

NOV 25 2009

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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6 In re:) BAP Nos. NV-09-1092-MoDK
7)
8 MARTIN BRIAN SHAT and) Bk. No. 08-23136-BAM
9 ANJANETTE SHAT,)
10 Debtors.)
11)
12)
13)
14 MARTIN BRIAN SHAT;)
15 ANJANETTE SHAT,)
16 Appellants,)
17)
18 v.) **M E M O R A N D U M**¹
19)
20)
21 SARA L. KISTLER, Acting)
22 United States Trustee for)
23 Region 17,)
24 Appellee.)
25)
26)
27)
28)

Argued and Submitted on September 24, 2009
at Las Vegas, Nevada

Filed - November 25, 2009

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Before: MONTALI, DUNN, and KURTZ,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Frank L. Kurtz, Chief Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

1 Christopher G. Gellner ("Gellner") appeals the bankruptcy
2 court's denial of his employment under section 327(a)³ as counsel
3 for debtor-appellant Steven H. Hofsaess ("Hofsaess") in his
4 chapter 11 case (BAP No. NV-09-1089) and debtors-appellants
5 Martin B. Shat and Anjanette Shat (individually or collectively
6 the "Shats") in their chapter 11 case (BAP No. NV-09-1092).⁴ For
7 the reasons stated below, we AFFIRM.

8 **I. FACTS**

9 **A. Prepetition Background**

10 The Shats and Hofsaess are long-time friends and both
11 parties own and manage several rental properties. In July 2005,
12 Mr. Shat purchased a rental property located in Las Vegas, Nevada
13 ("Property"). It later became a bad investment since the
14 mortgage payments were higher than the rent, leaving the Shats to
15 make up the difference. In December 2006, Mr. Shat approached
16 Hofsaess about purchasing the Property. Hofsaess agreed to pay
17 \$630,000 for the Property, with \$20,000 down, assuming the notes
18 secured by the first and second deeds of trust in favor of
19 Countrywide Mortgage. The parties closed the sale themselves.
20 Hofsaess paid the \$20,000, took over ownership, control, and
21 management of the Property, and also had Countrywide Mortgage
22 mail the mortgage statements to his home. However, Mr. Shat did
23 not execute a deed transferring title to Hofsaess.

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26 ³ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

28 ⁴ These two appeals have not been consolidated although
they were argued together before us. We are issuing this
identical memorandum in both appeals.

1 Shortly after Hofsaess purchased the Property, he improved
2 it with a \$100,000 swimming pool. Thereafter, he was able to
3 rent it out for a profit. Since Hofsaess took over the Property,
4 he has collected all rents and made all mortgage payments. The
5 Shats have had no involvement in the Property since selling it to
6 Hofsaess in December 2006, and the parties have had no disputes
7 over its ownership.

8 **B. Procedural History**

9 The Shats filed an individual chapter 11 petition on
10 November 5, 2008. They retained Gellner to prepare their
11 petition and represent them in their bankruptcy. Since they
12 still held legal title to the Property as of the petition date,
13 out of an abundance of caution they listed it on their Schedules
14 A and D, showing a value of the Property of \$340,000, subject to
15 secured claims totaling \$576,000.

16 On November 16, 2008, with Gellner's assistance, Hofsaess
17 also filed an individual chapter 11 petition. Although Hofsaess
18 held an equitable interest in the Property as of his petition
19 date, he did not list it in his schedules. Gellner informed the
20 United States Trustee ("UST") of the situation regarding the
21 Property at both the Shats' and Hofsaess's initial debtor
22 interviews, and stated that he would amend their respective
23 schedules once the transfer of ownership was complete.

24 According to Gellner, his clients prepared, and on
25 December 4, 2008, Mr. Shat executed a quitclaim deed transferring
26 the Property to Hofsaess. They brought the deed to his office to
27 be notarized and recorded, but it was not recorded.

1 The creditors of both estates were not provided with notice
2 of the transaction and an opportunity to object. Gellner
3 justified this omission by arguing that because both Mr. Shat and
4 Hofsaess were in the business of buying and selling real estate,
5 the transaction was in the ordinary course of business for both
6 estates.

