AMERICAN BANKRUPTCY INSTITUTE

New York City Bankruptcy Conference 2021

PLENARY SESSION

Ethics

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2021

Ethics Considerations for the Business Lawyer

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Ethics Considerations for the Business Lawyer[1]

I. Disclosure Obligations as a Retained Advisor

A. Bankruptcy Code Requirements

1. 11 U.S.C. § 327 and 101(14)

   a. Section 327 requires that Proposed Professionals "not hold or represent an interest adverse to the estate" and are "disinterested persons."

   b. Section 101(14)(c) requires that a disinterested person "not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in the debtor, or for any other reason."

2. Fed. R. Bankr. Proc. 2014(a)

   a. . . . The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

B. Jay Alix / McKinsey Litigation

1. Multi-jurisdictional effort by Jay Alix against McKinsey for alleged violations of Bankruptcy Code Section 327 and Bankruptcy Rule 2014.

   a. Included motions to reopen closed bankruptcy cases, an objection to a pending retention application in Westmoreland Coal in S.D. Tex. and a civil RICO lawsuit in S.D.N.Y.

2. Focus of disclosure allegations is on MIO, McKinsey's in-house pension. fund—Alix argues that all investments of this fund (all of which are managed by third-party managers or McKinsey investment professionals

[1] These materials were prepared by the non-judicial members of the presentation panel and are intended for educational purposes. No specific panel member had responsibility for any individual statement included herein. None of the statements, facts or opinions contained in this paper constitutes official policy of any Judge, Court, agency or government official or quasi-governmental agency unless otherwise specifically identified as such.

walled off from the McKinsey consultants) should be disclosed in Rule 2014 filings.

C. Baker Protocol

1. As part of its response to Alix's allegations, McKinsey enlisted Jan Baker on a pro bono basis to pull together industry best practices for how to compile connections disclosures in large Chapter 11 cases.
    a. This "Protocol" was informed by surveys of practices described in retention filings and interviews with leading practitioners responsible for their own firm's retention filings.
    b. Final Protocol filed in the *Westmoreland Coal* in May 2019.
2. Key features of the Protocol:
    a. The Protocol recognizes a distinction between direct connections—those of the retained professional itself—and those of its affiliates. But in any case, it recommends that known connections be disclosed.
        i. For investment affiliates, there is a sliding scale of suggested disclosures depending, among other things, on whether the investment affiliate is a regulated entity, invests third-party or inside money and has overlapping directors/officers with the professional.
    b. The Protocol recognizes that disclosure of connections may vary depending on factual circumstances of the bankruptcy and generally should exclude de minimis matters.
        i. Who decides what's de minimis? No safe harbor.
    c. Recommends a 3-year lookback period, except for particularly relevant connections (but again, no safe harbors).
    d. Acknowledges, and thinks reasonable, the widespread practice of relying on an "interested parties list" prepared by the debtors as the basis to check connections (but again, no safe harbors).
    e. Recommends the use of surveys to diligence pertinent information not generally maintained in conflicts databases (e.g., relationships with judges, equity holdings in debtors).
    f. Sealing connections should be subject to 11 U.S.C. 107 standards.

D. US Trustee Guidance on Corporate Disclosure (12/4/19) Memo directing US Trustees to do the following:

1. **Enforce the Law** – "The USTP's responsibilities start and stop with a textual reading and expert application of the Bankruptcy Code and Rules. Although professional firms may adopt internal protocols that guide their processes for compliance, these internal protocols cannot change substantive law. Nor can these protocols provide a safe harbor for a firm that does not meet the strict legal requirements governing disclosures and conflicts."
2. **Disclose Connections on the Public Record** – "It is the USTP's position that relevant bankruptcy law requires professional firms to disclose on the public record their connections to a case, even if they have a contractual arrangement to keep client information, including client names, confidential. The USTP will argue that a professional firm required to disclose information must either publicly disclose it on the record or file a properly supported motion to seal it under section 107 of the Bankruptcy Code for the court to adjudicate."
3. **Disclose Affiliate Connections** – "It is the USTP's position that a professional firm being employed must disclose the connections of all its affiliates. . . . In some circumstances, a professional firm may be able to show that it is sufficiently separate from its affiliates to excuse affiliate disclosure. The applicant seeking to employ the professional firm bears the burden of proof and only the court has authority to excuse affiliate disclosure."
4. **Disclose Connections Based on Investments** – "It is the USTP's position that relevant bankruptcy law requires the professional firm to disclose connections that extend to investments in clients and other entities that may be a party in interest in the case . . . . Investments include direct investments in such entity, as well as investments made through third parties.

