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THE BOILING POT OF LAWYER CONFLICTS IN BANKRUPTCY

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I take up here only two modest pieces of the current puzzle of lawyer conflicts of interest in bankruptcy practice. One involves the decision of the American Law Institute (hereinafter "ALI") to sidestep the entire field in the course of drafting its Restatement of the Law Governing Lawyers (hereinafter "Restatement").[2] The other involves the decision of the National Bankruptcy Review Commission (hereinafter "NBRC") to refuse to recommend that Congress do anything at all major to disturb existing law in the same realm. Either the law of lawyer conflicts in bankruptcy has been blessed in its present state by two prestigious and influential organizations, or something else is going on. I suggest here that something else is indeed afoot in the law and in legal institutions, and it doubtless will continue.

First, with respect to the ALI, why would an enterprise with the global title of "Restatement of the Law Governing Lawyers" *not* take up a topic as important, confused, and worthy of addressing as that concerning the conflicts problems of lawyers who represent clients in bankruptcy? As is amply proved, if by nothing else, by several papers in this Symposium, there is widespread disagreement about starting points, not to mention finish lines, with respect to lawyer conflicts in bankruptcy. Judicial decisions on the subject sometimes reflect what may charitably be characterized as chaos. A significant number reflect, in my eyes,

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2. The most recent preliminary edition of the Restatement dealing with conflicts is RESTATEMENT OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 1, 1996). Hereafter, I will refer to all drafts as "Restatement," with appropriate notation of the various dated drafts. Proposed final draft number 1 was finally approved, as amended at the 1996-98 annual meetings, at the conclusion of discussion of the Restatement at the May 1998 annual meeting. The final hard-bound version of the Restatement will be published sometime in 1999.

antediluvian concepts of conflicts analysis.[3] At the very least, it seems to be common ground that "[r]ecent years have seen increasingly rigorous application of the conflicts rules by courts and state bar ethics committees . . . ."[4] The number of bankruptcy filings in recent decades has skyrocketed, meaning that more lawyers (and a correspondingly larger number of judges) are forced to grapple with conflicts imponderables that may be encountered in bankruptcy. The stakes are also high, at least for the lawyers.[5] As is now commonplace, a lawyer or law firm whose conflict antennae are not precisely calibrated with those of a judge, who might pass on the issue, may be forced to forfeit the entire fee that otherwise would be due for extensive work on the matter. It is also well known that the judicial decision will come down many months or years after the lawyer will have been forced to decide whether to represent the bankruptcy client. Although

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3. A prominent example is the persistence in some decisions of invocation of the hollow concept of "appearance of impropriety" as the test to determine the existence of a bankruptcy conflict. *See, e.g., In re* Martin, 817 F.2d 175, 180-82 (1st Cir. 1987) ("[S]ection 327 is intended . . . to address the appearance of impropriety as much as its substance . . . . The question is not necessarily whether a conflict exists . . . but whether a potential conflict, or the perception of one, renders the lawyer's interest materially adverse to the estate or the creditors."); *In re* Blinder Robinson & Co., 131 B.R. 872, 878 n.2 (Bankr. D. Colo. 1991) ("The need to avoid the appearance of impropriety forms the baseline for determining whether a party is disinterested under . . . the Bankruptcy Code . . . ."), *as modified,* No. 90-K-1670, 1991 U.S. Dist. Lexis 12290 (D. Colo. Aug. 14, 1991); *cf., e.g., In re* Marvel Entertainment Group, Inc., No. 97-638-RRM, 1998 U.S. Dist. Lexis 1308, at *21 (D. Del. Jan. 27, 1998); *rev'd, In re* Marvel, 140 F.3d 463 (3d Cir. 1998); *on remand, In re* Marvel, 222 B.R. 243 (D. Del. 1998)

> (However, the key issue raised by the present motion [by the court appointed trustee to retain his own law firm as counsel to the estate] is not whether there exists a conflict of interest, or whether there exists an 'appearance of impropriety.' It is whether [the law firm], in light of its [unrelated] representation of [a potential defendant to claims of the debtor], can fairly be said to be disinterested.).

For useful, recent analyses of the unsettled state of bankruptcy conflicts decisions, in addition to key works cited elsewhere herein, *see generally* Symposium: *Bankruptcy Ethics*, 5 AM. BANKR. INST. L. REV. 1 (1997); Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy,* 26 CONN. L. REV. 913 (1994); William I. Kohn & Michael P. Schuster, *Deciphering Conflicts of Interest in Bankruptcy Representation,* 98 COM. L.J. 127 (1993); John T. Cross, *Conflicts of Interest in Bankruptcy Representation*, 1 J. BANKR. & PRAC. 233 (1992); Richard L. Epling & Claudia G. Sayre, *Employment of Attorneys by Debtors in Possession: A Proposal for Modification of the Existing Attorney Eligibility Provisions of the Bankruptcy Code and the Existing Conflict of Interest Provisions of the Ethical Rules of Professional Responsibility,* 47 BUS. LAW. 671 (1992); R. Craig Smith, Note, *Conflicts of Interest Under the Bankruptcy Code: A Proposal to Increase Confidence in the Bankruptcy System,* 8 GEO. J. LEGAL ETHICS 1045 (1995); Christopher M. Ashby, Comment, *Bankruptcy Code Section 327(a) and Potential Conflicts of Interest--Always or Never Disqualifying?*, 29 HOUS. L. REV. 433 (1992); Karen J. Brothers, Comment, *Disagreement Among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help,* 138 U. PA. L. REV. 1733 (1990).

4. ALAS LOSS PREVENTION JOURNAL, May 1994, at 22.

5. As today's headlines announce, exposure of a bankruptcy lawyer to criminal liability is not out of the question. Paul M. Barrett, *How an Ex Milbank Partner Got Indicted,* WALL ST. J., February 23, 1998, at B6 (account of impending trial of former member of New York City law firm for federal offense of failure to disclose conflict in filings with federal bankruptcy court in Milwaukee). Criminal convictions are uncommon, but not unknown. *E.g.,* United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), *cert. denied,* 456 U.S. 915 (1982) (affirming conviction of lawyer for fraudulent use of mails to further lawyer's own undisclosed interests that conflicted with those of client in non-bankruptcy representation).

legal malpractice claims against bankruptcy lawyers apparently do not presently loom large,[6] the potential exists for significant increase in such claims.

