AMERICAN BANKRUPTCY INSTITUTE

Bankruptcy 2024:
Views from the Bench

# All Things Ethics


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**Hon. Sean H. Lane**
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**Hon. Mina Nami Khorrami**
U.S. Bankruptcy Court (S.D. Ohio) | Columbus


2024

**SEVERAL THINGS ABOUT ETHICS: A CLOSER LOOK AT CONFLICTS, DISCLOSURE AND ARTIFICAL INTELLIGENCE**

**AMERICAN BANKRUPTCY INSTITUTE VIEWS FROM THE BENCH WASHINGTON DC – SEPTEMBER 27, 2024**

- **Panelists:**
- **Honorable Jeffrey W. Cavender, Atlanta, GA**
- **Honorable Sean H. Lane, New York, NY**
- **Honorable Mina Nami Khorrami, Columbus, OH**
- **Moderators:**
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ARTIFICIAL INTELLIGENCE

IGNORANCE MAY BE BLISS, BUT IT IS A DERELICTION OF YOUR ETHICAL OBLIGATIONS TO YOUR CLIENT . . .

## Artificial Intelligence Hypothetical 1

- Summary: AmLaw 173 Law Firm Nations & Brannon's second year associate drafts a brief in support of confirmation using ChatGPT but fails to check cited quotes or tell his partner he has used ChatGPT. The partner then signs off on the brief and it is filed. Opposing counsel calls out the miscites and the Bankruptcy Court enters a rule to show cause as to why sanctions should not be entered against Nations & Brannon.
- Should anyone be sanctioned here? And what would be appropriate?

## Ethical Rules to Consider – Hypothetical 1

- Rule 1.1 – Competence
- Rule 1.4 – Communication
- Rule 1.6 – Confidentiality of Information
- Rule 5.1 - Responsibilities of Partners, Managers, and Supervisory Lawyers
- FRBP 9011/FRCP 11

## Artificial Intelligence – Hypothetical 2

Summary: Benner & Block is litigating causes of action under Sections 547 and 548 of the Bankruptcy Code and is contemplating whether its client should file for summary judgment. Part of the firm's evaluation process uses a generative artificial intelligence model that evaluates the judge's prior summary judgment decisions plus a significant amount of case information particular to the firm's client.

Does the firm need the client's consent to use AI in this manner?

Can the lawyer charge an enhanced fee for these services?

What about confidentiality?

## Ethical Rules to Consider – Hypothetical 2

- Rule 1.4 – Communication
- Rule 1.5 - Fees
- Rule 1.6 – Confidentiality of Information
- Rule 5.1 - Responsibilities of Partners, Managers, and Supervisory Lawyers

## Rule 1.1: Competence

*Client-Lawyer Relationship*

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

## Rule 1.4 – Communications

*Client-Lawyer Relationship*

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

## Rule 1.5 – Fees

*Client-Lawyer Relationship*

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

* * *

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

* * *

## Rule 1.6: Confidentiality of Information

*Client-Lawyer Relationship*

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

## Rule 5.1 – Responsibilities of Partners, Managers, and Supervisory Lawyers

*Law Firms And Associations*

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

## American Bar Association Formal Opinion 512 - July 29, 2024 Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

# Conflicts and Disclosures – Hypothetical 1

- Summary: National law firm ABC has a continuing attorney client relationship with Lending Bank, which relationship reflects about 2% of the firm's annual revenue, and is primarily related to front end transaction work. Sporting Good wants to hire ABC to represent it in its upcoming Chapter 11 filing, and ABC would like to do so and earn the millions of dollars in fees in anticipates from this engagement, and the Firm learns that Lending Bank is Sporting Good's largest secured lender. The Firm did not do the financing work between Lending Bank and Sporting Good, but it would like to be retained.
- How should ABC address this conflict and disclosure issue?
- Is this an actual conflict? Or only an appearance of one?
- Is this a waivable conflict, and if so by whom and how?
- What if the Firm previously reviewed the relevant loan documents for Lending Bank?

# Conflicts and Disclosures - Hypothetical 2

- Summary: ABC, having not prepared the Lending Bank/Sporting Good loan documents decides it can take on the engagement. ABC discloses the relationship and the ethical steps it proposes to take to preserve client confidences. During negotiations for the DIP, ABC realizes that it may have knowledge about ABC particular to the terms being negotiated in the DIP and begins to feel angst and shame about the relationship.
- How should ABC address this conflict now?
- May an ethical wall resolve this conflict?

## Conflicts & Disclosures – Hypothetical 3

- Summary – Post-confirmation, the former counsel for the creditors committee is representing the newly minted liquidating trustee. The liquidating trustee sues the former majority shareholder for breach of fiduciary duty and the receipt of fraudulent transfers. The majority shareholder asked ABC firm if it can defend her. ABC firm then seeks to withdraw as counsel for the debtor in order to appear for and defend the shareholder against the liquidating trustee's adversary complaint.
- Should the Bankruptcy Court grant the motion to withdraw?
- Would the liquidating trustee be able to successfully exclude ABC from representing the former majority shareholder?

## 11 U.S.C. Section 101(14)

The term "disinterested person" means a person that--

**(A)** is not a creditor, an equity security holder, or an insider;

**(B)** is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

**(C)** 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.

# Rule 2014 Employment of Professional Persons

- (a) Application for an Order of Employment.
- . . . and, to the best of the applicant's knowledge, **all of the person's connections** with the debtor, creditors, any other party-in-interest, their respective attorneys and accountants, the United States trustee, or any other person employed in the office of the United States trustee.

# SEVERAL THINGS ABOUT ETHICS:

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## Conflicts and Disclosure While Working for the Estate

Hypothetical One:

ABC Firm ("Firm") has a continuing client relationship with the Lending Bank. The Firm's gross income from its work for the Lending Bank is in excess of one million dollars annually, which is about 2% of the Firm's annual income. The Firm has a nationwide presence in different areas of the law including insolvency and bankruptcy. In fact, this Firm represents several debtors as well as creditors' committees in the bankruptcy courts nationally. But most of the Firm's work for the Lending Bank is with respect to transactional work, financing, investment, loans, mergers and acquisitions, and other related transactional work.

Sporting Good, Inc. ("Sporting") with over 150 stores is experiencing financial difficulties. The sales are slow and Sporting does not have a great online presence. Its overhead is excessive and many stores are experiencing loss which has continued after the pandemic shutdown. Sporting has closed over 50 of its stores recently but it is still experiencing annual losses. Sporting has heard of the Firm's reputation and wants to have the Firm represent it to help it turn around its business or ultimately file bankruptcy. One of the major creditors of Sporting is the Lending Bank and in fact it is its largest secured creditor. The Lending Bank has threatened to foreclose on Sporting if it does not come current on its loans.

Sporting contacts the Firm and after the initial meeting, it is determined that Sporting's best option is to file Ch. 11 immediately. This Ch. 11 case can bring the firm several million dollars in revenue. The Firm does its conflict check and discovers the conflict.

Let's assume that the Firm did not work on the loan documents between the Lending Bank and the Sporting, so that the Firm can truthfully disclose that its work for Lending Bank is unrelated to its proposed representation of Sporting in the Ch. 11.

How should the Firm deal with this conflict?

Is this an actual conflict, a potential conflict, or simply an appearance of conflict?

What if the Lending Bank does not consent to the waiver. What should the Firm do?

What if the Lending Bank consents to the waiver. How should this conflict be disclosed?

What if the Firm did review the loan documents between the Lending Bank and the Sporting? Is this an actual conflict that cannot be waived?

Hypothetical Two:

The Firm, not being involved in reviewing/drafting the prepetition Sporting lending document with Lending Bank, decides to take on the case of Sporting and files the Ch. 11. In its retention motion, the Firm discloses the conflict of interest about its representation of the Lending Bank in matters not related to the DIP and that it has resolved the conflict by an ethical wall. The Lending Bank does not object to the retention motion and the court allows the Firm to be retained by DIP. In its negotiation with the Lending Bank, the Firm realizes that its knowledge of the terms of any loan documents places the Firm in a position that might be adversarial to the Lending Bank.

How should the Firm deal with this conflict?

Is this an actual conflict, a potential conflict, or simply an appearance of conflict?

What if the Firm was involved in reviewing/drafting the prepetition Sporting loan documents with the Lending Bank, can an ethical wall resolve this conflict?

Hypothetical Three:

After confirmation, the Firm decides to stop working for the Debtor and files a motion to withdraw as counsel so that it can represent the former majority shareholder of Sporting. At the time this motion is filed, Sporting's assets were sold as a going concern as part of a 363 sale, with the bulk of the proceeds going to Lending Bank, which agreed to a carve-out as part of a liquidating Plan. The carved-out funds, along with all of Sporting's potential avoidance actions and other litigation claims, went into the Sporting Liquidating Trust. The Plan provides that the Liquidating Trust succeeds to any privilege that had been held by Sporting prior to confirmation. The Trustee decided to retain the firm that had represented the Creditors' Committee during the case, and Firm, which has received final approval under Section 330 of its fees earned during the case, has little, if anything, left to do in the case. When the Liquidating Trustee files an adversary proceeding against the largest shareholder of Sporting, who was also the chair of its board of directors, asserting claims for breach of fiduciary duty and receipt of fraudulent transfers from the Debtor, the shareholder contacts Firm to represent him. Firm files a motion to withdraw from representation of the Debtor, citing the fact that there is essentially nothing left for it (or the Debtor) to do. In the motion, it discloses that it has been retained by the former majority shareholder and enters an appearance on the majority shareholder's behalf in the adversary proceeding.

Should the court grant the motion to withdraw?

If the Liquidating Trustee pursues a motion to disqualify will Firm be able to represent the majority shareholder?

No. 24-10453-BFK
United States Bankruptcy Court, Eastern District of Virginia

# In re Enviva Inc.

Decided May 30, 2024

24-10453-BFK

05-30-2024

In re: ENVIVA INC., et al., Debtors.

Enviva Inc. Chapter 11 Debtor Peter J. Barrett, Counsel for Debtor Jeremy S. Williams Counsel for Debtor Gerard R. Vetter, U.S. Trustee Adolyn Clark Wyatt, Counsel for Debtor David S. Meyer, Proposed Counsel for Debtor Jessica C. Peet, Proposed Counsel for Debtor Glenn T. Nunziata, Debtor Designee Nicholas S. Herron, Counsel for U.S. Trustee Alexander F. Antypas, Proposed Counsel for Unsecured Creditors Committee Kristen E. Burgers, Proposed Counsel for Unsecured Creditors Committee Matthew J. Pyeatt Proposed Counsel for Debtor Trevor G. Spears Proposed Counsel for Debtors

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Honorable Brian F. Kenney United States Bankruptcy Judge

Chapter 11

Enviva Inc. Chapter 11 Debtor

Peter J. Barrett, Counsel for Debtor

Jeremy S. Williams Counsel for Debtor

Gerard R. Vetter, U.S. Trustee

Adolyn Clark Wyatt, Counsel for Debtor

David S. Meyer, Proposed Counsel for Debtor

Jessica C. Peet, Proposed Counsel for Debtor

Glenn T. Nunziata, Debtor Designee

Nicholas S. Herron, Counsel for U.S. Trustee

Alexander F. Antypas, Proposed Counsel for Unsecured Creditors Committee

Kristen E. Burgers, Proposed Counsel for Unsecured Creditors Committee

Matthew J. Pyeatt Proposed Counsel for Debtor

Trevor G. Spears Proposed Counsel for Debtors

**MEMORANDUM OPINION AND ORDER DENYING DEBTORS' APPLICATION TO EMPLOY VINSON & ELKINS L.L.P.**

Honorable Brian F. Kenney United States Bankruptcy Judge

This matter is before the Court on the Debtors' Application to Employ Vinson & Elkins L.L.P. ("V&E") as counsel for the Debtors in Possession pursuant to 11 U.S.C. § 327(a). Docket No. 183. The Application is supported by the Declaration of David S. Meyer, and Mr. Meyer's two Supplemental Declarations. Docket Nos. 183, 442, 481. The U.S. Trustee filed an Objection to the Application, and a Brief in Support of its Objections. Docket No. 273, 440. The Court heard the evidence and the parties' arguments on May 9, 2024. For the reasons stated below, the Court will deny the Application.

**Findings of Fact**

The Court, having heard the evidence, makes the following findings of fact.

*A. The Debtors.*

1. Enviva, Inc. and its affiliates (collectively, "Enviva," or "the Debtors") filed Voluntary Petitions under Chapter 11 with this Court on

March 12, 2024. Docket No. 1. The cases are being jointly administered. Docket No. 84.

2. The Debtors are "the world's largest producer of
2 industrial wood pellets, a *2 renewable and sustainable energy source produced by aggregating a natural resource- predominantly waste wood fiber-and processing it into a transportable form." Docket No. 27, Nunziata Decl. ¶ 6. The Debtors "[own] and [operate] ten industrial-scale wood-pellet production plants located in Virginia, North Carolina, South Carolina, Georgia, Florida, and Mississippi." *Id.* at ¶ 7. They have been "developing and constructing two additional plants; the first near Epes, Alabama, and the second near Bond, Mississippi." *Id.*

*B. The First Day Hearing.*

3. The Court held a first day hearing in the case on March 14, 2024. At that time, no creditors committee had been appointed.

4. The Debtors sought approval on an interim basis of Debtor in Possession financing (the "DiP Facility") in the amount of $500 million, $150 million of which was to be disbursed immediately upon entry of the Interim Order approving the DiP Facility. Docket No. 24.

5. The lenders under the DiP Facility are known as the Ad Hoc Group. The Ad Hoc Group consists of 75% of the holders of Prepetition Senior Secured Debt, 95% of the holders of the Debtors' 6.50% 2026 Notes, 78% of the holders of the Debtors' Epes Bonds, 45% of the holders of the Debtors' Bond Green Bonds, and 5,073,753 shares of common stock in Enviva, Inc. Docket No. 442, Meyer Suppl. Decl. ¶ 22.[1]

[1] The Ad Hoc Group also has entered into a Restructuring Support Agreement ("RSA") with the Debtors, which has not yet been presented to the Court for approval. The Debtors also have entered into a separate RSA with the holders of 45% of its Bond Green Bonds.

6. The Court approved the DiP Facility, but both the Court and the U.S. Trustee questioned the Debtor's proposal to pay $4.6 million of tax and other liabilities for a non-debtor entity known as Enviva Wilmington Holdings, LLC ("EWH").
3 Docket No. 7, Motion of Debtors *3 for Entry of Interim and Final Orders (I) Authorizing the Payment of Certain Prepetition Taxes and Fees; and (II) Granting Related Relief, p. 9.

7. The Debtors withdrew their request to pay the $4.6 million in EWH obligations at the hearing. Docket No. 128, Hrg. Tr. 51:15-19.

8. One of V&E's current clients, John Hancock, is a member of EWH. Docket No. 481, Meyer Second Suppl. Decl. ¶ 6. As such, John Hancock would have benefitted indirectly from the proposed payment of the $4.6 million on behalf of EWH.

*C. Final Approval of the DiP Facility.*

9. The Court heard the Debtors' Motion for final approval of the DiP Facility on May 1, 2024. The Official Committee of Unsecured Creditors ("the Committee") objected to several features of the DiP Facility. Docket Nos. 375, 390.

10. By the time of the hearing on final approval of the DiP Facility, the Debtors and the Committee resolved all the Committee's concerns, except for one. An unusual feature of the DiP Facility involved granting existing equity holders the opportunity to subscribe to up to $100 million of the DiP Facility (with the Ad Hoc Group backstopping the entire $500 million). Docket No. 128, Hrg. Tr. 30:1-13. By the time of the hearing, this opportunity was fully subscribed.

11. The Court approved the DiP Facility and overruled the Committee's Objections with respect to the $100 million subscription feature. Docket No. 457.

12. As later disclosed in connection with the V&E Application (below), certain members of the Ad Hoc Group are also clients of V&E.

4 *D. The V&E Application.* *4

13. On March 27, 2024, the Debtors filed an Application for Entry of an Order Authorizing the Retention and Employment of Vinson & Elkins L.L.P. as Attorneys for the Debtors and Debtors in Possession Effective as of the Petition Date. Docket No. 183 ("the V&E Application"). The Application was supported by a Declaration from Mr. Meyer. *Id.*

14. The Debtors also filed an Application to Employ Kutak Rock LLP as Co-Counsel for the Debtors. Docket No. 187. The Court approved the Kutak Rock Application on April 12, 2024. Docket No. 319.

15. On April 3, 2024, the Court entered an Order Continuing the Hearing on the V&E Application, noting that V&E had disclosed: (a) that it represents certain Officers and Directors of the Debtors in shareholder and derivative litigation; and (b) that it represents the Riverstone entities, which are equity security holders in the Debtors (discussed below). Docket No. 224. *See also* Docket No. 183, Meyer Decl. pp. 9-11. The Court further noted that V&E had not discussed any ethical walls in its Application. Docket No. 224.

16. On April 10, 2024, the U.S. Trustee filed an Objection to the V&E Application. Docket No. 273. On May 2, 2024, the U.S. Trustee filed a Supplemental Brief in support of his Objection. Docket No. 440.

17. The Debtors filed a Reply Brief, and Mr. Meyer filed a Supplemental Declaration in support of the V&E Application. Docket Nos. 441, 442.

18. On May 8, 2024, Mr. Meyer filed a Second Supplemental Declaration. Docket No. 481.

19. At the hearing on the V&E Application, the parties stipulated to the admission of U.S. Trustee Exhibits 101-119, and the Debtors' Exhibits 1-20. Docket No. 532, Hrg. Tr. 5:1-7.

*E. V&E's Representation of Members of the Ad Hoc Group.* *5

5 20. Mr. Meyer disclosed in his first Supplemental Declaration that V&E represents certain members of the Ad Hoc Group in unrelated matters. Docket No. 442, Meyer Suppl. Decl. ¶¶ 21-24. Specifically, V&E represents Ares Management, LLC, Morgan Stanley & Co., LLC, Oaktree Capital Management, LP, and Monarch Alternative Capital LP. *Id*. at ¶¶ 25-28.

21. The U.S. Trustee asserts that V&E failed to disclose its connection with Oaktree, and that the U.S. Trustee discovered this connection on its own. Docket No. 440, p. 4.[2]

[2] The U.S. Trustee asserts that V&E is currently representing Oaktree in connection with the bankruptcy case of *Curo Group Holdings Corp.,* in Texas. Docket No. 440, n. 7.

22. The Monarch representation is notable because it began in April 2024, after V&E filed the Petitions in this case on behalf of the Debtors. Docket No. 442, Meyer Suppl. Decl. ¶ 28.

*F. V&E's Representation of the Officers and Directors.*

23. V&E represents several of the Debtors' Officers and Directors in shareholder and derivative litigation. Docket No. 183, Meyer Decl. ¶ 21, 22.

24. The cases are currently stayed, at least as to the Debtors.

25. V&E will be compensated for its representation of the Officers and Directors through insurance policies. *Id.* at ¶ 22.

26. The Officers and Directors maintain that they are entitled to indemnity from the Debtors. *Id*. at ¶ 18.

27. The U.S. Trustee argues that V&E's representation of the Officers and Directors represents a conflict because the Ad Hoc Group RSA provides that the Debtors' management will

receive 3.5% of the equity in the reorganized entities, and additional warrants to purchase equity in the reorganized entities. Docket No. 440, p. 5.

*G. V&E's Continuing Representation of Riverstone.* *6

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28. The first Meyer Declaration disclosed that Riverstone Investment Group, LLC, and its affiliates (collectively, "Riverstone"), are current clients of V&E. Docket No. 183, Meyer Decl. ¶ 20.

29. Riverstone and its affiliates collectively own 43% of the common equity of Enviva, Inc. *Id.*

30. Two members of Enviva's 13-member board are affiliated with Riverstone. Docket No. 442, Meyer Suppl. Decl. ¶ 6.

31. V&E currently represents Riverstone in matters unrelated to this case. *Id*. at ¶ 3.

32. There are no ethical walls erected at V&E concerning its simultaneous representation of Enviva and Riverstone. Docket No. 441, V&E Reply Br. p. 3; *see also* Docket No. 532, Hrg. Tr. 12:13-19. In fact, there are attorneys at V&E who currently represent both Enviva and Riverstone, thereby making any ethical walls impossible.[3]

[3] V&E's extensive connections with Riverstone are not difficult to find on V&E's own website. *See* V&E News, *Vitol and Riverstone Credit Partners Announce the Formation of Valor Upstream Credit Partners, L.P.,* Vinson & Elkins, *https://www.velaw.com/news/vitol-and-riverstone-credit-partners-announce-the-formation-of-valor-upstream-credit-partners-l-p/* (June 21, 2023) ("Vinson & Elkins advised Vitol, the largest independent energy trading company globally, in the formation of Valor Upstream Credit Partners, L.P. ('VCP' or the 'Fund') with Riverstone Credit Partners, a dedicated credit investment platform focused on energy and the energy transition."); V&E News, *Riverstone Holdings Invests in Group14 Technologies' $400M Raise to Accelerate Global Production of Lithium-Silicon Battery Materials,* Vinson & Elkins, *https://www.velaw.com/news/riverstone-holdings-invests-in-group14-technologies-400m-raise-to-accelerate-global-production-of-lithium-silicon-battery-materials/* (May 5, 2022) ("Vinson & Elkins advised an affiliate of Riverstone Holdings LLC in its investment in Group14 Technologies' $400 million Series C funding round led by Porsche AG…").

33. Riverstone represented 0.8% of V&E's billings, and 1.4% of its collections for V&E's fiscal year, ending December 31, 2023. Docket No. 183, Meyer Decl. ¶ 3. This translates to Riverstone being a $14 million-dollar-a-year client for V&E.[4] *7

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[4] V&E News, *The American Lawyer Profiles Vinson & Elkins' Record Financial Performance in 2023,* Vinson & Elkins, *https://www.velaw.com/news/the-american-lawyer-profiles-vinson-elkins-record-financial-performance-in-2023/* (Feb. 16, 2024) ("Vinson & Elkins posted a record year in 2023, topping the $1 billion revenue mark for the first time…").

34. Riverstone has consented to V&E's representation of the Debtors, and has engaged its own counsel. Docket No. 442, Meyer Suppl. Decl. ¶ 9.

35. As recently as December 2022, three months before these bankruptcy cases were filed, Mr. Meyer represented Riverstone in two matters in connection with: (a) the bankruptcy cases of *In re Talen Energy Corp.* ("TEC") in the Southern District of Texas; and (b) a preferred equity investment in Anuvia Plant Nutrients Holdings, Inc. ("Anuvia"). *Id*. at ¶ 13.[5]

[5] On January 24, 2024, V&E, representing "the Riverstone Parties," and others, submitted an Agreed Stipulation of Dismissal With Prejudice in an adversary

> proceeding in the Southern District of Texas Bankruptcy Court. Adv. Pro. 22-09001-MI, Docket No. 243. The adversary proceeding was dismissed with prejudice on the same day. *Id*. at Docket No. 244.

H. *The Alleged Preferential Payments*.

36. Finally, the U.S. Trustee argues that V&E is not disinterested because it received certain pre-petition payments of its invoices that might be characterized as preferential under Section 547(b) of the Code. Docket No. 440, pp. 6, 14-17.

37. V&E responds by arguing: (a) it has arguable defenses to any preference liability, such as new value (11 U.S.C. § 547(c)(4)), and ordinary course (11 U.S.C. § 547(c)(2)); and (b) it is willing to waive any Section 502(h) claims that might arise in the event any of the payments are avoided. Docket No. 441, pp. 19-20.

**Conclusions of Law**

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Order of Reference entered by the U.S. District Court for this District on August 15, 1984. This is a core proceeding under 28 U.S.C. 157(b)(2)(A) (matters concerning the administration of the estate).

The Court does not question V&E's qualifications to represent the Debtors in this case. V&E is a large, national law firm with deep experience in these kinds of cases. The Court further does not find that V&E was deficient in any way in its
8 ethical obligations of full disclosure and *8 condor to the Court, the U.S. Trustee and the parties in interest. The Court does find, however, that V&E's connections with Riverstone, with no ethical walls (indeed, with the impossibility of erecting an ethical wall), render V&E not disinterested within the meaning of Section 327(a) of the Code. The Court, therefore, will deny the Debtors' Application to Employ V&E.

**I. The Disinterestedness Standard.**

Bankruptcy Code Section 327 provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a).[6]

> [6] A Debtor in Possession, such as Enviva, occupies the position of "trustee" under this statute. 11 U.S.C. § 1107(a).

The term "disinterested person" means a person that:

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
>
> (C) 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.

11 U.S.C. § 101(14).

The two terms - not holding an adverse interest and being disinterested - are generally conflated in the case law. *In re Boy Scouts of Am.,* 35 F.4th 149 (3d Cir. 2022). The Bankruptcy Code and Rules do not define the term "interest adverse to the estate." The courts generally hold that an adverse interest means either "(1) the possession or assertion of any economic interest that would tend to lessen the value of the bankruptcy estate or create an actual or potential dispute with the estate as a rival claimant, or (2) a predisposition of bias
9 against the estate." *In re* *9 *Lewis Rd., LLC,* 2011

WL 6140747, at *7 (Bankr. E.D. Va. Dec. 9, 2011); *In re Granite Partners, L.P.,* 219 B.R. 22, 33 (Bankr. S.D.N.Y. 1998).

The burden is on the applicant, here V&E, to demonstrate that it meets the disinterestedness standard. *In re Harold & Wiliams Dev. Co.*, 977 F.2d 906, 910 (4th Cir. 1992) ("once the trustee meets the burden of demonstrating that an applicant for professional employment is qualified under § 327, *see* Bankr. Rule 2014(a), the discretion of the bankruptcy court must be exercised in a way that it believes best serves the objectives of the bankruptcy system."); *In re Champagne Servs., LLC*, 560 B.R. 196, 201 (Bankr. E.D. Va. 2016).

**II. V&E's Disclosures.**

Bankruptcy Rule 2014 provides in part, as follows:

> The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, *and, to the best of the applicant's knowledge, all of 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.*

Fed. R. Bankr. P. 2014(a) (emphasis added).

Judge Huennekens of this Court held in the *Lewis Road* case:

> Disclosures made pursuant to Rule 2014 "must be explicit enough for the court and other parties to gauge whether the person to be employed is not disinterested or holds an adverse interest." *In re Circle T Pipeline, Inc.,* 2011 Bankr. LEXIS 2490, at *33 (quoting *In re Midway Indus. Contractors, Inc.,* 272 B.R. 651, 662 (Bankr.N.D.Ill.2001)). "[D]ebtors-in-Possession and their attorneys, whose employment is sought to be approved, [must] be meticulous in disclosing 'all connections' with the debtor and other parties in interest, and the failure to do so [justifies] a Court's taking significant punitive or corrective action." *Id.*

*In re Lewis Rd.*, LLC, 2011 WL, at *8.

"Bankruptcy Rule 2014 disclosure is not optional; it's mandatory." *In re Dickson Properties, LLC,* 2012 WL 2026760, at *8 (Bankr. E.D. Va. June 5, 2012). *10

The Court understands that in complex cases such as this one, Rule 2014(a) disclosures are a difficult, time-consuming task. To be clear, all applicants for professional employment have a continuing duty of disclosure of any connections. The Court finds that V&E was not deficient in its disclosure obligations in this case. It appears that all V&E's connections were disclosed in advance of the hearing on its Employment Application on May 9th.[7] V&E acknowledged its belated disclosure of Oaktree as a client, but V&E described Oaktree as a "late entrant" into the Debtors' debt structure, and the Court accepts that explanation. This is not a case where an undisclosed conflict is discovered deep into the case.

[7] The Court would have preferred to know of V&E's representation of John Hancock at the first day hearing, where the Debtors proposed to pay $4.6 million in tax obligations for a non-debtor entity, EWH, in which John Hancock is a member. The

> Debtors withdrew the request for pay the $4.6 million at the hearing, after both the U.S. Trustee and the Court questioned the propriety of paying $4.6 million on behalf of a non-debtor affiliate.

The Court finds that V&E's disclosures satisfied the requirements of Rule 2014(a). Its disclosures are not a reason to disqualify the firm from representing the Debtors in this case.

**III. V&E's Representation of the Officers and Directors.**

V&E represents certain Officers and Directors in shareholder and derivative actions pending elsewhere. Absent bad faith or willful misconduct, officers and directors are generally entitled to indemnification, including defense costs. V&E's fees for its representation of the Officers and Directors will be paid from D&O insurance policies.

The matter is made more complex, however, by the fact that, under the RSAs, the Debtors' management would be entitled to 3.5% of the equity in the reorganized entities, with warrants for additional equity. The Court reiterates that the RSAs have not been presented for approval, and that the RSAs are subject to continuing negotiations with the Committee. The Court views this particular issue as falling on the side of the flexible inquiry required by the Fourth Circuit in *In re Harold & Williams Development Company.*
11 977 F.2d at 911 ("In *11 considering the approval of dual appointments, a bankruptcy court should satisfy itself that the foreseeable legal and accounting tasks present no inherent conflict or potential breach of confidence. The court should then weigh, against the risks of any *potential* difficulties, the potential advantages to the bankruptcy estate of a dual appointment, such as savings of time and money spent on estate administration.") (emphasis in original).

For now, at least, the Court finds that V&E's representation of the Officers and Directors does not present an impermissible conflict.

**IV. The Alleged Preferences.**

The U.S. Trustee also argues that V&E received certain pre-petition transfers that may be characterized as preferences under Section 547(b) of the Code. The Court is not in a position to evaluate any possible defenses, such as new value or ordinary course, to any preference claims. V&E has offered to waive any possible 502(h) claims against the estate, if it is forced to disgorge any preference payments.

The Court finds that this is not a basis to disqualify V&E. If V&E were employed as Debtors' counsel, the Court would consider granting the Committee derivative standing to pursue preference claim against V&E, should the Committee seek such standing. *Off. Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003); *but see In re Baltimore Emergency Servs. II, Corp.*, 432 F.3d 557 (4th Cir. 2005) (questioning, but not deciding, the issue of derivative standing). It is more likely that, if not waived consensually in connection with confirmation of a plan, such potential preference claims would be channeled into a liquidating trust for the benefit of the creditors as a part of plan confirmation, and counsel for the liquidating trust
12 could bring the preference claims against *12 V&E, if warranted. *See* 11 U.S.C. § 1123(b)(3)(B) (plan may provide for enforcement of estate claims "by a representative of the estate appointed for such purpose").

The Court finds that the alleged preference claims against V&E are not a reason to disqualify V&E from representing the Debtors in this case, particularly considering V&E's concession that it will waive any Section 502(h) claim should it be forced to disgorge any preferential payments.

**V. V&E's Continuing Representation of Riverstone.**

The Court finds that V&E's simultaneous representation of Riverstone renders V&E not disinterested under Bankruptcy Code Section 327(a). Riverstone has a 43% interest in the Debtors' common stock. It has two of the Debtors' thirteen directors' seats. V&E's representation of Riverstone is extensive. *See* n. 3, above. Riverstone is a $14 million-dollar-a-year client of the firm.

V&E argues that it only represents Riverstone in unrelated matters, Riverstone has consented to V&E's representation of the Debtors in this case, and the Debtors have consented to V&E's continuing representation of Riverstone. While consent may satisfy certain State bar rules on conflicts, it is not a substitute for disinterestedness under Section 327(a). *In re Nilhan Devs., LLC*, 2021 WL 1539354, at *11 (Bankr. N.D.Ga. Apr.19, 2021) ("The requirement that a professional be 'disinterested' cannot be waived or circumvented by agreement or consent among creditors and the debtor"); *In re Dickson Properties, LLC*, 2012 WL 2026760, at *7 (Bankr. E.D. Va. June 5, 2012) ("When [State bar rules concerning informed conflict waivers are] combined with the overlay of the "disinterestedness" standard (11 U.S.C. § 327(a)), there can be no consent by the Debtor in possession without full disclosure to, and approval by, the Court"); *In re Lewis Rd., LLC*, 2011 WL 6140747, at *10 (Bankr. E.D. Va. Dec. 9, 2011)
13 *13 ("[E]ven if the conflict was waivable under the Virginia Rules of Professional Conduct, [counsel] must independently satisfy the requirements of § 327"); *In re MF Glob. Inc*., 464 B.R. 594, 605, n. 9 (Bankr. S.D.N.Y. 2011) ("in a retention approved pursuant to Section 327 ... conflicts waivers rarely suffice to trump the strict requirement of disinterestedness").

There are no ethical walls in place at V&E between its representation of the Debtors and its representation of Riverstone. V&E argues that an ethical wall is unnecessary. But, the fact is that an ethical wall is impossible to impose here. To this day, a number of V&E attorneys work both on Envia matters and Riverstone matters. An ethical wall is an impossibility under such circumstances.

V&E relies on *In re Ceasars Ent. Operating Co., Inc*., 561 B.R. 420 (Bankr. N.D.Ill. 2015), for support. In *Ceasars*, proposed debtors' counsel represented several operating-level subsidiaries of the investment funds Apollo and TPG. *Id.* at 425. Proposed debtors' counsel did not represent Apollo and TPG. *Id.* Judge Goldgar held that the representation of the unrelated operating entitles was "too remote from the bankruptcy cases to conclude that [proposed debtors' counsel] would be predisposed to act adversely to the estates…" *Id*. at 433. In this case, by contrast, V&E represents Riverstone, the investment-level entity, which is a 43% shareholder in the Debtors.

This is not an academic concern. This is a case in which the Debtors have touted the RSAs as the basis for a stand-alone plan. It is not a case in which the Debtors seek approval for a Section 363 sale of substantially all their assets. The RSAs contemplate that existing equity holders will retain five percent (5%) of the equity in the reorganized entities. This will have to be negotiated with the Committee and the other constituents in the case. V&E suggests that if this becomes a problem, it will look to its co-counsel, Kutak Rock, to
14 negotiate the Riverstone- *14 related provisions of the plan. A plan in a stand-alone reorganization case, though, is like a machine in which all of the parts depend on all of the other parts. Further, the allocation of equity in the reorganized entities is a zero-sum game - whatever old equity retains will come at the expense of the creditors unless the creditors are paid in full (or the plan is a consensual one). Even in the case of a "new value" plan, the creditors are entitled to challenge the sufficiency of any new value contribution and to

demand that such contributions be market-tested. *See, e.g., Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P 'ship,* 526 U.S. 434, 454 (1999) ("[the plan] is doomed, we can say without necessarily exhausting its flaws, by its provision for vesting equity in the reorganized business in the Debtor's partners without extending an opportunity to anyone else either to compete for that equity or to propose a competing reorganization plan.") The Court in this case just does not see how V&E can delegate this core function of Chapter 11 counsel to its co-counsel.

In the Court's view, this case is more analogous to *In re Project Orange Assocs., LLC,* 431 B.R. 363 (Bankr. S.D.N.Y. 2010). In *Project Orange*, proposed debtor's counsel represented GE, the debtor's largest unsecured creditor and the supplier of gas turbines critical to the debtor's operations. *Id.* at 365-66. Proposed debtor's counsel argued that it could use conflicts counsel for any issues related to GE. *Id.* at 366. The court rejected that suggestion, holding that it did not appear that proposed debtor's counsel could "'fairly and fully advise' in the negotiation and drafting of a plan when it may not even be able to advocate litigation against GE." *Id*. at 377. The Court ultimately denied the application to employ proposed debtor's counsel. *Id*. at 379 ("as [proposed counsel's] conflict is with the Debtor's largest unsecured creditor that is central to the issues in this case, the Court concludes that it is inappropriate to approve the retention application.") In this case too, the Court cannot
15 see how V&E could possibly negotiate a plan *15 adversely to Riverstone's position. The employment of conflicts counsel can be useful for a discrete portion of a case, such as the prosecution of preference or fraudulent transfer claims, but it cannot be used as a substitute for general bankruptcy counsel's duties to negotiate a plan of reorganization. *In re WM Distribution, Inc*., 571 B.R. 866, 873 (Bankr. D.N.M. 2017) ("use of conflicts counsel is not appropriate where the adverse interests of the debtors represented by the same general bankruptcy counsel are central to the reorganization efforts of either debtor or to other resolutions of the chapter 11 case or where the adverse interests are so extensive that each debtor should have its own independent general bankruptcy counsel.")

V&E also relies heavily on Bankruptcy Code Section 327(c), which provides:

> In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

11 U.S.C. § 327(c). *See also In re Invitae Corp*., 2024 WL 2230069 (Bankr. D.N.J. May 16, 2024) (finding no actual conflict).

Arguably, Section 327(c) does not apply here because Riverstone is an equity security holder, not a creditor. More importantly, the Court finds that there *is* an actual conflict of interest. V&E cannot be expected to negotiate a Plan that contravenes the interests of its $14 million-dollar-a-year client. In *Invitae*, the proposed law firm billed the adverse party and client (Deerfield) a total of $2.4 million from the inception of the relationship, and $1.8 million in 2023, representing 0.03% of the applicant's revenue for that year. *Id*. at *5. The court described this as "relatively *de minimus*" in the scheme of things. *Id*. In this case, V&E's revenue from Riverstone amounts to 1.4% of its annual revenue for 2023, or
16 46 times more than the percentage *16 of annual revenue in *Invitae*. The Court does not view V&E's revenues from Riverstone to be *de minimus* in any sense of the term.

V&E argues that the U.S. Trustee improperly advocates for a *per se* rule. The Court agrees that these matters must be addressed under the facts

and circumstances of each case. *See In re Harold & Williams Dev. Co.*, 977 F.2d at 910 ("the courts must take care not to fashion *absolute* prohibitions beyond those legislatively mandated without some measure of assurance that the purposes of the Bankruptcy Code *always* will be served thereby") (emphasis in original). But, where: (a) Riverstone owns 43% of the Debtors' equity; (b) Riverstone has two of the Debtors' thirteen directors; (c) Riverstone is a $14,000,000.00 a year client of V&E; and (d) no ethical walls have been imposed, and no ethical walls can be constructed because V&E attorneys continue to represent the Debtors and Riverstone simultaneously, the Court must conclude that V&E is not disinterested within the meaning of Section 327(a).

Finally, the Court understands that this is a setback for the Debtors, though, hopefully not a "value destructive" one, as V&E suggests.[8] The Court hopes that the various constituencies will see the wisdom of a certain amount of flexibility in pushing back milestones, which will be occasioned by the result here.

[8] Docket No. 441, V&E Reply Br. p. 4.

For all the above reasons, the Court will deny the Debtors' Application to Employ V&E.

