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OF BUBBLING POTS AND BANKRUPTCY ETHICS: A COMMENT ON WOLFRAM AND SMITH

*Todd J. Zywicki**

It is an honor for me to have two scholars as distinguished as Charles Wolfram[1] and Gerald Smith[2] contribute to this symposium issue and to comment on my Article. They share a belief that the disinterestedness requirement is wrong in its conception, at least as applied to professionals for a debtor in possession. Nonetheless, I remain convinced that they still have not carried the burden of showing why the disinterestedness standard should be abandoned for a debtor in possession's professionals. Given the acknowledged benefits of disinterestedness for a trustee's professionals, they simply have not demonstrated why those benefits should be foregone when a trustee is not appointed. While both articles raise many interesting and valuable points, this comment will focus on just a few of them.

I. CHARLES WOLFRAM

Professor Wolfram's "confessions of an unrepentant non-draftsman"[3] provides a frank and insightful look into the ALI drafting process and the difficulties of dealing with the unique ethical issues raised in the bankruptcy context.[4] His impressions as an "outsider" to the bankruptcy community provide a fresh and useful look at some old bankruptcy debates.

Wolfram explains the process which led to the ALI's conclusion to take no position on the issue of conflicts in bankruptcy and laments the current state of the law and that an opportunity for needed reform was squandered.[5] Moreover, he interprets the opposition of Judge Carolyn King in the ALI and Judge Edith Jones in the National Bankruptcy Review Commission to loosening ethical requirements for attorneys for a debtor in possession as evidence that they believe that "bankruptcy conflict rules are just about right," expressing his view that he "strongly disagree[s]."[6]

While I do not purport to speak for Judge King nor Judge Jones on this issue, I think that Professor Wolfram has misconstrued their and, by implication, my reasons for objecting to the efforts in the ALI and the NBRC to do away with disinterestedness for a debtor in possession's professionals. Speaking for myself, I

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* Assistant Professor of Law, George Mason University School of Law. I would like to thank Scott Norberg and David Skeel for their comments on an earlier draft of this Comment.

1. Charles W. Wolfram, *The Boiling Pot of Lawyer Conflicts in Bankruptcy*, 18 MISS. C. L. REV. 383 (1998).

2. Gerald K. Smith, *Standards for the Employment of Professionals in Bankruptcy Cases: A Response to Professor Zywicki's "Case For Retaining the Disinterestedness Requirement For Debtor in Possession's Professionals,"* 18 MISS. C. L. REV. 327 (1998).

3. The reference here, of course, is to Grant Gilmore's famous "Confessions of a Repentant Draftsman." *Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1980-81).

4. Like Professor Hazard, Professor Wolfram is to be commended for his candor in describing the ALI's rocky path through the bankruptcy minefield. *Compare* Wolfram, *supra* note 1, at manuscript 7, n.27.

5. Wolfram, *supra* note 1, at manuscript 11.

6. *Id.* at manuscript 11.

agree with his diagnosis that the case law applying the Bankruptcy Code's ethical rules can "charitably be characterized as chaos."[7] It is an ill-considered and inconsistent hash of poor reasoning, archaic doctrine, and unpredictable results. Thus, everything is *not* all right with how the conflicts rules have been applied by the courts.

But the fact that the courts have misread the Code is not an argument for abandoning the *concept* of disinterestedness. The solution to this confusion and inconsistency in interpreting the Code's requirement is for the courts to interpret the conflicts rules in a more consistent and logical way. I think that the conflicts rules *as written* are just about right, subject to the amendments discussed in my Article and possible future targeted reforms. I agree, however, that the conflicts rules *as applied* are a mess. Thus, just as the ALI's decision to take "no position" should not be interpreted as an endorsement of the current state of the law governing bankruptcy ethics,[8] the retention of the prevailing Code language on disinterestedness also should not be read as satisfaction with the current sorry state of the case law. Greater oversight by the Courts of Appeals to resolve some of the problems in the case law is unquestionably warranted. Indeed, to reiterate a point from my Article, if disinterestedness itself is a concept that is so unworkable as to make judicial confusion inevitable, then this is an argument for abandoning it in *all* cases, not just for debtors in possession. Yet, nobody has called for the abolition of disinterestedness for trustees or their professionals on the grounds that it is unworkable.

