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Finding Debtor's Counsel

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In this Essay, we explore the question of how to assess the independence of debtor's counsel in Chapter 11. The question has arisen in recent high-profile bankruptcy cases, attracting renewed attention from commentators. We examine these cases and revisit the unique role that debtor's counsel serves.

From this analysis, a few guiding principles emerge for determining independence and managing conflicts that may arise. First, consistent with the rules outside of bankruptcy, sophisticated parties are capable of waiving conflicts and should be free to do so when their interests alone are affected by the conflict. Second, the possibility of conflicts—both real and apparent—is much higher for debtor's counsel than for attorneys in other roles. This creates a challenge for courts, which must address both the real conflicts and the weaponization of apparent conflicts to shift leverage. Conscious of this, courts should rely, whenever possible, on intermediate remedies—such as conflicts counsel and ethical firewalls—to address allegations that debtor's counsel is not independent. Finally, one should be careful to separate the analysis of the independence of a debtor's managers (including its directors and officers) from that of its counsel.

With this framework in mind, notwithstanding several criticisms from commentators, most of the outcomes in recent cases are easy to explain and reconcile.

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INTRODUCTION

When a large corporate debtor[1] initiates a Chapter 11 bankruptcy, its structure is fundamentally transformed, and its essence becomes a bit nebulous.[2] The debtor's interests and

1. We use this term as it is used in the Bankruptcy Code to broadly include corporations, partnerships, limited liability companies, business trusts, and other unincorporated companies or associations. *See* 11 U.S.C. § 101(9).

2. Chapter 11 bankruptcies are generally initiated by the voluntary filing of a petition by the debtor. 11 U.S.C. § 301. They can also be initiated by an involuntary filing. 11 U.S.C. § 303. But such cases are rare.

property all become part of a bankruptcy "estate."[3] The default rule—unless the bankruptcy court orders otherwise—is that the debtor's management will retain control of the debtor's operations and serve the role of trustee of the estate.[4] This is often referred to as the "debtor-in-possession" approach.[5]

The transformation is fundamental because the estate is to be administered, somewhat like a trust, for the benefit of those with claims against it, under the supervision of the court. The essence of the estate is nebulous because the nature and amount of the claims on (and interests in) the estate are not fully known. Indeed, the very process to benefit the claimants is the same—often contentious—process by which the nature and size of their claims will be determined. Thus, the debtor in possession[6] is running a process for the benefit of claimholders who are fighting over whether they are, in fact, claimholders.

This creates a complicated set of incentives and obligations for the debtor. One might try to simplify things by saying that the managers should just maximize the firm's value.[7] But that doesn't get us very far. During reorganization, managers face myriad choices that affect not just the expected value of the estate but also the allocation of risk, distribution of value, and assignment of control across classes of stakeholders. Two projects might have the same expected return but vastly different timelines, risk profiles, and distribution effects. Stakeholders have a strong

3. 11 U.S.C. § 541.

4. *See* 11 U.S.C. §§ 1101(a), 1107(a), 1108. The party that retains control would be whoever is authorized to operate and make decisions for the debtor under non-bankruptcy law. For corporations created under state law in the United States, this will be the directors and officers. For partnerships and LLCs, the titles may differ. But the general point is that the debtor continues to be run by whoever is in the role of manager unless a trustee is appointed in the bankruptcy case. *See* 11 U.S.C. §§ 322, 1104, 1106, 1108.

5. The two primary alternative regimes are the creditor-in-possession model (where some group of creditors take control) and the insolvency-practitioner model (where a professional administrator takes control).

6. For ease of exposition, unless otherwise noted, we use the terms debtor and debtor in possession interchangeably. There is a technical difference under the statute, but it does not affect the analysis in this Essay.

7. *See generally* Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309 (2008) (exploring the complications and alternative views of managers' duties in bankruptcy).

incentive to fight over these choices when their interests are at risk, and even sometimes when they are not.[8]

It is with this complicated backdrop that debtor's management must make one particularly important choice: Which law firm should they hire as their Chapter 11 counsel?

The choice has gained renewed attention in recent years as creditors and the United States Trustee have opposed the retention of certain law firms in large Chapter 11 cases, raising objections based on conflicts of interest with varying outcomes. Resolving these objections is challenging. Doing so requires a determination of whether a law firm's prior representations or other relationships create a conflict with the interests of its client, but the question is asked before one can even determine what those interests are. This Essay examines some of these cases and explores the general problem of assessing the independence of law firms representing a Chapter 11 debtor in possession.

From our analysis, a few guiding principles emerge for determining independence and managing conflicts that may arise. First, consistent with the rules outside of bankruptcy, sophisticated parties are capable of waiving conflicts and should be free to do so when their interests alone are affected by the conflict. Second, because of the unique role that debtor's counsel serves, the possibility of conflicts—both real and apparent—is much higher than for attorneys in other roles and in bilateral litigation. This creates a challenge for courts, which must address both the real conflicts and the weaponization of apparent conflicts to shift leverage. Conscious of this, courts should rely, whenever possible, on intermediate remedies—such as conflicts counsel and ethical firewalls—to address allegations that debtor's counsel is not independent. Finally, one should be careful to separate the analysis of the independence of a debtor's managers (including its directors and officers) from that of its counsel.

We proceed as follows. In Part I, we lay out the considerations and complications that arise in the context of finding debtor's counsel and set forth our guiding principles for determining the

8. Here we refer to the incentive to bring objections to obtain leverage in the negotiation. Richard Lieb, *The Section 327(a) "Disinterestedness" Requirement—Does a Prepetition Claim Disqualify an Attorney for Employment by a Debtor in Possession?*, 5 AM. BANKR. INST. L. REV. 101, 123 (1997) ("All too often such interference by a creditor or committee is to gain a tactical advantage by depriving the DIP of the professional of its choice.").

independence of debtor's counsel. In Part II, we explore recent cases that demonstrate the common forms the potential conflict problem has taken and discuss how our principles apply to these cases. In the Conclusion, we suggest that with our framework in mind, notwithstanding several criticisms from commentators, most of the outcomes in recent cases are easy to explain and easier to reconcile than the critics have maintained.

I. ATTORNEY CONFLICTS, DEBTOR'S CONFLICTS, AND DEBTOR'S COUNSEL

While conflicts can arise in all legal settings, there are special considerations in the context of debtor's counsel. We explore that problem in this Part. We start by discussing the baseline of attorney conflicts generally. We then turn to the subject of attorney conflicts in Chapter 11 cases, with a focus on debtor's counsel. Finally, we set out our principles for dealing with conflicts for debtor's counsel.

