

2014 AIRA POR 2014

Ethical Considerations in the Restructuring Practice and Best Practices

Judge Elizabeth Stong	US Bankruptcy Court, EDNY
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I. Professional Conduct

Lawyers

- State law - standards set forth in disciplinary rules in each state
- ABA Model Rules of Professional Conduct
- Bankruptcy Code & Bankruptcy Rules provide further standards on matters such as disclosure, conflict of interest regarding retention, compensation
- ABI Ethics Task Force - "state ethics rules do not always 'fit' with the realities of bankruptcy practice" - Report was finalized on April 21, 2013. The Task Force was charged with deciding whether there is a need for national ethics rules and standards. The report incorporated state ethical rules & ABA's Model Rules of Professional Conduct. Topics included:
 - a. conflicts of interest
 - b. disclosure, retention and fee issues
 - c. consumer issues
 - d. committee solicitation issues
 - e. discipline, sanctions and multi jurisdictional practice issues

Accountants & Financial Advisors

- Non-attorney professionals are not subject to legally enforceable rules of conduct, however one's reputation in the industry often guides behavior
- The industry is one of continuous self-regulation. And recent trends support the notion that saying more in disclosures regarding relationships, fee arrangements, and prior involvement with parties in a matter is well advised

- Ultimately the responsibility for meeting the rules are determined on a case by case basis, and are squarely the responsibility of the individual or firm
- Whether it is AICPA, ABI, TMA or AICPA, several key components resound for all financial advisors
 - a. competence
 - b. independence
 - c. integrity
 - d. confidentiality
- From these key areas, each group expands on their own rules of ethics, with much overlap in most areas. Not surprisingly, the details around rules in the AICPA are the fullest
- Performance is case specific, but a common goal in all matters, regardless of which client is being served is to maximize value for all parties
- CRO rules are a little different, since this position is regarded as management of the company. Under state corporate law, duty and loyalty is owed to the company. However, even here, differences in state law make regulations different
- Supplements: TMA Code of Ethics and AICPA Code of Professional and Ethical Conduct

Duties

- Competence & diligence— knowledge of legal principles, inquiry into and analysis of factual and legal elements involved in matters, knowledge of procedural rules and court rules and adequate preparation to present client's position with admissible evidence
- Communication – explain matter to permit client to make informed decision; keep client reasonably informed of status; and promptly comply with reasonable requests for information
- Prohibition of assisting the client in the commission of a crime (i.e., fraudulent concealment or transfer of assets)
- Candor to courts and other third parties
 1. Facts presented in contested matters and AP's

2. Schedules & SOFA (signed under penalty of perjury)
 3. Providing adequate info in DS
 4. Making of false oaths, misstatements, omissions or misrepresentations can subject a debtor to criminal prosecution and/or criminal prosecution
- Prohibition of knowingly conducting litigation or advancing a claim or defense that is unwarranted under existing law; there must be a good faith argument for its support
 - Rule 9011 requirements
 - Disclosure of legal authority in controlling jurisdiction known to the lawyer to be adverse to client's position and not disclosed by opposing counsel
 - Prohibition against knowingly offering evidence that lawyer knows to be false; requirement that lawyer take reasonable remedial measures with respect to material evidence that lawyer subsequently learns its false

Enforcement Mechanisms by Bankruptcy Courts

- Rule 9011 sanctions
- 11 U.S.C. §105(a) enforcement to prevent abuse of bankruptcy process
- 28 U.S.C. § 1927 – award of attorneys fees where conduct of an attorney “multiplies the proceedings in any case unreasonable and vexatiously”
- 18 U.S.C. § 152 – conduct found criminal

II. Retention & Compensation Ethical Issues

- Rule 2014 - Disclosure of Connections
 - a. disclosure of relevant connections
 - b. different thresholds based on size of cases
 - c. conflict of interest duties are higher pursuant to B. Code & Rules as debtor's counsel (1) cannot hold any interest adverse to the estate and (b) must be disinterested
 - d. Role of UST as monitor
- Counsel to Debtor vs Counsel to the Estate
 - a. tension between estate (multiple beneficiaries) and the company

- b. core duties: loyalty and care, maximize the estate; tension with acting in its own interest (i.e files own plan)
 - c. tension of representing a closely held company and maintain independence from owners and management
- Can an attorney or accountant serve as a trustee and as his/her own counsel or accountant
- Indemnity
- Fee Arrangements/Disclosure of retainers paid by principal or potential plan proponent
- Best Practices