Wolfram's Article also illustrates the difficulties of dealing with conflicts of interest in the special "context" of bankruptcy.[9] As Wolfram suggests, bankruptcy raises a number of unique and vexing ethical problems that frustrate easy application of non-bankruptcy ethics rules to the bankruptcy context. While I discuss a number of these factors at length in my primary Article, Wolfram highlights three of them: the difficulty of distinguishing litigation from non-litigation matters in bankruptcy, bankruptcy's uniquely sordid history of corruption and self-dealing, and the intertwining of ethical and substantive rules in bankruptcy. As Wolfram notes, any further proposals for reform will require a firm grasp on the unique "context" of bankruptcy to ensure that any changes actually improve the operation of the system.

Finally, Wolfram's Article cautions against making changes in this area without proper deliberation. Wolfram's refreshing candor shines through again in his confession that because of the press of publication deadlines, the proposed amendments to § 209 were "ill-drafted in some important respects" and "bore the unfortunate appearance of an attempt to steal a march on those concerned to maintain high standards of legal ethics among bankruptcy practitioners."[10] As a result, neither the ideas nor the language itself was given the thorough and elabo-

7. *Id.* at manuscript 1.
8. *Id.* at manuscript 8.
9. *Id.* at manuscript 12 and n.51.
10. *Id.* at manuscript 14-15.

rate "multiple-draft and multiple-layer review by several groups within the ALI" which it normally would have received. Indeed, Judge King's comments in the ALI reflect concern over the haste of the decision as much as the substance. Regrettably, similar procedural defects characterized the NBRC's consideration of the issue.[11] One can only hope that future consideration of the issue will proceed in an open and deliberative forum.

II. GERALD SMITH

In his response to my Article, Gerald Smith raises two points that I want to address briefly. First, he accuses me of promoting an inaccurate view of the historical record filled with sensationalist and irrelevant historical events. Second, he rebukes me for perceived incivility in my remarks, classifying my observation that the disinterestedness requirement falls hardest on large firms. His concerns on both points are unjustified.

Smith characterizes my discussion of the history of bankruptcy ethics in this century as "revisionist," and he favors me with setting "the record straight, even though in a general way."[12] Given this build-up, it is somewhat disappointing that the historical summary that he actually presents is an inaccurate, whitewashed rendition that ignores many relevant and pivotal episodes in the history of bankruptcy ethics. Even more puzzling is his characterization of my view as a "revisionist" view of history, considering that virtually all bankruptcy commentators agree with my interpretation of the historical record. Indeed, it is only because this interpretation is so well-established and so widely accepted among bankruptcy scholars and practitioners that I felt it unnecessary to include a detailed recitation of that record in my Article. Given Smith's concerns, however, I will do so below.

Smith has three general criticisms regarding the brief historical discussion in my paper. First, he claims that I rely on irrelevant historical incidents, such as the Donovan Report, solely for their shock value. Second, he characterizes my reading of the historical record as "revisionist," suggesting that my interpretation is unique and idiosyncratic. Third, he claims that my revisionist view is also inaccurate. He is wrong on all three counts.

Smith claims that the historical incidents that I describe are irrelevant to the creation and persistence of the disinterestedness requirement. This position, however, ignores that those historical abuses are merely symptoms of underlying characteristics of the bankruptcy process itself. Some of the problems identified in the Donovan Report were solved with administrative reforms, but Congress noted their persistence in 1978 and commentators continue to note their presence today. As the Court wrote in *In re Kendavis Industries*, "[i]t is interesting to note that many of the comments made regarding the disinterestedness requirement at

11. *See* Todd J. Zywicki, *Mend It, Don't End It: The Case for Retaining the Disinterestedness Requirement for Debtor in Possession's Professionals*, 18 MISS. C. L. REV. 291, 324 (1998).

12. Smith, *supra* note 2, at manuscript 8.

early congressional hearings remain relevant today."[13] The absence of effective creditor control and the vast powers given to debtor's counsel are central elements of the bankruptcy system today, and remain potential sources of self-dealing for bankruptcy attorneys. Thus, so long as the bankruptcy system maintains the structural dynamics which make it prone to fraud and abuse, strict ethical standards and diligent policing of those standards will be necessary.

