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Hello, my name is Michael riello. I'm a partner at the law firm of tenenbaums Syracuse, her stryd. Here to talk today about bankruptcy ethics, something very important for bankruptcy practitioners as well as any attorney who works in the bankruptcy sphere. The interesting thing about about bankruptcy ethics is that attorneys have to deal with two sets of rules. One are the state ethics rules that that apply to any lawyer regardless of where they practice. And secondarily, there's also bankruptcy specific rules and procedures that need to be followed. If you miss if you do not comply with either one of those in a bankruptcy case, you could be subject to sanctions, including disallow element of disallowance or disgorgement of fees that were incurred during the bankruptcy case, as well as other monetary or other sanctions, including even disbarment. So it's very important to make sure that if you are practicing in the bankruptcy area, that you're aware of all of these rules and procedures, but we'll talk a little bit first about the state ethics rules and then we'll we'll transition to the bankruptcy rules and see how they're different and see how they add on to what you have to do from from the state perspective. So state ethics rules generally deal with things like confidentiality, loyalty, conflicts of interest, making sure that the lawyer is diligently and competently in zealously representing the interests of their clients. On the other hand, bankruptcy rules deal with it with a different set of issues. in bankruptcy, there is a bankruptcy estate that is set up. And the debtor, either individual or corporation is a fiduciary to creditors, as well as as equity holders, if there's a solvency. So there are different issues, including the ones I just discussed with respect to loyalty and confidentiality of information that courts want to make sure that lawyers follow. So things like disinterestedness lack of an adverse interest, public disclosure of any potential connections or conflicts are very important in the bankruptcy sphere, where you don't really necessarily have those issues in connection with other matters that don't relate to bankruptcy. So first, I'll talk a little bit about some of the rules under the model rules of professional conduct. Now, these were promulgated by the American Bar Association, their model ethics rules, but they have been adopted in one form or another by every state, at

least I think every state. So I'll talk about the model rules, because they're their general applicability. But obviously, each lawyer should be looking at their own state rules to make sure that they're complying with with their state rules. So first of all I'll talk about is a model rule of Professional Conduct 1.7. This deals with conflict of interest relating to the current clients, and provides that a lawyer cannot represent a client if that representation is a concurrent conflict of interest with another matter, which certainly makes sense. So you can't represent one client in a matter that's adverse directly adverse to to another client, or if there's a significant risk, that the representation of one client would be materially limited by the lawyers responsibilities to another person, or by the lawyers own personal interest. The idea here is that lawyers really need to be able to fully advocate zealously advocate for their own clients and should not be laboring under a conflict of interest, particularly with respect to a law firm, lawyers, lawyers and law firm represent, obviously, clients in many different areas different maybe representing clients who are competitors of each other.

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It's important to note we'll talk about this a little bit later, that a conflict of interest that one lawyer in a firm has, is imputed to the entire law firm, regardless of where their offices are, etc. The idea here is that the firm overall is representing the client, as well as information that one lawyer in the firm has, could easily be gotten by other lawyers in the firm and if other lawyers in the firm are representing clients and matters adverse to that to that client. confidential information could be seeped over from one team to another team. So the model rules deal with these types of things. The idea generally is that conflicts if there are real conflicts, there needs to be waivers. By informed waivers by, by clients who are affected ethical walls by within a law firm between lawyers who are practicing on are met, handling different matters that could be adverse to each other are also usually a good idea. Now, there are exceptions to the model rule 1.7 that a lawyer can represent a client where there's a concurrent conflict of interest. If the lawyer reasonably believes that it can continue to provide competent, diligent representation to both clients, if their representation is not prohibited by law, and if the clients give informed written consent, a basically a waiver, you want to make sure that the the the consent is is fully informed that the client knows that here are the downsides to the lawyer or the law firm representing you the client as well as some other client in an adverse manner. And certainly, if there ever becomes litigation or dispute over whether there's a conflict or not, you'll want to make sure that there's a record shown that the client was was informed and executed the waiver model. switchover to model rule 1.9, which deals with the lawyers duties to former clients, there are specific rules it within 1.9 dealing with representation of clients in matters that are adverse to a former client, the lawyer cannot represent a another client in a state in the same or substantially related matter in which the current clients interests are materially adverse to the interests of former clients unless the former client has given informed consent. So there the rule is kind of the same with respect to former clients a little bit less stringent. But again, the lawyer does the does have obligations to his

