Inside the Minds: The Art & Science of Bankruptcy Law
The Role of a Restructuring Lawyer

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The Art and Science of a Restructuring Lawyer

A restructuring lawyer is both a corporate lawyer and a litigator. A restructuring lawyer is able to function both in court and out-of-court, performing a variety of different tasks in each setting. To perform these different tasks, a restructuring lawyer must have knowledge and skills that go beyond corporate and litigation law. He or she must also understand other areas of law, such as securities, tax, real estate, and employee benefits, as well as substantive business matters. A restructuring lawyer is, in essence, a jack of all trades.

The art of being a restructuring lawyer is present in any good corporate lawyer because a restructuring lawyer must be able to practice the art of the deal. A restructuring lawyer, however, has a much more difficult job than a corporate lawyer, or a litigator, due to the multiple parties with different interests involved in a restructuring. In a corporate transaction, such as an asset sale or a loan, there is often only one other party to the deal. In litigation, there is typically one adversary. A restructuring is different, because there are so many different constituencies with varying interests that are part of the process. There are creditors with different rights and priorities. There are equity holders with different rights and priorities. And, there are other important constituencies, such as employees, customers, potential investors, and third-party acquirers. In most cases, many of these different constituencies are not adversaries. In all cases, these constituencies are parties that must be brought together by the restructuring lawyer to complete a deal.

In order to practice the art of the deal successfully, a good restructuring lawyer, and a good debtor’s lawyer in particular, must have several key attributes. First, a good debtor’s lawyer must always be constructive, not
destructive. He or she should begin the restructuring process with the principle that the business comes first and that the law needs to bend to the maximum extent to protect the value of the business. To be constructive, a debtor’s lawyer must be creative and flexible, never willing to take no for an answer, and always trying to serve as the honest middleman who moves the various parties with different interests towards resolution and completion of the deal. A debtor’s lawyer must be a person who wants to bring consensus to the process, rather than someone who allows the process to evolve into armed warfare or to drag on forever. Most importantly, a debtor’s lawyer cannot allow personalities to become an obstacle to, or a focus of, the deal. A good debtor’s lawyer is one who brings people together and facilitates the deal.

Second, a good debtor’s lawyer must be patient and understanding. Most management teams do not have any experience in going through the restructuring process. A debtor’s lawyer must recognize management's inexperience with the issues that often arise in a restructuring and must be patient in assisting the management team through the minefield of such issues. Additionally, in order to provide the most assistance to a company, a debtor’s lawyer must take the initiative to learn about the company’s business before meeting with the management team. Although a management team may lack knowledge of the restructuring process, a debtor’s lawyer should never lack knowledge of the business. Lastly, a debtor’s lawyer must understand that, in most cases, a restructuring is a result of, or results in, many people losing tremendous sums of money. One must be sympathetic to those people when trying to bring them together to create a deal that maximizes the remaining value of the troubled company. Basically, a good debtor’s lawyer must be a real human being.
Third, a good debtor’s lawyer must be a practical problem solver who is always trying to determine how to maximize the value of the business within the confines and the contours of the law. Being a practical problem solver requires a lawyer to take the time to understand the business and the particular problems of the client. A debtor’s lawyer must be close to the day-to-day business operations of the client to ensure that the client’s issues are identified and addressed. It is the responsibility of a debtor’s lawyer to know the business and the issues faced by the client and the industry so as not to slow down the restructuring process. Only a lawyer who has a full understanding of a client's business can be a practical problem solver.

Finally, a good debtor’s lawyer must be trustworthy. Credibility is a lawyer’s capital. In the restructuring profession, credibility is the most important capital that a lawyer possesses. If a lawyer loses his or her credibility with the parties in a deal, the deal will likely not occur. Conversely, a lawyer who has credibility can lend that credibility to a company during the restructuring process, thereby facilitating the deal. A lawyer builds credibility by being an absolute straight shooter and by never taking a shortcut. He or she also must be honorable and not try to take advantage of another party or the words on a piece of paper. A debtor’s lawyer seeking to represent a client needs to demonstrate that he or she has a solid reputation in the restructuring community, which will add value to the management team. Because restructuring lawyers are part of such a small community, it is critically important for a good debtor’s lawyer to be known as one who can be trusted.