III. Attorney Client Privilege

- Application – communication made between the lawyer and client in confidence for the purpose of obtaining or providing legal advice
- Includes agents
- Limitations/Exceptions
- FRE Rule 501 provides that federal law supplies the substantive rule of decision and state law governs when state law supplies the substantive rule
- BR 2004 examinations – take place pursuant to federal law and courts have ruled that privilege issues are governed by federal common law, even if the 2004 inquiry related to a matter governed by state law
- Bankruptcy Trustee has right to waiver privilege of corporate debtor – *Commodity Futures Trading v. Weintraub*

IV. Standing to pursue litigation in cases where creditors are paid in full

- Adelpia - standing not found as creditors would not benefit
- Mirant - standing found

Ethics Outline^{*}

Ethical Considerations and Best Practices Regarding Representation of Clients, and conduct of case, in insolvency cases.

I. Retention and Compensation of Estate Representative

A. Attorneys

i. 11 U.S.C. § 327(a)

(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.

ii. Disclosures of disinterestedness and lack of adverse interest Bankruptcy Rule 2014:

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.

iii. The term "disinterested person" as defined in the Code 11 USC § 101(14) means a person that-

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

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

(C) does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect

^{*}These materials were prepared by Jeffrey A. Cooper, Esq. and Barry J. Roy, Esq. of Rabinowitz, Lubetkin & Tully, LLC

relationship to, connection with, or interest in, the debtor, or for any other reason.

- iv. Conflicts to be determined by actual or potential standard and governed by Code of Professional Responsibility ("CPR") and bankruptcy case law

See, generally, In re BH&P, Inc., 949 F.2d 1300, 1317-18 (3rd Cir 1991)

In New Jersey, the United States District Court has its own ethics rules for attorneys in the Court, which presumably includes the Bankruptcy Court.

Can the parties waive the conflict? Can the Court allow the parties to waive the conflict?

Caution: The CPR precludes governmental entities from waiving a conflict.

- v. 327(e)-limited retention, not need to be disinterested, need not waive claim. It reads:

The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to employed.

- vi. New York State Standards of Civility (EDNY) (attached)

B. Accountants

- i. 327(a)-same issue regarding waiving of claim
- ii. 327(e)-is this available for accountants?

C. Financial Advisors- Role to be played is critical, if not as accountant then as a financial advisor and/or chief restructuring officer ("CRO")

- i. 327(a) or (e)-are they an estate professional? See In re First Merchants Acceptance Corp., 1997 WL 873551 at * 3 (D. Del. 1997 Dec. 15, 1997) (setting forth six (6) part test for making determination of whether a party is a "professional" under Section 327); In re Seven Counties Services, Inc., 496 B.R. 852, 855 (Bankr. W.D. Ky. 2013) (public relations firm not a "professional" under Section 327); In re CNH, Inc., 304 B.R. 177, 179 (Bankr. M.D.Pa. 2004) (nursing home consulting service not a "professional" under Section 327); In re American Tissue, Inc., 331 B.R. 169, 173 (Bankr. D. Del. 2005) (class action lawsuit recovery business not

a "professional" under Section 327); In re ITG Vegas, Inc., 2007 WL 1087212 at * 2 (Bankr. S.D. Fla. April 3, 2007) (political consultant not a "professional" under Section 327).

The prongs of the First Merchants test are as follows: (1) whether the employees [of the entity seeking to be retained] control, manage, administer, invest, purchase or sell assets that are significant to the debtor's reorganization; (2) whether the employees are involved in negotiating the terms of a Plan of Reorganization; (3) whether the employees are directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations; (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate, (5) the extent of the employee's involvement in the administration of the debtor's estate; and (6) whether the employee's services involve some degree of special knowledge or skill, such that the employee can be considered a "professional" within the ordinary meaning of the term.

In applying these factors, courts stress that no one factor is dispositive and that the factors should be weighed against each other and considered in toto. In re First Merchants, 1997 WL 873551 at * 3.

- ii. 363-even if retained by a corporation, is retention outside the ordinary course?

Practice Pointer-Is it better to retain the CRO before the bankruptcy so that he/she is already a representative of the corporation?

- iii. See AIRA Code of Professional Conduct and Ethical Conduct

II. Compensation

- A. 327 professionals are subject to the requirements of 330 as well as the governing applicable rules in the district.
- B. Most districts now allow for the monthly payment of 80% of fees, plus expenses to be trued up every quarter.
- C. Compensation-initial payment by principal, potential buyer or plan proponent? In a closely held company, how can the principal fund the case, either directly as a loan or equity infusion or otherwise?

