IS ANYBODY INTERESTED IN “DISINTERESTEDNESS”?  
(WE BETTER BE)

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IS ANYBODY INTERESTED IN “DISINTERESTEDNESS?”
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“Sometimes the law gets in the way of our good sense.”
(-Somebody is bound to have said that sometime;
I just don’t know who.)

I. Introduction
The retention of professionals by the Trustee or
Debtor-in-Possession and the Rules governing same have
gotten more than their fair share of “air time” since the
adoption of the Bankruptcy Code in 1978. As usual,
what should be simple “rules of the road” are not capable
of being easily understood. Like looking in your
passenger side rear-view mirror, “objects in the mirror
are closer than they appear.” Traps are there for the
unwary. Land mines are stepped on by those most
careful afoot. Those seeking to be employed (and most
importantly paid), and those seeking to block the
employment of those with that intention, have much to
consider in going through what should be a simple non-
nonsense process.

II. The Law
The rules as regards the hiring of professionals, and
for the purposes of this paper paying particular attention
to the retention of attorneys, are governed by 11 U.S.C.
§327(a) which says:

“(a) 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.” (Emphasis
added).

And then to be employed, the person seeking
employment must seek the approval of the bankruptcy
court. Bankruptcy Rule 2014 governs the employment
process for professional persons. Rule 2014 states in
relevant part as follows:

“(a) Application for an Order of Employment.
An order approving the employment of attorneys, accountants, appraisers, auctioneers,
agents or other professional persons pursuant
to §327, §1103 or §1014 of the Code shall be
made only on application of the trustee or the
committee. The application shall be filed and,
unless the case is a chapter 9 municipality
case, 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 persons
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, 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.”
(Emphasis added).

And as we try to wade our way through all this, we also
occasionally find some help in that faithful companion to
which we often turn to pull our statutory ox out of the
ditch, 11 U.S.C. §105:

“(a) The court may issue any order, process,
or judgment that is necessary or appropriate to
carry out the provisions of this title. No
provision of this title providing for the raising of
an issue by a party in interest shall be
construed to preclude the count, sua sponte,
taking any action or making any determination
necessary or appropriate to enforce or
implement court orders or rules, or to prevent
an abuse of process.”

Obviously, the whole point behind the statutory scheme
of things governing the employment of professional
persons is to make sure that no one is employed by and
on behalf of the bankruptcy estate who has a conflict of
interest. The statutory scheme seeks to preserve the
purity of the bankruptcy process, a process that in the
mind of the average lay person is already tainted and less
than pure from the get go. But, alas, sometimes even the
best of golf swings produce some pretty bad shots.

III. The Issues (or at least some of them)
Bearing in mind that our goal is to have the Trustee,
the Debtor-in-Possession and therefore the bankruptcy
estate represented by professionals free of any
“conflicts” and therefore free to clearly make the best
decisions for and on behalf of the estate, the statutory
framework and the practical application of same give rise
to a number of issues. Picking apart and parsing the law,
some of them are as follows and more obvious than
others:

1. Section 327(a) states that a
professional can’t hold or represent “an
interest adverse” to the estate. And, the
person must be “disinterested.” However, the
phrase “interest adverse” is not defined. But
the word “disinterested” in effect is. Section
101(14)(E) states that a disinterested person is
one that “does not have an interest materially
adverse to the interest of the estate.” This
gives rise to potentially two different standards
within the same line of the Code. Is “an
interest adverse to the estate” different from
“an interest materially adverse” to the estate?
(I am not making this up).

2. In determining what is and what
isn’t an “adverse interest”, is an interest
adverse one where an actual conflict of
interest is present or merely one where a
potential conflict of interest is present? And
if there is a difference between an actual
conflict and a potential conflict, do we treat
them the same for purposes of determining
whether a professional person is disqualified
from serving?

3. And in determining actual
conflicts and/vs. potential conflicts, is it the
character of the conflict and the remoteness of
the conflict that is important? And should we
be in the business about predicting the effect of
the conflict if it is potential rather than actual?

4. If a conflict clearly is potential

but not actual, is it disqualifying? And if a
potential conflict is not alone necessarily
disqualifying, do we judge the disqualifying
nature of a potential conflict when applying
same to the size of the case in which the
professional is seeking to be employed?
Should a different standard exist for judging
conflicts, and therefore the adverse
interest/disinterestedness standard, in large
cases versus small cases?

