

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

In re: RANDALL MEIER, Debtor

**No. 5:13-bk-74143
Ch. 11**

ORDER

Before the Court is the *Amended Application for Order for Employment of Attorneys* filed by the debtor, Randall Meier [Meier], on February 26, 2014, and the response in opposition filed by AmerisourceBergen Drug Corporation [Amerisource] on March 19, 2014. Amerisource, which is a creditor in Meier's case, opposes Meier's employment of Stanley Bond [Bond] because Bond has represented Amerisource in matters both related and unrelated to Meier. The Court held a hearing on April 9, after which it took the matter under advisement. For the reasons stated below, the Court denies Meier's application to employ Bond.

FACTS AND CONCLUSIONS OF LAW

In November 2006, Bond was hired by Amerisource to register a Pennsylvania judgment in the amount of \$931,576.77 against Meier in Arkansas. Amerisource then began post-judgment collection proceedings in Arkansas. Bond testified that his role in the matter was somewhat limited—he did not have direct communication with Amerisource and acted only at the behest of a Pennsylvania law firm, which also represented Amerisource. In April or May 2007, Bond took Meier's deposition and rendered advice to the law firm regarding some aspect of the proceeding. Shortly after, in May or June 2007, Bond's involvement with the case ended when Amerisource hired different local counsel to proceed with the collection efforts. Bond testified that since that time, he has not worked on any matter related to that proceeding. Separately, however, Bond represents Amerisource in a circuit court case currently pending in Jefferson County, Arkansas.¹

¹ Meier's initial application to employ Bond as Meier's attorney, filed on January 15, 2014, included an affidavit of disinterestedness signed by Bond stating that "neither
(continued...)"

Both parties agree that the circuit court case is unrelated to Meier.

At the hearing, counsel for Amerisource characterized the past dispute between Amerisource and Meier as a “long bloody fight” and “not a simple collection action.” Ultimately, as a result of Amerisource’s collection efforts against Meier, the parties entered into a settlement agreement in June 2012. Pursuant to the terms of the settlement, Meier signed a promissory note with Amerisource and also granted Amerisource a mortgage on his home. The mortgage appears in Meier’s Schedule D in the amount of \$575,000, making Amerisource Meier’s largest secured creditor in the bankruptcy case.

Amerisource alleges that in the course of Bond’s representation of Amerisource in the collection action against Meier, Bond was a party to privileged attorney-client communication concerning the debt at issue between the parties. Amerisource also argues that if Bond represents Meier in the bankruptcy case, Bond could be in a position to dispute aspects of that same debt to the potential detriment of Amerisource. Because it is early in the case and a chapter 11 plan has not been filed, it is unknown how Bond, on Meier’s behalf, will elect to treat the debt owed to Amerisource, and Amerisource alleges that these unknowns give rise to the appearance or risk of a conflict of interest. In addition, Bond’s current representation of Amerisource in a separate matter increases the potential for conflict. For these reasons, Amerisource asks this Court to deny Bond’s employment as Meier’s attorney. In response, Bond argues that his past representation of Amerisource (against Meier) does not create a disqualifying conflict for two reasons: (1) he has not been involved with the dispute between the parties for the last seven years, and (2) the settlement created, in essence, a new debt—or at least a new configuration of the

¹ (...continued)

the firm nor its associated attorneys have *any connection* with any creditors . . . (emphasis added).” Bond’s past and present representations of Amerisource were not disclosed. Approximately one month later, Bond filed Meier’s amended application for employment, which is currently before this Court. The amended application only discloses Bond’s past representation of Amerisource.

old debt. Bond alleges that because he was not involved in the settlement process, he has no special or privileged information regarding the debt in its current form. He acknowledges, however, that he is unsure whether his current representation of Amerisource constitutes a disqualifying conflict of interest in this context.

Section 327 controls the employment of professional persons in a bankruptcy case, and a court should strictly construe this section “in order to maintain the integrity of the bankruptcy process.” *Sturgeon State Bank v. Perkey (In re Perkey)*, 194 B.R. 846, 850 (Bankr. W.D. Mo. 1996) (quoting *In re Temp-Way Corp.*, 95 B.R. 343, 346 (E.D. Penn. 1989)). Subsection (a) of § 327 authorizes a debtor, with court approval, to hire an attorney who (1) does not hold or represent an interest adverse to the estate, and (2) is a disinterested person. A disinterested person is defined, in relevant part, as someone who does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, 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). This definition has been referred to as a broad “catch-all clause” designed to exclude anyone “with some interest or relationship that would even faintly color the independence and impartial attitude required by the Code and Bankruptcy Rules.” *In re Black Hills Greyhound Racing Ass’n.*, 154 B.R. 285, 292 (Bankr. D.S.D. 1993). Under § 327(c), an attorney’s representation of a creditor does not automatically disqualify him from being employed by the debtor unless a creditor objects and the court finds that an actual conflict of interest exists.

