When Conflicts Become Crimes: Professionals Representing Parties in Bankruptcy

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WHEN CONFLICTS BECOME CRIMES:

PROFESSIONALS REPRESENTING PARTIES IN BANKRUPTCY

BY

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On July 24, 1998, the United States District Court for the Eastern District of Wisconsin sentenced John G. Gellene to serve a fifteen month term of imprisonment on his conviction for violations of 18 U.S.C. Section 152 and 18 U.S.C. Section 1623. 1 Mr. Gellene’s conviction arose out of his failure to disclose his firm’s connections with creditors in the Bucyrus-Erie Company Chapter 11 Bankruptcy case. The editorialists at Bankruptcy Court Decisions’ News and Comment, in a flight of overheated rhetoric, commented on his conviction:

As you read this, you might want to remember that Gellene didn’t actually lie. His life, liberty and chosen career are all in jeopardy because he didn’t volunteer information (sounds like anybody you know?). In fact, the defense believes he is the first defendant ever charged or convicted on the premise that violation of Bankruptcy Rule 2014 is criminal conduct--and he is appealing. . . . If this ruling stands, it will forever change the way Bankruptcy law is practiced. 2

Before we explore whether that journal’s concern for the future of safe practice in bankruptcy is well-founded, an examination of the state of the law with respect to conflicts and the disclosure of those

1 United States of America v. Gellene, 24 F. Supp. 2d 922 (E.D. Wisc. 1998). 18 U.S.C. § 152 provides in pertinent part that: “[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 five years, or both.” 18 U.S.C. § 1623 provides in pertinent part: “[w]hoever 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, . . . knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.”

2 Bankruptcy Court Decisions’ News and Comment. “Special Issue on Conflicts Why John Gellene Received the Sentence He Did,” September 29, 1998.
conflicts in bankruptcy is required. Attorneys as a group, functioning as lawyers for the estate, lawyers for the debtor prior to filing, and as trustees themselves have had a part in bankruptcy crime as participants from the beginning.\(^3\) The common form of lawyer misbehavior has been embezzlement and the lying crimes associated with that act were done to conceal the embezzlement.\(^4\) While lying and stealing are (without need for citation) of ancient origin, these sins continue in the modern world.\(^5\) One wonders whether this conduct is inhibited in the least by the web of reporting and self reporting created to catch conflicts and defalcations. This article will suggest that while conflict of interest rules in bankruptcy are confused and, to the extent not confused, often wrong headed, nonetheless, practitioners in bankruptcy are at no real risk for criminal prosecution. Although in Mr. Gellene’s case we may properly blame the criminal, we shall see that, in part, he may have been victimized but only by the seduction of the shoddy practices of the world from which he came. At least, we may note that the prosecution of Mr. Gellene may, in fact, have a salutary effect on the state of practice (dare we say ethical practice?) in the national bankruptcy community.

\(^3\) The history of lying in bankruptcy, at least the first reported American decision, begins with Anonymous, 1 F.CAS. 1032 (Cir. D.PA. 1804). That case involved a putative bankrupt who wavered under oath as to his ownership of the brigg Abigail in 1799. The old circuit court concluded that lying to the Commissioner of Bankrupts was not an offense as the existing bankrupt law had been repealed. The court took the trouble to distinguish the continuing crime of perjury from oral wafflings under a repealed bankrupt law.

\(^4\) See Pruett v. United States, 3 F.2d 353 (9th Cir. 1925) (Trustee/lawyer convicted of embezzlement of estate funds); Jackson v. United States, 72 F.2d 764 (3d Cir. 1934) (Trustee/attorney/receiver convicted of embezzlement); United States v. Ivers, 512 F.2d 121 (8th Cir. 1975).

\(^5\) See, e.g., United States v. Center, 853 F.2d 568 (7th Cir. 1988); United States v. Unger, 949 F.2d 231 (8th Cir. 1991).
Representation of parties in bankruptcy is regulated by the applicable codes of professional conduct, provisions of the Bankruptcy Code governing the appointment of professionals and the attendant rules related to that Code and, theoretically, the Bankruptcy Code’s criminal provisions. Bankruptcy Code section 327(a) authorizes the employment of professionals who “do not hold or represent an interest adverse to the estate, and that are disinterested.” A “disinterested person” is defined in Bankruptcy Code section 101(14) as one who is not a “creditor” and one who “does not have any interest materially adverse to the interest of the estate or of any class of creditors or equity security holders.” Bankruptcy Rule 2014 requires disclosure of the “connections” of the professional, a rule which is designed to be used to enforce the foregoing provisions.6

Of course, the Rules of Professional Conduct for lawyers prohibit, in some degree, representation of adverse parties. For example, the ABA Model Rules of Professional Conduct 1.7(a) prohibits a lawyer from representing clients whose interest are “directly adverse.” Model Rule of Professional Conduct 1.7(b) precludes representation if a lawyer’s responsibilities to or interests in anyone else, including himself, may “materially limit” his ability to represent a client. Both of these

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6 As this is written, amendments are being contemplated with respect to Bankruptcy Rule 2014. While recognizing these comments are made in a true vacuum, it is difficult to believe that there will be some attempt at reducing the disclosure requirements without inhibiting the rule’s effectiveness. Further, it is difficult to see how they could be written to be more encompassing concerning disclosure. Perhaps more specificity is desirable, some guide to this confession. Bankruptcy courts have throughout the land provided such guidance. For example, Judge C. Timothy Corcoran III, United States Bankruptcy Judge for the Middle District of Florida has extensive advice on compliance with this rule on his website.
limitations may be waived by the client, but only if the lawyer “reasonably believes the representation
will not be adversely affected.” Model Rule of Professional Conduct 1.9(a) precludes representation
of a client in a “substantially related matter” when that client’s interest are “materially adverse to the
interests of the former client.” This restriction may also be waived by the former client.