Smith is also plainly wrong in tagging my interpretation as revisionist. Bankruptcy scholars are virtually unanimous in adopting my version of history. Kenneth Klee has argued that the historical record compels retention of the disinterestedness requirement for debtor in possession's counsel, stating "I'm one of the few people who, because of the sordid history of bankruptcy law, am fairly happy with the status quo and would like to see careful study done before the standards are departed from."[14] Similarly, Louis Robin has referred to the "unfortunate history" that led to the enactment of the disinterestedness requirement for bankruptcy attorneys.[15] Judge Joel Pelofsky has observed, "I look at it historically. One of the motivations for adopting the Bankruptcy Code was this public perception that there was misconduct in the professional ranks of the bankruptcy practice."[16] Justice Douglas, of course, was extremely critical of the "many sordid chapters" in the history of bankruptcy fees. Echoing Douglas's concerns, the Court in *Kendavis Industries* concluded that the disinterestedness requirement was enacted in response to the "sordid history" of bankruptcy ethics. Judge Leif Clark similarly observed that "the legislative history of the disinterestedness requirement in § 330(a) provides further insights relevant to the case at bar," in that one purpose of the disinterestedness requirement was to "'guard against a recurrence of the "sordid chapters" in the history of fees in corporate reorganizations.'"[17]

All of these commentators agree that the enactment of the disinterestedness standard was a deliberate response to widespread scandal, corruption, and self-dealing by bankruptcy attorneys.[18] Smith may disagree with the substance of my argument, but he is simply incorrect in labeling it revisionist. In short, I share the *traditional* view that the disinterestedness requirement was enacted to thwart widespread ethical misbehavior by attorneys, thereby rendering Smith's white-washed version of history the *revisionist* version.

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13. *In re* Kendavis Indus. Int'l, Inc., 91 B.R. 742, 747 (Bankr. N.D. Tex. 1988).

14. *The Commission Proposals that are Most Likely to Succeed*, 31 BANKR. COURT DECISIONS Issue 13, at 3 (November 11, 1997).

15. Louis S. Robin, *Responses to Ethics and Service Working Group Proposals Concerning Conflicts of Interests*, 102 COM. L.J., 224, 225 (1997) (referring to "unfortunate history" which led to enactment of the disinterestedness standard).

16. *Ethics: Is Disinterestedness Still a Viable Concept? A Discussion*, 5 AM. BANKR. INST. L. REV. 201, 206 (1997) (statement of Judge Joel Pelofsky).

17. *In re* Office Prod. of Am., Inc., 136 B.R. 983, 989 n.2 (Bankr. W.D. Tex. 1992) (quoting *Kendavis Indus.*, 91 B.R. at 747).

18. In addition, I have received comments on prior versions of this Article from many different people. *See* Zywicki, *supra* note 11, at n.*. Of all of the people who have read various drafts of this Article, Smith is the first to question the accuracy of the historical events recounted or their relevance to the original enactment of the disinterestedness requirement.

Moreover, the traditional view is well-grounded in the historical record. Writing in 1938, Mitchell Dvoret observed that "[t]he Donovan Report was the first thorough investigation of its kind conducted since the passage of the Act in 1898. It played an important part in molding the legislation that followed. It formed the basis of the study for the Chandler Act."[19] President Hoover's concern about problems in the bankruptcy system led him to order Congress to publish the Donovan Report.[20] Hoover then commissioned his Solicitor General, Thomas D. Thacher, to investigate bankruptcy law and practice, which resulted in the submission of the Thacher Report to Congress.[21] In turn, some of the ideas in the Thacher Report eventually were incorporated into the Chandler Act.[22] Prior to becoming Solicitor General, of course, Thacher was the Judge in the Southern District of New York who had created the commission which generated the Donovan Report.[23] In turn, Congress must have been aware of and concerned with the ethical state of the bankruptcy bar when it voted for heightened ethical standards in the Chandler Act. Indeed, of a Chapter X trustee's professionals, attorneys were alone singled out and required to meet the strict standard of disinterestedness.[24] All of this taken together evidences an unquestionable concern by Congress and President Hoover about the ethics of the bankruptcy bar.

Smith, however, would have us ignore all of this contextual evidence and focus only on the findings of William O. Douglas's Protective Committee Study.[25] Taking such a narrow view, however, is untenable. Douglas was intimately involved in Donovan's investigation, and Donovan "acknowledged that without [Douglas's] aid much of the research work relating to the Donovan Report could not have been done."[26] Moreover, Douglas's Protective Committee Study cites to the Donovan Report several times, particularly to illustrate the "unsavory reputation of bankruptcy"[27] and the low "calibre of some members of the bankruptcy

19. Dvoret, *infra* note 23, at 198-99.

20. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 29 (1995); HOUSE JUDICIARY COMM., 71st CONG., 3d SESS., DONOVAN REPORT (Comm. Print 1931).

