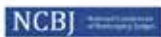


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**Oct. 23, 2020, 1:30-3:00 p.m.**

## **ABI: ABI Talks**

**Sponsored by Skierski Jain, PLLC**

**Kathryn L. Harrison; Campbell & Levine LLC**

**Hon. Steven W. Rhodes (ret.); JAMS**

**Robert V. Sartin; Frost Brown Todd LLC**

# Educational Materials



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## Restructuring, Insolvency & Distressed Debt Virtual Summit

SEPTEMBER 16 - OCTOBER 27, 2020

### HIDDEN PROFESSIONAL CONFLICTS IN CHAPTER 11 CASES

HON. STEVEN W. RHODES

UNITED STATE BANKRUPTCY JUDGE (RETIRED)

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*Case 1*

Professional A, a large consulting firm with offices around the world, was retained as a professional for the debtors in ten chapter 11 cases from 2001 through 2016.

- a. Professional A had numerous client and investment connections in each of these cases but never disclosed the identity of any of those connections in its initial declarations and only one connection in a supplemental declaration in one case.

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*Case 1*

Professional A, a large consulting firm with offices around the world, was retained as a professional for the debtors in 10 chapter 11 cases from 2001 through 2016.

- a. Professional A had numerous client and investment connections in each of these cases but never disclosed the identity of any of those connections in its initial declarations and only one connection in a supplemental declaration in one case.
- b. In several of the cases, undisclosed clients of Professional A acquired the assets of the debtors.

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Case 2

Professional B was retained as a professional for the debtor in a chapter 11 case. Professional B has a wholly owned and controlled investment office that has **\$33 billion** in assets under management.

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Case 2

Professional B was retained as a professional for the debtor in a chapter 11 case. Professional B has a wholly owned and controlled investment office that has **\$33 billion** in assets under management.

Most of these assets consist of the investment funds of its current and former partners. A much smaller portion consists of its employees' retirement assets. It has no other assets under management.

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Case 2

Professional B was retained as a professional for the debtor in a chapter 11 case. Professional B has a wholly owned and controlled investment office that has \$33 billion in assets under management.

Most of these assets consist of the investment funds of its current and former partners. A much smaller portion consists of its employees' retirement assets. It has no other assets under management.

Through this investment affiliate, Professional B had invested in the W Fund, and Professional B was aware that the W Fund held senior secured debt in the case. Therefore, the partners and employees of Professional B had a financial interest in outcome of the case.

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Case 2

- a. Professional B did not disclose this financial interest in the senior secured creditor.

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Case 2

- a. Professional B did not disclose this financial interest in the senior secured creditor.
- b. The judge entered an order requiring Professional B to disclose all of its investment interests in parties in interest in the case. However, Professional B still did not disclose this financial interest in the senior secured creditor.

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Case 2

- a. Professional B did not disclose this financial interest in the senior secured creditor.
- b. The judge in the case entered an order requiring Professional B to disclose all of its investment interests in parties in interest in the case. However, Professional B still did not disclose this financial interest in the senior secured creditor.
- c. After the senior secured creditors, including the W Fund, acquired the debtor's assets through the plan, Professional B's partners and employees made a multi-million dollar profit on this investment.

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Case 3

Professional C was retained as a professional for the debtor in a chapter 11 case to maximize its pricing to its customers.

Professional C, however, failed to disclose that at the same time, and with the same partners, it was also advising a major customer of the debtor on how to reduce its pricing of the debtor's contracts.

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Case 4

Professional D was retained as a professional for the debtor in a chapter 11 case to investigate the debtor's fraudulent transfer claims against its parent company totaling hundreds of millions of dollars.

Professional D, however, did not disclose that at the time of those alleged fraudulent transfers, the debtor's parent was also its client.

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### Case 5

Professional E was retained as a professional for the debtor in two different chapter 11 cases to review creditors' proofs of claim and to file objections to them.

Professional E, however, did not disclose that many of the creditors whose claims it was reviewing in these two cases were also its clients and investments.

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### Case 6

Professional F was retained as a professional for the debtor in a chapter 11 case. In its initial disclosure declarations, Professional F disclosed about 150 client connections.

Before the court could rule on the objections to Professional F's employment, the debtor's plan was confirmed.

After confirmation, the debtor and Professional F withdrew the original employment application and filed a new application. This new application sought *nunc pro tunc* relief and disclosed an additional 3,000 client and investment connections. These included several investments in funds that were the secured creditors who had acquired the debtor's assets through the plan.