7 Previously, on November 10, 2008, the bankruptcy court
8 issued an order instructing the Shats to file, among other
9 things, a status report on the development of their plan of
10 reorganization, at least five days prior to a December 16, 2008,
11 status conference hearing.⁵ The order further instructed that if
12 Gellner had not yet sought employment by December 16, 2008, he
13 should be prepared to explain why the amount of his compensation
14 listed in the Shats' petition is reasonable given the services
15 provided. Neither Gellner nor the Shats appeared at the December
16 16 hearing, nor did Gellner file the required status report. On
17 December 18, the bankruptcy court issued an order continuing the
18 status conference to January 27, 2009, and further ordered that
19 if Gellner failed to appear he would be fined \$500.

20 Hofsaess and the Shats filed applications for Gellner's
21 employment in their respective cases on January 14, 2009. The
22 applications stated that both Gellner and his law firm were
23 disinterested pursuant to section 101(14) and did not hold or
24 represent any adverse interest to the respective estates.
25 Gellner verified these representations and set forth his
26 experience and attested that he never represented either party

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28 ⁵ The Hofsaess case was initially assigned to a different
judge who does not require status conference reports.

1 prior to bankruptcy and that he and his firm were disinterested
2 within the meaning of section 101(14). Because both applications
3 were filed approximately two months postpetition, they requested
4 that Gellner's employment be approved retroactively, or "nunc pro
5 tunc." Gellner set the employment matter for hearing in the
6 Hofsaess case for February 18, and in the Shats' case for
7 February 24, 2009.⁶ Neither the applications nor Gellner's
8 verified statements disclosed the estates' competing interests in
9 the Property, or that Gellner represented both estates, or any
10 details regarding the attempted quitclaim deed to Hofsaess
11 facilitated by Gellner's firm on December 4, 2008.

12 Meanwhile, the rescheduled status conference in the Shats'
13 case took place on January 27, 2009. When the court inquired why
14 Gellner failed to appear at the December 16 status conference or
15 file the required status report, Gellner responded that he did
16 not receive the November 10 order due to staff error, and the
17 December 18 order continuing the status conference, which he did
18 receive, made no mention of the status report requirement. After
19 hearing Gellner's explanation, the court expressed its concern
20 about both the neglectful manner in which Gellner had represented
21 the two estates and his explanation of his conduct. The court
22 emphasized that the December 16 order did not eliminate the
23 November 10 order's requirement of filing a status report.

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27 ⁶ The employment application hearing in the Hofsaess case
28 was set on February 18, 2009 before Judge Nakagawa, the judge
assigned to the case. At that hearing, Judge Nakagawa decided to
transfer the Hofsaess case to Judge Markell since it was related
to the Shats' case and the employment issues were the same.

1 Gellner proceeded to offer an oral status report advising the
2 court of the progress in the case.

3 At the end of the status conference, the court questioned
4 Gellner's competence to represent a debtor in an individual
5 chapter 11 case in light of the prior events. The court further
6 noted that Gellner intended to charge the bankruptcy estates
7 \$335.00 per hour for his representation, even though that
8 representation apparently did not include appropriate procedures
9 to ensure that he received and reviewed court orders. When
10 Gellner interrupted the court attempting to explain his
11 bankruptcy experience, the court threatened to fine Gellner \$100
12 and \$500 for a second interruption. The status conference was
13 continued to the employment application hearing date on
14 February 24, 2009. The court asked Mr. Gellner to provide
15 additional information regarding his experience and competence to
16 represent debtors in individual chapter 11 cases.

17 On January 29, 2009, the UST filed an opposition to
18 Gellner's employment in both cases, contending that Gellner had
19 failed to make disclosures about the potential conflict of
20 interest between the two bankruptcy estates which would impact
21 his disinterestedness status. In the UST's view, there was an
22 actual conflict of interest. The UST also contended that Gellner
23 failed to explain adequately why he should be employed nunc pro
24 tunc.