With the concern over theoretical ethics evident by the existence of the bankruptcy provisions,
one may wonder where is the impact of the ordinary state law restrictions on professional conduct.
Outside of bankruptcy, few decisions of those entrusted with monitoring professional ethics exist related
to bankruptcy practice. The American Bar Association in Formal Opinion 271 held that there was no
ethical problem when a trustee is represented by the firm of which he is a member.\footnote{ABA Formal Opinion 271 (Oct. 25, 1946).} This opinion is
obviously from a different age wherein there must have been a modicum of sensitivity that a conflict
might arise from a trustee being represented by his own firm. The problem in that opinion was viewed
as one of fee. That is, would the trustee manipulate the administration of the estate in order to enhance
compensation to his brethren in his firm? The ABA opinion concludes that enough interested parties are
watching the fiduciary that that risk was really no risk at all. The ABA did opine in Informal Opinion
83-1501\footnote{ABA Informal Opinion 83-1501 (Oct. 9, 1983).} that a lawyer that had represented a special committee in bankruptcy could not represent a
new committee formed to question the activities of the prior committee chairman. Analysis in that
informal opinion tracked common rules with respect to conflicts of interest between a client and a
Occasionally, the restrictions in the extant rules of professional conduct have been used by courts in bankruptcy cases to support their conclusion. As noted below, absent the “appearance of impropriety standard,” the strictures of the Bankruptcy Code with respect to conflicts appear to be more intrusive than those in any ordinary state code of professional conduct. Of course, the rules of professional conduct are still in use aggressively in bankruptcy against those whom the provisions of the statutes do not reach. For example, in *In re Jaeger*\textsuperscript{10}, the bankruptcy court used the California Rules of Professional Conduct to disqualify counsel representing defendants in a fraudulent transfer action who had represented certain debtors in a group of consolidated Chapter 7 cases.\textsuperscript{11}

The provisions of the Bankruptcy Code noted above use a terminology and a technique that differs somewhat from the experience that lawyers had had under ethical systems based upon the Model Rules of Professional Conduct (or any of those rules predecessors). Broadly, the provisions of the Bankruptcy Code seem to disqualify (as trustee or as a professional representing the estate) without exception any professional who is a creditor or has an adverse interest. Nonetheless Bankruptcy Code section 327(c) also provides that a person is not disqualified from employment solely because the

\textsuperscript{9} See ABA Model Rule of Professional Conduct 1.9.


professional had represented a creditor unless “there is an actual conflict of interest.” What is an adverse interest, and how is it distinct from actual conflicts, if at all? Note at the outset the unusual and perhaps disconcerting ethical restrictions imposed by the Bankruptcy Code prohibiting creditors of the estate from employment as a professional. The experience of all lawyers (and many accountants) is that they seem to be able to represent clients who owe them money without any ethical dilemma. Note as well, that in ordinary practice, many forms of conflict may be waived. Thus, in a sense, lawyers confronting these perhaps stricter bankruptcy rules tend to balk at compliance or fail to understand the seriousness of the difference. For example, Bankruptcy Rule 2014 requires the disclosure of the connections of the professional from lawyers who are habitually and ethically constrained to keep representation secret. Of course, the foregoing is a charitable excuse. Frequently, the caught sinners in this area are not visitors to bankruptcy surprised by its rules. Mr. Gellene, as we shall see, was well acquainted with the rules he had violated.

The bankruptcy court’s culture itself also has inhibited clarity in application of the Code. Bankruptcy courts have traditionally viewed their control over the employment and compensation of professionals as largely within their good discretion. Unfettered discretion, however, in the bankruptcy court with respect to this issue does not seem to be consistent with many appellate court decisions concerning the application of these rules. Consequently, decisions about conflicts that are disqualifying

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12 See *In re Kridlow*, 1999 Bankr. LEXIS 126 (Bankr. E.D. Pa. 1999) (Holding that Bankruptcy § 327(e), allowing special appointments of attorneys for a “specified special purpose” is not subject to the disinterested requirements of § 327(a) or § 327(c).)
are in conflict, a confusion that, in turn, may lull professionals into the error that if a connection is not
disqualifying it need not be disclosed.

As an entre into the confusion surrounding the interpretation of section 101(14) of the
Bankruptcy Code and its interaction with section 327(a), the schizoid experience of the Third Circuit is
instructive.\textsuperscript{13} \textit{In re BH &P, Inc.}, \textsuperscript{14} a single trustee was appointed for a debtor corporation in Chapter
11 and for the estates of the Chapter 7 bankruptcy for each of the two principals of the corporation. A
single law firm was approved for this trustee. The trustee in the Chapter 11 filed proofs of claim on
behalf of the corporation in the Chapter 7 proceedings based on voidable transfers. He also objected
to the individuals’ discharge. Seeking interim fees in the Chapter 11, the trustee and the law firm were
confronted with an objection from the corporation’s principal lender. None of the conflicts suggested
by these facts had been disclosed.

\textsuperscript{13} Although clearly each circuit has a slant on these matters, the central debate on the level of
adversity required for disqualification has been explored in the Third Circuit’s opinions. Oft-cited these
decisions seem to form the center piece for current analysis. \textit{See, e.g., In re Arochem Corp.}, 176 F.3d
610 (2d Cir. 1999). \textit{See also} Goldstein, New York Law Journal, “Decisions Address Retention of
Bankruptcy Professionals.” February 28, 2000. Further, for several seasons the American Bankruptcy
Institute Law Review has contained more extensive examinations of the withering array of decisions in
this area, an examination beyond the scope of this piece. \textit{See} Rapoport, “Our House Our Rules: The
Need for a Uniform Code of Bankruptcy Ethics,” 6 Am. Bankr. Inst. L. Rev. 45 (1998); Phelan &

\textsuperscript{14} 949 F.2d 1300 (3d. Cir. 1991).
The bankruptcy rules with respect to employment, as noted above, match for trustee appointment, attorneys, and other sorts of professionals. Additionally, the issue of bankruptcy conflicts and disclosure can arise in a number of procedural settings. Consequently, the issue of a disqualifying conflict can arise at the outset of a bankruptcy proceeding with respect to the appointment of a trustee or professional. Or the issue might be raised at a later time when an application for fees is made.\(^{15}\)

The Third Circuit reviewed the suggested disqualification of the trustee and the law firm. With respect to the trustee, the court held that for purposes of section 101(14), a trustee is not a “creditor” simply because the estate he represents has a claim. Creditor disqualification under section 101(14) is intended to be reviewed based upon the professional’s “personal status.”\(^{16}\) Further, the Third Circuit held that inter-debtor claims do not mandate disqualification of a professional (here, the trustee) due to “materially adverse interests.” The Third Circuit supported this conclusion by noting the practical advantages of joint-case administration. In this context, the Third Circuit offered this test to determine whether a conflict is disqualifying: “[T]he test . . . is whether a potential conflict, or the perception of one renders the [trustees] materially adverse to the estate of the creditors.”\(^{17}\)

\(^{15}\) Bankruptcy Code § 328(c) provides for the disallowance of fees when the professional is not disinterested or represents or holds an interest adverse to the estate.