A. Attorney Conflicts Generally

To set the baseline, we start with attorney conflicts generally. A lawyer may face allegations that he or she has a disqualifying conflict or otherwise lacks independence in various contexts.[9] Most simply, a client might seek to terminate a relationship with one of its own attorneys based on a conflict that arises or is discovered during the case. In a litigation setting, one party might allege that the attorney on the other side owes them a duty based on a prior or concurrent relationship. With transactional work, a lawyer may be the target of subsequent litigation or complaints from a client who discovers that the lawyer had some conflicting interest in the transaction, or clients may object when they find their lawyer representing a counterparty. And in cases involving collective or fiduciary representation, someone might allege that the lawyer lacks the independence necessary to represent the interests of the group. Sophisticated rules of legal ethics, familiar to

9. *See, e.g.*, Ronald D. Rotunda, *Resolving Client Conflicts by Hiring "Conflicts Counsel*," 62 HASTINGS L.J. 677, 692 (2011) (discussing the problem of cross examining a client in an unrelated matter).

all licensed attorneys,[10] lay out substantive rules and procedures for how lawyers should navigate these scenarios.[11] They rely heavily on disclosure, well-informed consent, and the use of prophylactic measures to avoid surprise and the appearance of impropriety.

B. Conflicts in Chapter 11

Turning to Chapter 11 cases, things are more complicated. Bankruptcy is a collective litigation procedure for negotiating a massive financial transaction.[12] With this hybrid nature, a single Chapter 11 proceeding may bring together the thorniest conflicts problems of general litigation, transactional practice, and collective and fiduciary representation. Large Chapter 11 cases are even more complex, involving dozens, hundreds, or sometimes thousands of adverse parties arguing over millions or billions of dollars. These parties often seek to hire the most sophisticated law firms with experience not just in bankruptcy practice but also in related fields such as private equity, commercial finance, complex litigation, mass torts, tax, and so on.

The possibilities for conflicts in this situation are real. But so are the risks that protective measures could cause more harm than good. Clients want to hire the best and most experienced counsel, and courts are reluctant to deny them their right to do so.[13] The best attorneys are often the most likely to have relationships with parties with interests that overlap with or are adjacent to those being litigated. This dilemma is perhaps most prominent when it comes to debtor's counsel. A few large firms dominate the space.[14]

10. Law schools are required to teach legal ethics courses, most state bars require lawyers to take an ethics exam to be a licensed attorney, and most states also require attorneys to fulfill continuing legal education requirements that include ethical training. It is also good practice for lawyers to remain current on their knowledge of these requirements.

11. *See generally* MODEL RULES OF PRO. CONDUCT (A.B.A. 2020) (providing the model rules for attorney conduct).

12. *See generally* Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709 (2020) (describing the purpose of bankruptcy law as facilitating a collective renegotiation of a firm's capital and operating structure).

13. *See generally* Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913 (1994) (noting throughout the emphasis law places on a client's right to choose counsel).

14. *See* Roy Strom, *Kirkland Tops Big Bankruptcy Cases as Alum Helps Rivals Close Gap*, BLOOMBERG (July 10, 2025, at 03:35 MT), https://news.bloomberglaw.com/business-and-

These firms often have a vast team that works on the debtor's case. It has become common in recent years for these firms also to have practices in overlapping areas, like private equity.

To fully understand the challenges that arise in these settings, we first lay out the conflicts not of the debtor's counsel, but of its client, the debtor in possession. We then turn to the problem of hiring debtor's counsel, and finally, to the counsel's own conflicts.

1. *The Client's Conflicts*

The client we are focused on in this analysis is the debtor. Many factors complicate the role of the debtor in Chapter 11. Some of these arise from the allocation of power in Chapter 11, while others are inherent in the divergent incentives that arise when a firm is in financial distress. We explore the most important of those factors here and explain why they create various conflicts for the debtor.

To start with, the debtor-in-possession structure of Chapter 11 makes it difficult to understand the interests of the Chapter 11 client fully.[15] This structure, put in place with the enactment of the Bankruptcy Code in 1978, allows a debtor's managers (directors and officers) to retain control of the estate in Chapter 11 proceedings. This is a default rule. A court could, for cause, order the appointment of a trustee to take control from the managers. But that is not common in large cases. Generally, when a large corporate debtor is being reorganized in Chapter 11, the firm's managers remain in control.[16]

But what exactly is the debtor in possession? The Bankruptcy Code, somewhat unhelpfully, provides that "'debtor in possession'

practice/kirkland-tops-big-bankruptcy-cases-as-alum-help-rivals-close-gap (on file with the BYU Law Review). It is notable that as firms move into this space to create competition, the likelihood of apparent conflicts goes up. The universe of potential conflicts also increases as the complexity of financial structures increase. With more layers of finance, more banks involved in a syndicated loan, new financial products, and more players in the private credit market, the number of sophisticated players who need counsel before and during bankruptcy goes up.

15. *See generally* Brenda Hacker Osborne, *Attorneys' Fees in Chapter 11 Reorganizations: A Case for Modified Procedures*, 69 IND. L.J. 581, 596 (1994) ("In bankruptcy the identity and interests of the DIP are not clearly defined and may change throughout the proceeding.").

16. This is not the case when a firm is being liquidated under Chapter 7. And to be clear, the debtor may have negotiated with creditors and agreed to replace certain directors or officers on the eve of filing.

means debtor except when" a trustee is appointed.[17] At its simplest, the debtor in possession is the debtor's management acting as a fiduciary of the bankruptcy estate. That means that it must act in the best interests of the estate—but the interests of the estate are being discovered as the process plays out. Indeed, that is one of the main purposes of the process. Moreover, because Chapter 11 is both a litigation and a negotiated transaction among the beneficiaries, the alliances and interests of the beneficiaries are constantly shifting.

At any given moment, the debtor's managers are aligned with some stakeholders and adverse to others. By definition, this creates a conflict of interest between the fiduciary and those claiming to be the fiduciary beneficiaries. If a debtor in possession opposes a creditor's claim, it certainly is not acting in that creditor's interests. But should it be? That can only be answered once we know the outcome of the dispute. And if the debtor in possession settles with that creditor, it is not acting in the interests of the other creditors. Again, the propriety of the debtor's position turns on the underlying substance of the dispute.

The debtor in possession is, in a sense, serving a public role. Its duty is not to any one party in interest but rather to the general purpose of preserving estate value. And this is all playing out in a context where one of the biggest threats to estate value is the self-interest of each beneficiary of the estate. The bankruptcy process addresses the threat of self-interest by blocking individual collection actions, forcing cooperation, and ultimately allowing the court to bind holdouts. This feature—a collective litigation coupled with a negotiating framework to bind holdouts for the benefit of the group—adds layers of complication that are not often present in bilateral litigation or transactional settings.

