The Difficult Client (Ethics)

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CONCURRENT SESSION

2015

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ABI 2015 Northeast Conference

Flying Saucer Burgers, Inc. operates a chain of approximately 100 fast-casual restaurants located in multiple states. For a period of time, it successfully rode the wave of "gourmet", high-priced burgers and grew rapidly. The business was started by the Meyer Family, which owned 100% of its capital stock. Three years ago, the business was acquired by Rainbow Capital Partners, a well- known private equity firm. Rainbow, as it often did with new investments, financed more than 75% of the acquisition price through a credit facility provided by Acme Bank. The Meyer Family, after driving a hard bargain, sold all of its shares to Rainbow and realized an excellent return on its investment.

Flying Saucer has struggled mightily since the Rainbow acquisition. Rising beef and vegetable prices squeezed profit margins just as a number of well-financed competitors rushed into the gourmet burger market. The resulting decrease in cash flow and some other operational hiccups resulted in Flying Saucer failing to satisfy various financing covenants in its credit facility, although no payment defaults have occurred. Acme responded by issuing a series of increasingly belligerent Notices of Default.

Rainbow in turn became increasingly dissatisfied with the company's management team, which Rainbow believed was still loyal to the Meyer Family, and has become directly involved in the day-to-day operations of the company. In fact, Rainbow's representatives on the Board of Directors have made clear that management must seek Board approval before any material business decision or cash expenditure can be executed. The Board, after multiple discussions with management, recently approved a reduction-in-force that resulted in the immediate layoff of approximately 120 employees. The Board also directed the management team not to make the most recent monthly rent payments owed to Flying Saucer's various landlords (which aggregated more than $3 million), although company representatives had previously assured many landlords via email that the rent would be paid.

Paul Gleeson of Hooks, Snow & Ladder, LLP is serving as Flying Saucer's primary restructuring and bankruptcy counsel. It became clear to Paul that a Chapter 11 filing was necessary. A number of angry unpaid vendors had filed suit and were threatening to file an involuntary petition. Further, Acme had full dominion over all of the company's bank accounts and insisted that it would not extend additional credit unless Flying Saucer agreed to various conditions. Among other things, Acme demanded that Flying Saucer retain a "chief restructuring officer" acceptable to the bank and that the company file bankruptcy to effect a sale under Section 363 of the Bankruptcy Code. The company's Board consulted at length with Paul and ultimately agreed to substantially all of the Bank's conditions, including the appointment of a CRO, Sally Jones of Triple AAA Advisory Group, a nationally known firm.

Paul and his team worked feverishly to file the Chapter 11 case and, after an uneventful first day hearing, were hopeful that the case would proceed smoothly. Unfortunately, Paul is now growing very concerned both about the case and his own role in it. His firm, HS&L, had

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represented Rainbow for years in numerous matters and one of his most powerful partners, Carla Smith, managed the overall relationship. The managing director of Rainbow contacted Carla soon after the Ch. 11 petition was filed to make sure that Paul was "on board with the program" and was making sure to look out for Rainbow's interests. About a year earlier, Rainbow had taken a pummeling in the press after it chose to liquidate one of its portfolio companies following a lengthy labor dispute; Rainbow believed that the law firm which had represented the portfolio company was not appropriately loyal to Rainbow and had ceased using that firm on other matters. Further, Rainbow had told Paul and Carla that it was going to submit a bid for Flying Saucer's assets and that it expected to receive a general release from the Debtor's estate as a condition to closing.

Acme was also proving to be a challenge. Although it had agreed to provide DIP Financing, Acme was concerned that the Debtor's results were trending below plan and was threatening to cease funding unless the sale process was accelerated. Paul believed that the Debtor could survive on cash collateral and that a longer sale process likely would generate more value, but was meeting opposition from both Rainbow and Sally Jones, the CRO. Rainbow regularly obtained financing from Acme for other investments and was not eager to be part of a contested cash collateral fight. Further, Acme is one of Sally's most important referral sources and she had expressed great concern to Paul about "going to war" with the Bank even if the DIP Financing was not needed. A workout officer at Acme had gone so far as to tell Sally, in an off-the-record conversation, that she would never get another referral if the Debtor became uncooperative. Paul had raised serious concerns with Acme's counsel about the workout officer's behavior, but was told that this was "business as usual" for a tough Chapter 11 case.