   "In deciding whether investments must be disclosed, the USTP will analyze two key factors: **(1) knowledge and (2) control**. If the professional firm knew or could have known about the investment in a

particular entity that may be involved in the case or an investment in the debtor's industry, then it is the USTP's position that the investment should be disclosed."

II. Disclosable Economic Interests Under Rule 2019

A. What constitutes a "disclosable economic interest" with respect to a group under Federal Rule of Bankruptcy Procedure 2019?

B. When must the interest be disclosed and in what level of detail?

1. Group v. Committee
   a. Addressed in *In re Wash. Mut., Inc.*, 419 B.R. 271 (Bankr. D. Del. 2009).
   b. Issue resolved by 2011 amendments to the rule, which covered groups and introduced the concept of identifying "each disclosable economic interest" with respect to each member of a group, Fed. R. Bankr. Proc. 2019 (c)(2)(C)
2. Disclosable Economic Interest
   a. According to the Notes of the Advisory Committee to the 2011 amendments, the term "disclosable economic interest":

"is intended to be sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. A disclosable economic interest extends beyond claims and interests owned by a stakeholder and includes, among other types of holdings, short positions, credit default swaps, and total return swaps."

   b. Helps courts and public understand what the net effect is of the economic incentives affecting the group and/or the group members.

C. Application in Puerto Rico Case

1. The rule is incorporated into PROMESA by 48 U.S.C. §2170.
2. The Court required virtually contemporaneous disclosure in connection with material change in "disclosable economic interest," *In re Fin. Oversight & Mgmt. Bd.*, 2019 U.S. Dist. LEXIS, at *9 -*10 (D. P.R. June 6, 2019).

3. In a May 26, 2020 Order, the Court required retroactive and prospective CUSIP-level disclosure.

D. Congressional Letters

1. On August 5, 2020 a group of members of Congress asked the New York Attorney General to investigate alleged misconduct based on, inter alia, divergence between public legal and previously non-public elements of economic interests

2. On October 21, 2020, the Congressional group followed up with letter to the Oversight Board requesting a "thorough, independent investigation."

E. New Normal?

1. Will Court orders and investigations in the Puerto Rico case lead to a new normal as to what constitutes a "disclosable economic interest," when it needs to be disclosed and in what level of detail under Rule 2019 or is the Puerto Rico case *sui generis*?

III. Covid Issues, Including Remote Work Issues

A. Remote work, away from "regular offices" for extended periods both highlighted and created issues for professionals of all types, in addition to the obligations usually imposed by various licensing bodies.

1. While this presentation can identify issues to consider, each professional is urged to become and remain very familiar with the policies and procedures of both their employer and those of the organizations that issued certifications, licenses or other similar credentials since compliance with each is critical.

2. Of particular note, professionals residing and practicing in states outside of the one(s) where they have been licensed should become and remain informed regarding that state's procedures and views regarding remote operations within that state's borders.

B. Issues Identified by ABA Ethic Opinion 498 – (https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf)

1. Competence, Diligence and Communication

a. See Model Rules 1.1, 1.3 and 1.4.

2. Confidentiality

a. See Model Rule 1.6.
b. Lawyers have a duty to prevent inadvertent or authorized disclosure of information regarding their representation.
c. This includes providing security for all communication devices (both voice and data) and any cloud or shared storage features.

3. Supervision
a. The requirement to adequately supervise attorneys and non-lawyer staff continues during remote work.

C. Unauthorized practice of law
1. Some states specifically permit practicing at a temporary residence provided that you are not soliciting clients in a state in which you are not licensed, meeting with clients in that state or holding oneself out as able to practice in that state.
2. This can include limiting one's services federal law or services otherwise permitted by law or regulation.