21. Dvoret, *infra* note 23, at 199; S. DOC. No. 65, 72nd CONG., 1st SESS. (1932). The Thacher Report is sometimes referred to as the Thacher-Garrison Report. *See* Tabb, *supra* note 20, at 29.

22. The recommendations of the Thacher Report were later introduced as the Hastings-Michener Bill, which was defeated by the American Bar Association. Tabb, *supra* note 20, at 29. "However, some of the ideas in that bill found their way into the Chandler Act." *Id.* Dvoret concludes that "[t]he bill was a little ahead of its time." Dvoret, *infra* note 23, at 201.

23. *See* Mitchell S. Dvoret, *Bankruptcy Under the Chandler Act: Background*, 27 GEO. L.J. 194, 199 (1938).

24. 3 COLLIER ON BANKRUPTCY, 327.03-327.04[3][a], p. 327-14-29 (Lawrence P. King, 15th ed. 1996). In part, this was because of the essential role played by lawyers in reorganization proceedings. As noted above, however, the powerful role played by bankruptcy lawyers also puts them in a unique position to engage in self-dealing behavior, thereby necessitating a strict standard of disinterestedness.

25. *See* SECURITIES AND EXCHANGE COMMISSION REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (hereinafter, "REPORT ON PROTECTIVE COMMITTEES"). The Report was issued in eight parts in the period from April 30, 1936 to September 30, 1940. *See* Hopkirk, *infra* note 30, at 667 n.13.

26. Dvoret, *supra* note 23, at 198.

27. 8 REPORT ON PROTECTIVE COMMITTEES, *A Summary of the Law Pertaining to Equity and Bankruptcy Reorganizations and of the Commission's Conclusions and Recommendations* 64 n.9 (Sept. 30, 1940).

bar, [who] by their abuses of the process and their evasion of devices which were supposed to assure honest and equal treatment of creditors."[28] Thus, the Protective Committee Study itself reflects Douglas's role in authoring the Donovan Report and the influence it had in shaping his report. Moreover, the Report of the Protective Committee Study was shaped by the overall context of the bankruptcy system of the time and its effect on Douglas personally.

Even if the Report of the Protective Committee Study is examined in a vacuum, it contradicts Smith's whitewashed story. As the Courts in *Kendavis Industries* and *Office Products of America* noted, the findings of the Protective Committee Study in fact provided the foundation for the application of the disinterestedness requirement to bankruptcy attorneys.[29] Douglas's criticisms of the extent of the corruption and self-dealing in the bankruptcy system of the time did not spare the bankruptcy bar. In his penetrating study of Douglas's contributions to American bankruptcy law, John Hopkirk describes the scene in the hearing room of the Protective Committee:

> One after another a long procession of corporation officials, bankers, investment underwriters and their attorneys passed through the hearing room. Frequently Douglas uncovered evidence of a single-minded pursuit of gain in the course of which those investigated appeared to have abandoned the fiduciary obligations of trustees, the duty of corporation officials to stockholders' interests, and the ethical standards of conduct supposedly adhered to by members of the bar. While Douglas had some prior intimation of these lapses gained from his brief, early work in the Wall Street law firm of Cravath, de Gersdoff, Swaine & Wood, from his previous study of reorganization, and from prior investigation of these same matters by others, apparently he was surprised to find such extensive evidence as was uncovered in this investigation.[30]

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28. 8 REPORT ON PROTECTIVE COMMITTEES, *supra* note 27, at 73 n.45.

29. *In re* Kendavis Indus. Int'l, Inc., 91 B.R. 742, 747 n.1 (Bankr. N.D. Tex. 1988) (quoting Protective Committee Report); *In re* Office Prod. of Am., Inc., 136 B.R. 983, 988 (Bankr. W.D. Tex. 1992) (quoting *Kendavis Indus.*, 91 B.R. at 747).

30. John W. Hopkirk, *William O. Douglas--His Work in Policing Bankruptcy Proceedings*, 18 VAND. L. REV. 663, 668 (1964-65). According to Hopkirk, Douglas's experience working for the Cravath firm apparently left Douglas with a negative impression of the bankruptcy system and the bankruptcy bar:

> Douglas was not aware of the fact that legal services in reorganizations were often of great importance and that they could take many hours of a firm's time. He had his own experience as a young associate in Cravath, de Gersdoff, Swaine, & Wood to draw upon. That experience may also have suggested to him what his group declared might be the root of the difficulty.