5. Can we lay down hard and fast
rules as regards actual versus potential
conflicts which would result in per se
disqualifications, or can we indulge ourselves in
the luxury of determining these things on a
case by case basis? And does Section 105
help us out in this regard?

IV. The Cases (or at least some of them)
Arguably, the Bankruptcy Code’s qualification
requirements (or disqualification standards as the case
may be) are difficult to determine because they are
ambiguous on the one hand, and the statutory framework
is difficult to piece together and complex on the other.
Clearly the purpose of the Code is to prevent a Trustee
or Debtor-in-Possession from hiring counsel where the
interest of counsel runs contrary to the interest of the
estate. But there is more gray area here than there is
dry farm land in West Texas. There are few clear rules save and except the one laid down by the Fifth Circuit back in 1990 in the case of In Re W.F. Development Corporation, 905 F.2d 883(5th Cir 1990). That case involved four related Chapter 11 cases filed by three Debtors which were limited partnerships and which were limited partners of the fourth Debtor, W.F. Development Corporation. The three limited partnerships filed first. The Court approved the employment of the same lawyer to represent all three limited partnerships. Subsequently, W.F. Development filed. When the U.S. Trustee objected to the lawyer’s application to serve as counsel in that case, the bankruptcy court not only refused to approve counsel’s application to serve as the lawyer for W.F. Development but also went back and disqualified the lawyer from representing the three limited partners and ordered the discouragement of fees. Ouch. Major ouch.

In a two page opinion, the Fifth Circuit literally laid down the law by stating:

"In a bankruptcy proceeding, limited and general partners do hold materially adverse positions. A non-debtor general partner’s assets will often be tapped to cover deficiencies in the limited partner’s estate. 11 U.S.C. §723(b). So, the bankruptcy court held ‘out of an abundance of precaution,’ that [the lawyer] ought to be disqualified from representing both sets of partners. *We agree and adopt here a clear rule. When one attorney represents both limited and general partners in bankruptcy, there will always be a potential for conflict, and disqualification is proper.*” W.F. Development Corporation, at 84.

The Court states that a conflict “will always exist in this type of case.” Therefore, whether or not you agree with the factual conclusions on which the Court’s opinion is based, it does appear that the “clear rule” is: Don’t mess with the representation of both limited partners and the general partner in related Chapter 11 proceedings. Won’t fly.

However, the supposition on which the Court’s opinion is founded doesn’t always ring true. Hard and fast “clear rules” are dangerous. You can’t really state that one set of circumstances “always exists” in any type of case.

Whether you love it or hate it, the Court’s opinion in the case of In re Kendavis Industries International, Inc., 91 B.R. 742 (Bankr. N.D. Tex 1988) is a great beginning point for analyzing the problem. But at the end of the day it won’t get you any closer to a solution. In that case, the Official Unsecured Creditors’ Committees filed a motion requesting that the Court order counsel for the debtors to disgorge compensation and reimbursement of expenses previously paid. The motion was founded in part not only on the alleged conduct of counsel for the debtors in delaying the proceedings and failing to produce any beneficial results but was also based on alleged actual conflicts of interest. The Committees suggested that debtors’ counsel actually represented the interests of the principals of the debtors and not the debtors themselves, and that this representation constituted a fatal conflict of interest for which debtors’ counsel should not be compensated from the estate.

The Court begins this section of the opinion tracking back to 11 U.S.C. §328(c) which allows the Court to deny compensation to a professional in any case where the professional is not “a disinterested person, or represents or holds an interest adverse to the interest of the estate.” The Court then paraphrases by saying that if the attorney for the debtor is found to be “interested”, then attorney’s fees should be disallowed. The Court cites the case of In re Coastal Equities, Inc., 39 B.R. 304 (Bankr. S.D. Cal. 1984) for the proposition that if counsel holds “an undisclosed adverse interest”, then the Court is empowered to deny all compensation.