**Conclusion**

It is therefore ORDERED:

A. The Debtors' Application to Employ Vinson & Elkins L.L.P., pursuant to Bankruptcy Code
17 Section 327(a) (Docket No. 183) is denied. *17

B. The Clerk will mail copies of this Order, or will provide cm-ecf notice of its entry, to the parties below.

No. 24-10453-BFK
United States Bankruptcy Court, Eastern District of Virginia

# In re Enviva Inc.

Decided Jul 2, 2024

24-10453-BFK

07-02-2024

In re: ENVIVA INC., et al., Debtors.

Enviva Inc. Peter J. Barrett Counsel for Debtor Glenn T. Nunziata Nicholas S. Herron Counsel for U.S. Trustee Jeremy S. Williams Counsel for Debtor Gerard R. Vetter Adolyn Clark Wyatt Counsel for Debtor David S. Meyer Proposed Counsel for Debtor Jessica C. Peet Proposed Counsel for Debtor Alexander F. Antypas Proposed Counsel for Unsecured Creditors Committee Kristen E. Burgers Proposed Counsel for Unsecured Creditors Committee Matthew J. Pyeatt Trammell Crow Center Proposed Counsel for Debtor Trevor G. Spears Trammell Crow Center Proposed Counsel for Debtors

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Honorable Brian F. Kenney United States Bankruptcy Judge

Chapter 11

Enviva Inc. Peter J. Barrett Counsel for Debtor

Glenn T. Nunziata Nicholas S. Herron Counsel for U.S. Trustee

Jeremy S. Williams Counsel for Debtor

Gerard R. Vetter Adolyn Clark Wyatt Counsel for Debtor

David S. Meyer Proposed Counsel for Debtor

Jessica C. Peet Proposed Counsel for Debtor

Alexander F. Antypas Proposed Counsel for Unsecured Creditors Committee

Kristen E. Burgers Proposed Counsel for Unsecured Creditors Committee

Matthew J. Pyeatt Trammell Crow Center Proposed Counsel for Debtor

Trevor G. Spears Trammell Crow Center Proposed Counsel for Debtors

**MEMORANDUM OPINION AND ORDER DENYING DEBTORS' MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER DENYING APPLICATION TO EMPLOY VINSON & ELKINS LLP**

Honorable Brian F. Kenney United States Bankruptcy Judge

This matter comes before the Court on the Debtors' Motion to Reconsider the Court's Memorandum Opinion and Order Denying the Debtors' Application to Employ Vinson & Elkins LLP ("V&E"). Docket No. 663. The Motion is supported by the Declarations of David S. Meyer of V&E and Jason E. Paral. Docket Nos. 664, 665.[1] The Ad Hoc Committee filed a Joinder in Support of the Debtors' Motion, as did the Successor Indenture Trustee for the 6.50% Senior Notes Due 2026. Docket Nos. 703, 704. The U.S. Trustee filed an Opposition to the Motion. Docket No. 705. The Official Committee of Unsecured Creditors filed a Statement in Support of the Debtors' Motion. Docket No, 712. The Court heard the parties' arguments on June 14, 2024. For the reasons stated below, the Court will deny the Motion.

1 Mr. Meyer is a partner with V&E. Docket No. 665, ¶ 1. Mr. Paral is the Executive Vice President, General Counsel and Secretary of Enviva, Inc. Docket No. 664, ¶ 1. Prior to his employment with Enviva, he practiced law at V&E from 2008 to 2015. *Id.* at ¶ 5.

**Procedural History**

2 *A. The May 9, 2024, Hearing.* *2

On March 27, 2024, the Debtors filed their Application to Employ V&E. Docket No. 183. The Application was supported by the Declaration of David S. Meyer, and later, two Supplemental Meyer Declarations. Docket Nos. 183, 442, 481. The U.S. Trustee filed an Objection to the Application, and a Supplemental Brief in Support of his Objection. Docket Nos. 273, 440. V&E filed a Reply to the U.S. Trustee's Objection. Docket No. 441.

On April 3, 2024, the Court issued an Order, *sua sponte*, setting the V&E Application for a hearing, noting that: (a) V&E represented the Debtors' Officers and Directors in shareholder and derivative litigation; and (b) V&E also represented the Riverstone entities, which owned 43% of the Debtors' common stock. Docket No. 224. The Court noted in its Order: "There does not appear to be any reference to a wall of separation in the Meyer Declaration." *Id*. at p. 1. Apparently unwilling to take the hint, V&E did not address the issue of an ethical wall in its Reply Memorandum. Rather, it argued that it represented Riverstone in unrelated matters, and therefore, it was disinterested. *See* Docket No. 441, pp. 7-15.

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On May 9, 2024, the Court held a hearing on the V&E Application. At the hearing, the Court inquired whether a wall of separation at V&E would be appropriate. Mr. Meyer responded as follows:

> But a wall of separation in unrelated matters is not required by the model rules, the Bankruptcy Code, the bankruptcy rules, or the local rules. And we do agree, as we must, that no confidential information of Enviva will be shared with Riverstone, and no confidential information of Riverstone will be shared with Enviva. But a wall of separation where none is required *would be incredibly harmful to Enviva* at this critical phase of its restructuring efforts. To be clear, this isn't a situation where the harm outweighs the need, but rather there's no need *and it would be harmful.*

Docket No. 532, Hr'g. Tr. 13:7-11 (emphasis added).

Mr. Meyer further stated:

> So specifically, if we have scenarios where we have senior partners in particular that have worked on Enviva-related matters but they've also worked on Riverstone-related matters
>
> *3
>
> unrelated to Enviva of course over the last calendar year, then the world we find ourselves in is, first, if those partners could not work on Enviva because they worked on Riverstone matters, well, now, *there's certainly a detriment to Enviva* because certain of those partners have highly specialized knowledge, specific information about the company, ongoing matters in which they've represented the company, whether it be in litigation matters, finance matters, restructuring matters. And so to tell Enviva that those parties cannot work on Enviva-related matters *would be detrimental to the debtors*.

*Id*. at 13:14-14:2 (emphasis added).

The Court then asked whether there were attorneys at V&E who simultaneously represented the Debtors and Riverstone. *Id*. at 14:3-5. Mr. Meyer responded that there were a "handful" of such attorneys, and that "it's a very limited group." *Id*. at 14:6-9.

On May 30, 2024, the Court denied the V&E Application, after finding that V&E was not "disinterested" within the meaning of Section 327(a) of the Bankruptcy Code. Docket No. 653.[2]

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[2] *In re Enviva Inc.,* 2024 WL 2795274 (Bankr. E.D. Va. May 30, 2024) ("*Enviva I*").

*B. The Motion to Reconsider.*

On June 3, 2024, the Debtors filed a Motion to Reconsider, supported by the Meyer Declaration and the Paral Declaration. Docket Nos. 663, 664, 665. The Debtors moved for an expedited hearing, which the Court granted. Docket Nos. 666, 668. The U.S. Trustee filed an Opposition to the Motion. Docket No. 705. The Ad Hoc Group and the Indenture Trustee filed Statements in Support of the Debtors' Motion. Docket Nos. 703, 704.

V&E now proposes an ethical wall as follows:

> a. *Team A (Enviva)*. All timekeepers who have billed time to the Debtors but have not billed time to Riverstone since the Petition Date will be on Team A, and will be prohibited from working on Riverstone engagements through the later of the effective date of any confirmed plan of reorganization in this case and any dismissal or conversion of the Debtors' chapter 11 cases (or potentially longer should the Court find that circumstances at the time of plan confirmation so warrant);
>
> b. *Team B (Riverstone)*. All timekeepers who have billed time to Riverstone but have not billed time to the Debtors since the Petition Date will be on Team B, and will be prohibited from working for the Debtors through the later of the effective date of any confirmed plan of reorganization in this case and any dismissal or conversion of the Debtors' chapter 11 cases

*4

(or potentially longer should the Court find that circumstances at the time of plan confirmation so warrant);

c. V&E will divide the 13 timekeepers who have billed time to both Riverstone and the Debtors since the Petition Date as follows:

(i) All timekeepers who have billed less than 12.5 hours to Riverstone since the Petition Date will be on Team A (Enviva);

(ii) All timekeepers who have billed 12.5 or more hours to Riverstone since the Petition Date will be on Team B (Riverstone);

d. Any new timekeepers working for the Debtors: (1) will be on Team A; (2) must not have already been on Team B; and (3) will be prohibited from working on matters for Riverstone during the relevant time period;

e. Any new timekeepers working for Riverstone: (1) will be on Team B; (2) must not have already been on Team A; and (3) will be prohibited from working on matters for the Debtors during the relevant time period;

f. V&E will establish an electronic wall in V&E's document management system that prevents team members from accessing the other team's electronic documents;

> g. V&E will instruct members of both teams in writing: (1) not to discuss confidential information regarding their respective representation with the other team; (2) not to access files maintained by the other team; and (3) to restrict access to data to protect against in advertent access to such material; and
>
> h. V&E will require members of each team to affirm in writing that they understand and will comply with the ethical screen.

Docket No. 663, pp. 6-7.

Additionally, V&E proposes that any V&E partners who bill more than 10 hours on the Enviva bankruptcy, as well as the members of V&E's Executive Committee, will forgo any participation in the firm's net profits resulting from the representation of Riverstone in 2024 and 2025. *Id*. at p. 2.

The U.S. Trustee argues that: (a) V&E consciously chose not to erect an ethical wall before the May 9th hearing; (b) V&E's newly proposed ethical wall is insufficient; and (c) there has been no clear error or manifest injustice. Docket No. 705, pp. 7-13.

*C. The Plan Evaluation Committee.*

On the morning of June 14, 2024, the date of the hearing on this matter, the Committee filed a Statement in Support of the Debtors' Motion. Docket No. 712. In its Statement, the Committee advised the Court that it reached an agreement
5 with the Debtors for the creation of a *5 Plan Evaluation Committee ("PEC"). *Id*. at pp. 3-4. At the hearing, the Court admitted into evidence the Resolution of the Board authorizing the establishment of the PEC. Docket No. 713, Ex. A. The PEC would have the following functions:

> WHEREAS, the Board deems it appropriate and advisable for the Board to designate a special committee of the Board (the "*Plan Evaluation Committee*") and to delegate to the Plan Evaluation Committee, to the fullest extent permitted by law, the authority on behalf of the Board to review, evaluate, independently assess, approve, and authorize the filing of or entering into (as applicable) any (i) Plan, (ii) other restructuring transaction, including but not limited to any future DIP financing, refinancing, equity or asset sale (including pursuant to Bankruptcy Code section 363 or otherwise), merger, acquisition, other business combination, or recapitalization, and (iii) settlement of any claims or causes of action against the Company's directors, officers, affiliates, or shareholders (the "*Committee Scope*"[.]

*Id*. (emphasis in original).

The PEC would consist of six Board members, none of whom are Riverstone members. *Id.* The PEC would be entitled to engage its own legal professionals. *Id*. at p. 2. It does not have the authority to engage its own financial advisers without additional Board approval. Docket No. 722, Hr'g. Tr. 88:1-4. The Board Resolution establishing the PEC is not irrevocable. *Id.* at 86:18-19. Counsel for the Committee advised the Court that the Committee understood that the Resolution was revocable, but if the Resolution were revoked, the Committee would react promptly with a Motion to appoint a Chapter 11 Trustee, or for other similar relief. *Id.* at 86:15-18.

The Court heard the parties' arguments on June 14, 2024.

**Conclusions of Law**

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Order of Reference entered by the U.S. District Court for this District on August 15, 1984. This is a core

proceeding under 28 U.S.C. § 157(b)(2)(A) (matters concerning the administration of the
6 estate). *6

The Debtors move for reconsideration under Bankruptcy Rules 9023 (incorporating Rule 59 of the Federal Rules of Civil Procedure) and 9024 (incorporating Rule 60 of the Federal Rules of Civil Procedure). The Court will address both arguments, below.

**I. Bankruptcy Rule 9023.**

Under Rule 59(e), courts in the Fourth Circuit have recognized three grounds for amending a judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Braunstein v. Pickens*, 406 Fed. App'x. 791, 798 (4th Cir. 2011) (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998)). Reconsideration of a judgment is "an extraordinary remedy which should be used sparingly." *In re Mitrano*, 409 B.R. 812, 820 (E.D. Va. 2009) (quoting *Pac. Ins. Co.,* 148 F.3d at 403).

A. *Intervening Change in the Law.*

There has been no intervening change in the law on the disinterestedness standard under Section 327(a).

B. *Newly Discovered Evidence.*

V&E and the Debtors proffer that there are three "new facts" that warrant relief under Rule 9023: the newly created ethical wall, the limits on compensation, and the Board Resolution establishing the PEC. These are not, however, newly discovered facts. They are newly created, in response to the Court's decision in *Enviva I*. "Where a motion for reconsideration is based on purportedly newly discovered evidence, the evidence must not have been discoverable prior to judgment by the exercise of reasonable due diligence." *JTH Tax, Inc. v. Aime*, 984 F.3d 284, 292 (4th Cir. 2021) (internal citation omitted). Then-Chief Judge St. John properly made the point in *In re Greene* that in order for evidence to be considered as newly discovered, "the evidence
7 must *7 be in existence at the time of the trial." 2013 WL 1724924, at *20 (Bankr. E.D. Va. Apr. 22, 2013), *aff'd sub nom. Greene v. U.S. Dep't of Educ.*, 2013 WL 5503086 (E.D. Va. Oct. 2, 2013), *aff'd*, 573 Fed.Appx. 300 (4th Cir. 2014). V&E's belated acceptance of the need for an ethical wall, its revised compensation arrangement, and the new PEC, do not qualify as newly discovered evidence.

The Court finds it more appropriate to address the Motion to Reconsider under the "clear error of law or manifest injustice" standard, below.

C. *Clear Error of Law or Manifest Injustice.*

V&E argues that there are three reasons to reconsider the Court's decision in *Enviva I*: (a) V&E has now erected an ethical wall; (b) V&E has modified its compensation structure; and (c) Enviva's Board has approved a Resolution establishing the PEC. The Court will address each of the newly proffered issues, below.

*(1) The Proposed Ethical Wall.*

V&E now proposes to impose an ethical wall. Even with V&E's *volte-face* on the issue of an ethical wall, the Court still finds that V&E is not disinterested.[3] The lack of an ethical wall was only one factor in the Court's denial of the V&E Application. Riverstone is still a multi-million-dollar client for V&E, and is still a 43% shareholder in Enviva. According to the most recent Meyer Declaration, Riverstone has accounted for 0.97% of V&E's revenues for the first five months of 2024 (which translates to roughly $4,500,000.00 for that period, assuming that V&E has another $1 billion year), and V&E has collected 0.22% of its revenues (or $1,100,000.00 for the same period) from Riverstone. Docket No. 665, pp. 4-5. If this trend
8 *8 continues, V&E's Riverstone billings will

exceed $9,000,000.00 for 2024 - 64% of its 2023 billings of $14,000,000.00, but still not "de minimis" in any sense of the term.

[3] "*Volte-face*: n. The act of turning so as to face in the opposite direction; figurative a complete change of attitude or opinion." Oxford English Dictionary, *https://www.oed.com/search/dictionary/?scope=Entries&q=volte-face*, (last visited June 24, 2024).

Further, the latest Meyer Declaration identifies 13 timekeepers at V&E who have billed time to both Enviva and Riverstone post-petition. Docket No. 665, Meyer Decl. Ex. A. Of these, two V&E attorneys would be walled off. *Id*. at Ex. B. The three-months in the post-petition period, however, do not reflect V&E's extensive pre-petition ties with Riverstone. *See* Docket No. 653, Mem. Op. and Order, pp. 5-7 ("V&E's Continuing Representation of Riverstone"). V&E's use of post-petition time-keeping hours only does not inform the Court as to how extensive the overlap might have been during the run-up to the bankruptcy filing, and the negotiation of the pre-petition Restructuring Support Agreements ("RSAs") in 2023, and the first quarter of 2024. Moreover, V&E uses an arbitrary "less than [or more than] 12.5 hours" billed to Riverstone since the petition date. If the term "more [or less] than 10 hours" were employed, then two additional V&E attorneys, Carter Olson (12.00 hours) and Lindsay Moore (11.25 hours), would find themselves on Team B. *Id.* at ¶ 7; Ex. B. The U.S. Trustee correctly describes this as a "partial ethical wall." Docket No. 705, p. 13.

The Court finds that V&E's proposed ethical wall is insufficient.

*(2) The Compensation Proposal.*

V&E proposes that no attorney who works more than 10 hours on the Debtors' cases, and no member of the firm's Executive Committee, will be entitled to participate in any net profits from its representation of Riverstone. Docket No. 663, Debtors' Mot. at ¶ 1b. This notwithstanding, V&E still has extensive ties to Riverstone. The perception of fairness is important here. *See In re Martin*, 817 F.2d 175, 182 (1st Cir. 1987) ("Perceptions are important; how the matter likely appears to creditors and to other parties in
9 legitimate interest should be *9 taken into account."); *In re Springfield Med. Care Sys., Inc*., 2019 WL 6273385, at *8 (Bankr. D. Vt. Nov. 22, 2019) ("The Court begins this analysis by recognizing the foundational nexus between the specific requirements for appointment of professionals in bankruptcy cases and the integrity of the bankruptcy process as a whole - both in reality and in terms of public perception."); *In re Granite Partners, L.P.,* 219 B.R. 22, 33 (Bankr. S.D.N.Y.1998) ("[T]he professional has a disabling conflict if it has '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.'") (internal citation omitted). Moreover, the opposite must be true for 2023, and the first quarter of 2024, when the RSAs were negotiated - partners at V&E who represented both Enviva and Riverstone, and the members of the Executive Committee, undoubtedly *did* enjoy some form of compensation based in part on Riverstone revenues.

The Court finds that V&E's proposed compensation arrangement, together with the newly created ethical wall addressed above, do not render it disinterested under Section 327(a).

*(3) The Plan Evaluation Committee.*

On the morning of the hearing on the Motion to Reconsider, the Committee filed its Statement, along with the Board Resolution establishing the PEC. Docket No. 712. At the hearing, both Debtors' counsel and Committee counsel explained to the Court that the PEC was not intended to be the primary vehicle for negotiation of the Plan in this case. Rather, the primary

responsibility for negotiating a Plan will continue to rest with management, which answers to the Board, which in turn relies on V&E for advice. The PEC and its counsel will act as a check of sorts on the Board and V&E. *10

The Court finds that the establishment of the PEC does not solve the disinterestedness problem for three reasons. First, the Resolution establishing the PEC is not irrevocable. The Board can revoke the Resolution at any time, and is likely to do so if the PEC were to disagree with the Board's view of the case. Second, the PEC is not in a position to hire its own financial advisers, and will be completely dependent on the Board's financial advisers for advice.

Third and most importantly, the PEC is not tasked with the primary responsibility of negotiating the Plan. This responsibility continues to reside with the Debtors' Board, management, and V&E. The PEC will only act as a "check" on the Board's discretion. *See* Docket No. 772, Hr'g Tr. 98:13-15[4]; *see also id.* at 100:4-14[5]. This, in the Court's view, is only so much window dressing, an attempt to make it appear that V&E is disinterested. In *Enviva I*, the Court held that V&E could not delegate to conflicts counsel the firm's core function in the case: the negotiation of a Chapter 11 Plan. Docket No. 653, Mem. Op. and Order at p. 15 ("The employment of conflicts counsel can be useful for a discrete portion of a case… but it cannot be used as a substitute for general bankruptcy counsel's duties to negotiate a plan of reorganization.") (citing *In re WM Distribution, Inc.*, 571 B.R. 866, 873 (Bankr. D.N.M. 2017), and *In re Project Orange Assocs., LLC*, 431 B.R. 363 (Bankr. S.D.N.Y. 2010)). The creation of the PEC, which can be disbanded at any time, does not have its own financial advisers, and is not tasked with the primary responsibility of negotiating a Plan, does not solve V&E's disinterestedness problem. *11

4 "Mr. Meyer: It [the Board] is not delegating negotiating authority to that. The company will continue… to negotiate the plan with all of its stakeholders."

5 "The company, together with the company's advisors, and we're proposed counsel of the company is the one that's going to negotiate that Chapter 11 plan. The sole farming out that we're discussing here is after that plan has been extensively negotiated, proposed, it's going to go to this six member independent committee that would have its own independent counsel to get -- to give one more look, to say, do we think that this plan is a plan that the company should file and is authorized to file?"

There has been no clear error or manifest injustice here. The Court, therefore, will deny the Debtors' Motion to Reconsider under Bankruptcy Rule 9023.

**II. Bankruptcy Rule 9024.**

The Debtors also move for reconsideration under Bankruptcy Rule 9024. Bankruptcy Rule 9024 incorporates Federal Rule of Civil Procedure 60, including Rule 60(b) (Grounds for Relief from a Final Judgment, Order, or Proceeding). Fed.R.Bankr.P. 9024. Relief under Rule 60(b) is "extraordinary and is only to be invoked upon a showing of exceptional circumstances." *United States v. Walsh*, 879 F.3d 530, 536 (4th Cir. 2018) (quoting *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979)). A Rule 60(b) Motion is "not authorized when it is nothing more than a request for the district court to change its mind." *Myers v. Simpson*, 831 F.Supp.2d 945, 956 (E.D. Va. 2012) (citing *Lee X v. Casey,* 771 F.Supp. 725, 728 (E.D. Va. 1991)). In addition, a motion for reconsideration is not an opportunity for a litigant "to present a better and more compelling argument than was originally presented." *In re Greene*, 2013 WL 1724924, at *2 (Bankr. E.D. Va. Apr. 22, 2013), *aff'd sub nom. Greene v. U.S. Dep't of Educ.,* 2013 WL 5503086 (E.D. Va. Oct. 2, 2013),

*aff'd,* 573 Fed.Appx. 300 (4th Cir. 2014) (quoting *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 402 F.Supp.2d 617, 619 (M.D. N.C. 2005)).

This Court has vacated an Order approving the employment of counsel under Rule 60(b) for undisclosed connections. *In re Lewis Rd.*, LLC, 2011 WL 6140747 (Bankr. E.D. Va. Dec. 9, 2011); *see also In re eToys, Inc.,* 331 B.R. 176 (Bankr. D. Del. 2005) (Rule 60(b)(6) allows the Court to consider vacating employment orders for undisclosed conflicts of interest). The Court is not aware of any decisions in the Fourth Circuit vacating an Order denying the employment of
12 counsel because of disclosed conflicts. *12

V&E argues that the Court should look to Rule 60(b)'s Subsections (5) and (6) - that applying a judgment prospectively is no longer equitable, or "any other reason that justifies relief." Fed.R.Civ.P. 60. Subsection (5) does not apply here. The Court's decision to deny the V&E Application was not inequitable, and nothing has changed other than V&E's position that an ethical wall may now be in order, the revised compensation arrangement, and the PEC, all of which are addressed above. V&E is still not disinterested under Section 327(a).

Subsection (6) is the catch-all provision of Rule 60(b). For all the reasons stated above, the Court finds that the Motion to Reconsider does not present circumstances that justify relief.

The Court, therefore, will deny the Debtors' Motion under Bankruptcy Rule 9024.

**III. Section 327(e).**

The Debtors, the Ad Hoc Group, and the Indenture Trustee point to the difficulties, delays, and expense that the Debtors inevitably will encounter by the Court's denial of the V&E Application. V&E has acted as Enviva's outside counsel for ten years, and has "deep institutional knowledge" and "unique and specific expertise" with respect to the company's tax matters, securities laws disclosures, and contract renegotiations. Docket No. 664, Paral Decl. ¶¶ 5, 10. The Court accepts all of that as true, but these arguments elide the disinterestedness standard. The parties are essentially inviting the Court to ignore the disinterestedness standard in favor of expediency in the employment of counsel. The Court concludes that it is bound by the disinterestedness standard contained in Section 327(a).

There may, however, be an important role for V&E under Section 327(e) in this case. Section 327(e) incorporates a standard more limited than that of Section 327(a). Whereas Section 327(a) requires professionals to be disinterested generally, Section 327(e) is limited to conflicts "on which such attorney is to be employed." 11
13 U.S.C. § 327(e). *See In re WWMV, LLC*, 2024 *13 WL 2284898, at *3 (Bankr. S.D. W.Va. May 20, 2024) (one purpose of § 327(e) is "to allow counsel who cannot meet the disinterestedness requirement of § 327(a) nevertheless to render valuable services to the debtor in matters where counsel has no adverse interest") (quoting *In re Tidewater Mem'l Hosp., Inc.,* 110 B.R. 221, 227 (Bankr. E.D. Va. 1989)). As long as the matters do not involve V&E's other clients, V&E might be employed under Section 327(e) on tax matters or securities law compliance, for example. Section 327(e) is not to be employed as an end-run around Section 327(a)'s more general requirement of disinterestedness. *See* 11 U.S.C. § 327(e) ("for a specified, special purpose, other than to represent the trustee in conducting the case"). The Court anticipates that V&E would respect the limits of any employment under Section 327(e), and that V&E would not duplicate efforts by Section 327(a) counsel.

**Conclusion**

It is therefore ORDERED:

A. The Debtors' Motion to Reconsider (Docket No. 663) is denied.

B. The Clerk will mail copies of this Memorandum Opinion and Order, or will provide cm-ecf notice of its entry, to the parties below.

# IN RE: BOY SCOUTS OF AMERICA (2022)

**United States Court of Appeals, Third Circuit.**

**IN RE: BOY SCOUTS OF AMERICA, a/k/a BSA; Delaware BSA, LLC, Debtors Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Indemnity Insurance Company of North America, Appellants**

**No. 21-2035**

**Decided: May 24, 2022**

**Before: McKEE, AMBRO, and SMITH, Circuit Judges**

**Jonathan D. Hacker (Argued), Andrew R. Hellman, O'Melveny & Myers, 1625 Eye Street, N.W., Washington, DC 20006, Tancred V. Schiavoni, O'Melveny & Myers, 7 Times Square, Time Square Tower, 33rd Floor, New York, NY 10036, Counsel for Appellants Derek C. Abbott, Andrew M. Remming, Paige N. Topper, Morris Nichols Arsht & Tunnell, 1201 North Market Street, 16th Floor, P. O. Box 1347, Wilmington, DE 19899, Michael C. Andolina, Matthew E. Linder, White & Case, 111 South Wacker Drive, Suite 5100, Chicago, IL 33130, Jessica C. Lauria, White & Case, 1221 Avenue of the Americas, New York, NY 10020, Counsel for Appellee Boy Scouts of American and Delaware BSA, LLC Robert N. Hochman (Argued), James W. Ducayet, Sidley Austin, One South Dearborn Street, Chicago, IL 60603, Counsel for Appellee Sidley Austin**

OPINION OF THE COURT

Sidley Austin LLP represented insurer affiliates of Chubb Ltd.—Century Indemnity Co., Westchester Fire Insurance Co., and Westchester Surplus Lines Insurance Co. (collectively, "Century")—in obtaining backup coverage from reinsurers of Century's policies. Sidley also represented the Boy Scouts of America and Delaware BSA, LLC (collectively, "BSA") in its restructuring efforts under the Bankruptcy Code following myriad molesting claims of scouts. Though BSA made coverage claims under Century's policies, it did so while represented by another firm—Haynes and Boone LLP. And Sidley's reinsurance services for Century were limited to claims made against the reinsurers (and not BSA).

Century, however, came to feel jilted and claimed a conflict concerning Sidley's representation of it and BSA. It objected when Sidley filed a retention request in BSA's bankruptcy case. Century's objection only concerned the ability of Sidley to represent BSA, and the Bankruptcy Court determined that Sidley could do so effectively, thus approving its retention. The District Court affirmed, and now Century appeals to us. We agree with those Courts and hence affirm Sidley's retention as bankruptcy counsel to BSA.

I. BACKGROUND

Century issued insurance to BSA, and those insurance policies are now assets of the BSA estate. To help cover its obligations to BSA in the event of claims, Century purchased reinsurance—think of it as insurance for insurance companies—and, after BSA made claims related to sexual-abuse litigation, Century sought to collect on those policies. On October 5, 2018, Century hired Sidley's Insurance and Financial Services Group to represent it in ensuing reinsurance disputes. That representation did not extend to the underlying direct insurance issued by Century to BSA. It (BSA) was not a party to the reinsurance disputes, and the matters did not pertain to whether Century would pay BSA under the direct insurance contracts.

At roughly the same time, starting on September 26, 2018, BSA retained Sidley to explore restructuring options. The engagement letter for Sidley specified that it would not "advis[e] [BSA] on insurance coverage issues." J.A. at 1199. BSA had already retained, without objection, Haynes and Boone to serve as insurance counsel. Sidley filed BSA's bankruptcy petition on February 18, 2020, and subsequently filed a retention application on March 17.[1] Century objected.

By this time the attorney-client relationship between Century and Sidley had unraveled. Century appears to have first learned that Sidley was representing BSA when The Wall Street Journal published an article on December 13, 2018, identifying Sidley as BSA's counsel. But Century did not object—at least formally—to Sidley's representation of BSA until the autumn of 2019. In the interim, BSA engaged in substantive discussions with its insurers, including Century. While Haynes and Boone was the sole insurance counsel, Sidley attorneys were present at some meetings. Century did not object at the time. But in late October 2019, Century told Sidley that its representation of BSA created a conflict. On November 3, Century's counsel objected to a mediation related to BSA's restructuring because of Sidley's presence. Sidley responded the next day by putting a formal ethics screen into place between its restructuring team and its reinsurance team.

Sidley and Century could not reach an agreement. The former continued to maintain there was no conflict, but on January 3, 2020, Century sent a letter explaining that it could not provide a conflict waiver for Sidley to represent BSA or consent to Sidley's withdrawal of Century's representation. Indeed, Century never gave Sidley a waiver for any claimed conflict. In response to Sidley's suggestion that Century was using the threat of disqualification as a litigation tactic, Century asserted that it was "shocking and offensive that Sidley would suggest that Chubb has an improper motive in trying to address the conflict issue." J.A. at 1391. Sidley then provided written notice to Century on January 16 that it was withdrawing due to a breakdown in the attorney-client relationship. The Bankruptcy Court found Sidley finished withdrawing on either February 20 or 24, 2020.

Fast forward to September 2020, when the Sidley attorneys working for BSA moved to a new firm, taking with them BSA as a client. Sidley is thus no longer actively working on BSA's bankruptcy. Century is separately pursuing its grievances about the representation it received from Sidley in arbitration as provided in their governing retention agreement.

The parties dispute what information Century provided to Sidley and the significance of it. The Bankruptcy Court found that Sidley's representation of Century "could be 'substantially related' to at least some aspects of [BSA's] bankruptcy case." J.A. at 38. But it also concluded that while Sidley may have received confidential information in the reinsurance matter relevant to BSA's bankruptcy, no privileged or confidential information was shared between the two legal teams at Sidley. Id. at 40.

The Bankruptcy Court, in a well reasoned ruling, approved Sidley's retention nunc pro tunc to the February 18 petition date. It concluded that Sidley's retention did not run afoul of the pertinent provision in the Bankruptcy Code— § 327 [2] —because Sidley's representation of Century did not render it unable to represent BSA effectively. The Court then considered the potentially applicable Rules of Professional Conduct—Rules 1.7 and 1.9 [3] —and noted that, even if certain legal positions taken in the bankruptcy case regarding the BSA/Century insurance policies "could be harmful to Century's efforts to collect on its [re]insurance," id., disqualification was unnecessary because BSA had special insurance counsel and Sidley had put an ethics screen into place, id. at 38–40.

Century appealed to the District Court, which affirmed in a thorough opinion. The Court observed that the relevant facts were not in dispute. It separately considered § 327(a) and the Rules of Professional Conduct (though with no decision on the latter). As had the Bankruptcy Court, the District Court discerned no actual conflict for § 327 purposes because, at the time of its retention, Sidley held no interest adverse to BSA. Even assuming a professional rule violation, it held the Bankruptcy Court exercised its discretion appropriately in deciding disqualification was even then not a fitting remedy in this context. By proceeding in this way, the Court held for Sidley without deciding the merits of the alleged violations of Rules 1.7 and 1.9.

On appeal to us, Century asserts that § 327 "does not operate in a vacuum but rather incorporates ethical rules from state law—here, the Rules of Professional Conduct." Century's Op. Br. at 27. By their declining to determine whether Sidley violated Rules of Professional Conduct 1.7 and 1.9 and in failing to find an actual conflict under § 327—the latter requiring per se disqualification—Century alleges the Bankruptcy Court erred as did the District Court in affirming that judgment.

II. JURISDICTION AND STANDARD OF REVIEW

This is a core proceeding under 28 U.S.C. § 157(b)(2). The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 157 and 1334. The District Court had jurisdiction under 28 U.S.C. § 158(a)(1) over the appeal of the Bankruptcy Court's decision, a final order. See In re Congoleum Corp., 426 F.3d 675, 684– 85 (3d Cir. 2005). We have jurisdiction under 28 U.S.C. § 1291.

The District Court acted as an appellate court, and we review both its factual and legal determinations. Id. at 685. "[T]o determine whether the District Court erred, we review the [B]ankruptcy [C]ourt's findings by the standards the District Court should have employed." Id. That means we review for abuse of discretion the decision to approve Sidley's application for retention as BSA's bankruptcy counsel. In re Marvel Ent. Grp., Inc., 140 F.3d 463, 470 (3d Cir. 1998); United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980). "An abuse of discretion exists where the . decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." Marvel, 140 F.3d at 470 (quoting ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1476 (3d Cir.1996) (en banc)). We give fresh, or plenary, review to legal determinations and review factual findings for clear error. Id.

III. ANALYSIS

Before turning to the merits, we detour to consider whether this appeal has become moot.

A. Standing and Mootness

As a threshold issue, does an active case or controversy continue? If no, we lack authority under Article III of the Constitution to consider the merits of Century's appeal. See Hamilton v. Bromley, 862 F.3d 329, 334–35 (3d Cir. 2017). When the requirements necessary for standing at the start of a case disappear, it becomes moot and no longer satisfies Article III's case-or-controversy requirement (unless the defendant voluntarily ceased the challenged conduct in response to litigation or the injury is likely to recur while evading review). See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189–91, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

There is an additional prudential (that is, not-constitutional) requirement in bankruptcy appeals for standing: it is limited to "persons aggrieved" by an order of the Bankruptcy Court. See In re Combustion Eng'g, Inc., 391 F.3d 190, 214 (3d Cir. 2004). Potential appellants are "persons aggrieved" only if they can show that "the order of the bankruptcy court 'diminishes their property, increases their burdens, or impairs their rights.' " Id. (quoting In re PWS Holding Corp., 228 F.3d 224, 249 (3d Cir. 2000)); see also PWS Holding, 228 F.3d at 249 ("[O]nly those whose rights or interests are directly and adversely affected pecuniarily by an order of the bankruptcy court may bring an appeal." (internal quotation marks and citation omitted)).

But when considering appeals from an order approving the retention of counsel, we need not scrutinize the appellant's injury in as much detail. Retention of counsel "implicate[s] the integrity of the bankruptcy court proceeding as a whole"; hence it is "extremely important to resolve" those disputes. Congoleum, 426 F.3d at 685. Absent immediate appeals, meaningful review of potentially serious ethical issues might never occur. Id. Congoleum involved whether insurers had standing to appeal the Bankruptcy Court's approval of a retention request. Only the insurers there had reason to challenge the retention order, and holding they lacked standing would have impeded self-regulation of the profession. Id. at 686–87. These same considerations apply here. Accordingly, the Bankruptcy Court's order affects interests of Century sufficiently for it to be a "person aggrieved."

Additionally, even though Sidley no longer has an active role in the underlying bankruptcy case, the possibility remains that we could order the disgorgement of its fees. Thus, the outcome of this retention dispute has continuing implications for the BSA estate and its creditors. For these reasons, we conclude Century continues to have standing to bring this appeal and the matter is not moot.

B. Section 327

Section 327(a) of the Bankruptcy Code is the starting point for retaining a debtor's professionals. It authorizes the trustee (and, under § 1107(a) of the Code, a debtor in possession), with court approval, to employ professionals, including lawyers, if they (1) "do not hold or represent an interest adverse to the estate" and are (2) "disinterested persons." 11 U.S.C. § 327(a); see also In re BH & P, Inc., 949 F.2d 1300, 1314 (3d Cir. 1991). The latter are defined, in relevant part, as those who do "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." 11 U.S.C. § 101(14)(C). Save the "any other reason" catchall, the focus dead ends at the debtor and especially its estate.

We recognize these two prongs (i.e., not holding an adverse interest and being disinterested) as formally distinct. BH & P, 949 F.2d at 1314. That said, in many cases— including this one—they effectively collapse into a single test. See 1 Collier on Bankruptcy ¶ 8.03[9] (16th ed. 2022) (noting that "[t]hese two tests invoke the same consideration of whether the professional holds or represents an adverse interest to the interests of the debtor and its estate"); see also BH & P, 949 F.2d at 1314 ("There is, indisputably, some overlap between the [§] 327(a) standard and [§] 101(14)[C] disinterest requirement.").

Section 327 conflicts can be sorted into three subcategories: (1) actual conflicts of interest, (2) potential conflicts of interest, and (3) appearances of conflict. Marvel, 140 F.3d at 476. The implications of an apparent conflict depend on which category it fits. Attorneys with actual conflicts face per se disqualification, but disqualification is at the court's discretion for attorneys with potential conflicts. Id. And a court "may not disqualify an attorney on the appearance of conflict alone." Id.

Though not unfettered, bankruptcy courts have "considerable discretion in evaluating whether professionals suffer from conflicts." In re Pillowtex, Inc., 304 F.3d 246, 254 (3d Cir. 2002). Indeed, actual conflicts of interests in the § 327 context do not have a strict definition. Id. at 251. Courts thus proceed "case-by-case." Id. (quoting BH&P, 949 F.2d at 1315). Pragmatically, a conflict is actual when the specific facts before the bankruptcy court suggest that "it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest." Id.