25 Gellner replied, arguing that he was disinterested and that
26 he held no adverse interest because Hofsaess and the Shats agreed
27 about the ownership of the Property and that the execution and
28 recording of the quitclaim deed would resolve any conflict

1 between the two bankruptcy estates. As for the nunc pro tunc
2 issue, Gellner contended that even though the employment
3 applications were filed untimely, his efforts necessarily
4 benefitted both estates. Gellner, a sole practitioner, explained
5 the delay was due to an unusually busy work load, employee
6 vacations, and the holidays. As ordered, Gellner filed a status
7 report in the Shats' case on February 17, 2009.

8 At the February 24 employment application hearing, Gellner
9 described his bankruptcy experience and presented his prior
10 arguments to support his disinterestedness and the lack of any
11 actual or potential conflict of interest between him and the
12 estates or between the estates themselves.

13 The court asked Gellner if he was familiar with section 549.
14 Gellner's response indicated that he was not, so the court
15 explained how that section allows an estate to avoid unauthorized
16 postpetition transfers outside the ordinary course of business.
17 Gellner replied that he considered filing a motion to have the
18 transfer approved, but determined that since Hofsaess and the
19 Shats were both in the business of buying and selling rental
20 properties, and that the only thing missing from the sale of the
21 Property almost two years prior was the deed, the transaction was
22 in the ordinary course of business and thus a noticed motion was
23 not necessary. Further, Gellner contended that he had disclosed
24 all of this information to the UST so nothing was being hidden.
25 The deed has not been recorded to date.

26 The UST contended that since the Property was transferred in
27 violation of section 549, the creditors of the Shats' estate
28 could potentially bring an action to recover it, and therefore

1 the estates are adverse to one another. The UST also noted that
2 neither party had independent counsel advise them about the
3 Property, nor did the pleadings discuss the rights of creditors
4 and how they were or were not affected by the transaction.

5 In response, the court commented that because the deed had
6 been executed but not recorded, section 549 may not have been
7 violated. It nevertheless asked Gellner how he could advise both
8 parties about the Property yet contend he had no conflict.
9 Gellner explained that the transaction was "fair" because the two
10 individuals involved in the transaction agreed about the
11 ownership of the Property and because the debts secured by the
12 Property exceeded its value. The court disagreed, explaining
13 that because both the Shats and Hofsaess were in bankruptcy and
14 fiduciaries of bankruptcy estates, they were required to protect
15 the interests of their respective creditors. The court expressed
16 its concern that no disinterested party had conducted an
17 independent examination regarding the status of the Property and
18 the purported transfer by quitclaim deed. The court rhetorically
19 asked which estate was entitled to the benefit of the rental cash
20 flow.

21 As to the nunc pro tunc issue, Gellner offered an
22 explanation that he had not previously disclosed - during the
23 relevant two month period, his firm was forced to vacate its
24 office space of twenty years for renovations.

25 After weighing all the information and expressing some
26 reluctance, the bankruptcy court denied Gellner's employment in
27 both cases. The court based its decision upon two grounds.
28 First, the court stated:

1 . . . Mr. Gellner's office's participation in the
2 drafting of the deed shows that there is a conflict
3 here. It may not be actual, but it certainly is
4 potential because there has been no independent
5 examination of this.

6 . . . [I]t appears that there's a confusion by
7 Mr. Gellner on behalf of who his clients are, whether
8 it's the individuals or whether it's the estates of
9 those individuals, something that this far into both
10 cases I simply find astounding.

11 . . . [W]hy there was no consideration given to
12 disclosing this to creditors to allow them to take a
13 look at it is beyond me. That would seem to me to be
14 standard practice for Chapter 11 especially when you're
15 representing two estates that have a joint interest.
16 . . . [I]t's not for Mr. Gellner to appoint himself as
17 judge and jury to say that it's a fair transaction, and
18 it should go forward. . . . [O]nce both parties were
19 in bankruptcy, that is a transaction that deserves the
20 attention of the creditors before they're going
21 forward.

22 The court's second independent ground for denying Gellner's
23 employment was its concern over Gellner and his firm's
24 competence. Although the court believed Gellner to be a
25 competent attorney, because of his not filing a court-ordered
26 status report in the Shat case, his inability to timely file his
27 employment applications among other things, his staff's inability
28 to ensure that Gellner receives court orders, and Gellner's
tendency to blame his staff for case management errors, the court
concluded that Gellner was not competent to represent individuals
in chapter 11 cases.