\(^{16}\) 949 F.2d at 1309.

\(^{17}\) Id. at 1312 (citing In re Martin, 817 F.2d 175 (1st Cir. 1987).
Importantly, the Third Circuit emphasized that disqualification decisions are to be left to the sound discretion of the bankruptcy court. The court went on to note, and specifically reiterated, that simply the potential for conflict can be disqualifying. Thus, the Third Circuit affirmed the bankruptcy court’s disqualification of the trustee.

The Third Circuit further examined the disqualification of the law firm under Bankruptcy Code section 327(c). That statute provides that a person is not disqualified from employment “solely” because the person represented a creditor unless “there is an actual conflict of interest.” Holding that such a determination is to be made on a case-by-case basis, the court concluded that the uncertainty as to whether the individual debtors’ estates will have sufficient access to satisfy the corporation’s claim is an actual conflict. Importantly, as well, the Third Circuit buttressed its affirmance of the disqualification of the attorneys by noting the inherent power of the bankruptcy court to regulate professional employment, even where the conflict is only “potential.”

Clearly, In re BH & P, Inc. left the ultimate decision to the bankruptcy court in terms of disqualification with the note that, in some sense, even the appearance of impropriety can lead to disqualification. It should be noted that the Third Circuit’s view of disqualifications because of such an

\[\text{18 Id. at 1316-17. Note that the view that there is any difference between actual conflicts and potential ones is much criticized. See In re Kendavis Industries International, Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988) (If there is a potential for conflict, the conflict is actual.)}\]
unripened conflicts is unfortunately antiquated, compared to modern rules of professional responsibility. Simply, the ABA Model Rules of Professional Conduct, the predominant model for states’ regulation of lawyer behavior, contains no such standard. The test suggested in *In re BH & P, Inc.* obviously would lead to more disqualification than a standard which does not consider the appearance of impropriety as disqualifying. Further, that case suggests that appellate review of a decision in this area is necessarily limited because of the broad discretion afforded the bankruptcy court.

Not that long ago, the Judicial Council of the Third Circuit had held that the appearance of a conflict could be disqualifying. In *In re Imperial “400” National, Inc.*\(^19\), the Third Circuit reviewed an application of a resolution of the Judicial Council of the Third Circuit. The resolution provided that any lawyer representing a third party submitting a plan for reorganization must be disqualified from representing the estate.\(^20\) The Third Circuit reviewed the disqualification of an attorney on the black and white grounds of the resolution. The lower court disqualified the attorney from representation without a hearing as uncontroverted evidence was presented that he had in fact participated in the presentation of a plan. The Third Circuit concluded that while the Judicial Council had power to disqualify professionals based only on the appearance of impropriety, the attorney must be afforded a hearing to weigh the extent of the conflict.\(^21\) Obviously, even under this old regime, the absolute disqualification suggested by the council resolution gave way to some sort of balancing test with respect to the benefit

\(^{19}\) 481 F.2d 41 (3d Cir. 1973).

\(^{20}\) *Id.* at 42  (The Judicial Council Resolution was dated February 10, 1972.)
or harm in employing the professional under a cloud of the appearance of a conflict of interest.

Of course, the perception may be proper that disqualification based on the appearance of impropriety only is inappropriate. The professions have long recognized that opponents raising issues of conflicts frequently do so for tactical reasons, not to elevate the mores of the practice. Simply, knocking out another’s chosen professional will lead ineluctably to additional costs to that party, that in turn will encourage settlement. Further, even in the homey world of bankruptcy, there is the fear of the rogue judge who might disqualify those professionals subject to his displeasure on the slender reed of the look of impropriety. Once disqualified on this ground, success on an appeal, testing the lower court’s exercise of its discretion for abuse, would be rare, indeed.

But what the Third Circuit giveth, in terms of power to the bankruptcy court to control professional employment, the Third Circuit taketh away. In the acrimonious Chapter 11 case, In re Marvel Entertainment Group, Inc.22, the Third Circuit reviewed the approval of the appointment of a trustee but the concomitant disqualification of his law firm as trustee’s counsel. The firm had previously represented a principal lender of the debtor, Chase Manhattan Bank, in an unrelated matter. Chase had waived any conflicts and had authorized representation in adverse matters. The Third Circuit noted that the fee the firm had collected for the unrelated matter with Chase Manhattan Bank was $48,000 and

21 Id. at 46.

22 140 F.3d 463 (3d Cir. 1998).
was a tenth-of-a-percent of the law firm’s revenue. In reversing the lower court’s disqualification of the firm, the Third Circuit, while claiming “to reiterate” the holding of BH & P, Inc., held that “the district court may not disqualify an attorney on the appearance of conflict alone.” The Third Circuit consequently now divided conflicts into three: actual; potential; the mere appearance of impropriety. In this case, dealing with representation in a particular matter, eschewing a definition of the difference between these tests, the court held that there was only an appearance of impropriety here and that does not support the disqualification of the professional. Of course, the Marvel court offers that this decision does not conflict with BH & P, Inc. Of course, however, this later decision does tip the balance away from disqualification and necessarily inhibits bankruptcy court control over professional employment.

Before exploring additional examples of this too, too subtle distinction, between actual, potential and the appearance of conflict, a brief exploration of the discretion, if any, afforded the bankruptcy court in other disqualification grounds is appropriate. Simply, In re BH & P, Inc. contains extensive language or, perhaps, idle rhetoric supporting bankruptcy court discretion in the appointment of professionals. Does this discretion extend to allow the appointment of creditor professionals? In United States Trustee v. Price Waterhouse, the Third Circuit reviewed a bankruptcy court’s authorization for the employment of Price Waterhouse by debtors in possession, even though the firm had a claim against the estates for pre-petition services. The lower court had taken to heart the language of In re

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23 Id. at 469.
24 Id. at 476.
BH & P, Inc., balancing the benefits to the estate attended by experienced representation against creditor status. Price Waterhouse also argued that the existence of Bankruptcy Code section 328(c) implied the employment of interested professionals was possible. That provision authorizes a denial of compensation for professionals who are not disinterested. Consequently, so Price Waterhouse’s argument went, the existence of that provision must mean that, occasionally, professionals who are not disinterested might be employed. The Third Circuit rejected this argument out of hand.\(^\text{26}\) Instead, the Third Circuit held pursuant to the numerous “plain language” decisions of the Supreme Court in the bankruptcy setting, the prohibition on retaining a pre-petition creditor as a professional is absolute.\(^\text{27}\)

The strict construction view reflected by Price Waterhouse has not been universally followed. In the oft cited decision of the First Circuit, In re Martin,\(^\text{28}\) the First Circuit determined that the disqualification based upon creditor status should not be given a “literalistic reading.”\(^\text{29}\) Seeking advice

\(^{25}\) 19 F.3d 138 (3rd Cir. 1994).