Century asks us to adopt a new rule and hold that courts must always consider the applicable Rules of Professional Conduct before reaching a conclusion on § 327. We decline to do so. Section 327 and the Rules of Professional Conduct impose independent obligations. Cf. Congoleum, 426 F.3d at 687–92 (analyzing separately the applicable Rules of Professional Conduct and § 327); see also 1 Collier on Bankruptcy § 8.03[2] ("[A]ttorneys have an independent duty, apart from the particular requirements of the Bankruptcy Code or rules, to conform their activities to [the local rules governing professional conduct]."). Professional conduct rules may be relevant and "consulted when they are compatible with federal law and policy ." Congoleum, 426 F.3d at 687.[4]

Yet, depending on the facts, the Bankruptcy Court may not need to examine the relevant professional rules to decide a § 327 retention. Such was the case here. The provision makes clear that its purview is focused primarily on the interests of the estate. When professionals "hold or represent an interest adverse to the estate," they cannot be retained. 11 U.S.C. § 327(a) (emphasis added). This focus is reiterated in § 327(a)'s second prong: professionals must be "disinterested"—most relevant, they cannot have an "interest materially adverse to the interest of the estate." Id. § 101(14)(c).[5]

The relevant issue in our case is thus whether a possible conflict implicates the economic interests of the estate and might lessen its value. See In re First Jersey Sec., Inc., 180 F.3d 504, 509 (3d Cir. 1999) ("A Court may consider an interest adverse to the estate when counsel has 'a competing economic interest tending to diminish estate values or to create a potential or actual dispute in which the estate is a rival claimant.' "); accord In re Am. Int'l Refinery, Inc., 676 F.3d 455, 461 (5th Cir. 2012) (providing, inter alia, the same definition for "interest[s] adverse"); In re AFI Holding, Inc., 530 F.3d 832, 845 (9th Cir. 2008) (same); AroChem, 176 F.3d at 623 (same); In re Crivello, 134 F.3d 831, 835 (7th Cir. 1998) (same); In re Prince, 40 F.3d 356, 361 (11th Cir. 1994) (same).

In this context, the conflict alleged by Century was outside the scope of § 327(a). The Bankruptcy Court explained it was "in no way convinced that Sidley generally cannot effectively represent BSA. This is not a situation where the [C]ourt is concerned that proposed counsel has a bias in favor of a non-debtor entity such as a parent or significant creditor." J.A. at 33. Century has not meaningfully challenged the Bankruptcy Court's factual finding that Sidley did not have an interest adverse to the estate. Century asserts that Sidley had a conflict because it was violating Rule 1.7 but does not explain why this violation, if it indeed occurred, impeded Sidley's effective representation of BSA for purposes of § 327(a). This is unsurprising, as Haynes and Boone served as BSA's dedicated insurance counsel at all relevant times, and BSA was not a party to the reinsurance matters Sidley worked on for Century. Nor has Century explained why its positions in the reinsurance disputes are opposed to BSA's interests during its reorganization. On these facts, the Bankruptcy Court did not abuse its discretion in ruling there was no actual conflict under § 327.

Still, the Rules of Professional Conduct may be informative in some cases. For example, in Congoleum, 426 F.3d at 679, we held that Congoleum's counsel—Gilbert, Heinz & Randolph LLP—violated the Rules of Professional Conduct and § 327 for the same reason. But Century draws the wrong conclusion from that case. We never stated that violations of the Rules of Professional Conduct are themselves sufficient to create a § 327 conflict. Rather, we explained that the same facts showing Gilbert had violated its professional obligations under the Rules also meant it was not disinterested for purposes of § 327. Congoleum's facts were markedly different than those before us: while Gilbert was representing Congoleum, it was also assisting claimants in settlement negotiations with that entity. That arrangement directly implicated its loyalty to Congoleum. Here, by contrast, Sidley represented Century in reinsurance matters in which BSA was not a party, and Sidley's representation of BSA excluded insurance issues.

Because Sidley's relationship to Century did not affect its ability to advocate on behalf of BSA, it was not an "actual conflict" under § 327 even if Century had legitimate concerns about Sidley's compliance with the applicable Rules of Professional Conduct. Accordingly, the Bankruptcy Court reasonably ruled that Sidley's retention did not require disqualification under § 327.

C. Rules of Professional Conduct

A court may use its inherent disciplinary power over the advocates appearing before it to disqualify an attorney. In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 160 (3d Cir. 1984). The conduct of attorneys practicing in federal court is governed by the local rules of the court. See Congoleum, 426 F.3d at 687. Local Rule 9010-1(f) for the United States Bankruptcy Court for the District of Delaware provides that "all attorneys admitted or authorized to practice before this Court . shall . be governed by the Model Rules of Professional Conduct of the American Bar Association, as may be amended from time to time."

As noted, Century asked the Bankruptcy Court to disqualify Sidley from representing BSA because (in Century's view) Sidley violated at least one of two Model Rules of Professional Conduct that regulate the attorney-client relationship: Rules 1.7 and 1.9. The first governs obligations to current clients and states that, unless certain listed exceptions apply, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Model Rules of Pro. Conduct r. 1.7 (Am. Bar. Ass'n 1983). This occurs when "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Id. The second governs obligations to former clients. It states that, absent consent, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Model Rules of Pro. Conduct r. 1.9; see also Model Rules of Pro. Conduct r. 1.10 (Am. Bar Ass'n 1983) (extending the obligations of Rules 1.7 and 1.9 to all attorneys within the same firm).

Because the power to disqualify stems from a court's authority to supervise the attorneys appearing before it, a decision about whether to use that power is discretionary and "never is automatic." Miller, 624 F.2d at 1201. Even when an ethical conflict exists (or is assumed to exist), a court may conclude based on the facts before it that disqualification is not an appropriate remedy. Relevant factors depend on the specifics of the case, but generally include the ability of litigants to retain loyal counsel of their choice, the ability of attorneys to practice without undue restriction, preventing the use of disqualification as a litigation strategy, preserving the integrity of legal proceedings, and preventing unfair prejudice. See Corn Derivatives, 748 F.2d at 162; see also TQ Delta, LLC v. 2Wire, Inc., No. 13-1835, 2016 WL 5402180, at *6 (D. Del. Sept. 26, 2016) (identifying these and other possible considerations). Sometimes disqualification is more disruptive than helpful even though an attorney may not have satisfied his or her professional obligations. And, indeed, courts in our Circuit often deny disqualification even when finding or assuming conflicts under the professional conduct rules. See, e.g., TQ Delta, 2016 WL 5402180, at *6–7 (denying motion for disqualification despite violation of Rule 1.9); Bos. Sci. Corp. v. Johnson & Johnson Inc., 647 F. Supp. 2d 369, 374 (D. Del. 2009) ("[Counsel's] violation of Model Rule 1.7 notwithstanding, the court concludes that disqualification is not the appropriate remedy under the circumstances."); Wyeth v. Abbott Lab'ys, 692 F. Supp. 2d 453, 458–59 (D.N.J. 2010) (denying motion for disqualification even though there was "no dispute" that counsel violated Rule 1.7); Elonex I.P. Holdings, Ltd. v. Apple Comput., Inc., 142 F. Supp. 2d 579, 583 (D. Del. 2001) (even were Rule 1.7 violated, disqualification would not have been warranted).

Here, the Bankruptcy Court followed this practice. Though it did not definitively decide whether Sidley had violated any professional responsibility rules, it determined that disqualification was inappropriate regardless. Century could not have been adversely affected, the Court found, because Sidley's bankruptcy team did not receive any confidential or privileged information from the attorneys working on Century's reinsurance matters. In contrast, BSA, the Bankruptcy Court also found, would have been adversely affected if the firm were disqualified.[6] These factual findings were well supported, and Century does not directly challenge them. Cf. Century's Op. Br. at 47–48 (arguing that Sidley must have been aware of privileged information from the reinsurance matters but not suggesting that any such information was passed to the team handling BSA's reorganization). Because Sidley's representation of BSA did not prejudice Century, but disqualifying it would have been a significant detriment to BSA, it was well within the Court's discretion to determine that the drastic remedy of disqualification was unnecessary.[7]

In the alternative, Century asks us to hold at least that courts should apply Rule of Professional Conduct 1.7 in cases (including, according to Century, this one) where a law firm dropped an existing client to avoid conflicts that would prevent it from taking on a more lucrative client. Under this concept— known as the "hot potato" doctrine—courts apply the more stringent Rule 1.7 standards even though representation has formally ended to discourage firms from dropping a client (like a hot potato) for self-interested reasons. See, e.g., Merck Eprova AG v. ProThera, Inc., 670 F. Supp. 2d 201, 209 (S.D.N.Y. 2009). There are not enough facts to put that principle into play in our case. Accordingly, we save consideration of it for the future.

* * * * *

In holding that the Bankruptcy Court permissibly allowed BSA to retain Sidley as its restructuring counsel, our concern is primarily whether it could effectively represent BSA in its bankruptcy case. Whether it did so in Century's reinsurance matters is a separate question that Century can independently challenge in its arbitration proceeding with Sidley. But as to the issue before us, § 327 is the test the Bankruptcy Code requires. Though a court's decision on retention may be

informed by counsel's conduct implicating the Rules of Professional Conduct, the facts before us do not require that this be done. The Bankruptcy Court properly focused on § 327 and took Century's concerns seriously. It also did not hastily jump to a conclusion; it looked carefully at the specific facts before it and reasonably approved BSA's retention of Sidley. This is nowhere close to an abuse of discretion. We thus affirm the approval of its judgment by the District Court.

FOOTNOTES

1. There is a tentative settlement proposal between BSA and Century. The proposal specifically excludes Century's claims against Sidley, and it is included in the proposed reorganization plan still pending before the Bankruptcy Court. See generally In re Boy Scouts of America, No. 20-10343-LSS (Bankr. D. Del. filed Feb. 18, 2020).

2. Section 327(a) of the Bankruptcy Code (Title 11 of the U.S. Code) provides that "the trustee, with the court's approval, may employ one or more attorneys . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." Section 327(c) adds that "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest."

3. The Delaware Bankruptcy Court has adopted the American Bar Association's Model Rules of Professional Conduct. See Bankr. D. Del. Ct. R. 9010-1(f). Rule 1.7 governs concurrent conflicts of interest, and Rule 1.9 concerns obligations to former clients. Each is set out in Section III.C below.

4. Also, in an analogous situation, violating those rules in soliciting creditors' committee members tainted a firm's eligibility for retention as committee counsel. See In re Universal Bldg. Prods., 486 B.R. 650, 658–61 (Bankr. D. Del. 2010).

5. We also note that § 327(a) is written in the present tense: it bars the retention of professionals who "hold or represent" adverse interests. It only allows disqualifications for adverse interests that exist at the time of retention. Accord In re AroChem Corp., 176 F.3d 610, 623 (2d Cir. 1999) ("[C]ounsel will be disqualified under section 327(a) only if it presently 'hold[s] or represent[s] an interest adverse to the estate,' notwithstanding any interests it may have held or represented in the past." (alterations in original)); see also United States v. Wilson, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992) ("Congress' use of a verb tense is significant in construing statutes."). While any conflict here has now ceased, Century argues that there was an actual, concurrent conflict that continued between at least Sidley's retention application on February 18, 2020, and when Sidley dropped Century as a client on February 20 or 24. But we do not need to explore this timing question because, as explained below, the putative conflict was outside the purview of § 327(a).

6. Because Sidley is no longer actively involved in the case, Century argues that disqualification would no longer prejudice BSA. But this is of no moment. We review the Bankruptcy Court's decision based on the record before it at the time of its decision. See Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (explaining that a factual finding is "clearly erroneous" only when implausible "in light of the record").

7. Century now requests other remedies (e.g., disgorgement of fees) as alternatives to disqualification. But it argued only for disqualification before the Bankruptcy Court, and so it has forfeited any request for other remedies. See In re Handel, 570 F.3d 140, 143 (3d Cir. 2009). Moreover, it is within the Bankruptcy Court's discretion to weigh the same considerations when imposing alternative remedies in lieu of disqualification as when imposing disqualification itself.

AMBRO, Circuit Judge



# ROWE v. GIBSON (2015)

**United States Court of Appeals,Seventh Circuit.**

**Jeffrey Allen ROWE, Plaintiff–Appellant, v. Monica GIBSON, et al., Defendants–Appellees.**

**No. 14–3316.**

**Decided: August 19, 2015**

**Before POSNER, ROVNER, and HAMILTON, Circuit Judges.**

**Jeffrey A. Rowe, Carlisle, IN, pro se. Aaron T. Craft, Attorney, Office of the Attorney General, Jeb A. Crandall, Rachel A. East, Attorney, Bleeke Dillon Crandall, PC, Indianapolis, IN, for Defendant–Appellee.**

An Indiana prison inmate named Jeffrey Rowe, the plaintiff in this suit under 42 U.S.C. § 1983, charges administrators and prison staff (actually employees of Corizon, Inc., which provides medical services to the inmates at Pendleton Correctional Facility, Rowe's prison) with deliberate indifference to a serious medical need—that is, with knowing of a serious risk to inmate health or safety but responding ineffectually (as by departing substantially from accepted professional judgment) or not at all. See, e.g., Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); Sain v. Wood, 512 F.3d 886, 894–95 (7th Cir.2008). Such conduct was held in Farmer to violate the cruel and unusual punishments clause of the Eighth Amendment, deemed applicable to state action by interpretation of the due process clause of the Fourteenth Amendment. Rowe charges gratuitous infliction of physical pain and potentially very serious medical harm—cogent examples of cruel and unusual punishment. He has a subsidiary claim of having been retaliated against for filing this lawsuit, a claim we discuss briefly toward the end of our opinion. The district judge granted summary judgment in favor of the defendants on both claims, dismissing Rowe's suit and precipitating this appeal.

In 2009, already an inmate at Pendleton, Rowe was diagnosed with reflux esophagitis, also known as gastroesophageal reflux disease (GERD). See National Institutes of Health, "Gastroesophageal reflux disease," www.nlm.nih.gov/medlineplus/ency/article/000265.htm (visited August 17, 2015, as were the other websites cited in this opinion). The Mayo Clinic explains that "a valve-like structure called the lower esophageal sphincter usually keeps the acidic contents of the stomach out of the esophagus. If this valve opens when it shouldn't or doesn't close properly, the contents of the stomach may back up into the esophagus (gastroesophageal reflux). [GERD] is a condition in which this backflow of acid is a frequent or ongoing problem. A complication of GERD is chronic inflammation and tissue damage in the esophagus." Mayo Clinic, "Diseases and Conditions, Esophagitis: Reflux Esophagitis," www.mayoclinic.org/diseases-conditions/esophagitis/basics/causes/con–20034313. As we explained in a recent case in which, as in this case, a prison inmate complained of failure to treat his GERD (and we reversed the grant of summary judgment in favor of the prison staff), "GERD can . produce persistent, agonizing pain and discomfort. It can also produce 'serious complications. Esophagitis can occur as a result of too much stomach acid in the esophagus. Esophagitis may cause esophageal bleeding or ulcers. In addition, a narrowing or stricture of the esophagus may occur from chronic scarring. Some people develop a condition known as Barrett's esophagus. This condition can increase the risk of esophageal cancer.' WebMD, Heartburn/GERD Health Center, "What Are the Complications of Long–Term GERD?" www.webmd.com/heartburn-gerd/guide/reflux-disease-gerd1?page=4." Miller v. Campanella, 2015 WL 4523799, at *2 (7th Cir. July 27, 2015). Rowe complains of pain based on neglect of his need for symptomatic relief; continued neglect will endanger him more profoundly.

The prison physician who diagnosed Rowe with GERD told him to take a 150–milligram Zantac pill twice a day. Zantac inhibits the production of stomach acid and is commonly used to treat esophagitis (as we'll abbreviate the name of Rowe's disease). Although technically "Zantac" is merely the trade name for ranitidine manufactured by Glax-oSmithKline (in prescription strengths) and Boehringer Ingelheim (in over-the-counter strengths), it is often used as a synonym for ranitidine, see Wikipedia, "Ranitidine," http://en.wikipedia.org/wiki/Ranitidine, because Glaxo was the first, and remains the best-known, manufacturer. "Zantac" is the only word for the drug that appears in the briefs, and so we too will call the drug that Rowe received "Zantac."

After the diagnosis Rowe was given Zantac pills and was permitted to keep them in his cell and take them when he felt the need to. This regimen continued for more than a year. But in January 2011 his pills were confiscated and he was told that he would be allowed to take a Zantac pill only when a prison nurse gave it to him, and that would be at 9:30 a.m. and then at 9:30 p.m. He complained that he needed to take Zantac with his meals, which were, oddly enough, scheduled by the prison for 4 a.m. and 4 p.m. (why these times, we are not told). The prison had decided that inmates such as Rowe who take psychiatric medications should not be allowed to keep any pills in their cells—yet the head of health care at the prison told Rowe that he could keep in his cell (and thus take whenever he

wanted) any Zantac pills that he bought at the prison commissary—which, however, as we're about to see, he couldn't afford. No reason has been articulated for forbidding him to keep Zantac given him by prison staff while permitting him to keep Zantac that he bought at the commissary and take it whenever he needs to in order to prevent or alleviate pain. There is no suggestion that Zantac is a narcotic or otherwise consumed for nonmedical as well as medical reasons.

The defendants question Rowe's inability to pay for the pills. They point out that in one 13–month period he spent approximately $60 at the commissary. But the prison commissary charges $3.28 for just four 75–mg Zantac pills (and recall that Rowe was to take two 150–mg pills daily), meaning that he would have to pay almost $1300 for a 13–month supply. And he was forbidden to buy more than eight days' worth of Zantac a month from the commissary, which was only about a quarter of the amount that he needed.

To continue the narrative of what seems a senseless series of decisions by the prison's medical staff, as well as heartless given what the staff knew about the disease and Rowe's continuous claims of severe pain: at the beginning of July 2011, a month after he filed suit, he ceased receiving Zantac because his "prescription" (that is, his authorization to receive over-the-counter Zantac free of charge on a continuing basis) had lapsed. He made a series of requests for the drug beginning on July 3, but the nurse defendants denied all of them because he had no prescription. When he complained he was told by the administrative director of the medical staff: "Your chronic care condition does not warrant the continued use of Zantac. The continual use of over-the-counter medications can create further health problems in many instances. You will have to purchase this off of commissary if you wish to continue taking it." Notice the contradiction (illustrating the run around to which Rowe was continually subjected) in denying Rowe free Zantac because it could create "further health problems" but permitting him to buy and use it at will, though he couldn't afford to buy it. Nor is there any suggestion that Zantac is one of the over-the-counter medications that can create health problems if taken daily for a protracted period of time. And finally, if over-the-counter medicines are to be barred, why wasn't Rowe given a prescription for 300–mg Zantac pills; these are not only prescription rather than over-the-counter drugs but one such pill a day may be sufficient to control one's GERD, compared to two or more when an over-the-counter strength Zantac is prescribed.

On July 13, 2011, in response to Rowe's continued requests for a renewed prescription for Zantac, a physician who works at the prison (though employed by Corizon) named William H. Wolfe, whose professional specialty is preventive medicine, about which see American College of Preventive Medicine: Physicians Dedicated to Prevention, www.acpm.org/, rather than gastroenterology, see healthgrades, "Dr. William H. Wolfe, MD.," www.healthgrades.com/physician/dr–william–wolfe–2fgkl/background–check, and who is a frequent defendant in prisoner civil rights suits, reviewed Rowe's medical records and opined that his condition didn't require Zantac at all—this despite the fact that Rowe had been continuously prescribed Zantac for almost two years and that Wolfe himself had been the prescribing doctor for a quarter of that period. But though initially refusing to provide a new prescription for Zantac, Wolfe later relented and on August 2 prescribed it though he later stated in an affidavit that he had done so as a "courtesy" to Rowe and not out of medical necessity. (Prescribing drugs for prison inmates as a "courtesy" seems very odd; it is not explained.) The upshot was that Rowe had no access to Zantac for more than a month (between July 1 and August 3)—a significant deprivation. Even after Zantac was restored to him, he continued to be allowed to take it only at 9:30 a.m. and 9:30 p.m., both times being many hours distant from his meals.

In another affidavit Wolfe stated that "it does not matter what time of day Mr. Rowe receives his Zantac prescription. Each Zantac pill is fully effective for twelve hour increments. Zantac does not have to be taken before or with a meal to be effective." However, according to Boehringer Ingelheim, the manufacturer of over-the-counter Zantac, while Zantac can be taken at any time "to relieve symptoms," in order "to prevent symptoms" it should be taken "30 to 60 minutes before eating food or drinking beverages that cause heartburn." Zantac, "Maximum Strength Zantac 150," www.zantacotc.com/zantac-maximumstrength.html# faqs, and this advice is repeated on the labels of the boxes in which over-the-counter Zantac is sold. Were Zantac equipotent whenever taken, the manufacturer would not tell consumers to take it 30 to 60 minutes before eating, for having to remember when to take a pill adds a complication that the consumer would rather do without. There is thus no reason for the manufacturer to be lying, and it would be absurd to think that Dr. Wolfe, a defendant who is not a gastroenterologist, knows more about treatment of esophagitis with Zantac than the manufacturer does.

Rowe's aim was pain prevention, so having to take Zantac six and a half hours before a meal did not do the trick. It left him in pain for five and a half hours during and after the meal, until he got his next Zantac pill. Wolfe's statement that "each Zantac pill is fully effective for twelve hour increments" is also contradicted by the Zantac website, which states that one 150–mg pill "lasts up to 12 hours" (emphasis added). Thus a pill taken six and half hours before a meal might not be effective in alleviating the pain caused by acid secretions stimulated by the meal.

It might be thought that a corporate website, such as that of the Zantac manufacturer, would be a suspect source of information. Not so; the manufacturer would be taking grave risks if it misrepresented the properties of its product. In any event, the Mayo Clinic's website, as we'll see in a moment, confirms the manufacturer's claims.

Wolfe's affidavit states that Rowe was complaining just of "alleged heartburn [that] was not a serious medical condition warranting a prescription for Zantac"—but if so why did he prescribe Zantac for Rowe during the very period in which, according to the affidavit, Rowe's condition was not serious? (The affidavit fails to mention that it was Wolfe who had prescribed Zantac for Rowe, but that's conceded.)

It's true that the Mayo Clinic's website, at "Drugs and Supplements: Histamine H2 Antagonist (Oral Route, Injection Route, Intravenous Route)," www.mayoclinic.org/drugs–supplements/histamine–h2–antagonist–oralroute–injection–route–intravenous–route/proper–use/drg–20068584, after listing various drugs (including ranitidine) for treatment of the cluster of ailments that includes esophagitis, states that "for this class of drugs . patients taking two doses a day are instructed: 'Take one in the morning and one before bedtime.' " But this dosing, Mayo goes on to state, is appropriate "only for patients taking the prescription strengths of these medicines." The 150–mg pills that Rowe was taking are available over the counter; a prescription is required only for the 300–mg version. Both the Boehringer Ingelheim and Mayo websites also say that the patient shouldn't take Zantac for more than two weeks unless directed by a doctor—but Rowe was of course directed by Wolfe, as well as by other doctors earlier, to take Zantac on a continuing basis.

Not only wasn't Rowe allowed to take Zantac with his meals; he was not, as the Mayo website recommends, allowed to take it with water a half hour or an hour before eating a meal or drinking beverages that might cause him esophageal pain. As the Mayo website explains, for "adults and teenagers–150 mg with water taken thirty to sixty minutes before eating a meal or drinking beverages you expect to cause symptoms. Do not take more than 300 mg in twenty-four hours" (emphasis added).

Stomach acid is of course integral to the digestion of food, and indeed thirty percent of total gastric acid secretion is stimulated by the anticipation, smell, and taste of food, before the food ever reaches the stomach. Thomas A. Miller, Modern Surgical Care: Physiologic Foundations and Clinical Applications 344–45 (2006). "The foods you eat affect the amount of acid your stomach produces," and "many people with GERD find that certain foods trigger their symptoms." Healthline, "Diet and Nutrition for GERD," www.healthline.com/health/gerd/dietnutrition# Overview1. So it is no surprise that Rowe experiences painful symptoms when he eats without having been allowed to take a Zantac pill shortly before the meal.

The Physicians' Desk Reference, "PDR Search: Full Prescribing Information: Zantac 150 and 300 Tablets," www.pdr.net/full–prescribinginformation/zantac–150–and–300–tablets?druglabelid=241, states that a 150–mg dose of Zantac inhibits 79 percent of food-stimulated acid secretion for up to three hours after it's taken. This implies that the drug's efficacy decreases over time and so supports Rowe's claim that a 150–mg dose does not suppress his food-stimulated acid secretions when taken six and a half hours before a meal. The Physicians' Desk Reference also says that "symptomatic relief commonly occurs within 24 hours after starting therapy with ZANTAC 150 mg twice daily," which could be misread to mean that it does not matter what time of day the pills are taken, but which actually means that it takes a day for the body to recognize Zantac as a source of relief from esophageal distress. This interpretation is confirmed by Mayo, which states (at the website cited earlier): "It may take several days before this medicine begins to relieve stomach pain."

The evidence that Rowe was in pain for five and a half hours after eating is his repeated attestation—in his verified federal complaint and his declarations—that he experienced pain for that length of time when he was not allowed to take Zantac with or shortly before his meals. For purposes of summary judgment his attestations of extreme pain must be credited. See 28 U.S.C. § 1746; Fed.R.Civ.P. 56(c). There was no plausible contrary evidence. The affidavits of the only expert witness on the proper times at which to take Zantac, defendants' witness Wolfe, were highly vulnerable. Wolfe is not a gastroenterologist. He says that Rowe didn't need Zantac yet prescribed Zantac for him. He opined with confidence about what Rowe needed or didn't need—yet never examined him—and offered no basis for his off-the-cuff medical opinion. A court should not "admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." General Electric Co. v. Joiner, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); see also Finn v. Warren County, 768 F.3d 441, 452 (6th Cir.2014) ("the 'knowledge' requirement of Rule 702 requires the expert to provide more than a subjective belief or unsupported speculation"); Guile v. United States, 422 F.3d 221, 227 (5th Cir.2005) ("we look to the basis of the expert's opinion, and not the bare opinion alone. A claim cannot stand or fall on the mere ipse dixit of a credentialed witness"); McClain v. Metabolife International Inc., 401 F.3d 1233, 1242 (11th Cir.2005).

Remember that Rowe had been diagnosed with esophagitis back in 2009 and that for the ensuing two years physicians had prescribed Zantac to treat his condition. Furthermore, the Indiana Department of Correction permits such continuous treatment only to treat a serious health condition, so presumably the prescribing physicians thought Rowe's condition serious. None of this evidence or inference is undermined by Dr. Wolfe's evidence.

A member of a prison's staff is deliberately indifferent and thus potentially liable to an inmate if he "knows of and disregards an excessive risk to inmate health," Williams v. O'Leary, 55 F.3d 320, 324 (7th Cir.1995), quoting Farmer v. Brennan, supra, 511 U.S. at 837; see also Miller v. Campanella, supra, at *2. Rowe makes two distinct claims of deliberate indifference; the evidence that we've reviewed tends to substantiate both. There is both evidence that defendants Wolfe, Deborah Dotson, Melissa Bagienski, Chris Deeds, and Lisa Gibson were deliberately indifferent to his pain when they denied him access to free Zantac for thirty-three days, and that defendants Mary Mansfield, Gibson, and Dr. Michael Mitcheff were deliberately indifferent to his pain when they insisted—for many months—on giving him Zantac only at 9:30 a.m. and 9:30 p.m., instead of at his prescribed mealtimes. Regarding the first claim, if the nurse defendants to whom Rowe complained about reflux pain were not authorized to give him the free Zantac they should have promptly referred the matter to a doctor.

The evidence of Wolfe's deliberate indifference to Rowe's pain and resulting need for Zantac is, as we've shown, substantial, and likewise the evidence that limiting Rowe's taking Zantac to 9:30 a.m. and 9:30 p.m. for a protracted period exhibited deliberate indifference to a serious medical need. Wolfe never told anyone, so far as appears, when would be the best times for administering Zantac to Rowe. In very large doses Zantac will remain in your blood stream long enough to affect the stomach acid produced by meals eaten many hours later, but the Mayo and Boehringer Ingelheim timing recommendations suggest that this isn't true for 150–mg doses. Wolfe's assertion that "it does not matter what time of day Mr. Rowe receives his Zantac prescription" is implausible as well as vigorously contested. Rowe's pain and the Mayo Clinic's timing recommendations suggest that giving 150–mg doses of Zantac five and a half hours after one meal and six and a half hours before the next (and only other) meal of the day may be a substantial departure from accepted professional practice, preventing summary judgment for defendants regarding Rowe's claim of deliberate indifference to avoidable pain caused by the timing of his medication. See Sain v. Wood, supra, 512 F.3d at 894–95. Since Rowe's pain strongly indicated that he was experiencing reflux, the reflux could have had serious medical consequences (up to and including cancer) in addition to inflicting chronic pain on him. Prisoners aren't supposed to be tortured.

In citing even highly reputable medical websites in support of our conclusion that summary judgment was premature we may be thought to be "going outside the record" in an improper sense. It may be said that judges should confine their role to choosing between the evidentiary presentations of the opposing parties, much like referees of athletic events. But judges and their law clerks often conduct research on cases, and it is not always research confined to pure issues of law, without disclosure to the parties. We are not like the English judges of yore, who under the rule of "orality" were not permitted to have law clerks or other staff, or libraries, or even to deliberate—at the end of the oral argument in an appeal the judges would state their views seriatim as to the proper outcome of the appeal.

We don't insulate judges like that, but we must observe proper limitations on judicial research. We must acknowledge the need to distinguish between judicial web searches for mere background information that will help the judges and the readers of their opinions understand the case, web searches for facts or other information that judges can properly take judicial notice of (such as when it became dark on a specific night, a question we answered on the basis of an Internet search in Owens v. Duncan, 781 F.3d 360, 362 (7th Cir.2015), citing WeatherSpark, "Average Weather On September 22 For Chicago, Illinois, USA: Sun," https://weatherspark.com/averages/30851/9/22/Chicago–Illinois–United–States), and web searches for facts normally determined by the factfinder after an adversary procedure that produces a district court or administrative record. When medical information can be gleaned from the websites of highly reputable medical centers, it is not imperative that it instead be presented by a testifying witness. Such information tends to fall somewhere between facts that require adversary procedure to determine and facts of which a court can take judicial notice, but it is closer to the second in a case like this in which the evidence presented by the defendants in the district court was sparse and the appellate court need only determine whether there is a factual dispute sufficient to preclude summary judgment.

Rule 201 of the Federal Rules of Evidence makes facts of which judicial notice is properly taken conclusive, and therefore requires that their accuracy be indisputable for judicial notice to be taken of them. We are not deeming the Internet evidence cited in this opinion conclusive or even certifying it as being probably correct, though it may well be correct since it is drawn from reputable medical websites. We use it only to underscore the existence of a genuine dispute of material fact created in the district court proceedings by entirely conventional evidence, namely Rowe's reported pain.

There is a high standard for taking judicial notice of a fact, and a low standard for allowing evidence to be presented in the conventional way, by testimony subject to cross-examination, but is there no room for anything in between? Must judges abjure visits to Internet web sites of premier hospitals and drug companies, not in order to take judicial notice but to assure the existence of a genuine issue of material fact that precludes summary judgment? Are we to forbear lest we be accused of having "entered unknown territory"? This year the bar associations are busy celebrating the eight hundredth anniversary of Magna Carta. The barons who forced King John to sign that notable document were certainly entering unknown territory, and risking their lives to boot. Shall the unreliability of the unalloyed adversary process in a case of such dramatic inequality of resources and capabilities of the parties as this case be an unalterable bar to justice? Must our system of justice allow the muddled affidavit of a defendant who may well be unqualified to be an expert witness in this case to carry the day against a pro se plaintiff helpless to contest the affidavit?

This is not the case in which to fetishize adversary procedure in a pure eighteenth-century form, given the inadequacy of the key defense witness, Dr. Wolfe. Let's review: Wolfe refused to continue Rowe's Zantac prescription in July 2011 while Rowe was being kept waiting for three weeks before being seen by a doctor. Wolfe knew Rowe had esophagitis: he reviewed Rowe's medical records, which contained the 2009 diagnosis and revealed nearly two years of physicians' having prescribed Zantac for him continuously. Wolfe had personally prescribed Zantac for Rowe for six months of those two years and must have known that the Department of Correction authorizes such treatment only for a serious health condition. Rowe was complaining of continuing reflux pain; and while Wolfe denied a prescription renewal on July 13, he demonstrated his awareness that Rowe might need treatment by scheduling him for a later appointment (the August 2 appointment) to evaluate his request to resume taking Zantac.

Against this background, to credit Wolfe's evidence that it doesn't matter when you take Zantac for relief of GERD symptoms (evidence that may well have failed to satisfy the criteria for the admissibility of expert evidence that are set forth in Fed.R.Evid. 702) just because Rowe didn't present his own expert witness would make no sense—for how could Rowe find such an expert and persuade him to testify? He could not afford to pay an expert witness. He had no lawyer in the district court and has no lawyer in this court; and so throughout this litigation (now in its fourth year) he has been at a decided litigating disadvantage. He requested the appointment of counsel and of an expert witness to assist him in the litigation, pointing out sensibly that he needed "verifying medical evidence" to support his claim. The district judge denied both requests, leaving Rowe unable to offer evidence beyond his own testimony that he was in extreme pain when forbidden to take his medication with his meals.

The web sites give credence to Rowe's assertion that he was in pain. But the information gleaned from them did not create a dispute of fact that was not already in the record. Rowe presented enough evidence to call Dr. Wolfe's assessment into question—Rowe claims that after his medication was switched to the 12–hour schedule he was in extreme pain and Dr. Wolfe, without examining Rowe or disclosing the basis for his opinion (as we require experts to do), stated cursorily that the medicine would be effective for 12 hours. It will be up to the factfinder to decide, on a better developed record, who is right.

Nor is pain the only concern. Esophageal reflux disease can lead to serious damage of the stomach or esophagus, and even to cancer.

It is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence. To say for example that however implausible Dr. Wolfe's evidence is, it must be accepted because not contested, is to doom the plaintiff's case regardless of the merits simply because the plaintiff lacks the wherewithal to obtain and present conflicting evidence. Rowe did not move to exclude Wolfe as an expert witness on the ground that Wolfe neither qualified to give expert evidence in this case (because he is not a gastroenterologist) nor, as a defendant, was likely to be even minimally impartial. But Rowe does not have the legal knowledge that would enable him to file such a motion.

We have decided to reverse the judgment. We base this decision on Rowe's declarations, the timeline of his inability to obtain Zantac, the manifold contradictions in Dr. Wolfe's affidavits, and, last, the cautious, limited Internet research that we have conducted in default of the parties' having done so. We add that the judge erred not only by giving undue weight to Wolfe's internally contradictory affidavit but also by relying on a defendant (Wolfe) as the expert witness. There are expert witnesses offered by parties and neutral (court-appointed) expert witnesses, but defendants serving as expert witnesses?—and in cases in which the plaintiff doesn't have an expert witness because he doesn't know how to find such a witness and anyway couldn't afford to pay the witness? And how could an unrepresented prisoner be expected to challenge the affidavit of a hostile medical doctor (in this case really hostile since he's a defendant in the plaintiff's suit) effectively? Is this adversary procedure?

Esophagitis is a common disease for which Zantac is a common treatment, and it makes common sense as well as medical sense that a drug for treating symptoms of stomach acid backing up into the esophagus would be administered shortly before or shortly after meals unless the massive 300–mg pill was being administered to the patient, and it was not in this case. Rowe claimed that the Zantac he took became ineffective in treating his esophagitis pain symptoms when the prison staff decided to give it to him only long before his meals. His pain and the timing recommendation of the Mayo Clinic that we mentioned earlier suggest that giving 150–mg doses of Zantac six and a half hours before and five and a half hours after meals may be a substantial departure from accepted professional practice. But without his own expert, Rowe couldn't counter Wolfe's assertion that Zantac does not need to be taken shortly before, or with or shortly after, a meal in order to be effective. As Rowe explained in his brief, while he "provided evidence that Zantac does not 'prevent' reflux during its 12 hours of effectiveness, and that it was not effective at relieving Rowe's symptoms, the district court accepted the word of a defendant [i.e., Dr. Wolfe], who was speaking as an 'expert,' that the treatment Rowe received was adequate and effective. Had an expert been appointed, the expert would have confirmed Rowe's factual representations, and would have supported Rowe's objection that the defendant lacks personal knowledge about the condition(s) Rowe had because Wolfe never physically examined Rowe or had diagnostic testing done on Rowe" (citations omitted).

Rowe's allegations alone were sufficient to preclude summary judgment, and were enhanced by the defendants' own evidence, which included both Wolfe's contradictory evidence (among other things, he asserted that Rowe does not need Zantac and yet prescribed it for him) and the absurd opinion by the medical director that over-the-counter medications should not be provided to prisoners. Allowing Wolfe to be an expert witness in the case despite his being a defendant and not practicing the medical specialty at issue was another boost to the plaintiff's case, though again not one that an unrepresented, indigent prisoner could exploit.

We are coming to the end of this long opinion but we need to change gears for a moment: Besides arguing deliberate indifference to a serious medical need, Rowe accuses several of the defendants, in particular Dr. Wolfe and Nurse Bagienski, of retaliating against him for filing a lawsuit. He says they told him that going without Zantac for a month would make him "think twice about bringing lawsuits about inadequate medical care." If indeed they said this—an issue that cannot be determined without a trial—Rowe has a solid claim of retaliation. The retaliation claims against the other defendants were properly dismissed, however, and likewise the deliberate-indifference claims against the following defendants, who the district court correctly found were not responsible for the failure to treat Rowe's medical condition competently—Rose Vaisvilas, Wayne Scaife, and Kenneth Hysell. But we reverse with regard to the remaining defendants and remand the case for further proceedings consistent with this opinion.

Although reversing, we are not ordering that judgment be entered in Rowe's favor. As we've explained, we are not invoking Fed.R.Evid. 201 and thus not taking judicial notice of any facts outside the district court record. The remaining defendants are entitled to try to rebut any evidence whether or not presented in the district court, including any evidence found on the Internet. Like the conventional forms of evidentiary inquiry, Internet research must be conducted with circumspection. In particular it must not be allowed to extinguish reasonable opportunities for rebuttal.

Pure adversary procedure works best when there is at least approximate parity between the adversaries. That condition is missing in this case, in which a pro se prison inmate, incapable of retaining an expert witness (expert witnesses usually demand to be paid—and how would this inmate even find an expert witness?), confronts both a private law firm and the state attorney general.

Because of the profound handicaps under which the plaintiff is litigating and the fact that his claim is far from frivolous, we urge the district judge to give serious consideration to recruiting a lawyer to represent Rowe, see Miller v. Campanella, supra, at *2; Perez v. Fenoglio, 792 F.3d 768, 2015 WL 4092294, at *11 (7th Cir. July 7, 2015); appointing a neutral expert witness, authorized by Fed.R.Evid. 706, to address the medical issues in the case; or doing both. We are mindful that district courts don't have budgets for paying expert witnesses. But the medical issues in the case are not complex; there should be no difficulty in the judge's persuading a reputable gastroenterologist to speak to Rowe and some of the prison medical personnel (Rowe's prison is only 30 miles from Indianapolis, and there are 128 gastroenterologists in or near Indianapolis, healthgrades, www.healthgrades.com/gastroenterology-directory/in-indiana/indianapolis), to sit for a deposition, and, if necessary, to testify. Rule 706(c)(2) states that a court-appointed expert "is entitled to a reasonable compensation, as set by the court," and that "the compensation is payable . in any . civil case [not involving just compensation under the Fifth Amendment] by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs." In light of Rowe's indigency, the court if it appoints its own expert witness will have to order the defendants to pay the expert a reasonable fee if the expert is unwilling to work for nothing. Most prisons are strapped for cash, and this is something for the district court to bear in mind in deciding on whether and how large a fee to order the defendants to pay a court-appointed expert witness in a case (such as this case) that has sufficient merit to warrant such an appointment.