Paul also immediately found himself at odds with the Creditors' Committee. The Committee was made up of four landlords and three vendors. Its counsel had advised Paul that the landlords on the Committee were apoplectic about the Debtor's failure to pay pre-petition rent and were demanding that the estate file a lawsuit against the Board and management team even if it derailed the sale process. The vendors on the Committee, meanwhile, had stated that they were most interested in having a customer to sell to after the case ended even if no value was generated for the estate's creditors. The vendors were urging the Debtor to sell its assets back to the Meyer Family, who had expressed interest is regaining control of the business. But Rainbow had advised Paul that the Meyer Family could not be trusted and directed Paul not to engage them in negotiations.

As he prepared for an important all-hands' meeting with Acme and the Committee in advance of the case's second-day hearing (at which, among other things, Paul's retention application would be heard by the Court), Paul was torn about how to proceed. While he was not eager to take any action that would upset Rainbow or his partner Carla Smith, Paul knew that Rainbow's actions were troubling. His first instinct was to ally himself more closely with Sally, who was known as a significant force in the restructuring world. But Paul was not confident that Sally was fully on the Debtor's side. He was also frustrated that counsel to Acme and the Committee were doing little to rein in their clients. Paul was starting to wonder if he could continue to represent the Debtor under these circumstances.

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THE DIFFICULT CLIENT – SELECTED ETHICAL AND FIDUCIARY ISSUES IN BANKRUPTCY CASES

A. **Concurrent Representations Outside of Bankruptcy**

1. Under general principles of corporate law and the Rules of Professional Conduct (the "Rules"),[1] an organization and the person or persons who own and operate it are considered separate clients. When a lawyer represents an organization, she should distinguish between the organization and the various constituents of the organization. The client is the organization, not the officers or owners of the organization. See, generally, Rule 1.13.

2. A lawyer employed or retained by an organization represents the organization through its duly authorized constituents. See Rule 1.13(a).

3. In dealing with an organization's constituents, a lawyer should explain the identity of the client when a lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent with whom the lawyer is dealing. See Rule 1.13(f).

4. Outside of the bankruptcy context, it generally is permissible for a lawyer to concurrently represent an organization and its owner(s). Indeed, Rule 1.13(g) expressly permits such concurrent representations subject to Rule 1.7 regarding conflicts of interest. When dealing with a closely held entity, there usually should be no conflicts between the interests of the organization and its owner(s) because the legal and economic interests of the organization and the owners ordinarily are aligned.

5. Outside of the bankruptcy context, this general principle would remain true even if the organization is insolvent. However, the insolvency of an organization can affect who may have standing to assert derivative claims on behalf of the organization against its fiduciaries. See, e.g., *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007).

B. **Concurrent Representation of Organization and Its Owner(s) in Bankruptcy**

1. Concurrent representations that are generally permissible outside of the bankruptcy context may be impermissible in a bankruptcy case. See, generally, 11 U.S.C. §§ 327(a) and 101(14).

2. Generally, counsel for the debtor-in-possession cannot represent the owner(s) of the debtor <u>in the same bankruptcy case</u>. Counsel for a d-i-p must qualify under §327(a) of the Code which requires that counsel be "a disinterested person." Section 101(14) defines "disinterested person." Among other things, a "disinterested person" cannot have "an interest materially adverse to the interest ...of any class of creditors... for any... reason." In a bankruptcy case, it is foreseeable that there will be instances in which the interests of creditors

[1] References are to the Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.), which are largely derived from and the similar to the American Bar Association's Model Rules of Professional Conduct.

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will be adverse to the interests of equity security holders. In addition, under §327(a), counsel for the debtor-in-possession also may not "hold or represent an interest adverse to the estate." Counsel for the debtor-in-possession also owes a fiduciary duty of loyalty to her client; that duty could be compromised by conflicting loyalties to other parties, such as shareholders, if they are also clients in the case.

3. The foregoing, however, does not mean that in representing the debtor-in-possession, counsel might not often take actions that are beneficial to the interests of the owners of the debtor, e.g., drafting a plan that preserves the interests of shareholders.

4. The potential adversity between d-i-p counsel's duties to the d-i-p and her duties to the debtor's owners, if they are also concurrent clients, may be most apparent in the case of a closely-held debtor company where the nondebtor owner is a guarantor or co-obligor of the debtor's debts as compared to a case in which a parent corporation and its subsidiaries are debtors represented by a single counsel.