or her own former clients as well as as current clients. Model rule. 1.9 also has rules relating to a lawyer representing an interest or a client in a new law firm, that may be adverse to a client interest that he or she represented in their old law firm. So if you move from client from Firm A to Firm B, as as a lawyer, you have specific rules that you need to follow if you're going to to the to the new law, firm Law Firm B, and they're representing a client in a matter that is adverse to the interest that you represented in in your old law firm. Basically, the rule says you cannot, you as the lawyer moving to the new firm cannot represent that net new client. If there's material adversity, with respect to the client that you formerly represented at your old law firm. Or if you the lawyer, obtained confidential information protected information from the old client at your old firm. You cannot and use that information at your new firm, unless, again, the former client and your old law firm has given informed consent. Again, informed consent is very key here. The idea being that the lawyer is has more knowledge about the potential downsides of future representations of adverse interests. And if a client does not necessarily know what those downsides are, that the content really isn't valid for for purposes of the ethical rules. So when a lawyer moved from one firm to another, typically the new firm will ask the lawyer for a list of matters on which they represented clients in their at their former firm, to make sure that all necessary waivers and ethical walls are being imposed.

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My rule 1.9 also deals with the lawyers use of information that he or she obtained from the past representation of a former client. So you cannot use that information to the disadvantage of a former client unless the model rules otherwise permitted, or when or if the information becomes generally known. Again, lawyers have a duty of confidentiality. And just because either the client has become a former client or a lawyer moves law firms, for instance, you can't just willy nilly disregard the confidentiality of that information. Model rule 1.6 goes into more detail about the confidentiality of information and provide some limited exceptions for when a lawyer may or even must disclose information that is obtained confidential out confidentially through the attorney client relationship. I'll talk a little bit now about model rule one point 10. I talked I mentioned a little bit earlier that the conflict that a particular lawyer in a law firm has is imputed to that lawyers entire law firm. And basically, one point 10 provides that except for certain exceptions, no lawyer in a law firm can knowingly represent a client, if any one of the other lawyers in the law firm would be forbidden from doing so under the rules. Again, that's the imputation of other conflict to the entire firm. Usually what law for and you have law firms with 1000s of attorneys offices all over the world, you deal with these issues by getting quiet consent. To the extent that that is a way that you can follow you can abide by the rules. Ethical walls again, if somebody comes into a firm, newly is is newly hired by the firm, represented a former client and in a matter adverse to the the new client of the new firm, the new firm is going to wall off that that lawyer from dealing with any matters relating to that new firms client, you don't want to have the seepage of confidential, confidential information that would just get the the law

firm and the lawyer in trouble. Again, the rules are tried to protect the clients expectations of loyalty and confidentiality of information. Interestingly, the complex of non lawyers in the firm are not imputed to the firm as a whole. So we have a paralegal who moves from one firm to another. The rules themselves don't impute the that particular conflict, as brought by apparently by new paralegal to the entire firm. But, again, I think that the best course of action is to make sure that if you have some a new non attorney comment to a firm who represented a matter, client, in a matter adversity to different new firms matter, at least wall that person off so that that person does not have access to information is not working on the new firms matters that are adverse to the old firms matters. There are some exceptions to rule one point 10 we're talking if the conflict is more of a personal interest of the lawyer and does not present a significant risk to the or of limiting the representation of the client, the amputation rules don't necessarily apply. But again, I would generally urge people to be more cautious with respect to following the rules. To the extent that there's a question of whether a waiver from a client ought to be received ought to be gotten might as well get it, it never really hurts necessarily. And usually clients like to be informed earlier rather than later about a potential conflict. It could be a bad from a client relationship as well as an ethical standpoint. If a client learns later on that the firm was representing different clients and matters adverse to the to that client and there may have been a breach of the ethical rules. You don't want to face lawsuits or or or clients who are walking out the door because the firm or the lawyer did the wrong thing.

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Rule one point 10 B says that a lawyer if when a lawyer leaves a law firm to go to another firm and takes a client with him or her to the new firm, the Old Firm can continue representing clients in matters that are adverse to the client that the lawyer took to his or her new firm, with certain exceptions for matters that are related to the matters for which the the they, the lawyer moved to the new firm, or if any of the lawyers who remain at the Old Firm continue to have confidential information from the client who moved with the new lawyer. The Old Firm cannot then start taking matters that are adverse to the client that the lawyer took over to the new firm. But again, those are exceptions to to the general rule. If a lawyer generally the lawyer moves from one firm to another taste clients with him or her to the new firm, the Old Firm can, with the with these exceptions, take matters on their adversity to the client who left with that with that lawyer. All these disqualifications all these limitations under Rule one point 10 just like a lot of these other model rules can be waived with the the informed consent of the affected clients. Last next model rule I'll deal with briefly is model rule one point 13 dealing with organizational clients, clients who are companies, nonprofit organizations and the like, basically not not natural persons model rule one point 13. He says that the organization's lawyer represents the organization itself, as opposed to its board of directors or other constituents. The CEO of a company is not the client of the company's lawyer, the CEO may have their own lawyer, his or her own lawyer do representing an amount of unknown matters, but the organization's lawyer, the company's lawyer, is a is the