A substantial academic literature identifies serious deficiencies in the provision of health care in American prisons and jails. See, e.g., Andrew P. Wilper et al., "The Health and Health Care of U.S. Prisoners: Results of a Nationwide Survey," 99 Am. J. Public Health 666 (2009), and the studies posted by the Academic Consortium on Criminal Justice Health, www.accjh.org/. On the quality of treatment problems of Corizon, the employer of Dr. Wolfe and the other medical staff members sued by Rowe, see David Royse, "Medical Battle Behind Bars: Big Prison Healthcare Firm Corizon Struggles to Win Contracts," April 11, 2015, www.modernhealthcare.com/article/20150411/MAGAZINE/304119981; also Human Rights Defense Center, Prison Legal News, "Corizon Needs a Checkup: Problems with Privatized Correctional Healthcare," March 2014, www.prisonlegalnews.org/news/2014/mar/15/corizon-needs-a-checkup-problems-with-privatized-correctionalhealthcare/. The present case illustrates the problems that this literature has identified.

Affirmed in Part, Reversed in Part, and Remanded

Appendix

We respectfully suggest that the dissenting opinion is misleading in certain respects that require a response; page references are to pages in the dissent.

Page 29: The dissenting opinion states that "the reversal is unprecedented, clearly based on 'evidence' this appellate court has found by its own internet research. When the opinion is read as a whole, the decisive role of the majority's internet research is plain." No, the majority opinion endeavors to make clear that Rowe's allegations alone, coupled with the affidavit of Dr. Wolfe and other defense evidence, would be enough without any reference to the Internet to preclude summary judgment for the defendants, and doubtless would have precluded summary judgment had Rowe been represented. The dissent ignores this part of the majority opinion.

Page 29: The reader is told that "the majority writes that adherence to rules of evidence and precedent makes a 'heartless . fetish of adversary procedure.' " That is not what the majority opinion says; it says: "It is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence" (emphasis added). Nowhere does the majority opinion deny the validity of the federal rules of evidence or of procedure.

Page 32: The proposition in the dissent that the prison's response was adequate as long as it "provided at least some treatment for pain" overlooks the fact that a 150–mg Zantac pill given six and a half hours before one's next meal provides, according to Rowe, no alleviation of pain caused by stomach acid backing up into the esophagus, which is the pain of which Rowe complains. Also, it can't be correct that providing "some" treatment of pain always gets a prison doctor off the hook. Suppose Rowe were in agony from a slipped disk; would it be enough for Dr. Wolfe to give him an aspirin? To tell him, if he broke his leg, that it would heal by itself, in time?

Page 35: The statement that the majority opinion "holds in essence that the district judge erred by not doing such independent factual research" is mistaken. There is no such holding or suggestion in the opinion. The opinion merely suggests that the district judge should have appointed, and on remand should appoint, an expert witness who is a gastroenterologist (as Dr. Wolfe, the defendants' principal witness, is not) and who also is not a defendant.

Pages 35–36: The dissent's citation of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as a celebration of traditional adversary procedure misses the significance of Daubert, which is that it enlarged the role of the judge in policing expert testimony. The district judge in this case failed to play the role envisaged in Daubert by treating Dr. Wolfe as an expert on GERD despite his being a defendant accused of neglecting Rowe's GERD and also his not being a gastroenterologist. A Daubert hearing would doubtless have led to his exclusion from an expert-witness role.

Page 39: The dissent says that "when a prisoner brings a pro se suit about medical care, the adversary process that is the foundation of our judicial system is at its least reliable. Few prisoners have access to lawyers or to expert witnesses needed to address medical issues." Right on! (And Rowe is not one of the few who does have the necessary access.) But affirmance of a quite possibly incorrect decision cannot be the correct solution to the problem thus correctly stated by the dissent. The majority opinion offers a modest solution—a remand to enable a competent, impartial evidentiary exploration of Rowe's claim.

Page 40: On this page the dissent repeats its contention that the majority is insisting that district judges conduct Internet research: "The majority clearly implies, while denying it is doing so, that the district judge herself should have done the independent factual research the majority has done on appeal, questioning an unchallenged expert affidavit." No; the district judge should have recognized the existence of a substantial issue of material fact, barring summary judgment. Rowe's evidence of pain contradicted Dr. Wolfe's affidavit.

Page 41: The dissent expresses concern that the defendants may have to pay most or all of an expert witness's fee in a case brought by an indigent prisoner, such as Rowe. But it seems unlikely that a gastroenterologist would charge more than a nominal fee merely to testify that—what appears to be obvious—in order to prevent serious esophageal pain (and the even more serious consequences that can ensue from untreated GERD) a 150–mg Zantac pill should be taken no more than an hour before eating—not six and a half hours. One has only to read the label on a box of 150–mg Zantac pills to learn when the pill should be taken to prevent pain—30 to 60 minutes before eating. In addition, an expert's fee, if any, would in a case such as this, with its numerous defendants, be split many ways or, more likely, be paid for by the Indiana Department of Correction, the State of Indiana, Corizon or its liability insurer, or individual defendants' malpractice insurance (depending on the contractual arrangements between Corizon and the state, as well as the parties' insurance arrangements), or some combination of these well-heeled entities.

Page 42: The dissent states: "Without an expert witness qualified to present the facts and opinions the majority finds persuasive, that information does not come into evidence." This implies that without an expert witness, a party cannot defeat a motion for summary judgment. That isn't true. If a jury believed Rowe, he would win. It would be more likely to believe him than to believe Dr. Wolfe.

Page 42: The parade of horribles on this and other pages of the dissent (such as page 35, discussed earlier in this Appendix) is based on a belief that the majority is ordering that the district judge on remand do her own Internet research. Not so. It is unlikely that any Internet research by anyone will be necessary. All that should be necessary is testimony by a qualified, impartial expert witness who is a gastroenterologist and is not a defendant in this litigation.

Page 43: The dissent again states that we are requiring judges to conduct their own factual research. No. We are even accused by the dissent of trying to turn judges into substitutes for physicians. Again no.

Page 45: The dissent appears to misunderstand the Mayo Clinic's advice to "take one [Zantac pill] in the morning and one before bedtime." As pointed out in the majority opinion, this advice is intended "only for patients taking the prescription strengths," whereas Rowe was taking the 150–mg strength that is available over the counter. The Mayo Clinic provides different advice for the 150–mg pill: that it should be taken 30 to 60 minutes before meals to prevent heartburn symptoms (the mildest GERD symptoms). The dissent does not mention Boehringer Ingelheim's advice, also quoted in the majority opinion, that while Zantac can be taken at any time "to relieve symptoms," in order "to prevent symptoms" it should be taken "30 to 60 minutes before eating food or drinking beverages that cause heartburn." That is, if you have pain, you take a pill right away to alleviate the pain; if you foresee pain as a result of eating or drinking, you take the pill before you eat or drink—but not six and a half hours before.

Page 45: The dissent's reference to taking Zantac for more than “two weeks” without a doctor's permission is irrelevant to the case because Rowe had a doctor's permission—indeed Dr. Wolfe's permission—to take Zantac and had begun taking it long ago, always with permission.

Page 45: The reference to symptomatic relief beginning “24 hours” after taking Zantac could be understood to mean that Zantac can prevent pain that far in advance. Not so. As explained in the majority opinion, “24 hours” is the time it takes for Zantac when first taken to begin to have a therapeutic effect.

A disagreement about the outcome of this relatively simple case has morphed into a debate over the propriety of appellate courts supplementing the record with Internet research. To be clear, I do not believe that the resolution of this case requires any departure from the record: as the majority opinion makes patently clear, Rowe has consistently maintained that he experiences hours of severe pain if he does not take Zantac with his meals, and at this stage of the proceedings his assertions of extreme pain must be credited. See Catalan v. GMAC Mortg. Corp., 629 F.3d 676, 696 (7th Cir.2011). Given that, I think this case can be decided on the fundamental and unremarkable rule that we give Rowe the benefit of all conflicts and draw all reasonable inferences in his favor as the nonmoving party. E.g., Keller v. United States, 771 F.3d 1021, 1022 (7th Cir.2014). Dr. Wolfe, himself a defendant, cursorily asserted that the timing ought not to matter. But Dr. Wolfe's self-interested “expert” opinion on this fact is disputed by Rowe's own personal experience with the timing of the medication, as the majority makes clear. If he informed prison officials that he was in severe pain because he could not take his medication at particular times and they did nothing about it because they did not care about his pain, that is the very definition of deliberate indifference. See Greeno v. Daley, 414 F.3d 645, 653–54 (7th Cir.2005); Walker v. Benjamin, 293 F.3d 1030, 1039–40 (7th Cir.2002).

Treating the competing claims of Dr. Wolfe and Rowe as disputed at the summary judgment stage is hardly holding that a prisoner's dissatisfaction with his treatment is always enough to require a jury trial on whether the prison's medical staff were deliberately indifferent to his pain (dissent at 32). Instead, I believe it falls more comfortably into the category the dissent itself recognizes (dissent at 32–33)–those cases in which prisoners have shown that medical staff persisted in an obviously inadequate course of treatment. E.g., Arnette v. Webster, 658 F.3d 742, 754 (7th Cir.2011) (prescribing inadequate pain medication for condition causing pain and swelling in joints); Berry v. Peterman, 604 F.3d 435, 441–42 (7th Cir.2010) (prescribing over-the-counter medications that did not relieve pain of severe toothache ultimately necessitating root canal); see also Greeno, 414 F.3d at 649–54 (continuing to provide ineffective antacid treatment for severe heartburn). Rowe argued in the district court that he needed an expert precisely because his medical condition is “complicated” and “can appear to be non-serious to a lay person.” The district court denied Rowe's motion to appoint an expert, which left Rowe with only his own testimony to counter Dr. Wolfe. That the manufacturer's website and other reputable medical web sites support the plausibility of his testimony merely illuminates the factual dispute that exists within the record as we received it; they are not necessary to the outcome. Although the standard for deliberate indifference is high, I have no trouble at this stage of the litigation giving Rowe the benefit of the doubt.

I agree with the majority's disposition of most claims and issues: affirming summary judgment for defendants on several claims and reversing on Rowe's retaliation claim and his claim for complete denial of his Zantac medicine for 33 days in July and August 2011.

I must dissent, however, from the reversal of summary judgment on Rowe's claim regarding the timing for administering his medicine between January and July 2011 and after August 2011. On that claim, the reversal is unprecedented, clearly based on “evidence” this appellate court has found by its own internet research. The majority has pieced together information found on several medical websites that seems to contradict the only expert evidence actually in the summary judgment record. With that information, the majority finds a genuine issue of material fact on whether the timing of Rowe's Zantac doses amounted to deliberate indifference to a serious health need, and reverses summary judgment. (The majority denies at a couple of points that its internet research actually makes a difference to the outcome of the case, see ante at 14, 16, but when the opinion is read as a whole, the decisive role of the majority's internet research is plain.)

The majority writes that adherence to rules of evidence and precedent makes a “heartless . fetish of adversary procedure.” Yet the majority's decision is an unprecedented departure from the proper role of an appellate court. It runs contrary to long-established law and raises a host of practical problems the majority fails to address.

To explain my disagreement, Part I reviews the facts in the record before us and shows that the majority has actually based its decision on its internet research. Part II explains why the majority's reliance on its own factual research is contrary to law. Part III addresses the practical problems posed by the majority's decision to do its own factual research. Finally, Part IV points out problems with the reliability of the majority's factual research and shows that the enterprise of judicial factual research is unreliable when it loses the moorings to the law of judicial notice.

I. The Facts in the Record

On Rowe's claim that the timing of his Zantac doses showed deliberate indifference to his health, the evidence in the record consists of two items. First, plaintiff Rowe asserts in his verified complaint and in several affidavits that he believes the prison's schedule for giving him two 150 mg Zantac pills each day left him in unnecessary and avoidable pain for hours every day after meals. Second, defendants filed an affidavit from defendant Dr. William Wolfe, who was a career physician in the United States Air Force and is now a contract physician for the Indiana Department of Correction. Dr. Wolfe testified: “It does not matter what time of day Mr. Rowe receives his Zantac prescription. Each Zantac pill is fully effective for twelve hour increments. Zantac does not have to be taken before or with a meal to be effective. Providing Mr. Rowe with Zantac twice daily as the nursing staff makes their medication rounds, whatever time that may be, is sufficient and appropriate to treat his heart burn symptoms.”

The record thus shows a prisoner's diagnosed disease and complaints of pain that prison staff treated with an appropriate medicine. The prisoner is not satisfied with details of the treatment's timing, but a physician testified that the timing change the prisoner wanted was not called for because the medicine was equally effective as long as he was receiving two doses per day. This evidence does not support a reasonable inference of deliberate indifference.

Proof of deliberate indifference is much more demanding than proof of even medical malpractice. E.g. Petties v. Carter, ––– F.3d ––––, 2015 WL 4567899 (7th Cir. July 30, 2015); Ray v. Wexford Health Sources, Inc., 706 F.3d 864, 866 (7th Cir.2013); Duckworth v. Ahmad, 532 F.3d 675, 679 (7th Cir.2008); see generally Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). This record evidence would not let a reasonable jury find that the prison's schedule for giving Rowe his medicine departed so far from professional standards to find that any prison staff acted with deliberate indifference to his health. The district court therefore properly granted summary judgment for defendants on this claim. See, e.g., Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir.2006) (reversing denial of summary judgment), citing Estate of Cole v. Fromm, 94 F.3d 254, 262 (7th Cir.1996) (affirming summary judgment); see also, e.g., Pyles v. Fahim, 771 F.3d 403, 409 (7th Cir.2014) (affirming summary judgment; physician's refusal to order MRI for prisoner's back pain did not show deliberate indifference).

As noted above, the majority claims twice that its decision does not actually depend on its independent factual research, at pages 14 and 16. See also ante at 27–28 (Rovner, J., concurring). These denials contradict the rest of the majority opinion. If they were accurate, the majority's long discussion of its research and its justifications for it would amount to a long essay not necessary to the court's decision. If the denials were accurate, moreover, the majority decision would amount to a significant rewriting of the Eighth Amendment law governing health care for prisoners.

Where prison medical staff just refuse to treat serious pain or disease, a prisoner may well have a viable claim that should go to trial. E.g., Miller v. Campanella, No. 14–1990, ––– F.3d ––––, 2015 WL 4523799 (7th Cir. July 27, 2015) (no treatment of prisoner's GERD); Hayes v. Snyder, 546 F.3d 516, 524–26 (7th Cir.2014). Where the evidence shows, however, that medical staff have provided at least some treatment for pain we almost always hold that the prisoner is not entitled to a jury trial on a claim for deliberate indifference based on a claim that the pain treatment was not adequate. E.g., Pyles v. Fahim, 771 F.3d 403, 409, 411 (7th Cir.2014); Holloway v. Delaware County Sheriff, 700 F.3d 1063, 1073–76 (7th Cir.2012).

If the majority decision did not depend on its own factual research, then the majority would be holding that the prisoner's dissatisfaction with pain treatment is enough to require a jury trial on whether the prison's medical staff were deliberately indifferent to his pain. We have not found before this case that such evidence is sufficient to infer deliberate indifference. But we will see a lot more cases like this one. As the average age of the prison population increases, so will the incidence of painful, chronic conditions that cannot be treated to the complete satisfaction of the prisoners. The fact that a treatment for pain is not as effective as the prisoner would like should not be enough to support an inference that the prison staff are deliberately indifferent to his pain.

In fact, the majority's reversal on this claim is based on a small but important category of cases in which prisoners have shown that medical staff persisted in obviously inadequate courses of treatment. In those cases, we have found triable issues of deliberate indifference. E.g., Arnett v. Webster, 658 F.3d 742, 754 (7th Cir.2011); Berry v. Peterman, 604 F.3d 435, 441–42 (7th Cir.2010); Greeno v. Daley, 414 F.3d 645, 654 (7th Cir.2005) (treatment prisoner received was "blatantly inappropriate"). As we explained in Pyles, these decisions were based on evidence showing that the need for specialized expertise or different treatment was either known by the treating physicians or would have been obvious to a lay person. 771 F.3d at 411.

The problem for the majority here is that Rowe himself has made no comparable showing. Only by relying on its independent factual research can the majority establish an arguable basis for applying this theory that the course of treatment was so clearly inadequate as to amount to deliberate indifference. The majority decision to reverse summary judgment on this claim thus depends on that independent factual research.

II. The Law on Judicial Research into the Facts

The ease of research on the internet has given new life to an old debate about the propriety of and limits to independent factual research by appellate courts.[1] To be clear, I do not oppose using careful research to provide context and background information to make court decisions more understandable. By any measure, however, using independent factual research to find a genuine issue of material, adjudicative fact, and thus to decide an appeal, falls outside permissible boundaries. Appellate courts simply do not have a warrant to decide cases based on their own research on adjudicative facts. This case will become Exhibit A in the debate. It provides, despite the majority's disclaimers, a nearly pristine example of an appellate court basing a decision on its own factual research.

The majority's factual research runs contrary to several lines of well-established case law holding that a decision-maker errs by basing a decision on facts outside the record.

If a district judge bases a decision on such research, we reverse for a violation of Rule 201. E.g., Pickett v. Sheridan Health Care Center, 664 F.3d 632, 648–51 (7th Cir.2011) (district court erred by relying on independent internet research on attorney fees without giving parties opportunity to address information).

If jurors start doing their own research during a trial, a new trial is likely. United States v. Thomas, 463 F.2d 1061, 1062–65 (7th Cir.1972); see also United States v. Blagojevich, 612 F.3d 558, 564 (7th Cir.2010) (noting concern that messages to jurors would tempt them to engage in "forbidden research and discussion").

If an immigration judge or administrative law judge bases a decision on facts without record support, we reverse it. See, e.g., Huang v. Gonzales, 403 F.3d 945, 948–50 (7th Cir.2005) (reversing immigration decision based on alien's answers to questions based on judge's personal beliefs about alien's religion); Nelson v. Apfel, 131 F.3d 1228, 1236–37 (7th Cir.1997) (ALJ's reliance on evidence outside record was erroneous but harmless).

We are in no better a position to go outside the record for decisive facts. Our job is to reverse in cases where the decision-maker has gone outside the record. The majority in this case, however, not only does what we treat as reversible error when others do it; it holds in essence that the district judge erred by not doing such independent factual research. What was forbidden is now required.

In addition to the case law holding that a decision-maker is not permitted to base a decision on evidence outside the record, another body of law is relevant to this issue: Federal Rule of Evidence 201 and the law of judicial notice. The majority opinion runs contrary to that law and misunderstands how Rule 201 and judicial notice fit together with the ordinary, adversarial presentation of facts.

The vast majority of facts that courts consider when deciding cases comes from the familiar, adversarial presentations of evidence by opposing parties. The foundation of our legal system is a confidence that the adversarial procedures will test shaky or questionable evidence: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Those protective procedures are not available when a court decides to do its own factual research and bases its decision on what it finds.

The law of evidence allows a narrow exception permitting some judicial research into relevant facts, under Federal Rule of Evidence 201 and the concept of judicial notice. Judicial notice "substitutes the acceptance of a universal truth for the conventional method of introducing evidence," and as a result, courts must use caution and "strictly adhere" to the rule before taking judicial notice of pertinent facts. General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1081 (7th Cir.1997); see also Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1354 (7th Cir.1995) ("In order for a fact to be judicially noticed, indisputability is a prerequisite.").

The majority says twice it is not taking judicial notice of all the cited medical information from the internet. Ante at 13–14, 19. I agree it could not properly take judicial notice of this information under Evidence Rule 201(b) and (e). The proper timing of a patient's doses of Zantac is not "generally known within the trial court's territorial jurisdiction" and is not beyond "reasonable dispute," nor can it be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned," as Rule 201(b) requires. And the majority has made no effort to comply with the procedural requirements of Rule 201(e), essential to basic fairness, of giving the parties an opportunity to be heard on the evidence.

If the majority is not taking judicial notice, what exactly is it doing? It seems to have created an entirely new, third category of evidence, neither presented by the parties nor properly subject to judicial notice. The majority writes:

When medical information can be gleaned from the websites of highly reputable medical centers, it is not imperative that it instead be presented by a testifying witness. Such information tends to fall somewhere between facts that require adversary procedure to determine and facts of which a court can take judicial notice, but it is closer to the second in a case like this in which the evidence presented by the defendants in the district court was sparse and the appellate court need only determine whether there is a factual dispute sufficient to preclude summary judgment.

Ante at 13 (emphasis added). In other words, the majority acknowledges that its "evidence" neither comes from adversarial presentation by the parties nor meets the strict substantive and procedural standards for judicial notice under Rule 201.

Before this decision, American law has not recognized this category of evidence, which might be described as "non-adversarial evidence that the court believes is probably correct." Compare the comments of the authors of Rule 201, the Advisory Committee Notes from 1972:

The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

In other words, the Federal Rules of Evidence allow no room for the majority's innovation. Adversarial evidence and judicial notice are not opposite poles on a wide spectrum, with a middle ground for the majority's evidence that has neither been subjected to adversarial testing nor a proper subject of judicial notice. These are two distinct categories. To be admissible, evidence must fall within one or the other. "Close" to judicial notice does not count.

The majority has not offered any precedent from the law of evidence to support its reliance on its own factual research. Instead, it tries to downplay the unprecedented step it takes, including its emphasis that it is "not ordering that judgment be entered in Rowe's favor" and that defendants will be entitled to rebut the majority's factual research on remand. Ante at 19. The majority's modest demurrer loses sight of the stakes. The issue on summary judgment is whether the evidence in the record would allow a reasonable jury to find in favor of the non-moving party. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 149–50, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). By reversing, the majority is necessarily finding that this record is sufficient to support a jury verdict for Rowe. I disagree.

The majority also points out that "judges and their law clerks often conduct research on cases without disclosure to the parties." Ante at 12. Such research has long been understood to involve only legal research. The majority's effort to compare long-accepted judicial research into case law and statutes to its independent factual research shows the majority has entered unknown territory.

To justify this venture, the majority asks a number of rhetorical questions and invokes the courage of the barons at Runnymede in 1215. Ante at 14. With respect, we are an intermediate appellate court. The Federal Rules of Evidence and Federal Rules of Civil Procedure that we apply are adopted and amended through processes established by the Rules Enabling Act, 28 U.S.C. § 2071 et seq. We simply do not have authority on our own to take the law into this unknown territory.

III. The Practical Problems

The majority points out correctly that prisoners must depend entirely on the government for their health care. If they turn to the federal courts for help, the combination of the constitutional standard under the Eighth Amendment, deliberate indifference to a serious health need, and the system of personal liability under 42 U .S.C. § 1983 can make it very difficult for a prisoner to hold anyone accountable for serious wrongs. See, e.g., Shields v. Illinois Dep't of Corrections, 746 F.3d 782 (7th Cir.2014). When a prisoner brings a pro se suit about medical care, the adversary process that is the foundation of our judicial system is at its least reliable. Few prisoners have access to lawyers or to expert witnesses needed to address medical issues.

These conditions pose important challenges to federal courts doing their best to decide these cases fairly. Yet the majority's solution—to research available medical information on its own and find a genuine issue of material fact on that basis—raises problems much more serious than a possible error in the resolution of one prisoner's case.

The majority's approach turns the court from a neutral decision-maker into an advocate for one side. The majority also offers no meaningful guidance as to how it expects other judges to carry out such factual research and what standards should apply when they do so. Under the majority's approach, the factual record will never be truly closed. This invites endless expansion of the record and repetition in litigation as parties contend and decide that more and more information should have been considered.

In addition to the abandonment of neutrality, consider the problems from the district judge's point of view. The majority clearly implies, while denying it is doing so, that the district judge herself should have done the independent factual research the majority has done on appeal, questioning an unchallenged expert affidavit by looking to websites of the drug manufacturer, the Mayo Clinic, the Physician's Desk Reference, and Healthline.

The practical questions are obvious: When are district judges supposed to carry out this independent factual research? How much is enough? What standards of reliability should apply to the results? How does the majority's new category of evidence fit in with a district judge's gate-keeping responsibilities under Rule 702 and Daubert? The majority offers no answers.

The majority essentially orders the district judge on remand to find an expert witness on the medical issues, either for plaintiff or as a neutral expert under Rule 706. That might well be helpful, but as the majority concedes, district courts do not have budgets for that purpose. Even if a few experts might be willing to volunteer in unusual cases, the demand of prisoners for free medical or other expert witnesses will far exceed the supply, especially in the rural areas where so many prisons are located and smaller towns where the nearest district courts are located.

The majority's solution for this problem is to have the district court use Federal Rule of Evidence 706 to order defendants, and only the defendants, to pay for an expert witness for the plaintiff or the court. See ante at 19–20. That approach is not foreclosed by the language of Rule 706, and there is some case law supporting it. See Ledford v. Sullivan, 105 F.3d 354, 360–61 (7th Cir.1997). Nevertheless, the majority's reliance on this solution in this ordinary case further threatens the neutrality of the courts. It is worth recalling that damages under 42 U.S.C. § 1983 must be sought from state employees only in their individual capacities. Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Indemnification by their employer is a matter of state law and policy, and sometimes grace. See Ind.Code § 34–13–4–1; Estate of Moreland v. Dieter, 576 F.3d 691, 694–96 (7th Cir.2009). Is it fair to impose on individual guards, prison administrators, staff, nurses, and doctors the cost of finding evidence to build a case against them? At the very least, such one-sided burdens should be imposed only in extraordinary cases.[2]

Further, if the case goes to trial, how is the district judge supposed to present to a jury the information the majority has found? My colleagues and I agree it is not suitable for judicial notice because it is not indisputable, as required under Rule 201(b). Without an expert witness qualified to present the facts and opinions the majority finds persuasive, that information does not come into evidence. On appeal would the majority's approach lead us to remand for a new trial with instructions to look harder for the right evidence? Or what should we do if the district judge did not find or rely on the information that our research turns up? As long as the factual record remains open for judicial supplements, parties will try to use the quest for the perfect record to keep any loss in litigation from being final.

Then consider the problems parties and their lawyers will face. If we permit such independent factual research by district judges—even expect such research from them—parties will need to plan for it. Responding to the evidence actually offered by the other side is often the biggest challenge and expense in a lawsuit. Now parties need to anticipate the evidence the judge might turn up on her own and prepare to meet it. The time and expense devoted to such preventive measures will be substantial and should be unnecessary. And if the district judge does her own research and gives the parties an opportunity to respond to it, the majority's approach here is an open invitation for parties to add to the record on appeal. The parties will also need to anticipate on appeal that our court will undertake its own factual research, opening up opportunities to save any losing case by offering new evidence on appeal.[3]

From the larger perspective of our judicial system, the independent factual research the majority endorses and even requires here is not something that federal courts can carry out reliably on a large scale. History is probably the academic field closest to the practice of law and judging. Yet historians regularly scoff at the phenomenon called “law-office history.” See Velasquez v. Frapwell, 160 F.3d 389, 393 (7th Cir.1998) (Posner, J.) (“[J]udges do not have either the leisure or the training to conduct responsible historical research or competently umpire historical controversies. The term ‘law-office history’ is properly derisory and the derision embraces the efforts of judges and law professors, as well as of legal advocates, to play historian. * * * Judges don't try to decide contested issues of science without the aid of expert testimony, and we fool ourselves if we think we can unaided resolve issues of historical truth.”), vacated in part, 165 F.3d 593 (7th Cir.1999).

Law-office or judicial-chambers medicine is surely an even less reliable venture. The internet is an extraordinary resource, but it cannot turn judges into competent substitutes for experts or scholars such as historians, engineers, chemists, psychologists, or physicians. The majority's instruction to the contrary will cause problems in our judicial system more serious than those it is trying to solve in this case.

IV. How Reliable is Our Research?

Thus far I have avoided debating the details of the majority's research, but they deserve closer attention. The specific details highlight the more general criticisms I have directed at such factual research by judges.

First, on the websites the majority relies upon, we find important disclaimers that emphasize the need for filtering their information through qualified medical advice, which no member of this court is qualified to provide. The Physician's Desk Reference site says it is to be used "only as a reference aid. It is not intended to be a substitute for the exercise of professional judgment. You should confirm the information on the PDR.net site through independent sources and seek other professional guidance in all treatment and diagnosis decisions." www.pdr.net (last visited August 19, 2015, as were all websites cited here). The Mayo Clinic and Zantac websites have similar disclaimers advising readers to talk to a physician or other health care provider before acting on the information on the websites. See www.mayoclinic.org/about-this-site/terms-conditions-use-policy; www.zantacotc.com/zantac-maximumstrength.html# faqs.

Second, after we get past the disclaimers, the content of the majority's websites simply does not give clear support to the majority's views (a) that Dr. Wolfe was wrong in saying that the 150 mg pills Rowe was receiving twice a day could be equally effective even if not given shortly before meals, let alone (b) that Dr. Wolfe was so thoroughly and obviously wrong that a jury could infer that prison staff were deliberately indifferent to Rowe's health needs. The majority's web-sites instead show that some degree of medical judgment is needed to decide when best to administer which size pills for patients with different needs, especially patients like Rowe with chronic conditions.

The Mayo Clinic site says that patients taking prescription strength Zantac twice a day should take one in the morning and one at bedtime. The majority discounts that advice because Rowe was taking an over-the-counter dosage of 150 mg pills rather than the prescription dosage of 300 mg pills. Ante at 8. Yet that explanation overlooks the advice from both the manufacturer and the Mayo Clinic that a patient should not take the over-the-counter pills for more than two weeks unless directed by a doctor. For patients like Rowe, taking Zantac long-term to treat GERD, the Mayo Clinic offers more specific guidance. It advises that adult patients with GERD take the 150 mg pill two times a day without specifying that the pills should be taken shortly before meals. www.mayoclinic.org/drugssu pplements/histamine–h2–antago nist–oral–route–injection–route–intravenousroute/proper–use/drg–20068584. That advice from the Mayo Clinic seems identical to Dr. Wolfe's view.

Similarly, the PDR advises that for treatment of GERD, "Symptomatic relief commonly occurs within 24 hours after starting therapy with ZANTAC 150 mg twice daily," again without indicating any need to take the pills before meals. www.pdr.net/full–prescribing–information/zantac–150–and–300–tablets?druglabelid=241# section–standard–1.

The "full prescribing information" on the Physician's Desk Reference website says that for treatment of GERD with the 150 mg and 300 mg pills, "Symptomatic relief commonly occurs within 24 hours after starting therapy with ZANTAC 150 mg twice daily," again without saying anything about taking pills before meals. www.pdr.net/full–prescribinginformation/zantac–150–and–300–tablets?druglabelid=241. And again, that was Rowe's diagnosis and those were his pills in 2011.

The majority draws on the PDR website and "common sense" regarding how long the pills remain effective. Ante at 17. The PDR website, however, simply does not provide sufficient data on absorption and clearance rates for the medicine to allow us to exercise our own (non-expert) judgment about whether the timing of Rowe's pills was appropriate. It certainly does not allow us to conclude that the timing could have amounted to deliberate indifference to his serious health needs or to find that Dr. Wolfe's uncontradicted affidavit did not support the district court's entry of summary judgment on this claim.

Of course, the point of this discussion of the websites is not to debate the majority on the medical fine points. The websites the majority relies upon tell us themselves that their information needs to be interpreted by a qualified physician. None of this information is in the record. None was before the district court, nor is it properly before us.

The majority's interpretation of its internet research is not a reliable substitute for proper evidence subjected to adversarial scrutiny. And while Dr. Wolfe's affidavit is far less detailed than the information the majority has explored on the internet, I also see no basis for the majority's harsh criticism of him, especially when Dr. Wolfe has not been given any opportunity to respond or explain.[4]

* * *

In the end, whether Dr. Wolfe's testimony about the timing for Rowe's doses was right or wrong in some pure and objective sense, or in a case tried with ample resources and talent on both sides, is not the question for us. For purposes of summary judgment, Dr. Wolfe's testimony was undisputed. We have no business reversing summary judgment based on our own, untested factual research. By doing so, the majority has gone well beyond the appropriate role of an appellate court. I respectfully dissent from the reversal of summary judgment on Rowe's claims based on the timing of his medication.

FOOTNOTES

1. See, e.g., Layne S. Keele, When the Mountain Goes to Mohammed: The Internet and Judicial Decision–Making, 45 N.M. L.Rev. 125 (2014); Allison Orr Larsen, The Trouble with Amicus Facts, 100 Va. L.Rev. 1757 (2014); Richard A. Posner, Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views, 51 Duq. L.Rev. 3 (2013); Frederick Schauer, The Decline of "The Record": A Comment on Posner, 51 Duq. L.Rev. 51 (2013); Elizabeth G. Thornburg, The Lure of the Internet and the Limits on Judicial Fact Research, Litig., Summer 2012, at 41; Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra–Record Factfinding, 61 Duke L.J. 1 (2011); Elizabeth G. Thornburg, The Curious Appellate Judge: Ethical Limits on Independent Research, 28 Rev. Litig. 131 (2008); Coleen M. Barger, On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials, 4 J.App. Prac. & Process 417 (2002).

2. I share the concerns expressed by the district court in Martin v. Cohn, 1999 WL 325054, at *1 (N.D.Ind. April 5, 1999), about the fundamental fairness of imposing this financial burden on one side solely because the opposing party is indigent. The defendants will end up having to foot the bill for the expert even if they win the case. One partial but creative solution to this problem can be found in Goodvine v. Ankarlo, 2013 WL 1192397, at *2 (W.D.Wis. March 22, 2013) (providing for longterm assessments of plaintiff's prison trust account to pay for court-appointed expert if plaintiff did not prevail).

3. If parties on appeal try to supplement the record as the majority does here, they are rebuked and may even be sanctioned. E.g., Hart v. Sheahan, 396 F.3d 887, 894–95 (7th Cir.2005) (stating general rule but finding no violation because appeal was from dismissal on pleadings); Holmberg v. Baxter Healthcare Corp., 901 F.2d 1387, 1392 n. 4 (7th Cir.1990) (striking portions of appellee's brief). Under the majority's approach, we could not take such steps in response to parties' invitations to our court to repeat what the majority does here.

4. The majority criticizes Dr. Wolfe's affidavit for not providing an explanation for his opinion about the timing of the Zantac doses. The majority overlooks Federal Rule of Evidence 705, which permits conclusory expert testimony unless and until the conclusions are challenged, which Dr. Wolfe's affidavit was not in the district court. He has not yet been called upon to explain his opinion in this case. The fact that he is a defendant does not disqualify him from offering an affidavit; we often affirm summary judgment based on a moving party's testimony. The majority points out that Dr. Wolfe is "a frequent defendant in prisoner civil rights suits," ante at 6, as if that reflected poorly on his professionalism. Virtually any physician serving large numbers of prisoners will be "a frequent defendant in prisoner civil rights suits."

POSNER, Circuit Judge.



## ROWE v. GIBSON (2015)

**Docket No:** No. 14–3316.

**Decided:** August 19, 2015

**Court:** United States Court of Appeals,Seventh Circuit.

24-11362 (MBK)
United States Bankruptcy Court, District of New Jersey

# In re Invitae Corp.

Decided May 16, 2024

24-11362 (MBK)

05-16-2024

In Re: INVITAE CORPORATION, et al., Debtors

Michael B. Kaplan Judge

NOT FOR PUBLICATION

Chapter 11

Hearing Date: May 7, 2024

**MEMORANDUM DECISION**

Michael B. Kaplan Judge

*All Counsel of Record*

This matter comes before the Court on an Application (the "Retention Application," ECF No. 158) filed by Debtor Invitae Corporation, et al. ("Debtors") seeking to retain Kirkland & Ellis LLP and Kirkland & Ellis International LLP ("K&E") as Attorneys for the Debtors and Debtors in Possession. The Official Committee of Unsecured Creditors (the "Committee") filed a Limited Objection (ECF No. 283). The Office of the United States Trustee ("UST") also filed an Objection (ECF No. 322). Interested party, Deerfield Partners, L.P., filed a Statement in Response to the objections (ECF No. 336); and Debtors submitted a Reply (ECF No. 363). The parties also submitted a Joint Stipulation of Undisputed Facts regarding the Retention Application (the "Joint Stipulation," ECF No. 454). The Court fully considered the parties' submissions, as well as the arguments raised during the hearing on May 7, 2024. At the conclusion of the hearing, the Court granted the Retention Application and indicated that it would supplement its oral ruling with a written opinion. The following constitutes the written basis for the Court's oral ruling. *2

2

**I. Jurisdiction**

The Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the Standing Order of the United States District Court dated July 10, 1984, as amended September 18, 2012, referring all bankruptcy cases to the bankruptcy court. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A). Venue is proper in this Court pursuant to 28 U.S.C. § 1408.

**II. Background and Procedural History**

In 2023-prior to filing for bankruptcy-the Debtors entered into a transaction with Deerfield L.P. and certain of its affiliates ("Deerfield") whereby Deerfield became Debtors' senior secured noteholder (the "Transaction"). It is undisputed that Deerfield is the largest secured creditor, holding approximately 79% of Debtors' debt. *Joint Stipulation* ¶ 11, ECF No. 454. It is likewise undisputed that K&E was not involved in the Transaction in any capacity for either rhte Debtors or Deerfield. Following the Transaction, in September 2023, Debtors engaged with K&E with regard to preparation for a possible chapter 11 proceeding. After filing their voluntary Chapter 11 bankruptcy petition on February 13, 2024, Debtors sought to formally retain K&E as bankruptcy counsel. The objections to the Retention Application are based on K&E's concurrent

representation of Deerfield, who initially retained K&E in 2021. *Id.* At ¶ 14. K&E continues to represent Deerfield in certain matters unrelated to the bankruptcy case. *Id.* at ¶¶ 16, 17.

The Committee explains that the Transaction will likely be a "central issue" in this bankruptcy proceeding, meaning that a successful challenge to the Transaction could result in "hundreds of millions of dollars of additional recovery to unsecured creditors." *Committee's Objection* ¶ 1, ECF No. 283. As such, the Committee asserts that "any evaluation, prosecution, or settlement of matters related to the [Transaction] should be
3 transparent, comprehensive, and *3 perhaps most important, performed by unconflicted, independent counsel and fiduciaries." *Id.* The Committee contends that K&E is unable to perform such an independent evaluation due to its simultaneous representation of parties involved in the Transaction. Thus, the Committee submits that K&E's representation is prohibited under 11 U.S.C. § 327(a) and asks that this Court limit the scope of K&E's representation in this case essentially to matters that do not involve Deerfield.