5. In contrast to the general prohibition of the concurrent representation of the debtor-in-possession and the owners of the debtor in the same case, there is no per se prohibition of representing the debtor-in-possession and concurrently representing the owners of the debtor in matters unrelated to the bankruptcy case provided that counsel's relationship with the owners does not cause counsel to be not disinterested or otherwise impair counsel's ability to zealously carry out her duties to the debtor-in-possession.

6. As demonstrated by *In re Project Orange Assoc., LLC,* 431 B. R. 363 (Bankr. S. D. N. Y. 2010), obtaining a conflict waiver from the non-debtor client may be insufficient to enable counsel to satisfy the requirements of §§327(a) and 101(14). In Project Orange, the court held that, where d-i-p counsel represented the debtor's largest creditor in other matters; the conflict waiver precluded counsel from suing or threatening to sue that creditor; and the resolution of disputes with that creditor were central to the possible success of the reorganization, counsel could not satisfy the requirements of §327(a) of the Code.

7. In *In re Kendavis Industries, Int'l., Inc.,* 91 B. R. 742 (Bankr. N.D. Tex. 1988), the bankruptcy court required a firm which acted as d-i-p counsel to disgorge compensation because the court found that the firm had acted to protect the interests of the debtor's shareholders.

8. In *In re Amdura Corp.,* 121 B. R. 862 (Bankr. D. Col. 1990), the bankruptcy court refused to approve the employment of a firm as d-i-p counsel where the firm had in the past and continued to represent the debtor's principal lender (owed $215 million) in matters unrelated to the debtor. The firm indicated that it could not undertake an investigation of the relationship between the debtor and the lender nor could the firm initiate or prosecute any claims against the lender if they were found to exist. Under these circumstances, the court determined that the firm was not disinterested.

C. **Disinterestedness and the Receipt of Payments for Prepetition Services**

1. If proposed d-i-p counsel has received payment for its prepetition services within 90 days prior to the filing of the petition, an issue may arise with regard to counsel's

disinterestedness. See *United States Trustee v. First Jersey Sec., Inc. (In re First Jersey Sec., Inc.),* 180 F.3d 504 (3rd Cir. 1999); *Staiano v. Pillowtex, Inc. (In re Pillowtex, Inc.),* 304 F.3d 246 (3rd Cir. 2002).

2. Whether the payment was in the form of cash, which were the facts in *Pillowtex*, or securities, which were the facts in *First Jersey Securities*, a payment received within the 90-day period will be subject to scrutiny as a possible voidable preference.

3. In *First Jersey Securities*, the proposed d-i-p counsel argued that the payment it received was not voidable for several reasons. First, counsel argued that there was no antecedent debt because (i) no debt came into existence until it sent out its invoice for the services rendered and (ii) assuming there was debt, that debt did not become antecedent debt until the invoice was deemed overdue. Counsel also argued that if there was an antecedent debt, the payment was not voidable because it was made in the ordinary course of business. The Third Circuit rejected all of these arguments. The court held that a debt would be deemed to arise as soon as legal services were rendered. The court also held that the payment was not in the ordinary course of business for a couple reasons, including the fact that it was made by a transfer of restricted securities.

4. In *Pillowtex*, counsel also argued that several payments received within the 90-day period were within the ordinary course of business. Counsel argued that it was not disqualified because it had agreed that, if it was found to have received a preference, it would immediately return the funds to the estate and waive any claim that would result in its favor. This was acceptable to the lower court but the Third Circuit held that it was error for the court to approve the employment of counsel while the issue of the potential voidable transfer was unresolved. This unresolved issue rendered counsel unqualified under § 327(a) of the Code.

5. As a result of these decisions, it is now standard practice in certain circuits for prospective d-i-p counsel, in anticipation of a Chapter 11 filing, to obtain an advance payment retainer for services to be rendered within the 90-day period and to waive any fees which remain outstanding and unpaid as of the filing date.

D. **<u>Insider Guaranties and Conflicts</u>**

1. D-i-p counsel may accept a guaranty of payment for her services so long as she makes full disclosure and the terms of the guaranty don't restrict her professional independence in representing the d-i-p.

2. Rule 1.7(b) provides that a lawyer holds a conflict of interest if there is a significant risk that her representation of a client will be materially limited by her responsibilities to another client or a third person or by her own personal interests.