A second factor, and perhaps the greatest, complicating the role of the debtor, is the interplay between the debtor-in-possession structure and the absolute priority rule. This rule—often viewed as the "organizing principle" of corporate bankruptcy law in the United States[18]—requires that a senior creditor must be paid in full

17. 11 U.S.C. § 1101(1).

18. Douglas G. Baird, *Priority Matters*, 165 U. PA. L. REV. 785, 786 (2017).

before any junior creditor receives anything[19] and that all creditors must be paid in full before equity can recover or retain any value.[20]

There are many virtues to a debtor-in-possession structure, but when combined with the absolute priority rule it does complicate incentives.[21] Management is often chosen by and sometimes overlaps with those who owned the equity of the firm before bankruptcy.

This can make for an awkward dynamic. After all, for a truly insolvent firm, a Chapter 11 filing is the event that crystalizes their losses.[22] The doctrinal rule is that absolute priority means equity holders of an insolvent business get nothing in bankruptcy.[23] In addition, one of the standards in the creditor's playbook is to push for lawsuits against managers and owners alleging that pre-bankruptcy transactions destroyed or diverted value. And so, one substantial asset of the estate might be a fraudulent transfer claim against equity holders or a fiduciary claim against its directors and officers.

A third factor is that managers have their own personal incentives with regard to the future of the firm. Questions about retention and compensation of managers create fertile ground for dispute and are not easily resolved in a debtor-in-possession model. As some have pointed out, these dynamics may have ripple

19. *Id.*

20. Elizabeth Warren, *A Theory of Absolute Priority*, 1991 ANN. SURV. AM. L. 9, 9 (1991).

21. One potential virtue is that giving control to management gives them an incentive to file in a timely manner. *See* Randal C. Picker, *Voluntary Petitions and the Creditors' Bargain*, 61 U. CIN. L. REV. 519, 524 (1992).

22. *See* Baird, *supra* note 18; Anthony J. Casey & Joshua C. Macey, *The Hertz Maneuver (and the Limits of Bankruptcy Law)*, U. CHI. L. REV. ONLINE (Oct. 7, 2020), https://lawreviewblog.uchicago.edu/2020/10/07/casey-macey-hertz (on file with the BYU Law Review); Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930, 1937 (2006). This doesn't have to be the rule, as alternatives have been proposed. *See, e.g.*, Anthony J. Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11*, 78 U. CHI. L. REV. 759, 764–66 (2011). And other countries have adopted rules that allow or sometimes require equity to retain value in a reorganization. *See generally* Aurelio Gurrea-Martínez, *The Myth of Debtor-Friendly or Creditor-Friendly Insolvency Systems: Evidence from a New Global Insolvency Index* (Aug. 31, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4557414 (on file with the BYU Law Review) (noting the different rules across jurisdictions regarding priority and the ability of shareholders to retain value in reorganization).

23. In reality, parties often negotiate to something less than absolute priority. *See* Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV 1235, 1237 (2013). But that is a function of litigation leverage and uncertainty in valuation and control rights.

effects that change the bargaining between managers and creditors both before and during the Chapter 11 proceedings.[24]

While some of this may seem like madness, there is a method to the design. The Bankruptcy Code allocates different levers of power to various parties throughout the capital structure, and then it places guardrails on the use of that power. The goal is to create an environment for supervised renegotiation in the face of financial distress.[25] And it is worth noting that Congress designed this complex structure, with all its checks and balances only after the failure of several alternatives.[26]

Thus, while the managers retain control, the creditors are represented by a powerful committee paid for out of the estate.[27] That committee has the power and the incentive to seek standing to bring actions against managers and equity holders when appropriate. It also has the power to seek the appointment of an examiner (perhaps in every case)[28] and a trustee (in extreme cases). On top of that, a permanent watchdog is in place in every case to bring independent objections when the debtor in possession fails in its duty.[29]

Like many parts of the American legal system, this design harnesses the incentives and checks and balances created by an adversarial process to guide parties toward the best achievable outcome. Whether the design of Chapter 11 is successful at this is

24. Kenneth Ayotte & Jared A. Ellias, *Bankruptcy Process for Sale*, 39 YALE J. ON REG. 1, 11–13 (2022); Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CAL. L. REV. 745, 752–53 (2020).

25. Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1711 (2020) ("In short, corporate bankruptcy law's proper purpose is to solve the incomplete contracting problem that accompanies financial distress. And Chapter 11 of the United States Bankruptcy Code implements that purpose—perhaps imperfectly—by facilitating a structured renegotiation that allows parties to preserve value in the face of hold-up threats.").

26. One prominent practitioner has likened his view of Chapter 11 to the Churchillian view of democracy: it is the worst form except for all the others that have been tried. This comparison seems to have first appeared in print in James H.M. Sprayregen, Jonathan P. Friedland & Roger J. Higgins, *Chapter 11: Not Perfect, but Better Than the Alternatives*, AM. BANKR. INST. J., Oct. 2005, at 1. But those who have been fortunate enough to hear Sprayregen speak on various occasions know that it is a common theme.

27. 11 U.S.C. §§ 330, 503, 1102, 1103.

28. *See In re* FTX Trading Ltd., 91 F.4th 148, 153 (3d Cir. 2024).

29. *See* Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. REV. 1297, 1308 (2020).

a question for a different project,[30] but there is no doubt that it complicates the question of identifying the interests of a client for the purposes we address here.

2. Hiring Debtor's Counsel

Having laid out the potential conflicts, we can turn to the choice of debtor's counsel. Not surprisingly, debtor's counsel is chosen by the debtor. This choice is governed by the Bankruptcy Code, which requires that the lawyer "not hold or represent an interest adverse to the estate" and be "disinterested."[31] The choice must also be approved by the court. The attorney is also bound by the relevant ethical rules governing conflicts.

Compliance with those rules requires understanding the interests of the estate and determining what interests are adverse to them. We have, hopefully, convinced the reader that this is no easy question. The reader might also wonder whether the debtor is the best person to make this choice. In our view, it is unquestionably so.

Identifying the decisionmaker in a situation like this is a pervasive problem in law. In the area of fiduciary and representative relationships, academics love to ask, "Who watches the watchers?"[32] But perhaps the better question is: "Who chooses the choosers?"

Delaware courts have grappled with this for decades in the context of choosing directors. The independence of directors has often been relevant for determining what level of scrutiny the court will give to a particular transaction. The courts have required varying levels of independence depending on the context and the case.[33] But on one thing they have always remained constant: as a legal matter, the identity of the person choosing a director—even

30. One of us has argued that Chapter 11 likely is successful in guiding parties to the best outcome. Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709 (2020).