\(^{26}\) Id. at 142.

\(^{27}\) An argument (without much force) has been made that Bankruptcy Code § 327(a) has no impact at all with respect to debtors in possession. See Lieb, “The § 327(a) “Disinterestedness” Requirement +Does a Pre-Petition Claim Disqualify an Attorney for Employment By a Debtor in Possession,” 5 Am. Bankr. Inst. L. Rev. 101 (1997). The author suggests that “trustee” in that section means only trustees, noting the statutory structure (for example § 327(c)’s specific reference to Chapter 11) and intoning the salutary value of continuing representation by professionals experienced with the debtor. No court has adopted this view. One may wonder if the benefits of continuing representation were so salutary why does the Code prohibit creditor representation.

\(^{28}\) 817 F.2d 175 (1st Cir. 1987).

\(^{29}\) Id. at 180.
concerning bankruptcy, the Martins employed a law firm but were unable to pay a $5,000 retainer. The law firm took a note and a security interest to secure the fee in property of the Martins in which there was equity. A Chapter 11 bankruptcy ensued, soon sadly converted to a Chapter 7. The law firm made application for its fees and there was objection. The bankruptcy court disqualified the firm based on creditor status and set aside the mortgage.

The First Circuit in its analysis cited what was already in a 1987 a leading decision with respect to disqualification of professionals and creditor status in bankruptcy, *In re Roberts.*\(^{30}\) That decision held that fees generated by ordinary pre-petition services creating a debt to the professional would not be disqualifying. Consequently, in the First Circuit’s view, the simple existence of a debt to the professional is not the salient issue. Rather, the issue became whether the holding of the security interest for payment of those fees is adverse. One might note that under ordinary rules of professional conduct, again taking the American Bar Association model, a security interest for legal fees has never been held to produce a disqualifying conflict between the lawyer and his client. Similarly, the rules would not prohibit the taking of a minority share interest in a corporate client as a payment for fees.\(^{31}\)


\(^{31}\) But see ABA Model RPC 1.8(a) which may be implicated by the taking of a security interest for fees by a lawyer, requiring advice to the client that separate counsel might be consulted with respect to the parameters of the relationship.
The First Circuit adopted the flexible test which was in turn the basis for *BH & P, Inc.*’s analysis which required the bankruptcy court to look to whether there was a potential for conflict or, in fact, “the perception of one.” The First Circuit thus reversed the lower court which had believed that it had no choice in voiding the mortgage and the disqualification of the professional. The First Circuit enumerated factors which should be considered in determining whether even creditor status was disqualifying: the reasonableness of the arrangement; the necessity of the arrangement to obtain competent counsel; and the possible effects on the proceeding.  

The enforcement of the absolute rule precluding representation based upon creditor status has the unfortunate effect of encouraging border-line fraudulent behavior on the debtor’s pre-bankruptcy professional counsel. Simply, to continue representation of the estate of the debtor post-bankruptcy, all the outstanding bills must be paid prior to filing. This unseemly activity has led to an examination of the voidable preference rules with respect to the payment of professional fees. In *In re First Jersey Securities, Inc.* 34, the Third Circuit reviewed a determination of the bankruptcy court that had refused to disqualify counsel for a Chapter 11 debtor. This counsel had received payment for services in connection with the preparation for bankruptcy and for other unpaid pre-petition services on the eve of bankruptcy. Payment was effectuated to the counsel through a transfer of securities. While the securities may have been worth more or less than the fees that were owed, the attorney waived any  

32 817 F.2d at 182.  
33 *Id.*
rights concerning any unpaid portion of the fees.

The Third Circuit concluded that the payment was a voidable preference, concluding that a professional’s claim or debt arose when the services were performed not, as argued by the attorneys, when the bill was presented to the client. The Third Circuit also concluded that the instant transfer would not be protected under Bankruptcy Code section 547(c)(2), which excepts from voidable preference treatment transfers in the ordinary course of business. No evidence was elicited in this case to show that the payment of legal bills with stock was part of the ordinary course of business. (This is not to say that cases involving regular payments of any sort to the professional could not qualify for such treatment.) The Third Circuit goes on to note the practically obvious, that the existence of such a preferential transfer from a debtor/client to the attorney automatically creates a disqualifying conflict of interest.\textsuperscript{35}

Exploration of the apparently absolute rule of creditor disqualification in bankruptcy can aid in understanding the nature of the discretion of the bankruptcy court in determining whether a conflict because of adversity of interest is disqualifying. Further, in this vein, consider \textit{Vergos v. Timbercreek},

\textsuperscript{34} 180 F.3d 504 (3d Cir. 1999).

\textsuperscript{35} \textit{Id.} at 509. Lingering in the background of policy considerations for disqualification by reason of creditor status must lie the problem of preference. Perhaps a lawyer, part creditor, part paid, would not advise his trustee client to bring an action to void a preferential payment made to himself.
While in the professional/claimant cases the debt disqualifies a firm as a whole because the firm as a whole is owed the claim, other seemingly absolute disqualifications may not extend to the entire firm. In this action, the United States Trustee objected to the appointment of a law firm for a Chapter 11 debtor because one of the firm’s partners was a director of the debtor and had a disqualifying ownership interest. Nonetheless, the district court approved the appointment of the firm after imposing a “Chinese wall” exception to the imputed disqualification rules. The court here took advice in a sense (but by no means binding authority) from Tennessee’s Code of Professional Responsibility which allows a “Chinese wall” to insulate a firm from disqualification when an attorney enters the firm and creates a conflict. The disqualified partner was also required to resign his position with the debtor and refrain from participation in shareholders’ meetings.

The Vergos court followed the long-standing tradition of the bankruptcy court, viewing its equitable powers as sufficient to craft solutions to problems not specifically statutorily resolved. The district court concluded that there is no imputed disqualification under the Bankruptcy Code. While clearly the district court here found support for use of screening devices from the local ethical rules, by no means are screening devices thought of with such respect generally. In fact, the ABA itself in its Model Rules rejects the approach of screening devices to avoid conflicts.