In a field bearing such characteristics, it would seem that the role of the ALI in crafting its Restatement would necessarily include bankruptcy conflicts. Yet, after initially ignoring the field and then taking a faltering start, the Institute proposes now to withdraw entirely from the effort. The Restatement, in its most recent edition,[7] states, in the most studied way possible, that the Institute intends to say nothing about this important field. Our inglorious retreat has hardly been universally praised by bankruptcy lawyers. To the contrary, an effort was still underway in early 1998 by bankruptcy practitioners within the ALI to have us face at least the major issues.[8] The omission, as well as the false start, requires a bit of explanation. I propose to provide that here, although it will only be natural if my attempt to provide history proves more convincing to affected bankruptcy lawyers than my defense of the course we have taken.

Second, just as the ALI was refusing to move on bankruptcy conflicts, the NBRC was being advised by several lawyers representing large organizations of bankruptcy lawyers that the present law of bankruptcy conflicts was unworkable and needed serious overhauling. With near unanimity, a working group suggested a number of relatively major revisions (although it did not recommend the most radical proposal for reform that was discussed by the group). As with the ALI, the NBRC at first seemed interested in reform, but then also stepped back and seems instead to have affirmed that all is well under the present law. In my opinion, the initial instincts of the NBRC were more sound. Those events and their implications I briefly canvass here.

I conclude with the thought that the last word has hardly been uttered on lawyer conflicts in bankruptcy. Reform, of either the sudden or gradual variety, will probably characterize the field in years to come.

I. HISTORY OF THE RESTATEMENT'S DEALINGS WITH BANKRUPTCY CONFLICTS

A. The Background of the Restatement Effort in General

What a restatement should appropriately attempt to do lies mainly in the eye of the beholder. I have elsewhere sketched what I believe that objective ought to be--agreeing with the position traditionally embraced by the ALI itself as official policy.[9] The key concept is that a restatement is not limited, as is sometimes sup-

6. *See* ALAS LOSS PREVENTION JOURNAL, May 1994, at 21-22 (concern of loss-prevention counsel about potential for bankruptcy conflict claims, despite fact that such claims historically have contributed less than 1% of claims of national large-firm malpractice insurer). *Cf.* ALAS News, Summer 1995, at 14 (report of malpractice insurer's seminar program devoted to discussion of $2.1 billion claims filed against two New York City law firms by creditors committee, although apparently not based on claim of conflict of interest).

7. *See* RESTATEMENT § 209 (Proposed Final Draft No. 2, 1998) (finally approved, 1998).

8. *See infra* text accompanying note 32.

9. *See* Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195 (1987); Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817 (1998) (examining process by which Restatement has been produced); *see also* Charles W. Wolfram, *Legal Ethics and the Restatement Process--the Sometimes-Uncomfortable Fit*, 46 OKLA. L. REV. 13 (1993) (examining the overlaps and disconnects between everyday morality and the somewhat stylized morality of lawyer codes and restatements on lawyers).

posed--or at least as it is occasionally contended--to mechanical recitation of the propounded view of a tabulated majority of American jurisdictions whose courts have taken a position on an issue. Thus, it would clearly be competent for a restatement to stake out the markers in an area which courts had not yet visited or to attempt to clarify an area of the law in which courts have been able to proceed only tentatively or incompletely, or in which some courts have thoroughly bungled the state of doctrine--perhaps in competing lines of decisions--as seems true of several aspects of bankruptcy conflicts law.[10] Restating bankruptcy conflicts law is complicated, but hardly precluded, by the fact that the law here is plainly federal in nature and, in significant part, is compelled, or at least strongly impelled, by statutory language or concepts. As a parallel example, in many jurisdictions, statutes define the attorney-client privilege, but that has not deterred us from attempting a rather thoroughgoing restatement of the privilege.[11] Even more obviously, the law of lawyering in all jurisdictions is found mainly in lawyer codes enacted with much the same legal force as statutes, but that has not deterred us from attempting to restate the law in most of the areas covered by the lawyer codes. In short, a proper view of the restatement process would by no means preclude the ALI, on the ground of institutional incompetence, from undertaking a thorough re-examination and, if appropriate, a proposed reworking of bankruptcy conflicts law.

B. Restating Bankruptcy Ethics--Section 209 in Its Original and Reshaped Forms

At least at one point, we indeed felt that we possessed the competence, the specialized knowledge, and an adequate grasp of doctrinal subtleties to warrant a partial excursion into the field of bankruptcy conflicts. Initially, however, we had ignored bankruptcy conflicts. Early drafts, including the first version of the relevant portions of Chapter 8 on conflicts generally, that were tentatively approved by the ALI contained no explicit mention of the topic.[12] Section 209 did address the conflict problems that may arise when a lawyer or a law firm represents one[13] or

10. As only one example, federal courts have taken strongly divergent views on whether a conflict in bankruptcy may be disregarded if it is "merely potential" (in the sense that the harm threatened by the conflicting interests would occur, if at all, only in the future). *Compare, e.g., In re* American Printers & Lithographers, Inc., 148 B.R. 862, 866 (Bankr. N.D. Ill. 1992) (rejecting "actual versus potential" distinction for bankruptcy conflicts); *In re* Kendavis Indus. Int'l, Inc., 91 B.R. 742, 754 (Bankr. N.D. Tex. 1988) (same); *In re* Michigan Gen. Corp., 78 B.R. 479, 484 (Bankr. N.D. Tex. 1987) (same), *with, e.g., In re* Global Marine, Inc., 108 B.R. 998, 1004 (Bankr. S.D. Tex. 1987) (representation of clients with "potentially conflicting interests" does not violate Bankruptcy Code).

11. RESTATEMENT §§ 118-42 (Proposed Final Draft No. 1, 1996) (tentatively approved, 1996-97; finally approved, 1998).

12. RESTATEMENT §§ 201-216 (Tentative Draft No. 4, 1991) (tentatively approved, with the exception of § 216, in 1991); *see also id.* (Tentative Draft No. 3, 1990) (first iteration of conflicts chapter, not all of which was reached for discussion at the May, 1990 annual meeting).