D. Pre-approval under § 328-set fee

- (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under

section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

- E. In the event of CRO retained under 363, there is likely not a requirement to file formal fee applications but, absent 328 retention, would there be a requirement to demonstrate benefit to the estate as an administrative expense?
- F. Fee applications

III. Conduct of Case-Duties and Fiduciary Obligations

- A. Depends upon who the client is, that is, is it a slightly different role for committee representatives, See 11 U.S.C. § 1103.
- B. Obligations for financial advisors through Bankruptcy Code and case law-corporate law/deepening insolvency.

IV. Best Practices

- A. Conflict counsel
- B. Separation within law firm
- C. Limited scope of representation-unbundling-ghost writing

V. General Issues

1. Does it matter if the representation is part of a plan process or 363 sale? What are the various roles of professionals for the plan proponent and/or buyer or competing bidder?

The best practice: as a part of the negotiations for professionals for the debtors who are trying to satisfy the obligation a buyer, perhaps use language that includes reasonable efforts instead of best efforts to meet certain benchmarks pursuant to a timeline.

2. Use of 363 sale to benefit secured creditor-use of gift and/or payment by secured party to utilize the bankruptcy process?

VI. Enforcement

A. Bankruptcy Rule 9011

B. US Trustee

The author acknowledges several panels at the recent NCBJ meeting for topics and questions raised in this outline, specifically the ethical considerations program and the closely held businesses program.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re:

Adoption of New York State Standards of Civility

Administrative Order No. 568

-----X

UPON the resolution of the Board of Judges for the United States Bankruptcy Court for the Eastern District of New York, it is

ORDERED, that the New York State Standards of Civility for the legal profession, New York Rules of Court, Part 1200, Appendix A, a copy of which is annexed hereto, are hereby adopted as guidelines for practice in all cases and proceedings in this Court.

Dated: Brooklyn, NY
October 28, 2010

/s/Carla E. Craig
CARLA E. CRAIG
Chief United States Bankruptcy Judge

STANDARDS OF CIVILITY

1. Preamble

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules, or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course. The Standards are divided into four parts: lawyers' duties to other lawyers, litigants and witnesses; lawyers' duties to the court and court personnel; court's duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants.

As lawyers, judges and court employees, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

LAWYERS' DUTIES TO OTHER LAWYERS, LITIGANTS AND WITNESSES

I. Lawyers should be courteous and civil in all professional dealings with other persons.

- A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.
- B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.
- C. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

- A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.
- B. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.

- A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court or other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

IV. A lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response.

V. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.

A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office.

B. Papers should not be served at a time or in a manner designed to inconvenience an adversary.

C. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

A. A lawyer should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.

B. A lawyer should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

VII. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.

- A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
- B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at depositions and at conferences, and, to the best of their ability, prevent clients and witnesses from causing disorder or disruption.
- C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.
- D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

VIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.

IX. Lawyers should not mislead other persons involved in the litigation process.

- A. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
- B. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.
- C. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

X. Lawyers should be mindful of the need to protect the standing of the legal profession in the eyes of the public. Accordingly, lawyers should bring the New York State Standards of Civility to the attention of other lawyers when appropriate.

LAWYERS' DUTIES TO THE COURT AND COURT PERSONNEL

I. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

- A. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.
- B. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

C. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.

D. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

II. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

JUDGES' DUTIES TO LAWYERS, PARTIES AND WITNESSES

I. A Judge should be patient, courteous and civil to lawyers, parties and witnesses.

A. A Judge should maintain control over the proceedings and insure that they are conducted in a civil manner.

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses

C. Judges should, to the extent consistent with the efficient conduct of litigation and other demands on the court, be considerate of the schedules of lawyers, parties and witnesses when scheduling hearings, meetings or conferences.

D. Judges should be punctual in convening all trials, hearings, meetings and conferences; if delayed, they should notify counsel when possible.

E. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

F. Judges should use their best efforts to insure that court personnel under their direction act civilly toward lawyers, parties and witnesses.

DUTIES OF COURT PERSONNEL TO THE COURT, LAWYERS AND LITIGANTS

I. Court personnel should be courteous, patient and respectful while providing prompt, efficient and helpful service to all persons having business with the courts.