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The Marvel court’s restricted view of the bankruptcy court’s discretion over the professionals that will practice before it is consistent with the general legal ethical view that clients should be permitted to choose their attorneys. (The Third Circuit’s absolute view of disqualifying creditor status must be lain at the feet of the Supreme Court’s relentless use of plain language construction principles in bankruptcy.) Thus, the policy of allowing choice of professional is aided by precluding the bankruptcy court from disqualifying professionals simply based upon potential conflicts or the appearance of impropriety. Even if this fettering of the bankruptcy court’s discretion were loosed, still courts would engage in the analysis of whether there is in fact any adverse interest at all. Courts will continue to wrestle with whether there is any difference between actual and potential conflicts. Further, regardless of the standard of review of the bankruptcy court’s decision on qualification, the fact-based analysis of whether there is adversity of interest has created a twisted body of law from which it is virtually impossible to set forth any useful delineation of fact patterns which might lead to predictable results. In fact, as a diligent reader of the decisions in this area, I sense that courts infer that a quest for some measure of predictability seems to be a particularly mean and vile approach.38

38 See, e.g., In re American Printers & Lithographers, Inc., 148 B.R. 862 (Bankr. N.D. Ill. 1992) (After reviewing the cases, the court settles on a rule that it is good policy to avoid any bright line test.) For the most recent compilation and analysis of this array of opinions, See Phelan and Penn, “Bankruptcy Ethics: an Oxymoron,” 5 Am. Bankr. Inst. L. Rev. 1,14-21 (1997) (The authors characterized those courts as recognizing the potential for conflict as not disqualifying as taking the “let’s see what happens” approach).
For an example of a court reviewing potential conflicts under the spell of *Marvel*, examine *In re White Glove, Inc.*. In this case, the bankruptcy court reviewed the application for retention of the same counsel for two related debtors in possession who had and continued to represent one of the debtor’s principals. The attorney had not waived a pre-petition claim against one of the debtors. Payment of that claim was guaranteed by the principal. Further, the debtors had claims against each other based upon inter-company transactions.

Preliminarily, the court reviewed whether any one counsel could, within the rules represent both debtors. The United States Trustee (himself obviously under the spell of *Marvel*), who had objected to the appointment, nonetheless admitted that any conflict between the entities themselves was “potential” rather than actual. Citing *Marvel*, the bankruptcy court concluded that “while potential conflicts are disfavored, I have the discretion to allow dual representation of these related debtors when there is a compelling reason to do so and the likelihood of conflict is remote.” Note that fully under the spell of *Marvel*, the court might have said that where potential conflicts only exist, I have no discretion to disqualify counsel.

After concluding that dual representation was appropriate, the court reviewed whether this attorney could effectuate that dual representation. Other than the attorney’s failure to waive the pre-
petition debt, the bankruptcy court found the relationships described as mere potentials for conflict. The court only found the potential too great for the dual representation of the principal and his company. The appointment was approved, conditioned upon waiver of the pre-petition debt.

Take an analysis from a court which continues under the spell of old BH & P, Inc. In In re Cook 42, the bankruptcy court’s order disqualifying counsel and requiring the disgorging of fees was reviewed by the bankruptcy appellate panel. Counsel in this case had been appointed for four inter-related debtors. He had disclosed further that he also represented a substantial creditor of one of the debtors. He did not disclose that his arrangement with that creditor was on a contingency fee basis. The history of his counsel for the management of the related estate revealed an attempt to move assets to the estate that was subject to the creditor’s claim that he represented on that contingent basis. The court cited, with approval Roberts (as do many courts not yet influenced by Marvel) that to have an interest adverse means:

To possess or assert any economic interest that would tend to lessen the value of the estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or to possess a predisposition . . . that renders such a bias against the estate.43

41 Id. at 11.

42 223 B.R. 782 (BAP 10th Cir. 1998).

43 Id. at 789 (citing 46 B.R. at 827).
This court notes that it believes Bankruptcy Code section 101(14)(E) covers relationships that would “even faintly color the independence and impartial attitude required.”

The court rejected the notion offered by the counsel that Bankruptcy Code section 327(c) provides an independent ground in favor of qualification. The rejected argument was that if any attorney represents a creditor, he can only be disqualified from representation if there is an “actual conflict”. Rather, the court properly holds that section 327(c) simply addresses the case where the sole reason advanced for disqualification is a creditor representation. Simply section 327(c) does not trump 327(a).

Nonetheless, as I find typical in this style of decision making, the court is uncomfortable with calling the conflict in the case anything but actual. The court notes that to call this affair as not producing an actual conflict reflects “an incomplete appreciation of fiduciary duty.” This particularly well-chosen slam against the attorney is taken from In re Interwest Business Equipment, Inc.

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44 Id.
45 Id. at 21.
46 Bankruptcy Code 327(c) certainly should authorize the common practice of trustee employment of attorneys for a creditor in an asset less estate where the creditor essentially pays the attorney’s fees. See In re Pappas, 216 B.R. 87 (Bankr. Conn. 1997).
47 23 F.3d 311, 317 (10th Cir. 1994). (The 10th Circuit affirming, under a clear abuse of discretion standard, a lower court’s disqualification of a single attorney for three related debtors in possession based upon conflicts presented by intercompany claims.)
One bankruptcy court has cut the Gordian Knot with respect to its discretion to control professional employment by using statutory authority rather than a plea to the traditional authority of the bankruptcy court. In *In re Vebeliunas*, the bankruptcy court reviewed a debtor’s motion to disqualify a Chapter 7 trustee’s attorney as having an “adverse interest.” The adverse interest was principally manifested by the attorney calling the debtor a liar. The disqualified counsel argued that disqualification for adversity of interest only applies for conflicts against the estate, creditors or equity security holders, not the debtor. The court, however, viewed the last phrase of Bankruptcy Code section 101(14)(E), which allows disqualification “for any other reason” as authority for disqualification in this instance. While the court also noted that in this case the possibility of a surplus could result in the characterization of the debtor as an equity security holder, the court viewed its power under the “for any other reason” clause as practically plenary. Further, the court noted that *Marvel* does not bar the consideration of other factors as a proper basis for disqualification. For example, the court notes that disqualification may be appropriate based on New York state ethical standards that require the avoidance of the appearance of impropriety. The court also cites with approval, as further ammunition to support its view that its discretion is broad, the bankruptcy court’s decision in *In re Kurtzman*. In that case, the bankruptcy court disqualified the trustee’s firm from representation of the trustee under Bankruptcy Code section 327(d) because the firm’s hourly rates as manifested in other works reviewed by the court were repetitively too high.