3. Rule 1.8(f) provides that a lawyer may not accept compensation for representing a client from someone other than the client unless three conditions are met: (i) the client must give its informed consent; (ii) there must be no interference with the lawyer's

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independent professional judgment or with the client-lawyer relationship; and (iii) information relating to the representation of the client is protected as required by Rule 1.6.

4. In order for the debtor-in-possession to give its informed consent, the terms of the guaranty would have to be fully disclosed in the engagement letter and in the retention papers filed with the court.

5. In addition, the terms of the guaranty should not impose any restrictions on the lawyer's independence as counsel for the debtor-in-possession. Thus, for example, the guaranty should not preclude counsel from taking actions in the case adverse to the guarantor.

E. **Potential Conflict Presented By Acceptance of Security for Post-Petition Fees**

1. The First Circuit's decision in *In re Martin,* 817 F.2d 175 (1st Cir. 1987), bears upon this question. In that case, the First Circuit held that the grant of a mortgage on property of the estate to d-i-p counsel as security for payment of its post-petition fees was not impermissible per se.

2. However, the court was careful to note that whether such a security arrangement would render counsel disqualified has to be determined on the facts of each case; and there must always be full and timely disclosure to parties-in-interest and the court of the details of any given arrangement.

3. It is noteworthy that in *Martin*, the mortgage was granted on property that was not the debtor's principal residence nor was it used for any business purposes associated with the debtor's business; and it appears that the property was not essential to any potential reorganization.

4. Therefore, *In re Martin* probably would not support d-i-p counsel's receipt of a security interest on property of the estate that is essential to the business where there could be a conflict between the need to use the property in the reorganization and counsel's reliance upon the property as a source of payment.

F. **D-I-P Counsel's Disclosure Obligations**

1. See generally 11 U.S.C. § 327(a); Fed. R. of Bankr. P. 2014(a). But see Rule of Professional Conduct 1.6(b).

2. Proposed d-i-p counsel has a duty to disclose all "connections." See Fed. R. Bankr. P. 2014; *In re Leslie Fay Cos.,* 175 B. R. 525 (Bankr. S.D.N.Y. 1994).

3. Rule 1.6's requirement that a lawyer preserve the confidentiality of client information may limit what counsel can disclose regarding existing or prior representations of nondebtor parties in counsel's effort to comply with the disclosure requirements applicable to d-i-p counsel, but Rule 1.6(b)(4) does permit a lawyer to reveal client information "when permitted under these rules or required by law or court order."

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G. **<u>Fiduciary Duties Owed by D-I-P Counsel</u>**

1. It has been held that the debtor-in-possession's counsel's client is the d-i-p, not the estate or creditors; while d-i-p counsel owes fiduciary duties of loyalty and care to the d-i-p, counsel does not owe fiduciary duties directly to the estate or creditors. See *Hansen, Jones & Leta, P.C. v. Segal*, 220 B. R. 434 (D. Utah 1998).

2. *Hansen* contains an excellent analysis and discussion of the legal and ethical duties of d-i-p counsel by the federal district court.

3. *Hansen* holds that d-i-p counsel's client is the debtor-in-possession, not the estate and not creditors.

4. *Hansen* also holds that d-i-p counsel, like any other attorney, owes professional duties of loyalty and care to her client. *Hansen* holds that the sources of these duties for d-i-p counsel are the Rules of Professional Conduct and the Bankruptcy Code. Another source may be the common law.

5. *Hansen* holds that d-i-p counsel does not owe a fiduciary duty to the estate or to creditors. The court holds that courts should not impose upon d-i-p counsel the fiduciary duties owed by the d-i-p itself, as a trustee, to the creditors. In determining professional compensation, the court should consider whether the services provided by counsel satisfied the statutory standard, including benefit to the estate, not whether counsel fulfilled or breached fiduciary duties to the estate or creditors.

H. **<u>Duties of D-I-P Counsel When Learning of Misconduct</u>**

1. Rule 1.6(a) requires a lawyer to maintain the confidentiality of information relating to the representation of her client, unless (i) the client gives informed consent to disclosure or (ii) disclosure is permitted under other parts of Rule 1.6. Rule 1.6(b) <u>permits</u> disclosure of client information to third parties without the client's consent under certain circumstances. Moreover, disclosure <u>is</u> <u>required</u> if necessary to comply with Rules 3.3 (dealing with a lawyer's duty of candor toward the tribunal), 4.1(b) (dealing with a lawyer's duty to be truthful in statements to others); or 8.3 (dealing with a lawyer's duty to report professional misconduct).