The UST likewise asserts that "as a result of its prior and current representation of Deerfield . . . it appears that K&E is not disinterested and holds an adverse interest against the estate." *UST's Objection* ¶ 14, ECF No. 322. The UST requests that the Court deny the Retention Application in its entirety.

**III. Discussion**

Employment of counsel in bankruptcy cases is governed by § 327(a) of the Bankruptcy Code, Federal Rule of Bankruptcy Procedure 2014, and the local rules of professional conduct. *See, e.g.*, *In re Jeep Eagle 17, Inc.*, 2009 WL 2132428, at *2 (Bankr. D.N.J. July 13, 2009). Section 327 of the Bankruptcy Code provides that debtors in possession may, with court approval, employ professionals that "do not hold or represent an interest adverse to the estate, and that are disinterested persons[.]" 11 U.S.C. § 327(a). The Bankruptcy Code defines the latter term, "disinterested persons," in relevant part, as those who do "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." 11 U.S.C. § 101(14)(C); *see also In re Boy Scouts of Am.*, 35 F.4th 149, 157 (3d Cir. 2022)). An "adverse interest" is defined as "any economic interest that would tend to lessen the value of the bankruptcy or that would create either an actual or
4 potential dispute in which the estate is a rival *4 claimant." *In re Vascular Access Centers, L.P.*, 613 B.R. 613, 623 (Bankr. E.D. Pa. 2020) (quotations and citations omitted).

> Third Circuit case law establishes that:
>
> (1) Section 327(a), as well as § 327(c), imposes a per se disqualification as trustee's counsel of any attorney who has an actual conflict of interest; (2) the district court may within its discretion-pursuant to § 327(a) and consistent with § 327(c)- disqualify an attorney who has a potential conflict of interest and (3) the district court may not disqualify an attorney on the appearance of conflict alone.

*In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 476 (3d Cir. 1998); *see also In re Boy Scouts of Am.*, 35 F.4th at 158 n.5 (collecting cases and explaining that § 327(a) "only allows disqualifications for adverse interests that exist at the time of retention").

While acknowledging that K&E is representing both the Debtors and Deerfield concurrently, the Court finds that such concurrent representation does not create a per se conflict that prohibits retention. Indeed, to hold otherwise would ignore binding case law and § 327(c), which explicitly states that "a person is not disqualified for employment under this section solely because of

such person's employment by or representation of a creditor, . . . unless there is an actual conflict of interest." 11 U.S.C. § 327(c). For reasons discussed below, the Court concludes that no actual conflict exists, and that K&E is "disinterested" as that term is defined in the Code, *see* 11 U.S.C. § 101(14).

In support of its contention that an actual conflict exists, the Committee relies on Formal Opinion 05-434 issued on December 8, 2004 by the American Bar Association's Standing Committee on Ethics and Professional Responsibility (the "ABA Opinion"). As an initial matter, the ABA Opinion involves vastly different circumstances than those in the present case. There, the situation involved merely one attorney and the issue arose
5 in the context of the drafting of a *5 will: one client sought an attorney's assistance in disinheriting the attorney's other client, whom the attorney represented in unrelated matters. Here, however, the situation involves a large, global firm in the context of complicated business transactions and a bankruptcy proceeding. Nevertheless, despite the distinguishable factual circumstances, the ABA Opinion relies on Rule 1.7 of the ABA's Model Rules of Professional Conduct. Indeed, K&E is bound by those Rules.[1]

[1] New Jersey's Rules of Professional Conduct mirror the ABA's Model Rules. *See* N.J. Rules Prof'l Conduct R. 1.7.

Rule 1.7 provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." The Rule further explains:

> A concurrent conflict of interest exists if:
>
> (1)the representation of one client will be directly adverse to another client; or
>
> (2)there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Here, it is undisputed that K&E does not represent Deerfield in these bankruptcy proceedings. *Joint Stipulation* at ¶ 20. Instead, Deerfield is represented by two law firms: Sullivan & Cromwell LLP and Wollmuth Maher & Deutsch LLP. *Id.* Moreover, K&E was not counsel to Debtors at the time of the Transaction, *id.* at ¶ 21, did not represent either party in the context of the Transaction, and K&E's present representation of Deerfield pertains to matters wholly unrelated to the pending Chapter 11 bankruptcy, *id.* at ¶ 14. Therefore, K&E's zealous representation of Deerfield in other, unrelated matters does not present a significant risk that its representation of the Debtors in this bankruptcy case will be in any way impacted or limited-and Rule 1.7(a)(2) is not
6 implicated. *6

With respect to Rule 1.7(a)(1), the Court understands the Committee's arguments; namely, that K&E's investigation into the Transaction as part of its representation one of its clients (Debtors) may have a direct, adverse impact on the general legal rights of another client (Deerfield). Even assuming, without finding, that K&E's representation of Debtors is directly adverse to Deerfield in these circumstances, the Committee's arguments ignore the parties' prepetition agreements; specifically, the conflict waivers. As counsel for K&E highlighted during the hearing, Rule 1.7(b) of the Model Rules permits concurrent representation even where a conflict exists when-as relevant here-the affected clients give informed consent. *See* Model Rule of Professional Conduct 1.7(b)(4). This exception is complimentary to the statute at issue, § 327(c), which-as stated-explicitly allows concurrent representation under certain circumstances.

The Court accords weight to the extensive and detailed waivers present in this case. K&E's engagement letters with both Debtors and Deerfield explicitly acknowledge and advise that conflicts may arise. Through evaluation of such engagement letters, both parties expressly provided their informed consent and waived any such potential conflicts. The Court is mindful that K&E cannot draft engagement letters so as to avoid the requirements of § 327; however, it *can* draft engagement letters so that potential conflicts are waived. It did so here. The Court has reviewed K&E's engagement letter with Debtors, *Exhibit 1 to Retention Application* (the "Invitae Engagement Letter"), ECF No. 158 at 22-35, and highlights the following excerpts:

> *Conflicts of Interest*. As is customary for a law firm of the Firm's size, there are numerous business entities, with which Client currently has relationships, that the Firm has represented or currently represents in matters unrelated to Client.
>
> Further, in undertaking the representation of Client, the Firm wants to be fair not only to Client's interests but also to those of the Firm's other clients. Because Client is engaged in activities (and may in the future engage in additional activities) in
>
> 7 *7
>
> which its interests may diverge from those of the Firm's other clients, the possibility exists that one of the Firm's current or future clients may take positions adverse to Client (including litigation or other dispute resolution mechanisms) in a matter in which such other client may have retained the Firm or one of Client's adversaries may retain the Firm in a matter adverse to another entity or person.
>
> In the event a present conflict of interest exists between Client and the Firm's other clients or in the event one arises in the future, Client agrees to waive any such conflict of interest or other objection that would preclude the Firm's representation of another client (a) in other current or future matters substantially unrelated to the Engagement or (b) other than during a Restructuring Case (as defined below), in other matters related to Client (such representation an "Allowed Adverse Representation"). By way of example, such Allowed Adverse Representations might take the form of, among other contexts: litigation (including arbitration, mediation and other forms of dispute resolution); transactional work (including consensual and non-consensual merger, acquisition, and takeover situations, financings, and commercial agreements); counseling (including advising direct adversaries and competitors); and restructuring (including bankruptcy, insolvency, financial distress, recapitalization, equity and debt workouts, and other transactions or adversarial adjudicative proceedings related to any of the foregoing and similar matters).
>
> . . .
>
> Restructuring Cases. If it becomes necessary for Client to commence a restructuring case under chapter 11 of the U.S. Bankruptcy Code (a "Restructuring Case"), the Firm's ongoing employment by Client will be subject to the approval of the court with jurisdiction over the petition. If necessary, the Firm will take steps necessary to prepare the disclosure materials required in connection with the Firm's retention as lead restructuring counsel. In the near term, the Firm will begin conflicts checks on potentially interested parties as provided by Client.

> If necessary, the Firm will prepare a preliminary draft of a schedule describing the Firm's relationships with certain interested parties (the "Disclosure Schedule"). The Firm will give Client a draft of the Disclosure Schedule once it is available.

*Invitae Engagement Letter*, ECF No. 158 at 27-28.

The Invitae Engagement Letter provides clear and detailed notice of potential conflicts. Debtors-who are sophisticated entities-made an informed decision in choosing to waive any potential conflict and proceed with K&E's representation, notwithstanding K&E's disclosures. *8

8

The Committee makes much of the fact that Debtors did not mention Deerfield by name in the Invitae Engagement Letter. The Committee asserts that the failure to advise Debtors prior to the bankruptcy filing of a potential conflict with Deerfield, specifically, means that Debtors could not have given informed consent. The Court respectfully disagrees.[2] Debtors were sufficiently on notice that a large firm like K&E may also represent one of its creditors. Not only is this common industry knowledge and practice,[3] K&E provided ample notice of this possibility in the Invitae Engagement Letter. Further, as a follow-up to the Invitae Engagement Letter, K&E made disclosures that identified Deerfield in schedules. *See Exhibit B to Retention Application* (the "Winters Declaration"), ECF No. 158 at 36-63.

2 The Court is cognizant that the engagement letter does not specifically identify Deerfield or any other K&E client. Given the breadth of K&E's global client base, reference to specific clients would be impracticable; to require otherwise would necessitate continuous updates and amendments to the engagement letter. K&E maintains responsibility to apprise their clients of conflicts and did so here as part of the retention process.

3 The Bankruptcy Code also explicitly recognizes and contemplates the situation where a debtor's chosen firm also represents a creditor. *See* 11 U.S.C. § 327(c) (stating that "a person is not disqualified for employment under this section solely *because of such person's employment by or representation of a creditor*") (emphasis added).

Ultimately, the Court finds the existence of the prepetition waivers significant. *See In re Marvel*, 140 F.3d 463 (citing failure to consider waiver of conflicts in finding that district court abused its discretion in denying retention). The detailed communications gave notice to the clients that K&E can and does represent potentially adverse parties. The Invitae Engagement Letter's expansive language-coupled with information in the disclosure schedules-withstands careful scrutiny and satisfies the Court that the parties (Debtors *and* Deerfield) gave informed consent when agreeing to the waivers. *See In re Congoleum Corp.*, 426 F.3d 675, 691 (3d Cir. 2005) (stating that "the effect of a waiver, particularly a prospective waiver, depends upon whether the clients have given truly informed consent"). *9

9

The Court also considers the competing economic interests. It is undisputed that "[i]n 2023, K&E invoiced Deerfield $1,884,294 or 0.03% of K&E's annual revenue for that year." *Joint Stipulation* ¶ 16, ECF No. 454. K&E has billed Deerfield under $2.4 million in total since the inception of their relationship, and has invoiced Deerfield only $36,610 year-to-date. *Id.* While these sums are not insignificant, they are relatively de minimus when considered in the context of the total annual K&E revenues. To be clear, the fact that K&E bills such a high amount is not a commentary on their worthiness of retention; nor does it offer them a free pass to skirt the rules. Rather, case law instructs that the economic impact is a consideration that the Court should take into account in gauging material adversity. *See In re*

*Marvel Ent. Grp., Inc.,* 140 F.3d at 469; *In re Boy Scouts of Am*., 35 F.4th at 158; *In re Art Van Furniture*, LLC, 617 B.R. 509, 519 (Bankr. D. Del. 2020) (stating that client "represented a de minimis component of its aggregate revenue in each of the last three years"). Here, the economics of the situation are such that they do not create any type of conflict or adverse interest that would warrant disqualification of K&E. To the contrary, the Court concludes that K&E is a "disinterested person" for purposes of § 327(a).

"The professional seeking to be retained under § 327(a) bears the burden of establishing that it is 'both disinterested and [does] not represent an interest adverse to the estate.'" *In re Vascular Access Centers*, 613 B.R. at 624 (quoting *In re Big Mac Marine, Inc*., 326 B.R. 150, 154 (8th Cir. BAP 2005) (internal citations omitted)). Here, guided by the Third Circuit's precedent in *In re Marvel*, the Court determines that K&E has satisfied such burden. The Committee's and the UST's arguments to the contrary do not persuade this Court otherwise. As discussed during the May 7, 2024 hearing, the Court does not view the circumstances of K&E's representation as remarkable. Concurrent representations of debtors and creditors commonly arise in the bankruptcy context and are explicitly contemplated by the
10 Bankruptcy Code. Moreover, the record *10 demonstrates that K&E has served-and can continue to serve-the bankruptcy estate in a manner adverse as to Deerfield. Indeed, in the recent sale process, Deerfield served as the stalking horse, but was not the successful bidder-resulting in a greater recovery for the estate. Nothing presented to date suggests that K&E cannot zealously represent the debtor and the bankruptcy estate's interests.[4]

> [4] The Court notes that that three K&E lawyers who represent Deerfield have billed a collective 3.9 hours in this bankruptcy proceeding. *Joint Stipulation* ¶ 17, ECF No 454. As discussed on the record during the May 7, 2024 hearing, K&E is directed to ensure that, going forward, *no attorneys working on Deerfield matters perform any work in the Debtors' bankruptcy case.*

Further supporting this decision are policy considerations. First, K&E argues-and the Committee acknowledges-that disqualification of K&E at this point in the bankruptcy would be detrimental both to the bankruptcy estate and the creditors. Given the time and effort already invested by K&E and the circumstances of these chapter 11 cases-which may result in little, if any, recovery for unsecured creditors-disqualification of K&E would cause undue delay and significant additional expense. Moreover, Debtors chose K&E to represent them in this bankruptcy case. Where possible, debtors' choice of counsel should be afforded deference. *See, e.g.*, *In re Straughn*, 428 B.R. 618, 626 (Bankr. W.D. Pa. 2010).

Finally, the Court considered the Committee's suggestion that-rather than disqualifying K&E altogether-the scope of its retention be limited to matters *not* involving Deerfield. While, at first glance, this seems like a middle-ground, the Court finds it unworkable. Simply put, the Court is loath to place such handcuffs on Debtors' counsel. Deerfield is the major secured creditor in this bankruptcy case-holding nearly 79% of the debt. Given Deerfield's role, any attempt to limit K&E's representation to work that does not impact Deerfield would be impractical, difficult to police, and engender further debate and contest. It is
11 likely that even the most minimal task will *11 affect Deerfield's interests and any meaningful work undertaken nearly certainly will. The Court is unwilling to narrow the scope of K&E's retention as requested by the Committee.

**IV. Conclusion**

For the aforementioned reasons, the Court finds that K&E's retention under § 327(a) is appropriate. The record does not establish the existence of either an actual conflict or a potential conflict that would warrant denial of the Retention

Application. K&E is a disinterested party whose interests are not adverse to the bankruptcy estate and whose conduct comports with the applicable rules of professional conduct. Accordingly, the Court overrules the objections of the Committee and the UST and grants Debtors' Retention Application. An appropriate Order was previously entered.

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| ----------X | **FOR PUBLICATION** |
| In re: | Chapter 11 |
| WB BRIDGE HOTEL LLC and<br>159 BROADWAY MEMBER LLC, | Case No. 20-23288 (SHL) and<br>Case No. 20-23289 (SHL) |
| | (Jointly Administered) |
| Debtors. | |
| ----------X | |
| NAT WASSERSTEIN, AS TRUSTEE OF THE<br>WB BRIDGE CREDITOR TRUST | |
| Plaintiff, | |
| v. | Adv. Pro. No. 22-07059 (SHL) |
| 11 APPLE LLC *et al.*, | |
| Defendants. | |
| ----------X | |

**MEMORANDUM OF DECISION**

**A P P E A R A N C E S:**

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**SEAN H. LANE**
**UNITED STATES BANKRUPTCY JUDGE**

Before the Court is the question of whether a law firm that represented the Debtors in these Chapter 11 cases—up through and including confirmation—may now withdraw from that representation to represent the individual who managed the Debtors and who now is being sued by the trustee liquidating the Debtors' estates. This issue is raised in two pending motions. In the first motion, the law firm of Leech Tishman Robinson Brog, PLLC ("LTRB") filed the Motion to Withdraw as Counsel to the Post-Confirmation Debtors, WB Bridge Hotel LLC and 159 Broadway Member LLC. *See* ECF No. 190, Case No. 20-23288 (the "Withdrawal Motion"). Nat Wasserstein, the Trustee of the WB Bridge Creditor Trust ("Trustee") filed an objection to the Withdrawal Motion [ECF No. 192, Case No. 20-23288] (the "Withdrawal Opp.") and LTRB filed a response to the objection [ECF No. 198, Case No. 20-23288] (the "Withdrawal Reply"). In the second motion, the Trustee seeks to disqualify LTRB from representing that individual—and some of his entities—in an adversary proceeding filed by the Trustee, *Wasserstein v. 11 Apple LLC et. al*, Adv. Pro. No. 22-07059 (the "Adversary Pro."). *See* ECF No. 14, Adv. Pro. No.22-07059 (the "Disqualification Motion"). LTRB objected to the Disqualification Motion, [ECF No. 29, Adv. Pro. 22-07059] (the "Disqualification Opp.") and the Trustee filed a reply. [ECF No. 31, Adv. Pro. No. 22-07059] (the "Disqualification Reply").

The Court concludes that, while LTRB may withdraw from its representation of the Debtors in the main bankruptcy proceeding, it is ethically barred from its proposed representation of the defendants in the Adversary Proceeding as these matters substantially overlap with LTRB's prior representation of the Debtors. Accordingly, both the Withdrawal Motion and the Disqualification Motion are granted.

## BACKGROUND

In late 2020, WB Bridge Hotel LLC ("WB Bridge") and 159 Broadway Member LLC ("159 Broadway," and together with WB Bridge, the "Debtors") filed voluntary petitions under Chapter 11 of the Bankruptcy Code. *See* ECF No. 1, Case No. 20-23288; ECF No. 1, Case No. 23289.[1] The Debtors' cases were jointly administered for procedural purposes only. *See* Order Directing Joint Administration of Chapter 11 Cases and Related Relief [ECF No. 12, Case No. 20-23288]. At the time of filing, Debtor 159 Broadway owned 100% of the membership interests in Debtor WB Bridge, and WB Bridge owned real property located at 159 Broadway, Brooklyn, New York. Declaration Pursuant to Local Rule 1007-2 ¶ 3 [ECF No. 20, Case No. 20-23288]. The Debtors were in the process of developing the real property owned by WB Bridge into a hotel but were unable to consensually restructure existing financial obligations. *Id.* ¶¶ 3, 4. When the secured lender of 159 Broadway scheduled a UCC sale of 159 Broadway's membership interests in WB Bridge, *id.* ¶ 4, the Debtors commenced these Chapter 11 cases "to preserve the assets of the Debtors for the benefit of their creditors and their estates." *Id.* Fred Ringel from the law firm of Robinson Brog Leinwand Greene Genovese & Gluck P.C. ("Robinson Brog") signed the bankruptcy petition of both WB Bridge and 159 Broadway as attorney for the Debtors. *See* ECF No. 1, Case No. 20-23288; ECF No. 1, Case No. 20-23289.

Consistent with Section 521(a)(1)(B) of the Bankruptcy Code, the Debtors filed schedules of assets and liabilities as well as statements of financial affairs ("SOFAs") shortly after commencing the cases. *See* ECF No. 19, Case No. 20-23288 (the "159 Broadway SOFA"); ECF No. 18, Case No. 20-23288 (the "WB Bridge SOFA"). In these filings, the Debtors listed,

[1] It is well settled that a court may take judicial notice of documents filed on the court's docket. *See Teamsters Nat'l Freight Indus. Negotiating Comm. v. Howard's Express, Inc. (In re Howard's Exp., Inc.)*, 151 F. App'x 46, 48 (2d Cir. 2005).

among other things, the Debtors' property as well as their creditors. In the SOFAs, the Debtors also identified their equity holders and answered certain questions about financial transactions. *Id.* Specifically, the 159 Broadway SOFA stated that Cornell 159 LLC owned 93.75% of the equity of 159 Broadway, and that Yitzchok Hager ("Mr. Hager") was the manager of 159 Broadway. *See* 159 Broadway SOFA. The Debtors' SOFAs also listed pre-petition transfers to insiders that occurred within one year of the petition date. *See, e.g., id.* Part 2 (identifying a payment of $238,000 to Cornell Realty Holdings LLC as a "reimbursement").

At the start of these cases, the Debtors filed an application to retain Robinson Brog as counsel. *See* Amended Debtors' Application for Authorization to Retain Counsel [ECF No. 43, Case No. 20-23288] (the "Robinson Brog Retention Application"). The services to be provided by Robinson Brog included, *inter alia,* "providing advice to the Debtors with respect to their powers and duties under the Bankruptcy Code in the continued operation of their business and the management of their property" and "assisting the Debtors in connection with all aspects of these [C]hapter 11 cases." *Id.* ¶ 11. In support of the application, Mr. Hager submitted a declaration stating that Cornell Realty Holdings LLC—of which Mr. Hager is the managing member—had paid $10,000 to Robinson Brog on behalf of the Debtors in connection with Robinson Brog's representation of the Debtors. *See* Amended Declaration of Isaac Hager ¶¶ 1-2 [ECF No. 43-3, Case No. 20-23288]. Mr. Hager further stated that he understood that Robinson Brog would only act as counsel to the Debtors in the bankruptcy case and that Robinson Brog's fiduciary duty was to the Debtors. *Id.* ¶ 4. In further support of the application, the Debtors filed an Amended Declaration of Fred Ringel [ECF No. 43-4, Case No. 20-23288] (the "Ringel Declaration"), wherein Mr. Ringel—a shareholder at Robinson Brog—affirmed that Robinson Brog does not represent any interest adverse to the Debtors and that Robinson Brog is a

disinterested party as defined in Section 101(14) of the Bankruptcy Code.[2] Ringel Declaration ¶ 7. The Court granted the Robinson Brog Retention Application. *See* ECF No. 49, Case No. 20-23288.

Though Mr. Hager is not an equity holder of 159 Broadway, he appears to be in control of the Debtors through other entities. For example, the Debtors' books and records are held by Cornell Realty Management LLC, which has the same address that Mr. Hager lists for his address as manager of 159 Broadway. *See* 159 Broadway SOFA at Part 13, questions 26c.1, 28. Mr. Hager is also a co-obligor on 159 Broadway's secured debt. *See* Bankruptcy Petition, Schedule H [ECF No. 19, Case No. 20-23288]. Finally, Cornell Realty Holdings LLC paid the retainer to Debtors' counsel, with Mr. Hager being the manager of Cornell who submitted the declaration in connection with the Robinson Brog Retention Application.

After Robinson Brog's retention, the Debtors filed an Application for an Order Authorizing Employment and Retention of Leech Tishman Robinson Brog PLLC as Substitute Bankruptcy Counsel to the Debtors Effective as of May 15, 2022 [ECF No. 139, Case No. 20-23288] (the "LTRB Retention Application."). The LTRB Retention Application was prompted by Robinson Brog combining its practice with the firm Leech Tishman Fuscaldo & Lampl, LLC, with the resulting firm practicing under the name Leech Tishman Robinson Brog PLLC.[3] LTRB Retention Application ¶ 3. The same team of attorneys continued to represent the Debtors despite the change in firm name. *Id.* ¶ 10. The LTRB Retention Application stated that LTRB would render services to the Debtors that included "providing advice to the Debtors with respect

[2] A "disinterested party" under the Bankruptcy Code is a party that "(A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) 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." 11 U.S.C. § 101(14).

[3] Robinson Brog ceased to practice law after the consolidation. LTRB Retention Application ¶ 3.

to its powers and duties under the Bankruptcy Code in the continued operation of their business and the management of their property" and "assisting the Debtors in connection with all aspects of these Chapter 11 cases." *Id.* ¶ 11. The LTRB Retention Application was granted. *See* ECF No. 150, Case No. 20-23288.

Ultimately, the Court confirmed a plan of reorganization that had been proposed by the secured creditor, 159 Broadway 1 LLC. *See* 159 Broadway 1 LLC's First Amended Plan of Liquidation [ECF No. 129, Case No. 20-23288] (the "Plan"); Order Confirming 159 Broadway 1 LLC's First Amended Chapter 11 Plan of Liquidation for the Debtor [ECF No. 160, Case No. 20-23288] (the "Confirmation Order"). The Plan provided, *inter alia,* that the property owned by WB Bridges would be sold and the proceeds from the sale distributed to creditors. *See* Plan § 6.1. The Plan also provided for the creation of a liquidating trust (the "WB Creditor Trust") for the benefit of Debtors' creditors and interest holders, with the WB Creditor Trust taking title to any claims or causes of actions, other than claims directly related to the property to be sold. Plan §§ 6.5, 7.1, 7.3. The Confirmation Order designated Nat Wasserstein as Trustee and the Trustee was vested with the "duty and authority" to maximize the value of these transferred claims. *Id.* § 7.5; Confirmation Order ¶ 21. The Plan became effective on November 16, 2022. *See* Notice of Effective Date of Plan [ECF No. 178, Case No. 20-23288].

After his appointment, the Trustee commenced a number of adversary proceedings to recover Debtors' interests in property that were allegedly fraudulently conveyed prior to the Debtors' bankruptcy. *See* ECF No. 180-189, Case No. 20-23288. Of particular relevance to the pending motions, the Trustee commenced the Adversary Proceeding against Mr. Hager and forty-six corporate entities (the "Entity Defendants" and, together with Mr. Hager, the "Adversary Defendants") seeking to recover transfers under Sections 544(b), 548, and 550 of the

Bankruptcy Code as well as N.Y. D.C.L §§ 273-276. *See generally* Complaint [ECF 1, Adv. Pro. No. 22-07059]. The Entity Defendants include, *inter alia,* Cornell 159 LLC, the majority owner of WB Bridge. *Id.* Mr. Hager is alleged to own and/or control and/or exercise dominion over each of the Entity Defendants, as well as the Debtors. Complaint ¶ 64. The Complaint generally alleges that the Adversary Defendants were recipients or beneficiaries of property that was fraudulently conveyed away from the Debtors and that the Debtors did not receive fair consideration or reasonably equivalent value for the property or interest conveyed. *Id.* The Trustee alleges that these transfers reduced the assets of the Debtors that may otherwise have been available to pay creditors. The Complaint further alleges that Mr. Hager caused the Debtors to transfer its interests in property for the benefit of the Adversary Defendants, and that the Entity Defendants did not recognize corporate formalities, as funds were regularly transferred between the Entity Defendants.[4] *Id.* ¶¶ 63-66, 69.

In early 2023, LTRB filed a motion to dismiss the Complaint in the Adversary Proceeding on behalf of Mr. Hager and 41 of the 46 Entity Defendants.[5] *See* Defendants' Memorandum of Law in Support of Motion to Dismiss Complaint [ECF No. 6, Adv. Pro. No. 22-07059]. At the time this motion to dismiss was filed, LTRB still represented the Debtors.

Five days after LTRB filed the motion to dismiss, the Trustee requested that LTRB withdraw as counsel to the Adversary Defendants and withdraw the motion to dismiss. *See* Withdrawal Motion, Exhibit C. In early 2023, LTRB filed its Withdrawal Motion seeking

[4] The Court notes that the defendants in the Adversary Proceeding whom LTRB seeks to represent list as their address 75 Huntington Street, Brooklyn New York—the same address used by Mr. Hager and the entity that holds the Debtors' books and records. *See generally* Complaint.

[5] LTRB does not represent four of the Defendants in the Adversary Proceeding; these include 159 Broadway 1 LLC (the Debtors' secured lender and the Plan proponent), 159 Broadway Mezz LLC (the Debtors' Mezzanine Lender) and two parties whose relationship to the Debtors is unknown. *See* Withdrawal Motion at 5, n. 2.

instead to withdraw as counsel to the Debtors, and the Trustee responded by seeking LTRB's disqualification in the Adversary Proceeding. The Debtors subsequently filed a notice to substitute Shafferman & Feldman, LLP as counsel to replace LTRB. *See* ECF No. 194, Case No. 20-23288 (the "Consent to Change Attorney").[6]

In the spring of 2023, the Court held a hearing on both the Withdrawal Motion and the Disqualification Motion. *See* Hr'g Tr. (March 23, 2023) [ECF No. 33, Adv. Pro. No. 22-7059]. At the hearing, the Court invited the United States Trustee (the "UST") to weigh in on the retention dispute. *Id.* at 70:5-72:1. After the hearing, the UST filed a letter supporting the disqualification of LTRB but taking no position on LTRB's Withdrawal Motion. *See* ECF No. 204, Case No. 20-23288 (the "UST Letter"). LTRB promptly responded to the UST Letter. *See* Letter of Leech Tishman Robinson Brog, PLLC, dated May 2, 2023 [ECF No. 205, Case No. 20-23288]. With both motions fully briefed, the Court took the matter under advisement.

## DISCUSSION

### I. Withdrawal Motion

In this Court, "[a]n attorney who has appeared as attorney of record may withdraw or be replaced only by order of the Court for cause shown." Bankr. S.D.N.Y. R. 2090-1(e); *see also* S.D.N.Y. R. 1.4 (an attorney of record may be relieved or displaced only by order of the Court upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal). "Whether cause exists to grant a motion to withdraw as counsel is in the discretion of the trial court." *In re Wiener*, 2019 Bankr. LEXIS 1893, at *8 (Bankr. S.D.N.Y. June 21, 2019) (citing *Stair v.*

[6] Additionally, 159 Broadway Member LLC and Cornell 159 LLC—two defendants in the Adversary Proceeding (one of whom holds the majority of the equity in 159 Broadway)—filed a substitution of counsel in the Adversary Proceeding, with LTRB being removed as counsel to those two entities in favor of a different firm. *See* Substitution of Counsel [ECF No. 28, Adv. Pro. No. 22-07059]. Meltzer, Lippe, Goldstein & Breitstone, LLP now represents Cornell 159 LLC and 159 Broadway in this Adversary Proceeding. *See* Notice of Appearance [ECF No. 27, Adv. Pro. No. 22-07059].

*Calhoun*, 722 F. Supp. 2d 258, 264 (E.D.N.Y. 2010)); *cf. Hunkins v. Lake Placid Vacation Corp.*, 120 A.D.2d 199, 201 (App. Div. 3d Dep't 1986). "In exercising that discretion, the court must consider (i) the reasons for withdrawal and (ii) the impact of the withdrawal on the timing of the proceeding." *Weiner*, 2019 Bankr. LEXIS 1893, at *8; *accord Farmer v. Hyde Your Eyes Optical, Inc*., 60 F. Supp. 3d 441, 444 (S.D.N.Y. 2014). An application for withdrawal must be supported by an affidavit and a showing of satisfactory reasons "sufficient to constitute cause for withdrawal." *Goldstein v. Albert* (*In re Albert)*, 277 B.R. 38, 45 (Bankr. S.D.N.Y. 2002).

Reasons for withdrawal can include "a client's lack of cooperation, including lack of communication with counsel, and the existence of irreconcilable conflict between attorney and client." *Farmer,* 60 F. Supp. 3d at 445 (quoting *Naguib v. Pub. Health Solutions*, 2014 WL 2002824, at *1 (E.D.N.Y. May 15, 2014)). Nonpayment of fees can also constitute a basis for dismissal. *See Stair*, 722 F. Supp. at 264; *but see Albert,* 277 B.R. at 50 ("Non-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation"). A client's decision to discharge an attorney is also a basis to withdraw. "When a client discharges a firm from its employment, and the firm accepts such discharge, the court should grant a motion to withdraw 'except under the most compelling circumstances.'" *Weiner*, 2019 Bankr. LEXIS 1893, at *10 (quoting *Figueroa v. City of New York*, 2017 U.S. Dist. LEXIS 186560 at *1 (E.D.N.Y. Nov. 9, 2017)).

In considering withdrawal, courts must also evaluate whether "the client's rights will be prejudiced by the delay necessitated in obtaining replacement counsel or [if] the court's trial calendar will be adversely affected." *Wiener¸* 2019 Bankr. LEXIS 1893, at *16 (quoting *Welch v. Niagara Falls Gazette*, 2000 U.S. Dist. LEXIS 16982, at *3 (W.D.N.Y. Nov. 17, 2000); *see also Honeedew Investing LLC v. Abadi*, 2022 WL 16857354, at *4 (S.D.N.Y. Oct. 3, 2022).

Courts are more likely to deny a motion to withdraw when a case is on the eve of trial but less likely to find prejudice to a client if discovery is still ongoing. *Id.; see also Karimian v. Time Equities, Inc*., 2011 WL 1900092, at *3 (S.D.N.Y. May 11, 2011).

Applying these principles here, the Court finds that cause exists to allow LTRB to withdraw. The Debtors have discharged LTRB as their counsel. *See* Consent to Change Attorney; *see also* Hr'g Tr. 23:24-24:8 (March 23, 2023) (counsel for LTRB representing to the Court that LTRB had a telephone conversation with the Debtors where the Debtors informed LTRB that the Debtors were discharging LTRB and hiring new counsel). "Courts in this District have consistently found that a client's discharge of an attorney is a sufficient basis for an attorney to withdraw as counsel." *Honeedew Investing* 2022 WL 16857354, at *3; *accord Weiner,* 2019 Bankr LEXIS 1893, at *10. Accordingly, cause exists to discharge LTRB.

The Court also finds that the Debtors will not be prejudiced by the withdrawal, and the withdrawal will not cause any delay or adversely impact proceedings going forward.[7] It is clear that this motion was motivated by the concern of LRTB's simultaneous representation of the Debtors and Adversary Defendants. *See* Withdrawal Motion ¶¶ 4, 22. While the Trustee initially opposed the Withdrawal Motion, *see* Withdrawal Opp. ¶¶ 14-21, the Trustee's concerns focused on LTRB's representation of the Adversary Defendants, rather than LTRB's continued representation of the Debtors. *Id.* During the hearing on the Motion to Withdraw, the Trustee was unable to point to any prejudice that would result from the termination of LTRB's representation of the Debtors other than a possible inability to obtain the Debtors' records; upon being assured that all of the Debtors' files had been passed to Debtors' new counsel, the Trustee

[7] LTRB asserts that it may withdraw as counsel to the Debtors without leave of the Court, a position the UST vigorously disputes. *See* Withdrawal Motion ¶ 5; Reply to Withdrawal Motion ¶ 14; *see also* UST Letter at 1-2. As LTRB's Withdrawal Motion is presently before the Court, the Court assumes that LTRB recognizes the need to seek Court approval when withdrawal is disputed, as is the case here.

appeared to concede that there was no basis to object to withdrawal. In fact, little—if any—work remains to be performed on behalf of the Debtors, as this case has already been confirmed and the real estate sold that constituted the majority, if not the entirety, of the bankruptcy estate. *See* Confirmation Order; Notice of Effective Date of Plan; *see also* Hr'g Tr. 39:8-42:24 (March 23, 2023).[8]

## II. Disqualification Motion

### A. The Applicable Standard

Federal courts' power to disqualify attorneys "derives from their inherent power to 'preserve the integrity of the adversary process.'" *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)). When exercising power to disqualify counsel, courts must balance "'a client's right freely to choose his counsel' against 'the need to maintain the highest standards of the profession.'" *Id.* (quoting *Gov't of India v. Cook Indus.*, *Inc.*, 569 F.2d 737, 739 (2d Cir.1978)). In deciding a motion to disqualify, "courts often seek guidance from the American Bar Association (ABA) and state disciplinary rules, though 'such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification.'" *James E. Zalewski, Draftics, Ltd. v. Shelroc Homes, LLC*, 2012 U.S. Dist. LEXIS 11608, at *10 (N.D.N.Y. Jan. 31, 2012) (quoting *Hempstead Video,* 409 F.3d at 132-33 (2d Cir. 2005)).

Motions to disqualify "are generally disfavored, and the movant carries 'a heavy burden and must satisfy a high standard of proof.'" *Nisselson v. Empyrean Investment Fund, LP (In re MarketXT Holdings Corp.)*, 2005 WL 3789407, at *3 (Bankr. S.D.N.Y. Apr. 20, 2005) (quoting *Felix v. Balkin*, 49 F. Supp. 2d 260, 267 (S.D.N.Y.1999)); *accord Bell v. Rochester Gas & Elec.*

[8] The UST took no position on whether the Court should grant the withdrawal motion. *See* UST Letter at 1.

*Corp.*, 2004 U.S. Dist. LEXIS 14343, at *4 (W.D.N.Y. July 20, 2004). Courts are skeptical of motions to disqualify because the motions "are 'often interposed for tactical reasons' and result in unnecessary delay." *Bennett Silvershein Assoc. v Furman*, 776 F. Supp. 800, 802 (S.D.N.Y. 1991) (quoting *U. S. Football League v. Nat'l Football League*, 605 F. Supp. 1448, 1452 (S.D.N.Y.1985)); *see also Employers Ins. Co. of Wausau v. Munich Reinsurance Am., Inc*., 2011 WL 1873123, at *4 (S.D.N.Y. May 16, 2011) (a trial court "should be mindful that a disqualification motion might be used as tactical device to delay a case, and impose upon an adversary the costs of defending an issue collateral to the merits of a case"). Nevertheless, "doubts should be resolved in favor of disqualification." *Bennett Silvershein*, 776 F. Supp. at 802.; *see also MarketXT Holdings*, 2005 WL 3789407, at *3. Whether to disqualify counsel is "subject to the trial court's sound discretion." *Blue Cross & Blue Shield of New Jersey v. Philip Morris, Inc*., 53 F. Supp. 2d 338, 342 (E.D.N.Y. 1999) (citing *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir.1990)); *accord Hull v. Celanese Corp.,* 513 F.2d 568, 571 (2d Cir. 1975).

When considering a motion to disqualify counsel based on a conflict of interest, courts consider the timing of the representation. Said another way, courts examine whether counsel seeks to engage in concurrent representation of adverse parties or if the current representation of a party is subsequent to the representation of the party to whom the current client is adverse. *Hempstead Video*, 409 F.3d at 133. For concurrent representation, it is "'prima facie improper' for an attorney to simultaneously represent a client and another party with interests directly adverse to that client." *Id.* (quoting *Cinema 5, Ltd. v. Cinerama, Inc.,* 528 F.2d 1384, 1387 (2d Cir.1976)). Thus, disqualification of counsel is the likely result for concurrent representation of two adverse parties, unless there is a showing that "at the very least, that there will be no actual

or *apparent* conflict in loyalties or diminution in the vigor of his representation." *Id.* (emphasis in original). "This burden is 'so heavy that it will rarely be met.'" *Pergament v. Ladak*, 2013 WL 3810188, at *4 (E.D.N.Y. July 23, 2013) (quoting *GSI Com. Sols., Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 209 (2d Cir. 2010)).

