AMERICAN BANKRUPTCY INSTITUTE

New York City Bankruptcy Conference

Ethics Panel

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Hon. Melanie Cyganowski (ret.)
Otterbourg P.C.

Daniel F. X. Geoghan
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Ira L. Herman
Blank Rome LLP

Kyle J. Ortiz
Herbert Smith Freehills Kramer LLP

Hon. Elizabeth S. Stong
U.S. Bankruptcy Court (E.D.N.Y.) | Brooklyn

CONCURRENT SESSION

2025

ABI 2025
New York City Bankruptcy Conference
Ethics Panel

Meet Your Moderator and Panelists

Dion Hayes (Moderator)
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U.S. Bankruptcy Court, Eastern District of New York

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1. Your firm is retained by a long-time client to handle its chapter 11 case. Working collaboratively with other professionals, you are successful in obtaining substantial creditor support for a pre-arranged chapter 11 plan which will recapitalize the company. In your retention application, your firm discloses that it represents, on unrelated matters, the largest (43%) equity holder in the debtor and that entity, a private equity fund, represents about 1% of the annual revenue for your firm. The equity holder has separate counsel in the chapter 11 case.

   It is not feasible for your firm to set up a complete ethical wall during the case (which you disclose to the court, as well as the details of your firm's relationship with the equity holder) because a few timekeepers are essential to both the work for the debtor and to unrelated other work for the equity holder. No party objects to your firm's retention as bankruptcy counsel except the U.S. Trustee.

   Should the court approve your firm's retention as bankruptcy counsel for the debtor?

2. Assume the same facts as above. Months into the case, the court denies your retention application to serve as bankruptcy counsel for the debtor. By this point, your firm has performed millions of dollars of post-petition bankruptcy legal work for the debtor to keep the complex case on track to confirmation while your disputed retention is resolved, ultimately against your firm. You file a successful application to be retained as special corporate counsel for the debtor and then file a final fee application in which you seek compensation for, among other things, over $1 million for work on the DIP financing. This DIP financing work had to be done, and there was no other firm retained by the debtor at the early stages of the case that was capable of performing that work. There was also great efficiency to your firm performing that work, as your firm had handled corporate and financing matters for the debtor for years prepetition and was very familiar with the debtor's business, assets, prepetition financing and capital structure. No party other than the U.S. Trustee objects to your fee application as special corporate counsel seeking compensation for your essential and successful work on the DIP financing.

How should the court rule on your fee application for work on the DIP financing?

5

3. Two (2) years before it filed for chapter 11 relief, a corporate debtor borrowed $500 million in term debt from a lender named Note ONE, such that the Note ONE became the debtor's senior secured noteholder, holding around 80% of the debtor's total debt. Six months later, the debtor engaged a law firm that eventually prepared and filed a chapter 11 petition for the debtor into. This same law firm also represents Note ONE on matters unrelated to the debtor, but it did not represent Note ONE or the debtor in the prepetition loan. Note ONE has been a client of the law firm for the last 6 years, and its annual billings represent 4-6% of the firm's annual revenue in each of the last 6 years. The U.S. Trustee and the Unsecured Creditors Committee object to the debtor's retention of the law firm as bankruptcy counsel on the basis that it is not disinterested, in light of its work on unrelated matters for Note ONE.

   a. **Should the bankruptcy court approve the law firm's retention application?**

   b. **Would it matter if Note ONE had signed prepetition a prospective conflict waiver to permit the law firm to serve as bankruptcy counsel for the debtor?**

6

4. Dewey Cheatham & Howe ("DCH") represents CarBunk, a public company that manufactures folding mattresses. Two (2) years ago, CarBunk was taken private in a deal engineered by CarBunk's then-CEO, John Caesar. DCH also represented Caesar individually in connection with a federal investigation into his previous employment as an investment advisor. Six (6) months ago, DCH discussed strategic options with CarBunk, including bankruptcy, because the folding mattress market had plummeted. CarBunk has hired separate counsel, Sleepy Eyes, to investigate potential claims against Caesar related to the take-private deal.

