

ETHICS FOR EXAMINERS

*Daniel J. Bussel**

INTRODUCTION

I recently assessed the emergence of a new type of bankruptcy examiner employing inquisitorial methods of investigation in a few recent large Chapter 11 reorganizations.¹ There are many reasons to commend this development: it promises renewed emphasis on transparency,² superior factfinding capability,³ use of nonpartisan experts,⁴ freedom from artificial evidentiary constraints,⁵ and a counterweight to imbalances among the parties in terms of resources and other strategic advantages and disadvantages.⁶ These inquisitorial methods can promote the fairness and legitimacy of the bankruptcy reorganization process in certain large cases implicating the public interest.⁷

* Professor of Law, UCLA School of Law. Professors Sung Hui Kim, Kenneth N. Klee, Laurel Terry, and Dennis J. Connolly, Esq., provided thoughtful comments on early drafts of this Article. I am especially grateful for the editorial support, careful research, and substantive suggestions of my research assistant Michael Morris-Nussbaum, UCLA School of Law, Class of 2017. I also thank Fordham University School of Law, the *Fordham Law Review*, and the participants in *Lawyering in the Regulatory State* for the excellent and helpful discussion of these issues when I presented an early draft of this Article there. For an overview of the colloquium, see Nancy J. Moore, *Foreword: Lawyering in the Regulatory State*, 84 *FORDHAM L. REV.* 1811 (2016).

1. Daniel J. Bussel, *A Third Way: Examiners As Inquisitors*, 90 *AM. BANKR. L.J.* (forthcoming 2016) (on file with author).

2. *Id.* (manuscript at 72).

3. *Id.* (manuscript at 69).

4. *See id.* (manuscript at 68–69).

5. *See id.* (manuscript at 68–72).

6. *Id.* (manuscript at 69–71).

7. *Id.* (manuscript at 70, 75–76); *see also* Karen M. Gebbia-Pinetti, *Second Report of the Select Advisory Committee on Business Reorganization*, 60 *BUS. LAW.* 277, 281–325 (2004); Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 *AM. BANKR. L.J.* 1, 59 (2010) (“We should use examiners more, but under the ‘right’ circumstances, and for the ‘right’ reasons.”); Ryan M. Murphy, *Does the Recent String of Examiner Appointments in Delaware Represent a Sea Change in Approach or Merely a Perfect Storm of Cases?*, 2011 *PRATT’S J. BANKR. L.* 04-2; Elizabeth Warren & Jay L. Westbrook, *Examining the Examiners*, 24 *AM. BANKR. INST. J.* 34 (2005); Clifford J. White III & Walter W. Theus, Jr., *Chapter 11 Trustees and Examiners After BAPCPA*, 80 *AM. BANKR. L.J.* 289, 289 (2006) (“The thesis of this Article is that trustees and examiners can serve creditor, shareholder, and public interests by promoting the efficiency, effectiveness, and transparency of complex [C]hapter 11 cases.”); Jonathan C. Lipson & Christopher Fiore Marotta, *Examining Success* (Temple Univ. Legal Studies Research Paper No. 2015-17, 2015), <http://ssrn.com/abstract=2568178> [<https://perma.cc/5SLY-DV4P>]; RAMONA D. ELLIOTT ET AL., *AM. BANKR. INST., EXAMINERS: THEIR USE, MISUSE AND CREATIVE APPLICATIONS* (2011) (on file with the *Fordham Law Review*). Most

But for these new inquisitorial examinations, bankruptcy courts, like other American courts, would continue to resolve disputes through adversary litigation or settlement. Both the Federal Rules of Evidence and the Federal Rules of Civil Procedure apply in modern bankruptcy litigation.⁸ American-style civil litigation is expensive, time consuming, wasteful, often winner-take-all, and constrained by procedures and biases that may inhibit the quest for both truth and justice.⁹ Although the Bankruptcy Code¹⁰ authorizes (indeed, in some instances, directs) investigations¹¹ prior to the commencement of adversary litigation, these investigations are ordinarily conducted by trustees and official creditors' committees.¹² Unlike examiners, neither trustees nor committees are neutrals charged with finding truth. They occupy adversarial roles and must advance the interests of particular constituencies. Trustees of insolvent estates owe fiduciary obligations to general creditors and are duty-bound to maximize the value of the estate. They are not neutrals as to any claims or defenses that affect the estate. Indeed, trustees' personal economic interests are purposely aligned with the goal of estate