13. Representing a single client in litigation can, of course, create a conflict if, for example, the client is a plaintiff who opposes a defendant who, as a client in an otherwise unrelated matter, the lawyer or the lawyer's firm represents in a transactional matter. *E.g., In re* Curtis, 656 N.E.2d 258 (Ind. 1995) (discipline of a lawyer who represented a client in a small claims matter in court at same time that lawyer, as part-time government lawyer, was engaged in criminal investigation of that client's delinquent taxes). The principle is stated in Comment [8] to ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7 (1983): "Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated . . . ." The "ordinarily" qualifier apparently refers only to the possibility of cure of the conflict through appropriate consent by affected clients. The same principle is explicitly stated in Section 209(2). *See infra* text accompanying notes 16-19.

more of multiple clients in litigation, including complex litigation. In the first public draft, the first subsection of Section 209 took the unremarkable position that a lawyer in civil litigation could not represent multiple clients if a substantial risk existed "that the lawyer's representation of one of the clients would materially and adversely affect the lawyer's representation of another client."[14] That provision, although stated in somewhat different language, has proved relatively non-controversial and has remained substantively unchanged through succeeding public drafts.[15]

What eventually proved problematic for bankruptcy lawyers was the second subsection of Section 209. In its initial formulation, Section 209(2) stated the then-unquestioned[16] proposition that a lawyer or law firm representing one client may not sue (or otherwise litigate against) another present client.[17] In its hard-core applications, the rule that a lawyer representing one client may not sue another is universally accepted in the lawyer codes and the judicial decisions.[18] Where the rule becomes difficult to trace is in multi-party, multi-claim litigation. To take an example from another, related realm, is it permissible for a lawyer to represent a class of thousands of manufacturers if one or more members of the class (not named as representatives and not otherwise clients of the firm) is the opposing party in negotiations or litigation being conducted by other lawyers in

14. RESTATEMENT § 209(1) (Tentative Draft No. 3, 1990). The 1990 draft did not specifically address any conflict issue involving complex litigation, other than a brief review of conflict issues in class actions. *Id.*, cmt. g.

15. *Id.* (Tentative Draft No. 4, 1991); *Id.* (Proposed Final Draft No. 1, 1996)

> (Unless all affected clients consent to the representation under the limitations and conditions provided in § 202 [on client consent], a lawyer in civil litigation may not: (1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one of the clients would be materially and adversely affected by the lawyer's duties to another client in the matter . . . .).

The 1996 Proposed Final Draft has been the last public draft to address (or not) the bankruptcy conflicts issues, prior to the very recent appearance of Proposed Final Draft No. 2, *supra* note 7.

16. My Restatement co-reporter, Professor Thomas D. Morgan, has more recently created a stir in an article arguing that a lawyer should often be able to sue an existing client. *See* Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEGAL ETHICS 1157 (1996). For a somewhat mild response, *see* Brian J. Redding, *Suing a Current Client: A Response to Professor Morgan*, 10 GEO. J. LEGAL ETHICS 487 (1997).

For what it is worth, my own view is that the traditional, and universally followed, *per se* rule invariably prohibiting such representation is right. Professor Morgan's argument for a more relaxed rule starts from a narrow factual assumption that many large corporations feign outrage when objecting to being sued by the same law firm that represents them in an unrelated matter. Unless this is indeed common (which is unknown), Professor Morgan may too readily extrapolate from the pathological to the usual. More generally, I think his empirical speculations give too little weight to real problems of client-lawyer relationships that can arise if the same lawyers, in a corporation's general counsel office, must deal with lawyers in a single law firm as both close allies in one matter and adversaries in another. A fundamental sense of disloyalty, in most such situations, would hardly seem feigned. In any event, given the universal acceptance of the *per se* rule, the lack of substantial opposition to it when it was considered in connection with Section 209(2), and general impatience to conclude the Restatement project (*see supra* note 14), there does not seem much likelihood that the rule or Section 209 will be revisited in work yet to be done on the Restatement. That was indeed the case when the books were closed on the Restatement at the conclusion of the May 1998 annual meeting of the ALI.

17. RESTATEMENT § 209(2), *supra* note 7: "[In the absence of effective consent of all affected clients] a lawyer in civil litigation may not . . . 2) represent one client to assert or defend a claim against another client currently represented by the lawyer, even if the matters are not related."

18. *E.g.*, RESTATEMENT § 209, cmt. c, note (Tentative Draft No. 9, 1998) (forthcoming); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.7:201 (1998 Supp.); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.3.2 (1986). On some recent scholarly dissonance, *see supra* note 16. Texas is a partial exception. *See* TEX. DISCIPL. R. PROF. CONDUCT, rule 1.06(b) (apparently broad exception permitting suits against existing clients in some circumstances); *but see In re* Dresser Indus., Inc., 972 F.2d 540 (5th Cir. 1992) (federal court in Texas directed to disqualify lawyer who would sue own client, even in entirely unrelated matter, despite arguable construction of Texas rule 1.06(b) to contary).

the same firm?[19] Our attempts to address such complex-litigation questions in the initial draft was confined to an oblique look at class actions. Even on class actions, our analysis was hardly penetrating in its discussion or complete in its coverage. Nonetheless, the text was tentatively approved by the ALI membership in the 1991 annual meeting.[20] Normally, that would mean that the text remained on the shelf until a final (and often largely perfunctory) review immediately prior to completing the work as a whole. That was not to be the case with Section 209.

Not surprisingly, lawyer members of the Institute who practice extensively in the bankruptcy area were unimpressed with the tentatively approved conflicts chapter. Among the major watchdog groups that have followed the work of the Restatement since its inception, the Business Law Section of the American Bar Association has been particularly assiduous in its attention, sometimes through public meetings attended by one or more reporters of the ALI's director. Their work has been informed through reporting of liaison ALI members who have been able to review early drafts as advisers to the Restatement or self-appointed members of the ALI's "members consultative group" that receives and comments upon preliminary drafts of material. Particularly interested in the Restatement's treatment of bankruptcy issues has been the Business Bankruptcy Committee of the ABA's Business Law Section and, separately, the National Bankruptcy Conference.[21] ALI members Susan M. Freeman and Gerald K. Smith, who are active in both groups, led an effort through correspondence with myself, as chief reporter, and Professor Geoffrey C. Hazard, Jr., as director (and, of course, as a well-known expert on legal ethics in his own right), to expand our treatment of

19. *Compare, e.g., In re* Corn Derivatives Antitrust Litig., 748 F.2d 157 (3d Cir. 1984) (lawyer for two class members disqualified where one client actively opposed settlement and the other client supported it); Molina v. Mallah Org., Inc., 804 F. Supp. 504, 512-13 (S.D.N.Y. 1992) (law firm attempting to represent class of employees had impermissible conflict due to firm's representation of union against which employees had potential claims); Lewis v. National Football League, 146 F.R.D. 5 (D.D.C. 1992) (law firm representing professional football players' association in suit against individual players for breach of contract may not concurrently represent class of football players in antitrust suit against professional football league where class included several players being sued by association); *In re* Joint E. and S. Dist. Asbestos Litig., 133 F.R.D. 425 (E.D. & S.D.N.Y. 1990) (fact that lawyer for proposed class of asbestos victims previously represented individual clients against same defendant for asbestos related claims did not create disqualifying conflict).