The most challenging part of being a restructuring lawyer is creating an environment in which various constituencies, who have conflicting interests and who want different results, arrive at a deal. A restructuring
lawyer must attempt to bring those conflicting desires together and design a course of action that people are willing to follow. The worst result for a restructuring lawyer is to fail to create an environment in which people come together. If the process degenerates into warring factions, management will become focused on trying to resolve the war rather than on fixing the business problems that led to the restructuring. Creditors also may lose sight of the bigger picture of reorganizing the business. As a result, the business will be in the restructuring process for a longer period of time and value will be lost to the detriment of all parties.

A lawyer who is constructive, patient and understanding, a practical problem solver, and trustworthy will be able to meet the challenges of being a restructuring lawyer by practicing the art of the deal.

Succeeding as a Restructuring Lawyer

The goal of a restructuring lawyer is to stay out of bankruptcy. Therefore, a restructuring lawyer is successful when a company never has to commence a bankruptcy case. In the vast majority of cases, bankruptcy should be the last option because it is a very difficult and expensive process. Most businesses suffer upon the commencement of a bankruptcy case. Bankruptcy puts the management team in a fishbowl where a variety of constituencies will question every decision that the team makes. Bankruptcy also carries additional burdens for the company, such as the delay in effecting the restructuring, the expense of professionals, the public exposure and increased scrutiny of the company, and the operational disruption or value diminution resulting from the commencement of the bankruptcy case. Restructuring a
company out-of-court avoids these burdens. Therefore, a good restructuring lawyer should consider an out-of-court restructuring as the first option for a troubled company.

In order to restructure a company out-of-court, a good restructuring lawyer must be able to show the various creditor constituencies that the company is doing everything possible to maximize the value of the enterprise. The creditor constituencies also must see that they are not being disadvantaged by the company’s failure to commence a Chapter 11 case. The key element in this analysis will be the credibility of the management team. If the management team can demonstrate credibly that the value of the enterprise is preserved outside of bankruptcy, then the company should pursue an out-of-court restructuring to the fullest extent possible.

If a company cannot accomplish an out-of-court restructuring, then the goal of the restructuring lawyer becomes the efficient reorganization of the company under Chapter 11. In bankruptcy, a restructuring lawyer is successful when a company is able to reorganize quickly, maximize its value, and preserve jobs to keep the human toll from the restructuring to a minimum. The less time a company spends in Chapter 11, the more likely the company will be able to emerge successfully. Additionally, a quick reorganization will help minimize the burdens and the costs of bankruptcy upon the company.

In either an out-of-court restructuring or a bankruptcy restructuring, a good restructuring lawyer should always remember to put the client first and to assist the management team in building credibility. The speed and the degree of success of a restructuring can be driven by the quality of the management team and the underlying business. The restructuring
lawyer’s efforts to create an environment in which the different constituencies come together to do a deal will be facilitated if the management team, like the restructuring lawyer, is regarded as being reliable and credible. From the beginning of the restructuring process, therefore, a good restructuring lawyer will put the client out in front. The restructuring lawyer should try not to be the center of attention.

Lastly, some general rules for success that a good restructuring lawyer should follow are:
1. Don’t rush headlong into bankruptcy; explore all other alternatives first, especially an out-of-court restructuring.
2. Before resorting to bankruptcy, try to use the threat of bankruptcy to drive an out-of-court restructuring; many times the success of driving a deal out-of-court depends on demonstrating that you are not averse to commencing a bankruptcy case.
3. In bankruptcy, it is necessary to develop a plan to move quickly through the process.
4. The goal is a deal; don’t put your ego in front of the deal.
5. Remember that you are dealing with other people’s money and agony; be sympathetic to their needs and the process.
6. Remember that your credibility will facilitate your client’s restructuring.