Finally, the bankruptcy court addressed the retroactive
employment issue stating:

. . . [A]nd that feeds also into the request for nunc
pro tunc. I understand the press of business . . .
especially when an office is being moved.

But if business is that tight in order for a simple
employment application, I wonder how it will be if, in
fact, these cases turn into something that's a little

1 more difficult. It appears Mr. Gellner has not handled
2 these matters in a manner that the estates deserve in
3 timeliness to get the matters that should be before the
Court pretty much on a first-week or a first-month
basis.

4 So, I will sustain the U.S. Trustee's objection in both
5 cases.

6 On March 5, 2009, the bankruptcy court entered final orders
7 in both cases denying Gellner's employment. These timely appeals
8 followed.

9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C.
11 §§ 157(b)(2)(A) and 1334. Orders denying a professional's
12 employment under section 327(a) are interlocutory. Sec. Pac.
13 Bank Wash. v. Steinberg (In re Westwood Shake & Shingle, Inc.),
14 971 F.2d 387, 389 (9th Cir. 1992). A motions panel granted leave
15 to appeal on June 25, 2009. Therefore, we have jurisdiction
16 under 28 U.S.C. § 158(a)(3).

17 **III. ISSUES**

- 18 1. Did The Bankruptcy Court Abuse Its Discretion When It Denied
19 Gellner's Employment?
20 2. If The Bankruptcy Court Should Have Approved Gellner's
21 Employment, Should It Have Been Approved Retroactively?

22 **IV. STANDARDS OF REVIEW**

23 We review orders on employment, disqualification, and
24 compensation of professionals for abuse of discretion. Film
25 Ventures Int'l, Inc. v. Asher (In re Film Ventures Int'l, Inc.),
26 75 B.R. 250, 253 (9th Cir. BAP 1987). An abuse of discretion
27 occurs if the bankruptcy court bases its ruling upon an erroneous
28 view of the law or clearly erroneous factual findings. Hansen v.

1 Moore (In re Hansen), 368 B.R. 868, 875 (9th Cir. BAP 2007). To
2 reverse for abuse of discretion, we must have a definite and firm
3 conviction that the bankruptcy court committed a clear error of
4 judgment in the conclusion it reached. Id.

5 We review the bankruptcy court's legal conclusions and
6 questions of statutory interpretation de novo, and factual
7 findings for clear error. Village Nurseries v. Gould
8 (In re Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999).

10 V. DISCUSSION

11 A. Applicable Law.

12 The employment of counsel in a bankruptcy case is governed
13 by section 327, Rule 2014, and the applicable state's rules of
14 professional conduct. 11 U.S.C. § 327; Fed. R. Bankr. P. 2014;
15 In re Wheatfield Bus. Park, LLC, 286 B.R. 412, 417 (Bankr. C.D.
16 Cal. 2002).

17 1. Section 327(a).

18 Section 327 is applicable to employment of professionals by
19 a debtor-in-possession ("DIP"). DeRonde v. Shirley
20 (In re Shirley), 134 B.R. 940, 943 (9th Cir. BAP 1992); 11 U.S.C.
21 § 1107(a). A professional employed under section 327(a) is a
22 fiduciary to the estate and is employed to represent the estate
23 and act only in its best interest, not the interest of the
24 debtor. McCutchen, Doyle, Brown & Enersen v. Official Comm. of
25 Unsecured Creditors (In re Weibel), 176 B.R. 209, 212 (9th Cir.
26 BAP 1994). Section 327(a) allows the bankruptcy court to
27 determine whether the attorney selected by the DIP is competent
28 and whether his or her services are in the best interest of the

1 estate. See In re Kroeger Prop. and Dev., Inc., 57 B.R. 821, 823
2 (9th Cir. BAP 1986).

3 Section 327(a) imposes a two-prong test for the employment
4 of professionals by a DIP or trustee. The professional (1) must
5 not hold or represent any interest adverse to the estate, and
6 (2) must be a "disinterested person." In re Wheatfield Bus.
7 Park, LLC, 286 B.R. at 418. The term "adverse interest" is not
8 defined in the Code, but case law has defined it to mean:

9 (1) possession or assertion of an economic interest that would
10 tend to lessen the value of the bankruptcy estate; or

11 (2) possession or assertion of an economic interest that would
12 create either an actual or potential dispute in which the estate
13 is the rival claimant; or (3) possession of a predisposition
14 under circumstances that create a bias against the estate.