D. AICPA also devoted significant resources to issues of remote effort to creating information for CPA's – https://future.aicpa.org/topic/covid-19/remote-working

E. Additional issues to consider include:
1. Reimbursement for meals, including evening meals at home while working;
2. Carefully proofreading documents on a screen and when printed;
3. Secure disposal of paper information, including shredding;
4. Confidential conversations outside of a conference room or an office with a closed door;
5. Working near digital assistants ("Alexa, does talking 'to you' risk waiving a privilege?") and how that can affect the confidentiality of information and communications; and,
6. Whether one's professional responsibility insurance covers remote work from that state.

IV. Disinterestedness Standards of Debtor's Counsel

In re Caesars Entertainment Operating Co., Inc., 561 B.R. 420 (Bankr. N.D. Ill. 2015)

A. This case addressed the question of whether Kirkland's representation of the Debtor, Caesars Entertainment Operating Co. (CEOC), was improper due to the

fact that Kirkland also represented several of the portfolio companies of Apollo and TPG Capital, which owned the limited liability companies that had a majority ownership stake in CEOC. The bankruptcy court applied the disinterestedness standard and found that Kirkland's representation of the debtor was proper.

B. Section 327(a) of the Bankruptcy Code, states that a professional can only be employed to assist the Debtor if they "do not hold or represent an interest adverse to the estate." The court breaks this standard down into two requirements:

1. First the professional must be a disinterested person, which is defined at bankruptcy code Section 101(14) as one who "is not a creditor, an equity security holder, or an insider" and who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest, in the debtor ... or for any other reason."
2. The second requirement is that the professional must not hold or represent an interest that is adverse to the estate. Section 327(a). The court defines an adverse interest to mean "1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate." (quoting *In re Crivello*, 134 F.3d 831, 835 (7th Cir. 1998))

C. In this case, the Court found that despite their representation of other portfolio companies of Apollo and TPG, and, importantly, because they did not represent Apollo or TPG in this case or otherwise, Kirkland's representation of the Debtor was proper and not in violation of Section 327(a). Kirkland met its initial burden by testifying to the fact that they only represented the Debtor, and that they did not currently nor had they in the past represented any other Caesars entity or any equity holder of Caesars entities. Their representation of affiliates of Apollo and TPG were too attenuated be considered related to the bankruptcy case or to create undue bias. Since Kirkland made its prima facie case, the noteholders committee was required to prove that the representation was indeed in violation of Section 327(a). The noteholders offered three arguments, all of which the court rejected:

1. Bias Against the Estate – The noteholders argued that since Kirkland represented other entities that Apollo and TPG have an interest in, Kirkland would really work to benefit Apollo and TPG, and not the Debtor's estate. The Court rejected this argument because there was no indication that Kirkland's representation of other interests of Apollo and TPG would influence their representation. It concluded that "Kirkland represents in unrelated matters companies in which Apollo and TPG, three layers of corporate ownership removed from CEOC, have an interest. Those attorney-client relationships are too remote from the bankruptcy cases to conclude that Kirkland would be predisposed to act adversely to the estates as a result of them." All other evidence offered by the opposing party failed to establish that Kirkland had a bias against the estate.
2. Interest Adverse to the Estate – Next, the noteholders argued that since Kirkland made two significant draws against the retainer they had with Caesars right before the time the Chapter 11 case was filed, it indicated that Kirkland had interests that were adverse to the estate. The noteholders' principal argument was that the retainer agreement was a "security" retainer, which would belong to the Debtors on the petition date. The Court rejected this argument as well. The court analyzed the structure of the retainer and found that it was a proper "advance payment" retainer and its purpose was to ensure "that Kirkland never became a prepetition creditor" of the Debtor. Therefore, the money in the retainer was not the property of the estate, and Kirkland did not act adversely to the bankruptcy estate when they made draws on the retainer at the time of Chapter 11 petition.
3. Nondisclosure – The noteholders argued that the debtors failed to disclose their representation of the Debtor's special governance committee. The noteholders withdrew their support of this argument, so the argument was forfeited. However, the Court still found that there was no evidence contrary to Kirkland's statement that it did not represent the special governance committee.