> For successive representation, an attorney may be subject to disqualification if:
>
> (1) the moving party is a former client of the adverse party's counsel;
>
> (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and
>
> (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

*Hempstead Video,* 409 F.3d at 133 (citing *Evans v. Artek Sys. Corp.,* 715 F.2d 788, 791 (2d Cir. 1983)). The New York State Rules of Professional Conduct echo the three elements needed to subject a lawyer to disqualification. The Rules provide that "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a 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." *See* N.Y. Prof'l Rule 1.9.

For matters to be substantially related, the issues have to be "identical" or "essentially the same." *Streichert v Town of Chester*, 2021 U.S. Dist. LEXIS 35468, at *36 (S.D.N.Y. Feb. 25, 2021); *In re I Successor Corp.*, 321 B.R. 640, 658 (Bankr. S.D.N.Y. 2005). While "[t]he Second Circuit has not provided definitive guidelines on what issues in the past and current actions must be 'identical' or 'essentially the same,' [ ] the relevant inquiry extends beyond 'whether there are common legal claims or theories (. . .) to whether there are common factual issues that are material to the adjudication of the prior and current representations.'" *Ladak*, 2013 WL

3810188, at *3 (quoting *Mitchell v. Metropolitan Life Ins. Co., Inc.*, 2002 WL 441194, at *8 (S.D.N.Y. 2002)). Nevertheless, "disqualification may be appropriate when the two matters are merely similar [if] 'disqualification is predicated on the extensiveness of the attorney's exposure during the prior representation to particular practices that are similar to those underlying the subsequent litigation.'" *In re I Successor Corp.*, 321 B.R. at 658 (quoting *Bennett Silvershein*, 776 F. Supp. at 804).

Regarding the third prong, access to confidential information is presumed if there is a substantial relationship between the former and current representation. *Hull*, 513 F.2d at 572; *accord Employers Ins. Co. of Wausau*, 2011 WL 1873123, at *5 ("When the prior matter involved litigation, it will be conclusively presumed that the lawyer obtained confidential information about the issues involved in the litigation.") (internal citation omitted). Such a presumption is necessary to avoid requiring a client to "tear aside the protective cloak drawn about the lawyer-client relationship." *In re I Successor Corp.*, 321 B.R. at 648 (quoting *T. C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953)).

However, disqualification is not warranted simply based on a finding that all three elements required to show an adverse representation of a former client are present. *See In re Corp. Res. Servs., Inc*., 595 B.R. 434, 442 (S.D.N.Y. 2019) (holding that a violation of disciplinary rules does not necessarily result in disqualification). Rather, "the Second Circuit has made clear that disqualification is appropriate, at least in most cases, only if a violation of the Code of Professional Responsibility gives rise to 'a significant risk of trial taint.'" *Pfizer v. Stryker Corp.*, 256 F. Supp. 2d 224, 226 (S.D.N.Y. 2003) (quoting *Glueck v. Jonathan Logan, Inc*., 653 F.2d 746, 748 (2d Cir. 1981)); *see Hempstead Video*, 409 F.3d at 132 ("[D]isqualification is only warranted where an attorney's conduct tends to taint the underlying

trial.") (internal citations and quotations omitted); *see also Am. Int'l Grp., Inc. v. Bank of Am. Corp*., 827 F. Supp. 2d 341, 345 (S.D.N.Y. 2011).

B. Disqualification Here

The Court must first determine whether LTRB's representation of both the Debtors and the Adversary Defendants was concurrent or successive. One can argue that LTRB should be subject to the standard for concurrent representation. In fact, LTRB represented both the Debtors and the Adversary Defendants for a short period of time. LTRB noted its appearance on behalf of the Adversary Defendants on January 20, 2023, but LTRB did not file its Motion to Withdraw until January 30, 2023 and the Consent to Change Attorney wasn't filed for another six days. Despite this overlap—during which LTRB filed a motion to dismiss on behalf of the Adversary Defendants—there is authority that a law firm can avoid the more stringent rules of concurrent representation by belatedly seeking withdrawal of one representation if the standards for withdrawal are met. *See Pereira v. Allboro Building Maintenance, Inc. (In re Allboro Waterproofing Corp.)*, 224 B.R. 286, 289 (Bankr. E.D.N.Y. 1998); *see also Peterson v. Sanches (In re Mack Indus., Ltd.)*, 606 B.R. 313, 316 (Bankr. N.D. Ill. 2019); *but see In re I Successor Corp.*, 321 B.R. at 649 (rejecting the assertion that a lawyer has no duty of loyalty to a former client); *Schwed v. Gen. Elec. Co.*, 990 F. Supp. 113, 115 (N.D.N.Y. 1998) (finding that an attorney can be constrained from representing a party whose interests are adverse to a former client because of a continuing duty of loyalty to the former client). Given that the Court has found that LTRB satisfies the requirements for withdrawal here and that its brief period of dual representation did not result in any prejudice to either of its clients, the Court will apply the rules for successive representation. But the Court strongly counsels LTRB against such a lax

approach in the future on this important issue. Analyzing LTRB's representation as successive then, the Court turns to evaluating each of the prongs of the three part test.

1. Whether the Moving Party is a Former Client of the Adverse Party's Counsel

As to the first prong, the question is whether the Trustee qualifies as a former client of LTRB by virtue of LTRB's representation of the Debtors. *See Hempstead Video*, 409 F.3d at 133 (stating that the moving party must show that the moving party is a former client of the adverse party's counsel). While LTRB contends that the Trustee does not qualify as LTRB's former client, the Trustee and the UST disagree. *See* Disqualification Opp. ¶ 20; *but see* Disqualification Motion ¶ 22; UST Letter at 3. Based on the record here, the Court finds that the Trustee is a former client of LTRB.

It is well settled that a "[t]rustee steps into the shoes of the debtor for the purpose of bringing property into the bankruptcy estate." *Picard v. JPMorgan Chase & Co.*, 460 B.R. 84, 91 (S.D.N.Y. 2011), *aff'd sub nom. In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54 (2d Cir. 2013). Of significance here, the Plan specifically provides that "any Privilege of the Debtors' shall be transferred to the Creditor Trust and shall vest in the Creditor Trustee and its representatives," with "privilege" specifically defined to include attorney-client privilege. *See* Plan §§ 7.3(b), 1.67. As the court in *I Successor Corp.* concluded, this transfer of privilege renders the Trustee LTRB's former client. "The fact that [the debtor] changed its name to [a different entity] as a condition of the asset sale is [ ] irrelevant. [The new entity] shares the attorney-client privilege of its prepetition predecessor, [the debtor], and, consequently, is [the law firm's] former client." *In re I Successor Corp.*, 321 B.R. at 652.

The facts of *I Successor* are extremely similar to this case. In that case, the debtor was substantially liquidated; however, the unsecured creditors committee retained the right to pursue

the debtor's preference, fraudulent conveyance, and post-petition transfer claims. The unsecured creditors' committee then brought suit against a corporate entity and its principals; those principals had also been principals of the debtor and were alleged to have breached their fiduciary duties and entered into multiple transactions for the benefit of those principals to the detriment of the debtor. The unsecured creditors' committee then moved to disqualify the law firm that was representing the defendant-principals in the adversary proceeding because the law firm had previously represented the debtor regarding transactions that were now at issue in the adversary proceeding. The Court in *I Successor* rejected the argument that the debtor and the plaintiff were not the same former client, emphasizing that, just as the attorney-client privilege passes to a Chapter 7 bankruptcy trustee, so too does the attorney-client privilege pass to post-petition managers in a Chapter 11. *Id.* (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1986)). Significantly, the *I Successor* court held, "the attorney-client privilege of [the debtor] passed to the post-petition managers, acting in their roles on behalf of the debtor when control of [the debtor] passed to them. [The debtor] has not yet died, and the fact that the debtor continues to exist solely to pursue lawsuits to collect assets to pay liabilities is irrelevant." *Id.*

Other courts of this Circuit have used a similar analysis. See *In re Flag Telecom Holdings, Ltd.*, 2009 WL 5245734, at *9 (S.D.N.Y. Jan. 14, 2009) (finding that the litigation trustee, and not the new entity that purchased the assets of the bankrupt corporation, held the attorney-client privilege, a key tool that would enable it to bring suit against the former officers and directors of the bankrupt corporation); *cf. Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 134 (1996) ("As a practical matter, then, old [entity] did not die. To the contrary, the business operations of [the old entity] continued under the new managers. Consequently, control

of the attorney-client privilege with respect to any confidential communications between [the law firm] and corporate actors of [the old entity] passed to the management of [the new entity]. An attorney-client relationship between [the law firm] and [the new entity] necessarily exists.") (internal citations omitted). Treating the entity that now holds a debtor's attorney-client privilege after a transfer of assets—whether liquidating trustee or new entity—as the former client of the firm accords with the principle articulated in *Weintraub* that the attorney-client privilege should be held by the entity that "plays the role most closely analogous to that of a solvent corporation's management." *Weintraub*, 471 U.S. at 353.

LTRB disagrees with this analysis, relying heavily on *Alan N. Halperin, as Liquidating Trustee of the High Ridge Brands Co. Liquidating Trust v. Arawak IX, L.P., et al., (In re HRB Windown Inc., et. al.)*, 2023 WL 3294623 (Bankr. D. Del. May 5, 2023) (cited in Letter dated June 15, 2023 [ECF No. 38, Adv. Pro. No. 22-07059]). In *HRB Windown*, a law firm represented a private equity fund that purchased the debtor and then represented the debtor as special counsel in its bankruptcy proceedings. *HRB Windown*, 2023 WL 3294623, at *1-*2. During the course of the bankruptcy, the debtor confirmed a plan of reorganization that provided for the creation of a liquidating trust, the appointment of a trustee for the liquidating trust, and for further appointment of a plan administrator to manage assets that had not been transferred to the Trust. *Id.* at *2. The trustee, on behalf of the liquidating Trust, then commenced an adversary proceeding against the private equity firm, who retained as their counsel the same law firm that had represented the debtor as special counsel. *Id.* The trustee then moved to disqualify the law firm. *Id.* The Delaware Court denied the motion, finding that the plan administrator, not the trustee, was the former client of the law firm. *Id.* at *4-*5. The Court noted that the plan

stated that "the [d]ebtors shall continue in existence pursuant to the terms of the [p]lan" while corporate governance activities were to be handled by the plan administrator. *Id.*

But the *HRB Windown* case is distinguishable for several reasons. Unlike the plan in *HRB Windown,* the Plan here does not provide for the continued existence of the Debtors, there is no plan administrator, and the Plan does not designate an entity other than the Trustee to continue going forward. Indeed, the Debtors' only asset here was sold as part of the Plan. *See* Plan, Schedules A/B [ECF No. 18, 19, Case No. 20-23288] (stating that 159 Broadway's only asset is 100% interest in WB Bridge; in turn, WB Bridge's only asset was the real property improvements located at 159 Broadway, Brooklyn). Thus, the effective date of the Plan rendered the Debtors non-existent, with no one but the Trustee having the power to act on behalf of the Debtors.[9] Thus, there is continuity here between the Chapter 11 estate and the Trustee. *Cf. Waldschmidt v. Compcare Health Services Ins. Corp. (In re Peck Foods)*, 196 B.R. 434, 439 (Bankr. E.D. Wis. 1996) ("[B]oth the debtor in possession and the [C]hapter 7 trustee are fiduciaries for creditors in existence at the [C]hapter 11 filing . . . '[I]f a debtor remains in possession . . . the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession.'") (quoting *Weintraub*, 471 U.S. at 355).

There is also a significant difference in the circumstances of the representation here compared with *HRB Windown*. In *HRB Windown*, the law firm represented the private equity

[9] The Plan does include a provision that "[o]n and after the Effective Date, each of the Post-Confirmation Debtors may conduct its financial affairs and may use, acquire, and dispose of property free of any restrictions of the Bankruptcy Code, the Bankruptcy Rules and the Bankruptcy Court, except as otherwise provided in this Plan or in the Confirmation Order." Plan ¶ 9.4. This statement appears in a section entitled "Revesting of Assets" that provides that property other than the causes of action related to the Property would revest in the Debtors. However, it does not appear that there were any remaining assets to revest in the Debtors and that the Debtors therefore have no assets or ongoing business. *See, e.g.*, Plan ¶ 5.1 (providing for the rejection of all leases); Plan ¶ 6.1(c) (requiring the Debtors to hand over all cash on hand to the disbursing agents); Plan ¶ 6.6 (providing for the transfer of the Debtors' books and records to the purchaser of the property).

fund first, and only later undertook to represent the debtor after both clients explicitly agreed to waive any conflict that might arise during the joint representation. 2023 WL 3294623, at *1-*2. By contrast, LTRB represented the Debtors first, which resulted in LTRB first owing a duty of loyalty to the Debtors, and the Trustee explicitly declined to waive any conflict. *See* Disqualification Motion ¶ 28; Disqualification Reply ¶ 8; *see also Kohut v. Lenaway (In re Lennys Copy Ctr. & More LLC)*, 515 B.R. 562, 567 (Bankr. E.D. Mich. 2014) (The "first client's rights to loyalty takes precedence over the second client's individual preference for a particular counsel.") (internal citations omitted).

LTRB also cites *In re Abengoa Bioenergy Biomass of Kansas*, *LLC*, 2018 WL 1321951 (Bankr. D. Kan. Mar. 13, 2018) and *In re Las Uvas Valley Dairies*, 648 B.R. 260, 265 (Bankr. D.N.M. 2022), *reconsideration denied*, 649 B.R. 53 (Bankr. D.N.M. 2023), to support its assertion that a liquidating trust is a different entity than a debtor. *See Abengoa*, 2018 WL 1321951, at *8; *Las Uvas*, 648 B.R. at 265. As cases outside the Second Circuit, these cases are not binding on this Court and, in fact, the court in *Abengoa* expressly rejected reliance on the *I Successor* case from the Southern District of New York. *See Abengoa*, 2018 WL 1321951, at *7 (noting that *I Successor* applies New York's disqualification rules and thus the court is not bound to follow it in applying Kansas Rules of Professional Conduct); *Las Uvas,* 648 B.R. at 264-65 (following *Abengoa).* Moreover, the *Abengoa* case is factually distinguishable. It involved multiple debtors in cases from different jurisdictions, all of whom had consented to joint representation and information sharing, and the motion to disqualify was brought on the eve of trial, apparently to gain a tactical advantage. *Abengoa,* 2018 WL 1321951, at *7 (finding facts

there to be distinguishable from *I Successor Corp*., which "didn't involve intercompany claims between separate Chapter 11 debtors").[10]

2. Whether there is a Substantial Relationship between the Prior Representation and the New Matter

As for the second prong of substantial relationship, the Court starts by reviewing the obligations of a debtor in bankruptcy and its counsel.

A debtor in possession owes a fiduciary duty to the estate and the debtor's creditors. *In re Sillerman,* 605 B.R. 631, 640 (Bankr. S.D.N.Y. 2019); *see also In re Klaynberg*, 643 B.R. 309, 317 (Bankr. S.D.N.Y. 2022) ("[A] debtor in possession owes fiduciary duties to the bankruptcy estate and must, among other things, protect and . . . conserve property in [its] possession for the benefit of creditors and refrain[ ] from acting in a manner which could damage the estate, or hinder a successful reorganization of the business.") (internal citations and quotations omitted). "In nonlegal terms, directors and management of a [C]hapter 11 debtor are obligated to preserve the assets of the debtor and otherwise act consistently with the interests of *both* creditors and shareholders." 1 Collier Trustees & Debtors in Possession ¶ 20.05 (2023) (emphasis in original). Officers and directors of a debtor in possession are bound by a duty of loyalty, which encompasses "an obligation to refrain from self-dealing, to avoid conflicts of interests and the appearance of impropriety and to treat all parties to the case fairly." 7 Collier on Bankruptcy ¶ 1108.09 (16th ed. 2023). "Indeed, the willingness of courts to leave debtors in possession 'is premised upon an assurance that the officers and managing employees can be

[10] The Court in *Abengoa* explained that "where the attorney's representation was of two, commonly interested clients, one of whom is now complaining[,] the substantial relationship test is inapposite because one client couldn't reasonably expect confidences imparted during the course of the joint representation to be withheld from the other client." *Abengoa*, 2018 WL 1321951, at *8 (noting that attorney jointly represented the two debtors) (internal citations and quotations omitted); *id.* at *9 (noting that engagement letters provided that none of the information supplied by one of the debtors would be deemed confidential as against the other companies).

depended upon to carry out the fiduciary responsibilities of a trustee.'" *Weintraub*, 471 U.S. at 355–56 (quoting *Wolf v. Weinstein*, 372 U.S. 633, 651 (1963)).

Consistent with these obligations, counsel to a debtor in possession must "carefully balance not only obligations to the client, but also the additional fiduciary and ethical obligations imposed by the bankruptcy courts in the context of a bankruptcy case." 1 Collier on Bankruptcy § 8.01 (16th ed. 2023). "Courts have held that, as part of this fiduciary duty, a lawyer must make inquiries and take action to [educate] and remind the client of the client's own duties in the bankruptcy case." John G. Lounghnane & Maria Pevzner, *Ethics: Who Exactly is Your Client, How Do You Get Paid (and by Whom), and How Do You Avoid Getting Into Trouble When the Client Tells You to Do Something That Makes You Feel a Little Queasy*, 071405 American Bankruptcy Institute 227 (2015). "[P]rofessionals employed by the debtor in possession are expected to represent the interests of the bankruptcy or [C]hapter 11 'estate' rather than a single party." 1 Collier on Bankruptcy § 8.01 (16th ed. 2023). In representing these Debtors in possession then, LTRB's representation included all aspects of the Debtors' bankruptcy cases. *See* Robinson Brog Retention Application ¶ 11; LTRB Retention Application ¶ 11; Ringel Decl. ¶ 3 (noting that Debtors sought to retain Robinson Brog as its "general and corporate counsel to . . . assist it in carrying out its duties as a debtor in possession under Chapter 11 of the Bankruptcy Code.").

Of particular note here, LTRB's duties included completing the Debtors' schedules of assets and liabilities, as well as the SOFAs. *See* 11 U.S.C. § 521(a). The accuracy of these documents is vital to a bankruptcy proceeding because they

> provide a recent financial history of the debtor as well as a list of its assets, liabilities and contractual obligations. **These forms are the debtor's representations of its own financial condition at the start of the case. They are signed under penalty of perjury. They are critically important and must be accurate, since the information**

> **will be relied upon by all parties and form the basis for discussions regarding a plan.**

1 Collier Trustees & Debtors in Possession ¶ 20.05 (2023) (emphasis in original). A debtor's SOFA requires a debtor to list, among other things, payments or transfers of property made within one year before filing the bankruptcy case that benefitted any insider and transfers of property made by the debtor or a person acting on behalf of the debtor within two years of filing the bankruptcy. *See* Official Bankruptcy Form 207. And in fact, Robinson Brog did prepare and file these documents. *See, e.g.,* Final Application of Robinson Brog Leinwand Greene Genovese & Gluck P.C. as Attorneys for the Debtors for an Award of Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred [ECF No. 135, Case No. 20-23288] (showing time records that indicate at least ten hours' work by multiple staff related to the Debtors' schedules); *see also* 159 Broadway SOFA (listing payments to insiders).

Turning now to the LTRB's proposed new representation, LTRB seeks to defend its new clients against allegations about the receipt of prepetition transfers from the Debtors. More specifically, the Complaint here seeks to recover a total of $7,189,600 in prepetition transfers that were alleged to have been fraudulently conveyed, the majority of which were made within two years of the filing date of the Debtors' bankruptcy petition. *See generally* Complaint. In seeking such relief, the Adversary Proceeding directly addresses the prepetition financial activity of the Debtors, which LTRB was required to assess when completing the SOFA and schedules. Thus, litigation over these prepetition transfers clearly has a substantial overlap with LTRB's work in preparing the Debtors' schedules and SOFAs, as that work entailed an analysis of Debtors' assets and transfers of property within two years of the bankruptcy filing. Said another way, LTRB as Debtors' counsel was required to undertake "essentially the same" analysis as it

would be required to perform in defending its new clients in the Adversary Proceeding, only this time representing the opposing side. *Ladak,* 2013 WL 3810188, at *3 (quoting *Bank of America, N.A. v. Klein*, 2011 WL 63910, at *4 (D. Conn. 2011); *see also Watkins v. Trans Union, LLC*, 869 F.3d 514, 520 (7th Cir. 2017) (matters "may still be substantially related if there is a substantial risk that confidential information would materially advance the client's position in the present matter").

In reaching the conclusion that there is substantial overlap here, the Court finds the analysis in *In re MarketXT Holdings Corp.*, 2005 WL 3789407, to be particularly instructive. In that case, several of the debtor's creditors filed an involuntary Chapter 7 petition but the case was voluntarily converted to a Chapter 11 case. *Id.* at *2. The operating trustee that was appointed filed an adversary proceeding to recover funds from a series of transactions as actual and constructive fraudulent conveyances. *Id.* Against this backdrop, the trustee moved to disqualify the law firm that sought to represent the defendants in the adversary proceeding, alleging that an impermissible conflict had arisen because that firm had also represented the debtor before the bankruptcy regarding the transactions at issue in the adversary proceeding. *Id.* at *1-*3. The court in *MarketXT* granted the trustee's motion to disqualify the law firm from representing the defendants in the adversary proceeding, finding "an identity of issues" between the former representation and the adversary proceeding—namely, that the law firm had access to confidential information by virtue of its access to the debtor's books and records and interview of the Debtor's principals, in-house and outside counsel, and at least one employee. *Id.* at *5-*6; *see also In re Lennys Copy Ctr.*, 515 B.R. at 566 (finding that an adversary proceeding brought to recover fraudulent conveyances was "substantially related" to representation of the debtor).

LTRB argues that it did not discuss pre-petition transfers with the Debtors. *See* Hr'g Tr. 32:16-24 (March 23, 2023).[11] But this does not change the result. As another court succinctly stated, "[a]lthough [C]hapter 11 counsel did not perform a preference analysis while representing [the Debtor], he could have. In fact, he should have, as [ ] [a] debtor in possession . . . [is] responsible for recovery of preferences, and the assistance of counsel is vital in assisting the debtor or trustee in performing this duty." *Peck*, 196 B.R. at 439 (concluding that it is irrelevant that the attorney did not actually examine possible preferences). Indeed, the UST is right in identifying this argument as problematic in potentially allowing a law firm to benefit from a failure to carry out its duties as debtor's counsel. *See* UST Letter at 3-4 (arguing that if LTRB had no communications with the Debtors concerning prepetition transfers, "the firm would be admitting that it failed to provide advice and counsel to the Debtors to fulfill its duties and obligations under the Bankruptcy Code and Rules, which require the filing of Statements of Financial Affairs (SOFAs)."). Condoning such a position might incentivize a law firm to avoid certain duties as debtor's counsel as a way to open the door to the law firm's later representation of a debtor's principals in litigation.[12]

In a similar argument, LTRB selectively characterizes its obligations as Debtors' counsel to argue that its representation of the Debtors is not substantially related to the Adversary

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[11] At the hearing, counsel from LTRB explained:

> [t]hese issues of, you know, what's potentially recoverable transfers might be out there, was not an issue that anyone looked at or anyone was focused on during the entire case, except, maybe the Creditors' Committee, which is the predecessor to the Creditors' Trust, may have looked at it, but from the debtors' standpoint, it was so far down on the list of things that had to get done in this case for it to be successful, that it never reached the point of getting anyone's attention in the case.

*Id.*

[12] Moreover, there is reason to disagree with LTRB's stance for another reason: the record indicates that it did engage in at least some analysis of pre-petition transfers. The 159 Broadway SOFA lists two pre-petition transfers to insiders within a year of the petition. *See* 159 Broadway SOFA. Further, the Debtor was prompted to engage in additional analysis of pre-petition transfers when counsel for the Official Committee of Unsecured Creditors requested additional information about pre-petition transfers. *See* Hr'g Tr. 41:7-19 (March 23, 2023).

Proceeding. *See* Disqualification Opp. ¶ 22-23 ("The central issue in the [C]hapter 11 case concerned the Debtors' effort to obtain financing or a joint venture partner to complete the construction of a hotel during the pandemic . . . [i]n contrast, the fraudulent transfer claims have no relationship to Robinson Brog and then [LTRB]'s efforts to obtain the necessary financing to complete the project . . . [N]either [LTRB] nor Robinson Brog had any involvement in anything related to the fraudulent transfer claims asserted by the Trustee when they were counsel to the Debtors."). In supports of its position, LTRB relies on *In re Mack Indus., Ltd.*, 606 B.R. 313 and *In re Allboro Waterproofing Corp*., 224 B.R. 286. But once again, the Court disagrees.

In the *Mack* case, the court declined to disqualify an attorney from representing defendants in an adversary proceeding when the attorney also had represented the debtors, holding that the new representation would be permissible so long as the attorney withdrew from representing the debtor. *See generally, Mack*, 606 B.R. 313. In reaching that conclusion, the *Mack* court found that the attorney "had no involvement in anything relating to preference claims or the types of non-insider fraudulent transfer claims asserted by the trustee when he was counsel for Mack for a few days when it was a [C]hapter 11 debtor in possession." *Id.* at 324. But the *Mack* case is distinguishable on its unusual facts. The debtor in *Mack* was a debtor in possession for less than a month—and counsel represented the debtor as a debtor in possession for less than a week—before a secured creditor successfully moved for the appointment of a Chapter 11 trustee. *Id.* at 317. As a result, the debtor's counsel essentially had no time to perform its duties for the debtor in possession in Chapter 11. The facts here are starkly different, with LTRB representing the Debtors in possession for nearly two years from the filing of these cases through confirmation.

The case of *In re Allboro Waterproofing Corp*. is also distinguishable. *Allboro* was a Chapter 7 case where the debtor never acted as a debtor in possession. In representing the Chapter 7 debtor, the firm's representation of the debtor was more "limited" than acting as debtor's counsel in Chapter 11. *See Allboro*, 224 B.R. at 289, 294. Generally, a Chapter 7 debtor's only obligations are to provide records and cooperate with the Chapter 7 trustee; a Chapter 7 debtor's counsel has no statutory duties to the estate and only has a duty to their client as described in Rules of Professional Conduct. *See Mack*, 606 B.R. at 318-19. By contrast, a Chapter 11 debtor owes a fiduciary duty to the estate. *Id.* at 320.[13] Thus, both the *Mack* and *Allboro* cases involved counsel who were confronted with far different circumstances and obligations than the counsel in this case. *See Allboro*, 224 B.R. at 294 (noting that a motion to disqualify requires a court to conduct a "painstaking analysis of the facts.") (internal citations omitted).

3. Whether the Attorney Whose Disqualification is Sought had or was Likely to have had Access to Confidential Information

Having found that there is a substantial relationship between the two matters being handled by LTRB, the Court does not need to determine "whether the lawyer did, in fact, receive confidential information." *Hull*, 513 F.2d at 572 (internal citations and quotations omitted). "Rather, where it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject matter of his subsequent representation, it is the court's duty to order the attorney disqualified. The breach of confidence

[13] Some courts have reached a different conclusion than *Mack* and *Allboro* about the substantial relationship question for counsel representing a Chapter 7 debtor, holding that such a lawyer cannot also represent a defendant in an adversary proceeding brought by the Chapter 7 trustee on behalf of the debtor's estate. *See, e.g., Houghton v. Morey (In re Morey)*, 416 B.R. 364 (Bankr. D. Mass. 2009). The Court does not need to address the split of authority on this question.

[does] not have to be proved; it is presumed in order to preserve the spirit of the Code." *Id.* (internal citations and quotations omitted); *accord Felix*, 49 F. Supp. 2d at 268.

LTRB again relies on *Mack,* which found that it was "hard to conceive of any confidential information that could potentially be relevant to the trustee's claims against the adversary defendants" and that the trustee had not met its burden to specify the confidential information to which the former firm may have had access. *Mack*, 606 B.R. at 325. But once again, the *Mack* decision must be understood on its unique facts, where counsel represented the debtor in possession for less than a week before a Chapter 11 trustee administered the case. In any event, *Mack* is inconsistent with the weight of authority, including binding authority in this Circuit. As the Second Circuit has clearly instructed, "a court should not require proof that an attorney actually had access to or received privileged information while representing the client in a prior case. Such a requirement would put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether." *Cook Indus.*, 569 F.2d at 740; *accord U.S. Football League*, 605 F. Supp. at 1461 (holding that a finding of a substantial relationship between the former and current representation creates a presumption that the former client of the challenged firm imparted to the firm confidential information relevant to the present suit). Indeed, courts have admonished that "[l]awyers should not put themselves in the position 'where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship.'" *DeFazio v. Wallis*, 459 F. Supp. 2d 159, 165 (E.D.N.Y. 2006) (quoting *T. C. Theatre Corp*, 113 F. Supp. at 269). Thus, "whether or not actual confidential information was shared with [the law firm] is irrelevant; the issue is whether [the law firm] 'could have' obtained such

information." *Peck*, 196 B.R. at 440 (citing *Burkes v. Hales*, 165 Wis. 2d 585, 592, n.5 (Ct. App. 1991)).

LTRB also relies upon the idea that any information concerning the allegedly fraudulent conveyances would be discoverable by the Trustee. Disqualification Opp. ¶¶ 24-25. "[A]s a general rule, however, the attorney-client privilege 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information . . . .'" *Tiuman v. Canant*, 1994 WL 198690, at *3 (S.D.N.Y. May 19, 1994) (quoting *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 572–73 (2d Cir. 1973)); *see also Gov't of India v. Cook Indus., Inc*., 422 F. Supp. 1057, 1060 (S.D.N.Y. 1976), *aff'd*, 569 F.2d 737 (2d Cir. 1978) ("Furthermore, if a substantial relationship is established, the presumption of access to confidences prevails even though the 'confidential' information may be publicly available").

Finally, when determining whether LTRB should be subject to disqualification, the Court considers whether the Disqualification Motion was interposed for any tactical advantage. The Court concludes it was not. This case is in its infancy. The Trustee raised his concerns about LTRB's disqualification as soon as possible. Given that discovery has not yet begun in this matter, the Adversary Defendants would suffer minimal prejudice if required to find new counsel. *Cf. Sauer v. Xerox Corp*., 85 F. Supp. 2d 198, 201 (W.D.N.Y. 2000) (motion to disqualify denied where litigation was already in advanced stages and disqualification would cause significant hardship).

C. Risk of Trial Taint

Having found that the three part test for disqualification has been met, the Court turns to the issue of trial taint. Disqualification is only warranted when there is a "significant risk of trial

taint." *Bell*, 2004 US Dist. LEXIS 14343 at *4; *see also Nyquist,* 590 F.2d at 1246. Risk of trial taint can arise "(1) 'where an attorney's conflict of interests in violation of Canons 5 and 9 . . . undermines the court's confidence in the vigor of the attorney's representation of his client,' or (2) 'where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9.'" *Bulkmatic Transp. Co. v. Pappas*, 2001 WL 504841, at *2 (S.D.N.Y. May 11, 2001) (quoting *Nyquist*, 590 F.2d at 1246).

When considering whether a risk of trial taint is present, the Court is mindful of the special obligations of a debtor in possession, and by extension, its counsel, which create a need for increased vigilance against conflicts of interest. 1 Collier on Bankruptcy § 8.03 (16th ed. 2023) ("Conflict-of-interest rules are more strictly applied in the bankruptcy context than in other areas of the law, at least insofar as they relate to professionals retained by the estate."). There are strong policy reasons behind such an approach:

> There are two general reasons for this strict application [of the conflict of interest rules] in the bankruptcy context: to maintain the integrity of the bankruptcy process and to assure that counsel devote undivided loyalty to the client. In addition, and more specifically, the complexity of party relationships, capacities and representations in the bankruptcy context creates the reason for stricter application of the rules. Concepts of consent and waiver become difficult to apply when the attorney representing a debtor in possession also has an interest in the estate, while the debtor in possession is acting as a fiduciary for another group, the creditor body . . . The competing interests, the multiplicity of parties and the diversity of interests present in bankruptcy cases create more numerous conflicts (actual as well as potential) than are found in other areas of litigation. Further, bankruptcy often involves shifting relationships and loyalties, which make it difficult to identify whether an actual conflict exists or there is the potential for one to arise during the case.

*Id.*

When considering trial taint in the context of subsequent representation of a party adverse to a lawyer's first client, it is particularly relevant whether an attorney had access to confidential

information concerning the first client. *See Wai Hoe Liew v. Cohen & Slamowitz, LLP*, 2015 WL 5579876, at *8 (E.D.N.Y. Sept. 22, 2015) ("The guiding principle for determining whether an attorney formerly represented a client in a matter for the purposes of disqualification is whether the attorney was in a position to learn the confidences of former clients.") (internal citations and quotations omitted). The issue of access to confidential information "concerns itself as much with the lawyer's *use* of confidential information in a manner adverse to the interests of the former client that trusted the lawyer with its confidences." *Ullrich v. Hearst Corp.*, 809 F. Supp. 229, 235–36 (S.D.N.Y. 1992) (internal citation omitted) (emphasis in original). "Adverse use of confidential information is not limited to disclosure. It includes knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject, and innumerable other uses. The rule concerns itself with the unfair advantage that a lawyer can take of his former client in using adversely to that client information communicated in confidence in the course of the representation." *Id.*

LTRB's representation of the Debtors provided exactly the type of access that warrants disqualifying LTRB from representing a party adverse to the Debtors. LTRB's representation of the Debtors required an understanding of the Debtors' finances and an analysis of pre-petition transfers, particularly transfers to purported insiders such as Mr. Hager.[14] To now allow LTRB to represent an adverse party in a matter involving those exact same transfers would give the

[14] While LTRB contends that Mr. Hager is not an equity owner of the Debtors, *see* Hr'g Tr. 63:5-8 (March 23, 2023), LTRB does not dispute that Mr. Hager is a person in control of the Debtors. *See* 159 Broadway SOFA (identifying Mr. Hager as the manager of the Debtors); *see also* 11 U.S.C. §101(31)(B)(3) (defining "insiders" as officers of a corporate debtor). Notably, LTRB has not identified any party other than Mr. Hager who exercises control of the Debtors.

Adversary Defendants in the Adversary Proceeding the precise type of advantage that Rule 1.9 is designed to avoid.

LTRB's potential representation of a party adverse to the Debtors is particularly concerning given LTRB's representations about its "disinterestedness" in these bankruptcy cases. Section 327(a) provides that a trustee "may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327(a). In seeking retention as counsel for the Debtors, the law firm represented itself as "disinterested," stating that "Robinson Brog has no connection with the Debtors (except for as stated herein), their 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 . . . . " Ringel Decl. ¶ 7. Notable for today's purposes, the law firm went further in categorically representing that it would "not, at any time, represent any other entity in connection with these cases." *Id.* It is hard to square this representation with what LTRB now seeks to do.

In reaching its decision today, the Court in mindful that the rules against representation of a party adverse to a former client "ensures that a prior client will not be cut loose from its legal counsel simply because a more lucrative client comes along with a claim against it." *In re Wingspread Corp*., 152 B.R. 861, 864 (Bankr. S.D.N.Y. 1993). Indeed, Rule 1.9 is also known as the "side switching rule" to prevent exactly that outcome. *See Wai Hoe Liew*, 2015 WL 5579876, at *7. Allowing a law firm representing a Chapter 11 debtor to later represent individuals who managed the debtor creates an incentive for a firm to "play[ ] fast and loose with its clients [ ]or turn [ ] a blind eye to potential conflicts." *Wingspread Corp*., 152 B.R. at 864;

*see In re Freedom Solar Ctr., Inc.*, 776 F.2d 14, 18 (1st Cir. 1985) ("Federal law imposes duties on the debtor. In a given case these duties can become onerous and complicated, necessitating truly independent counsel.").

In sum, LTRB's access to the Debtors confidential information and questions regarding LTRB's allegiance give rise to a significant risk of trial taint. In this instance, disqualification is "a necessary and desirable remedy . . . to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information . . . ." *Hull*, 513 F.2d at 571 (quoting *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975)).

**CONCLUSION**

For the reasons set forth above, both the Withdrawal Motion and the Disqualification Motion are granted. The Trustee is directed to settle an order on five days' notice. The proposed order must be submitted by filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon opposing counsel and the UST.

Dated: White Plains, New York
February 5, 2024

***/s/ Sean H. Lane***
UNITED STATES BANKRUPTCY JUDGE

# Ethics and (the Very New World) of Artificial Intelligence

Hypothetical One:

Jack is a second-year associate in the New York office of Nations & Brannon, LLP, an international law firm. Jack is the one of 10 lawyers at the firm involved in the representation of Sewell Manufacturing which is a debtor in a complex Chapter 11 case pending in the U.S. Bankruptcy Court for the Northern District of Georgia. Jack, as the youngest lawyer on the team, is tasked with preparing a brief in support of confirmation of the Debtor's Chapter 11 plan. Jack, who is pressed for time, turns to ChapGPT for the first time to assist him with the brief writing, and substantial portions of the brief were primarily drafted through use of ChapGPT. Consistent with Nations & Brannon's firm policies, Jack checks citations in the finished brief using Westlaw and Lexis. He confirms all of the cases are in fact "real" cases, but he fails to check all of the quotes in the brief or the holdings of the cases cited in the brief. He forwards the brief to his partner who signs off on the brief not knowing it was produced in part using ChapGPT. The brief is then forwarded to local counsel for filing. Local counsel, also unaware the brief was produced in part using ChapGPT, reviews the brief but does not check any of the citations in the brief and files it with the Court. One of the law firms opposing confirmation finds that many of the quotes cited in the brief in fact are not real and many of the cases cited do not support the propositions for which they were cited. Opposing counsel's reply brief is a scathing rebuke of the Debtor's false brief. The Bankruptcy Court in turn issues a show cause order as to why Debtor's lead counsel and local counsel should not be sanctioned for the filed brief. Should anyone be sanctioned for the conduct here, and if so, what is the appropriate sanction?

Hypothetical Two:

Banner & Block, LLP is a law firm that specializes in bankruptcy-related litigation and is involved in a complex adversary proceeding involving claims under sections 547 and 548 of the Bankruptcy Code and state law avoidance actions. In connection with advising their client as to whether it would be a productive use of the client's resources to file a motion for summary judgment, the firm uses a generative artificial intelligence model to predict the likelihood that the assigned judge will rule in their favor under the facts of the case. The model contains all of the judge's prior decisions on summary judgment issues, but to get a better predictive outcome the firm must input a substantial amount of case specific information about the case into the model. The model output indicates a very low likelihood of success should a summary judgment motion be filed. Does the firm need its client's consent before using the model for this purpose? Does the firm need to disclose to the client the use of the model in rendering advice about the predictive results? If the client, after being informed of the model's use, elects not to file a summary judgment motion, can the lawyer charge their client an enhanced fee for the money saved by not filing the motion?