lawyer for the company itself. My rule one point 13 b deals with conflicts between the interests of the organization itself. And the interest of the constituents in the in the organization basically says that if a CEO CFO, any employee of the organization is acting or not acting in a manner, that could be a legal obligation of the company, a violation of law that can be imputed to the company, or that is likely to result in substantial injury to the company, the lawyer has to proceed as reasonably necessary to the act in the best interest of the organization. Again, the organization is the is the client here as opposed to the individuals themselves. So that may require the organization say we have we have a company, a corporation, that may require the corporation's lawyer to alert the board of directors that, hey, the CEO is acting in a manner that is adverse to the organization and may bring legal risk to that organization, it would be a breach of the ethical duties if the lawyer were to go along with, say, the CEOs malfeasance, for instance, that he or she may learn through the representation of the organization itself.

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The lawyer also had you have a lot of situations where the lawyer will be talking with interviewing, having discussions with individuals within an organization where the client or the lawyer is representing that organization, the lawyer needs to make clear during those conversations, that the lawyer is acting on behalf of the organization as opposed to the individuals themselves. This comes into play quite a bit. When there's an internal investigation. For instance, the organization hires the lawyer to conduct a an investigation as to something that may have gone wrong within the company, the lawyer would then interview employees of the organization to figure out what happened, the lawyer will need to make make clear to the people in the company that they're talking to that, hey, I'm the lawyer for the for the company, I'm not your lawyer, the the individuals may want to get their own warrior if that becomes necessary, but the lawyer has to make make make it clear that the to the people that the lawyers representing the company itself, as opposed to to them personally. So those are that's that's the backdrop of the the model rules of Professional Conduct as a deal with with all attorneys, not just bankruptcy attorneys, but but but these rules will apply to the bankruptcy attorneys as well in connection with with their representation of, of clients in in a bankruptcy case. There are obviously a lot of other model rules that state ethics rules that need to be applied and need to be complied with. But though these are the ones that that tend to be addressed more often than not in in bankruptcy scenarios outside of the actual bankruptcy rules themselves. So let's let's talk now about the bankruptcy rules themselves. And I'll put a little bit of give you a little bit of background with respect to the the lawyers role in in bankruptcy cases. So when a an individual or an organization files in a voluntary bankruptcy case either a chapter seven liquidation a chapter 11 reorganization, or for an individual as a chapter 13 modification of debt case, there is a bankruptcy estate that is set up that is basically based based basically it deals With the property that the the debtor has, as of the time that it filed its bankruptcy case. And you'll have competing claims among creditors and equity security holders and others for a limited scope of assets. In most bankruptcy cases, there,

there isn't enough to go around asset wise to distribute to all creditors. So you're going to, as a matter of necessity, have fights among creditors and other parties in interest over the property of that estate. And the bankruptcy code has a number of rules dealing with how to deal with with with those particular issues with respect to distributing assets, marshaling assets, and the like. And it's important for the attorneys who represent the company who represent official committees, as we'll talk about a little bit later to be you basically as free of conflicts as possible because they as well as their client will generally be seen as fiduciaries to the bankruptcy estate and to creditors. So in addition to all of the rules that apply to all other attorneys, the state ethics rules that have which a few I've discussed, we need to also think about the bankruptcy rules with respect to, to due to lack of, of adverse interest, lack of conflicts. So the process that is that is undertaken for a for an attorney or for any other professional for a bankruptcy estate or a official committee to actually be retained by the bankruptcy court in order to provide services. There's a fair amount of paperwork that needs to be filed with the bankruptcy court in connection with with getting that done. And the bankruptcy court actually needs to approve the retention of attorneys and other professionals in the bankruptcy case, it's not just not the case that a attorney can say, Okay, I'm now representing a debtor in possession or trustee. And I can just do whatever I want. In fact, there are a number of requirements, paperwork requirements, other things that need to be disclosed to the court and other parties and interest before that can can actually happen. So the paperwork is that the client, either a debtor in possession in a chapter 11 case, basically the the organization in chapter 11, or chapter seven trustee, or an official committee that's appointed in the bankruptcy case, would file an application with the bankruptcy court to say, we want to represent we want this law firm, this lawyer, this other professional to represent us during the bankruptcy case, the professional needs to file a declaration or an affidavit in support of that application. And we'll talk a little bit about what that affidavit what that declaration is going to provide. The parties will then other party's creditors and others any, anybody in the public would have the ability to object to that application for whatever reason. They may say, hey, look there, there are conflicts here. So this this law firm cannot represent the debtor in possession or the trustee or their committee.

