 million (payable $5 million each in *ANR, Westmoreland,* and *Sun Edison*), and the UST released all claims related to inadequate disclosures** except for potential future claims that show that McKinsey is **not "disinterested."**
- Alix did not settle and continues to pursue discovery and other types of relief in its litigation.

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VI. Committee Counsel Issues – Positional Conflicts

- In ***In re Caldor, Inc.***, **193 B.R. 165 (Bankr. S.D.N.Y. 1996),** Bankruptcy Judge Garrity faced the issue of retaining a law firm to represent a creditors' committee, where proposed counsel already was representing the creditors' committee of one of the debtor's prime competitors.

- Although Judge Garrity found the two debtors to be competitors, he focused his analysis on the committees to be represented. By **finding that the two committees were not likely to become "rival claimants,"** the Judge refused to disqualify the firm from representing the second committee.

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VI. Committee Counsel Issues – Who Is the Client?

> Akin's performance of services on behalf of AIG and Post in furtherance of their self-interests and its lack of objectivity and disinterestedness in representing the Committee and the Committee members, exacerbated the tempest that raged in these chapter 11 cases. Such services were in disregard and not in the best interest of the Committee's constituency – all of the general unsecured creditors of FiberMark.

– Harvey R. Miller, as Examiner

In re FiberMark, Inc, et al.

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VII. Committee Counsel Retention Issues – *Universal Building Products*: The issues Raised – A Case Study

Addresses many issues:

- **Standing** of debtor to object to committee retention
- Violation of rules of Prof. Resp. as grounds for **denial of a motion to retain counsel**
- The **improper solicitation** of clients (and unavailing First Amendment defense)
- **Adverse interest v. disinterestedness**
- **Failure to disclose**

***2010 WL 4642046*;**
2010 Bankr. LEXIS 3828 (Bankr. D. Del. 2010)

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VII. Committee Counsel Retention Issues – *Universal Building Products*: The Facts – A Case Study

- Dr. Lui had served as translator for Asian creditors in other cases in which **committee counsel** had been involved
- **The attorneys involved** (from two different firms) had extensive contact with Dr. Lui while he was soliciting creditors to have their proxies on a creditors' committee
- **Counsel knew** Dr. Lui was making cold call telephone solicitations and they helped him do so;
- **Counsel**, in the first instance, **failed to make disclosure** regarding the solicitation process
- **Counsel provided legal analysis** concerning interests of individual creditors to help Dr. Lui with the solicitation effort
- Dr. Lui voted his proxy to retain counsel; counsel then recommended him as translator (**an apparent quid pro quo**)

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VII. Committee Counsel Retention Issues – *Universal Building Products*: A Case Study – The Standing Issue

- **Debtors had standing to object** to committee retention applications
- Section 1109—debtors have right to appear and be heard on issues in their cases
- As we were reminded in ***SonicBlue***, an attorney with knowledge of violation of rules of professional conduct has an ethical **obligation to report** such violation

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VII. Committee Counsel Retention Issues – *Universal Building Products*: A Case Study – The Solicitation Issue

Rule 7.3 of Model Rules governs the in-person, telephonic or real-time electronic solicitation of clients (there are exclusions – including, lawyers, family, friends, or other person with whom counsel has had a prior professional relationship with the lawyer).

Rule 8.4 of Model Rules prohibits using third parties to violate the Rules

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VII. Committee Counsel Retention Issues – *Universal Building Products*: A Case Study – Duty of Counsel to Disclose

What about Committee Counsel in the *SonicBlue* Case?

- A federal judge approved a $2.5 million malpractice settlement between ***SonicBlue*** and former Committee Counsel to settle a complaint by the ***SonicBlue*** Chapter 11 trustee against the firm, which was targeted for failing to disclose the alleged conflict of bankruptcy counsel.

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VII. Committee Counsel Retention Issues – *Universal Building Products*: A Case Study – The Outcome

- **The Court made analogies** to solicitation by the use of "runners" or chiropractors in personal injury cases or bail bondsmen where criminality is involved
- **The Court rejected First Amendment argument**, especially in light of fact that prospective clients were foreign creditors without knowledge of US bankruptcy laws
- The Court held that the violation of the Rules justified the **disqualification** of counsel

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VII. Committee Counsel Retention Issues – *Universal Building Products*: A Case Study – "Everybody's Doing It"

- The lawyers said they **weren't the only ones** seeking Dr. Lui's assistance to get proxies and vote them in their favor
- Dr. Lui's testimony suggested debtors' counsel might have done **the same thing in another case** (using him to solicit)
- **Court said that wasn't a good excuse – even if others may have violated the rules**

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VII. Committee Counsel Retention Issues – *Universal Building Products*: A Case Study – What Was Proper/Improper

- **Key Facts: Actively encouraging and assisting** Dr. Lui in soliciting creditors to get their proxies for the formation meeting and to vote for counsel
- **Court Finding: Not improper to provide lists** of creditors to contacts or to use written solicitations
- **Court Finding:** Once it was clear Dr. Lui did not have prior relationships with the creditors he was soliciting, **personal solicitation through him was improper**

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VII. Committee Counsel Retention Issues – *Universal Building Products*: A Case Study – Disinterestedness

The Analytical Framework

- **Counsel may not have been disinterested**, **because they provided legal advice to Dr. Lui to be passed on to individual creditors** (although even if they were not disinterested, Section 1103 only requires that they not hold or represent interests and does not require disinterestedness).
- **The analogy cocktail party talk** was unavailing.
- **Only a potential conflict existed not enough to support a finding that there existed an "adverse" interest**.