15 Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d 832, 845
16 (9th Cir. 2008). To represent an adverse interest includes
17 serving as an attorney for a party who holds such an adverse
18 interest. Tevis v. Wilke, Fleury, Hoffelt, Gould & Birney, LLP
19 (In re Tevis), 347 B.R. 679, 688 (9th Cir. BAP 2006).

20 A "disinterested person" is defined in the Code and
21 includes, in relevant part, "a person that . . . does not have an
22 interest materially adverse to the interest of the estate . . .
23 by reason of any direct or indirect relationship to, connection
24 with, or interest in, the debtor, or for any other reason."

25 11 U.S.C. § 101(14)(C). " 'A disinterested professional is one
26 that can make unbiased decisions, free from personal interest, in
27 any matter pertaining to the debtor's estate.' " First
28 Interstate Bank, NA v. CIC Inv. Corp. (In re CIC Inv. Corp.),

1 192 B.R. 549, 553-54 (9th Cir. BAP 1996)(citing In re Dynamark,
2 Ltd., 137 B.R. 380, 381 (Bankr. S.D. Cal. 1991)). Counsel must
3 be disinterested in order to assure undivided loyalty to the
4 debtor. Id. An attorney who represents a DIP while also
5 representing a party who has an interest adverse to the estate is
6 no longer considered disinterested because the attorney is put
7 into a position where he or she has a conflict. In re Envirodyne
8 Indus., Inc., 150 B.R. 1008, 1017 (Bankr. N.D. Ill. 1993).

9 An actual conflict mandates disqualification of a
10 professional to serve in a bankruptcy case. 11 U.S.C.
11 §§ 327(a), (c). A potential conflict also provides sufficient
12 grounds for a court to deny a professional's employment.
13 In re AFI Holding, Inc., 530 F.3d at 851.

14 **2. Rule 2014(a).**

15 Rule 2014(a) sets forth the application procedure for the
16 employment of professionals. It requires an applicant to
17 disclose in the application, "to the best of the applicant's
18 knowledge, all of the [professional's] connections with the
19 debtor, creditor, any other party in interest, their respective
20 attorneys and accountants, the United States Trustee, or any
21 person employed in the office of the United States Trustee."
22 Rule 2014(a) further requires that the professional's
23 accompanying verified statement set forth these same disclosures.

24 Full disclosure is an essential prerequisite for both
25 employment and compensation. Neben & Starrett, Inc. v. Chartwell
26 Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 881 (9th Cir.
27 1995). A professional has a duty to make full, candid and
28 complete disclosure of all facts concerning his transactions with

1 the debtor, and must disclose all connections with the debtor,
2 creditors, and parties in interest, no matter how irrelevant or
3 trivial those connections may seem. Mehdipour v. Marcus &
4 Millichap (In re Mehdipour), 202 B.R. 474, 480 (9th Cir. BAP
5 1996).

6 "All relevant facts must be disclosed to the court in the
7 application to retain a professional, and it is blatantly
8 improper for a trustee or professional to disclose less to the
9 court than is disclosed to the United States Trustee."

10 In re BH & P, Inc., 103 B.R. 556, 567 (Bankr. D. N.J. 1989),
11 aff'd, 949 F.2d 1300 (3d. Cir. 1991).

12 **B. The Bankruptcy Court Did Not Abuse Its Discretion When It**
13 **Denied Gellner's Employment.**

14 On appeal, Gellner contends that he met the requirements of
15 section 327(a), and the bankruptcy court abused its discretion
16 when it denied his employment in both cases. He further contends
17 the court failed to approve his employment because the court was
18 upset with him - an improper ground - and not because he failed
19 to meet the requirements of section 327(a). Alternatively,
20 Gellner argues that the bankruptcy court erred when it determined
21 there was a potential conflict due to his representation of both
22 parties in the quitclaim deed transaction. Gellner's positions
23 are that there is no actual or potential conflict between the
24 estates, no disagreement between the debtors regarding the
25 ownership of the Property and no problem with his representation
26 of both debtors and their respective estates. He further asserts
27 that there is no equity in the Property and for that reason there
28 is no problem with the Property being transferred from one

1 bankruptcy estate to another. Gellner contends that because all
2 of the debtors were involved in the business of buying and
3 selling real estate, the quitclaim deed transaction was correctly
4 handled as an ordinary course of business transaction.

