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INTRODUCTION

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Devoting an entire issue of the *American Bankruptcy Institute Law Review* to bankruptcy ethics is an ambitious undertaking, for with the multiplicity of parties in bankruptcy cases come seemingly boundless opportunities for ethical conundrums. As Robin E. Phelan and John D. Penn note in *Bankruptcy Ethics, An Oxymoron*, in other legal arenas counsel are constrained by the Code of Professional Responsibility alone, supplemented perhaps by their own consciences. But in bankruptcy there is overlaid statutory compulsion and implementing federal rules as well as a body of case law which is frequently contradictory.

To give an example of how bankruptcy imposes daunting additional requirements on professionals, we need look only so far as counsel for the debtor in possession in a chapter 11 case. All attorneys are officers of the court. But counsel for the debtor in possession is a fiduciary, representing not simply the shareholders or board of directors of the corporate debtor but the estate of the debtor in possession, including its creditors. In other words, counsel has ethical obligations to protect that estate, even if in so doing counsel may be incurring the wrath of management. Over the years I have increasingly heard counsel complain that the Code of Professional Responsibility "just doesn't work" in bankruptcy because of the unique obligations imposed on court−approved professionals. The article by C.R. Bowles, Jr. and Nancy B. Rapoport explores the tensions created by the fiduciary obligations and ethical rules.

Fiduciary obligations do not inhere only in the counsel for the debtor in possession. Fiduciary obligations to their constituencies exist for the committee counsel as well. Yet the various members of the committee may have completely different interests and agenda, stymying counsel and creating loss of function. Carl A. Eklund and Lynn W. Roberts explore just this problem. Fiduciary obligations have also been addressed in the consumer context in an article by Jean Braucher.

This issue of the *ABI Law Review* is particularly timely, for the National Bankruptcy Review Commission is examining a number of ethical issues such aswhether the debtor in possession's professionals should be required to meet the statutory disinterestedness standard and whether "conflict of interest" ought to or can be defined in bankruptcy. Disinterestedness is discussed by Richard Lieb and a student note. Similarly, the small business working group for that Commission is considering the types of obligations a debtor in possession ought to have vis−à−vis its creditors.

Like the long−running television hit "Law and Order," this issue also contains a thoughtful piece by Leif M. Clark and Douglas E. Deutsch drawn from the recent industry headlines—whether a perceived lapse of ethical judgment on the part of the bankruptcy court or one of its judges ought to be "remedied" by the district court's withdrawal of the reference of bankruptcy cases. A convincing argument is made that the substitution of withdrawal of the reference for more traditional methods of dealing with judicial misconduct is destabilizing to the system as a whole.

These ethical problems are not the dry stuff of law school classrooms as illustrated by a panel discussion containing a range of opinions by various insolvency professionals. For lapses in ethical judgment can in bankruptcy produce big results: forfeiture of fees, disqualification from further representation, and, in extreme cases, criminal prosecution. Two of my own recent cases come to mind: *Leslie Fay* and *Bidermann Industries*. In the first, where a law firm did not disclose that it had disabling conflicts of interest with the potential targets of an investigation which it was conducting as counsel for the debtor in possession, I disqualified the firm from handling newly−filed litigated matters and sanctioned the firm $1 million. In the second, where the debtors' crisis manager, with their consent, presented for my approval a transaction to sell the debtors to a group in which the manager and his firm were equity participants without having first marketed the debtors or obtained a disinterested valuation of their assets, I not only declined to approve the transaction, but appointed a fiduciary to value the debtors' businesses, determine what course their reorganization should take and review the appropriateness of fees paid to the crisis manager and the debtor's counsel. In addition, I imbued the fiduciary with the power of the board of directors, to prevent further derogation of fiduciary obligation.

Litigations over ethical conduct are difficult for bench and bar alike. Certainly they do little to enhance the public's perception of the legal profession. Yet it is the questions presented in hard cases such as these with which this issue grapples. Undoubtedly, you will find the articles in some areas enlightening and, where enlightenment is impossible, thought−provoking. If future litigation can be avoided by their study, then the industry owes the *ABI Law Review* our sincere thanks.