NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. NV-09-1092-MoDK
MARTIN BRIAN SHAT and ANJANETTE SHAT,	Bk. No. 08-23136-BAM
Debtors.	
MARTIN BRIAN SHAT; ANJANETTE SHAT,	
Appellants,	
v.	**M E M O R A N D U M**[1]
SARA L. KISTLER, Acting United States Trustee for Region 17,	
Appellee.	

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.

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[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.

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

I. FACTS

A. Prepetition Background

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

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

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

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

B. Procedural History

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

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

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

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

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

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

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

prior to bankruptcy and that he and his firm were disinterested within the meaning of section 101(14). Because both applications were filed approximately two months postpetition, they requested that Gellner's employment be approved retroactively, or "nunc pro tunc." Gellner set the employment matter for hearing in the Hofsaess case for February 18, and in the Shats' case for February 24, 2009.[6] Neither the applications nor Gellner's verified statements disclosed the estates' competing interests in the Property, or that Gellner represented both estates, or any details regarding the attempted quitclaim deed to Hofsaess facilitated by Gellner's firm on December 4, 2008.

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

[6] The employment application hearing in the Hofsaess case 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.

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

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

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

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

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

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

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

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

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

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

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

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

> . . . Mr. Gellner's office's participation in the drafting of the deed shows that there is a conflict here. It may not be actual, but it certainly is potential because there has been no independent examination of this.
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> . . . [I]t appears that there's a confusion by Mr. Gellner on behalf of who his clients are, whether it's the individuals or whether it's the estates of those individuals, something that this far into both cases I simply find astounding.
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> . . .[W]hy there was no consideration given to disclosing this to creditors to allow them to take a look at it is beyond me. That would seem to me to be standard practice for Chapter 11 especially when you're representing two estates that have a joint interest. . . . [I]t's not for Mr. Gellner to appoint himself as judge and jury to say that it's a fair transaction, and it should go forward. . . . [O]nce both parties were in bankruptcy, that is a transaction that deserves the attention of the creditors before they're going forward.

The court's second independent ground for denying Gellner's employment was its concern over Gellner and his firm's competence. Although the court believed Gellner to be a competent attorney, because of his not filing a court-ordered status report in the Shat case, his inability to timely file his employment applications among other things, his staff's inability 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

> more difficult. It appears Mr. Gellner has not handled these matters in a manner that the estates deserve in timeliness to get the matters that should be before the Court pretty much on a first-week or a first-month basis.
>
> So, I will sustain the U.S. Trustee's objection in both cases.

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

II. JURISDICTION

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

III. ISSUES

1. Did The Bankruptcy Court Abuse Its Discretion When It Denied Gellner's Employment?

2. If The Bankruptcy Court Should Have Approved Gellner's Employment, Should It Have Been Approved Retroactively?

IV. STANDARDS OF REVIEW

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

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

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

V. DISCUSSION

A. Applicable Law.

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

1. Section 327(a).

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

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

Section 327(a) imposes a two-prong test for the employment of professionals by a DIP or trustee. The professional (1) must not hold or represent any interest adverse to the estate, and (2) must be a "disinterested person." In re Wheatfield Bus. Park, LLC, 286 B.R. at 418. The term "adverse interest" is not defined in the Code, but case law has defined it to mean: (1) possession or assertion of an economic interest that would tend to lessen the value of the bankruptcy estate; or (2) possession or assertion of an economic interest that would create either an actual or potential dispute in which the estate is the rival claimant; or (3) possession of a predisposition under circumstances that create a bias against the estate. Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d 832, 845 (9th Cir. 2008). To represent an adverse interest includes serving as an attorney for a party who holds such an adverse interest. Tevis v. Wilke, Fleury, Hoffelt, Gould & Birney, LLP (In re Tevis), 347 B.R. 679, 688 (9th Cir. BAP 2006).

A "disinterested person" is defined in the Code and includes, in relevant part, "a person that . . . does not have an interest materially adverse to the interest of the estate . . . by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C). " 'A disinterested professional is one that can make unbiased decisions, free from personal interest, in any matter pertaining to the debtor's estate.' " First Interstate Bank, NA v. CIC Inv. Corp. (In re CIC Inv. Corp.),

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

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

2. Rule 2014(a).

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

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

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

"All relevant facts must be disclosed to the court in the application to retain a professional, and it is blatantly improper for a trustee or professional to disclose less to the court than is disclosed to the United States Trustee." In re BH & P, Inc., 103 B.R. 556, 567 (Bankr. D. N.J. 1989), aff'd, 949 F.2d 1300 (3d. Cir. 1991).

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

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

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

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

1. The Two Estates Were In Inherent Conflict Under Bankruptcy Law.

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

[7] Section 363(b)(1) provides:

(continued...)

Second, under section 541, the filing of a bankruptcy case creates an estate that includes all legal and equitable interests of the debtor in property as of the commencement of the case. The estate can also acquire interests in property postpetition, including what a trustee recovers under section 550.[8] Here, on the date of the Shats' petition, Mr. Shat held title to the Property yet Hofsaess held an unrecorded, though non-possessory, ownership interest in it. As such, the Shat estate held a potential claim under section 544(a)(3) giving it the status of a bona fide purchaser and right to sell the Property to another despite Hofsaess' non-possessory interest. Further, as the bankruptcy court recognized, the postpetition deed transfer may have given rise to a section 549[9] claim by the Shat estate against the Hofsaess estate as an avoidable and recoverable transfer.[10]

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

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[7](...continued)
"The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ."

[8] Section 550 provides, in relevant part, to the extent that a transfer is avoided under section 544 or 549, the trustee may recover, for the benefit of the estate, the property transferred, or the value of such property, from the initial transferee.

[9] Section 549 provides, in relevant part, that the trustee 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.

[10] We do not ignore the fact that the Hofsaess estate might 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.

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

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

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

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

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

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

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[11] Gellner stated in the replies to the UST's opposition that "[o]n December 4, 2008, Mr. Shat executed a Quit Claim Deed in favor of Mr. Hofsaess .... The deed legally completed the 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.

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

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

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

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

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

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

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

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

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

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

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

4. Disposition Of The Issue.

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