   Two (2) months ago, CarBunk filed a petition for chapter 11 relief. DCH drafted the debtor's plan, including provisions that would transfer the estates' claims against Caesar to a litigation trust, with a trustee to be chosen by the debtor and its lenders. Sleepy Eyes was not involved in drafting the plan. The plan provides for two sources of recovery for creditors—proceeds from the litigation trust and proceeds from the sale of CarBunk's operating assets. The U.S. Trustee and an ad hoc lender group objected to CarBunk's retention application for DCH as bankruptcy counsel.

   a. Should the bankruptcy court approve the application to employ DCH as bankruptcy counsel?

   b. Does the result change if DCH created an ethical wall between its attorneys that represented Caesar prepetition and those representing the debtor?

   c. Does the result change if Sleepy Eyes drafted the plan? What if only Sleepy Eyes drafted the litigation trust provisions?

7

5. You are a senior associate at DCH, on partnership track. DCH has been retained by the Board of Directors (the "Board") of a new client, Sandy Sandals, a large public company that makes beachwear. DCH was retained to investigate certain accounting irregularities and, following the investigation's revelation of fraud by the company's chief financial officer, DCH's engagement was expanded to include financial restructuring.

   After the fraud findings were made public, Sandy Sandals lost access to credit and could not secure the financing necessary to remain a going concern. DCH filed a chapter 11 petition on Sandy Sandals' behalf. DCH also filed a retention application as bankruptcy counsel for the debtors that indicated DCH would continue its work post-petition on behalf of the Board. The Creditors' Committee has objected to this application on the grounds that DCH is not disinterested.

   Should the court approve the application?

8

6. Assume the same facts as in 5. Before the court issued a ruling on DCH's retention application, a senior partner asks you to prepare a disclosure affidavit in support of the application. Your draft supplemental affidavit includes the following disclosures: (i) DCH's largest client, Top Dog Capital, has a 12% equity stake in Sandy Sandals and its chief executive officer is a member of the Board; (ii) DCH represents one of Sandy Sandals' largest creditors, Commercial Rent; and (iii) a senior officer at an important DCH client, Squirrel Bank, was a member of the Board and Sandy Sandals' audit committee during the period the accounting irregularities took place, and this officer may be subject to suit by Sandy Sandals. The U.S. Trustee and the Creditors' Committee have objected to DCH's retention application and argue that the firm is not disinterested.

Should the bankruptcy court approve the application to employ DCH as bankruptcy counsel?

7. Assume the same facts as in 6, except that a senior partner has reviewed the draft disclosure affidavit you prepared. She asks you to omit disclosures (i) and (iii), then sign and file the affidavit.

   a. What are the ethical issues with the senior partner's request?

   b. If you do as the senior partner instructs, what are the potential consequences for you? What about DCH? What should you do?

8. You are still a partner at DCH. The firm was recently engaged to serve as counsel by the newly formed unsecured creditors' committee in a chapter 11 case; the court, however, never approved your firm as committee counsel. You and your team immediately identify issues with the debtors' retention of Sleepy Eyes as its counsel, including the use of prepetition transfers of cryptocurrency that were later converted to USD to pay the debtors' legal and professional fees. One (1) week later, the committee informs you that it wants to replace DCH with another firm, Acme Law.

   Two (2) months later, Sleepy Eyes' retention application is approved and it returns $5 million to the estate. DCH has neither been paid for its $260,000 in legal services to the committee, nor has it filed a retention application. You file a substantial contribution motion to get DCH paid and attach an affidavit disclosing that DCH does not have any conflicts that would have prohibited its retention in the case. The U.S. Trustee objects to the motion, arguing that DCH was never formally retained, therefore DCH's motion is improper.

   How should the court rule on the motion?

11

9. A large company confirms a liquidating chapter 11 plan, which creates a liquidating trust. Two (2) years later, the trust files a multi-billion lawsuit against the debtor's former parent. Both parties to the lawsuit are represented by large law firms. More than two (2) years after the lawsuit is filed, a partner named Sally in one of the firms representing the defendant (which partner had billed 300 hours to the matter) left that firm and joined the firm representing the plaintiff. The law firm representing the plaintiff immediately screened Sally from the litigation. The defendant seeks the disqualification of the law firm representing the plaintiff because of Sally's firm switch.

   How should the court rule?

12

10. A law firm serves as corporate counsel for a large company ("OpCo") that is not in chapter 11 and handles significant M&A work for OpCo. The law firm also represents the controlling equity holder of OpCo and (with the appropriate consents) represented both clients in a prepetition recapitalization of OpCo. When OpCo runs into financial difficulty, the law firm represents it as bankruptcy counsel in its chapter 11 case, which results in the confirmation of a plan (the "Plan").