Because Amerisource has objected to the employment of Bond, the Court’s inquiry is whether there is a conflict of interest. Section 327(c) specifies that a court must deny employment of an attorney if there is an actual conflict, but this provision also has been interpreted as granting courts the discretion to deny employment of an attorney based on a potential conflict of interest. See *In re J & M Dev. of Cass County, Inc.*, No. 04-41065-JWV, 2004 WL 1146451, at *3 (Bankr. W.D. Mo. May 19, 2004); *In re Gilbertson Restaurants LLC et al.*, No. 04-00385, 2004 WL 1724878, at *3 (Bankr. N.D. Iowa May

3, 2004); *In re Am. Printers & Lithographers, Inc.*, 148 B.R. 862, 866-67 (Bankr. N.D. Ill. 1992). Generally, courts characterize both forms of conflict as too interrelated to be treated differently. One bankruptcy court stated that

[t]he terms “actual” and “potential” conflict merely describe different stages in the same relationship. . . . [A]n actual conflict can be defined as an active competition between two interests, in which one interest can only be served at the expense of the other. A potential conflict can then be defined as one in which the competition is presently dormant, but may become active if certain contingencies occur.

In re BH & P, Inc. et al., 103 B.R. 556, 567 (Bankr. D.N.J. 1989), *aff'd*, 949 F.2d 1300 (3d Cir. 1991). By requiring a debtor to retain counsel who has *no* potential conflicts from the outset of the case, a court can prevent the delay and disruption associated with disqualifying counsel in the middle of the case, should those contingencies occur and the potential conflict becomes actual. *Id.*

Several facts indicate that Bond’s representation of Meier constitutes at least a potential conflict of interest. As a preliminary matter, Bond’s past representation of Amerisource, by itself, does not create a disqualifying conflict. Bond has been removed from the dispute between Amerisource and Meier for approximately seven years, was not involved in the 2012 settlement agreement, and has no privileged or special knowledge of the terms of the current debt that resulted from the settlement agreement. However, Bond’s current representation of Amerisource in the unrelated circuit court case, when considered in the context of his past involvement, signals conflict. Given the past alleged rancor between Amerisource and Meier, if Bond is now also employed as Meier’s counsel—over Amerisource’s objection and while he is concurrently representing Amerisource—Bond will be required to balance the resulting tensions and, potentially, conflicting interests of both clients in the bankruptcy case. In a case with similar issues, a Missouri bankruptcy court observed that

[e]ven if the conflict between the Debtor, on the one hand, and [the creditors], on the other hand, is only potential, it is possible that just the prospect of future competition between their interests will exert a subtle influence over [the attorney’s] handling of this case.

In re J & M Dev. of Cass County, Inc., 2004 WL 1146451, at *3. Under the circumstances of the present case, Bond's ability to represent Meier and reorganize Meier's obligations, including the largest secured debt owed to Amerisource, could be subtly influenced by his concurrent (although separate) representation of Amerisource. As the bankruptcy case progresses, the debt owed to Amerisource may prompt a challenge to ensure the most advantageous result for Meier; an actual conflict would develop at that point if Bond was Meier's attorney. For these reasons, the Court finds that there is a disqualifying conflict of interest and denies Meier's application to employ Bond as his attorney.²

IT IS SO ORDERED.


Ben Barry
United States Bankruptcy Judge
Dated: 05/16/2014

cc: Stanley V. Bond
Randall Meier
Todd P. Lewis
U.S. Trustee

² Arkansas Rule of Professional Conduct 1.7, to which Bond is subject as a licensed Arkansas attorney, supports this finding, and the Court should not be complicit in the violation of this rule. The rule bars an attorney from representation of a client "if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another clients'; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"
- Ark. R. Pro. Conduct 1.7(a). Comments to this rule, particularly Comments 6-8, illustrate the applicability of this rule to the facts currently before the Court.