Id at 673. Given that Douglas's negative impression of the bankruptcy bar was formed by his experience with the Cravath firm and the fact that he was highly critical of the firm in his report, *see e.g.*, 1 REPORT ON PROTECTIVE COMMITTEES, *supra* note 25, at 212 n.886, 220, it is strange that Smith relies on an excerpt from a law review article written by Robert T. Swaine of the firm as a supposedly objective "summary" of the findings of the Report. *See* Smith, *supra* note 2, at 334 n.26 (quoting Robert T. Swaine, *"Democratization" of Corporate Reorganizations*, 38 COLUM. L. REV. 256, 257-58 (1938)). Indeed, Swaine's antipathy for Douglas on a personal level virtually leaps off the page. Swaine wrote that

> [i]t is a common phenomenon of government that those who seek power often do so in the guise (often sincere) of protecting a people, assumed to be incompetent to protect themselves, against public enemies (often imaginary). All the elements of this phenomenon are to be found in the SEC Reports and their recommendations.

Swaine at 257. Swaine's hatred for the report itself is also obvious. *See id.* at 259 (stating that the portrayal drawn in the report "is drawn with colorful verbage which rivals the dime novel of the nineties and a degree of dramatic excitement which rivals a modern Hollywood gangster thriller" and charging that the facts presented were so inaccurate that they actually fell "materially short" of the SEC's own standards of truthfulness). In light of this obvious animosity, Swaine is an unlikely source for Smith to quote for a summary of the conclusions of the Protective Committee Study. *See* Swaine at 257 (describing Swaine's criticisms of Douglas and the Report of the Protective Committee Study). Douglas was an associate of the Cravath firm from September 15, 1925, to January 28, 1926, and again from October 1, 1926, to June 30, 1927. *See* Hopkirk, *supra* note 30, at 673 n.26.

Hopkirk further observes that,

> Douglas and his fellow investigators directed one of their most scathing attacks at members of their own profession who by pyramiding the costs of reorganization ate still further into the assets of the bankrupt. In the investigators' minds the crime was further compounded by the fact that these same lawyers at times were responsible for the original dissipation of the assets.[31]

If anything, criticism of the ethical practices of the bankruptcy bar in the final Report of the Protective Committee Study was harsher still. Douglas wrote:

> The depression with its consequent wave of security defaults presented the legal profession with an unsurpassed opportunity to render genuine public service in the rehabilitation of corporate enterprises in the interests of investors. Yet, though there are, of course, exceptions, the profession by and large has not evidenced a desire to promote reorganization expeditiously, economically, and solely in the interests of investors. On the contrary, it has evidenced ability and ingenuity in furthering the interests of those who utilize the reorganization processes to serve selfish ends. Many incidents of this nature will be described in this report.
>
> At this point we are particularly concerned with the shift of the reorganization bar from standards of professional service to those of pecuniary gain. In its avarice for reorganization fees the legal profession by and large has forsaken the traditions of officers of the court and has become highly entrepreneurial in nature. Futhermore, as we shall subsequently develop, members of the reorganization bar have not been reluctant to occupy inconsistent positions, and, under the guise of disinterested service to the estate, to act as the faithful servant of interests hostile to the investors.[32]

Douglas singled out the large firms of the era as the primary culprits.

> [T]he vice is that the bar has been charging all that the traffic will bear. It has forsaken the tradition that its members are officers of the court and should request and expect only modest fees. This condition has prevailed to an extent throughout the profession. And it is not a new development; it is a practice of long standing. But it has been accentuated in [the] case of the financial bar, which has been dominant in reorganizations. Part of this unseemly tendency of the financial bar to demand huge fees may be due to the business cast of law practice of that kind. Part may be due to overspecialization in financial centers with large law offices composed of dozens of lawyers, a huge overhead, and consequent artificial standards of the worth of legal services. In other words, organization for the practice of law on the large scale of mass production has contributed to the alleged necessity of computing legal fees on an overhead rather than on a service basis. Part may be due to the fact that the practice of financial law has been to a great extent monopolized by relatively few firms.