**Developing a Strategy with Clients**

Lawyers who are familiar with their clients are able to confront a situation and ask the “right” questions. Most of the time, however, restructuring lawyers may not know what the right questions are,
especially if they are not familiar with a particular company or the industry in which the company operates.

When developing a strategy for a client, a good debtor’s lawyer takes the initiative and learns about the client’s business before meeting with the management team. Then, the lawyer sits down with the management team and learns of the operational or balance sheet problems that the client wishes to confront. During these discussions, the lawyer must be exceedingly patient. After learning the initial aspects and problems of the client’s business, the lawyer explains to the client how the out-of-court restructuring process or the bankruptcy process works, including the principles underlying these processes. Thereafter, the lawyer and the client should engage in a dialogue in which the lawyer educates the client about the different legal frameworks and the client educates the lawyer about the business and its problems.

As a result of this dialogue, the lawyer helps the client develop a course of action for the company. In developing this course of action, a good restructuring lawyer must ensure that the client understands all of the benefits and the risks involved. Restructuring is not a risk-free proposition. There are many decisions and choices to be made during the restructuring process. Before the client makes a decision, it is important that the client has been advised of all of the risks and rewards. A good restructuring lawyer has to provide constructive, unbiased and accurate advice. The client makes the ultimate decision to move forward on a particular course of action after weighing the benefits and the burdens of that course of action.

A course of action for a restructuring often will feature several strategic components. The first strategic component is determining how the
The second strategic component to the course of action is determining an exit strategy. How will the company exit the restructuring? The answer to this question requires an analysis of whether the restructuring involves significant operational changes for the client, or whether it involves a balance sheet problem in which the restructuring process allows for the reduction of the amount of claims, or a change in the consideration that might be paid on account of such claims. In either situation, before a company begins the restructuring process, it should develop a strategy of how it will lead that process and an exit strategy.

Additionally, the restructuring lawyer and the client may develop a communication component to the course of action. Communication is exceedingly important in a Chapter 11 case. A debtor’s lawyer must have open and frequent communication with the creditor constituencies and other important stakeholders in the case. These constituencies must not be surprised with actions that may be taken during the case. Instead, these constituencies should be apprised regularly of what the company is
doing and why it is taking such action. A debtor’s lawyer also must give stakeholders an opportunity to communicate back their views with the clear understanding that those views will be considered when the company makes its decisions. This does not mean that the company must accept those views in every instance. It does mean, though, that the stakeholders must feel that their views have been given due consideration and that they are included in the restructuring process. If people feel shut out from communicating with a company or its restructuring lawyer, then they are not likely to trust or accept the company's decisions during the case.

In addition to maintaining an open line of communication with creditor and stakeholder constituencies, a company needs to communicate with the constituencies that are necessary to preserve its business, such as the company’s employees and customers. Just as a company’s management team may lack experience and knowledge of the restructuring process, so may the company’s most valuable assets – its employees and customers. A good debtor’s lawyer will assist the client in educating its employees and customers about the restructuring process as soon as possible and know to minimize the effects of that process upon them. As part of educating these constituencies, the restructuring lawyer will need to dispel certain misconceptions that have developed relating to the bankruptcy process.

The process of developing a strategy with a client is complicated. A good restructuring lawyer recognizes the complexity of this process and plays an important role in assisting the client to develop a course of action for the company to enter and exit the restructuring process, as well as communicate with stakeholders and important constituencies during the process.
Misconceptions Relating to Bankruptcy

The greatest misconception people have about bankruptcy is that it is the beginning of the end for a company. The truth is this: a properly managed bankruptcy process can mean the beginning of a fresh start for a company, rather than the end of the company. It becomes a process by which the company is able to fix any operational problems that it may have, or reorganize and restructure its balance sheet. A company that is preparing to emerge from bankruptcy also has a tremendous opportunity to change the way in which it operates and overhaul its compensation and benefit plans. The company just needs to plan carefully how it wants to operate going forward as a world-class company. Too many people think that the commencement of a bankruptcy case is a failure. While bankruptcy should be used only as a last resort for a company, and a company should not linger in Chapter 11, bankruptcy is nonetheless still a tool to deal with a company’s problems and to allow the enterprise to grow and prosper as a result.