31. 11 U.S.C. § 327(a).

32. *See, e.g.*, Bruce Markell, *The Contributors Speak Up*, CREDITOR RTS. COAL., https://viewstripo.email/template/e37eeea7-ec4d-4df0-aa43-a58a20ba5dae (on file with the BYU Law Review).

33. *See generally* Randy J. Holland, *Delaware Independent Directors a Judicial Contextual Evolution*, 24 U. PA. J. BUS. L. 782 (2022) (discussing director independence in various contexts); Lucian Bebchuk & Kobi Kastiel, *How to Control Controller Conflicts*, 50 J. CORP. L. 1001(2025) (same).

if it is the alleged wrongdoer or person with a conflict—is irrelevant to determining that director's independence. This surprises many people. But the practicality of it is plain. If the identity of the chooser affects independence, then you have to anoint another person to choose. And how do you choose that person? Delaware law tends to cut the inquiry there and avoid the question.

Here the problem is not quite as complicated. Once one accepts that we have a debtor-in-possession system, the choice of lawyer must lie with the debtor, and the risk of conflicts is much less than it is in choosing directors (or in choosing to have a debtor-in-possession system in the first place).

To see why, consider the alternatives. In the Chapter 11 context, every party in interest has a potential conflict. The creditors all have conflicts of interest, and the structure of the system encourages them to seek their own interests.[34] The equity holders are the same. The only party in the proceeding who is bound to act in the best interests of the entire estate is the debtor in possession (or a trustee if one is appointed). And if we can't trust the debtor to choose its own lawyer—a lawyer who is ultimately bound to accept the debtor's directions in running the estate (or withdraw from representation)[35]—how do we trust the debtor to run the estate?

One answer might be that the United States Trustee or some neutral body should choose debtor's counsel. But then what happens? Lawyers act at the direction of their clients and, if they can't do that, they withdraw from representation. If a neutral party appoints counsel, the lawyer would still be acting at the direction of the debtor in possession. If that is not required and the lawyer may choose her own desired course of action, then we have abandoned the debtor-in-possession model and moved

34. As an example of this, in the voting context, bankruptcy courts have always been clear that the self-interest of a creditor, as a creditor, is never disqualifying. Votes only get designated when the creditors start with ulterior interests.

35. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2 (A.B.A. 2020) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."); MODEL RULES OF PRO. CONDUCT r. 1.16 (A.B.A. 2020) (noting that a lawyer "shall withdraw" if the representation required will result in a violation of rules of conduct or other laws; and the lawyer may withdraw for good cause including when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

toward an insolvency-practitioner model. But that model was soundly rejected in the United States when the Bankruptcy Code was enacted in 1978. And so, unless courts ignore the Bankruptcy Code and create their own from a new model, the choice of counsel must remain with the debtor subject to the approval of the court.

C. *The Standard of Independence and Disinterest*

Once the debtor chooses its counsel, how should the court assess counsel's disinterest as required by section 307? We present three principles that courts can use to guide their approach to ensuring the independence and disinterest of debtor's counsel. (1) Sophisticated parties, including the debtor in possession, are capable of waiving most conflicts and should be free to do so when solely their interests are affected by the conflict. (2) The possibility of conflicts—both real and apparent—is higher for debtor's counsel than for attorneys in other roles. This creates a challenge for courts, which must address both the real conflicts and the weaponization of apparent conflicts to shift leverage. As such, remedies that are short of disqualification should be freely imposed, and disqualification should be rare. (3) The independence of debtor's managers should be dealt with separately from the independence of its counsel.

1. *First Principle: Sophisticated Parties Should Be Free to Waive Conflicts When Solely Their Interests Are Affected by the Conflict*

Despite the unique complexity of Chapter 11, most conflicts questions are still amenable to resolution by the conventional tools that courts use for resolving attorney conflicts in other contexts. We note below that some instances will require a different balancing for the choice of tools. But the fundamental tools are the same and most conflicts will be resolved by resorting to non-bankruptcy guidance.

The most foundational guidance is that parties generally get to choose their own counsel. And when a conflict threatens only that parties' interests, they generally have the option of waiving that conflict. First, sophisticated parties are permitted per existing ethical rules to waive conflicts and should remain free to do so. Model Code Rule 1.7 allows representation where the client has provided informed consent.[36] Nothing in existing ethical rules requires a new or different approach in bankruptcy.[37] And, as with all things in bankruptcy law and theory, one should not deviate from the non-bankruptcy baseline without good reason;[38] even then, one should only do so cautiously.[39]

As a first-order matter, the debtor in possession must determine whether counsel has a conflict with *its* interest. But that is a decision entirely entrusted to the debtor in possession and thus waivable by the debtor's managers. For example, if there is an apparent conflict that suggests that the lawyer may ignore the direction of management, management can and must be trusted—like any other client—in determining whether to waive that conflict. Management is the one who will have to supervise the attorneys and determine whether to terminate the relationship if the lawyers are unable to perform their obligations.

Related to this, alignment with management is not a conflict. Lawyers must serve their clients, and that includes following the directions of the agents who are charged with running the operation of their corporate clients. As discussed more below, if management has a disqualifying conflict, removing the counsel of their choice provides no remedy at all. Any alternative rule would be a futile attempt to force management to hire a lawyer who will defy them in a world where that lawyer will still owe them a duty of obedience[40] and confidentiality. That is a solution that creates more problems than it solves.

36. MODEL RULES OF PRO. CONDUCT r. 1.7(b)(4) (A.B.A. 2020).

37. Lieb, *supra* note 8, at 122 ("[T]here is no sound reason why conflict waivers should be governed by different rules in bankruptcy cases than those generally applicable in civil litigation.").

38. Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 858, 858 n.8 (1982); Thomas H. Jackson, *A Retrospective Look at Bankruptcy's New Frontiers*, 166 U. PA. L. REV. 1867, 1872 (2018); Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. CHI. L. REV. 1557, 1565 (2013).

39. Anthony Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1758 (2020) (arguing that bankruptcy law should balance ex ante costs of distorting non-bankruptcy rules against ex post costs).

40. We do not mean to say that a debtor's lawyer owes a duty of loyalty to the individual managers. Their ultimate duty is to the estate. *See, e.g.*, Stephanie Kenn, *Conflicts Counsel is Not a Cure All; It Does Not Overcome an Actual Conflict of Interest*, ST. JOHN'S BANKR. RSCH. LIBR. (2018), https://scholarship.law.stjohns.edu/bankruptcy_research_library/90 (on file with the BYU Law Review).; Osborne, *supra* note 15, at 588; Lieb, *supra* note 8. *See also In re* Lee, 94 B.R. 172, 178 (Bankr. C.D. Cal. 1988). But lawyers cannot act as agents for

Because the estate's interests are trusted to the debtor in possession, the debtor in possession must be comfortable with and trust its counsel. To preclude the debtor's choice of counsel without a compelling reason is to interfere with that structure and impose unnecessary conflicts between the client and its lawyer. As we discuss below in section I.C.3, any conflicts with regard to the debtor's ability to fulfill *its* duties should be dealt with separately.