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One wonders, for example, how the plain reading and plain speaking Justice Scalia would view the bankruptcy court’s interpretation of that final clause of Bankruptcy Code section 101(14)(E). The bankruptcy court’s reading of the clause arguably has the aspect of eliminating or minimizing the debate between views which restrict bankruptcy court discretion by precluding disqualification for the mere potential of conflict versus the view that mandates disqualification even for potential conflicts. While disqualification “for any other reason” might yet be fettered, a restriction or review of disqualifications under so general a standard would probably be tested under an abuse of discretion standard, for arbitrariness or caprice. The phrase is set off from the rest of subparagraph (E) by a comma rather than set off in a separate subsection. The overall structure of the section indicates that perhaps there are only five reasons to find that a person is “disinterested.” Consequently, the phrase “for any other reason” may describe a range of conflicts produced by reasons other than “direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker.” Thus, the interpretation of the phrase “for any other reason” would settle on the classic principle of statutory construction, *ejusdem generis*, requiring that a general term following specific terms must take its character from the list which is specific. With that interpretation, the notion of the court in *In re Vebeliunas* becomes something of a stretch. Having said that, it is difficult to quarrel with the conclusion of the bankruptcy court in *In re Kurtzman* that overcharging is a sufficient reason for disqualification. A tenuous argument could be made that overcharging does create an interest materially adverse to the interest of the estate, exhausting assets through administrative expenses that would otherwise inure to the benefit of the unsecured creditors.
An additional auditing occurs with respect to these special conflicts when the grounds for
disqualification are not discovered until there is an application for fees. Sanctions accompanying
disqualifications or sanctions for the failure to disclose certain “connections” without disqualification
have been widely held to be within the discretion of the bankruptcy court. In determining these
sanctions, as usual, some sort of factor analysis is employed, weighing the egregiousness of the conduct
with, for example, the benefit to the estate. While some light sanction for failure to disclose a connection
may seem justified, it is difficult to see how a conflict that would have resulted in disqualification should
result in anything but fee disgorgement. Views differ. In In re Crivello, the court held that the
bankruptcy court was not required to deny fees even in a case where the attorney could not have been
appointed because of a pre-petition claim against the debtor. In Michel v. Federated Dep’t Stores, Inc.,
the Sixth Circuit came to the contrary conclusion that the fees must be denied. As another
example of the wide range of discretion exercised in sanction consider that it has been also widely held
that the failure to disclose a pre-petition claim by an attorney can be sufficient grounds alone for
disgorgement of previously paid fees. Obviously (if anything is obvious in this area) the appointment of
an attorney does not preclude review of the propriety of the appointment in retrospect through a
sanction tied to fees.

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50 134 F.3d 831 (7th Cir. 1997).
51 44 F.3d 1310 (6th Cir. 1995).
While some confusion may exist with respect to whether a putative conflict is disqualifying, the bankruptcy rules require broad disclosure. Bankruptcy Rule 2014 with respect to the employment of professional persons requires at subsection (a), “to the best of the applicant’s knowledge, [the disclosure of] all of the person’s connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United Trustee, or any other person employed in the office of the United States Trustee.” Here we approach after our tour of conflicts the rule that Mr. Gellene violated. While the term “connection” is chillingly broad, Mr. Gellene’s failure did not involve the failure to disclose some tenuous or theoretical connection. Nonetheless, the rule does go against the normal professional inclination to keep secret relationships, especially, with clients. The purpose of the disclosure is to allow free ranging review of the potential for conflicts. Short of criminal prosecution, the fate of Mr. Gellene, one may certainly be subject to a lesser sanction for violating this rule even though the underlying and undisclosed connection would not in itself be disqualifying. In *In re Olsen Industries, Inc.* 53, the bankruptcy court commenced a review of a request for the disgorgement of the fees paid to Pepper, Hamilton and Scheetz, LLP. The firm had represented the debtor and the debtor’s major creditor. The firm agreed that the rule imposed an obligation to disclose these potential conflicts. And even though the conflict in this case may not have been disqualifying, the failure to disclose that potential conflict, “connection,” is still sanctionable. After all, no good rule is without a sanction.

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The story of John Gellene, late of Milbank, Tweed, Hadley and McCloy, presents such an egregious tale of the violation of Bankruptcy Rule 2014 that perhaps the severity of his sentence does not provide sufficient moral caution to the rest of us. (I make this comment in the face of the rhetoric that his conviction will somehow work a fundamental detrimental change to the nature of bankruptcy practice.) Convicted of three felony counts by a Milwaukee jury, he has been sentenced to prison to 15 months in prison, a $15,000 fine, two years probation, and a lifetime of notoriety and ill repute. As is frequent in the world of white collar crime, the facts of the matter are in dispute as far as Mr. Gellene is concerned. Even so, the story that seems to have been accepted by the jury and the judges (especially District Judge Stadtmueller) is that Mr. Gellene purposefully and repetitively failed to disclose his firm’s representation, albeit indirectly, of a secured lender in the Bucyrus-Erie Company Chapter 11 bankruptcy. Mr. Gellene as lead counsel for the debtor in possession knew that Milbank Tweed also represented a partnership which was a secured lender controlled by one Mr. Salovarra. Mr. Gellene knew that his superior at Milbank Tweed, a Mr. Lederman, had had a close relationship in his representation of Mr. Salovarra. As Mr. Gellene told the tale, he said that one day he walked in to Mr. Lederman’s office and found, to his surprise, a two foot stack of documents confirming that representation. (Perhaps it goes without saying that the jury did not believe that Mr. Gellene had this surprise epiphany; having only read the opinions and comments on this case, thus my judgment is at a distance, I do not believe him either.) He filed two statements under Bankruptcy 2014, neither of which disclosed the connection. When finally caught, Milbank Tweed was forced to disgorge the fees in a lurid public fashion. Mr. Gellene after as abject an apology as he could muster was nonetheless put on ten month’s medical leave by the firm then eventually let go. (Abnegation of his innocence does not
seem to fit within his aggressive personality.) Note at the outset, that the undisclosed connection is not
dicey, with respect to the obligation under Bankruptcy Rule 2014. In other words, where there might
be dispute because of the law with respect to what is a disqualifying conflict, it could not be argued that
this connection was not the sort of information that should have been disclosed pursuant to Bankruptcy
Rule 2014.