A. Court employees should respond promptly and helpfully to requests for assistance or information.

B. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

STATEMENT OF CLIENT'S RIGHTS

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.
2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).
3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory.
5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.
6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.
7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).
8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.
9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.
10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

Code of Professional and Ethical Conduct

AIRA members have a responsibility to perform professional services in a manner consistent with this Code of Professional and Ethical Conduct, developed by the Board of Directors, according to each of the following standards:

COMPETENCE

- Maintain an appropriate level of professional competence by ongoing development of their knowledge and skills.
- Perform their professional duties in accordance with relevant laws, regulations and technical standards; including, but not limited to, technical standards issued by authoritative bodies as designated in the bylaws.
- Accept only those assignments for which they possess, or can reasonably acquire, the necessary competence to complete—applying their knowledge and skill with reasonable care and diligence, without assuming a responsibility for infallibility of knowledge or judgment.

CONFIDENTIALITY

- Refrain from disclosing confidential information acquired in the course of their work, except when authorized, unless legally obligated to do so.
- Inform subordinates as appropriate regarding the confidentiality of information acquired in the course of their work and monitor their activities to assure the maintenance of confidentiality.
- Refrain from using or appearing to use confidential information acquired in the course of their work for unethical or illegal advantage, either personally or through third parties.

INTEGRITY

- Be honest and candid within the constraints of client confidentiality.
- Avoid actual or apparent conflicts of interest and advise all appropriate parties of any potential conflicts.
- Not knowingly misrepresent facts.
- Refrain from any activity that would prejudice their ability to carry out their duties ethically.
- Recognize and communicate professional limitations or other constraints that would preclude responsible judgment or successful performance of an activity.
- Refrain from engaging in or supporting any activity that would discredit the profession.

- Observe the principles of objectivity and due care.

OBJECTIVITY

- Be impartial, intellectually honest, and free of conflicts of interest.
- Communicate information fairly and objectively.

DUE CARE

- Discharge their professional responsibility with competence and diligence.
- Adequately plan and supervise the performance of professional services.
- Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

BYLAWS

The Code of Professional & Ethical Conduct and other standards and policies regarding membership and certification are found in [AIRA's Bylaws](#).



TMA Code of Ethics

Preamble

Members of the Turnaround Management Association (hereinafter "TMA") are dedicated to the highest standards of professionalism, integrity and competence for those engaged in all matters involving turnaround and crisis management and corporate renewal. The following principles are guidelines for the conduct of members in fulfilling those obligations.

The transactions in which we engage are diverse, multifaceted and sometimes complex. It is thus not possible to state a set of rules that would prescribe proper behavior under every circumstance. However, to provide guidance and clarity, we have developed and stated our Code of Ethics.

This Code is composed of Canons and Ethical Standards. The Canons are broad principles of conduct. The Ethical Standards (E.S.) are more specific goals toward which members should aspire in professional performance and behavior.

Canon I

General Obligations and Professional Boundaries

A member shall maintain and advance knowledge of the practice of turnaround and crisis management and corporate renewal, respect the practice and contribute to its growth.

E.S. 1.1 Professional Boundaries:

A member bound by this Code of Ethics is one who is engaged in the practice of providing managerial services and consultation services to businesses, debtors, creditors and other interested parties with respect to troubled businesses, organizations and associations. While such services include a wide range of issues and problems, a member must take care not to perform services that require a license, unless the member is so licensed to perform such services.

E.S. 1.2 Standards of Excellence:

A member shall strive to improve his or her professional knowledge and skill. Within his or her practice, a member shall demonstrate a consistent pattern of reasonable care and competence.

E.S. 1.3 Conduct:

A member shall uphold the law in the conduct of his or her professional activities.

E.S. 1.4 Human Rights:

A member shall uphold human rights in all of his or her professional endeavors.

E.S. 1.5 Continuing Education:

A member shall seek out and participate in educational programs to enhance his or her professional knowledge.

Canon II

Obligations to the Client

A member shall serve his or her client independently, competently and in a professional manner. A member should exercise unprejudiced and unbiased judgment on the client's behalf.

E.S. 2.1 Professional Responsibilities:

(A) A member shall undertake to perform the engagement to the best of his or her ability; (B) A member shall not proceed with an engagement unless the client has agreed with the objectives, scope and approach to be employed and has agreed to the fee structure; (C) A member shall not undertake an engagement which cannot be fulfilled in a timely manner because of his or her commitments.