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Though there's an opportunity for those objections, the bankruptcy court will then hold a hearing to determine whether or not the the the professional can be retained. And assuming that they are retained, the bankruptcy court approves it, then at only at that point, will the professional attorney or otherwise be retained in order to provide services to a debtor in possession a trustee or an official committee. That professional will also need to file fee applications during the case, you just can't get paid right away. In connection with your work, your fees get reviewed by the bankruptcy court. So that is overall what the process looks like. So we'll drill down now into talking about what the rule the bankruptcy rules themselves require of professionals in order to be retained by parties like a debtor in possession or chapter 11 or chapter seven trustee. Section 327

A of the bankruptcy code that's title 11 of the United States Code. So, title 11 section 327. A addresses their retention of professionals in bankruptcy cases, for a trustee or debtor in possession generally, and provides that except as otherwise provided in within the statute. The the attorney or other professional cannot hold an interest adverse to the bankruptcy estate and must be a disinterested person. Now, the term disinterested person is actually defined in the bankruptcy code. It basically provides that you could not have been a director officer investment banker of the of the client, you cannot have an interest that's materially adverse to to the estate, you cannot be a creditor of the estate. You cannot have a avoidable preference action of preference transfer received during the 90 days before the bankruptcy case was filed. We'll talk about preferences a little bit later. But section 327. A puts these disinterestedness and lack of the material adverse interest requirement on all professionals who wish to be retained by a chapter 11 or seven trustee or chapter 11. debtor in possession. There are specific rules for some types of attorneys who wants to represent who want to represent a chapter seven trustee or a chapter 11 debtor in possession for specific for specific purposes only. There's a separate provision of the Bankruptcy Code Section 327. He that it basically says that the trustee or the debtor in possession can employ an attorney for a specified special purpose if that attorney had represented the debtor before the bankruptcy case, but again, the attorney there could not cannot represent or hold any adverse interest to the debtor or to the bankruptcy estate with respect to the matter on which that attorney is going to be employed. So if you have, for instance, a Chapter or Chapter Seven trustee or debtor in possession who wishes to retain a law firm, to handle specific litigation against parties, certain parties, that attorney can be retained under Section 327 II of the bankruptcy code, the disinterested rule does not apply to such an attorney. But that attorney cannot represent an interest adverse to the debtor with respect to that specific litigation matter.

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So those those those are specific rules relating to to attorneys for specific matters. There's also a different type of professional that could be retained, usually in larger chapter 11 cases, called ordinary course professionals. This is an exception to the rule that I mentioned before where I said all attorneys and other professionals need to file paperwork with the court and say that we're disinterested and, and that we have to file fee applications in the like, for for certain types of professionals who do work for relatively modest fees in the ordinary course of the of the company's business, not relating to the prosecution of the chapter 11 case itself, the bankruptcy court can enter an order that establishes procedures that would allow the debtor the debtor in possession to retain professionals in the ordinary course of business. And usually what the court will require in that situation is that the ordinary proposed ordinary course professional file some sort of declaration that says here are what my potential adverse interests are, with respect to the matter on which I'm being retained. And that I'm not going to take on any matters adverse to the company for that matter, which I'm going to retain during the chapter 11 case. So it's, it's more of a streamline process, the you still need to file a declaration with the bankruptcy court to say, look,