recently, the American Bankruptcy Institute proposed to subsume examiners within the broader role of "Estate Neutral" appointed for cause at the discretion of the bankruptcy court to potentially assume broad portfolio activities now performed by examiners, examiners with expanded powers, trustees, and other officers. *See* AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11 FINAL REPORT AND RECOMMENDATIONS 32–37 (2014) [hereinafter ABI REPORT].

8. Federal Rule of Bankruptcy Procedure 9017 incorporates the Federal Rules of Evidence and related portions of the Federal Rules of Civil Procedure dealing with evidentiary matters into bankruptcy proceedings. *See* FED. R. BANKR. P. 9017. In adversary proceedings in bankruptcy court, the Federal Rules of Civil Procedure, with relatively minor variations, apply through Part VII of the Federal Rules of Bankruptcy Procedure. *See id.* 7001. In other contested matters, unless the bankruptcy court otherwise directs, Federal Rules of Civil Procedure 9, 17, 21, 25–37, 41, 42, 52, 54–56, 64, 69, and 71 are incorporated by reference. *See id.* 9014(c).

9. These drawbacks, if you will, to the adversary process have been extensively remarked upon by many others. *See, e.g.,* *Addresses of Learned Hand*, in 3 LECTURES ON LEGAL TOPICS 89, 105 (1926) ("I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness or death."); Jeb Barnes, *Bankrupt Bargain? Bankruptcy Reform & the Politics of Adversarial Legalism*, 13 J. L. & POL. 893 (1997); Jerome Frank, "Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism, 26 N.Y.U. L. REV. 545 (1951); Robert A. Kagan, *Adversarial Legalism & American Government*, 10 J. POL'Y ANALYSIS & MGMT 369 (1991); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1926) (reprinting Pound's address at the twenty-ninth meeting of the American Bar Association in 1906). Perhaps the most telling critique is Trollope's brilliant nineteenth-century fictional effort, which still resonates today. *See generally* ANTHONY TROLLOPE, ORLEY FARM (1862).

10. *See generally* 11 U.S.C. (2012).

11. *See* 11 U.S.C. § 341(d) (providing mandatory debtor examination); *id.* § 704(a)(4) (explaining investigative duties of Chapter 7 trustee); *id.* § 1103(c)(2) (describing powers of a creditors' committee to include investigation); *id.* § 1106(a)(3) (describing investigative duties of Chapter 11 trustee).

12. *See id.* § 343 (providing for examination of debtor); FED. R. BANKR. P. 2004 (authorizing examinations of any entity by compulsory process on any matter which may affect administration of the estate including matters pertaining to the operation of the business or any reorganization plan).

maximization.¹³ Similarly, creditors' committees consist of creditors from particular interested constituencies who serve and negotiate on behalf of those constituencies.¹⁴ As I have noted elsewhere, in the hands of a committee, investigations are generally used strategically to advance the committee's position in plan negotiations.¹⁵ Unsurprisingly, trustee- and committee-led investigations quickly and naturally fall into the adversarial model.

Settlement is the common answer to concerns about the cost and efficacy of adversary litigation. The Bankruptcy Code facilitates settlement in numerous ways.¹⁶ But settlements in bankruptcy avoid assigning culpability, preclude fact-finding, and may manipulate consent doctrines in ways that undermine legitimacy in the eyes of the public and aggrieved constituencies.¹⁷

Inquisitorial investigation sidesteps many of the pitfalls of adversary litigation and settlement.¹⁸ Inquisitorial investigation, however, also comes with potential costs: large fees and expenses for the examiner and his professionals of course,¹⁹ but also lost focus,²⁰ due process concerns,²¹ delay,²² and the risk of strategic manipulation of inquisitorial methods by the parties or examiner.²³ Infamously, inquisitorial process employed by such institutions as the Star Chamber and the Spanish Inquisition has been at least as susceptible to abuse as the adversarial process.²⁴ Abuse of inquisitorial methods in a major reorganization case could easily undermine the legitimacy garnered through the recent spate of successful inquisitorial examinerships, or even nip innovative inquisitorial investigation in the bud, leaving adversary litigation and settlement as the only realistic choices for resolving matters.