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 512** **July 29, 2024**

**Generative Artificial Intelligence Tools**

*To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.*

## I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] What level of competency should lawyers acquire regarding a GAI tool? How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a GAI tool to clients? What level of review of a GAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

## II. Discussion

### A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

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[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.[15] While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

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[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

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[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

### B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

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[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].
[27] MODEL RULES R. 1.6(c).
[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").
[29] MODEL RULES R. 1.6, cmt. [18].
[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.
[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).
[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.
[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

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[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

### C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

### D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

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lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

### E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

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necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

### F. Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.
[54] *See* ABA Formal Op. 08-451, *supra* note 15.
[55] Fla. Bar Advisory Op. 12-3 (2013).
[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].
[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.
[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

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[59] The listed considerations are (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

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[66] ABA Formal Op. 93-379 at 7.
[67] *Id.* at 8.
[68] *Id.* at 7.
[69] *Id.*
[70] *Id.* at 8.
[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

## III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

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09-1074-cr
United States v. Bari

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

August Term 2009

(Argued: February 23, 2010 Decided: March 22, 2010)

Docket No. 09-1074-cr

UNITED STATES OF AMERICA,

*Appellee*,

v.

ANTHONY BARI,

*Defendant-Appellant*.

Before: CABRANES and PARKER, *Circuit Judges*, and UNDERHILL, *District Judge*.[*]

We consider whether the District Court for the Southern District of New York (Denny Chin, *Judge*) erred in considering during a supervised release revocation hearing information confirmed by its own Internet search. Defendant Anthony Bari ("Bari") appeals from the District Court's March 11, 2009 judgment revoking Bari's term of supervised release, imposed after an earlier conviction for bank robbery and, after revocation, sentencing him principally to a term of thirty-six months' imprisonment. During the supervised release revocation hearing, Judge Chin noted that his chambers "did a Google search" to confirm that "there are also lots of different rain hats . . . that one could buy." On appeal, Bari argues that this independent Internet search violated Rule 605 of the Federal Rules of Evidence. We now consider (1) to what extent the Federal Rules of Evidence

[*] The Honorable Stefan R. Underhill, of the United States District Court for the District of Connecticut, sitting by designation.

apply in supervised release revocation hearings, and (2) whether the use of an Internet search to confirm a judge's intuition about a fact not subject to reasonable dispute is grounds for reversal. We conclude that the Federal Rules of Evidence do not apply with their full force in supervised release revocation hearings. We also conclude that the District Court did not commit reversible error in conducting an Internet search to confirm his intuition regarding a matter of common knowledge.

Affirmed.

DAVID S. HAMMER, New York, NY,
*for Defendant-Appellant.*

PETER M. SKINNER, Assistant United States Attorney (Preet Bharara, United States Attorney, *on the brief*, and Andrew L. Fish, Assistant United States Attorney, *of counsel*) United States Attorney for the District of Connecticut, *for Appellee.*

PER CURIAM:

We consider whether the District Court for the Southern District of New York (Denny Chin, *Judge*) erred in considering during a supervised release revocation hearing information confirmed by its own Internet search. Defendant Anthony Bari appeals from the District Court's March 11, 2009 judgment revoking Bari's term of supervised release, imposed after an earlier conviction for bank robbery, and sentencing him principally to a term of thirty-six months' imprisonment. During the supervised release revocation hearing, Judge Chin noted that his chambers "did a Google search" to confirm that "there are also lots of different rain hats . . . that one could buy." A. 89a. On appeal, Bari argues that this independent Internet search violated Rule 605 of the Federal Rules of Evidence ("Rule 605"). We therefore consider (1) the extent to which the Federal Rules of Evidence (the "Rules") apply in supervised release revocation hearings, and (2) whether the use of an Internet search to confirm the judge's intuition about a fact not subject to

reasonable dispute is grounds for reversal.

## BACKGROUND

Unless stated otherwise, the following facts are not in dispute.

Bari pleaded guilty to, and was convicted of, one count of bank robbery. In a judgment entered on October 18, 1995, he was sentenced principally to 188 months' imprisonment to be followed by five years' supervised release. In May 2008, Bari was released from custody and began serving his term of supervised release.

On October 24, 2008, the United States Probation Office submitted to the District Court an Amended Request for Court Action alleging that Bari had violated the terms of his supervised release. The Amended Request alleged several violations of the terms of Bari's supervised release, including that on September 9, 2008 Bari had committed bank robbery in violation of 18 U.S.C. § 2113 (a).[1]

On November 18 and 19, 2008, the District Court held a hearing on the charged violations. At the conclusion of the hearing, the District Court found Bari not guilty of some of the violations alleged, but guilty of the bank robbery violation and a firearms violation. With respect to the bank robbery violation, the District Court based its finding that Bari had indeed violated the terms of his supervised release on the cumulative effect of multiple items of evidence. Specifically, Judge Chin

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[1] This statute provides, in relevant part, as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a).

observed that a bank employee's identification of Bari's voice was "worth something," A. 91, because Bari "speaks in a loud, aggressive manner," and "that his voice is recognizable." A. 92. He also noted that numerous witnesses estimated the robber's height and weight, which were similar to Bari's height and weight. Moreover, the height, weight, and posture captured on the video footage taken by the security cameras matched Bari's height, weight, and posture. A. 92-93. Judge Chin was also persuaded by similarities between Bari's car and a car that drove by the bank shortly after the robbery. A. 94. Additionally, he considered the evidence of "Mr. Bari's suspicious conduct at the bank or in the vicinity of the bank" in the days before and after the robbery. A. 96. He also found "troubling" the evidence that a stolen license plate was found in Bari's car. A. 98. In addition, he concluded that there was evidence to show that Bari was in the area of the bank on the day of the robbery. A. 98.

Most relevant to this appeal, Judge Chin considered evidence that the bank's surveillance footage showed that the robber wore a yellow rain hat and that a yellow rain hat was found in the garage of Bari's landlord. He stated as follows:

> In addition, and I think this is the strongest piece of evidence frankly, we have the yellow hat. I am convinced from looking at the surveillance video [from the bank] of September 9 that [the hat found in the garage] is the same type of hat as appears in the video. It may not be precisely the actual hat, but it is the same type of hat. It is just too much of a coincidence that the bank robber would be wearing the same hat that we find in [his landlord's] garage.

A. 93. Judge Chin then noted several similarities between the hat found in the landlord's garage and the hat worn by the robber. To emphasize the similarity between the hats, he stated that "there are clearly lots of yellow hats out there," and that "[o]ne can Google yellow rain hats and find lots of different yellow rain hats." *Id.* Earlier in the proceeding, he had also stated that "[w]e did a Google search, and you can find yellow hats, yellow rain hats like this. But there are also lots of different rain hats, many different kinds of rain hats that one could buy." A. 89a.

Taking all of the evidence together, he concluded that there were "too many coincidences," and, accordingly, found "by a preponderance of the evidence and plus some" that the government had met its burden to establish that Bari had violated the terms of his supervised release by robbing a bank. A. 99.

On February 27, 2009, the District Court reversed its ruling with respect to the firearms violation and sentenced Bari to a term of 36 months' imprisonment, to be followed by two years' supervised release, in connection with the bank robbery violation.

Bari now appeals.

## DISCUSSION

On appeal, Bari argues that the District Court violated Rule 605[2] by conducting its own Internet search and relying on the results of that search in making its decision to revoke Bari's supervised release. The government argues that the Federal Rules of Evidence do not apply to supervised release revocation proceedings. Alternatively, the government argues that if the Federal Rules of Evidence apply to this proceeding, the District Court took proper judicial notice of a fact not subject to reasonable dispute, as allowed by Rule 201 of the Federal Rules of Evidence.

We consider first to what extent the Federal Rules of Evidence apply in supervised release revocation proceedings. We then consider whether the use of an Internet search to confirm the judge's intuition about a fact not subject to reasonable dispute is grounds for reversal.

### A. Federal Rules of Evidence in Supervised Release Revocation Proceedings

The government argues that the Federal Rules of Evidence are not applicable in supervised release revocation hearings. Because this is a question of law, we review it *de novo*. *See, e.g.*, *In re*

[2] Rule 605 states that "[t]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Fed. R. Evid. 605.

*N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 405 (2d Cir. 2009). As a general matter, we agree with the government that the Federal Rules of Evidence, except those governing privileges, do not apply in supervised release revocation proceedings. It is well settled that the Federal Rules of Evidence do not apply in full in probation revocation proceedings. *See, e.g.*, *United States v. Aspinall*, 389 F.3d 332, 344 (2d Cir. 2004) (concluding that the Federal Rules of Evidence, except those governing privileges, do not apply at probation revocation proceedings); *see also United States v. Carlton*, 442 F.3d 802, 809 (2d Cir. 2006) ("The full panoply of procedural safeguards does not attach to revocation proceedings," because a "probationer *already stands convicted of a crime*." (internal quotations omitted)). Moreover, the Rules expressly state that they are inapplicable in proceedings "granting or revoking probation." Fed. R. Evid. 1101(d)(3). We have also previously established that "the constitutional guarantees governing revocation of supervised release are identical to those applicable to revocation of parole or probation." *United States v. Jones*, 299 F.3d 103, 109 (2d Cir. 2002). Accordingly, we have no difficulty concluding that the Federal Rules of Evidence do not apply in full at supervised release revocation hearings.[3]

Although we conclude that the Federal Rules of Evidence do not apply with their normal force in supervised release revocation hearings, the Rules nevertheless provide some useful guidelines to ensure that any findings made by a district court at such hearings are based on "verified facts" and "accurate knowledge." *See generally Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (discussing the "flexible" evidentiary guidelines in parole revocation proceedings before state parole boards). As we observed in *Aspinall*, "in revocation proceedings the normal evidentiary constrictions should be

[3] We note that several of our sister Circuits have also concluded that the Federal Rules of Evidence do not apply at supervised release revocation hearings. *See, e.g.*, *United States v. Lloyd*, 566 F.3d 341, 343 (3d Cir. 2009); *United States v. Black Bear*, 542 F.3d 249, 255 (8th Cir. 2008); *United States v. Verduzco*, 330 F.3d 1182, 1185 (9th Cir. 2003); *United States v. Armstrong*, 187 F.3d 392, 394 (4th Cir. 1999).

*relaxed*." 389 F.3d at 344 (emphasis added). We emphasize that the evidentiary constraints in such proceedings should be loosened, although not altogether absent. Furthermore, in relaxing those constraints, we consider "verified facts" and "accurate knowledge" to be the touchstones of our inquiry. *See Morrissey*, 408 U.S. at 489. Put differently, district courts need not comply with the Federal Rules of Evidence during supervised release revocation proceedings, so long as their findings are based on "verified facts" and "accurate knowledge."

**B. Independent Internet Searches and Judicial Notice**

Applying relaxed evidentiary constraints to the instant case, we now consider whether the District Court committed reversible error when it conducted an independent Internet search to confirm its intuition that there are many types of yellow rain hats for sale. Bari argues that the District Court's search violates Rule 605 of the Federal Rules of Evidence; the government argues that the search is permissible under Rule 201 of the Federal Rules of Evidence. We agree with the government that Rule 201—in some relaxed form—governs this inquiry.[4] Because Bari did not object to the District Court's statement that "there are lots of different rain hats . . . that one could

[4] First, a few words on the relationship between Rules 605 and 201. Rule 605 prohibits the judge presiding at the trial from testifying in that trial as a witness. Rule 201 permits a judge to take judicial notice of certain types of facts. Logically, then, if a fact is of a kind that a judge may properly take judicial notice of it, then he is not improperly "testifying" at trial by noting that fact. Any other conclusion would lead to Rule 605 effectively subsuming Rule 201. If, after all, a judge was improperly testifying at trial each time he took judicial notice of a fact, it would be effectively impermissible to take judicial notice of any fact. Accordingly, we must first consider whether the judge was taking permissible judicial notice of a fact, pursuant to Rule 201. If he could not have taken judicial notice of that fact within the bounds of Rule 201—because, for example, it was not a "matter[ ] of common knowledge"—then we consider whether the judge violated Rule 605. Here, we conclude that Judge Chin did permissibly take judicial notice of the fact that there are many kinds of rain hats for sale, and therefore we need not consider whether he "testified" at a trial over which he was presiding.

buy," A. 89a, we review Judge Chin's decision to consider that fact as evidence for plain error.[5]

Under Rule 201, "[a] court may take judicial notice, whether requested or not" of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)-(c); *see also* Black's Law Dictionary 923 (9th ed. 2009) (defining judicial notice as "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact"). More generally, the "traditional textbook treatment" of Rule 201 has included two categories for judicial notice: "matters of common knowledge" and "facts capable of verification." Fed. R. Evid. 201, Advisory Committee Notes, Note to Subdivision (b).

Here, the District Court made a statement on a "matter[ ] of common knowledge." *Id.*; *cf. Kaggen v. IRS*, 71 F.3d 1018, 1019 (2d Cir. 1995) (holding that "[t]his Court may appropriately take judicial notice of the fact that banks send customers monthly bank statements"). Common sense leads one to suppose that there is not only one type of yellow rain hat for sale. Instead, one would imagine that there are many types of yellow rain hats, with one sufficient to suit nearly any taste in brim-width or shade. The District Court's independent Internet search served only to confirm this common sense supposition.

Bari argues in his reply brief[6] that "Judge Chin undertook his internet search precisely because the fact at issue . . . was an open question whose answer was not obvious." Reply Br. 8. We

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[5] We note, however, that plain error review would not apply if Rule 605 governed our inquiry because "[n]o objection need be made in order to preserve the point." Fed. R. Evid. 605.

[6] We note that although we normally will not consider *issues* raised only in reply briefs, *see, e.g.*, *Poupore v. Astrue*, 566 F.3d 303, 306 (2d Cir. 2009); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998), we will consider *arguments* raised in response to arguments made in appellee's brief.

do not find this argument persuasive. As broadband speeds increase and Internet search engines improve, the cost of confirming one's intuitions decreases. Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all rain hats are alike. Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search. *See Reno v. ACLU*, 521 U.S. 844, 853 (1997) ("The Web is . . . comparable . . . to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.").

As the cost of confirming one's intuition decreases, we would expect to see more judges doing just that. More generally, with so much information at our fingertips (almost literally), we all likely confirm hunches with a brief visit to our favorite search engine that in the not-so-distant past would have gone unconfirmed. We will not consider it reversible error when a judge, during the course of a revocation hearing where only a relaxed form of Rule 201 applies, states that he confirmed his intuition on a "matter[ ] of common knowledge."

**CONCLUSION**

In summary, we hold as follows:

(1) The Federal Rules of Evidence, except those governing privileges, do not apply with their full force in supervised release revocation hearings; and

(2) In the circumstances presented here, it was not reversible error for a judge to employ an Internet search to confirm a reasonable intuition on a matter of common knowledge.

For the foregoing reasons, the judgment of the District Court is **AFFIRMED.**

# UNITED STATES v. GELLENE (1999)

**United States Court of Appeals,Seventh Circuit.**

**UNITED STATES of America, Plaintiff-Appellee, v. John G. GELLENE, Defendant-Appellant.**

**No. 98-2985.**

**Decided: July 20, 1999**

**Before COFFEY, RIPPLE and MANION, Circuit Judges.**

**Steven M. Biskupic (argued), Thomas P. Schneider, Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee. Mark L. Rotert (argued), Jeffrey E. Crane, Winston & Strawn, Chicago, IL, for Defendant-Appellant.**

John G. Gellene, a partner at the law firm of Milbank Tweed Hadley & McCloy ("Milbank") in New York, represented the Bucyrus-Erie Company ("Bucyrus") in its Chapter 11 bankruptcy. Mr. Gellene filed in the bankruptcy court a sworn declaration that was to include all of his firm's connections to the debtor, creditors, and any other parties in interest. The declaration failed to list the senior secured creditor and related parties. Mr. Gellene was charged with two counts of knowingly and fraudulently making a false material declaration in the Bucyrus bankruptcy case, in violation of 18 U.S.C. § 152, and one count of using a document while under oath, knowing that it contained a false material declaration, in violation of 18 U.S.C. § 1623. Although Mr. Gellene admitted that he had used bad judgment in concluding that the representations did not need to be disclosed, he asserted that he had no fraudulent intent. After a six-day trial, on March 3, 1998, the jury returned guilty verdicts against Mr. Gellene on all three counts. Mr. Gellene was sentenced to 15 months of imprisonment on each count, to run concurrently, and was fined $15,000.

I

BACKGROUNDA. The Bucyrus Bankruptcy Proceedings

Bucyrus, a manufacturer of mining equipment based in South Milwaukee, Wisconsin, had retained Milbank to represent it in general corporate matters in the 1980s. Between 1988 and 1992, Bucyrus' financial transactions, including a leveraged buy-out, left the company with more than $200 million in debt. During that time, the head of Milbank's Mergers and Acquisitions Department, Lawrence Lederman, managed the Bucyrus account. In 1993, Lederman brought in Mr. Gellene, a bankruptcy attorney at Milbank, to work on the financial restructuring of Bucyrus.

At that time, the major parties with an interest in Bucyrus included Goldman Sachs & Co., Bucyrus' largest equity shareholder, which held 49% of the Bucyrus stock; Jackson National Life Insurance Company ("JNL"), Bucyrus' largest creditor, which held approximately $60 million in unsecured notes; and South Street Funds, a group of investment entities, which held approximately $35 million in senior secured notes and leasehold interests.[1] South Street Funds was managed and directed by Greycliff Partners, an investment entity which consisted of financial advisers Mikael Salovaara and Alfred Eckert, former employees of Goldman Sachs.

On February 18, 1994, Bucyrus filed its Chapter 11 bankruptcy petition in the Eastern District of Wisconsin.[2] Because the legal representation of a debtor is subject to court approval, Bucyrus submitted an application requesting that Milbank be appointed to represent it in the bankruptcy. Pursuant to Bankruptcy Rule 2014, the application included the required sworn declaration disclosing "any connection" that Milbank had with "the Debtors, their creditors, or any other party in interest."[3] Ex. 22, ¶ 5. Mr. Gellene, Milbank's lead attorney in the Bucyrus bankruptcy, under oath disclosed that his firm had previously represented Goldman Sachs and JNL in "unrelated" matters and would continue to represent Goldman Sachs in non-Bucyrus proceedings. See id. at ¶ 6. Mr. Gellene did not disclose any of Milbank's representations of South Street, Greycliff Partners or Salovaara.

The United States Trustee and JNL filed objections to Mr. Gellene's Rule 2014 declaration. They sought additional information regarding Milbank's representation of Goldman Sachs and questioned whether there was a sufficient conflict of interest to bar Milbank's retention as counsel for the debtor.

On March 23, 1994, the bankruptcy court conducted a hearing on the issue. It requested that Mr. Gellene submit a second declaration containing more detail about possible conflicts of interest.[4] The court specifically commented: "If you represent them [Goldman Sachs] in other matters, then I think it's important to state precisely what arrangements have been made internally to separate what you're doing in this matter with the recommendation in other matters." Tr. 917-

18.

On March 28, 1994, Mr. Gellene signed a second sworn Rule 2014 statement providing details about Milbank's representation of Goldman Sachs and the "Chinese wall" that the firm planned to put in place. It also disclosed its prior representation of two other creditors, Cowen & Co. and Mitsubishi International. The declaration then stated:

Besides the representations disclosed in my declaration dated February 18, 1994, after due inquiry I am unaware of any other current representation by Milbank of an equity security holder or institutional creditor of [Bucyrus].

Ex. 27, ¶ 7. Mr. Gellene again did not disclose any representation by Milbank of South Street, Greycliff Partners or Salovaara. However, at the time of both declarations, Milbank was doing their legal work, including the representation of Salovaara when his partner, Alfred Eckert, sued him.[5]

At Milbank, one partner recognized that there might be a conflict of interest between Milbank's representation of Salovaara in the Salovaara-Eckert dispute and its representation of Bucyrus in its bankruptcy proceedings. At a meeting on December 22, 1993, with Mr. Gellene, Lederman and Milbank partner Toni Lichstein, all of whom were working on the Bucyrus bankruptcy and the Salovaara-Eckert dispute, Lichstein raised the possibility of conflict. Both Lederman and Mr. Gellene stated it was not a problem. Lichstein raised the issue again in March 1994 after she, representing Salovaara, had attended a South Street investors' meeting at which South Street's investment in Bucyrus was discussed. At that time, Mr. Gellene responded that Salovaara was not a creditor of Bucyrus and that all disclosure obligations had been satisfied. However, Lederman suggested that, if Lichstein had further concerns, Salovaara should obtain other counsel. After that, Milbank's representation of Salovaara in his dispute with Eckert slowed and eventually ended. By December 1994, Lederman had resigned his representation of South Street/Greycliff and had written off the billings generated in a tangential matter, a Colorado bankruptcy[6] (about $16,000), and in the Salovaara-Eckert dispute (more than $300,000). Mr. Gellene also wrote off $13,000 in fees and expenses on the Bucyrus bankruptcy billings.[7] Mr. Gellene never informed anyone at Bucyrus of the other Milbank representations.

Meanwhile, the Bucyrus bankruptcy creditors' committee worked through the summer and fall of 1994 to see if it could formulate a plan that would satisfy the major creditors.[8] By late fall, a compromise was reached and all the parties to the Bucyrus bankruptcy agreed to the new plan of reorganization.

Thereafter, Milbank filed a petition requesting compensation for its work on the bankruptcy case. In November 1995, a hearing was held on Milbank's application for more than $2 million in legal fees and expenses. The United States Trustee and JNL both opposed the application. Mr. Gellene was lead attorney for Milbank at those hearings. However, when he testified in support of his firm's request for fees, Milbank partner David Gelfand was the attorney who put on Mr. Gellene's testimony. Gelfand presented Mr. Gellene's sworn declarations to him on the stand. Mr. Gellene testified that the supplemental Rule 2014 declaration had disclosed Milbank's relationship with Goldman Sachs and thus that the court had been fully aware of that relationship. However, Mr. Gellene did not testify that his firm had represented and was continuing to represent South Street and Greycliff. The United States Trustee did not learn of that representation until the late fall of 1996. The court ultimately awarded Milbank approximately $1.8 million in fees and expenses.[9]

In late 1996, JNL discovered that Milbank had represented Salovaara in his dispute with Eckert at the same time it was representing Bucyrus. JNL then filed a motion in the bankruptcy court in December 1996 seeking disgorgement of Milbank's fees. Mr. Gellene did not respond to the motion. On February 24, 1997, when his partners became aware of the motion and asked him about it, Mr. Gellene responded falsely that the answer was due in a few days. Mr. Gellene even altered the JNL filing to conceal the date it had been signed. When that deception was uncovered, however, Mr. Gellene admitted to Lichstein and Gelfand that he had lied about the response due date.

In March 1997, Mr. Gellene filed a third declaration with the bankruptcy court. In it, he explained that he had made an error in legal judgment by omitting Milbank's representations of South Street and of Salovaara and took "full personal responsibility for failing to disclose these matters to the court." Tr. 1247.

B. The Federal Criminal Charges

On December 9, 1997, a federal grand jury returned a three-count indictment against Mr. Gellene, charging him with two counts of bankruptcy fraud and with one count of perjury. It alleged that Mr. Gellene had lied three times in the course of a bankruptcy case: twice when he filed the Rule 2014 declarations knowing that they were false and once when he used the supplemental declaration, while under oath at a bankruptcy hearing, knowing that it contained a false material declaration.

At Mr. Gellene's trial, the government produced evidence of other false representations by the defendant, evidence that was admitted under Rule 404(b) of the Federal Rules of Evidence. The first concerned Mr. Gellene's bar status. He joined the New York State Bar in 1990; however, between 1981 and 1990 he represented himself to be a member of that bar in court filings and in legal publications. Mr. Gellene also represented himself to be a member of the federal bar in the Southern District of New York, both by repeatedly appearing in that court and by claiming that membership when applying for membership in the Eastern District of Wisconsin to represent Bucyrus in its bankruptcy proceedings.

The second category of evidence admitted at trial concerned Milbank's relationship with Lotus Cab Company: Mr. Gellene had included his charges to the cab company in the itemized expenses of the Milbank fee request but had failed to disclose to the court the ownership interest of some law firm partners in that company. The third false representation admitted at Mr. Gellene's trial under Rule 404(b) was made to the Colorado bankruptcy court. After South Street, Milbank's client, failed to produce discovery documents in the bankruptcy case of George Gillett, the bankruptcy court dismissed the South Street claim. Mr. Gellene moved for reconsideration; he stated that the delay in producing the documents was caused by the winding-up of South Street and by the ongoing dispute between Eckert, the managing partner of South Street, and the Funds' portfolio advisor, Greycliff Partners, regarding control of the funds. At Mr. Gellene's trial, however, Eckert testified that Mr. Gellene's explanation was not true and that he had produced the documents shortly after Mr. Gellene had requested them-which was after the deadline for production of the documents.

Mr. Gellene testified as the only defense witness at his trial. He stated that he began work at Milbank in 1980 and developed a bankruptcy practice. He testified that Lederman gave him the Bucyrus work and the South Street/Greycliff representation. He also admitted being aware in December 1993 of his firm's representation of Salovaara in the Eckert dispute. He testified that he failed to disclose these representations in the Bucyrus bankruptcy because he did not consider Salovaara to be a creditor, did not distinguish South Street/Greycliff from Salovaara, and thus did not think the representations needed to be disclosed. He also testified that the matters involving Salovaara, South Street and Greycliff were unrelated to the Bucyrus matter and that an agreement with Salovaara had already been reached. He called these conclusions "bad judgment" and "stupid, but not criminal." The jury did not agree; it convicted him on all three counts.

II

DISCUSSIONA. Bankruptcy Fraud under 18 U.S.C. § 152(3)1.

Mr. Gellene was found guilty of two counts of making false oaths in a bankruptcy proceeding, in violation of 18 U.S.C. § 152(3).[10] He was convicted specifically of "knowingly and fraudulently" making false declarations under oath in two Rule 2014 bankruptcy applications.[11] Twice he applied for an order approving his employment as attorney for the debtor; first, on February 18, 1994, the day he filed Bucyrus' Chapter 11 bankruptcy, and second, on March 28, 1994, after the hearing on his application, when he elaborated on potential conflicts of interest, as the bankruptcy court had requested. Those applications failed to list the senior secured creditor and related parties.

At trial, the district court instructed the jury on the elements of bankruptcy fraud [12] and specifically instructed that "[a] statement is fraudulent if known to be untrue and made with intent to deceive." Jury Instructions at 18. Mr. Gellene submits that the court's definition of "fraudulent" as "with intent to deceive" is erroneous. In his view, the statute requires that the statement be made not simply with the intent to deceive but with the intent to defraud. He further claims that, because the government misapprehended the statutory requirement, it failed to present evidence that he made his declarations with an intent to defraud because it believed it needed to prove merely an intent to deceive. He submits that the distinction between the two terms is significant: To deceive is to cause to believe the false or to mislead; to defraud is to deprive of some right, interest or property by deceit. Therefore, under § 152 of the Bankruptcy Code, he contends, the defendant must have a specific intent to alter or to impact the distribution of a debtor's assets and not merely to impact the integrity of the legal system, as the government argued.

We cannot accept Mr. Gellene's narrowly circumscribed definition of "intent to defraud" or "fraudulently." Mr. Gellene would limit exclusively the statute's scope to false statements that deprive the debtor of his property or the bankruptcy estate of its assets. In our view, such a parsimonious interpretation was not intended by Congress.[13]

First, the plain wording of the statute suggests no such limited scope. Rather, the plain wording of the statute punishes making a false statement "knowingly and fraudulently." The common understanding of the term "fraudulently" includes the intent to deceive.[14] Indeed, our case law has long acknowledged a broader scope for the statutory language than Mr. Gellene suggests. We have held that the section is designed to reach statements made "with intent to defraud the bankruptcy court." United States v. Key, 859 F.2d 1257, 1260 (7th Cir.1988). In United States v. Ellis, 50 F.3d 419 (7th Cir.), cert. denied, 516 U.S. 849, 116 S.Ct. 143, 133 L.Ed.2d 89 (1995), we commented that § 152 has long been recognized as the Congress' attempt to criminalize all the possible methods by which a debtor or any other person may attempt to defeat the intent and effect of the Bankruptcy Code and that the expansive scope of the statute "reaches beyond the wrongful sequestration of a debtor's property and also encompasses the knowing and fraudulent making of false oaths or declarations in the context of a bankruptcy proceeding." Id. at 423 (citing Key, 859 F.2d at 1259-60).

In addition, Ellis commented that the omission of material information in a bankruptcy filing "impedes a bankruptcy court's fulfilling of its responsibilities just as much as an explicitly false statement." Id. (affirming § 152 conviction of debtor for omission of prior bankruptcies from petition); see also United States v. Cherek, 734 F.2d 1248, 1254 (7th Cir.1984) (holding that failure by corporation president to list asset on corporation's bankruptcy petition was omission of material information supporting a § 152 conviction), cert. denied, 471 U.S. 1014, 105 S.Ct. 2016, 85 L.Ed.2d 299 (1985); United States v. Lindholm, 24 F.3d 1078, 1083 (9th Cir.1994) (affirming § 152 conviction of debtor for omission of prior bankruptcy filings). Thus, whether the deception at issue is aimed at thwarting the bankruptcy court or the parties to the bankruptcy, § 152 is designed to protect the integrity of the administration of a bankruptcy case. As one commentator has put it:

The orientation of title 11 toward debtors' rehabilitation and equitable distribution to creditors relies heavily upon the participants' honesty. When honesty is absent, the goals of the civil side of the system become more expensive and more illusive. To protect the civil system, bankruptcy crimes are not concerned with individual loss or even whether certain acts caused anyone particularized harm. Instead, the statutes establishing the federal bankruptcy crimes seek to prevent and redress abuses of the bankruptcy system. Thus, most of the crimes do not require that the acts proscribed be material in the grand scheme of things, that the defendant benefit in any way nor that any creditor be injured.

1 Collier on Bankruptcy, ¶ 7.01[1][a] at 7-15 (Lawrence P. King ed., 15th ed. rev.1999) (emphasis added).

2.

Mr. Gellene's narrow reading of the statute leads him to take a narrow view of the provision's materiality requirement. In his view, the statute criminalizes only fraud that is intended to frustrate the equitable distribution of assets in the bankruptcy estate. As counsel explained at oral argument, the fraud ought to be considered material only when it is related to the estate's assets, to pecuniary and property distribution issues. Under this narrow interpretation, his failure to divulge his representation of a major secured creditor of the debtor was not material, he asserts, because it was not intended to impact on the equitable distribution of assets in the bankruptcy.

We agree that § 152 requires that materiality be an element of the crime of bankruptcy fraud and, indeed, we have incorporated such a requirement in our analysis of § 152 fraud. See Key, 859 F.2d at 1261. The statute is therefore construed to require that the false oath be in relation to some material matter. See United States v. Jackson, 836 F.2d 324, 329 (7th Cir.1987) (citing cases). That material matter about which the misrepresentation was made could of course be the debtor's business transactions, the debtor's estate assets, the discovery of those assets, or the history of the debtor's financial transactions. See id. (holding that the debtor's false statements about the location of assets of the estate were material to the proceedings). However, we have never accepted Mr. Gellene's view that only misrepresentations that relate to the assets of the bankruptcy estate are material. Indeed, we, like other circuits, have rejected expressly such a reading. See Key, 859 F.2d at 1261 (stating that materiality does not require showing that creditors were harmed by the false statements).[15] The same commentator, addressing the materiality element, likewise has explained why a broader view of materiality than the one urged by Mr. Gellene is compatible with the purpose of the bankruptcy laws:

Materiality in this context does not require harm to or adverse reliance by a creditor, nor does it require a realization of a gain by the defendant. Rather, it requires that the false oath or account relate to some significant aspect of the bankruptcy case or proceeding in which it was given, or that it pertain to the discovery of assets or to the debtor's financial transactions. Just what is significant is difficult to say for the general case: failing to disclose ownership of a ream of paper in a multi-million dollar bankruptcy is probably not material, but in many cases a false social security number or a false prior address may be. Statements given by individuals in order to secure a particular adjudication carry their own reliable index of materiality; the person giving the statement believed it sufficiently important-and hence, material-to the goal of obtaining the desired action.

Collier on Bankruptcy, ¶ 7.02[2][a][iv] at 7-46 to 7-47. We conclude that the materiality element does not require proof of the potential impact on the disposition of assets.

We have no doubt that a misstatement in a Rule 2014 statement by an attorney about other affiliations constitutes a material misstatement. The Bankruptcy Code requires that attorneys who seek to be employed as counsel for a debtor apply for the bankruptcy court's approval of that employment. See In re Crivello, 134 F.3d 831, 835-36 (7th Cir.1998). Bankruptcy Rule 2014 requires the potential attorney for the debtor to set forth under oath any "connections with the debtor, creditors, [and] any other party in interest." Fed. R. Bankr.P. 2014(a). The disclosure requirements apply to all professionals and are not discretionary. The professionals "cannot pick and choose which connections are irrelevant or trivial." In re EWC, Inc., 138 B.R. 276, 280 (Bankr.W.D.Okl.1992). "[C]ounsel who fail to disclose timely and completely their connections proceed at their own risk because failure to disclose is sufficient grounds to revoke an employment order and deny compensation." Crivello, 134 F.3d at 836; see also Rome v. Braunstein, 19 F.3d 54, 59 (1st Cir.1994). As Judge Kanne pointed out in Crivello, this procedure is designed to ensure that a "disinterested person" is chosen to represent the debtor. This requirement goes to the heart of the integrity of the administration of the bankruptcy estate. The Code reflects Congress' concern that any person who might possess or assert an interest or have a predisposition that would reduce the value of the estate or delay its administration ought not have a professional relationship with the estate. See Crivello, 134 F.3d at 835.

3.

We now consider whether there was sufficient evidence of Mr. Gellene's guilt. We therefore must determine, after viewing the evidence in the light most favorable to the government, whether a rational trier of fact could have found the essential elements of the offense of bankruptcy fraud beyond a reasonable doubt. See United States v. Webster, 125 F.3d 1024, 1034 (7th Cir.1997), cert. denied, 522 U.S. 1051, 118 S.Ct. 698, 139 L.Ed.2d 642 (1998). "Circumstantial evidence is sufficient to prove fraudulent intent and to support a conviction." Id.

Our review of the record verifies that the government established Mr. Gellene's knowledge of his duty to disclose. It set forth Mr. Gellene's expertise in bankruptcy and the bankruptcy court's statements alerting him to the importance of full disclosures. Mr. Gellene was fully apprised of the importance of the information that had been excluded. He had been questioned by his law partner, Toni Lichstein, several times about whether there might be a conflict of interest and whether all necessary disclosures had been made. Yet Mr. Gellene continued to withhold the information over a two-year period; he simultaneously worked on the Bucyrus bankruptcy and represented South Street, Greycliff and Salovaara without informing his client Bucyrus of the other representations.

In addition to the direct evidence of Mr. Gellene's intentional fraudulent omission of information from the Rule 2014 applications, the government offered evidence that he had committed deceptions on the bankruptcy court and other courts with respect to (1) his failure to disclose his law firm partners' interest in the Lotus Cab Company, from whom he had submitted a bill; (2) his failure to file documents in a Colorado bankruptcy court; and (3) the status of his bar memberships. Moreover, Mr. Gellene himself testified regarding his mental state; therefore, the jury had an opportunity to judge in detail his innocent explanations regarding his conduct. After viewing the evidence in the light most favorable to the government, we conclude that there was evidence from which a jury reasonably could have found beyond a reasonable doubt that Mr. Gellene knowingly and fraudulently made two false material declarations in the Bucyrus bankruptcy case.

4.

Mr. Gellene claims that the court's definition of "fraudulent," which was set forth in the instructions, was erroneous. We therefore have considered the jury instructions, viewing them as a whole and acknowledging that we may overturn Mr. Gellene's conviction only if those instructions failed to treat the contested issues fairly and adequately. See United States v. Lerch, 996 F.2d 158, 161 (7th Cir.1993), cert. denied, 510 U.S. 1047, 114 S.Ct. 697, 126 L.Ed.2d 664 (1994).

The district court instructed the jury that a "statement or representation is fraudulent if known to be untrue, and made with intent to deceive." This instruction, given the facts of the case, adequately presented the issue to the jury. The defendant's conduct was to make a fraudulent statement. Because he is the attorney for the debtor rather than the debtor, his use of false statements defrauded the entire bankruptcy process when he withheld the name of a client that

was the debtor's major secured creditor and of other related entities. We conclude that the instruction given in this case, which notably was given along with an instruction stating the elements of § 152 that must be proven beyond a reasonable doubt, adequately addressed the issue of intent. We hold that the district court treated all elements of the offense fairly and accurately, and accordingly we affirm the use of the jury instruction defining "fraudulent."

B. Perjury under 18 U.S.C. § 1623

1.

Mr. Gellene was convicted on Count 3 of using a document, while under oath, knowing that it contained a material falsehood, in violation of 18 U.S.C. § 1623.[16] This charge arose from the bankruptcy court's hearing in November 1995 to consider Milbank's fee application. JNL opposed the application on the ground that Milbank had conflicts of interest in its representation of the debtor Bucyrus. Specifically, JNL challenged Milbank's relationship with Goldman Sachs.

At the fee hearing, Mr. Gellene testified on direct examination that he previously had disclosed to the bankruptcy court Milbank's representation of Goldman Sachs; in the course of his testimony, he referred to the two sworn declarations as exhibits to establish that disclosure. The second declaration in particular demonstrated that Milbank had divulged its relationship with Goldman Sachs and had put in place a "Chinese wall" to keep separate the Goldman Sachs legal representation and the Bucyrus bankruptcy work. That second declaration then made this concluding statement, alleged to be false in Count 3:

Besides the representations disclosed in my declaration dated February 18, 1994, after due inquiry, I am unaware of any other current representation by Milbank of an equity security holder or institutional creditor of the Debtors.

Indictment, Count 3, ¶ 2.

However, when Mr. Gellene drafted this Rule 2014 disclosure statement (around March 28, 1994) and when he used it at the fee hearing (November 29, 1995), he and his firm were actively representing South Street and Greycliff. Notably, Milbank's representation of those entities was not known at the time of the fee hearing to anyone involved in the Bucyrus bankruptcy.

2.