here are what my interests are, I'm not going to take any the adverse to to the debtor or to state, but it's a little bit easier to comply with. But again, it generally tends to only apply to professionals who do relatively modest fee work in the ordinary course of the debtor in possessions business. There is a separate provision of the bankruptcy code dealing with professionals for statutory official committees. So in chapter 11 cases in any chapter seven cases even possible as well. The Office of the United States trustee, which is an arm of the US Department of Justice, can appoint a committee of unsecured creditors are even the committee of equity security holders, to represent the interests of unsecured creditors or equity security interests as a whole. That committee then becomes As a fiduciary to that to that creditor or, or equity security interest body, it's usually a group of 357 or nine members usually an odd number. So they're the committee takes a vote, you won't necessarily have to break a tie. So it's usually not number. That committee, working together as a committee can also retain and often almost always do retain their own professionals to represent the committee's interest in the bankruptcy case. Section 1103 of the bankruptcy code deals with the retention of professionals to official committees. And it basically says that a an attorney or an accountant or any other professional for the official committee may not, while employed by the committee represent any other entity that has an adverse interest in connection with the case, there is an exception for creditors committees that allow them to a professional to creditors committee can represent individual creditors, as well as a committee itself, that's an exception to the rule. But more often than not, the professional who represents the committee as a whole will not represent other committee will not represent other creditors individually. The idea here is that the creditors themselves, even though they all may be creditors of a company, and bankruptcy, may very well have interest, they're adverse to each other and technically often do. If you have a company with, say, $50 worth of assets, and there are $200 worth of claims against that company. Well, everybody's going to get one quarter recovery, they're 50 divided by 200. But maybe one creditor is going to claim that the other creditor, another creditor doesn't really have a valid claim at all. If that claim goes away, then there's going to be fewer creditors, among whom to compete for the same level of assets. So at least from a technical perspective, all creditors of a bankruptcy estate have some sort of adverse interest to each other. It is generally 10 more tests to be more theoretical than not because law firms do outside of the committee. perspective, law firms do often represent more than one creditor in one particular case, but at least there is always that potential for at least a theoretical conflict. But for committee standpoint, the committee is a fiduciary for creditors as a whole. So the the attorneys for the committee, the professionals for the attorney need to keep that in mind and say, Look, I'm advocating for the interests of all general at General, unsecured creditors or all equity security holders, as a whole, I'm not going to necessarily represent the interest of one creditor versus another. And what the rules basically say under Rule 1103 is you cannot as a professional represent an interest adverse to too in connection with with with the case itself. So if you're a creditors committee, you want to be a creditors committee attorney, you probably cannot have represented or be representing an equity security holder, that's just a different type of of interest. And there's going to be adversity there.

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So committee professionals just like chapter 11 debtor in possession or chapter seven trustee professionals will also have to file a declaration with the court to disclose what connections they have with creditors and other parties and interest in the case. And they have to make the representation that they do not have an interest an adverse interest in connection with with the case itself. We mentioned a little bit before the the the definition of a disinterested person again, this goes to Section 327, a professionals who represent the the trustee or committee, you can't be a creditor, you cannot be an equity security holder. You cannot have been the director or officer or employee of the debtor within the last two years. So these are the types of things that you're going to need to disclose in a declaration that gets filed with with with the bankruptcy court. adverse interest, again, you're going to need to disclose all connections and the term Connections is is the word that's used in in the bankruptcy rules as opposed to conflicts or client relationships. So the the rules, at least imply that when you make your disclosure to the court about what potential adverse interest you may have, you'll need to disclose things beyond just simple credit odds or client relationships that the firm currently are In the recent past has, there are other types of relationships that could go to it could possibly bear on that attorney or other professionals obligations to, to their clients in bankruptcy, those should be disclosed. In the, the declaration itself, can can be pretty lengthy, it can be very detailed, and courts almost unilaterally say it's really up to the professional Tim, to make the disclosures in the declaration itself. And certainly if if new information comes to light after a declaration is filed, the professional may file a supplemental declaration, say, Look, you're here to hear some new information that's come to light. But you really always need to be transparent when you are proposed professional to a to a trustee or debtor in possession, etc. The professional should not unilaterally decide, hey, look, this isn't something that really requires disclosure, but it's not really a problem. The court could disagree later on if this, this, whatever that issue is comes to light. And you're going to be in a bad position. If if it comes out later on that yes, I was aware of this potential issue. But I just decided not to disclose that. And included in that there. There have been a number of cases where the Court has said, hey, look, the professional failed to disclose this, they may even in good data thought that this is not a conflict or something that requires disclosure, but it really does. And in sanctions were brought to bear by by the court against those parties. So what I always suggest to professionals and anybody else who is going to be involved in in a bankruptcy case, who has to file this type of declaration is if there's any doubt at all about whether you ought to disclose it or not, you should disclose it. Now there's something that could be completely minor maybe don't need to be disclosed. But again, it is going to be up to the professional to determine what to disclose. But really, it's going to be on that professional, if it turned out that their their judgment was wrong. And they decide not to disclose something when they really should have.

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Now the the types of things that ought to be disclosed are quiet, at least client relationships, they