    The Plan sets in place both a Plan Administrator and a Liquidating Trust. The Liquidating Trust is vested and charged with administering certain causes of action owned by the estates, including claims relating to the prepetition recapitalization. The Plan Administrator is vested with corporate assets that do not fall into the Liquidating Trust and is made the sole member of the debtors which were not dissolved as of the Plan's effective date. The Plan provides that the Plan Administrator, not the Liquidating Trust, shall be authorized after the Plan's effective date to take all actions on behalf of the remaining debtors.

    The Liquidating Trust files a lawsuit against the debtor's controlling prepetition equity holder, and the law firm appears on behalf of the equity holder-defendant. The Liquidating Trust seeks to disqualify the law firm from representing the equity holder based on the fact the law firm previously represented the debtor.

    How should the court rule on the disqualification motion?

13

11. Your former spouse, an adjunct law professor, is a bankruptcy judge in your city. Your relationship ended in divorce three (3) years ago. Your firm, DCH, has represented parties before your former spouse and consistently discloses that you and the judge were once married. You do not practice bankruptcy law. You have paid alimony to your former spouse for three (3) years and have commenced legal steps to revisit this arrangement.

    a. **Does DCH, in a pending case where it seeks to be retained or is retained, need to disclose the fact you are seeking to reopen your alimony arrangement which may be contested by your former spouse?**

    b. **Should your former spouse disclose this fact to the parties in a case pending before her where your firm is involved?**

14

12. You are a partner at DCH and have been asked by Tommy to serve as efficiency counsel for a debtor in a chapter 11 case where Tommy's firm serves as bankruptcy counsel. Tommy is your next-door neighbor and regular pick-up basketball teammate. This is the fourth such efficiency counsel opportunity Tommy has presented you in the last two (2) years, which you disclose on your affidavit. You do not disclose that Tommy is your neighbor or basketball teammate.

    You also do not disclose that you represent Tommy in his capacity as a Chapter 11 trustee in another bankruptcy case. The U.S. Trustee, who knows of your personal relationship with Tommy, objects to your employment application for inadequate disclosure. What should you do before the hearing?

    How should the court rule?

15

13. You are a senior partner in a large law firm and a self-acknowledged technological Luddite. Your firm has invested a lot of money in an AI product that can produce very well-done first drafts of certain pleadings and is very good at locating the seminal cases on particular legal issues to which it is directed. Even though you are told the AI product is fabulous and reduces research and drafting time by 90%, you do not know how to use the AI product and have no interest in it.

    In fact, you direct your associates not to use it (as they need to learn how to draft and do legal research without the aid of the product, in your view), and, to your knowledge, they do not use it. Even though you do not use the product on your matters, you follow the firm's preferred practice of including in your invoices a surcharge for the product of 5% of your hourly fees on the matter, and your clients pay the surcharge without question.

    What are the legal ethics issues presented by these facts?

16

14. Assume the same facts as in 13. You obtain a new matter for the firm representing an unsecured creditors committee in a chapter 11 case. Your firm's form engagement letter contains the firm's preferred boilerplate, including that the firm has an AI product and will charge a 5% surcharge associated with its use. Your retention is approved by the Bankruptcy Court without objection, including the engagement letter which is attached to your retention application. Your interim fee statements contain the surcharge and are paid in accordance with the court's interim fee order, including the surcharge, even though you and your team on the matter do not use the AI product.

    At the final fee application stage, the U.S. Trustee discovers the surcharge and objects to that portion of your final fee application and seeks disgorgement, or a credit, for the surcharge amounts that were previously paid.

    How should the court rule on the objection?

17

15. It is Friday afternoon at 4:30 PM ET. You are a senior partner at DCH's New York, NY office and are reviewing a plan objection prepared by your best associate on behalf of your client, a secured creditor with a persuasive argument that the proposed plan violates the Bankruptcy Code. This associate has prepared numerous such objections for you over the last year, in different cases. The plan objection is due at 5:00 PM today, and the confirmation hearing is Monday. The draft looks great, as usual, but one of the cited cases catches your eye because it is essential to the objection's argument and was decided your first year of law school. You cannot find the case in a legal research database. You ask the associate about the case, and she responds, "maybe the artificial intelligence program I used got confused, but I read a few cases that stood for that proposition. I don't think anyone will notice."