There is certainly evidence of, to understate the matter, friction between the sophisticated
urbanite Mr. Gellene and the solid Bankruptcy Court and District Court in Milwaukee. All of the
opinions in this matter take note of Mr. Gellene’s New York (forgive the tarring with the broad brush)
attitude. He essentially suggested that what he had done would have been typical behavior on the Isle
of Manhattan. As the Circuit Court took time to note in the affirmance of his conviction, this interchange
occurred between the bankruptcy court and Mr. Gellene:

The bankruptcy court also told Mr. Gellene: ‘New York is different
than Milwaukee. Professional things like conflicts [of interest] are taken
very, very seriously. And for better or worse, you are stuck in
Wisconsin.”

At this point, a brief interlude on the habits of Mr. Gellene’s milieu is appropriate. After all, a
large part of his plea of innocence is that his way is the way of the universe’s center, New York City.
The Southern District of New York, undeniably one of our nation’s bankruptcy hotbeds, has
considered the debate as to whether mere potential conflicts should be disqualifying and has largely

54 United States v. Gellene, 182 F.3d 578, 583 n.4 (7th Cir. 1999).
arrived at the conclusion that a talismanic rule is insufficient to decide the cases. For example, in
bankruptcy Judge Brozman’s well-considered opinion in In re The Leslie Fay Companies, Inc.\textsuperscript{55}, the
court viewed the important question as whether there is “‘either a meaningful incentive to act contrary to
the best interests of the estate and its sundry creditors--an incentive insufficient to place those parties at
more than acceptable risk’ or the reasonable perception of one.”\textsuperscript{56} In that case Weil Gotschal &
Manges failed to disclose a number of connections with creditors and members of an audit committee in
the high profile Leslie Fay bankruptcy. The United States Trustee sought complete disgorgement of all
fees when the failure to disclose was discovered. Interestingly, the court concluded that that sanction
was inappropriate, even though under the test noted above the court concluded that adverse interests
did exist. In fashioning a remedy, the court did not disqualify Weil Gotschal completely from continuing
to represent the debtor largely because of the complexity of the bankruptcy, the quality of their services,
and the depths to which the proceeding had already gone. Weil Gotschal was sanctioned only to the
extent that costs were incurred to discover and essentially litigate the issues produced by their failure to
disclose.

A similar approach was taken with respect to Willkie, Farr and Gallagher with respect to their
failure to disclose adverse interests in In re Granite Partners L.P.\textsuperscript{57} This litigation tends to confirm

\textsuperscript{55} 175 B.R. 525 (Bankr. Ct. S.D.N.Y. 1994).

\textsuperscript{56} Id. at 24-25, citing In re Martin, 817 F.2d at 180-81. See also JERWHTR Services, Inc. v.

perhaps the unfortunate style of large firm representation of significant bankruptcies in New York.

Perhaps these firms are unable to find all the conflicts early enough for adequate Bankruptcy Rule 2014 disclosure. Or, perhaps, Mr. Gellene’s protest to the court in Milwaukee was sadly accurate, that the close attention to the obligations of the rule is not the habit east of the Hudson. Nonetheless, again the sanctions in Granite Partners did not result in complete disgorgement of fees, rather, the firm was allowed to keep some money because “it performed substantial and valuable services which were not affected by the tainted investigation.” 58 Perhaps it is too obvious to suggest that given the nature of these sanctions, (absent the criminal result for Mr. Gellene) that there is little incentive for robust disclosure as you will be paid for the good work you perform anyway. 59 Why not roll the dice? Was Mr. Gellene’s failing simply that he gambled while gamboling among the cheese-heads?

Other unfortunate evidence was also introduced with respect to the character of Mr. Gellene’s representation of Bucyrus. For example, other creditors of Bucyrus wanted to pursue a claim against Mr. Salovarra. Is it odd that Mr. Gellene advised against it? There was evidence of a discussion where the folks at Milbank Tweed indicated that the dangerous Mr. Salovarra might turn on them if they engaged in anti-Salovarra behavior. And, what was apparently particularly galling to Mr. Gellene, the court in his criminal case allowed evidence that this Harvard go getter had practiced law for seven years

58 Id. at 43. See also In re Crivello, 143 F.3d 831 (7th Cir. 1997).

59 See In re Smith, 203 F. 369 (6th Cir. 1913). In this ancient case, the old circuit, after finding conflicts between a class of creditors and the trustee’s attorney, still allowed recovery of fees because the work was good.
in the Empire State without bothering to be admitted to practice there. And in a final bit of irony Mr. Gellene was presented with a difficulty in arguing that he knew not what his obligations were; he wrote (or, at least, was the nominal author of) the materials for the ALI-ABA course on conflicts of interest in the post-LBO era.

In analyzing his conviction under 18 USC section 152 for “knowingly and fraudulently” making a false verification, the Seventh Circuit explored the elements of the offence. Initially, the Circuit properly noted that the false verification was his failure to disclose all connections as required by Bankruptcy Rule 2014. The trial court instructed the jury that for a statement to be knowing and fraudulent and thus criminal under the statute the statement must be known to be false and to be made with intent to deceive. Gellene, however, argued that the word “fraudulently” in the criminal statute must mean something. Therefore, the statement must have a fraudulent aspect, that is an intent to deprive an entity of property or otherwise make some profit.

Of course, the presence of attorneys as defendants in bankruptcy criminal cases is not without precedent. The habit of the criminal attorney in the past, however, was not to conceal connections in order to gain lucrative employment. Rather, the few cases where historically lawyers have been prosecuted have dealt with the concealment of assets and the filing of false schedules.  

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60 See, e.g., Coghlan v. United States, 147 F.2d 233 (8th Cir. 1945) (Attorney convicted of false filings where he knew farmer clients had livestock and intentionally failed to list them as personal property in order to proceed under the Frazier-Limkey Act).
that attorney participation in concealment of assets at least presents the attorney with the economic incentive that he might steal some of the assets he has helped to conceal.\textsuperscript{61} Somehow, this conduct does not seem more evil than the plot of Mr. Gellene, simply more unimaginative and banal.

It is at this point that the unthinking reader might suspect that Gellene had made an error in advocacy. After all, the argument could have gone that Mr. Gellene did make the statement with the intent to profit. His false declaration under Bankruptcy Rule 2014 allowed him to be employed by the estate and to garner for himself and Milbank Tweed vast sums of money. Nonetheless, the court rejected this approach. One might think that the court had anticipated Gellene’s response to a charge that his taking of fees would be fraudulent. His response would have been, as in fact in a sense it was throughout the proceedings, that the services he provided were excellent and that in any event, the estate would have had to pay for similar services elsewhere. Thus, there was no fraudulent intent because the estate had not been deprived of property. Consequently, he argued that fraud must be shown and what he had done was not fraud.