2. As an officer of the court, counsel owes a duty of candor to the court. See Rule 3.3. Rule 3.3(a) provides that a lawyer shall not, inter alia, knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except for certain special rules applicable in criminal cases; (3) offer evidence that the lawyer knows to be false, except for special rules applicable in criminal cases. A lawyer is also required to take reasonable remedial measures if a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the client have given, material evidence that the lawyer comes to know is false. See Rule 3.3(a)(4). A lawyer is also permitted to refuse to offer evidence that the lawyer reasonably believes is false. See Rule 3.3(c). The disclosure obligations under Rule 3.3(a) apply "even if compliance requires disclosure of information otherwise protected by Rule 1.6."

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3. However, Rule 4.1(b) provides that a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

4. The obligation to report lawyer misconduct under Rule 8.3 does "not require disclosure of information otherwise protected by Rule 1.6." See Rule 8.3(c).

5. Rule 1.6 does not preclude a lawyer from disclosing client information to other people within the organizational structure of the client.

6. If the persons in control of the d-i-p propose to take action that would violate the law or otherwise prejudice the interests of the d-i-p, then d-i-p counsel should consider whether, pursuant to Rule 1.13, he should refer the matter to the d-i-p's board of directors.

7. If, notwithstanding d-i-p's counsel's bringing the matter to the attention of the highest corporate authority in control of the d-i-p, the client continues to proceed with an unlawful action, then d-i-p counsel should consider whether doing so would likely result in substantial injury to the debtor. Arguably, causing the debtor to knowingly violate the law would substantially harm the debtor. The lawyer should also consider her duties under Rule 3.3 and as an officer of the court. The lawyer should probably threaten to resign as d-i-p counsel pursuant to Rule 1.16. Such resignation would require counsel to file an application with the court on notice. The threat of counsel filing such an application might be sufficient to induce the officers not to proceed with the unlawful action.

I. **Representing Client in "Zone of Insolvency"**

1. See *Quadrant Structured Prods. Co. v. Vertin,* (Del. Ch. 2014), rehearing denied, 2014 Del. Ch. LEXIS (Del. Ch. Oct. 28, 2014). In that case, a corporation (the "parent") held a controlling interest in the equity of a Delaware corporation (the "subsidiary"). The parent also held junior debt securities of the subsidiary. The parent also caused members of its board to be appointed to a majority of the seats on the board of the subsidiary. The board of the subsidiary caused it to change its business strategy in a manner that significantly increased the risk that senior creditors of the subsidiary would not collect all of their claims while, on the upside, increasing the chance that the parent would recover on the junior notes and retain its ownership interest.

2. The Delaware Chancery Court reaffirmed recent holdings of the Delaware courts that directors owe no direct fiduciary duties to creditors but owe their fiduciary duties only to the corporation.

3. When a Delaware corporation is insolvent, however, creditors obtain standing to assert derivative claims for breach of fiduciary duty against the officers and directors of the corporation.

4. *Quadrant* holds that, regardless of the financial condition of the corporation, the directors and officers are permitted to cause the corporation to take actions that have the potential to maximize the value of the business even if those actions expose creditors to

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a greater risk that they will not recover the full amount of their claims. So long as the directors and officers act reasonably in doing so, the adoption of a more risky business strategy will be protected by the Business Judgment Rule.

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Selected First Circuit Decisions on Retention of Professionals

1. In the first opinion – Rome v. Braunstein, 19 F.3d 54 (1st Cir. 1994) – the First Circuit denied debtor's counsel's fee request due to an impermissible conflict of interest caused by his (undisclosed, simultaneous) representation of: (i) the debtor's sole shareholder, and (ii) the purchaser of the debtor's assets.

The court began its analysis by noting that "section 328(c) expressly empowers the bankruptcy court to disallow compensation if court-appointed counsel, 'at any time,' is either not a 'disinterested' person '**or** represents or holds an interest adverse to the interest of the estate with respect to the matter on which [counsel] is employed.'" Id. at 60 (emphasis added). And, when considering whether an impermissible conflict exists, "the bankruptcy court must determine whether any competing interest of a court-appointed professional created either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors – an incentive sufficient to place those parties at more than acceptable risk – **or the reasonable perception of one**." Id. at 58 (citation and internal quotations omitted) (emphasis added). Importantly, "[t]he test is neither subjective, nor significantly influenced by the court-appointed professional's 'protestations of good faith' . . . but[,] [rather,] contemplates an objective screening for even the 'appearance of impropriety.'" Id.