E.S. 2.2 Independence:

A member's duty is solely to the client and he or she should strive to remain independent of other affiliations that could compromise his or her judgment or result in the appearance of compromise. Prior to accepting an engagement, a member shall disclose to his or her client all financial relationships which may cloud, or give the appearance of clouding, his or her judgment. If the client is the troubled business or organization, disclosure shall be made of any past referrals from, prior work for, or an ownership interest in, any owner, creditor or customer of the client and any party offering financing to, or seeking to purchase an interest in the client. A member shall avoid conflicts of interest and the appearance of conflicts of interest.

E.S. 2.3 Competence:

A member shall not undertake an engagement for which his or her firm does not have the technical capability.

E.S. 2.4 Candor and Truthfulness:

(A) A member shall not intentionally or recklessly mislead existing or prospective clients about the results which can be achieved through the use of a member's services; (B) A member shall not offer solutions nor make recommendations that are unrealistic or impractical. The nature of proposed actions, and the potential ramifications of those actions, should be communicated to the client.

E.S. 2.5 Integrity:

(A) A member shall not disclose confidential information about his or her clients or otherwise take advantage of such information; (B) A member shall not serve a client using proprietary information developed for a previous client without obtaining the previous client's consent.

E.S. 2.6 Contingency Fees:

A member may accept a performance bonus or other contingency fee.

E.S. 2.7 Ownership:

(A) TMA recognizes the difficulties involved with respect to equity ownership of a troubled company client; (B) If a member owns or obtains a direct or indirect financial interest in a client, such interest must be disclosed to creditors and stockholders of the client on a timely basis, must be negotiated prior to the assignment and additional equity ownership should not be negotiated during the course of an engagement; (C) If an equity interest in a troubled business client results in the member gaining control of the client, the conditions and circumstances whereby the interest is obtained should be set forth in writing and agreed to prior to commencement of the engagement. Equity interests held by parties affiliated with the member shall be aggregated with the member's direct interest to determine whether or not the member would control the client. The member should insist that the client obtain legal counsel to represent the client with respect to negotiating and documenting the equity interest to be obtained by the member.

Canon III

Obligations to the Profession and to Colleagues

A member shall uphold the integrity and dignity of the profession.

E.S. 3.0: Responsibility to Colleagues:

E.S. 3.1: Each member has a responsibility to further the profession by acting with integrity and supporting the objectives and programs of the Association.

E.S. 3.2: A member shall not refer a client to a colleague in exchange for monetary consideration from that colleague or in any way share in any fee received by such colleague. For this purpose, "colleague" shall not include a member's partner, a shareholder or employee of such member's firm, or an independent contractor that has an exclusive, written contractual relationship with a member or such member's firm that predates the referral.

E.S. 3.3: A member referring a client to another member shall not make any commitments on behalf of the member receiving the referral or misrepresent the qualifications of the member receiving the referral.

E.S. 3.4: A member shall not misrepresent his or her credentials or capabilities in the pursuit of engagements.

E.S. 3.5: A member shall not disparage or make false statements about another member competing for an engagement.

E.S. 3.6: A member shall not give the impression that membership in the TMA bestows any credentials or in any way guarantees minimum qualifications.

E.S. 3.7: A member shall represent that he or she subscribes to this Code of Ethics.

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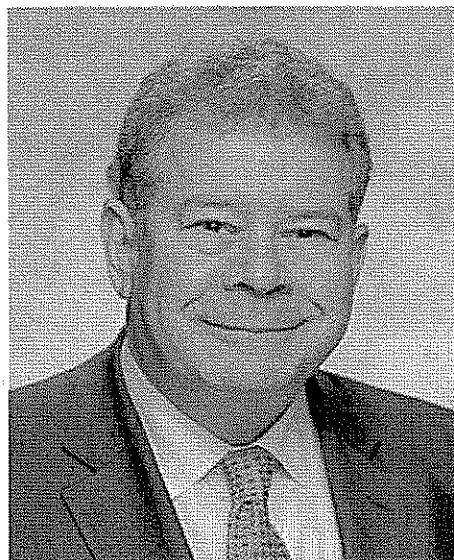
RABINOWITZ, LUBETKIN & TULLY, L.L.C.