5 Gellner interprets the power of the bankruptcy court over a
6 professional's employment and its decision here much too
7 narrowly. Since we can affirm the bankruptcy court on any
8 grounds supported by the record, Canino v. Bleau (In re Canino),
9 185 B.R. 584, 594 (9th Cir. BAP 1995), we now review the court's
10 decision and the record to determine whether there was a
11 sufficient basis to deny Gellner's employment.

12
13 **1. The Two Estates Were In Inherent Conflict Under**
14 **Bankruptcy Law.**

15 There are several problems with the position Gellner takes
16 regarding the postpetition quitclaim deed execution. First, we
17 question whether under the facts of this case, such a transaction
18 could ever be in the ordinary course of business of these
19 estates. Moreover, although he contends the evidence is
20 undisputed that transferring the Property was in the ordinary
21 course of business for these two estates, thus not requiring
22 notice to creditors, the bankruptcy court made no determination
23 of this fact. As the UST notes, nothing in the record confirmed
24 its legitimacy. Assuming that the quitclaim deed transaction was
25 outside of the ordinary course of business, section 363(b)(1)
26 required Gellner to file a notice and set the matter for hearing,
27 and presumably disclose his role in the transaction.⁷

28

⁷ Section 363(b)(1) provides:

(continued...)

1 Second, under section 541, the filing of a bankruptcy case
2 creates an estate that includes all legal and equitable interests
3 of the debtor in property as of the commencement of the case.
4 The estate can also acquire interests in property postpetition,
5 including what a trustee recovers under section 550.⁸ Here, on
6 the date of the Shats' petition, Mr. Shat held title to the
7 Property yet Hofsaess held an unrecorded, though non-possessory,
8 ownership interest in it. As such, the Shat estate held a
9 potential claim under section 544(a)(3) giving it the status of a
10 bona fide purchaser and right to sell the Property to another
11 despite Hofsaess' non-possessory interest. Further, as the
12 bankruptcy court recognized, the postpetition deed transfer may
13 have given rise to a section 549⁹ claim by the Shat estate
14 against the Hofsaess estate as an avoidable and recoverable
15 transfer.¹⁰

16 According to Gellner, no claims by either estate have been
17 asserted because the parties are friends and have no dispute over
18

19 ⁷(...continued)

20 "The trustee, after notice and a hearing, may use, sell, or
21 lease, other than in the ordinary course of business,
property of the estate"

22 ⁸ Section 550 provides, in relevant part, to the extent
23 that a transfer is avoided under section 544 or 549, the trustee
24 may recover, for the benefit of the estate, the property
transferee.

25 ⁹ Section 549 provides, in relevant part, that the trustee
26 may avoid a transfer of property of the estate that occurs after
the commencement of the case and that is not authorized under the
Code or by the court.

27 ¹⁰ We do not ignore the fact that the Hofsaess estate might
28 have defenses to such claims, such as constructive notice or the
like. We merely use these examples to illustrate that these two
estates were clearly in conflict.

1 ownership of the Property. This very well may be. However, that
2 is the crux of the dilemma here. Any claim available to either
3 the Shats or Hofsaess against the other belongs to their
4 respective creditors or their estates; yet, they were not
5 consulted. As the bankruptcy court noted, "it's not just them
6 anymore. It's them and their creditors." Neither Hofsaess nor
7 the Shats had the power unilaterally to waive any such claims
8 that might have been available to their respective estates.
9 In re Lee, 94 B.R. 172, 178 (Bankr. C.D. Cal. 1989).