Section 1623(a), often called the "false swearing statute" to distinguish it from its older sibling, the general federal perjury statute, see United States v. Sherman, 150 F.3d 306, 310 (3d Cir.1998), punishes anyone who "knowingly makes any false material declaration" under oath in a court proceeding. 18 U.S.C. § 1623(a).[17] A material statement is one that has "a natural tendency to influence, or was capable of influencing, the decision of" the decisionmaker to which the statement was addressed. Kungys v. United States, 485 U.S. 759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) (citing cases as examples). Materiality is an element of the offense; it must be proven by the government and decided by the jury. See United States v. Gaudin, 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); United States v. Akram, 152 F.3d 698, 700 (7th Cir.1998) ("Since Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), it has been clear that materiality under § 1623(a) is an element of the prosecution's case and must therefore be submitted to the jury and proven beyond a reasonable doubt.").

Mr. Gellene challenges his conviction on several grounds. First, he claims that the evidence was not sufficient to prove his guilt beyond a reasonable doubt because his testimony at the fee hearing did not constitute a knowing "use" of a "false material" document. Second, he asserts (for the first time on appeal) that, because the document was literally true, his statement based on the declaration cannot form the basis for a perjury conviction. And, third, he submits that the district court should have granted the motion for judgment of acquittal. We shall address the first two contentions in some detail and, in the course of our analysis, also discuss the sufficiency of the evidence.

a.

The false swearing statute, as the government seeks to apply it here, requires the "use" of a false statement. Mr. Gellene claims that his testimony at the fee hearing was entirely and historically accurate. In his view, the focus of the inquiry was on another paragraph of his March 1994 declaration, the paragraph that disclosed his relationship with Goldman Sachs. Mr. Gellene contends that he did not "use" the paragraph mentioned in the indictment because he never referred to that paragraph or used that paragraph to bolster his testimony; the inquiry was limited to Milbank's relationship with Goldman Sachs, and he made no mention at the fee hearing of the paragraph set forth in the indictment.

We cannot accept this argument. The thrust of JNL's challenge to the fee petition was a challenge to Milbank's divided loyalty. Although its allegation was limited to Milbank's association with Goldman Sachs, a fair interpretation of the record-and one the jury was certainly entitled to accept-was that JNL's foundational concern was that Milbank's divided loyalties might jeopardize the position of the creditors. The statement at issue in the indictment informed, and assured, the bankruptcy court that, beyond the area of acknowledged concern (Milbank's relationship with Goldman Sachs), there were no other areas of representation of which Mr. Gellene was aware. The statement conveyed the message that, once he met JNL's concern about Goldman Sachs, there was no other cause for concern about Milbank's divided loyalties and the fee petition could be approved.

We believe that the district court was correct in its determination that Mr. Gellene "used"[18] the designated paragraph of the supplemental statement in his 2014 application during his testimony. His reference to-and his reliance upon-the application allowed him to demonstrate not only that he had disclosed the representation of Goldman Sachs but also that he had examined other possible areas of concern and had determined that there were no other similar representations that warranted the court's scrutiny before awarding fees.

For essentially the same reasons, we believe that the use of the application was material. The district court noted that a document "is material if it has a natural tendency to influence or is capable of influencing the decision of the person to whom it was addressed." R.50 at 6 (citing United States v. Gaudin, 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), and United States v. Ross, 77 F.3d 1525, 1545 (7th Cir.1996)). According to the district court, the testimony of David Gelfand, Mr. Gellene's partner at Milbank who examined Mr. Gellene at the fee hearing, was sufficient evidence of materiality; Mr. Gelfand testified that the document was introduced to convince the bankruptcy court to award attorney's fees.

Our study of the record convinces us of the correctness of the district court's ruling. The jury was entitled to believe that the statement was designed to lull the bankruptcy court and the parties into believing that there were no other Milbank relationships deserving of scrutiny before the award of fees. The jury was entitled to conclude that the sequence of events established that Mr. Gellene had knowingly used the document to convey such an impression to the bankruptcy court. Indeed, Mr. Gellene stated prior to the hearing that he intended to use the declarations in response to JNL's allegation that Milbank had conflicts of interest. David Gelfand, who examined Mr. Gellene at that hearing, later testified that Mr. Gellene had chosen to proffer his sworn declarations as exhibits and had orchestrated the subsequent questioning of his own sworn testimony. According to Gelfand, the purpose in presenting the documents was to establish that Milbank was entitled to the $2 million in fees because all potential conflicts had been disclosed and considered by the bankruptcy court. There is no question that his proffer of the statement constituted use of a material document under § 1623.

The record permitted the jury to conclude that Mr. Gellene knowingly introduced the false document in order to gain approval of Milbank's $2 million fee request. Evaluating the testimony presented to it, the jury was entitled to conclude that Mr. Gellene had virtually bragged about the forthrightness of Milbank's disclosure of its representation of Goldman Sachs, all the while knowing that no one involved in the bankruptcy proceedings was aware of Milbank's undisclosed representations of South Street and the other entities. It was not until the next year that the falsity of that disclosure information was discovered. Only then could the United States Trustee seek return of the fees and an order of sanctions against Milbank.

Accordingly, we believe that sufficient evidence existed for the district court to find that materiality has been established.

b.

Mr. Gellene contends that his conviction under § 1623 cannot stand because the statement made in the paragraph set forth in the indictment is literally true. The government made no effort to prove, he contends, that Milbank's undisclosed clients-South Street, Greycliff and Salovaara-were "institutional creditors" or "equity security holders" of Bucyrus. Because there was nothing "materially false" about that paragraph of Mr. Gellene's declaration, he claims, the government could not have proven those necessary elements of the crime of perjury under § 1623. Therefore, he submits, his perjury conviction cannot be sustained.[19]

The government points out that, because Mr. Gellene has raised this issue for the first time on appeal, he may obtain a reversal only if he can demonstrate a "manifest miscarriage of justice." United States v. Hickok, 77 F.3d 992, 1002 (7th Cir.), cert. denied, 517 U.S. 1200, 116 S.Ct. 1701, 134 L.Ed.2d 800 (1996). It further argues that a reviewing court should uphold the conviction as long as the falsity is established by a "common sense reading" of the language used. United States v. Yasak, 884 F.2d 996, 1001 (7th Cir.1989). The government then submits that South Street and Greycliff were "institutional creditors" and that Mr. Gellene was fully aware that these entities were represented by Milbank at the time he stated that he was "unaware" of such creditors.[20]

The jury was entitled to credit the testimony of Alfred Eckert, partner of Mikael Salovaara and half-owner of South Street and Greycliff, who stated that South Street's first investment was a secured loan to Bucyrus in the summer of 1992. As Eckert explained, South Street had loaned $35 million to Bucyrus "and we were collateralized by all the assets of the company so that . we would be paid off first if there was a problem." Tr. 573. Eckert also testified that the interest of South Street certainly was affected by the Bucyrus bankruptcy. It is obvious from this testimony that, whether or not Mr. Gellene defines it as an "institutional creditor," South Street was a party in interest in the Bucyrus bankruptcy, one that should have been identified and disclosed by Mr. Gellene on his Rule 2014 declaration as long as he or his firm had any connection with it.

Because it is clear that South Street and Greycliff were institutions that had lent to and were owed millions of dollars by Bucyrus, we believe that the jury had sufficient information from the trial testimony of Eckert and others to determine that South Street and Greycliff were institutional creditors of the debtor Bucyrus. Accordingly, it was not a miscarriage of justice for the jury to find that South Street and Greycliff fit the term "institutional creditor" and then to conclude that Mr. Gellene's supplemental declaration was false.

C. Admissibility of Rule 404(b) Evidence

1.

Mr. Gellene next submits that the district court abused its discretion in admitting evidence, pursuant to Rule 404(b) of the Federal Rules of Evidence,[21] of certain other events on the ground that they were relevant and probative on the issue of intent.

During the course of trial, the court admitted evidence that Mr. Gellene had misrepresented his status as a member of the bar when applying to become a member of the bar of the Eastern District of Wisconsin: He stated that he was a member of the bar of the Southern District of New York and had been a member since 1981, but in fact he has never been a member of that bar, despite repeated appearances in that court over the years. In addition, Mr. Gellene practiced law in New York State between 1981 and 1990 without ever joining that bar. During that time, he represented himself to be a member of the New York bar in legal publications and court filings. The court also admitted evidence of (1) Mr. Gellene's misrepresentation to the Colorado bankruptcy court concerning his failure to produce discovery documents, and (2) Mr. Gellene's misrepresentation to the Wisconsin bankruptcy court in this case concerning his law firm's relationship with Lotus Cab Company.

Mr. Gellene explained that he had passed the bar but had neglected to complete the requisite paperwork to be licensed. He also admitted that he did not tell his law firm that he was not a member of the bar and, as a result, practiced law for almost nine years without a proper license. Nevertheless, he contends that the government sought to admit this irrelevant evidence to prove his propensity to make misrepresentations, thereby allowing the jury to infer that he must have been untruthful and even must have fraudulently intended the charged conduct. In his view, stating that he was a licensed attorney when he only had passed the bar exam, although not commendable conduct, is not equivalent to the state of mind involved with providing false testimony as to a material issue under litigation.

In admitting the evidence, the district court reasoned that, by denying that he had the requisite fraudulent intent for the charged crimes, Mr. Gellene had made intent an issue in the case; therefore, the court concluded, the government was entitled to rebut that contention with evidence of other bad acts that tended to undermine the defendant's innocent explanations for his act. Concerning Mr. Gellene's bar status, the court determined that there was clear evidence of (1) his knowledge that he was not a member of the New York state bar and (2) "his continuing intent for a period of almost nine years to deceive anyone who would have an interest [in] believing that indeed he was a member of the New York bar." Tr. 1480. The court then determined that this intent to deceive concerning his bar status was similar to his intent to defraud, to deceive and to perjure himself under Counts 1, 2 and 3 of the indictment. It noted Mr. Gellene's status as an officer of the court-in the bankruptcy court in Milwaukee, a federal court in New York, a bankruptcy court in Denver, or elsewhere-and then found that his conduct in those courts was similar and "appropriate to consider on the very narrow issue of this defendant's intent in his candor with the United States Bankruptcy Court in the Eastern District of Wisconsin." Tr. 1482.

2.

We review the district court's determinations concerning the admissibility of evidence under the abuse of discretion standard. See United States v. Lerch, 996 F.2d 158, 162 (7th Cir.1993). Our circuit's traditional four-part test to determine the admissibility of evidence under Rule 404(b) permits the admission of prior acts when:

(1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

United States v. Asher, No. 98-1700, 178 F.3d 486, 491 (7th Cir.1999). Our review, on appeal, of the district court's application of Rule 404(b) requires us to "ascertain whether the tendered evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the charged crime." United States v. Allison, 120 F.3d 71, 74 (7th Cir.), cert. denied, 522 U.S. 987, 118 S.Ct. 455, 139 L.Ed.2d 389 (1997) (emphasis added). When the defendant is charged with a specific intent crime, as Mr. Gellene is, "the government may present other acts evidence to prove intent." United States v. Lewis, 110 F.3d 417, 420 (7th Cir.) (quoting United States v. Long, 86 F.3d 81, 84 (7th Cir.1996)) (citations and internal quotation marks omitted), cert. denied, 522 U.S. 854, 118 S.Ct. 149, 139 L.Ed.2d 95 (1997). The admission of evidence of other crimes for that limited purpose is proper.

We cannot say that the district court abused its discretion in admitting the evidence. The district court was correct in its determination that Mr. Gellene had placed his intent in issue. It was clear from the parties' opening statements that the facts were basically not in dispute and that the focus of the trial would be on the intention underlying Mr. Gellene's conduct.[22] On this record, we also think that the district court was entitled to conclude that Mr. Gellene's false representations regarding his bar status and his other misrepresentations were similar enough in nature to the charged offenses to be relevant. Both the charged conduct and these other misrepresentations involve intentional misrepresentations before a court. The evidence admitted by the district court, like the offenses of conviction, tended to show intentional dishonesty, absence of mistake, and a cavalier disregard for the truth in his dealings with tribunals. For instance, Mr. Gellene's intentional deception in falsely representing to various courts (including the United States District Court for the Eastern District of Wisconsin) that he was a member of the bars of other courts, when he was not, is not dissimilar to his intentional deception in falsely representing to the bankruptcy court that he had no connection with other parties in interest in the bankruptcy, when in fact he was representing the major secured creditor. Certainly, his attempt to treat the earlier conduct as de minimis, trivial, a matter of neglect, a matter of embarrassment but not a knowing deception-when the circumstances evince knowing deception-is similar to the dishonesty reflected in his filings of the two fraudulent disclosure statements and the perjurious statement he made subsequent to the filing of those documents in order to win the requested $2 million fee award.[23]

Even when such evidence has a slight tendency to show Mr. Gellene's propensity to commit wrongs, "its predominant effect pertained to the legitimate purpose of proving [the defendant's] intent." United States v. Sinclair, 74 F.3d 753, 761 (7th Cir.1996) (affirming district court's discretionary decision to admit evidence that the defendant had signed certificates affirming that he complied with the bank's code of conduct but had not obtained permission to serve as an officer of another corporation, as the code required). We note, moreover, that the district court instructed the jury that Mr. Gellene was "not on trial for any act or conduct not alleged in the indictment" and that the jury was allowed to consider "evidence of acts of the defendant other than those charged in the indictment . only on the question of the defendant's intent." Jury Instructions at 4, 9. Given these limiting instructions, we cannot say that the danger of prejudice outweighed the probity of the evidence. The district court did not abuse its discretion in admitting evidence of Mr. Gellene's false representations and omissions concerning his bar status with respect to the "narrow issue" of his intent.

D. The Court's Sentencing Determinations

1. U.S.S.G. § 3B1.3

Mr. Gellene contends that the district court erroneously enhanced his conviction on Count 3, the perjury charge, under U.S.S.G. § 3B1.3 for abuse of a position of trust. According to Mr. Gellene, he does not occupy a position of trust with respect to his client Bucyrus, the bankruptcy court, the creditors, or his law partners.

We review a district court's interpretation of "position of trust" de novo. However, because the question whether the defendant occupied a position of trust is a factual one, we review that determination for clear error. See United States v. Bhagavan, 116 F.3d 189, 192 (7th Cir.1997). The § 3B1.3 adjustment is appropriate if (a) the defendant occupied a position of trust, and (b) his abuse of the position of trust significantly facilitated the offense. See United States v. Emerson, 128 F.3d 557, 562 (7th Cir.1997). Whether a defendant holds a position of trust depends on the amount of professional managerial discretion he has been given, see § 3B1.3, or on his "access or authority over things of value." United States v. Lamb, 6 F.3d 415, 419 (7th Cir.1993). When a person is given a great deal of autonomy by his employer, for example, and is in a position to steal or to do other harm without being caught, that person, if he abuses that trust, may be punished more heavily. See United States v. Deal, 147 F.3d 562, 563 (7th Cir.1998).

Mr. Gellene was a bankruptcy lawyer representing a large corporate client in bankruptcy. He held a position of considerable professional discretion. See § 3B1.3 n. 1 (giving the example that a lawyer who embezzles from his client abuses a position of trust). In our view, Mr. Gellene, as lead Milbank lawyer in the Bucyrus bankruptcy, occupied a position of trust.

We next ask, therefore, whether Mr. Gellene's abuse of his role as attorney for the debtor significantly facilitated the commission of the perjury. The district court determined that it did; Mr. Gellene, as counsel for Bucyrus, abused that position of trust by concealing critical information from his client, namely his representation of the senior secured creditor, South Street. Mr. Gellene's offense was lying about those representations in the Rule 2014 disclosure statements, at the bankruptcy fees hearing, and over a two-year period during which Bucyrus was never told of the conflicting representation. As the district court stated, such nondisclosure constituted a serious breach of trust and of "the ethical obligations that one owes to his client to be free from all the intrusions that surround potential conflicts of interest." Sent. Tr. 103.

We believe there was no error in the district court's imposition of the enhancement. Mr. Gellene's position representing the debtor brought with it fiduciary duties to act in the debtor's interest throughout the bankruptcy proceeding. See Bhagavan, 116 F.3d at 193 (concluding that the president/majority shareholder, with fiduciary duties to act in the interests of minority shareholders, occupied a position of trust). His undisclosed representation of the senior secured creditor of the debtor certainly created a potential if not actual conflict of interest and thus was a breach of his position of trust with the debtor. Mr. Gellene also abused his position of trust as an officer of the bankruptcy court by using his fraudulent sworn document to verify his perjurious sworn testimony.

2. Imposition of fine

Mr. Gellene claims that the district court did not properly consider his inability to pay the $15,000 fine imposed on him at sentencing. He asserts that the government miscalculated his net worth at $360,131.50 and that he actually is insolvent with three daughters dependent upon him for financial support. According to Mr. Gellene, the fine was imposed in disregard of the applicable sentencing standards and must be set aside.

Section 5E1.2 mandates that a district court impose a fine on a defendant unless he "establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). It is the defendant's burden to demonstrate that he lacks the ability to pay. It is the court's duty to consider the factors for imposition of a fine found in U.S.S.G. § 5E1.2(d) and 18 U.S.C. § 3572.[24] See United States v. Young, 66 F.3d 830, 838 (7th Cir.1995). We do not require that the sentencing court make specific findings regarding each of the relevant factors, however; in fact, the articulation of findings may be satisfied by adopting the PSR findings. See United States v. Bauer, 129 F.3d 962, 966 (7th Cir.1997). "[T]he sentencing court must consider the relevant factors and provide a reasoned and reviewable basis for its decision to impose a fine." Id. at 968.

In this case, the record makes clear that the district court spent considerable time properly considering the relevant factors. The court followed the PSR's factual findings, questioned Mr. Gellene concerning his current financial situation, and then asked Mr. Gellene and his attorney to meet over lunch with the probation officer who prepared the presentence report in order to provide to the court "a little detail about where all this money went in the last six years."[25] Sent. Tr. 69. The probation officer's notes from that discussion became a supplement to the PSR-a supplement created by both parties. See Bauer, 129 F.3d at 969 (recognizing that the defendant approved the supplement to the PSR). The court reviewed the material and questioned Mr. Gellene further concerning the estimated unpaid taxes and life insurance. He noted the high cost of living in New York and costs involved in schools for his daughters. After assessing Mr. Gellene's financial situation along with the nature of his conduct, the court believed that "the interests of justice and the interests of society" required some fine within the guideline range. Sent. Tr. 146. It determined that $15,000 was the appropriate fine within the guideline fine range of $4,000 to $40,000 for his offense level.

In our view, the district court gave Mr. Gellene the opportunity to prove his inability to pay a fine when it asked him to meet again with the probation officer over lunch. It carefully reviewed Mr. Gellene's claim of insolvency during the sentencing hearing before rejecting it. Mr. Gellene has given us no grounds for re-evaluating the district court's decision on this matter. The district court was within its discretion, and committed no error, when it fined Mr. Gellene. Moreover, " 'we have no authority to inquire into the precise amount of the fine the district judge specified,' because claims 'that the judge should have made a greater departure . [are] outside our jurisdiction.' " United States v. Sanchez Estrada, 62 F.3d 981, 995 (7th Cir.1995) (quoting United States v. Gomez, 24 F.3d 924, 927 (7th Cir.), cert. denied, 513 U.S. 909, 115 S.Ct. 280, 130 L.Ed.2d 196 (1994) (citation omitted)); see also Young, 66 F.3d at 839-40 (concluding that we are without authority to depart below the minimum fine level).

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

FOOTNOTES

1. According to Assistant United States Trustee John Byrnes, South Street Funds purchased Bucyrus' manufacturing equipment pursuant to a leaseback arrangement in order to raise money prior to the bankruptcy. Therefore, South Street is a creditor that held the debtor's equipment along with other secured debts.

2. Filing bankruptcy along with Bucyrus was a related corporate entity called B-E Holdings, Inc.

3. Rule 2014, "Employment of Professional Persons," states:(a) Application for an order of employmentAn order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals . shall be made only on application of the trustee or committee. The application shall be filed and . a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of 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. 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, or 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.Fed. R. Bankr.P.2014 (emphasis added).

4. The bankruptcy court also told Mr. Gellene: "New York is different from Milwaukee. Professional things like conflicts [of interest] are taken very, very seriously. And for better or worse you're stuck in Wisconsin." Tr. 916.

5. In November 1993, after Salovaara's partner Alfred Eckert decided to pursue employment elsewhere, Salovaara threatened and ultimately took legal action against him. Milbank served as Salovaara's attorney through June of 1994, although a New Jersey firm was listed as the counsel of record in the initial litigation. The dispute between Salovaara and Eckert involved control of South Street and Greycliff; it was still ongoing in 1998. On December 9, 1993, during the Salovaara-Eckert dispute, Mr. Gellene and other Milbank lawyers began representing South Street and Greycliff in an acquisition of a $15 million note and claim in the Colorado bankruptcy of George Gillett. Mr. Gellene was the Milbank partner in charge of the matter. In fact, Mr. Gellene billed work on this project the same day that he signed his second declaration in the Bucyrus case.

6. An internal Milbank memorandum stated that the matter had been "billed prior to a conflict arising in connection with our representation of Bucyrus-Erie in its bankruptcy." Tr. 500; Ex. 48. Nevertheless, Milbank did continue to represent South Street/ Greycliff in this matter in 1995 and 1996, and Mr. Gellene directly participated in this further work.

7. Mr. Gellene's internal memo explained the write-off:These charges represent fees and expenses incurred prior to February 18, 1994, the date of filing of the chapter 11 petition for Bucyrus-Erie. Under bankruptcy law, retaining these amounts as receivable would cause the firm to be a creditor of Bucyrus-Erie, creating both a potential conflict of interest and potential grounds for disqualification and denial of post-bankruptcy fees. I do not believe the risk is worth taking in view of the amount of the requested write-off, which is less than one-percent of all pre-bankruptcy fees.Tr. 503-04; Ex. 50.

8. On June 20, 1994, the bankruptcy court had rejected the disclosure statement submitted as part of the proposed Bucyrus reorganization on the ground that the statement had failed to make complete disclosures on some matters, including inadequate disclosure of the roles of Salovaara, South Street and Greycliff in Bucyrus' pre-bankruptcy dealings and failure to explain why certain parties-including Salovaara, South Street and Greycliff-were receiving releases from future litigation. However, the court urged the parties to settle these issues and to agree upon a plan of reorganization by the end of 1994 for tax reasons.

9. Based on Mr. Gellene's false statements, the bankruptcy court subsequently directed Milbank to return the $1.8 million to the bankruptcy estate.

10. § 152. Concealment of assets; false oaths and claims; bribery.A person who-.(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury . in relation to any case under title 11; . shall be fined under this title, imprisoned not more than 5 years, or both.

11. Federal Rule of Bankruptcy Procedure 2014 is presented in full in footnote 3.

12. The district court set forth the following elements of a § 152 violation: (1) a bankruptcy proceeding existed under Title 11 of the United States Code; (2) the defendant made a statement relating to the proceedings; (3) the statement was made under penalty of perjury; (4) the statement related to a material matter; (5) the statement was false; and (6) the statement was made knowingly and fraudulently. Mr. Gellene does not deny that the applications were sworn declarations in a bankruptcy case which were false and knowingly made. He challenges only two elements of the crime, namely that the false statements were "fraudulently made" and "material."

13. The bankruptcy treatise Collier on Bankruptcy states that a false oath or account, to be "knowingly and fraudulently" made, "must have been intentionally made with the purpose of deceiving or cheating parties affected by the bankruptcy case." 1 Collier on Bankruptcy ¶ 7.02[2][a] [v] at 7-47 to 7-48 (Lawrence P. King ed., 15th ed. rev.1999).

14. See Merriam-Webster's Collegiate Dictionary (10th ed.1998) (synonym of "fraudulent" is "deceitful"); Black's Law Dictionary (5th ed. 1979) ("To act with 'intent to defraud' means to act willfully, and with the specific intent to deceive or cheat.").

15. See also Lindholm, 24 F.3d at 1083-84 (criminal statute § 152 applies even if false statements do not affect the outcome of the bankruptcy proceedings); United States v. Yagow, 953 F.2d 427, 432-33 (8th Cir.) (citing cases and holding that debtor's sworn statement attesting to his lack of employment, aimed at securing in forma pauperis status before the tribunal, is material), cert. denied, 506 U.S. 833, 113 S.Ct. 103, 121 L.Ed.2d 62 (1992); In re Robinson, 506 F.2d 1184,

1188-89 (2d Cir.1974) (holding that materiality does not require a showing that the creditors were prejudiced by the false statement); cf. United States v. Grant, 971 F.2d 799, 808-09 (1st Cir.1992) (rejecting contention that § 152 implicitly requires that concealment involve a substantial amount of property material to the estate).

16. The statute, in pertinent part, states:§ 1623. False declarations before grand jury or court.(a) Whoever under oath (or in any declaration . ) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.18 U.S.C. § 1623.

17. Congress adopted § 1623 in 1970 in the Organized Crime Control Act of 1970. It was enacted "to facilitate Federal perjury prosecutions and establish a new false declaration provision applicable in federal grand jury and court proceedings." H.R.Rep. No. 91-1549, 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 4007, 4008. For discussions of the similarities and distinctions of these statutes, see Dunn v. United States, 442 U.S. 100, 107-12, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979); Sherman, 150 F.3d at 310-12; United States v. Molinares, 700 F.2d 647, 651-52 (11th Cir.1983); United States v. Watson, 623 F.2d 1198, 1207 (7th Cir.1980); and United States v. Gross, 511 F.2d 910, 914-15 (3d Cir.), cert. denied, 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed.2d 249 (1975). See also Kathryn Kavanagh Baran & Rebecca I. Ruby, Perjury, 35 Am.Crim. L.Rev. 1035 (1998).

18. For a compendium of cases applying the term "use" in § 1623, see Baran & Ruby, supra note 17, at 1041 n. 38.

19. Mr. Gellene relies on Bronston v. United States, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), when claiming that literally true statements cannot form the basis for a perjury conviction. In Bronston, the president of the debtor corporation was examined as a witness by a creditor's lawyer. He answered all the questions truthfully; however, the lawyer never asked him directly if he had a personal bank account in Switzerland, and one of his answers implied that he did not. When the government discovered the Swiss account, it charged him with perjury for misleading the questioner by answering in a literally truthful but unresponsive way. The Supreme Court characterized the lawyer's questioning of the witness as "a testimonial mishap that could readily have been reached with a single additional question by counsel alert-as every examiner ought to be-to the incongruity of petitioner's unresponsive answer." Bronston, 409 U.S. at 358, 93 S.Ct. 595. The Court placed the blame on the attorney for failing "to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." Id. at 358-59, 93 S.Ct. 595. It concluded that the perjury prosecution was a "drastic sanction to cure" that testimonial mishap, one that the statute did not intend. "Precise questioning is imperative as a predicate for the offense of perjury." Id. at 362, 93 S.Ct. 595.As can readily be seen, Bronston is inapposite to the case before us. It focuses on adversary examination of a witness; it does not encompass a case in which the witness orchestrates his own false evidence under direct examination through the planned questions of his own attorney. Mr. Gellene has no basis on which to rely on Bronston.

20. The government explained that South Street and Greycliff were investment entities engaging in the same type of transactions as Goldman Sachs. Although set up as separate "legal structures" for "legal and tax reasons," South Street and Greycliff were one and the same for operational purposes. The amount in the funds was $180 million, making it larger than many banks. The money had been raised from pension funds, insurance companies and individual investors. South Street and Greycliff were run by Mikael Salovaara and Alfred Eckert, two men who had operated similar, successful investment vehicles while working for Goldman Sachs and believed they could do the same or better away from Goldman Sachs. In essence, Eckert served as chairman and Salovaara as president.South Street's $35 million investment in Bucyrus was a secured loan structured, in part, as a sale/lease-back of company assets. At trial, Eckert characterized the transaction: "We loaned the money and we were collateralized by all the assets of the company . like a mortgage so that we would be paid off first if there was a problem." Tr. 573. In the bankruptcy case, Mr. Gellene himself characterized South Street as the "major secured lender" of Bucyrus. Tr. 968.South Street and Greycliff were multi-million dollar organizations, not individuals. As such, they were "institutions" or "institutional." South Street and Greycliff also served as major financial lenders, a characterization synonymous with "institutional creditor."Although Mr. Gellene's brief contends that there were no institutional creditors involved in the case, Mr. Gellene's first sworn declaration stated, in part: "Milbank has advised the Debtors that it has in the past represented and currently represents certain equity security holders and institutional creditors of the Debtors in matters unrelated to the Debtors, and may in the future do so." Ex. 22, ¶ 3. The document then identifies the representation of Goldman Sachs and JNL. Mr. Gellene's second sworn declaration repeated his use of the terms "equity security holder" and "institutional creditors" when disclosing his firm's representation of Cowen & Co. and Mitsubishi International Corporation. Ex. 27, ¶ 3. Although "institutional creditor" is not defined under the Bankruptcy Code, "equity security holder" is defined as a party owning stock in the debtor corporation. See 11 U.S.C. § 101. But in listing Goldman Sachs, JNL, Cowen & Co. and Mitsubishi International Corporation, Mr. Gellene represented their interests as beyond simply equity security holders, and suggested that they were institutional creditors as well. See Ex. 22, ¶ 6; Ex. 27, ¶ 3.

21. Rule 404(b) of the Federal Rules of Evidence provides that evidence of prior crimes, wrongs or acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" but not to prove a defendant's character in order to show he acted in conformity with the charged offense. Fed.R.Evid. 404(b).

22. See Tr. 60-61 (AUSA: "[John Gellene is] going to tell you that he didn't knowingly deceive anybody, that wasn't his intention at all"); Tr. 1087 (Counsel for Gellene to the court: "[T]he issue in this case is the defendant's state of mind.").

23. See, e.g., Morganroth & Morganroth v. DeLorean, 123 F.3d 374, 379 (6th Cir.1997) (holding that evidence that defendant, plaintiff's former client, consistently failed to pay other lawyers was relevant to prove the element of intent to defraud); Federal Deposit Ins. Corp. v. Fidelity & Deposit Co., 45 F.3d 969, 979-80 (5th Cir.1995) (affirming trial court's discretion to admit evidence of the bank officer's prior bad loans to demonstrate the bank officer's intent to make fraudulent loans in this case); United States v. Grissom, 44 F.3d 1507, 1513-14 (10th Cir.) (affirming trial court's discretion to admit evidence of defendant's underreporting of work hours and falsified payroll records to establish defendant's intent to make false statements on loan disbursement requests, particularly

because the defendant's theory of defense was lack of intent to make false statements), cert. denied, 514 U.S. 1076, 115 S.Ct. 1720, 131 L.Ed.2d 579 (1995); United States v. Jerkins, 871 F.2d 598, 604 (6th Cir.1989) (agreeing with district court's conclusion that the failure to file a return and the evasion of taxes are substantially similar).

24. 18 U.S.C. § 3572(a) states:(a) Factors to be considered.-In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)-(1) the defendant's income, earning capacity, and financial resources;(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;(3) any pecuniary loss inflicted upon others as a result of the offense;(4) whether restitution is ordered or made and the amount of such restitution;(5) the need to deprive the defendant of illegally obtained gains from the offense;(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

25. The presentence report listed Mr. Gellene's net worth at $360,131.50. It included a pension fund of $310,000, a savings account of $55,000, and a checking account of $5,000. At the sentencing hearing, the probation officer reported that Mr. Gellene earned $2,720,000 in income from Milbank from 1992 to 1996; Mr. Gellene did not dispute this amount.

RIPPLE, Circuit Judge.



## UNITED STATES v. GELLENE (1999)

**Docket No:** No. 98-2985.

**Decided:** July 20, 1999

# Faculty

**Sam J. Alberts** is a partner in Dentons US LLP's Restructuring, Insolvency and Bankruptcy Group in Washington, D.C. Ranked by *Chambers USA* since 2005, he is experienced in both in- and out-of-court restructurings, both in the U.S. and abroad. Named in *The Best Lawyers in America* (2018) and listed in *The Legal 500 US*, Mr. Alberts has represented clients in high-value restructurings, investigations, workouts, litigation and sale transactions. He has served as and represented trustees in bankruptcies, as well as creditors, debtors and other parties, including governmental and quasi-governmental entities. He also has experience with respect to distressed financial institutions, pensions and health care. Mr. Alberts has been recognized in *The Deal Pipeline*'s "Top Bankruptcy Lawyers" league table and as a "Local Litigation Star" in the District of Columbia by *Benchmark Litigation*. He is admitted to practice in the District of Columbia, Maryland and Virginia, and before the U.S. Courts of Appeals for the District of Columbia Circuit, Fourth Circuit and Ninth Circuit, the U.S. Court of Federal Claims, and the U.S. District Courts for the District of Columbia, Eastern and Western Districts of Virginia and the Western District of Washington. Mr. Alberts received his B.A. *cum laude* in 1987 from New York University and his J.D. in 1992 with honors from George Washington University School of Law.

**Hon. Jeffery W. Cavender** is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, sworn in on March 2, 2018. Prior to his appointment to the bench, he was a partner in the financial restructuring practice of Troutman Sanders LLP, where he primarily represented corporate debtors and secured lenders in chapter 11 cases and mortgage servicers in consumer-related litigation and bankruptcy matters. Judge Cavender previously was a partner in the bankruptcy group of McKenna Long & Aldridge LLP (n/k/a Dentons LLP) and served as the general counsel for a national mortgage company. He chaired the Bankruptcy Section for the Atlanta Bar Association from 2017-18 and was a member of its board of directors from 2012-18. During Judge Cavender's tenure as chair, the Atlanta Bar Bankruptcy Section was named the national CARE chapter of the year and received the *Pro Bono* Award for Excellence and the Small Section of the Year Award from the Atlanta Bar. He is an active member of the National Conference of Bankruptcy Judges, the Turnaround Management Association and ABI, having previously served on the advisory board for ABI's Southeast Bankruptcy Workshop. In 2021, Judge Cavender was appointed by Chief Justice John Roberts to serve a three-year term on the Federal Judicial Center's Bankruptcy Judges Education Advisory Committee, and he was recently reappointed by the Chief Justice to serve a second three-year term. He received his undergraduate degree in history *summa cum laude* in 1990 from Berry College, and his J.D. *cum laude* from the University of Georgia School of Law in 1993, where he was a member of the *Georgia Law Review* and was inducted into the Order of the Coif.

**Hon. Sean H. Lane** is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Sept. 7, 2010. He previously clerked for Hon. Edmund V. Ludwig, U.S. District Judge for the Eastern District of Pennsylvania, from 1991-92, as well as for Hon. Charles R. Richey, U.S. District Judge for the District of Columbia, from 1992-93. From 1993-97, he practiced with the law firm of BakerHostetler in Washington, D.C., and thereafter served as a trial attorney in the Department of Justice, Civil Division, National Courts Section, until 2000. From 2000 until he was appointed to the bench, Judge Lane served as an assistant U.S. attorney for the Southern District of New York and was

also chief of the Tax & Bankruptcy Unit of that office. During his time in the U.S. Attorney's Office, he was awarded the Attorney General's Distinguished Service Award in 2005 and the Henry L. Stimson Medal by the New York City Bar Association in 2008. Judge Lane is a member of the Federal Bar Council and has served as an adjunct professor at both New York University School of Law and Fordham Law School. He received his B.A. from New York University College of Art & Science in 1987 and his J.D. from New York University School of Law in 1991.

**Hon. Mina Nami Khorrami** is a U.S. Bankruptcy Judge for the Southern District of Ohio in Columbus and was appointed on Sept. 10, 2021, by the U.S. Court of Appeals for the Sixth Circuit. She began her career in St. Louis, Mo., where she practiced bankruptcy law and litigation as an associate with the firms of Vogler & Associates and then with Compton, Wells & Hamburg. While she practiced in St. Louis, she successfully argued a case before the U.S. Court of Appeals for the Eighth Circuit. In 1991, Judge Nami Khorrami relocated to Columbus to open her own firm. Her practice focused on more complex chapter 7 and 13 bankruptcies, including arguing before the Bankruptcy Appellate Panel of the U.S. Court of Appeals for the Sixth Circuit. She also handled general civil litigation, foreclosure defense, and issues relevant to small businesses. Prior to her appointment to the bench, she also served as a chapter 7 panel trustee. Judge Nami Khorrami has served on numerous committees of the Columbus Bankruptcy Bar and was a frequent speaker at CLE programs. She has long been committed to bankruptcy *pro bono* service in the Columbus community, and in 2013 she received the Columbus Bar Association and Foundation Award for her involvement in the implementation of the chapter 7 bankruptcy *pro bono* project in Columbus. Judge Nami Khorrami also served as vice-chair of the court's Attorney Advisory Committee and as co-chair of its Consumer/Small Business subcommittee. She is a past co-chair of the Columbus chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC) and a past co-chair of the Bankruptcy Law Institute's (BLI's) Planning Committee. She also served on the board of trustees for the Credit Education Coalition (CEC) and was a member of the Chapter 13 Liaison Committee. Judge Nami Khorrami is a member of the Education Committee of the National Conference of Bankruptcy Judges for 2024, an editor of *Conference News*, and a co-chair of NCBJ's Public Outreach Committee. She is a frequent speaker for ABI programs, and she serves on the advisory board of ABI's Midwest Regional Bankruptcy Seminar. Judge Nami Khorrami received her B.S. in business administration from the University of Missouri-St. Louis and her J.D. from Valparaiso University School of Law.

**Brian L. Shaw** is a member of Cozen O'Connor's national Bankruptcy, Insolvency and Restructuring Practice in Chicago and has more than 30 years of experience representing all types of constituents in bankruptcy and other insolvency matters and in related litigation. He previously was a member of Shaw Fishman Glantz & Towbin LLC. Mr. Shaw is a Fellow and on the Board of Regents of the American College of Bankruptcy, and he formerly served as ABI's president, chair and vice president of Membership. He also is a past chair of the Chicago Bar Association's Bankruptcy and Reorganization Committee. Mr. Shaw has authored and co-authored numerous articles in such national industry publications as the *A BI Journal*, *Law360*, *Norton Bankruptcy Law Letter*, *The Bankruptcy Strategist*, *Business Credit* and *Credit Today*, and he has spoken on a variety of bankruptcy-related topics at national and regional conferences. He is admitted to practice in Illinois and before the U.S. District Courts for the Northern and Central Districts of Illinois, Eastern and Western Districts of Wisconsin, Western District of Michigan and Northern District of Indiana, as well as the U.S. Courts of Appeals for the Third, Seventh and Eighth Circuits and the U.S. Supreme Court. Mr. Shaw received his B.A. from Tufts University and his J.D. *magna cum laude* from the University of Illinois College of Law.