don't need to go into a lot of detail about how I represent the client is there the other thing and go into a lot of detail. And quite frankly, you shouldn't because you you owe your other clients a duty of confidentiality. But to the extent that there's any representations that could be adverse, those should be disclosed, at least in some sort of summary fashion that does not breach the duty of confidentiality to the other client so that the court and other parties can determine whether or not there is a real problem. If the professional is a creditor of the of the debtor and that this happens a fair amount, you'll need to disclose that as well. And if you are required to be disinterested, you would have to waive any claim that you have against the debtor as a condition to be retained, otherwise, you would not be able to be retained. But you need to disclose the fact that you are a creditor and that look, if I get approved, I'll go ahead and I'll waive my claim against the debtor should also disclose the amount of any payments that the attorney or the other professional received during the 90 days before the bankruptcy case because that could be clawed back by the estate as a so called preference action. And to the extent that attorney received a potential preference, preference transfer, that could be clawed back, that could be an adverse interest that could disqualify the firm from the attorney from being retained by the debtor. Although there there are potential ways to deal with that particular issue. So that usually does not, doesn't create a wall that that stops a professional from being retained. But that professional may need to pay back whatever that that preference amount was. So that at the end of the day, they will become disinterested and and not having an ad versus adverse interest against the estate. Professionals often get retainers from a debtor before it files bankruptcy and the amount of those retainers that advance payments. retainer payments should also be disclosed as well. So basically your payment information about from the client is going to be very important, particularly in chapter seven and individual matters. Because at least in those matters where there's an individual there as opposed to a corporation as the debtor, there's more of a concern about the potential lack of expertise. Lack of sophistication on the part of the client, when the court wants to make sure that the the attorneys fees are reasonable, and that the attorney is not taking advantage unduly of a of a struggling individual who, who file bankruptcy. So those are basically what the rules are, you need to be disinterested not having adverse interest, etc. You need to make the use the proper disclosure to the court. Well, what happens if you don't do that? And and there there are, there's the possibility for sanctions. Section 328 C of the bankruptcy code deals directly with with the issue of sanctions, and provides that bankruptcy court can deny the fees and expenses that were incurred by a professional during the bankruptcy case. So again, I mentioned before is that the professionals, once they're retained, they need to file fee applications in order to get their fees approved, so that the judge ultimately will need to approve the fees. If something untoward or or wrong happened with respect to wrongful or inaccurate disclosure or if things were concealed, the court can deny the fees, even if the fees were otherwise reasonable. And certainly if in connection with with fees that were incurred, during a time where the attorney was laboring under an undisclosed conflict, courts very well can say, Look, I'm going to not approve any fees that were incurred during the time that the attorney or other professional had an undisclosed conflict and an extended any fees were received by the by

the professional that needs to be paid back to the to the estate, the disgorgement of fees.

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And the disgorgement is is a pretty extreme remedy. And it really can be imposed even for for disclosure thing, issues that one might consider minor. So again, the best course of action is always to disclose upfront, be very transparent, don't try to hide anything. It never comes out well, regardless of outside bankruptcy as well, you're really height trying to hide adverse information from the tribunal, because under the state ethics rules, you also have a duty of candor to the tribunal. And it's certainly the case here in in bankruptcy court. It the judge and the United States trustee, the government is not going to look upon that kindly if if if you do that. There are actually a number of cases dealing with inadequate disclosure of information. I'll, I'll talk a little bit about about some of those cases. Next, because I think these particular cases give you a fair amount of more specific information about the types of things that have gone wrong. Some of these are more egregious some of these could be considered kind of minor. But the idea, again, is that it's up to the professional, it's not up to the judge, it's not to other parties to try to ferret out information from a bunch of different from a bunch of different sources to figure out whether or not there's a there's a potential conflict or potential adversity here, it's up to the professional themselves, to make that disclosure. And if they in good faith, that there is no issue then then fine, and the case can be made there and the court can, can can can deal with that.

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So I'll touch upon a few potential specific issues that that can arise in connection with with with with bankruptcy, bankruptcy adversity. One of them is the representation of multiple entities that are in bankruptcy and that this happens actually quite a fair amount, particularly in larger chapter 11 or even smaller chapter 11 cases. The the you'll have one attorney who represents multiple entities, as both are part of one single enterprise, and all of them will file bankruptcy at the same time. And be the bankruptcy case itself would be so called jointly administered with each other. So you have a say, enterprise enterprise with 10 different organizations or 10 different companies, I'd say those 10 companies will retain one lawyer, one law firm to represent all 10 of them in the bankruptcy case. Now, technically, those are 10 different bankruptcy cases because we have 10 different organizations, but the The more often much more often than not, the cases get administered together so that the judge deals with them all at one time. And the attorney will represent the debtors as all 10 entities. Now, generally, that's not a problem at all, it happens all the time. But there are some circumstances limited circumstances I suppose, where there could be adversity between the entities themselves, you could have intercompany claims between one entity or another entity one loans might entity to its e two is not paid back for bankruptcy, the creditors of entity two would like entity to keep that money credit events, ie one will want to make sure that that entity to pays it back. So there are those potential types of of situations. Again,