On conflicts in class action representations in general, *see, e.g.*, William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns,* 106 YALE L.J. 1 (1997) (questioning why procedural law tolerates methods of group decision making that would not be tolerated for other types of political decisions); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 COLUM. L. REV. 1345 (1995) (proposing "constrained autonomy" model to limit mass tort class actions). Older, but hardly dated, studies are Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L.J. 470 (1976); and Deborah L. Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183 (1982). Similar problems can arise, for example, in environmental litigation involving potentially large numbers of "PRPs" (potentially responsible parties). Authority is scarce. *See* Comm. Prof. & Jud. Ethics, St. B. Mich., Formal Op. R-16 (1993) (extensively canvassing conflict issues).

20. 68 A.L.I. PROC. 568 (1991) (membership vote tentatively approving, among others, Section 209 as printed in Restatement (Tentative Draft No. 4, 1991)); *but cf. supra* note 11 (withholding of tentative approval of Section 209 as printed in later Restatement (Proposed Final Draft No. 1, 1996)).

21. *See* 64 U.S.L.W. 2741 (May 28, 1996) ("Working with the National Bankruptcy Conference and with the ethics subcommittee of the ABA Business Law Section's Business Bankruptcy Committee, the reporters crafted a proposed addition to Section 209's comments . . . .").

bankruptcy conflicts in Section 209, at least in the comments. Not coincidentally, Professor Hazard and I had listened, during an ABA program in August, 1995, while several leading bankruptcy lawyers lamented the failure of the Restatement to address bankruptcy conflicts issues.[22]

As the ALI's 1996 annual meeting approached, we worked on suggestions for additional language and, in correspondence after Proposed Final Draft No. 1 appeared in March, 1996, worked out what we believed to be a modest (at least brief) set of two amendments to add some content about bankruptcy conflicts. The first amendment would have added a new comment c(ii) to Section 209. The new comment c(ii) would have read as follows:

> *c(ii). Opposing client in multi-party litigation.* Certain types of civil proceedings, such as bankruptcy cases, may involve multiple parties and multiple disputes. The fact that one client holds a monetary claim against another client in a bankruptcy proceeding is not necessarily "assertion" of a claim for purposes of this Section. A claim is "asserted" or "defended" when a dispute concerning the claim is involved. When there is no substantial likelihood that the proceeding will devolve from administration of the estate into contested proceedings between two or more clients, no conflict of interest under this Section is ordinarily presented as between the clients. Further, a discrete conflict between two clients, such as a dispute over the validity of a claim in a bankruptcy proceeding, may not disqualify a lawyer from representing one client with respect to aspects of the case not involving the dispute between its clients. In addition to general conflicts rules that may apply, a lawyer must also comply with statutory regulations if more stringent, such as provisions of the bankruptcy code.[23]

A companion amendment would have revised the language of Section 209, comment d(ii), as it appeared in the tentatively approved Tentative Draft Number 4 (1991), to read as follows:

> *d(iii). Complex and multi-party litigation.* Not all possibly differing interests of co-clients in complex and multi-party litigation involve material interests creating conflicts. Determination whether a conflict of material interests exists requires careful attention to the context and other circumstances of the representation and in general should be based on factors such as the following: (1) whether issues common to the clients' interests predominate, (2) circumstances such as the size of each client's interest, and (3) the extent of active judicial supervision of the representation. Among other considerations, assessment of the existence of a conflict should take into account the requirements of materiality (see § 210 & Comment c(ii) thereof) and substantial risk (see id. & Comment c(iii) thereto) of conflict. In addition to general conflict of interest rules that may apply, a lawyer representing such multiple clients must also comply with statutory regulations if more stringent.[24]

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22. *Id.* ("At the ABA's annual meeting in Chicago [in 1995], Wolfram got an earful of comments from members of the bankruptcy bar who complained that [section 209] dealing with conflicts in litigation did not adequately address its implications for multiple representation in bankruptcy proceedings, which are a hybrid of administration and litigation.").

23. *See* 73 A.L.I. PROC. 924-25 (1996) for the text of the proposed amendments.

24. *See supra* note 15. The former comment d(ii) would have been re-designated as comment d(iii) in anticipation of adoption of the accompanying proposed new comment d(ii), described earlier.

C. Restating Bankruptcy Conflicts Law--The ALI Punts After the 1996 Annual Meeting

At the 1996 annual meeting, however, we soon discovered that our drafting efforts in the proposed amendments had been significantly unsuccessful. The problem was that our acceptance of the notion of bankruptcy as some sort of "administrative" process in the proposed new comment c(ii) (along with other drafting problems)[25] had obscured the potential for conflicts, rather than recognizing and dealing with their lurking threat. It was pointed out that, by the time a bankruptcy petition is filed and even if the accompanying plan of reorganization receives the apparently warm support (or at least, not warm opposition) of all affected parties, some very serious head-knocking (of a clear-conflict type) may already have occurred in the process of developing the plan.[26] Sliding by that clear possibility by referring to the fact that the proceeding does not "devolve from administration of the estate into contested proceedings between two or more clients,"[27] as in the proposed amendment, ignored that clear possibility for pre-filing conflict. Strong and trenchant criticism from Judge Carolyn Dineen King of the Fifth Circuit doomed the amendments and, as it turned out, any further effort to restate bankruptcy conflicts law.[28] (On reflection, at least one lesson of the debate was that identity of one's adversary can be critical. Within and outside the ALI, judges are revered as keepers of the legal professional flame. When a highly-regarded and prominent judge, who, in this instance, is also a member of the ALI's council,[29] denounces a proposal in strong terms, its fate is almost certainly sealed). Despite the restorative efforts of Susan Freeman,[30] we were eventually instructed by the ALI membership, by near unanimous voice passage of Judge King's motion to recommit the proposed amendments, to reconsider the matter carefully.[31]

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25. Chief among them was the flat-footed statement in the amendment proposing text for comment c(ii) that "no conflict of interest under this Section is ordinarily presented" in described circumstances. At the very least, the reference should have been limited to conflicts "under Subsection (2)." As the text indicates in its allusion to "assertion" of claims and similar references, that Subsection was the only focus of discussion. On criticism of the textual reference to the proceeding devolving from administration into contested litigation, *see infra* text accompanying note 32.