Thus, if the alleged conflict is that counsel has previously represented one particular creditor, the debtor in possession should be competent to waive that conflict. Some combination of conflicts counsel[41] and ethical firewalls[42] is likely appropriate in these cases and debtors should consider demanding them when agreeing to a waiver.

Of course, the other party (the particular creditor in this hypothetical) may have its own objection. But again, the non-bankruptcy rules of advance waivers and disclosure are quite sufficient to handle this situation.

involuntary clients. When a lawyer identifies a conflict between the instructions from the client's agent and the lawyer's duty to her client, the best a lawyer can do is withdraw from representing that client.

41. As the name suggests, conflicts counsel is an attorney who represents the clients on discrete matters within in a case. Rotunda, *supra* note 9, at 680. Courts have generally been willing to accept conflict counsel as sufficient solutions to avoid disqualification of counsel. See *In re* Wash. Mut. Inc., 442 B.R. 314 (Bankr. D. Del. 2011) (finding that the presence of conflicts counsel remedied conflict); *In re* Rockaway Bedding Inc., 454 B.R. 592 (Bankr. D.N.J. 2011) (approving remedies including waiver, conflicts counsel, and an ethical fire wall).

42. These are barriers between what information lawyers within a law firm can share or access. A court might find that a conflict necessitated a firewall separating access between those working on the case and those who have handled previous matters. *See In re* Enron Corp., 2002 WL 32034346, at *10–11 (Bankr. S.D.N.Y. May 23, 2002). The measures might include, (1) denying access to files related to the case in question, (2) prohibiting any discussion of the case in the presence of screened attorneys, (3) disqualifying attorneys from receiving fees from the case, and (4) screening attorneys at the time the firm takes the case. LaSalle National Bank v. County of Lake, 703 F.2d 252, 258–59 (7th Cir. 1983); *see also* Wayne Kitchens, Randall A. Rios, Timothy A. Million & Simon R. Mayer, *Use of Conflicts Counsel and Ethical Walls to Resolve Ethical Conflicts*, U.S. DIST. & BANKR. CT.: MATERIALS FOR HOU. BAR ASS'N BENCH–BAR BANKR. CONF. IN CORPUS CHRISTI JUNE 19–20, 2014, https://www.txs.uscourts.gov/sites/txs/files/UseofConflicts.pdf (on file with the BYU Law Review).

2. *Second Principle: Because Debtor's Counsel Have an Increased Likelihood of Both Real and Apparent Conflicts, Remedies that are Short of Disqualification Should be Freely Imposed, and Disqualification Should Be Rare*

The first principle deals with cases where the debtor in possession is waiving a conflict that affects their interest and their ability to manage the estate. But the unique position of the debtor, and thus of its counsel, means that there will often be conflicts that affect or appear to affect the interest of others. Perhaps debtor's counsel represents one particular creditor in another matter where that creditor is adverse to another creditor.

Or perhaps a situation arises where various creditors are vying to participate in the reorganized entity. The debtor in possession may get to choose who participates and who does not. In the end, the debtor may not have much at stake in the choice, while the creditors have a lot at stake. This may come up in the context of a DIP or exit financing arrangement. Or in the choice of which supply contracts to assume or reject.

If debtor's counsel currently represents one of the creditors who are vying for favor, it may have interest in favoring that creditor's position. Because the debtor, itself, is indifferent, the attorney may sway the debtor (with or without disclosing its motive) toward one alternative over another. This is a potential conflict of interest that arises because of the unique nature of Chapter 11 proceedings.

The debtor is serving in a fiduciary role in a context where the fiduciary beneficiaries are in direct conflict with each other. Recall that the choices the debtor makes about how to operate the firm can themselves impact who benefits from that operation. The debtor will have to make choices between the well-being of various stakeholders, but the law wants the debtor to do so in a neutral manner. Neither the debtor, nor its counsel, should be favoring one creditor over another based on such external circumstances.

Crucial to the analysis here is that the setup can lead to real conflicts as well as spurious allegations of conflict (leveled to gain leverage). It may be difficult for the courts—and the debtor—to distinguish between the two. And so, the default path should be to both protect against these conflicts and also to mitigate the leverage created by those protections. Disqualification motions are extreme where the particular conflict only affects relatively small matters. And given that the debtor itself is neutral, intermediate remedies—such as conflicts counsel and ethical firewalls—should be entirely sufficient.

Notably, the cost of disqualification can be catastrophic to a debtor. This is where the leverage comes from when a creditor brings a motion to disqualify. The debtor's counsel is often central to the bankruptcy process and is advising the management daily on the requirements of operating in Chapter 11. Thus, a threat to disqualify debtor's counsel is a threat to destroy an enormous amount of knowledge and human capital. This threat, if credible, can give certain creditors an enormous gain in bargaining leverage. For these reasons, disqualification, as opposed to intermediate remedies, should be especially rare.[43]

In short, when the possibility of these conflicts arises, the tools at hand include conflicts counsel and ethical firewalls. When the conflict is real the available remedies include conflicts counsel, giving standing to creditors to pursue actions, or the appointment of a trustee or examiner. Law firm disqualification should be off the table. These remedies should be utilized liberally when there is the possibility of a conflict, but courts should be vigilant in rejecting spurious disqualification motions. Disqualification should be rare and require more than arguments that something might be amiss or doesn't feel right.

3. *Third Principle: The Independence of Debtor's Managers Should Be Dealt with Separately from the Independence of Its Counsel.*

Finally, and perhaps most controversially, courts should not disqualify debtor's counsel because of allegations that the debtor in possession is, itself, conflicted. This problem is most likely to come up in the context of debtors owned by a private equity fund with a prior relationship to counsel. This scenario has received a lot of attention and commentary on conflicts for debtor's counsel.[44] Our analysis suggests that this commentary is misdirected.

43. *See* Lieb, *supra* note 8, at 120, 123 (noting the possibility of abuse of conflicts motions, arguing that the debtor should be free to choose its counsel, and also noting that restraining the debtor's choice "places the DIP at a disadvantage, as compared with the relative freedom of an official committee to select its own professionals").

44. *See, e.g.*, Crawford G. Schneider, *Private Equity, Conflicts, and Chapter 11: The Three Types of Attorney Conflicts that Undermine Corporate Restructuring*, 172 U. PA. L. REV. 1125, 1133 (2024).