usually in those in those types of matters. You could you can have one attorney that represents the entire enterprise, each each of the entities in connection with the bankruptcy case. But in those in those circumstances, you may have situations where the specific one specific entity may represent you may hire another law firm to represent it in specific intercompany dispute or the creditors of those entities may get involved in the case themselves. And and fight out whatever. inter inter family, intra family I'm sorry, intra family inter estate disputes. But if you're the attorney representing the entire enterprise, you want to keep in mind that there can be conflicts of interest between the debtor entities, so the hiring of specialists or special counsel, creditors themselves representative getting gained their own lawyers and in finding out the issues before bankruptcy court, those are ways to deal with intercompany. intra dispute intra family disputes. You know, this happened in the adelphia communications case, back in about 15 years ago, that was a very, very messy case with over 200 debtors that are entities and intercompany disputes between the the the bulk of them, the courts still permitted one law firm to represent all the debtor entities themselves, all 200 of them, so long as the firm maintain neutrality among the actual disputes between the companies themselves. The same thing, similar thing happening in the Gilbert sands restaurants case, in Iowa in 2004. The court permitted one law firm to represent multiple debtor entities even though there were intercompany claims and disputes. Because there was no conflict at the time that that law firm was retained. So as long as there's no conflict, then and we're okay and disputes are not being litigated, you'll probably be okay. But again, you don't want to be a lawyer representing the entire enterprise as well as representing one entity against another within that enterprise, it's best to have a different counsel get involved to deal with those issues. You can also have disputes between the company and its management. And this happens

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quite a fair amount. Either current or former directors and officers may have claims against the debtor. And in fact, the law firm may have been introduced to the debtor entity through say a CEO who may still be the CEO or may have left. Or there may be maybe other relationships that that lead to that law firm being retained by the debtor. Again, just like we talked about with respect to the state ethics rules, the organization if the organization is your client, the individuals in that organization are not going to be your clients. It's the organization itself. So the counsel to a debtor possession needs to keep that in mind, just as clearly also will need to make the requisite disclosures to the court about what relationships that firm may have with management directors and officers of the company. And the law firm that's representing the debtor should not be representing the the CEO for instance, in its claims in his claims against the data that should be done by by a different by by by by different law firm. The conflicts really kind of abound in bankruptcy cases, particularly given the fact that there are so few assets and so many claims against those assets. So disputes and bytes are going to be inevitable, but you have to make sure as as a company that you're sorry as the lawyer the law firm that you are following the rules. Both state law and in bankruptcy, debtors in possession, trustees they owe fiduciary duties to all their

creditors. So very important thing for an attorney for a debtor of possession or a trustee to make sure their client understands is that they are fiduciaries to the creditors. Now this is a little bit different from outside of bankruptcy where you have to do share duties to shareholders for corporations under under most states. But the courts are going to enforce these these duties very carefully in other creditors are going to make sure that the debtor in possession or committee are following what they what they need to do. So attorney should should should well advise their clients of these facts, equity holders, for instance, shareholders, they may or may not have a real interest in the case, depending on how much assets are really there. And to the extent that the stockholders are asserting claims or are asserting rights to property. The Attorney for the Darrow possession needs to also advise their their their their client, that look you're acting for the entire estate, you're not acting for the for the interest of the shareholders themselves. So another important thing to that I mentioned before, I want to make clear though, the the bankruptcy rules that we're talking about the section 327 A and E. They do not supplant state law, ethics rules, they are in addition to them. So even though in bankruptcy, we're in federal court, you cannot disregard your your state law, ethics obligations. And the courts are certainly going to to realize as well. Now that under under state ethics law rules, the conflicts can be waived by current clients and former clients. As I mentioned before, the same thing is the case in bankruptcy, but the waivers of a from a debtor in possession are not going to be enforceable against that bankruptcy estate, unless it gets disclosed to the bankruptcy court and the bankruptcy court approves it in one form or or another. So there are limitations on how broad a trustee or debtor in possession can weigh various conflicts for attorneys that they want to retain. So that needs to be kept in mind as well, as from a timing perspective. Usually, always, the there's a lot of work that needs to be done at the beginning of a bankruptcy case. So attorneys should, real estate should be thinking about whether there are potential hurdles in in getting retained before you spend a lot of time and energy doing work for a client, especially if there's a possibility that you are not going to be able to be retained because maybe the bankruptcy courts going to determine that there's an adverse interest or they're you're not disinterested, or the waiver that the debtor provided is not valid. So that's something that that should be kept in mind as well.