After an exhaustive analysis of the facts, the Court concluded that debtors’ counsel indeed had serious conflicts of interest in representing the debtors, their affiliates and their equity owners in those cases. The Court goes on to cite that the Courts in the Fifth Circuit are “sensitive to preventing conflicts of interest and [that] requires a ‘painstaking analysis of the facts and precise application of precedent’” In re Consolidated Bancshares, Inc., 785 F 2d 1249 (5th Cir. 1986). It is interesting to note that while the Court states that the evidence supporting the conflicts of interest was circumstantial, the totality of the evidence supported the conclusion that debtors’ counsel actually represented the interests of the equity security holders in their individual capacities. The Court states that a lawyer owes “his allegiance to the entity and not to the stock holder, director, officer, employee, representative or other person connected with the entity, “quoting In re King Resources Co., 20 B.R. 191(D. Colo. 1982). The Court again cites Consolidated Bancshares and 2 Colier on Bankruptcy Section 327.03 at 327-19, 20 (15th Ed. 1985) for the notion that disinterestedness includes “anyone who in the slightest degree might have some interest or relationship that would color the independent and impartial attitude required by the Code”.

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The Court then goes on to weave into its opinion portions of the ABA Code of Professional Responsibility, the Canons and Disciplinary Rules, particularly Canons Five, Nine and Four. In summary:

1. Canon Five requires an attorney to exercise independent professional judgment. The corresponding Disciplinary Rule 5.105 requires that an attorney refuse to accept employment if the interests of another client impair the independent professional judgment of the attorney. The attorney should not place him or herself in a position where he or she may be required to choose between conflicting loyalties.

2. Canon Nine provides that an attorney should avoid even the appearance of impropriety.

3. Canon Four requires that an attorney preserve the confidences and secrets of a client, something that supposedly he or she can’t do when the attorney has clients with claims against each other. That puts the attorney in the position of using information on behalf of one client against the other client.

The Court then engages in an interesting discussion of one of the arguments put forth by debtors’ counsel, that being that if a conflict existed, the conflict was at most “potential” and not “actual.” The Court states that there is no such thing as a “potential conflict” and that such a concept is a contradiction in terms. The Court states that once there is a conflict, it is actual - not potential. 

Kendavis at 754. The conflict, not being potential, arises at the date the representation by counsel commences. Having reached the conclusion that counsel was not disinterested and that an actual conflict of interest existed (there being no such thing as a “potential conflict”), the Court determined that it had no choice but to disallow fees at least in part. And rather than disallowing the entire fee, the Court felt that a fifty percent of compensation award was appropriate.

V. Say What? (and more cases)

This is all well and good and looks neat in print. Sounds esoteric and great. And it’s wonderful to be able to pontificate about keeping the bankruptcy process pure and potential—much less-actual-conflict-free as regards the representation of professionals is concerned. And maybe in large multi-million dollar cases all of this stuff can and should fly. But try telling that to the “mom and pop” sole owners of a couple of family corporations that are in financial difficulty, or three brothers and their wives which have gone into business together and set up a couple of farming corporations and a partnership. Tell them that, as the Court said in King Resources Co., above, “a lawyer owes his allegiance to the entity and not to the stockholder, director, officer, employee, representative or other person connected with the entity.” Do that and those folks are first going to look at you like you have lost your mind, your Fed Ex package didn’t make it in time for the meeting, your projector doesn’t work, give you a blank stare, walk out the door, or some combination of all of the above. This “allegiance to the entity” begs the question of “who is the entity?” Forgive them, but I believe those clients sitting there are going to think that they are the entity or at least have a good deal to do with it. You tell them that you will be glad to represent their company and would they please have their company cut you a retainer check, but after that check is cut and you are hired you then work for “the company” and not them. I don’t think they are going to get it. I know they won’t appreciate it.

In the last ten or twelve years, the issue has had comparatively little play in the Texas Courts at least insofar as written opinions are concerned. Back in 1992, Judge Brown dealt with the issue in the case of In re American Avia Associates-Sea, 150 B.R. 24 (Bankr. S.D. Tex. 1992). That case involved four related corporate debtors who were joint venturers with another corporation (not in bankruptcy) for the purpose of constructing, leasing and maintaining air cargo facilities at air terminals throughout the United States. The role of the fifth company (“AGRIC” for short) was to obtain financing for these ventures through its parent company (“AGIC”). A dispute developed between the four filing corporate debtors and AGRIC and AGIC. Prior to the case, the corporate debtors entered into a contingent fee arrangement with a law firm to represent them in a state court case. After the Chapter 11s were filed, they sought court approval for the firm to continue its representation.