D. The court did not find that any of the opposing party's argument persuasive and held that it was proper for Kirkland to represent the Debtor

V. Litigation Financing and Disclosure Obligations

A. Courts have generally held that litigation funding arrangements are not discoverable in regular commercial actions.

1. To what extent might the heightened disclosure obligations in the bankruptcy context require a different outcome?

B. Often Protected Nature of Litigation Funding Terms

1. With exceptions, details of litigation funding usually not subject to disclosure. *See generally* N.Y.C. Bar Working Group on Litig. Funding Report to the President, February 28, 2020 ("City Bar Report"), Section IV, available here: *http://documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf*

C. Special Considerations

1. However, there are "special considerations" in certain contexts, such as class actions and derivative actions. *See id.* at IV.D.1. (p. 63) (explaining the issue but declining to take a position)

D. What About Bankruptcy?

1. The City Bar Report does not specifically address the heightened disclosure requirements in bankruptcy, where Federal Rule of Bankruptcy Procedure 2014 requires that an application for a court order of employment include disclosure of "all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants…."

2. In a Memorandum to the United States Trustees from Clifford J. White III dated December 4, 2019 ("UST Memo"), the Director of the Executive Office for United States Trustees took the position that professional firms must disclose the connections of all affiliates, save for where the professional firm shows that it is sufficiently separate such that affiliate disclosure is not required

a. Separate incorporation is not dispositive, and disclosure is required with respect to "investments in clients and other entities that may be a party in interest in the case . . . ." UST Memo at 2

b. Key issues are whether the professional firm knew or could have known about an investment or whether the professional firm controlled or could have controlled the selection of the investment in a relevant entity . . . . " Id. at 2-3

3. Must professional firms think carefully about whether a potential funder is relatively more or less likely to have interests in bankruptcy matters that may exist or may arise in the future?
   a. Does it matter whether the funding is of an individual case or of a portfolio nature?
   b. Advantage or disadvantage to certain types of funders?
   c. Is the issue germane in the context of a post-confirmation litigation trust?

VI. Professional Compensation

A. Bankruptcy Code Sections

1. 11 U.S.C. §330

(a)(1)…subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) **reasonable compensation for actual, necessary services** rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for **actual, necessary expenses**.

2. 11 U.S.C. §328(a)

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, **on any reasonable terms and conditions of employment,** including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have

been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions

B. *Baker Botts LLP v. Asarco LLC*, 135 S. Ct. 2158, 2167 (2015)

1. The Supreme Court held that retained bankruptcy professionals had no statutory right to be compensated for time spent defending against objections to their fee applications.
2. The Court reasoned that under the American Rule (i.e., each side of a lawsuit is responsible for its own legal fees), section 330(a)(1) does not permit professionals to seek compensation for fees incurred in litigating its own fees, as that is not a "service." "The word 'services' ordinarily refers to 'labor performed for another.'"
3. The question after *Asacrco*: Can professionals sidestep the *Baker Botts* ruling by contract?

C. After *Baker Botts v. Asarco*

1. In the initial aftermath, courts rejected various attempts to contract around the *Asarco* holding.
2. *In re Boomerang Tube, LLC* (Delaware)—UST objection to the party's attempt to contract around *Asarco* was sustained:
   a. "First, § 328(a), like § 330(a), doesn't provide a statutory exception to the "American Rule" on attorneys' fees. Second, even if the engagement letter is a contract, it remains subject to bankruptcy court approval. Therefore, it doesn't provide a contractual exception to the American Rule on attorneys' fees. Ultimately, § 330(a), as limited by *Baker Botts*, determines the reasonableness of a fee provision."
   b. Within weeks, many of the other Delaware judges had adopted the same reasoning.
3. *In re New Gulf Resources LLC* (Delaware)—Under the proposed terms of a law firm's retention, aggregate fees would be increased 10% in accordance with a "Fee Premium" if the firm incurred material fees in defending objections to its fee applications.
   a. Rejecting this arrangement, the court stated that the Fee Premium "runs afoul of the holdings in *Asarco* and *Boomerang Tube*."
4. Subsequently, some courts have distinguished *Boomerang Tube.*

5. *In re Nortel Networks Inc.* (Delaware)—Held that a provision in a bond indenture obligating debtors to pay legal fees charged by the indenture trustee's attorneys for defending their requested fees did not violate *Asarco.*
6. *In re Hungry Horse, LLC* (New Mexico)—Reasoning that nothing in *Asarco* prevented a bankruptcy court from finding a fee defense provision in a retention agreement to be "reasonable" within the meaning of section 328, the court approved counsel's retention agreement containing a fee defense provision.
    a. "A typical employment agreement between a lawyer and a client has many terms; some benefit the client, while others benefit the lawyer. Considered together, they may be reasonable." The overall effect, the court noted, is that "the client obtains the services of needed, able professionals."