ATTORNEYS AT LAW

Jeffrey A. Cooper

Areas of Practice:

Business Reorganization and Restructuring
Debtor/Creditor Rights
Bankruptcy Litigation
Civil and Commercial Litigation



Admitted:

- New Jersey, 1980
- New York, 1983
- U.S. Court of Appeals 3rd Circuit
- U.S. Court of Appeals 2nd Circuit
- U.S. District Court Southern District of New York
- U.S. District Court Eastern District of New York
- U.S. District Court District of New Jersey

Education:

- Yale University, B.A. (History), 1977
- Cornell University Law School, J.D., 1980

Publications:

West's Bankruptcy Exemption Manual, New Jersey section

Nunc Pro Tunc, 2009, Newsletter of the Historical Society of the District Court, New Jersey, article on the history of the New Jersey Bankruptcy Court, co-author

Affiliations:

While representing various parties in interest in business and consumer bankruptcies, Mr. Cooper concentrates his practice on business reorganization and workouts. He has represented debtors-in-possession and plan proponents in the healthcare, garment, and food industries, including South Ambo Medical Center, Hit or Miss, Inc., and Deli Stars, Inc. He represented the buyer of the physical plant in United Healthcare and assisted the Trustee in litigation in the case of Robert E. Brennan. He has represented both the FDIC and RTC as a secured party in substantial bankruptcy cases. He also represents parties in the Chancery Courts of the State of New Jersey, as well as in out-of-court and state law workouts. He has represented parties to agreement with chapter 9 debtors.

Mr. Cooper has served as a Master of the Bankruptcy Inn of Court and on three Merit Selection Panels (which recommends bankruptcy judges for the District of New Jersey to the Third Circuit Court of Appeals). He edits the New Jersey Section of West's Bankruptcy Exemption Manual.

- New Jersey State Bar Association, member
- American Bankruptcy Institute, member
- Historical Society of the District Court, New Jersey, Board of Directors

He recently successfully represented Chapter 11 debtor Brisar Industries, a packaging entity in Paterson, New Jersey, which maintained the employment of 100 blue collar workers, and confirmed a Chapter 11 plan.

While at Carella, Byrne, Mr. Cooper served as the firm's voting representative to the State Capital Group, a global association of law firms, served on the group's Board of Directors and as the Chair of its Bankruptcy Section. He created and maintained a well respected bankruptcy blog and was instrumental in the evolution of that section into a key networking and information sharing vehicle and utilized an effective listserv.

He has lectured for the New Jersey Institute of Continuing Legal Education (ICLE), the National Bankruptcy Institute, at the State Capital Group's annual meetings, at the Commercial Law League's Annual New York City meeting, and at the William H Gindin Bankruptcy Bench Bar Annual Conference.

Mr. Cooper has been selected for inclusion in Best Lawyers, Super Lawyers, and has received an AV rating from Martindale-Hubbell.

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Practice Teams

Bankruptcy and Financial Restructuring
Complex Litigation

Areas of Focus

Acquirors & Investors in Distressed and Bankrupt Companies
Committees of Unsecured Creditors
Indenture Trustees, Agents and Corporate Trust Services
Post Petition, Exit & Rescue Financing
Bankruptcy & Financial Reorganization

Practice Areas

Leah Eisenberg is a partner in the Bankruptcy and Financial Restructuring Practice. She focuses on corporate reorganization, bankruptcy and inter-creditor issues and corporate trust matters and represents committees of unsecured creditors, indenture trustees, secured creditors, debtor-in-possession lenders, acquirors, unsecured creditors, bondholder and noteholder groups, equity holders, investors, creditor trustees, liquidation trustees, plan administrators, and disbursing agents and other entities in bankruptcy reorganization and liquidation proceedings.

Leah also is a member of the firm's Steering Committee for the firm's Women's Leadership Development Initiative.

Client Work

Leah's recent matters have included:

- § Representation of indenture trustees in the Chapter 11 bankruptcy proceedings of Advanta Corporation, Simmons Bedding Company, Velocity Express Corporation, Pliant Corporation, R.H. Donnelley Corporation, Washington Mutual Inc., Bank United Financial Corporation, TOUSA, Inc., Propex Inc., Homebanc Mortgage Corporation, Dana Corporation, Portrait Corporation of America, Inc., Vesta Insurance Group, Inc., Pac-West Telecomm, Inc., Maxxim Medical Group, Inc., Lodgian Inc., Plainwell Inc., ATA Holdings Corp., and Delta Airlines, Inc.
- § Representation of official committees of unsecured creditors in the Chapter 11 bankruptcy proceedings of Distributed Energy Corp., Auto Life Acquisition Corp., TKO Sports Group USA Limited, Tactica International, Inc., Scient Inc., AppliedTheory, Inc., Lantis Eyewear, Insilco Technologies, Inc., Apple Capital LLC, and Planet Hollywood
- § Representation of purchasers of real property and other assets in the bankruptcy sale process
- § Representation of a secured creditor in the Globe Metallurgical Chapter 11 bankruptcy proceedings
- § Representation of bondholders in the Exide Technologies Chapter 11 bankruptcy proceedings