    It is now 4:50 PM. The Southern District of New York's Local Bankruptcy Rule 9011-1 provides that (i) all documents submitted for filing are to be signed by an attorney of record, (ii) litigants are responsible for the accuracy and quality of legal documents produced with the assistance of technology, including generative artificial intelligence services, and (iii) if a litigant chooses to employ technology, they remain "bound by the requirements of Fed. R. Bankr. P. 9011 and must review and verify any computer-generated content to ensure it complies with all such standards".

    a. **Would you file and sign the brief?**
    b. **What should you do?**
    c. **What are the risks to you and DCH if the court discovers the citation at issue does not exist?**

18

16. You are a mid-level DCH associate in the firm's New York office, and a partner has asked you to prepare a response to a debtor's claim objection. DCH is testing a generative artificial intelligence product (the "Easy Button") that accelerates the drafting and legal research process. DCH encourages its attorneys to use Easy Button because DCH is testing different artificial intelligence products. You have a mediation today, so you ask Easy Button to prepare a first draft of the response and provide it with some key facts.

    The next day, you review the draft pleading Easy Button prepared. You do several hours of independent research and revise the draft, such that you only retain two paragraphs from Easy Button's draft, and neither paragraph cites to a case.

    a. Would you disclose to the reviewing partner that Easy Button contributed the initial draft?

    b. Should you disclose the use of Easy Button to your client?

19

17. Assume the same facts as in 16. DCH has expanded its use of Easy Button, despite initial hiccups. You are a senior partner at DCH and, with Sleepy Eyes, jointly represent a creditor in a chapter 11 case in the Southern District of New York. The debtor has filed an objection to your client's proof of claim. You have supervised the drafting and filing of a response by a team of attorneys from both firms.

    The court notifies you that 9 of the 30 case citations in the twelve-page brief did not exist or misrepresented the referenced opinion. You recall signing off on an outline proposed by Sleepy Eyes and that a partner and a senior associate at DCH drafted the response, with the assistance of Easy Button. The court has set a hearing on an order to show cause regarding the errors.

    What should you do, if anything, before the show cause hearing?

20

Faculty

Hon. Melanie L. Cyganowski is a partner with Otterbourg P.C. in New York and chairs its Bankruptcy practice. She joined the firm in 2008 after serving a full 14-year term as a U.S. Bankruptcy Judge for the Eastern District of New York and as its Chief Judge from 2005-08, and she now is a commercial and bankruptcy law litigator, mediator, arbitrator and expert witness. She has represented creditors, ad hoc committees and official committees of unsecured claimants in mass tort and other bankruptcy cases, including *In re LTL I & LTL II & Red River Talc* (a.k.a. the *J&J* cases) and *In re Aearo* (a.k.a. the *3M* cases), *In re Purdue Pharma* (the Ad Hoc of Governmental & Other Contingent Litigation Claimants), *In re Mallinckrodt* and *In re Hair Relaxer, et al.* Judge Cyganowski has also testified as an expert witness in the Cayman Islands and BVI in connection with transnational bankruptcy proceedings. In addition, she is an active mediator, having mediated cases in bankruptcy and federal cases throughout the country, including *In re The Diocese of Buffalo, NY*, *In re Madoff* and *In re Lehman Bros.* In addition to representing debtors, she also represents clients in bankruptcy litigation matters and trials. An author of numerous articles, Judge Cyganowski is a Fellow of the American College of Bankruptcy. She also is active in the Commercial & Federal Litigation Section of the New York State Bar Association as a member of its Executive Committee, and she chaired the Section's Nominating Committee from 1993-2023. Judge Cyganowski co-chaired the NYSBA Special Task Force on Courts from 2008-09) is a Fellow of the American and New York State Bar Foundations, and is a member of ABI, the American Bar Association, the Bar Association of the City of New York and the Federal Bar Council. She also was an adjunct professor of law at St. John's University School of Law's LL.M. in Bankruptcy Program and a commentator on Fox Business News, where she speaks from time to time on current bankruptcy issues. Judge Cyganowski received her J.D. *magna cum laude* from the State University of New York at Buffalo School of Law in 1981.

