COMMENTS ON EISENBERG, *DIFFERING PERCEPTIONS OF ATTORNEY FEES IN BANKRUPTCY CASES*

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In his article,[1] Professor Eisenberg observes differing "perceptions" of attorney fees in bankruptcy cases suggesting egocentric bias and self-aggrandizement of bankruptcy judges and lawyers, and then delights in synthetic revelation. My problem is not with the right to criticize fees or the "perceptions" of lawyers or judges with respect to bankruptcy fees. After all, this is America. But, I am compelled to ask: Why? For what purpose? At some point, academicians must reintroduce themselves to reality. The true test of legal scholarship—whether it has advanced legal thought, theory and analysis—is, after all, what this Interdisciplinary Conference is about. This article falls short of that goal.

Professor Eisenberg's article begins with a man's perception of a sheep's tail to be a leg, discusses human nature's exaggeration of ability and esteem, and draws conclusions regarding the egocentric bias and self-aggrandizement of bankruptcy judges and lawyers. Professor Eisenberg—in a paper without case authority and in which the author cites himself in eight of the first ten footnotes for support—would have the reader conclude that others are egocentric and self-aggrandizing!

Unfortunately, the public's perception of a lawyer's image is not good. A recent *American Bar Association Journal* article addressing lawyer advertising, entitled *Image Problems*, recites that "lawyers received a favorable rating from only forty percent of the respondents in a survey conducted for the ABA in early 1993 by Peter D. Hart Research Associates in Washington, D.C.—ahead of only stockbrokers and politicians among the nine professions identified in the survey."[2]

Professor Eisenberg's observations are hardly revelations, and merely state the obvious. Why must we persist perceiving "perceptions" of

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1. Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979 (1994).

2. James Podgers, *Image Problems*, A.B.A. J., Feb. 1994, at 66, 67; *see also* Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers*, A.B.A. J., Sept. 1993, at 60, 62.

professionals' fees—do they not just imitate real life? Professor Eisenberg explores "perceptions" about bankruptcy fees from the perspective of two different groups—bankruptcy judges and bankruptcy lawyers. What about the client whose business is saved? The members of the creditors' committee who expended time and effort as fiduciaries for a faceless constituency that does not care or have a clue as to the energy expended? The adversary? The adversary's counsel? The beneficiaries or constituents represented? Why persist in attempting to find answers in a congressionally mandated "trust" that works? Is this the way to make it better?

Sections 327 through 331, 503, 504, 507, and 1103 of the Bankruptcy Code provide the statutory framework that authorize retention and payment of compensation for bankruptcy professionals.[3] These nine statutory provisions in all of the Code constitute a proportionately large number for a relatively succinct statute. The statutory framework is mandated by a congressionally imposed "trust." Judges are the gatekeepers. Seldom does counsel receive heartfelt thanks for rendering the service. Similarly, except for insolent remarks of appreciation, a court is rarely thanked for dispensing justice.

The root of our service is advocacy—the promotion of a client's (or estate's) interest against another holding an adverse interest. Our bankruptcy system provides a mechanism for any adversary or interest-holder to contest payment *after* counsel has performed his best adversarial skills against that opponent. Arguably, every creditor not receiving full payment has an economic incentive to oppose professional compensation.

The conclusion that judges' and lawyers' views of a fee system are "self-serving" and "overstate the merit of professional performance" is merely a statement of the obvious. In order to be paid, one must *seek* payment. Who will advocate the right to be paid if not the one with the burden of proof? The statute places this burden squarely upon the movant[4] in an adversarial system where interest groups have economic incentive to complain. (In fact, the United States Trustee has nothing better to do.) Indeed, what if Professor Eisenberg was required to "apply" to his dean for compensation at the conclusion of an academic cycle and justify payment for his past services as a law professor? Under the approach taken by the article, one would find egocentric bias and self-aggrandizement of law professors and deans.

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3. 11 U.S.C. §§ 327-331, 503, 504, 507, 1103 (1988).
4. *See* 11 U.S.C. §§ 330, 331 (1988).

Professor Eisenberg goes on to cite "egocentric biases" as a partial explanation for why cases fail to settle.[5] He supports this by creating "perceptions" which he concludes are self-aggrandizing.[6] But the Bankruptcy Code is designed to promote speedy resolution of business issues through expedited issue recognition, confrontation, use of cash, use of property, and settlement with respect to *all* contested matters. Should not the proper inquiry concern the number of contested issues that are either resolved prior to hearing through settlement or *not* contested at all because the system has worked efficiently? Or, perhaps more importantly, should not the tangible benefits be weighed against the quantifiable costs through analysis of empirical data?

It serves no redeeming social purpose to selectively choose responses from a three-year-old American Bar Institute questionnaire and draw obvious conclusions concerning human nature. Any employer or functional unit having departments, divisions or categories such as management and labor, professional and nonprofessional, blue collar and white collar, etc. will always engender members' perceptions of self-importance or ego which Professor Eisenberg labels self-aggrandizement, egocentric bias and negative perceptions of the legal system.

Considering Professor Eisenberg's "revelations," I envision debtor's counsel's model presentation at a final fee hearing for compensation before the Honorable Theodore Eisenberg to be as follows:

> Forgive me, your Honor, for I have sinned. I know little of what I do. I dare stand before thee deigning to request payment, a humble warrior, having toiled in battle against multifaced foes for many months—nourished solely by thine kind, interim awarded morsels sufficient to water my horse, but providing little nutritional sustenance for my diminishing girth. Yea, though I walk through the valley of contingent hourly compensation, I shall fear no evil. Thy clerk and thy staff they comfort me. The Congress of the country I love, causeth me to bow with inverted hat in hand before thee—confident thine benevolence will graciously recognize my humility and reasonableness. Though other warriors fought bravely, the battle (but for this warrior's recompense) is over. Peace hath come. A worthy, reorganized, economically feasible debtor hath returned to the business arena from whence it came, leaving only I, your humble warrior seeking final recompense—the second hand on my Rolex wound only by your kind jurisprudence.

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5. Eisenberg, *supra* note 1, at 982-89.
6. *Id.* at 989-94.

This Interdisciplinary Conference has a brochure. The brochure proclaims, "The common subject, theories relating to bankruptcy reorganization, is the subject of this Conference." I submit this article misses that mark. I concur that we do not want to end up with a three-legged sheep, nor do we want to end up with some other sheep by-product.