26. 73 A.L.I. PROC. 389-92 (1996).

27. *Id.* at 389. One of the many traits that reporters have appreciated in Professor Hazard, in his role as director of the ALI, has been his candor in acknowledging his own role. During the debate on the proposed amendments to Section 209, he admitted that he had introduced the "administration" concept into the text of the proposed amendment. *See id.* at 391 ("I have to say the word 'administration' was my word, and I take responsibility for it . . . .").

28. *Id.* at 389-90, 392-93, 395 (1996) (remarks of Judge Carolyn Dineen King criticizing several aspects of proposed amendments to Section 209).

29. *See* RESTATEMENT at ii (Proposed Final Draft No. 1, 1996) (listing of Judge King as member of 61-member ALI Council).

30. 73 A.L.I. PROC. 393, 394 (1996).

31. While only the amendments were thus returned to the reporters for further consideration, Section 209 itself was later purposefully omitted from the material in Proposed Final Draft No. 1 that was (again, and as revised) approved at the ALI's 1996 annual meeting. *See id.* at 438-39 (specific exclusion of Section 209 from tentative approval of text, as printed in proposed final draft).

In the end, we have recommended that the Institute punt on bankruptcy conflicts questions. We have done that by employing the Restatement convention of stating that the Restatement takes no position on the question of the application of conflicts concepts in bankruptcy.[32] The alternative was to undertake anew to attempt to develop an adequately grounded and explicated statement of bankruptcy conflicts, at least outlining and addressing the several most important bankruptcy conflicts questions.

For reasons that I consider at a later point,[33] we decided that the Restatement was not, or at least no longer, the proper place to do so. Nonetheless, in view of statements made elsewhere, I cannot quite leave it at that. I have heard it said, for example, that our decisions to delete all bankruptcy language from Section 209 indicates that we accept the existing state of bankruptcy-conflicts law. That would hardly constitute taking "no position" on the issue, and it is clearly not a correct description of our "no position" position. Among other things, that reading would assume uniformity of judicial doctrine under existing bankruptcy law that plainly does not exist.[34] Or it would amount only to the odious position that we "accepted" the unwieldy and conflicting cacophony of voices heard today on bankruptcy conflicts. I have also heard it said that deletion of the bankruptcy language proposed in 1996 from the language finally adopted in comment c(ii) to Section 209 indicates rejection both of the language and of the assumptions that informed the amendments rejected in 1996. That, too, is incorrect. Taking no position entails agnosticism on all questions, including those we initially attempted to address.[35]

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32. RESTATEMENT § 209, cmt. c(ii), *supra* note 7:

> c(ii). Opposing clients in multi-party litigation. Certain types of civil proceedings may involve multiple parties and disputes, such as bankruptcy cases and proceedings involving environmental liability for alleged polluted conditions. In general, in all multi-party situations, the lawyer must comply with Subsection (1) and Section 201 generally, both before and after the filing of a formal proceeding.
>
> With respect to bankruptcy, there is substantial disagreement whether certain types of cases or proceedings should be considered under the automatic rule of Subsection (2) or under the general rule of Section 201 and, in general, whether general conflict of interest rules should be attenuated in some instances. Such conflict issues may affect lawyers and law firms representing multiple debtors, creditors of more than one class, creditors where there has been some representation of a debtor or its principals, and the like. Tribunals must resolve such questions in light of a body of decisions developed in the specific context of bankruptcy, and often the issues are controlled by statute. The context involves transformation of a business relationship into one that is at least in part controlled by different principles and rules, some of them of a fiduciary nature. The Restatement takes no position on the applicability of Subsection (2) in the many situations that may arise in bankruptcy.

After proposed text for Section 209, comment c(ii) appeared in the RESTATEMENT (Council Draft No. 13, Oct. 8, 1997), what can only be termed a last-ditch effort was mounted by several ALI members who practice bankruptcy law to avoid the "punt" solution and add more meat to the Restatement's bare bones. The effort took the form of several coordinated letters written to the ALI's director and to me as chief reporter. While the effort had substantive merit, in my view, for reasons that are developed later, we decided to adhere to the position reflected in the council draft and, now, in the version of comment c(ii) in Proposed Final Draft No. 2, *supra*.

33. *Infra* text accompanying notes 53-58.

34. *Compare, e.g.*, authorities cited at *supra* note 10 (divergence on use of "potential conflict" concept).

35. On the other hand, the Restatement does state a general position on conflict analysis in Section 201. On the implications of that general language for bankruptcy conflicts analysis, *see infra* text accompanying notes 39-43.

D. Frustration on Another Front: The NBRC and Bankruptcy Conflicts

After the die was cast in the ALI not to take any position on bankruptcy issues in the Restatement, entirely on my own (that is, divorced from my role as chief reporter for the Restatement), I cooperated in a limited way with efforts launched by bankruptcy lawyers Freeman and Smith, along with their fellow practitioners, Donald S. Bernstein, Michael A. Bloom, and Bernard Shapiro, to attempt to persuade the Service to the Estate and Ethics Working Group of the NBRC, and then the NBRC itself, to recommend that Congress repair the "disinterested" standard in the Code and otherwise rationalize the law of bankruptcy conflicts. That project, too, has thus far not borne fruit.