Daniel F. X. Geoghan is a member of the Bankruptcy and Corporate Restructuring department of Cole Schotz P.C. in New York. He is experienced in all facets of financial restructuring, complex insolvency law and bankruptcy proceedings, as well as commercial litigation. Mr. Geoghan has represented official committees of unsecured creditors, chapter 11 debtors, chapter 7 trustees and secured creditors in all aspects of chapter 11 proceedings and out-of-court restructurings in regards to post-confirmation trusts and the energy/oil and gas, automotive/industrial/manufacturing, retail, biotechnology/pharmaceuticals and services industries. He has represented parties in breach-of-contract claims, copyright and trademark infringement claims, director and officer liability claims and avoidance actions. In addition, he has represented clients in more than 500 mediations. Mr. Geoghan is a member of the board of directors of the Fordham Law School Alumni Association, and he chairs the Fordham Law Alumni Association Restructuring Affinity Group and sits on its Strategic Planning Committee. He also is a member of the New York State Bar Association, the New Jersey State Bar Association, ABI, the Turnaround Management Association and the Fordham Law Alumni Association, and he is an adjunct professor teaching trial advocacy at Fordham University School of Law. Mr. Geoghan was named to the list of *New York Super Lawyers* from 2012-24 and was given the 2013 Rising Star Award by Fordham University School of Law in recognition of his extraordinary achievements in private practice. He received both his B.A. and J.D. from Fordham University.

Dion W. Hayes is a partner with McGuireWoods LLP in Richmond, Va. He served from 2017-22 as the firm's deputy managing partner for Litigation and chaired the firm's Restructuring and Insolvency Department from 2012-17. Since 1992, Mr. Hayes has focused his practice on insolvency law and financial restructuring (including related litigation and cross-border insolvencies), bankruptcy, out-of-court workouts, distressed-asset acquisitions, recapitalizations and commercial litigation. He has a national practice and has handled significant matters in bankruptcy courts and other courts in numerous states, including California, Delaware, Florida, Illinois, Maryland, New York, North Carolina, Texas, Virginia and West Virginia. Mr. Hayes is a Fellow in the American College of Bankruptcy and has been selected for inclusion in *Chambers USA* (Tier 1) for Bankruptcy, *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights, *Super Lawyers* for Bankruptcy & Creditor/Debtor Rights, Banking, and Business Litigation, the *Legal Elite* for Bankruptcy, and the *Irish Legal 100*. He is admitted to practice in D.C., Maryland, New York and Virginia, and he has taught bankruptcy as an adjunct professor at William & Mary Law School. Mr. Hayes received his B.A. from the University of Virginia in 1989 and his J.D. from William & Mary Law School in 1992.

Ira L. Herman is a partner with Blank Rome LLP in its New York office, where he concentrates his practice on restructuring and bankruptcy matters with an emphasis on distressed public debt issues, secured and unsecured loans, cross-border insolvency matters, distressed M&A and corporate governance. He regularly counsels lenders and other constituencies regarding bankruptcy risk, including with regard to inter-creditor issues. Mr. Herman also has served as a mediator and arbitrator with respect to insolvency, real estate, tax and other commercial law issues. He annually updates "Anticipating and Managing Bankruptcy Risk," a series of articles he has written for the Financial Restructuring & Bankruptcy module of LexisNexis Practical Guidance®. He has served for five years on its editorial advisory board and has also served on *Law360*'s Bankruptcy Editorial Advisory Board. In 2022, Mr. Herman was received ABI's Distinguished Service Award in 2025 for his work spearheading Restructuring Masterclass, a series of online courses designed to get attorneys up to speed on the nuances of bankruptcy law and practice. He received his B.A. in political science *cum laude* from Yeshiva University in 1979, where he served as editor-in-chief of *The Polis*, a political science journal, and his J.D. *cum laude* with distinction from Boston University School of Law in 1982, where he served as an editor of the *Boston University International Law Journal*.