D. Effect of fee caps on professional fees
1. At least in Delaware, general view is that professional budget violations can trigger DIP defaults but are not binding when viewing Section 1129 factors.
    a. Committee professionals who go above budget still must be paid in full in cash as administrative claimants as part of a plan.

E. Professional fee challenges in prepacks
1. There have been a number of recent cases where investment banker fees have been challenged in prepackaged cases by supporting creditors (*e.g., Frontier Communications, David's Bridal*).
    a. Typical argument is that the in-court time and effort from such a case cannot justify such fees
    b. Challenges arise even where the creditors knew the quantum of fees in advance of signing the Restructuring Support Agreement.

VII. ABI Report on Professional Standards and Conduct

A. ABI's Report is available at https://abi-org-corp.s3.amazonaws.com/cle/materials/2013/Sep/Report_on_Standards_of_Professional_Conduct.pdf

B. ABI's Principles of Civility

1. Professionals should be courteous and civil in all professional dealings with other persons
2. When not inconsistent with their clients' interests, professionals should cooperate with other professionals in an effort to avoid litigation and to resolve litigation that already has commenced.
3. Professionals should respect the schedule and commitments of others, consistent with the protection of the client's interests.
4. A professional should not initiate communications with the intention of gaining undue advantage from the recipient's lack of immediate availability.
5. A professional should return telephone calls promptly and respond to communications that reasonably require a response, with due consideration of time zone differences and other known circumstances affecting availability
6. The timing and manner of the servicing of papers should not be designed to cause disadvantage or embarrassment to the party receiving the papers.
7. A professional should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.
8. In out-of-court proceedings, professionals should not engage in any conduct that would not be appropriate in the presence of a judge.
9. A professional should keep his or her word.
10. A professional should not mislead others involved in the bankruptcy process.

C. General Duties of Lawyers

1. Lawyers should be respectful of the schedules and commitments of others.
2. In examinations and other proceedings, as well as in meetings and negotiations, professionals should conduct themselves with dignity and refrain from displaying rudeness and disrespect.
3. Lawyers should not mislead others involved in the bankruptcy process.

D. Lawyers' Duties to the Court and Court Personnel

1. A lawyer is both an officer of the court and an advocate. As such, a lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court and its personnel.
2. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

E. Duties of Judges and Court Personnel to Lawyers, Parties, and Witnesses

1. A judge should be patient, courteous, and civil to lawyers, parties, and witnesses.
2. Court personnel should be courteous, patient, and respectful while providing prompt, efficient, and helpful service to all persons having business with the courts.

VIII. Directly Adverse v. Positionally Adverse Under Model Rule 1.9

A. What is constitutes and adverse interest under Section 327(a).

1. Most courts adopt a two part definition of "adverse interest" to the estate: "1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or 2) to possess a predisposition under circumstances that render such a bias against the estate." *Bank Brussels Lambert v. Coan* (*In re AroChem Corp.*), 176 F.3d 610, 623 (2d. Cir. 1999) (citing *In re Roberts*, 46 B.R. 815 (Bankr. D. Utah 1985)

2. Cases where courts found an adverse interest to the estate

a. *In re Git-N-Go, Inc.*, 321 B.R. 54 (N.D. Okla 2004): In *Git-N-Go*, debtor's counsel maintained an attorney-client relationship with several parties in interest. In addition, the firm represented some of those parties in transactions with the debtor that the court believed were deserving of close examination. Due to its relationship with a major shareholder of the debtor, the court found that the firm came in to the case with a preconceived belief that the transactions were valid and could not effectively object on behalf of the estate to the validity/priority/recharacterization of the major shareholder's claim. The major shareholder also

guaranteed some, but not all, of the debtor's leases, resulting in a direct conflict when deciding which leases to assume or reject. The court rejected the firm's application because it was unable to provide objective and independent advice.