The question is not one of counsel conflicts but rather of the debtor-in-possession model itself.

Too often disqualification motions are brought based on allegations about the managers. These motions are sometimes precursors or companions to a motion for the appointment of a trustee or examiner. Or, in some cases, they function as trustee-lite motions, where the party bringing the objection doesn't think it can succeed on ousting the control of the debtor in possession but hopes the court will apply a lesser standard to its motion to disqualify counsel. Other times, they are simply brought to impose costs and gain leverage.

Such motions should not be entertained. If the underlying argument is that the debtor in possession cannot be trusted, then that argument—and not the identity of counsel—is what the parties and the court should focus on. The appointment of new or conflicts counsel is a powerless tool that will not remedy a problem where the underlying conflict lies with the debtor in possession. And where there is no conflict, motions for such remedies do nothing more than waste estate resources.

In extreme cases where the debtor itself is truly and thoroughly conflicted, a trustee should be appointed. It would be a perverse remedy to block the choice of counsel in these cases but then leave the managers completely in control. In cases where the debtor can be trusted, its choice of counsel should also be respected. In the intermediate cases where the full story is unclear, or the conflict only affects one dispute, intermediate remedies *related to the debtor* should be utilized. These might include the appointment of an examiner, substantive arguments brought by the United States Trustee, or the empowerment (and funding) of the creditors' committee to pursue certain actions.

II. THE LAW AND RECENT CASES

Having laid out our principles, we turn now to showing how they would play out in the real world. To do so, we start by noting the basic law governing the conflicts of debtor's counsel and then walk through four recent high-profile conflicts cases discussing the problems that arose and how the principles we have discussed apply to those cases. Our conclusion is an optimistic one; despite the handwringing by commentators, the courts have largely found their way to the right outcomes in these cases. In that sense, our analysis can be viewed as a synthesis of what courts are doing. This synthesis is useful in understanding the problem and in guiding future courts.

A. The Basic Law

After the 1978 Bankruptcy Code was enacted, the presence of big law firms in insolvency cases increased, creating more opportunities for debtors and creditors to be represented by the same firm.[45] This inevitably led to the possibility of a firm having relationships with multiple parties in a bankruptcy case, especially one with hundreds of creditors. On one hand, no one thinks that bankruptcy cases allow attorneys to act unethically. Ethical attorney conduct is critical to "the integrity of the bankruptcy system."[46]

On the other hand, legal scholars have noted the difficult balance of granting a debtor the right to choose its counsel—which is imperative to the debtor-in-possession structure—and preventing big law firms from being on both sides of the same case.[47] The unique context of bankruptcy casts ethical guidelines in a different light than conventional cases or transactions.[48] Because bankruptcy attorneys represent the interests of the estate as a whole, and the identity and interests of the estate are not finitely or uniformly determined (or determinable), standard ethical rules are difficult to apply.[49]

Since the debtor in possession is a fiduciary required to act neutrally in the interest of the estate, the debtor's counsel also has a fiduciary duty to serve that neutral interest. At any given moment, the debtor may be in conflict with one of its stakeholders, and that conflict could change at any point.

45. Jonathan C. Lipson & David Skeel, *FTX'd: Conflicting Public and Private Interests in Chapter 11*, 77 STAN. L. REV. 369, 392 (2025).

46. *In re* NNN 400 Cap. Ctr. 16, LLC, 619 B.R. 802, 804 (Bankr. D. Del. 2020), *aff'd sub nom. In re* NNN 400 Capitol Ctr. 16 LLC, 632 B.R. 243 (D. Del. 2021), *aff'd sub nom. In re* NNN 400 Capitol Ctr. 16 LLC., Nos. 21-3013 and 22-1639, 2022 WL 17831445 (3d Cir. Dec. 21, 2022).

47. Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913, 975–76 (1994).

48. *See, e.g.*, Robin E. Phelan & John D. Penn, *Bankruptcy Ethics, an Oxymoron*, 5 AM. BANKR. INST. L. REV. 1, 27 (1997); Brenda Hacker Osborne, *Attorney's Fees in Chapter 11 Reorganization: A Case for Modified Procedures*, 69 IND. L.J. 581, 596 (1994).

49. For example, the Model Rules of Professional Conduct comment to rule 3.1 requires a clear understanding of the client's identity and interest.

Because of this, section 327 of the Bankruptcy Code requires that an attorney (1) does not hold or represent an interest adverse to the estate, and (2) is disinterested. But the Bankruptcy Code also adds a caveat: (1) "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless . . . there is an actual conflict of interest"[50]; and (2) "a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case."[51]

If a creditor or the United States Trustee objects to counsel, the debtor in possession must submit an application for employment to the court for approval, and the debtor in possession's intended attorney must submit a verified personal statement.[52] The statement should include all interests the attorney has in the case, including relationships with interested parties. The court then assesses if the attorney has a conflict of interest in the case. The sanctions the court will impose on attorneys for failing to meet the requirements are disqualification and disallowance of fees.[53]

B. Recent Cases

Several recent cases have garnered attention—perhaps because of seemingly disparate outcomes involving large law firms—with two cases being the target of frequent comparison by commentators. The first is *In re Invitae Corp.* from the U.S. Bankruptcy Court for the District of New Jersey. The second is *In re Enviva* from the U.S. Bankruptcy Court for the Eastern District of Virginia. We will also discuss two other important cases, *In re FTX*, and *In re Boy Scouts*.

1. In re Invitae Corp.

In *In re Invitae Corp.*, the creditors' committee objected to the debtor's retention of a law firm that allegedly had represented and was concurrently representing a senior secured noteholder in

50. 11 U.S.C. § 327(c).
51. 11 U.S.C § 1107(b).
52. FED. R. BANKR. P. 2014.
53. 11 U.S.C. § 328; *see In re* Leslie Fay Cos., 175 B.R. 525, 538–39 (Bankr. S.D.N.Y. 1994).

matters unrelated to the bankruptcy case.[54] The committee argued that the law firm would be unable to provide independent counsel to the debtor.