Previous Work

Before entering private practice, Leah served as a first law clerk to the Honorable Robert E. Gerber, US bankruptcy judge for the Southern District of New York (2000-2001).

Professional Activities

Leah co-founded and developed the Women's Division for the New York Institute of Credit ("NYIC") and serves as President. Leah is also a member of the American Bankruptcy Institute ("ABI"), the Association of Insolvency and Restructuring Advisors ("AIRA"), the Turnaround Management Association, and the International Women's Insolvency & Restructuring Confederation. Leah is also a member of Brooklyn Law School's Barry L. Zaretsky Annual Bankruptcy Roundtable Steering Committee.

Publications/Presentations/Recognitions

Leah has served on panels and moderated and lectured on bankruptcy and restructuring topics for the NYIC, ABI and AIRA as well as within her firm.

Leah's speaking engagements this past year included:

- § Moderator for the 7th Annual NYIC/AIRA Joint Bankruptcy & Restructuring Event on the topic of "Achieving Prompt and Efficient Confirmations: Pre-Negotiated Plans, Pre-Packaged Plans and Plan Support Agreements"
- § Speaker for the ABI's 14th Annual NYC Bankruptcy Conference on the topic of "Intersection of Securities Law and Bankruptcy Law"
- § Speaker for the AIRA's 28th Annual Bankruptcy & Restructuring Pre-Conference Financial Advisor's Toolbox Program on the topic of "Plan Process and Plan Funding"

In 2013, Leah proudly accepted an invitation from the Association of Insolvency & Restructuring Advisors to remark on the distinguished service of U.S. Bankruptcy Judge for the Southern District of New York, Honorable Robert E. Gerber at AIRA's 12th Annual Advanced Restructuring & Plan of Reorganization Conference. Leah has also taught bankruptcy topics for the CIRA courses offered by AIRA and this past year Leah co-chaired the Pre-Conference Financial Advisor's Toolbox Program for the AIRA's 28th Annual Bankruptcy & Restructuring Conference. Leah also completed Cannon Financial Institute's Course Corporate Trust I.

Leah has authored the following publications on bankruptcy issues:

- § "Clarifying TruPS Holders' Exercise Of Remedial Rights," *Law360*; October 2014
- § "A 3rd Circ. Opinion On Third-Party Releases," *Law360*; August 2014
- § "Lehman Bankruptcy Court Overrules UST Fee Objection and Reaffirms Confirmed Plan Provision," *Association of Insolvency & Restructuring Advisors Journal*; Vol. 26, No. 6, 2013
- § "Validating a Holder's Right to Elect Chapter 7 Trustee," *Law360*; August 2012
- § "Gifting and Asset Reallocation in Chapter 11 Proceedings: A Synthesized Approach," *American Bankruptcy Institute Journal*; September 2010
- § "Settlements of Estate Claims: May a Debtor Unilaterally Settle Claims and Causes of Action Commenced by a Creditors' Committee Without the Committee's Consent?" *AIRA Journal*, Volume 23, Number 2; 2009

- § "Creativity and Section 1129 (a) of the Bankruptcy Code: Confirmation of Administratively Insolvent Debtor," *American Bankruptcy Institute Journal*; September 2003
- § "Sharing a Piece of the Bankruptcy Pie: Asset and Plan Distribution Sharing & Reallocation," Winter Leadership Conference Educational Materials, American Bankruptcy Institute; 2003
- § "The Appointment of Examiners in Chapter 11 Proceedings: Legal Issues," 19th Annual Restructuring Conference, Association of Insolvency and Restructuring Advisors; 2003

Bar and Court Admissions

New Jersey Bar
New York Bar
US District Court, Eastern District of New York
US District Court, Southern District of New York
US Court of Appeals, Second Circuit

Education

Brooklyn Law School, JD, 2000
Binghamton University, BA (summa cum laude), 1997

Life Beyond the Law

Outside of the office, Leah's focus is on raising her son and daughter. Leah also enjoys running, volunteering for her synagogue and traveling.