31. Hopkirk, *supra* note 30, at 672-73.

32. 1 REPORT ON PROTECTIVE COMMITTEES, *Strategy and Techniques of Protective and Reorganization Committees* 212-13 (May 10, 1937).

> This has meant setting monopolistic prices on the legal services of the select financial bar. But whatever may have been the cause, the end result has been that more conservative and modest professional standards have been discarded.[33]

Moreover, contrary to Smith's understanding, the Report speaks directly to the attorneys' conflicts of interest and the necessity for disinterested counsel in the reorganization context.

> But there are stakes in addition to direct compensation. Counsel for the company will be desirous of continuing as counsel for the new, or reorganized, company. The value of their professional reputations may give them an interest in protecting the management against the assertion of claims based on fraud or mismanagement, for often the acts or omissions upon which such claims will be asserted would have received their express approval, or at least their countenance. The same observations are apt with respect to counsel for the bankers.
>
> To receive the benefits of both direct and indirect rewards, counsel for the dominant group, either the management or bankers or the two working in harmony, will frequently be found in the key positions in the reorganization. In the selection of attorneys to represent protective committees and to serve in other capacities, counsel for the controlling group will exert considerable influence. Such attorneys are frequently found in the position which will probably wield the greatest influence and accordingly carry the largest rewards.[34]

Part I of the Report concludes with the admonition that "[i]t is essential that renewed emphasis be given to the fact that representatives of security holders in reorganization occupy a fiduciary position. It is intolerable that they or their lawyers should possess dual or multiple interests."[35]

It is odd that Smith's summary of the activities of the Protective Committee Study makes no mention of Douglas's attacks on the bankruptcy bar in the hearings or in the final report.[36] Instead, he quotes an innocuous passage from the Protective Committee Study and sublimely concludes that "[t]o address these concerns, the Protective Committee Study recommended an independent trustee, one free of any 'interest'."[37] He relies on an article by Robert Swaine, who was extremely hostile to Douglas and the Protective Committee Study, and whose firm was lambasted--by name--by Douglas, to summarize the eight volumes of the Report.[38] Nowhere is there even a mention, much less a recognition, of Douglas's disgust at the ethics of the bankruptcy attorneys of the era. As the above indicates, however, Douglas was extremely dissatisfied with the state of the bankruptcy bar and reserved much of his harshest criticism for it.[39]

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33. *Id.* at 215-16. Douglas's views were not unique. *See* MAX LOWENTHAL, THE INVESTOR PAYS (1933) (describing receivership of Chicago, Milwaukee & St. Paul Railway Company in 1925).

34. *Id.* at 211-12.

35. *Id.* at 897.

36. Even Swaine at least took note of Douglas's attacks, although, of course, he disagreed with them. *See* Swaine, *supra* note 30, at 258.

37. Smith, *supra* note 2, at 339.

38. *See supra* note 30 (describing Swaine's criticism of Douglas and the Report of the Protective Committee Study).

39. Of course, this is not to say that Douglas was justified in his criticisms of the bankruptcy bar; it is simply to say that Douglas was clearly troubled by the long-standing ethical lapses by bankruptcy attorneys.

Given this avalanche of history which documents the deplorable ethics of the bankruptcy bar prior to the Chandler Act, the only reasonable conclusion which can be drawn is that the traditional view of history is correct. In turn, it is evident that a whitewashed version of history is insupportable. Thus, while I and other members of the bankruptcy bar would certainly like to accept the portrayal of bankruptcy's ethical history provided by Mr. Smith, I, like almost every other scholar, judge, and lawyer who has reviewed the historical record, am unable to do so.

Smith also accuses me of engaging in *ad hominem* attack and general incivility in my observation that the disinterestedness requirement falls hardest on large firms.[40] Despite his zealousness to construe what I wrote as an attack on the motives of large firms in seeking the proposed amendments, I never said any such thing. I will simply repeat what I stated the first time: "[I]t appears that this concern is animated by a sense that the disinterestedness requirement falls disproportionately hard on large law firms who will often have as clients large lenders and other creditors who the firm will be representing in other unrelated matters." What I said is quite clear and quite contrary to what Smith claims I said. There is no *ad hominem* attack and no allegation of improper motives.[41] I simply made the empirical observation that the disinterestedness requirement tends to fall harder on large firms than others, disqualifying them from potentially lucrative representations of debtors in possession for which they would be eligible absent the presence of the disinterestedness requirement.