The court in *Invitae* approved the retention, citing ABA Model Rule 1.7 and section 327 of the Bankruptcy Code.[55] Consistent with our first principle of waiver of conflicts, the court "accord[ed] weight to the extensive and detailed waivers present in th[e] case."[56] The court found that the waivers provided clear notice of the conflicts and that the debtor had made an informed choice to agree to them. Also consistent with our analysis above, the court added the following explanation of its decision:

> Further supporting this decision are policy considerations. First, K&E argues—and the Committee acknowledges—that disqualification of K&E at this point in the bankruptcy would be detrimental both to the bankruptcy estate and the creditors. Given the time and effort already invested by K&E and the circumstances of these chapter 11 cases—which may result in little, if any, recovery for unsecured creditors—disqualification of K&E would cause undue delay and significant additional expense. Moreover, Debtors chose K&E to represent them in this bankruptcy case. Where possible, debtors' choice of counsel should be afforded deference.[57]

The court did require a form of firewall, ordering that "K&E is directed to ensure that, going forward, *no attorneys working on Deerfield matters perform any work in the Debtors' bankruptcy case*."[58] The court did not require the appointment of conflicts counsel for matters involving the noteholder. The court wisely recognized that most matters would involve the noteholder in some way leading to a flood of spurious conflicts claims, of the sort our principles seek to prevent.[59]

54. *In re* Invitae Corp., No. 24-11362 (MBK), 2024 WL 2230069, at *1, (Bankr. D.N.J. May 16, 2024).

55. *Id.* at *4.

56. *Id.*

57. *Id.* at *6; *see, e.g.*, *In re* Straughn, 428 B.R. 618, 626 (Bankr. W.D. Pa. 2010).

58. *Invitae*, 2024 WL 2230069, at n.4.

59. It is worth emphasizing that the case did not involve an objection from the secured noteholder themselves, but rather a different group of outside creditors attempting to referee the relationships.

Invitae is an easy case of consent under our first principle. The debtor might worry that the law firm cannot be trusted to aggressively advocate against the secured noteholder. But here the debtor had no such worries. There is no reason to think that the debtor's managers could not make that determination on their own. The debtor's managers were not, themselves, beholden to the noteholder. And they hired the law firm with eyes wide open. They likely thought that the firewalls along with the firm's reputation were enough to protect their interests.

One commentator has floated, but mostly rejected, the idea that "rulings such as Invitae are intended to signal that a court is friendly to debtors, or to BigLaw or to case-placers in BigLaw."[60] This notion is unsupported. Perhaps the judge was being friendly *to the estate* by denying a disqualification that it found would have destroyed value belonging to creditors. But that is what bankruptcy courts should do, and it is not the same thing as favoring the debtor's managers.

The reference to "BigLaw" also seems gratuitous and odd. After all, the law firm representing the committee, which filed the objection to the retention, was a "BigLaw" firm as well. The court was ruling in favor of one large firm against another. Without more, there is no reason to suspect the court was doing so based on any motive other than the legal arguments before it.

2. In re Enviva Inc.

The next case is *In re Enviva, Inc.*[61] *Enviva* and *Invitae* have been compared, with some commentators claiming that their outcomes demonstrate different approaches to counsel conflicts. But they are, in reality, very different cases. While *Invitae* was a case demonstrating the importance of consent under our first principle, *Enviva* deals instead with unconstrained conflicts that fall under our second principle.

60. Nancy B. Rapoport, *Special Feature: Professor Nancy Rapoport on Recent Disqualification Decisions*, CREDITOR RTS. COAL. (June 5, 2024), https://creditorcoalition.org/special-feature-professor-nancy-rapoport-on-recent-disqualification-decisions (on file with the BYU Law Review).

61. *In re* Enviva Inc., No. 24-10453-BFK, 2024 WL 2795274, at *8, (Bankr. E.D. Va. May 30, 2024), *reconsideration denied,* No. 24-10453-BFK, 2024 WL 3285781 (Bankr. E.D. Va. July 2, 2024).

In *Enviva*, lawyers at the law firm representing the debtor were also representing entities that held a large equity stake in the debtor. The court found that this created a conflict for the law firm and, therefore, denied the debtor's application to retain the firm. In doing so, the court contrasted the arrangement before it to those in bankruptcies like that of *In re Caesars Entertainment Operating Co.*, where debtor's counsel was approved despite representing other portfolio companies of the private equity firm.[62] "In this case, by contrast, [the debtor's law firm] represents . . . the investment-level entity, which is a 43% shareholder in the Debtors."[63] The court also noted that negotiations between the debtor, the investment fund, and the creditors were ongoing over a restructuring support agreement that would result in old equity retaining a five percent stake in the company.

Consistent with our second principle, the court noted that this situation was one where the debtor's choices would affect control and distribution among the stakeholders:

> A plan in a stand-alone reorganization case, though, is like a machine in which all of the parts depend on all of the other parts. Further, the allocation of equity in the reorganized entities is a zero-sum game – whatever old equity retains will come at the expense of the creditors unless the creditors are paid in full (or the plan is a consensual one).[64]

The court also noted that no firewalls had been set up and that several individual lawyers representing the equity holder were also working on the bankruptcy case. In fact, during the hearing on the matter, debtor's counsel had argued, "But a wall of separation where none is required *would be incredibly harmful to Enviva* at this critical phase of its restructuring efforts. To be clear, this isn't a situation where the harm outweighs the need, but rather there's no need *and it would be harmful*."[65]

The court then concluded that "[a]n ethical wall is an impossibility under such circumstances."[66]

62. *In re* Caesars Ent. Operating Co., 561 B.R. 420, 440 (Bankr. N.D. Ill. 2015).
63. *Enviva*, 2024 WL 2795274, at *8.
64. *Id.*
65. *Id.* at *1 (quoting Transcript of Hearing at 13:7–11, *In re* Enviva, 2024 WL 2795274 (No. 532)).
66. *Id.* at *8.

Far from conflicting with *Invitae*, the *Enviva* opinion highlights the nuances that matter. In one case, there was at most a potential conflict that was actively addressed by using firewalls. In the other case, there was a clear conflict affecting ongoing negotiations that would affect distribution among creditors, and a representation by counsel that intermediate remedies like ethical fire walls would be harmful to the debtor.

3. In re Boy Scouts

In re Boy Scouts provides another prominent example of these principles at work. Here, an insurer of the debtor—a party in interest in the bankruptcy case—claimed debtor's counsel could not represent the debtor because the firm was or had been counsel to the insurer. Unlike the *Invitae* case, here, the party objecting was itself the other client. The firm countered, arguing that representation of the debtors in restructuring had no substantial relation to the work done with the creditors. This was not a case where the concern was over bias favoring a non-debtor, like an equity holder or significant creditor, but simply that counsel had a conflict relative to (and private information about) the insurer.

In this way, the dispute in *In re Boy Scouts* is very run-of-the-mill. It represents the sort of conflict that might arise in non-bankruptcy litigation. And appropriately, the court addressed it through conventional notions of attorney conflicts. In doing so, the court stressed the importance of letting a debtor choose its counsel and noted that disqualification should not be the automatic remedy for a conflict. From there, the court reasoned that—despite the lack of a waiver—counsel should be allowed to continue its representation of the debtor if it utilizes conflicts counsel when necessary.