The eventual proposal[36] of the service and ethics working group to the NBRC that I supported was to recommend that Congress delete the "disinterested" requirement of 11 U.S.C. § 327(a).[37] The proposal instead favored a standard[38] that would have defined conflicts of interest for the lawyer of a debtor in possession essentially in the terms now employed in Section 201[39] of the Restatement. As with the Restatement, the new statutory standard would have focused the bankruptcy court's inquiry on the question whether there was a substantial risk that the asserted conflict would materially and adversely affect the lawyer's bankruptcy representation. The proposal would leave untouched the statutory requirement that the lawyer disclose all potential conflicts to the bankruptcy court.[40] Then and now, my view is that such a standard would both materially aid conflicts analysis by courts in bankruptcy cases and would hardly diminish appropriate protection of client interests or the interests of other interested parties in bankruptcy. The type of conflicts analysis required by the "substantial risk" standard expressed in Section 201 is hardly new. It is the standard reflected in the

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36. Among other proposals considered by the service and ethics working group, but not approved or sent on to the NBRC, was a wide-ranging proposal to revise conflict-of-interests for bankruptcy lawyers. This proposal was not approved due to concern with Congressional reaction to a proposal that, to be effective, would have displaced state ethics rules.

37. 11 U.S.C. § 327(a) (1994).

38. The service and ethics working group submitted several proposals to the NBRC. Its fourth proposal was as follows:

> The Bankruptcy Code should define conflict of interest for purposes of retention of professionals under section 327. A professional has a conflict of interest if there is a substantial risk that such professional's representation will be materially and adversely affected by the professional's own interests or by the professional's duties to another person that currently employs or formerly employed such professional or a third person.

<http://www.abiworld.org/legis/review/hbrc.html>.

39. Section 201 provides as follows:

> Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 202, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

RESTATEMENT § 201, *supra* note 2.

40. *See* Memorandum of May 1, 1997, to National Bankruptcy Review Commission and Professor Elizabeth Warren (reporter/consultant to the Commission) from Professor Lawrence P. King (advisor to the Commission) and Elizabeth I. Holland (Commission staff attorney) (on file with author) (forwarding recommendation of service to the estate and ethics working group to full Commission); *see also* Memorandum of Aug. 22, 1996, to National Bankruptcy Review Commission and Professor Elizabeth Warren (reporter/consultant to the Commission) from Professor Lawrence P. King (advisor to the Commission) and Elizabeth I. Holland (Commission staff attorney) (on file with the author) (earlier proposal on disinterest standard).

lawyer code of every state[41] and has been employed by the large majority of courts in disqualification cases in all realms of law practice.[42] Among other areas of representation, it has proved durable and appropriately useful in protecting against lawyer conflicts in representations involving clients with the highest fiduciary demands exacted by the law. For example, those standards are employed in resolving conflict questions involving such clients as trustees of express trusts.[43] Clearly, such clients bear fiduciary obligations much more exacting than those borne by bankruptcy clients, such as debtors in possession. It seems to me *a fortiori* that such a standard is also appropriate for those clients in bankruptcy who have responsibilities to others that are less impinged upon by fiduciary obligations and more legitimately performed with partial attention to the self-interest of the actor.

Use of the substantial risk standard of section 201 to assess conflict questions now pursued under Section 327(a) of the Bankruptcy Code would hardly prove unsettling in bankruptcy conflicts law. Just as with conflicts formulations in modern lawyers codes and judicial decisions in other areas, that very standard or something much like it has already worked its way into bankruptcy decisional law and has already been employed in some of the most notable of recent bankruptcy-conflicts decisions. Those decisions include some--such as the *In re Leslie Fay Cos.* decision[44]--that I have heard described, in debates before both the ALI[45] and the Bankruptcy Commission, as important to uphold against the claimed loosening of conflicts standards that adoption of a test based on Section 201 would, it is claimed, entail.[46] In the end, while not entirely denigrating the arguments of those who believe that the "disinterested" standard is both apt and workable,[47] I am persuaded that the contrary position[48] offers a better balance of protection of appropriate public and private interests and respect for the rights of clients to retain counsel of their choice.

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41. *See* RESTATEMENT § 201, cmts. c-c(iv), notes, *supra* note 2.

42. Some conception of the range of practice areas in which the test of Section 201 has been employed may be gained from a review of the judicial decisions cited in *id.*, notes.

43. *See generally Report of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association,* 28 REAL PROP. PROB. & TR. J. 763, 839-48 (1994) (review of several conflict problems that may arise in course of lawyer's representation of trustee of express trust or other common-law fiduciary, with assumption that normal rules of conflict, including those of Restatement Section 201, should and would apply; citing authorities).

44. *In re* Leslie Fay Cos., 175 B.R. 525, 533 (Bankr. S.D.N.Y. 1994) (law firm's violation of "disinterested" standard of § 327(a) will be found "if it is plausible that the representation of another interest may cause the debtor's attorney to act any differently than . . . without that other representation.").

45. *E.g.,* 73 A.L.I. PROC. 390 (1996) (argument of Judge King praising *Leslie Fay* decision and urging that ALI "not go back to the way the law was before 1979 and the way it is so badly spelled out in the legislative history of the Bankruptcy Code. I would hope that we would hold the line on where we have been.").

46. *See infra* text accompanying note 49.

47. *E.g.,* 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 (1998) (arguing for retention of disinterested standard, with alteration in narrow instance of lawyer's own pre-filing claim for attorney fees).

48. *E.g.,* Gerald K. Smith, *Conflicts of Interest in Workouts and Bankruptcy Reorganizing Cases,* 48 S.C. L. REV. 793 (1997) (arguing for thorough-going revision of disinterested standard).

After some initial receptiveness among the NBRC's staff and, at one point, by an apparent majority of the members of the NBRC, the conflicts-reform recommendation was substantially beaten back in the final action of the NBRC in its recommendations to Congress. This time, defeat of the bankruptcy lawyers came primarily through the leadership of another Fifth Circuit judge, NBRC member Judge Edith Hollan Jones.[49] Evidently, the Fifth Circuit bench includes several judges who think bankruptcy conflicts rules are just about right. I strongly disagree. In my view, the eventual NBRC report, with its very limited proposal for change (limited to the problem of lawyers and other professionals with pre-bankruptcy bills that were not yet paid), was not helpful in its failure to address the situation of bankruptcy conflicts more broadly.[50] I have not followed what effort is being made in Congress on review of the NBRC report, but I know that interested lawyers and others have discussed trying there one more time.

II. THE RESTATEMENT PROCESS AND BANKRUPTCY CONFLICTS

I conclude with some thoughts about how the ALI's restatement process worked in the instance of bankruptcy conflicts. The outcome of the debate within the ALI was, to my mind, and at least in the circumstances in which the issue arose, the correct one. I say that from the chastened position of one who initially, and for some time, believed that the Restatement could address that tangled area of conflicts law and propose resolution to at least one of its more vexing problems. The reasons are several.