Regarding the attorney's representation of the shareholder, the court concluded that because the debtor "held claims of alleged preferential and fraudulent transfers" against the shareholder there was "a clear conflict of interest".

Similarly, in concluding that the attorney had a disqualifying conflict with respect to his representation of the asset purchaser, the court noted that:

> [S]imultaneous representation of the buyer and the seller in the same transaction is a prototypical disqualifying conflict of interest even if it is not invariably disqualifying in all circumstances. Even if [the purchaser] was the highest bidder for these [] assets, or even the only one, [the attorney's] longtime position as corporate clerk and counsel to [the debtor], both prepetition and postpetition, presumably afforded him unique access to inside information concerning the nature and value of its assets, information that [the attorney] could have used (or been tempted to use) to enable his other client [the purchaser] to submit a better calibrated bid than arm's-length bidders could venture, thereby potentially chilling bidding at the expense of [the debtor] and its creditors.

Id. at 61-62 (citations omitted).

2. In the second opinion – Parker v. Frazier (In re Freedom Solar Center, Inc.), 776 F.2d 14, 15 (1st Cir. 1985) – the First Circuit held "that the debtor's counsel may not also represent the debtor's sole shareholder when that sole shareholder is attempting to purchase some of the debtor's assets and may be liable for preferential transfers."

The relevant rule at issue in Freedom Solar Center was Maine Bar Rule 3.4, pursuant to which "[a] prima facie case for disqualification is made out if the moving party shows that an attorney

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is representing: (a) multiple clients; (b) with differing interests; and (c) absent full disclosure and consent." Id. at 16.

Below is a summary of the court's findings regarding these three issues:

(a) The fact that the attorney represented multiple clients was not disputed. Id.

(b) The court concluded that there was a differing (adverse) interest because the shareholder's "interest was in purchasing the assets for the lowest possible price, while the debtor's interest was in selling the assets for the highest possible price." Id.

(c) Although there was "full disclosure to all concerned parties of the multiple representations", "[a]ll concerned parties . . . did not consent to the multiple representation" because "[a]ssuming that [the shareholder] and [its new corporation] consented, it is clear that the debtor has not consented [because] . . . [o]nce a trustee has been appointed in bankruptcy, all functions traditionally handled by the debtor's management are subsumed by the trustee." Id. at 17.

3. In the third opinion – In re Filene's Basement, 239 B.R. 850 (Bankr. D. Mass. 1999) – the Bankruptcy Court for the District of Massachusetts vacated a prior order appointing a law firm as debtor's counsel.

In Filene's Basement, debtor's counsel disclosed that it represented a creditor of the debtor called "T.A.C." in connection with "discrete financing and corporate matters entirely unrelated to the Debtors." Id. at 856. However, T.A.C. was a plaintiff in a lawsuit naming the Debtors as defendants. Although the law firm did not represent "either party in such lawsuit" and stated that it would "not provide representation to T.A.C. in connection with any matters or dealings in the[] Chapter 11 cases", the Court found that the law firm was not disinterested and represented an interest adverse to the debtor's estate based on, *inter alia*, its over 18-year relationship with T.A.C., "resulting in the payment by T.A.C. to the Firm of over $1,5000,000 in fees". Id. at 856.

Regarding the existence of an actual conflict of interest, the court noted:

> Stated most simplistically, the Firm is regularly engaged by T.A.C. to handle legal matters of various kinds, and has been for almost a score of years. T.A.C. is now engaged in litigation against the Debtors, whom [the Firm] serve as general counsel. While it is true that the Firm is technically aloof from the conflict, in that it represents neither of the antagonists, it is a part of the proceedings, as the litigation will involve contracts drawn by [the Firm] for both sides; the interpretation of those contracts; and possible testimony of partners in the Firm regarding various related matters . . . Under these circumstances, I find that there is an actual adverse interest in the Firm's continued representation of T.A.C. while it seeks to represent the Debtors. When there is an actual conflict of interest, disqualification is mandatory."

Id. at 857-58.

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Furthermore, the court noted that "[e]ven if there is no present adverse interest, both the potential for a conflict and the perception that there might be such are clear to me [and] [a] potential conflict constitutes a ground for disqualification under § 327." Id. at 858.

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