In the bankruptcy court, AGRIC and AGIC opposed the retention of the debtors’ law firm. The law firm had considerable experience in representing companies similarly situated to the debtors in cases similar to that that had been filed. Also, the opinion states that over $1.4 million had already been spent in attorney’s fees and expenses.
The Court recognized as important the distinction between the fact that “disinterested” is defined by the Code while “adverse interest” is not. As a result, “one must look for assistance to state disciplinary rules concerning conflicts of interest and multi-party representation for a determination of adverse interests”, American Avia Associates - Sea, at 27. The Court found that there were no issues as regards the representation of minority interest holders who may have claims of corporate mismanagement or breach of fiduciary duty, or the type of claims asserted by limited partners against general partners or against co-litigant insiders or guarantors. Finding that the only claims and cross-claims that existed were against the debtors and AGRIC and AGIC, and relying on Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, and given how far the litigation had proceeded, the Court concluded that it was in the best interest of the estate for counsel to be retained.

In another Houston case, In re TV Red Line, Inc., 166 B.R. 296 (Bankr. S.D. Tex. 1994), the Court was asked to employ counsel for the debtor on a contingency basis as “Special Litigation Counsel.” Counsel already represented the two principals of debtor. Their employment on behalf of the debtor was sought to pursue claims against debtor’s bank lender, its officers and directors and was further sought to defend debtor in an action by the same bank. A key issue in the case centered around who was responsible for maintaining insurance coverage on the debtor’s business premises which had suffered a fire. Apparently the premises were not insured. The Court determined that the debtor could assert a claim against the shareholders for failure to maintain that insurance. The shareholders and the debtor claimed that the Bank was responsible for maintaining the insurance.

Though it seems clear that the interest of the shareholders and the debtor ran parallel insofar as their claims against the Bank was concerned, the Court found that if counsel were employed to represent the debtor and was already in the position of representing the shareholders, then there was a potential conflict of interest. The Court determined that the debtor may have a cause of action against the shareholders.

“The phrase ‘adverse interest’ is not defined in the Code and the legislative history gives no indications of its intended meaning. It is defined by case law. The case was primarily used in its broadest commercial and economic sense. In addition, it is defined as possessing or asserting any economic interest that would tend to lesson the value of the estate or create either an actual or potential dispute in which the estate is a rival claimant.” TV Red Line, Inc., at 289.

Accordingly, the Court denied counsel’s application for employment.

But venture this. Assume that different “Special Litigation Counsel” was retained by the debtor. And remember there are just two shareholders, “mom and pop.” Which corporate officer is going to give the “order to fire” on behalf of the debtor against “mom and pop?” Is this suddenly the new lawyers’ responsibility to make those corporate decisions and, having virtually no ownership interest in the corporation, decide to shoot the corporation’s owners or at least raise that claim? Gotta be a better way.

A year later, the Houston court again dealt with the issue in the case of In re Quality Beverage Co., Inc., 216 B.R. 592 (Bankr. S.D. Tex. 1995). This case actually deals with the employment of consultants and not attorneys. However, the opinion is helpful because of its acknowledgment that employment issues in each case must be examined on a case by case basis, and further for the fact that it discusses “potential conflicts.” In this case, the consultants had performed services for the Creditors’ Committee and was seeking to perform services for the Trustee who had potential preference actions against members of the Committee. This at least in the eyes of the Court resulted “in a potential dual representation” and therefore an “actual conflict.” In disallowing the employment, the Court did so in face of the fact that the Committee had been made aware of the possible conflict and had “informally waived their objections to the conflict.” The Court said those conflicts can’t be waived citing In re Envirodyne Industries, Inc., 150 B.R. 1008 (Bankr. N.D. Ill. 1993) and In re Amdura Corp., 121 B.R. 862 (Bankr. D. Colo. 1990).

How do we get our hands around what we really mean by the notion of holding an interest adverse to the estate?

The Court in the case of In re Roberts, 46 B.R. 815 (Bankr. D. Utah 1985) defined the holding of an adverse interest as “(1) to possess or assert mutually exclusive claims to the same economic interest, thus creating either an actual or potential dispute between rival claimants as to which, if any, of them the disputed right or title to the interest in question attaches under valid and applicable law; or (2) to possess a predisposition or interest under circumstances that render such a bias in favor or against one of the entities,” Roberts, at 826-827.