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The rules on the imputation of disqualifying conflicts to the entire firm model rule. One point 10 they talked about also applies in in bankruptcy. And that's the case even if the we have a law firm that is that does establishing an ethical wall. There's the essential therapeutics case, in Delaware from 2003. That it basically said if one lawyer is not disinterested than the entire firm is not disinterested. So what does that mean? So for the first perspective, you want to make sure that your your diligence that you're undertaking in connection with preparing the declaration, your filing with the court representation, that you're not just that you're disinterested, you want to make sure that you're doing everything you need to do in order to disclose any potential adverse interest that one of the lawyers in your firm might have is that can be done through

questionnaires that can be done through firm wide emails, or maybe the firm's database has that type of information. But even you need to make sure that you keep in mind the imputation rules with respect to to disqualification because that could be that can end up being a real problem. I talked a little bit before about unpaid claims unpaid, unpaid invoices for pre bankruptcy attorneys fees. If you're going to be professional under Section 327, a bit disinterested, that means you cannot be a creditor. So you'll have to waive those claims and disclose any potential preferences and may need to give those back those 90 day payments before the bankruptcy. Because if you received a preference payment, you could have an interest you, the lawyer could have an interest adverse to the estate, the professional wants to keep his money, Keep this money. And the as the state's going to have an interest in getting that money back, because there is a statute that says that that's, that's possible. So again, disclosure, and then it to the extent that there is a preference that has to be paid back, and there are various defenses I will get into, but it ends up being at the end of the day that you have to get that money back, the professionals gonna have to decide, do I give the money back? Or maybe do I apply the amount towards post bankruptcy fees? Or do I just walk away from the engagement, you'll have to decide one or another under under most, under most case law. So again, the idea of being upfront with respect to disclosure is, is going to be extremely important in getting connection with this. And with respect to the at the preference matter, the the pillow text case, from the Third Circuit in 2000 to four close the the ability of the law firm in that situation to say, hey, look, I may or may not have gotten a preference, but we'll fight about later just employ me now we'll fight about it later. The Third Circuit Court of Appeals there said you can't do it that way. We need to determine upfront whether there whether there is potential clawback preference here because otherwise, you may use the law for maybe operating as a in connection with with it with having a an adverse interest that that really shouldn't be. That shouldn't be the case. So let me talk a little bit, we have few minutes left here, I want to talk about specific cases dealing with inadequate disclosure, because I think it does provide some, some backdrop some additional information about really what types of things get lawyers in trouble. So one of these is the Hutch Holdings Inc. Case, from the Southern District of Georgia in 2015. In that case, the firm represented both the organization and its owner. So again, where I talked about before, the if you're the lawyer for the organization, you're the owner, you're the lawyer for the organization, not their constituents, here, this law firm, represent both the company and separately, its its owner, and that firm failed to disclose that it previously represented the owner in in non bankruptcy matters relating to the company as well as potentially bankruptcy matters relating to the company, and that it was also representing that owner in his own separate chapter 11 bankruptcy case. And what also happened in this case is that the, the the company paid a fair amount of money to the owner before they did the bankruptcy case. So it could be clawed back by the company. So the the firm represented both the company and its owner did not disclose it to the courts did not let anybody know that this

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was this potential adverse interest there. And in that case, the court disallowed a fair amount of fees that you can't get paid for, for her law that work that you did, because you are laboring under this, this adverse interest here. In the Jennings case, the 11th circuit in 2006, affirmed the bankruptcy court's ruling that disqualified counsel and disallowed a fair amount of fees and discouragement of fees that were retained. There, they've the firm represented multiple entities, corporate family, and a jointly administered bankruptcy proceeding. And a conflict there actually did arise, because one entity depleted the assets of another of another entity. And so if, again, I've mentioned before, if if one company is taking assets away from from another company, even though we're all part of the same enterprise, each different entity may have its own creditors, and creditors of one entity, you're going to be in worse shape, if another company has has depleted their assets or done something that they shouldn't have done. The law firm did not disclose all the potential connections that it had with with various parties in the case including the other entities. In the mercedez. The attorney basically said hey, look, the informations out there, if you take a look at this data, the other thing you can sort of piece together that there are the these these potential adverse interests. The 11th circuit said no, no, the courts, their job is Not to try and figure out what whatever, from all these other sources of information, what potentially may or may not be the case, it's up to you the council to make that disclosure upfront. And you do not do so you cannot unilaterally choose which what you want to disclose and what you do not want to disclose, you should disclose anything that could potentially be an interest there. And if you don't do so you could be sanctions. So these, these are just two and they're they're a bunch of other cases, BALCO equities from the Southern District of New York 2006 congoleum group from 2005 that that deal with with issues as well. But given that, that we're out of time, I wanted to give you those real really brief citations there in case you're interested in looking those up. So in summary, the bankruptcy rules in obligations are an addition to a bolt on to your state law ethics rules, if you're, if you're representing a debtor in possession, or chapter 11 trustee or certain other parties. There's a whole minefield involved here. So if you're if you're not an experienced bankruptcy practitioner, before you get involved in in a bankruptcy case, you need to make sure that you're aware of these rules. And I thank you very much for joining me today.