Kyle J. Ortiz is a partner with Togut, Segal & Segal LLP in New York, where he provides corporate restructuring advice to debtors, creditors and other parties in interest in corporate restructurings, both in and out of court. He has represented debtors in some of the largest and most complex chapter 11 cases of the past decade, including Eleston Holdings, Vice Media, Endo Pharmaceuticals, Pacific Drilling, LATAM Airlines and Toshiba Nuclear Energy (UK). He has also represented creditors and lenders in the financial services and real estate sectors. Mr. Ortiz's *pro bono* work has been recognized by both the Legal Aid Society and the New York State Bar Association. He is a frequent lecturer and has published over 50 articles on a range of bankruptcy topics. In 2018, Mr. Ortiz was honored as one of ABI's "40 Under 40" rising stars in the restructuring community and by *Finance Monthly* as Restructuring Lawyer of the Year. In 2019, he received an Emerging Leaders Award from The M&A Advisor and was recognized as one of *Global M&A*'s Rising Star Dealmakers. Mr. Ortiz began his career in the Business Finance and Restructuring Group at Weil, Gotshal & Manges LLP. He is a member of ABI, INSOL International and the Turnaround Management Association. Prior to beginning his legal career, Mr. Ortiz founded Operation ASHA in Cambodia, an arm of the worldwide tuberculosis treatment organization, Operation ASHA, which in Cambodia has grown to over

50 tuberculosis treatment centers serving over a million people in 1,283 villages in and around Cambodia's capital, Phnom Penh. Mr. Ortiz currently sits on the U.S. Board of Directors for Operation ASHA Worldwide. He received his B.S. from Northern Michigan University, where he graduated as Outstanding Graduating Male, served as student body president and was the student commencement speaker at his graduation. He received his M.P.P. in 2006 from the Harris School of Public Policy at the University of Chicago, and his J.D. in 2009 from the University of Chicago Law School, where he was an Edmund Spencer Scholar.

Hon. Elizabeth S. Stong has served as a U.S. Bankruptcy Judge for the Eastern District of New York in Brooklyn since 2003. Prior to her appointment the bench, she was a litigation partner and associate at Willkie Farr & Gallagher in New York, an associate at Cravath, Swaine & Moore, and law clerk to Hon. A. David Mazzone, U.S. District Judge in the District of Massachusetts. Judge Stong is a member of the Council on Foreign Relations, the Council of the American Law Institute, and the boards of the National Conference of Bankruptcy Judges, the Practising Law Institute, the New York County Lawyers' Association and the New York Law Institute. She is a member of the Advisory Committee of Columbia University's Committee on Global Thought and the Advisory Board of P.R.I.M.E. Finance, an international dispute resolution and judicial training organization, as well as co-chair of the New York City Bar's Middle East-North Africa Law Committee. Judge Stong regularly serves as a delegate to UNCITRAL's Working Groups on Arbitration and Conciliation and Insolvency, and is an elected member of the European Law Institute. She also chairs the ABA Standing Committee on Continuing Legal Education and holds leadership roles in the International Insolvency Institute, ABI and the ABA's Business Law Section, International Law Section and Judicial Division. In addition, she is an adjunct professor at Brooklyn Law School. Judge Stong has trained judges in more than 25 countries on five continents, including North, Central and West Africa, Central Europe, Central Asia, the Middle East, the Arabian Peninsula and South America, with the U.S. Commerce Department Commercial Law Development Program, the World Bank, INSOL and the ABA-Rule of Law Initiative, among other entities. She also has consulted with the Supreme Court of China and People's High Courts in Beijing and Guangzhou, the Uganda Registration Services Bureau, and recently has led judicial workshops and consultations in Bahrain, Kuwait, Kazakhstan, Nigeria and Brazil, among other venues. Judge Stong received the ABA International Law Section's Mayre Rasmussen Award for the Advancement of Women in International Law, the New York City Bar "Her Hero" Lifetime Achievement Award, the American Bar Foundation's Outstanding State Chair Award, the ABA Glass Cutter Award, the NYIC Honorable Burton R. Lifland Mentor of the Year Award, the NYIC Hon. Cecelia Goetz Award, the Association of Insolvency and Restructuring Advisors Judicial Service Award, the MFY Legal Services Scales of Justice Award, and the Brooklyn Bar Association's Freda Nisnewitz Award for *Pro Bono* Service, among others. She received her A.B. *magna cum laude* from Harvard University and her J.D. from Harvard Law School, where she received the Williston Prize, and she studied at the Université des Sciences Sociales in Toulouse, France, as a Rotary Foundation Graduate Fellow.