Collier’s takes a shot at defining adverse interests as “any economic interest that would tend to lesson the value of the bankruptcy estate or that would create either
In the Matter of Consolidated Bancshares, supra, about holding “a full evidentiary hearing and making a painstaking analysis of the facts and precise application of precedent.” Matter of Consolidated Bancshares, at 1256. If you can at least begin with the notion that there should be no hard and fast per se disqualification rule, that the whole darn area is gray and that there is no black and white (unless I suppose you are talking about the limited partner/general partner deal set forth in W.F. Development Corporation), then at least common sense has a fighting chance in all of these situations. In the actual-versus-potential-conflicts area, there is some authority for taking the permissive approach as regards particularly “potential” conflicts.

In re Waterfall Village of Atlanta, Ltd., 103 B.R. 340 (Bankr. N.D. Ga. 1989) appears to stand for the proposition that only actual conflicts to disqualify. And In re Stamford Color Photo, Inc., 98 B.R. 135 (Bankr. D. Conn. 1989) observes that potential conflicts alone are not enough to warrant disqualification. And the Texas case of In re Global Marine, Inc., 108 B.R. 998 (Bankr. S.D. Tex 1987) which predates Kendavis notes that only actual, not potential, conflicts are disqualifying under Section 327(a).

The Waterfall Village of Atlanta case adopted a two prong test referring back to Canon Nine as regards a lawyer avoiding even the appearance in impropriety. The question presented is whether or not “public suspicion” caused by the conflict outweighs the interest of counsel in continuing with the representation of the debtor in the face of that appearance. The Court concluded that a potential conflict of interest was insufficient to require disqualification. So did the Court in Global Marine. That Court chose it appears to take the position that if a conflict of interest was “dormant”, then it should be addressed only when it materialized rather than preemptively. And the Court takes what seems to be the more common sense approach pointing out that a premature disqualification for potential conflicts would only result in unnecessarily cost to the estate and further delay the process of the case.

The case of In re Dynamark, Ltd., 137 B.R. 381 (Bankr. S.D. Cal. 1992) involved a case in which debtor’s counsel also represented the largest secured creditor in the case in unrelated matters. Talk about a conflict. But this fact was disclosed. And debtor’s counsel represented the debtor in a “vigorously contested cash collateral motion” against that creditor “diligently and zealously.” Noting that the secured creditor amazingly executed a written waiver of any conflict that might exist, and further noting that debtor’s counsel covenanted to keep the Court aware of and disclose of any conflicts that arose during its representation of the Debtor, the Court allowed and approved the representation notwithstanding the “disinterestedness” aspect that existed in that case. The potential conflict that the Court saw was characterized as “too remote to warrant disqualification.” Dynamark, at 381.

The approach of engaging in a “painstaking analysis” as the Fifth Circuit seems to recommend in Matter of Consolidated Bancshares case has much to commend it. Knee-jerk reactions to what appear to be the same circumstances, but aren’t, seldom fly.

The case of In re Martin, 817 F.2d 175 (1st Cir. 1987) involved a situation where debtor’s counsel took a mortgage on debtor’s property as a retainer. The question was whether or not the creditor relationship that was established created an “interest adverse” so that the attorney was no longer disinterested. The Court found that this was a potential conflict and that while actual conflicts required disqualification, potential conflicts alone do not warrant the same result. The Court stated that “horrible imaginings alone cannot be allowed to carry the day. Not every conceivable conflict must result in sending counsel away to lick his wounds.” Martin, at 183. The Court stated that a potential conflict disqualification inquiry must be case specific and take into consideration all relevant facts of the particular case. The Court’s balancing test weighed various factors including (1) whether the arrangement is “reasonable”, (2) whether the parties have acted in “good faith”, (3) whether the arrangement is necessary for retaining competent counsel; and (4) the likelihood that the potential conflict will become an actual conflict. Potential conflicts are merely factors in support of disqualification and do not necessarily nullify the attorneys appointment.