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Case 7

Professional G was retained as a professional for the debtor in a chapter 11 case.

In support of the employment application, Professional G submitted the declaration of the partner who supervised the investigation of Professional G's connections. This partner, however, was not working on the case and had no bankruptcy training or experience.

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Case 7

The partner's investigation and disclosure of Professional G's connections in the case was restricted in the following ways:

- a. Even though the firm has over one hundred wholly owned and managed affiliates, and even though the firm holds itself out to the public as "one firm," the partner investigated and disclosed the connections of only the six affiliates within the firm's organization that staffed the engagement.

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Case 7

The partner's investigation and disclosure of Professional G's connections in the case was restricted in the following ways:

- b. The partner investigated and disclosed only the connections that resulted from "direct commercial relationships," a limitation not found in Rule 2014. He thereby excluded, for example, the personal investments in interested parties held by the firms' partners and employees, as well as other client relationships, litigation parties and other adverse interests.

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Case 7

The partner's investigation and disclosure of Professional G's connections in the case was restricted in the following ways:

- c. Even though the firm does a substantial and successful business in data analytics, it does not have a modern conflicts-checking software program.

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Case 8

Professional H was retained as a professional for the debtors in thirteen chapter 11 cases from 2001 through 2018.

- a. In each of these cases, its engagement agreement stated:

Nothing in this Agreement is intended to create,  
nor shall be deemed or construed to create, a  
fiduciary relationship.

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Case 8

Professional H was retained as a professional for the debtors in thirteen chapter 11 cases from 2001 through 2018.

- a. In each of these cases, its engagement agreements stated:

Nothing in this Agreement is intended to create,  
nor shall be deemed or construed to create, a  
fiduciary relationship.

- b. In 2016, a bankruptcy judge explicitly rejected Professional H's argument that it is not a fiduciary in its chapter 11 cases and held that it is indeed a fiduciary. Nevertheless, in three subsequent chapter 11 cases, Professional H continued to use this language in its engagement agreements.

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Case 9

Professional I was retained as a professional for several affiliated debtors in their chapter 11 cases to assist them with “operational transformation” that touches “on many aspects of the debtors’ operations.”

The debtors and Professional I requested the court’s approval for the debtors to pay Professional I a fixed monthly fee as an “ordinary course professional.”

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The following text is from *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.), quoted and cited with approval in:

*Woods v. City Nat. Bank & Tr. Co. of Chicago*, 312 U.S. 262 (1941); and

*Seminole Nation v. United States*, 316 U.S. 286, 297, n.12 (1942); and

*SEC v. Chenery Corp.*, 318 U.S. 80, 97 (1943).

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Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties.

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Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

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Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. **As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. (Citation omitted.)**

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Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.

Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. (Citation omitted.)

**Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.**

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SEPTEMBER 16 - OCTOBER 27, 2020



John Lewis  
@repjohnlewis

Do not get lost in a sea of despair. Do not become bitter or hostile. Be hopeful, be optimistic. Never, ever be afraid to make some noise and get in good trouble, necessary trouble. We will find a way to make a way out of no way. [#goodtrouble](#)

11:44 AM · Jul 16, 2019 · [Twitter Web Client](#)

51.9K Retweets and comments 129.9K Likes

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"I believe that lawyers have a special opportunity and duty to demonstrate leadership in bringing about the reforms in legislation and law enforcement practices that are needed to address the abusive practices perpetrated by some police."

-Michael Reed, Esq.


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 The Guardian


**Activists see Purdue bankruptcy case as last chance to call Sacklers to account**


... in Paris last year against the museum's ties with the company in April, the seventh month since the company filed for bankruptcy ...  
3 weeks ago

 Bloomberg Law

**Weinstein Accusers Seek Forced Liquidation of Bankrupt**


...  
Two actresses who accused disgraced film mogul Harvey Weinstein of sexual assault asked a judge to force his bankrupt entertainment ...  
1 week ago



 USA TODAY


**Tensions rise over local councils' role in Boy Scouts bankruptcy proceedings**

The role of local Boy Scout councils in the national organization's Chapter 11 bankruptcy, and the sexual abuse crisis that propelled it, is a ...  
May 6, 2020

 York Daily Record/Sunday News

**Are your church offerings used to settle sex abuse claims in bankrupt Harrisburg diocese?**

Who pays when a Catholic Church diocese files for bankruptcy? A good deal of the money to pay ...  
Feb 24, 2020



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## Restructuring, Insolvency & Distressed Debt Virtual Summit