b. *In re Kendavis Industries Intern., Inc.,* 91 B.R. 742: In *Kendavis*, there were competing plans proposed by the Debtors and the committee. The plan proposed by the Debtors was designed exclusively to benefit the Davis family (shareholders). With over $500 million owed in institutional debt, the Debtor proposed a "new value" plan, where they would make a capital contribution of $5 million to retain their equity interests. The plan also did not provide for any determination of fair market value because the debtors did not and would not market the assets. With respect to the committee's plan, the plan called for full recovery to all non-bank, non-insider creditors. The Debtor's counsel "vigorously opposed" the plan even though objecting would only benefit insiders, primarily the Davis family. Further, no substantial non-insider creditors objected to the committee's plan. In addition to the plan issues, the draft agreement for the sale of one of the debtors included compensation for a non-compete clause, in favor of the members of the Davis family, to be paid to the estate. However, debtors' counsel changed the version presented to the court to have the compensation being paid to members of the Davis family. Considering these facts, and the correspondence that suggested that the Davis family believed that debtors' counsel was working for them with the proceedings being conducted to their exclusive benefit, the court found that debtors' counsel's retention was inappropriate.

3. *Not all conflicts are per se materially adverse under 327(a)*

a. *In re Martin*, 817 F.2d 175 (1st Cir. 1987): In *Martin*, the First Circuit vacated a bankruptcy court order finding that a Mortgage constituted a materially adverse interest. In this case, the debtors could not afford to retain the law firm, so they struck a deal that allowed a small retainer payment and provided for a note payable

to the law firm, secured by a mortgage. Finding that the mortgage interest ran afoul of section 327(a), the bankruptcy court allowed the employment of counsel, but invalidated the mortgage interest. The First Circuit, after extensive analysis, decided that not all conflicts must result in a violation of section 327(a), suggesting a more flexible approach. Because the bankruptcy court applied per se standard in its ruling, the First Circuit remanded the case back to the bankruptcy court to consider the mortgage interest in a more flexible lens. It is not clear where the bankruptcy court landed on remand.

B. Positionally adverse under the Model Rules

1. Under Rule 1.9 of the Model Rule of Professional Conduct, "a lawyer who has formally represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

2. Former representation of a client in a related matter violates Rule 1.9

a. *In re Meridian Auto. Sys.-Composite Operations, Inc.*, 340 B.R. 740 (Bankr. D. Del. 2006): Here, Milbank provided legal services to Stanfield, a secured creditor, in connection with debt issued by the Debtor. Stanfield's agent hired other counsel as their representative in the bankruptcy case. Subsequently, an ad hoc committee of first lien lenders hired Milbank to represent them with respect to potential intercreditor issues if a "take-out" facility was not approved by the court. Stanfield then moved to disqualify Milbank from serving as counsel to the ad hoc committee in the Debtor's case. Milbank conceded that Stanfield and the ad hoc committee were materially adverse to each other and that it never sought a waiver from Stanfield. While Milbank was not an estate professional, and thus not subject to retention requirements under the bankruptcy code, the ABA's Model Rules of Professional Conduct, as adopted by the District of Delaware, applies to the practice of law before the court. Accordingly, the court found that

Milbank's representation of the ad hoc committee was in violation of Model Rule 1.9 because (1) the representations concerned the same or substantially related matters and (2) Stanfield did not consent, either expressly or impliedly, to Milbank's representation of the committee. The court determined that because Milbank did not meet the requirements of Rule 1.9, its retention as representation of the committee would be improper and would be adverse to its former client.

b. *In re Pittsburg Corning Corp.*, 308 B.R. 716 (Bankr. W.D. Pa. 2004): Here, a creditor's committee hired representation ("GHR") to act as special insurance counsel in a bankruptcy proceeding. Various insurance entities objected to the representation on the basis that GHR was not disinterested and had a conflict of interest because it had previously represented one of the Debtor's shareholders in a matter regarding insurance coverage. The court considered the propriety of the representation under Model Rule 1.9 and found GHR could not be retained in the case because it "was not disinterested, had an actual conflict of interest, or, at a minimum, a potential conflict of interest, and holds an interest adverse to the estate insofar as it purports to undertake representation of those who have claims against its former client." This was because the subject matter of the former representation of the shareholder and the current representation of the Creditor's Committee was the same. The court also found that a limited waiver by the former client was not sufficient to overcome the conflict of interest because GHR would not have been able to comply with the obligation to meet its ethical and fiduciary duties to both the former and current client. As such, GHR's retention by the Creditor's Committee was improper under Rule 1.9.