4. FTX

The honoree of this Symposium, Professor David Skeel with co-author Professor Jonathan Lipson, has addressed the problem of debtor's counsel in the context of the FTX bankruptcy.[67] It is to that case that we now turn.

67. Lipson & Skeel, *supra* note 45, at 369–460.

The allegations of conflict in FTX are very different from those in the previously discussed cases. Indeed, it may be a unique fact pattern. But it does raise certain important questions about the choice of counsel. And perhaps more than any other bankruptcy case, it highlights the question "Who chooses the choosers?"

Skeel and Lipson have pointed to FTX as a case highlighting the gravity and danger of conflicts involving the debtor's management and counsel. The general facts of FTX's meltdown have been chronicled elsewhere, including in Skeel and Lipson's work[68] and the examiner's report in the case.[69] We do not recount those facts here, but note that in the days leading up FTX's Chapter 11 petition on November 11, 2022, Sam Bankman-Fried, the company's Chief Executive Officer stepped down and was replaced by John Ray. Skeel and Lipson recount the details of how these events unfolded and the role played by Sullivan & Cromwell (S&C), the firm that was ultimately retained as debtor's counsel.[70] Also during that time, as recounted by Skeel and Lipson, S&C advised the debtor and urged Bankman-Fried to step down.

S&C had represented FTX in several pre-bankruptcy transactions and FTX's general counsel at the time of filing was a former S&C partner. Based on these potential—but disclosed—conflicts, both creditors and the U.S. Trustee objected to S&C's retention. The U.S. Trustee objected to the disclosure and the debtor's collapse, arguing that S&C did not meet full disclosure requirements and asking for an internal investigation. Despite these objections, the Bankruptcy Court of Delaware approved the retention of debtor's counsel.

The court determined that S&C fulfilled a proper notice of application in accordance with bankruptcy rules,[71] and found that S&C did not hold an adverse interest to the estate and was therefore disinterested under section 1107(b).[72] Later, a court-appointed Examiner concurred, finding there were no potential conflicts the

68. *Id.* at 393.

69. Report of Robert J. Cleary, Examiner, at 12, *In re* FTX Trading, Ltd., No. 22-11068 (Bankr. D. Del. May 23, 2024), ECF No. 15545 [hereinafter "Examiner Report"].

70. Lipson & Skeel, *supra* note 45, at 406.

71. Order Authorizing the Retention and Employment of Sullivan & Cromwell LLP as Counsel to the Debtors and Debtors-in-Possession *Nunc Pro Tunc* to the Petition Date at 1, In re FTX Trading, Ltd., No. 22-11068 (Bankr. D. Del. Jan. 20, 2023), ECF No. 553.

72. *Id.* at 2.

court did not resolve and "conclud[ing] that there was no error in the Court's decision concerning the Debtors' retention of S&C."[73]

Skeel and Lipson raise several objections to the way that the FTX case was handled. But with regard to debtor's counsel, they take particular issue with the chain of events leading to S&C's retention. They highlight S&C's prior representation of the debtor as well as the timeline where Bankman-Fried relinquished control "after significant pressure from S&C and their allies at FTX,"[74] John Ray became CEO after "Ray had been selected by S&C and was presented as Bankman-Fried's only choice,"[75] and "[a]mong Ray's first actions was retaining S&C as general counsel for FTX in its bankruptcy."[76] While Skeel and Lipson do not question Ray's qualifications, they do argue that "the process by which he gained control of the company was problematic,"[77] and question the assistance that Ray and S&C provided to prosecutors in Bankman-Fried's criminal case.[78] They also allege that "[Ray] frequently opted against action which might threaten S&C."[79]

The core of their argument appears to be that the choices of CEO and law firm tainted the entire proceedings. Ray chose S&C and S&C chose Ray. Lipson and Skeel imply that in making these choices the goal of Ray and S&C was to scapegoat Bankman-Fried to shield S&C from inquiry. Their argument has not gained traction in any court, and we are skeptical that either S&C or Ray had these motives. Especially with regard to Ray, supporting allegations about his motivation in shielding S&C are lacking. In particular, the goal of shepherding the debtor through its Chapter 11 case while navigating the maze of ongoing investigations seems a more plausible explanation for Ray's actions than the notion that he was beholden to S&C. Moreover, the debtor's cooperation with a criminal investigation into a former executive's conduct is

73. Examiner Report, *supra* note 69, at 35.

74. Lipson & Skeel, *supra* note 45, at 399.

75. *Id.* at 400.

76. *Id.*

77. *Id.*

78. *Id.* at 425. *See also id.* at 426 ("Ray made no secret of the debtors' close alignment with prosecutors."); *id.* at 454 ("In *FTX*, some assistance given by John Ray and S&C to the U.S. Attorney's Office would have been justified, since it enabled prosecutors, who often face debilitating resource constraints, to present a more effective case. But Ray and S&C did far more than simply make information available.").

79. Lipson & Skeel, *supra* note 45, at 451.

consistent with the prudent behavior of most firms that have been in a similar situation.[80]

At the same time, the case does highlight another common criticism of the debtor-in-possession structure. Management chooses its counsel, and often counsel will recommend new management when they are necessary. This criticism often arises in the context of independent directors or hiring chief restructuring officers. Consistent with our third principle, this is not really an issue about debtor's counsel, but rather about the underlying model of debtor control. We do not attempt to resolve the "chooser problem" here or to take a definitive stand on the debtor-in-possession model. But we reiterate the point from above, that the focus in such cases should not be on the law firm that is hired but rather on the choice of who controls the debtor throughout the Chapter 11 process.

CONCLUSION

In contrast to some of the criticism of bankruptcy court rulings on debtor's counsel from other commentators, we urge a more measured view of attorney conflicts. In the cases we have examined, courts have acted with moderation, neither allowing debtor's counsel complete free rein nor opting for knee-jerk disqualifications. This is the correct approach, and our three principles provide some guidance for courts seeking to standardize their analysis. Again, those principles stated in their short form are:

(1) Sophisticated parties should be free to waive conflicts when solely their interests are affected by the conflict;

(2) Remedies that are short of disqualification should be freely imposed, and disqualification should be rare; and

(3) The independence of debtor's managers should be dealt with separately from the independence of its counsel.

These principles are consistent with what courts have been doing and should be viewed as the standard for ensuring the independence of debtor's counsel.

80. *See, e.g.*, Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083, 1088–90 (2022).

It is important to remember that the questions here arise because the debtor-in-possession model relies on management to run the show. If there are flaws in that structure they cannot be remedied by policing the choice of debtor's counsel. As important as that decision may be, it is a sideshow when compared to the rules governing who controls the estate and when that control can be taken away.