SEPTEMBER 16 - OCTOBER 27, 2020

### Lasting Impacts of COVID-19 on Law Firm Operations and Legal Service Delivery



**Robert V. Sartin**

Chairman



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# COVID Impact on Firm Management

Coronavirus Is Forcing Big Law Out of Office – What They Can Learn

Law Firms Push to Get Bills Out, See More IOUs During Covid-19

Down 15% Is the New Flat

How A Novel Virus Is Raising Novel Issues For Attorneys

Adjusting the COVID-19 Response: How Law Firms Are Altering Austerity Measures

New Law Firm Strategies for Growth Amid COVID-19 and After

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## Crisis Management/Liquidity Protection

- 13-Week Cashflows
- Draw Down on Lines
- Expense Reductions
- Austerity Measures
- Daily Time Entry
- Inventory Management



"Our entire operation is sustainable except for our cash flow."

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## Remote Work

- Heightened Client Service
- Virtual Response/Touchpoints
- Phased Office Re-Entry

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## What is the "New Normal"?



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## But Not All Change is Permanent



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### First a Look at the Old Model...

- Partner/Associate Dynamic
- Traditional Partner Track – Highly Competitive
- Big Reward – Long-Term Obligations

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## But Millennials Were Already Shaping Change

**In 2025, it is anticipated that 56% of the U.S. Prime working aged employees will be millennials.**

Source: The 2020 National Legal Sector Benchmark Survey Results, Cushman & Wakefield

**Compared to other generations, Millennials are the biggest proponents for telecommuting, with 92% of Millennials desiring the option to work remotely, even if it's just one to two days a week.**

Source: Zendesk

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## Focused on Our Clients

- Fast Response, Simplifying the Complex and Being Efficient
- Teams Must be Talented *and* Collaborative
- Leveraging the Now for the Future

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## The Problem

**68%**

**Recruitment and Retention  
is Greatest Business  
Competition Issue**

**Associates were asked: How important are the following to you personally?**

(1 = Most Important; 9 = Least Important)



Source: The 2020 National Legal Sector Benchmark Survey Results, Cushman & Wakefield

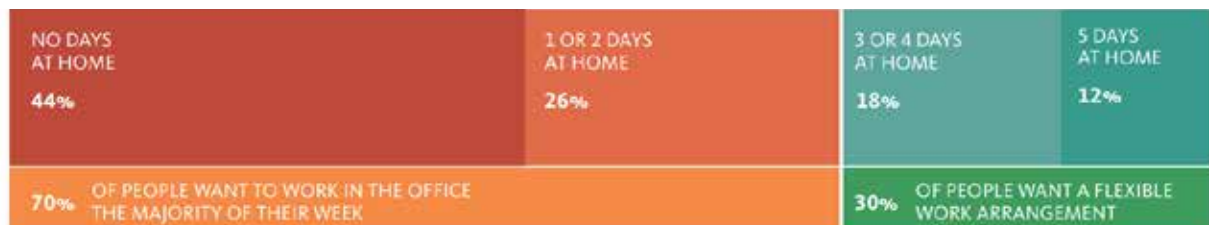
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## The Problem

**Do you prefer to go back to the office or continue to work from home?**



Source: U.S. Work From Home Survey 2020, Gensler

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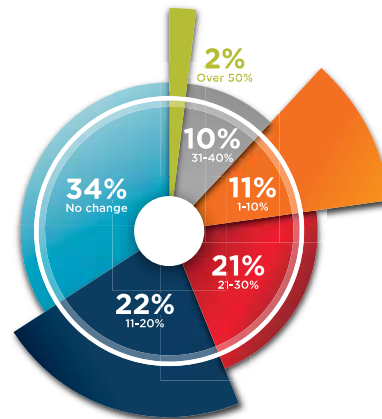
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## The Problem



**Real estate is expensive**  
In response to COVID-19, to what degree do you expect your firm's real estate portfolio square footage to shrink?