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VII. Committee Counsel Retention Issues - *Universal Building Products*: A Case Study – The Failure to Disclose

- **Counsel failed to disclose all "connections"** to parties in interest, **as required by Rule 2014**
- One firm disclosed having been involved in cases where Dr. Lui was a translator, but nothing about helping him solicit creditors
- The other firm initially revealed nothing at all about its prior involvement with Dr. Lui
- Full disclosure was made **only after a discovery request by the US Trustee and Debtors – justification enough for the denial of the motion to retain**

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VII. Committee Counsel Retention Issues – *Universal Building Products*: A Case Study – Financial Advisors?

- Footnote 16 of the ***Universal Building Products*** case states that all professionals, including financial advisors, are subject to Rule 2014 and should disclose direct calls to creditors (who were not their clients) seeking to be employed in a bankruptcy case.

- Is this right?
- *Alix v. McKinsey*; *UST v. McKinsey*

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VIII. Compensation Matters

General Rule:

- **Section 330(a)(3)(F)** bases reasonable compensation upon the customary compensation charged by comparably skilled practitioners in cases other than bankruptcy cases.

"Remember to round each billable hour off to the nearest week."

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VIII. Compensation Matters – *Haimil Realty*: A Case Study – Benefit to the Estate

In *Haimil Realty Corp.* the bankruptcy court held that the chapter 11 debtor owed more than $2.6 million to its secured lender and entered an order allowing the lender's claim in that amount, with interest accruing at 24 percent.

This put a high cost to the debtor of any unsuccessful appeal, in addition to the legal fees that would accrue.

The debtor appealed.

The district court affirmed.

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VIII. Compensation Matters – *Haimil Realty*: A Case Study – Benefit to the Estate

Ultimately, when **the bankruptcy court confirmed the debtor's chapter 11 plan** and the debtor sold the commercial real property at issue, close to $1 million interest had accrued on the debt since the petition date, approximately $330,000 of which had accrued from the date the bankruptcy court entered its decision through the date the district court affirmed.

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VIII. Compensation Matters – *Haimil Realty*: A Case Study – Benefit to the Estate

This set up a fee dispute between the debtor's equity holder and debtor's bankruptcy counsel under **§ 330**.

While the bankruptcy court found that the initial litigation against the secured lender had merit and many of the services performed were proper, **it held that debtor's counsel did not provide the debtor with a realistic analysis of the potential cost of prosecuting its appeal** in light of the accruing interest.

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VIII. Compensation Matters – *Haimil Realty*: A Case Study – Benefit to the Estate

In the context of the proposed estate-benefit analysis, the court found that the appeal in ***Haimil*** **passed muster under Rule 9011**, but also found that counsel did not fully analyze the "worst"-case scenario and present that outcome to the debtor

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VIII. Compensation Matters – *Haimil Realty*: A Case Study – Benefit to the Estate

In light of the continuing default interest, it appears that there was a likelihood of material detriment to the estate in the event of an unsuccessful outcome. Thus, it was not improper or unethical to proceed; counsel and the client are still free to "roll the dice" in such circumstances should they so choose. However, the unsuccessful outcome in ***Haimil*** left the fees at risk. **As a result, the court reduced debtor's counsel's fees by $55,000.42.**

579 B.R. 19 (Bankr. S.D.N.Y. 2017).

"Paying my fee will also help as evidence for our insanity defense."

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VIII. Compensation Matters – Documents

Documents

- When a professional seeks compensation for time spent sending or reviewing documents, the professional must identify each participant, describe the substance of the communication, justify the necessity of the task and explain its outcome.

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VIII. Compensation Matters – Reimbursement

Travel Time

- In the past, travel time for out of town professionals was often disallowed. The more modern approach has been for courts to determine on a case by case basis whether retention of out-of-state professionals was warranted and their travel time compensable.

Preparation of Fee Application

- Generally, time spent preparing an application is compensable, but time spent "fixing" or supplementing a defective application is not!

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VIII. Compensation Matters – Reimbursement of Expenses

Expenses

- **Must be reasonable!**

- Different rules for different categories.
  - Illustration: Mileage, parking and tolls – should be allowed; rental car cost for nearly every day of a professional's engagement "is overreaching and de facto ineligible for compensation from the estate."

- **Pay attention to the Local Rules, Administrative Orders, and UST Guidelines**

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Ira Herman, a partner at Blank Rome, has been in practice for over 35 years and regularly advises lenders and other clients on the management of bankruptcy risk in their transactions; indenture trustees regarding defaulted public debt issues; and lenders regarding restructuring and bankruptcy, including distressed M&A transactions and inter-creditor issues. Additionally, he provides services on the debtors' side, counseling financially distressed entities and their management on restructuring challenges pertaining to corporate governance issues, and litigating corporate governance matters, such as breach of duty in good faith and dealing.

As a court appointed mediator for over 15 years, Ira has been able to facilitate the resolution of controversies involving U.S. and non-U.S. parties concerning bankruptcy and commercial law issues. He is on the Register of Mediators and Arbitrators for the U.S. Bankruptcy Courts for Delaware, E. Dist. New York, and S. Dist. New York, and the U.S. District Court, E. Dist. New York.

In addition to his restructuring and bankruptcy practice, Ira has been providing support to for-profit and nonprofit entities concerning data privacy and cybersecurity issues.

Ira L. Herman

Partner
Blank Rome LLP
+1.212.885.5052
iherman@blankrome.com

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