3. While adverse interests under Section 327(a) and Rule 1.9 have substantially similar standards that often capture the same conduct, one clear distinction is the ability to waive such conflicts under the Model Rules. No such ability exists under Section 327(a). A Chapter 11 debtor has fiduciary duties to the estate and, therefore, cannot waive debilitating

conflicts on behalf of the estate. *In re Git-N-Go, Inc.*, 321 B.R. at 60 ("the Debtor, as a fiduciary, may not waive conflicts on behalf of the estate"); *In re Amdura Corp.*, 121 B.R. 862, 866 (Bankr. D. Colo. 1990) ("what may be acceptable in a commercial setting, where entities are solvent and creditors are being paid, is not acceptable when those entities are insolvent and there are concerns about intercompany transfers and the preference of one entity and it creditors at, perhaps, the expense of another").

Faculty

Jasmine Ball is a corporate partner and member of Debevoise & Plimpton LLP's Business Restructuring & Workouts Group in New York and regularly represents debtors, investors, creditors and other parties in distressed mergers & acquisitions, workouts, debt and equity financing and refinancing, complex restructurings and chapter 11 bankruptcy proceedings. She is recognized by *The Legal 500 US* and IFLR 1000, and was among the winners of M&A Advisor's 2017 "Restructuring Deal of the Year ($1B to $5B)" for her role as aircraft counsel to CHC Group in its successful chapter 11 proceedings. Ms. Ball was among the winners of Turnaround Management Association's 2018 "International Restructuring of the Year" and Global M&A Network's "Turnaround Atlas Awards 2018 Corporate Turnaround of the Year." In addition, she received the Turnaround Management Association's 2014 "Transaction of the Year: Mega Company Award" for her role in advising American Airlines and AMR as special aircraft counsel in their highly successful chapter 11 proceedings. Ms. Ball was named a 2015 recipient of the "Outstanding 50 Asian Americans in Business" awards and recognized as an "Outstanding Young Restructuring Lawyer" (2013) by *Turnarounds & Workouts*. She is a member of the Bar of the State of New York and is admitted to practice before the U.S. District Court for the Southern District of New York. Ms. Ball received her B.S. in civil engineering and operations research in 1996 from Princeton University, with a certificate in engineering and management systems, and her J.D. in 1999 from the University of Michigan Law School, where she was an executive editor of its *Journal of International Law*.

Christopher R. Donoho, III is global head of Hogan Lovells US LLP's Business Restructuring and Insolvency practice group and is experienced in domestic and cross-border private equity portfolio company restructurings, bondholder group representations and distressed M&A. He has played a leading role on numerous award-winning deals, including advising the Kodak Pension Plan in the Eastman Kodak Company chapter 11 case (which won the Turnaround Management Association's 2014 Mega Turnaround of the Year Award, where he received an individual award for his contributions), representing Orexigen Therapeutics in its chapter 11 proceedings and successfully negotiating a court-approved § 363 sale of Orexigen's assets to Nalproprion Pharmaceuticals (winner of The M&A Advisor's 2018 Turnaround Award for Healthcare/Life Sciences Deal of the Year (Under $500m)), and representing the unsecured creditors' committees in the Abengoa chapter 11 cases, having confirmed plans of reorganization delivering substantial value to unsecured creditors and now is pursuing additional recoveries for the liquidating trustees (which won The M&A Advisor's 2017 Turnaround Award for § 363 Sale of the Year (Over $250m - $500m)). From 2015-19, Mr. Donoho served as the office administrative partner of the firm's New York office. He received his A.B. from Brown University in 1991 and his J.D. from Vanderbilt University in 1994.