But opposite what would appear to be a more sensible approach, take the opinion of the Court in the case of In re Roger J. Au and Son, Inc., 64 B.R. 600 (N.D. Ohio 1986). In that case, debtor’s counsel theoretically had a potential conflict where counsel represented both the corporate debtor and the debtor’s principal shareholder and officer. The Court concluded that the possibility of a “shift in loyalty” in the debtor’s shareholder and principal officer furthering their own interests at the expense of the estate violated both the
“appearance of impropriety” standard of Canon Nine and the “disinterested” requirement of Section 327(a).

Holding the opposite and seemingly more sensible view is the Waterfall Village of Atlanta and Global Marine cases. The Court in the Waterfall Village of Atlanta case found that the prior representation of the debtor on unrelated matters did not warrant disqualification for a conflict of interest. This case apparently was a one-asset case with a small number of creditors and the majority of the debt was held by secured creditors that were represented by counsel. There was no “appearance of impropriety” in the opinion of the Court to outweigh the debtors right to retain its counsel of choice.

And in the Global Marine case, the Court found “common core interests” that involved the representation of the corporate debtor and its subsidiaries which resulted in potential conflicts in every case. However, this type of arrangement in the opinion of the Court did not warrant disqualification, particularly when disqualification would increase the costs of the parties and negatively effect the time management of the case by causing prematurely the hiring of new counsel.

Finally, those favoring the discretionary approach can take comfort in the Third Circuit opinion in In re Marvel Entertainment Group, Inc., 140 F.3d 463 (3d Cir. 1998) in which the Court held that while actual and potential conflicts of interest create an “appearance of impropriety” and violate Section 327(a), they think that the disqualification of counsel for potential conflicts of interest should apply only in large Chapter 11 cases. In small cases, the potential conflicts “should be evaluated in terms of equity and fairness.” And in determining what is a large Chapter 11 case, the authors cite back to 11 U.S.C. §101(51C) which says:

“(51C) “Small business” means a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed $2,000,000.00.”

The authors would suggest that the Court use that section to determine whether a bankruptcy is “small.” And what then follows is a good discussion of whether or not Section 105 of the Code can be used by the Courts to “deviate from the requirements set forth in Section 327(a).” Way back in 1990, one Court got on to that notion and apparently held that the Court could adopt “curative measures” if the employment of the professional is important to the case’s resolution, there was no actual impropriety or harm alleged or shown and all competing interests were carefully balanced. This at least was the District Court’s ruling in review of the Bankruptcy Court’s decision, the District Court’s opinion being found in the case of In re PHM Credit Corp., 110 B.R. 284 (E.D. Mich. 1990). The guideline suggested by the authors in the above-referenced note to determine disqualification for potential conflicts in small cases are taken in part from the 1989 case of In Re BH&P, Inc., 103 B.R. 556 (Bankr. D.N.J. 1989) which are as follows:

1. The entities ability to reorganize the debt and maximize the return to creditors;
2. The economic effect and delay caused by the retention of a new attorney at the outset as compared with allowing counsel to continue representation;
3. The likelihood, whether more profitable than not, that conflict will materialize into an actual conflict;
4. Fairness and equity of the result; and
5. The need for familiar counsel to continue representing the estate to enable the debtor to obtain a fresh start.

While not all inclusive, the above factors should be taken into consideration in determining particularly as regards potential conflicts whether or not counsel should be disqualified or allowed to continue representation in the case.

VII. Conclusion

In summary, if all actual and potential conflicts are disclosed, if all connections of counsel with the debtor and related parties are disclosed, if periodic reports and updates are made as regards the status of any potential conflicts and whether any new potential conflicts have arisen, or whether any actual conflicts have surfaced, then it would seem that particularly in small cases where the interest of all parties are being furthered and represented, everyone wins. At least potential conflicts shouldn’t disqualify counsel. To disqualify competent counsel in the face of a technical or potential “conflict” would seem to be imprudent. And if we adopt that approach, then it is less likely that those people sitting across the table wanting to hire a lawyer to help them reorganize their business affairs in a reorganization case are less likely to glaze over at the concept that they are hiring a lawyer to represent them but the lawyer is not really going to represent them but rather the entity that they created and that they own and that they have an interest in but is not really them, and the lawyer is going to represent it and not them, and ..... well, you get the idea.

Good sense needs to prevail. A case by case analysis will serve us better. But what else is new? Well, maybe this.