John C. Esposito

Executive Director – Restructuring and Transaction Advisory
New Jersey

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Industry Experience

Automobile and Components
Consumer Products and Apparel
Financial Services
Gaming, Lodging and Hospitality
Manufacturing, Metals and Mining
Technology and Telecommunications
Transportation

Selected Public Cases

Ameritrust
Bowater
Fontainebleau Miami Beach
Foxwoods Resort Casino
Greatwide Logistics
KPN Quest
Maidenform
Malden Mills
National Equipment Services
RCN
Safety Kleen
Sea Island Company
Solo Cup

Experience

John Esposito has nearly 30 years experience in accounting (11 years) and financial restructuring (18 years) advisory services for lenders and debtors in healthy and troubled situations, both in- and out-of-court. He has also managed due diligence projects for parties making new investments and has sat on company boards. He has been engaged in over 200 restructuring matters for both large and middle-market matters in various industries, with a concentration in manufacturing, finance companies, gaming/hospitality and transportation.

Mr. Esposito's extensive turnaround advisory experience includes strategic planning, cash flow forecasting and cash management, business plan preparation and analysis, facility rationalization and going concern and liquidation analyses.

Prior to joining Capstone, Mr. Esposito was a Senior Managing Director at the Policano & Manzo legacy practice of FTI Consulting. He was also with Deloitte's audit practice and with Anchin Block & Anchin, a regional accounting firm.

Education and Affiliations

Mr. Esposito holds a BBA in Accounting from Hofstra University. He is a Certified Public Accountant and has professional memberships with the Turnaround Management Association, Association of Insolvency and Restructuring Advisors, American Institute of CPAs, and the New York State Society of CPAs. He currently serves as a member of the Board of Directors for the New York City Chapter of the Leukemia and Lymphoma Society and is active in other charitable organizations.

Hon. Elizabeth S. Stong

Judge Elizabeth S. Stong has served as U.S. Bankruptcy Judge for the Eastern District of New York since 2003. Before entering on duty, she was a litigation partner and associate at Willkie Farr & Gallagher in New York, an associate at Cravath, Swaine & Moore, and law clerk to Hon. A. David Mazzone, U.S. District Judge in the District of Massachusetts.

Judge Stong is a member of the Council on Foreign Relations and the Council and Audit Committee of the American Law Institute. She is also a Trustee and member of the Executive Committee of the Practising Law Institute, a member of the board and co-chair of the UNCITRAL Relations Committee of the International Insolvency Institute, and a member of the board of P.R.I.M.E. Finance, an international dispute resolution organization that promotes judicial education in complex financial disputes. She is co-chair of the New York Fellows of the American Bar Foundation, serves on the ABA Standing Committee on American Justice System, represents the ABA's National Conference of Federal Trial Judges in the ABA House of Delegates, and is a member of the Council of the ABA Business Law Section. She chairs the National Conference of Bankruptcy Judges International Judicial Relations Committee and has trained judges in Central Europe, North Africa, the Middle East, and the Arabian Peninsula as an expert with the World Bank, the International Finance Corporation, and U.S. Department of Commerce Commercial Law Development Program. She has also consulted with the Supreme Court of China and People's High Courts in Beijing and Guangzhou, and has led judicial workshops in Cambodia, Brazil and Argentina. Judge Stong is an adjunct professor at Brooklyn Law School and St. John's University School of Law.

Judge Stong previously served as President of the Harvard Law School Association, Vice President of the Federal Bar Council, Vice President of the Board of Directors of New York City Bar Fund Inc. and the City Bar Justice Center, Chair of the New York City Bar's Alternative Dispute Resolution Committee and Vice Chair of its Judiciary Committee, and an officer of the ABA Business Law Section. She was also a member of the board of MFY Legal Services, Inc., one of the largest providers of free civil legal services to low-income residents of New York City, and served on the ABA's Standing Committee on Continuing Legal Education, Commission on Women in the Profession, and Commission on Homelessness and Poverty.

Judge Stong received the Brooklyn Bar Association's Freda Nisnewitz Award for Pro Bono Service, the New York Institute of Credit's Hon. Cecelia H. Goetz Award, the ABA Business Law Section's Glass Cutter Award, and the MFY Legal Services Scales of Justice Award, among other recognitions.

Judge Stong received her A.B. *magna cum laude* and her J.D. from Harvard University.

September 2014