First, restating lawyers' law in any field requires an adequate grasp of judicial doctrine, terms of reference, concepts of appropriate law practice, and, in general, the context[51] in which lawyers practice and in which judgments about the limits applicable to lawyer actors must be made. Those considerations are important in any area of client conflicts. At the very least, knowing the area is important in understanding instinctively how differing interests of clients may emerge, whether subtly or frontally. One who restates must also be able to use language that cabins potentially large concepts within appropriate limits and, generally, to avoid creating misunderstanding about recommended directions of analysis.

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49. *E.g.*, Memorandum of April 21, 1997, from Judge Edith H. Jones and Professor Todd J. Zywicki to National Bankruptcy Review Commission on Proposed Standard on Conflicts of Interest (on file with author) (memorandum extensively attacking proposal of service and ethics working group). Judge Jones also had the support of a particularly influential ally, Jerry Patchan, the director of the executive office for United States Trustees. *See* Letter from Jerry Patchan to Brady C. Williamson, chairman of the National Bankruptcy Review Commission (May 14, 1997) (on file with author) (agreeing with analysis and recommendations of Judge Jones and Professor Zywicki in their memorandum).

50. The NBRC's final report to Congress of October 20, 1997, limited its review of conflicts to the important question of lawyers (and other professionals, such as accountants) who the debtor in possession wished to retain, but who had as-yet unpaid bills for pre-bankruptcy services (making them general creditors of the estate). The NBRC's Recommendation 3.3.3 was that "Section 1107(b) should be amended to provide that a person should not be disqualified for employment under § 327 solely because such person holds an insubstantial unsecured claim against or equity interest in the debtor. Section 327 and § 101(14) should remain unchanged." 3.3.3 Qualifications of Professionals Under 11 U.S.C. § 1107(b). From <*http://162.140.225.1/report/03recomm.html*>.

51. The importance of the context law practice has been best formulated in a seminal article by Professor Wilkins. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990).

Frankly, as discussed above,[52] we fell short on those objectives in formulating what became the 1996 proposed amendments to Section 209.

Second, perhaps the greatest obstacle to a thorough and satisfying restatement of the law of bankruptcy conflicts is its present state of volatility. While some may debate the point, it seems evident to me that the decisional law of bankruptcy conflicts is in a state of rapid and thus, necessarily, unstable development. Many bankruptcy courts are rendering decisions which, no matter how justifiable as a matter of bankruptcy history, bankruptcy policy, or statutory formulation, have moved far ahead of bankruptcy practice and theretofore-existing bankruptcy precedents. In the process, lawyers in many firms have felt a strict judicial rap on the knuckles and pocketbook. Those lawyers and their sympathizers feel, often with some justification, that the groundbreaking decisions have failed to acknowledge that the asserted conflict wrong that the lawyer committed was the known, prevailing practice of reputable bankruptcy lawyers (or at least of many or most of them) until the innovative decisions were rendered. Such pain is, of course, inevitable in the process of legal reform through groundbreaking judicial decisions. And such decisions have occasionally characterized the last decade or so of increasingly rigorous application of conflicts standards and remedies in bankruptcy. The volatile state of bankruptcy conflicts makes the task of restating its basic premise one that would necessarily prove contentious and difficult--conditions that do not bode well for passage by the ALI of wide-ranging and reform-minded proposals, in the best of circumstances.

A related problem of volatility is that the effort to make what, in retrospect, can be seen only as very modest revisions to Section 209 of the Restatement occurred at the same time that the NBRC had begun its work and at a time when questions were being raised within the NBRC and outside it about possible revision of the "disinterested" standard of § 327(a) of the Bankruptcy Code.[53] In the field of bankruptcy conflicts, as with so many other reform efforts in law (and elsewhere), the problem is one of educating judges and other skeptics who may be tempted to believe instinctively that any attempt to reform existing bankruptcy conflicts law is an attempt to return to a dreaded area of corrupt and mischievous administration of bankruptcy. Such suspiciousness clearly emerged during the debate on Section 209 at the 1996 ALI annual meeting. At least as some arguments were framed, suspicion was cast on the motives of bankruptcy lawyers

52. *Supra* text accompanying notes 49-50.

53. When I was first contacted about serving as a consultant to the Service to the Estate and Ethics Working Group of the NBRC in late May, 1996, I was sent a set of issues lists that, as I understand, had been circulated among NBRC members and staff. Letter from Christine Wollaston-Loury, faculty assistant to Professor Elizabeth Warren (May 29, 1996) (on file with author). An enclosed list of issues for the service and ethics working group included the following:

> Should the 'disinterestedness' standard be relaxed? . . . Should parties be able to waive disinterestedness requirements? . . . Are potential, rather than actual, conflicts sufficient to disqualify counsel? . . . Should rules enacted in the Bankruptcy Code supersede local regulation under canons of ethics and disciplinary rules? . . . Does the disqualification of an individual in a law firm disqualify the entire firm? . . .

Clearly, the ambition of the working group was to raise very fundamental issues about bankruptcy conflicts.

interested in reforming bankruptcy conflicts law.[54] With due allowance for hyperbole in argument, I believe the charge that bankruptcy lawyers were attempting to revise the Restatement to remove themselves from its conflicts strictures--although clearly not an accurate portrayal of motivation--was warranted, in a sense, by what I was soon convinced was the unfortunate language of the Section 209 proposals.[55] In fact, however, I have been impressed by the assiduous care and resolve shown by lawyer proponents of reform in bankruptcy conflicts in preserving what, to me, seems to be a rock-hard resistance to conflicts. Unfortunately, those characteristics were probably unknown to an ALI audience hearing brief argument on complex and unfamiliar issues.[56]

Third, and perhaps most importantly, the timing was wrong. For whatever reason, bankruptcy lawyers rallied late to attempt to deal with their perception of the potential importance of the Restatement for their field, or at least to the fact that the reporters had misfired on earlier, general assurances that they would attempt to address the area of bankruptcy conflicts.[57] Work on the Restatement began in 1985-86 and, as with any such project, the lawyers' restatement has been a time-consuming and absorbing exercise for both the reporters and the ALI. Frankly, both personal and institutional fatigue and ennui had set in by 1996. When the issue was first raised in a major way at the 1996 annual meeting, the ALI no longer had the appetite for wide-ranging excursion into a specialized area of law practice. Many ALI members doubtless recalled the arguably ill-advised decision of the ALI council several years earlier to digress elaborately into the law of lawyer work product, as fervently urged by lawyer members of the ALI who spe-

54. *See* 73 A.L.I. PROC. 389 (1996) (remarks of Judge Carolyn Dineen King)

> (I know that the bankruptcy lawyers have assiduously pursued the proposition that they would like to be carved out of this Restatement, and we have, I think quite properly, resisted that, and I hope we will to our dying day. But I believe that, with the way this has been drafted, they have been carved out.).