The Circuit Court rejected this approach in its entirety and found that an attempt to deceive was sufficient in and of itself, constituting essentially a fraud on the court. This fraud on the court, the Circuit Court fervently notes, creates a negative impact on the integrity of the system. Thus, in order to be

\textsuperscript{61} For an interesting case where an attorney conceals a debt and suffers sanctions under Bankruptcy Rule 9011, see \textit{In re} Ramona Moix-McNutt, 220 B.R. 631 (Bankr. Ct. E.D. Ark. 1998). The lawyer advised the debtor not to schedule a secured debt which would have made the debtor ineligible for Chapter 13.
convicted under 18 USC section 152, according to the Seventh Circuit, intent to do financial harm need not be shown. This rule in its view is necessary to preserve the integrity of the system and to enforce rules that support that appearance of integrity.

Similarly, Gellene argued that the falsehood and the results of the deception must be material. Following the argument through, in the massive Bucyrus bankruptcy, the legal fees he obtained were a small percentage of the total assets. Consequently, he argued that his little lie did not make a difference with respect to the distribution of the assets of the estate, his proposed test for materiality. Here again, the Circuit Court rejects that approach and contends that systemic integrity is the highest value and that materiality can therefore be judged on its relationship to the bankruptcy process. Lying under Bankruptcy Rule 2014 is always material.

Gellene’s conviction under 18 USC section 1623 was likewise affirmed. The false swearing statute requires use of a false document. The Circuit Court concluded that Gellene used his Bankruptcy Rule 2014 statement in testimony regarding his various fee applications and that again was a material falsehood. And again, the court relies on the sanctity of the systemic processes to justify its conclusion with respect to materiality.

It was Gellene’s conviction which caused the overheated rhetoric of the Bankruptcy Court Decisions’ News and Comments noted at the outset. Since Mr. Gellene’s unfortunate experience (and the unfortunate experience of the bankruptcy court in Wisconsin having to deal with the experience of
Mr. Gellene) no other prosecutions are in the offing. Part of the bankruptcy community’s concern over Mr. Gellene’s prosecution has to be lodged in the concern that the statutory ethical restrictions of the Code are uncertain. If, for example, the Third Circuit within itself is confused over whether the mere appearance of impropriety is disqualifying or not, clearly the (so the story goes) innocent practitioner cannot know clearly what he must disclose or keep secret. This concern about confusion in legal obligation and its interface with criminal prosecution is misplaced. Admittedly, Bankruptcy Rule 2014 requires the disclosure of “connections” which may not result ultimately in a disqualifying conflict. Consequently, in a technical sense, the net of Bankruptcy Rule 2014 catches many more relationships than does the Code sections which create ultimate disqualification. While the salutary policy of the bankruptcy rule is to allow the bankruptcy court a full exploration of the conflicts, it also serves as an internal check on the professionals themselves in evaluating whether representation is appropriate. Nonetheless, an inadvertent omission from the disclosure requirements of Bankruptcy Rule 2014 will not create criminal liability. Inadvertence vitiates the knowing elements of the crime.

Each of the bankruptcy crimes that Mr. Gellene was prosecuted under require proof by the prosecution that the disclosure should have been made and that the affiant knew that it should have been made. For example, 18 USC Section 152 requiring for conviction “knowingly” making a false verification implies proof that the actor knew the verification was false. In this setting, the conclusion with respect to falsity is, in a sense a legal one, whether the disclosable connection exists. Mr. Gellene

62 See, e.g., In re Firstmaric Corp., 132 F.3d 1179 (7th Cir. 1997) (Inadvertent failure to disclose conflict warrants only a fine; no disgorging of fees.)
could not argue that the existence of the relationship of his firm with the secured creditor was not
disclosable. The jury believed (and I do too) that he knew of the relationship, knew it had to be
disclosed, and he failed to disclose it in order to conceal the relationship. Taking this characterization of
the elements of the criminal offence exculpates the inadvertent or simply lazy lawyer who misses
connections that should have been disclosed under Bankruptcy Rule 2014.63 (This is not to say of
course that the failure to disclose a connection is not without some penalty, including perhaps loss of
fees.)

Consequently, for me, the outpouring of sympathy for Mr. Gellene was somewhat misplaced.
His case is not one where there, but for the grace of God go all of us. Rather, his case displays the
activities of a seriously bad actor. His disregard of the rules which he knew reflects an evil style of
practice which none of us in the bankruptcy community should support. Recognition of the rectitude of
his prosecution does not abandon the position that the obligations of professionals in bankruptcy court
with respect to conflicts should be clarified. For example, it is anomalous to say that Gellene is guilty
because his act was an offense against the systematic integrity of the bankruptcy system because it
created an appearance of impropriety while the system itself ordinarily fails to disqualify professionals
from employment because of that appearance. Nonetheless, Mr. Gellene’s behavior is well beyond the
pale of appropriate and ethical conduct in our profession. It may be cliche to note that bankruptcy,
throughout the country, is practiced in small communities. Wherever you speak with individual

63 Cf. United States v. Yasser, 114 F.2d 588 (3d Cir. 1940) (Knowledge by the actor that
bankruptcy had existed an element of the crime of knowingly and fraudulently concealing estate assets).
bankruptcy practitioners about their professional life, the closeness of the community and their intimate
relation with their judges and the mutual dependency and respect the community engenders is palpable.
One wonders how any support could be out there for Mr. Gellene; who would wish to practice with the
likes of him? In fact, although anecdote does not always serve as scholarship, I have spoken on this
topic to a few bankruptcy bars throughout the country. Each time I have been greeted with the attitude
that Mr. Gellene is innocent and put upon. But when I have left the hearers have frequently come to me
and said that Mr. Gellene is not the sort they would have to practice in their courts.

I do not mean to make Mr. Gellene to be some sort of cliche. While it may be humorous to
view him from the hustings as a venal, sharp, no-time-for-ethics, New York lawyer, grim reality follows
his crimes as well. In his appeal, he was left to plead that the $15,000 fine imposed upon him was now
beyond his means (a man who probably made that sum in many a single day). He pled that the sentence
was too harsh; he has three young daughters. All of this sadness because of the quest for a large legal
fee and a cultured willingness to play fast and loose.