10 **2. Gellner's Representation Of The Adverse Estates Also**
11 **Likely Violated The Nevada Rules of Professional**
12 **Conduct.**

13 Gellner's representation of the two estates as well as his
14 participation in the deed transaction also may have violated the
15 Nevada Rules of Professional Conduct. Regardless of Gellner's
16 contentions, certainly by the time of filing Hofsaess' petition,
17 and Gellner's intended retention, the parties held conflicting
18 interests in the Property. As such, Gellner's representation of
19 both parties in the deed transfer constituted a concurrent
20 conflict of interest under NRPC Rule 1.7. Therefore, at minimum,
21 he was required to obtain written informed consent from the
22 parties waiving the conflict. In a normal case, that would
23 include only Hofsaess and the Shats. However, in the context of
24 a chapter 11 bankruptcy, involved parties also include their
25 respective creditors and the UST. In re Lee, 94 B.R. at 179;
26 In re Perry, 194 B.R. 875, 880 (E.D. Cal. 1996). Consequently, at
27 minimum, Gellner should have provided these parties with notice
28 of the deed transfer, giving them an opportunity to review the
matter and be heard.

1 We also reject Gellner's argument that the bankruptcy court
2 should have set a hearing on the deed transfer instead of denying
3 his employment if it believed notice of it was "so important."
4 What Gellner neglects to recognize is that the court did not
5 learn of the deed transaction and Gellner's dual representation
6 until long after-the-fact because of his failure to disclose it.
7 Even then, he disclosed it (and not exactly candidly) to the
8 court only after being forced to do so in reply to the UST's
9 opposition, which leads us to our next discussion.¹¹

10 **3. Gellner Did Not Meet The Requirements Of Section 327(a)**
11 **Or Rule 2014(a).**

12 Gellner asserts that he never held or represented an adverse
13 interest to either estate and that he was disinterested, but even
14 if there was any alleged potential competing interests for the
15 Property, such interests evaporated well before the employment
16 applications were filed or heard. In other words, according to
17 Gellner, as long as an interested professional takes a course of
18 action postpetition that possibly eliminates his conflict of
19 interest and does so prior to the filing of the employment
20 application, which discloses nothing relevant, this renders the
21 professional disinterested and now eligible for employment under
22 section 327(a). We reject his argument.
23

24
25 ¹¹ Gellner stated in the replies to the UST's opposition
26 that "[o]n December 4, 2008, Mr. Shat executed a Quit Claim Deed
27 in favor of Mr. Hofsaess The deed legally completed the
28 transaction that took place two years earlier." Nowhere in the
replies or his supporting declarations does he disclose that his
firm participated in the transfer. We assume the bankruptcy
court figured out Gellner's involvement by recognizing that the
notary's name was the same as Gellner's legal assistant - Terry
Leif Erickson. This also explains why the court inquired about
"who" notarized the deed.

1 Even if there is no actual or potential conflict as Gellner
2 contends, this may well be how the cases will turn out but this
3 is not how it appeared when the cases began. Notably, Hofsaess
4 did not disclose his equitable interest in the Property anywhere
5 in his petition while the Shats listed it in theirs. In any
6 event, the potential (or even actual) conflict arose when
7 Hofsaess retained Gellner to represent his chapter 11 estate
8 while Gellner represented the Shats' estate which held, on the
9 face of their schedules, an adverse interest in the Property
10 claimed by Hofsaess.

11 Furthermore, by representing the Shats while also
12 representing Hofsaess, who held a competing adverse interest to
13 the Shats' estate, Gellner was in an irreconcilable conflict. As
14 a fiduciary to the estate, Gellner is required to look at all
15 sources of recovery available to the estate and avoid any
16 interest adverse to the estate that would render such search
17 impossible. Kagan v. Stubbe (In re El San Juan Hotel Corp.),
18 239 B.R. 635, 646 (1st Cir. BAP 1999). Any independent
19 professional view of either estate's causes of action could not
20 have existed because of Gellner's relationship with both parties.
21 By virtue of that relationship, his loyalties were divided, and
22 thus he could not possibly have given objective advice on any
23 issues relating to the Property. Based on these circumstances,
24 the fact that Gellner never represented either party before they
25 filed bankruptcy, which he contends supports his
26 "disinterestedness," is irrelevant.