55. *See supra* text accompanying note 38.

56. While the point may be largely academic at this stage, acceptance by the National Bankruptcy Review Commission of the proposal to recommend replacement of the statutory disinterested standard with the substantial risk standard of Section 201 would have strengthened conflict norms in certain areas (at least in certain courts), for example, by eliminating the "merely potential" excuse for ignoring conflicts. *See supra* note 39.

57. The only mention that I have found of bankruptcy conflicts at the 1991 annual meeting at which Section 209 was first discussed by the ALI, as a whole, is nonetheless important. ALI member William Knight Zewadski of Florida, whom I know well to be a bankruptcy practitioner, raised an issue concerning whether representation of multiple creditors in the "limited pie" situation of bankruptcy was intended to be included within the statement (in RESTATEMENT § 209, cmt. d(i) (Tentative Draft No. 4, 1991)) that a conflict may exist when multiple claimants assert claims against a "defendant [who] lacks sufficient assets to meet all of the damages claims . . . ." *See* 68 A.L.I. PROC. 449 (1991) (remarks of William Knight Zewadski). Mr. Zewadski went on to refer broadly, and somewhat dismissively (for purposes of the Restatement), to the rapidly-developing law of bankruptcy conflicts:

> I would also mention, as a corollary to that, that under Title 11 U.S.C. §§ 327 and 1107, a great body of law is developing about creditors' counsel later representing the debtor and the different representations that come in connection with committee representation in bankruptcies. That is evolving so quickly I would suggest you only refer to it, rather than try to sort it out at this point. Thank you.

On re-reading the discussion, I can see that the reporters responded in a way that Mr. Zewadski and other bankruptcy lawyers well might have taken to be an undertaking to look further at the area of bankruptcy conflicts. *Id.*

cialized in litigation.[58] A particular piece of bad timing was that the impetus for visiting bankruptcy issues finally reached receptive ears within the ALI only after the text of what became Proposed Final Draft Number 1 of the Restatement had already gone to the printer (timing for which I, of course, am largely responsible). Thus, the proposals put forward at the 1996 annual meeting necessarily took the form of the suggested amendment to Section 209. Moreover, the amendments were quite modest in scope, ill-drafted in some important respects (in part due to the lack of opportunity for the normal and elaborate process of multiple-draft and multiple-layer review by several groups within the ALI[59]), 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. A complicating and complementary factor was that efforts were already being made (by some of the same persons who pushed for reform within the ALI) within the NBRC to reform bankruptcy legislation on lawyer conflicts,[60] perhaps strengthening the impression of marches being stolen.

III. CONCLUSION: THE FUTURE OF BANKRUPTCY CONFLICTS REFORM

The ALI's institutional situation and the bad timing that afflicted the 1996 attempt to introduce consideration of bankruptcy conflicts into the Restatement have meant the end of efforts to restate that subject in that form. The failure to obtain the support of the NBRC for significant change to § 327(a) of the Bankruptcy Code was another unfortunately missed opportunity for reform. But the law of bankruptcy conflicts, as it matures, will necessarily confront the need for further adjustment.

As nature abhors a vacuum, so law abhors irrationality, and there is too much of that now in the still-developing law of bankruptcy conflicts to warrant the belief that the area has reached some sort of stasis in which it seems likely that change will not occur. Efforts will undoubtedly continue to be made to reform it. Of course, it is conceivable that appropriate and adequate reform will occur through the ongoing development of what can properly be termed the common

58. In the initial plan of the Restatement, work-product was addressed merely through a single-section basic review of the relevant law. *See* RESTATEMENT § 136 (Tentative Draft No. 2, 1989) (section printed for discussion only). As indicated in that volume, *see id.* xv, xx, the ALI Council, at its meeting in October and December, 1989, had withheld approval of Section 136 for consideration of expanding the bare-bones treatment into "an exhaustive consideration of the doctrine." *Id.* at xv. An additional associate reporter, Professor Linda S. Mullenix of the University of Texas School of Law, was recruited specifically for the purpose of preparing a reporter's draft of the topic and then participating in presentation of what became successive drafts at several meetings of the ALI's adviser and member consultative groups, as well as to the Council and at two annual meetings. The eventual material, sadly much reduced in length, was brought to the membership in RESTATEMENT (Tentative Draft No. 5, 1992). *See* 69 A.L.I. PROC. 358-404, 423-63 (1992) (annual meeting discussion of tentative draft no. 5 provisions on work product immunity sections). The material was reprinted, as revised, in RESTATEMENT (Tentative Draft No. 6, 1993). They were discussed again at the 1993 annual meeting and tentatively approved. *See* 70 A.L.I. PROC. 365-79 (1993) (completion of discussion of most sections on work product immunity). A few final work-product matters were again presented in RESTATEMENT (Proposed Final Draft No. 1, 1996) and discussed for the final time at the 1996 annual meeting. *See* 73 A.L.I. PROC. 337-40 (1996).

59. *See* Wolfram, *supra* note 9, 1 GEO. J. LEGAL ETHICS 195, at 201 (description of submitting restatement drafts to reporters and director, then in preliminary draft form to adviser and members consultative groups, then in council draft form to ALI Council, then in tentative draft (or similar) form to members at annual meeting).

60. *See infra* pp. 110-11.

law of bankruptcy conflicts--continuing development of the law through judicial decisions which, although ultimately based on the Bankruptcy Code, frequently seem to be shaped more by the holdings and talk in other judicial decisions than by the raw language of the Code. More likely, thoroughgoing reform will require legislation. Both continuing judicial development and reforming legislation are possible future developments, if the latter is not entirely likely. Clearly, the pot of bankruptcy conflicts will continue to boil long after the failed efforts at a reform within the ALI and the NBRC have been forgotten by all but those who were intimately involved in those efforts.