Smith's rhetoric is especially puzzling, however, in that this is an empirical observation with which he *agrees*![42] It is unclear to me how this observation is appropriate when Smith makes it, but the identical observation is uncivil and *ad*

40. Smith, *supra* note 2, at manuscript 4, 51. He also points to my invocation of "irrelevant but sensational history and cases" as evidence of incivility. As discussed above, this element of his criticism is based on the faulty premise that these cases are irrelevant to the enactment of the disinterestedness requirement.

41. Other commentators, by contrast, have been much more direct in accusing large firms of selfish motives in advocating the repeal of disinterestedness. *See, e.g.*, G. Ray Warner, *Of Grinches, Alchemy and Disinterestedness: The Commission's Magically Disappearing Conflicts of Interest*, 5 AM. BANKR. INST. L. REV. 423 (1997). Warner writes:

> Mary Megafirm had wanted only one thing from Santa. Over the years, she had grown bigger and bigger, and by now she had pretty much outgrown the professional qualification rules. She had never much liked that nasty and bothersome 'disinterestedness' standard, but in recent years the disinterestedness standard was making it harder and harder to play with her Megafirm relatives in really fun mega-bankruptcies.

Id. at 423.

42. He makes this point in at least two different places. *See* Smith, *supra* note 2, at 357-58,

> If the bilateral litigation rule does apply to the entire case, as suggested by some, including Professor Zywicki, we will have closed the door opened by the Bankruptcy Code to the representation of trustees and debtors in possession by larger firms. As happened once before, law firms of any size will abandon the representation of trustees and debtors in possession.

He also argues that if the disinterestedness requirement is retained,

> Professor Westbrook's concerns will be realized; the pool of available talent to represent debtors in possession will be dramatically diminished. For a slightly different reason, this occurred in the wake of the Protective Committee Study and the Chandler Act Amendments. Major law firms abandoned the reorganization practice. When the Commission on the Bankruptcy Laws of the United States looked at reorganizations in the 1970's there were no Wall Street law firms involved in the practice . . . . Before we cause another exodus, we need to give serious consideration to what we are doing.

Id. at 368.

hominem in nature when I utter it.[43] Before being fitted for my tweed professor's jacket, I practiced bankruptcy with a large firm. I have seen up close how difficult it sometimes can be for large firms to squeeze through the eye of the disinterestedness needle (although many do so with great regularity). I understand quite well that occasional disqualification of large firm lawyers from representing some debtors in possession in some cases is an unfortunate consequence of the disinterestedness requirement. Thus, we are in agreement that the disinterestedness requirement falls hardest on large firms.

But the degree to which the disinterestedness requirement actually disqualifies large firms and the amount of harm this causes to the bankruptcy system remain open to debate. For his part, Smith only offers an unsubstantiated doomsday scenario whereby all large firms are disqualified from representing debtors in possession in all cases, eventually abandoning the practice of bankruptcy completely. There are several problems with this analysis.

In part, this scenario is based on Smith's faulty impression that *retaining* the *current* disinterestedness standard somehow works a change in the law. I must confess to some confusion as to the basis for Smith's belief that a reaffirmation of the status quo changes anything at all. Be that as it may, under the existing regime, large firms qualify to represent debtors in possession with regularity, and it is not evident why merely retaining the existing standard would change that result at all, much less bring about the doomsday scenario envisioned by Smith.

Moreover, even if Smith is correct in his belief that retaining the current standard will disqualify large firms from ever representing debtors, he is incorrect in arguing that they will be chased out of the bankruptcy system completely. My personal experience suggests that only a minority of large law firms actually ever seek to represent debtors, preferring to represent lenders and other creditors for whom disinterestedness is irrelevant. Firms who are disqualified from representing debtors can simply flip-over and represent creditors. Often, a firm will simply represent the very same party that rendered it non-disinterested in the first place. Thus, contrary to Smith's belief, large firms will not abandon bankruptcy practice, although they may shift from representing debtors to representing creditors. The bankruptcy system will still benefit from their expertise and ability; it will just be applied in a different way.

More fundamentally, Smith's analysis asks the wrong question. Merely agreeing that some large firms are disqualified from representing some debtors in possession in some cases does not resolve the issue. The question is comparative and relative, not absolute. The relevant question is whether the occasional disqualification of certain firms from representing debtors in possession works an intolerable hardship on the bankruptcy *system* as a whole, and whether the costs exceed the benefits of retaining the disinterestedness requirement.