27 Finally, Gellner asserts that only in the rarest case should
28 a chapter 11 DIP be deprived of employing the counsel of his or
her choice. While true, this does not extend to selecting

1 counsel who is not disinterested within the meaning of
2 section 327(a). In re Career Concepts, Inc., 76 B.R. 830, 834
3 (Bankr. D. Utah 1983).

4 What is most troubling to us in this case is Gellner's lack
5 of proper disclosure. Although these cases are not related in
6 the classic sense of an attorney representing both a debtor
7 corporation and its debtor sole shareholder, nevertheless they
8 are related because of the parties' shared interest in the
9 Property. When Gellner finally filed the employment applications
10 and verified statements two months postpetition, none of the
11 documents disclosed the parties' competing interests in the
12 Property, or that Gellner was representing both estates, or
13 anything regarding the postpetition deed transfer facilitated by
14 Gellner's firm just one month prior, regardless of whether such
15 transfer was in the ordinary course of business or not. In fact,
16 neither the applications nor verified statements even track the
17 required language of section 327(a) - viz., all connections with
18 the debtor, creditors, any other party in interest, their
19 respective attorneys and accountants, the United States trustee,
20 or any person employed in the office of the United States
21 trustee.

22 The fact that the deed was transferred prior to filing the
23 employment applications, which Gellner claims eliminated the
24 potential conflict, does not eliminate his "connection" with
25 either party and should have been disclosed, along with all of
26 the other relevant information noted above, to the court. As a
27 professional under section 327(a), Gellner has a duty to make
28 full, candid and complete disclosure of all facts concerning his
transactions with both parties, and he must disclose all

1 connections with them, their creditors, and any parties in
2 interest, no matter how irrelevant or trivial those connections
3 may seem. In re Mehdipour, 202 B.R. at 480. Failure to disclose
4 is alone a sufficient basis for denying Gellner's employment in
5 both cases. See In re Film Ventures Int'l, Inc., 75 B.R. at 252;
6 In re Lee, 94 B.R. at 177 (citing Diamond Lumber, Inc. v.
7 Unsecured Creditor's Comm., 88 B.R. 773, 777 (N.D. Tex. 1988),
8 and In re Roberts, 75 B.R. 402, 411 (D. Utah 1987)).

9 Gellner admits, without explanation, that his initial
10 applications and verified statements were "deficient," but
11 defends his lack of disclosure by asserting that he disclosed all
12 of the circumstances surrounding the Property to the UST.
13 Additionally, he contends, his subsequent replies to the UST's
14 opposition did disclose all of the pertinent information to the
15 court. These arguments do not help him for two reasons. First,
16 whether a professional has a conflict is not for the UST to
17 decide; that decision is exclusively within the province of the
18 bankruptcy court. Further, all relevant facts must be disclosed
19 to the court in the employment applications and Gellner's
20 verified statements, and it was improper for Gellner to disclose
21 less to the court than he did to the UST. In re BH & P, Inc.,
22 103 B.R. at 567.

23 Second, while the bankruptcy court eventually got the facts,
24 and many not until the employment hearing, withholding
25 disclosures to the court until forced to do so in response to the
26 UST's opposition is not stellar conduct of a bankruptcy
27 attorney. Presumably, had the UST not objected to Gellner's
28 employment in both cases, this highly relevant information would
never have been revealed to the bankruptcy court, putting it in

1 the repugnant position of unknowingly approving the employment of
2 disqualified counsel.

3 Consequently, Gellner did not meet the requirements of
4 section 327(a) or Rule 2014(a), and, in fact, the record supports
5 denying his employment based on the disclosure violations alone.
6 In re Film Ventures Int'l, Inc., 75 B.R. at 252.

7 **4. Disposition Of The Issue.**

8 In summary, we see no clear error of judgment in the
9 conclusion the bankruptcy court reached. We believe that it
10 could have denied Gellner's employment based on any of the
11 aforementioned grounds, and we can affirm on any grounds
12 supported by the record even if not so clearly articulated by the
13 bankruptcy court. In re Canino, 185 B.R. at 594. Because denial
14 of employment is within the court's discretion, and we perceive
15 no abuse of that discretion, we AFFIRM the bankruptcy court's
16 denial of Gellner's employment. Further, in light of our
17 affirmance, the issue of whether Gellner's employment should have
18 been approved retroactively is moot.