Jonathan E. Goldin is the COO and general counsel of Teneo Capital Advisory in New York and has more than a decade of experience as a corporate legal and operations principal. He also provides strategic financial advice, having worked with clients across various industries on restructuring engagements, valuation analyses and fiduciary matters. Mr. Goldin was previously a lawyer at Wachtell, Lipton, Rosen & Katz, where he focused on representing corporations, directors and officers in litigation relating to mergers and acquisitions, corporate governance, securities law issues, regulatory inquiries and other complex civil matters. Before practicing law, he clerked for Hon.

Sidney H. Stein of the U.S. District Court for the Southern District of New York and for Hon. José A. Cabranes of the U.S. Court of Appeals for the Second Circuit. Mr. Goldin is a member of the New York City Bar Association's Bankruptcy and Reorganization Committee, Puerto Rico Task Force and Litigation Funding Working Group, ABI and the Association of Corporate Counsel. His public service has included membership on the New York City Water Board and its Joint Audit Committee with the New York City Water Finance Authority, the Commercial Division Advisory Council of the New York Court System, the New York Chief Judge's Committee on Non-Lawyers and the Justice Gap, and the Pro Bono Advisory Committee of the New York Lawyers for the Public Interest. He also is a trustee of the Citizens Budget Commission. Mr. Goldin received his A.B. *cum laude* from Harvard College, where he was elected to Phi Beta Kappa, and his J.D. *magna cum laude* from Harvard Law School.

John D. Penn is the firmwide chair of Perkins Coie LLP's Bankruptcy & Restructuring Practice in New York and Dallas. He is licensed by the Supreme Court of Texas and the Supreme Court, Appellate Division of New York in 2010, and has been an active bankruptcy and insolvency practitioner for almost 40 years. Mr. Penn is a former ABI president and chairman, and he served as chairman and past president of the American Board of Certification. He has been Board Certified in Business Bankruptcy Law by both the American Board of Certification and the Texas Board of Legal Specialization for nearly 30 years. Mr. Penn has written extensively on bankruptcy and reorganization topics. His work has been published in the *ABI Law Review*, the *ABI Journal* and a number of other publications. Mr. Penn received both his B.B.A. and J.D. from Baylor University.

Hon. Alan S. Trust is Chief U.S. Bankruptcy Judge for the Eastern District of New York in Central Islip, initially appointed on April 2, 2008, and named Chief Judge on Oct. 1, 2020. He has been an adjunct professor of law at the St. John's University School of Law since 2009. Judge Trust served a two-year term as president of the Eastern District of New York Chapter of the Federal Bar Association, and serves as CLE Committee co-chair. He is a past chair of the Bankruptcy Law Section of the Federal Bar Association and a member of the board of directors of that Section, and has served as the CLE Committee chair. Judge Trust is a member of the *ABI Journal*'s Editorial Board and is a coordinating editor for the *Journal*, and for several years has had responsibility for its Dicta column. He is a member ABI and the National Conference of Bankruptcy Judges. Judge Trust had been previously designated by the Second Circuit Court of Appeals to mediate cases in the Southern District of New York and to sit in the District of Connecticut bankruptcy court. He has continued to serve as a judge mediator in the Eastern District of New York. Judge Trust has been selected by the Federal Judicial Center on several occasions to serve as a faculty member for national bankruptcy judge workshops, and he has spoken on issues such as evidence and the power of the bankruptcy courts to regulate its proceedings through sanctions and contempt. He also serves on the Judiciary Data Working Group under the auspices of the Administrative Offices of the U.S. Courts. Judge Trust is a frequent speaker and contributor for numerous CLE events and seminars, addressing bankruptcy, mediation, trial practice and ethics issues, and has participated in a number of civics programs. He was instrumental in the creation of the *Pro Bono* Mediation Program and the formation of the Consumer Lawyer Advisory Committee adopted by the Eastern District of New York Bankruptcy Court. Judge Trust received his undergraduate degree *summa cum laude* from Syracuse University in 1981, where he was a member of Phi Beta Kappa, and his J.D. *cum laude* from New York University School of Law in 1984, having served on its law review from 1982-83.