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43. Smith's sensitivity to the perceived allegations of self-interested motives is ironic considering that he has, on another occasion, criticized the efforts by "special interest groups" to influence the National Bankruptcy Review Commission. *See What Will Happen to the Commission's Report?* 31 BANKR. COURT DECISIONS, Issue 13 (Nov. 11, 1997) (statement of Gerald Smith). Apparently, the classification of what constitutes a "special interest group" is in the eye of the beholder.

The issue requires balancing competing concerns: Is the cost of disqualifying *some* highly-skilled lawyers from representing *some* debtors in possession justified when weighed against the benefits of the disinterestedness rule and the recognition that other adequate counsel will be available. Reasonable minds can differ in weighing these costs and benefits. Casual empiricism suggests that the cost to the bankruptcy system of the current rule is minimal in that there is a sufficiently large number of competent bankruptcy lawyers who meet the standards of disinterestedness so a debtor in possession will be able to find adequate representation. The purported problem of excluding all qualified counsel appears to be largely hypothetical. Thus, while there is obviously some cost to those particular lawyers disqualified by the disinterestedness rule, the cost to the overall bankruptcy *system* seems to be quite small.[44]

To the extent that there actually is some cost to the bankruptcy system from the disqualification of some, primarily large firms, lawyers, those costs must still be weighed against the offsetting benefits of requiring disinterestedness. It is not sufficient simply to observe that large firm counsel will be disqualified without considering the availability of alternative counsel and the offsetting benefits of the disinterestedness rule. It also must be shown that large firms will not be the *only* beneficiaries of the change--that debtors, creditors, and the bankruptcy system as a whole will also benefit from the change. The relevant question is whether, after the change, the overall system improved, in light of the costs and benefits generated. Smith's arguments simply fail to carry this burden.

III. CONCLUSION

Should we eliminate the disinterestedness requirement for a debtor in possession's professionals? Despite the contributions of Charles Wolfram and Gerald Smith in this Symposium, my convictions remain unshaken. Given the acknowledged benefits of disinterestedness, they simply have not identified the problem to which abolition of the disinterestedness requirement for professionals representing debtors in possession is the best solution. Targeted reforms have been recommended to deal with particular problems. Further discussion is warranted. But the bankruptcy system has survived for twenty years with the requirement that lawyers for debtors in possession must be disinterested. Disinterestedness has been a part of the bankruptcy system for trustees and their professionals for

44. Of course, bankruptcy is not unique in restricting the opportunities for large firms to represent certain types of clients. For instance, large firms rarely represent individual plaintiffs who are suing large corporations in employment law cases. Clearly, this is a detriment to those plaintiffs, many of whom have suffered intense discrimination or harassment and who might benefit from large-firm representation. Clearly, there also is a loss to the public if meritorious claims receive inadequate representation. Similarly, plaintiffs in securities lawsuits against large corporations are rarely represented by large firms, despite the unarguable importance of those proceedings for the individual plaintiffs and the public. In each of these situations, we recognize that large firm counsel will be excluded from undertaking the representation for one reason or another (not always purely ethical reasons), but also recognize that countervailing policies justify this result. Moreover, although these individuals do not receive the representation of large firms, they do, in fact, receive competent representation; thus, there is minimal harm to the public interest from the exclusion of large firms from this work. The retention or repeal of the disinterestedness requirement should turn on similar inquiries and should require a finding that, on net, there is a tangible harm to the public interest as a result of the impact of strict ethical rules in excluding large firm lawyers from representing debtors in bankruptcy.

half a century, and no one is calling for its elimination in that context. By and large, the system has avoided the plague of self-dealing and corruption which characterized earlier periods of bankruptcy practice, and to which the system still remains vulnerable. Most alleged costs, such as disqualification of all competent counsel or expulsion of all large firms from bankruptcy practice, are unproven and exaggerated. While retaining the disinterestedness requirement may cause certain lawyers to lose out on some of the spoils of bankruptcy practice, there simply is no identifiable harm to the bankruptcy *system* which justifies elimination of the disinterestedness requirement for DIP professionals. Until someone identifies what problems exist which can be fixed only by abandoning disinterestedness and all its attendant benefits, there is simply no reason to take such a drastic step.

Clarify the case law. Make needed reforms. Continue the debate. But given the history and structural problems of the bankruptcy system, retain disinterestedness until it is demonstrated why it must be scrapped.