Another misconception people have about bankruptcy is that a company must file bankruptcy to benefit from the bankruptcy process. The threat of filing for bankruptcy, however, can be a significant tool that a company uses in trying to cause an out-of-court restructuring. Because bankruptcy affords the debtor extraordinary powers in terms of rejecting burdensome contracts, freeing itself from obligations and compromising claims by paying cents on the dollar, the threat of bankruptcy can produce significant negotiating leverage against certain parties that may facilitate an out-of-court restructuring. Therefore, a company may benefit from the bankruptcy process without filing for bankruptcy. In fact, the bankruptcy process should only be used after it has been used as a means to try to reach a consensual deal out-of-court.
Richard Cieri leads the Business Restructuring and Reorganization Practice of Gibson, Dunn & Crutcher. He was named in the April 2000 issue of The American Lawyer as one of the top 10 corporate dealmakers in the nation, and in the December 2001 issue of Ohio Lawyers Weekly as one of its lawyers of the year.

He also has been recognized by Turnarounds & Workouts as one of the country’s outstanding bankruptcy lawyers in 1999, 2001, and 2002; in the K&A Restructuring Register of “America's Top 100 Restructuring Professionals;” and in The Guide to the World’s Leading Financial Law Firms. In addition, Mr. Cieri has been profiled in Lexpert, Crain’s Cleveland Business and Cleveland’s The Plain Dealer. He is a member of the American College of Bankruptcy Lawyers and is listed in the bankruptcy law section of The Best Lawyers in America and The Guide to the World’s Leading Insolvency Lawyers.

Mr. Cieri’s practice involves representing debtors, creditors’ committees, and secured creditors in restructurings and bankruptcies, advising the boards of directors of financially troubled companies, providing advice in connection with tort and product liability claims facing a debtor and technology and intellectual property issues, in the structuring of secured and commercial transactions (including advice related to fraudulent conveyance, corporate spin-offs, and related securities issues), and the acquisition of, and lending to, financially troubled companies.

He has played a key role in many of the country’s largest Chapter 11 cases and business restructuring matters. He was debtors’ counsel to Federated Department Stores, Inc./Allied Stores Corporation; LTV Steel Company, Inc.; Laidlaw Inc.; The Loewen Group; Purina Mills, Inc.;
Fruehauf Trailer Corporation; Montgomery Ward Holding Corp., Incorporated; World Kitchen, Inc.; Teleglobe Inc.; Napster, Inc.; Morrison Knudsen Corporation; Trans World Airlines, Inc.; Great American Communications Company; The Elder-Beerman Stores Corporation; Rax Restaurants, Inc.; and Cardinal Industries, Inc. in their respective Chapter 11 cases or out-of-court restructurings.

Furthermore, he was creditors’ committee counsel in the Official Financial Institutions’ Committee of Kmart Corporation; Olympia & York Developments Limited; Allegheny Health, Education and Research Foundation; the Stratosphere Corporation; and GWI, Inc. and Specialty Foods Corporation Chapter 11 cases. He was also counsel to Federated Department Stores in its acquisition of R.H. Macy & Co., Inc.

Mr. Cieri has lectured and written numerous articles dealing with the restructuring of troubled leveraged buyouts, spin-offs, resolution of tort and product liability claims, fraudulent conveyances, fiduciary duties of directors of insolvent corporations, prepackaged bankruptcy plans, intellectual property and technology issues in bankruptcy, plan confirmation and cramdown requirements of the Bankruptcy Code, securities issues in bankruptcy, and reclamation rights.
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