Source: The 2020 National Legal Sector Benchmark Survey Results, Cushman & Wakefield

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## Takeaways

- Flexible Work Remote Plans are Here to Stay
- In Office Work Supports Knowledge Transfer
- Legal Industry Operations Will Be Radically Different Within 5yrs



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# Faculty

**Kathryn L. Harrison** is an associate with Campbell & Levine LLC in Pittsburgh, where her practice is focused on the representation of debtors, creditors and trustees in chapter 7 and 11 cases. She represents both businesses and individuals in all matters related to insolvency and restructuring, and has experience representing clients in a variety of bankruptcy and insolvency litigation matters, including fraudulent transfer and preference actions. She also represents closely held businesses, including start-up companies, in general business matters. Prior to joining Campbell & Levine, Ms. Harrison clerked for Hon. Maurice B. Cohill, Jr. in the U.S. District Court for the Western District of Pennsylvania. She is a frequent lecturer on bankruptcy matters. Ms. Harrison is a member of the International Women's Insolvency & Restructuring Confederation, the Turnaround Management Association's Pittsburgh Chapter, the Judith K. Fitzgerald Bankruptcy American Inn of Court, the Allegheny County Bar Association's Commercial and Bankruptcy Law Section Council, and the Pennsylvania Bar Association, for which she has been a member of its Executive Committee of the Commission on Women in the Profession and the Business Section of its Task Force for the Modernization of Insolvency Laws. She received her B.A. in 2004 from St. Mary's College of Notre Dame and her J.D. in 2008 from Duquesne University School of Law.

**Hon. Steven W. Rhodes** is a retired U.S. Bankruptcy Judge for the Eastern District of Michigan in Detroit, where he served for nearly 30 years until his retirement on Feb. 18, 2015. He served as chief judge from 2002-09, and from 1997-2004 and 2008-11, he also served on the Bankruptcy Appellate Panel of the Sixth Circuit, serving as its chief judge from 2002-04. He joined the Ann Arbor, Mich., office of JAMS, the Judicial Arbitration and Mediation Service, and has experience in the resolution of complex disputes in bankruptcy, business/commercial, class action/mass tort, employment and fraud/Ponzi schemes. Judge Rhodes served as an adjunct professor at the University of Michigan Law School and the University of Detroit Law School, and he is a Fellow of the American College of Bankruptcy. He is also co-author of *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes* and oversaw the City of Detroit's municipal bankruptcy case. On March 1, 2016, Michigan Governor Rick Snyder appointed him to be the emergency manager for the Detroit Public Schools, serving until Dec. 31, 2016. Judge Rhodes has spoken at numerous conferences and seminars on bankruptcy law and practice. From 1994-96, he was an associate editor for the *American Bankruptcy Law Journal*, and from 2005-09, he was ABI's Vice President-Research. On April 3, 2009, ABI awarded him its 2009 Distinguished Service Award. From 2002-04, Judge Rhodes was the chair of the National Conference of Bankruptcy Judges Endowment for Education. *Crain's Detroit Business* honored him as one of its 2014 Newsmakers of the Year, and *Michigan Lawyers' Weekly* named him 2014 "Lawyer of the Year." In September 2015, the Commercial Law League of America awarded him the Lawrence P. King Award for Excellence in the Field of Bankruptcy. Goodwill Industries awarded him its Barbara R. Smith Lifetime Achievement Award, and Walsh College awarded him an Honorary Doctor of Laws. Judge Rhodes received his undergraduate degree in mechanical engineering from Purdue University and his J.D. from the University of Michigan Law School, where he served as an editor of the *Michigan Law Review*.

**Robert V. Sartin** is chairman of Frost Brown Todd LLC in Nashville, Tenn., and focuses his practice on the energy, health care, transportation and private-equity industries. In 2009, he formed the firm's

Automotive Industry Task Force, which convenes an annual symposium, AutoConnect, that draws thought leaders and industry titans from around the globe. Throughout his decades-long career, Mr. Sartin has worked in some of the most heavily regulated sectors — from the coal and auto industries to new ventures in health care and biopharmaceuticals — often acting as lead outside counsel for large national and multinational companies. He routinely advises clients on important contractual, transactional, tax and compliance matters, including asset and stock acquisitions, M&As, joint-venture formation and dissolution, private placements, tax planning, refinancings and corporate restructurings. He also oversees all 13 of the firm’s markets, as well as the firm’s ancillary business ventures, having served or currently serving on its Strategic Planning, Finance, Advancement, and Executive Committees. Mr. Sartin is admitted to the Kentucky and Tennessee Bars, is an ABI member, and is AV-rated by Martindale-Hubbell. He has been listed in *The Best Lawyers in America* for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Litigation – Bankruptcy (2006-19), *Mid-South Super Lawyers* (2012-17) and *Nashville Post In-Charge Legal* (2013-19), and was named a *BTI Client Service* “All Star” in 2014. Mr. Sartin received his B.B.A. in finance and economics in 1989 from Baylor University, his J.D. in 1995 from Washington & Lee University and his LL.M. in taxation from New York University in 1997.