13. Trustees are paid a sliding scale commission on creditor distributions up to \$1 million and "reasonable compensation not to exceed 3 percent" of distributions in excess of \$1 million. 11 U.S.C. § 326(a). In 2005, § 330 was amended to provide that the court shall treat trustee compensation "as a commission." *Id.* § 330(a)(7). The trend in the cases thereafter has been to award the statutory percentage unless there are extraordinary circumstances. *See In re Salgado-Nava*, 473 B.R. 911, 918 (B.A.P. 9th Cir. 2012) (equating trustee compensation with contingent or fixed fee counsel under 11 U.S.C. § 328); *see also* 3 COLLIER ON BANKRUPTCY ¶ 326.02[1][a] (16th ed. 2014) (discussing division in post-2005 case law on court's discretion to reduce trustee's fee below statutory percentage).

14. *See generally* Daniel J. Bussel, *Coalition-Building Through Bankruptcy Creditors' Committees*, 43 UCLA L. REV. 1547, 1561–70 (1996).

15. *Id.* at 1629.

16. Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 689 (2011).

17. *See id.* at 735.

18. Bussel, *supra* note 1 (manuscript at 66–72).

19. *Id.* (manuscript at 77–78). Depending on how events unfold, these costs may be in addition to, rather than in lieu of, other professional fees. *Id.*

20. *Id.* (manuscript at 78–79).

21. *Id.* (manuscript at 82–83).

22. *Id.* (manuscript at 77–78).

23. *Id.* (manuscript at 69–71).

24. *Id.* (manuscript at 14–15).

So far, examiner appointments in major Chapter 11 cases have been few and far between and reserved for the most elite lawyers.²⁵ Recent examiners conducting inquisitorial investigations have been self-conscious in breaking new methodological ground, zealous in protecting their own reputations for integrity and good judgment, and cautious in their use of inquisitorial methods. Their investigations have been remarkably well executed and yielded successful results.²⁶ But as inquisitorial investigation becomes more common and examiners more comfortable in the exercise of these powers, inevitably controversy and perceived or actual abuses will arise out of such methods.

To date, examiners have self-regulated, or have been regulated by their appointing bankruptcy court, on an ad hoc basis, principally through their appointment orders, subsequent “comfort orders” requested by the examiners themselves, or the statutorily required review of the fee applications of the examiner and his professionals.²⁷ No ex ante code of conduct binding on, or even addressed to, examiners exists. To be sure, examiners and their supervising bankruptcy courts have looked to what past examiners have done, and, being lawyers, they are familiar with the standards of behavior required of lawyers and judges.²⁸

But examiners are not advocates—they have no client, and they do not participate in an adversary process. These are all indispensable background assumptions for lawyers’ codes of ethics.²⁹ Judges’ ethical codes are also framed against a background assumption that the judge will be a passive fact finder reacting to party-discovered and party-presented evidence in an adversary framework.³⁰ Mediators have begun to develop precatory ethical

25. *Id.* (manuscript at 29–30).

26. *Id.* (manuscript at 55, 62, 64–66) (discussing recent cases).

27. 11 U.S.C. §§ 330–331 (2012). Note that unlike other estate professionals employed by a trustee, debtor-in-possession, or statutory committee, no alternative mechanism for preapproval of contractual fee arrangements exists for an examiner or his professionals. *Cf. id.* § 328.

28. *See, e.g.*, JUDICIAL CONF. OF THE U.S., JUDICIAL CODE OF CONDUCT FOR UNITED STATES JUDGES (2014); SUPREME COURT OF CAL., CALIFORNIA CODE OF JUDICIAL ETHICS (2015); MODEL CODE OF PROF’L RESPONSIBILITY (2014); N.Y. STATE RULES OF PROF’L CONDUCT (2013); ABA MODEL CODE OF JUDICIAL CONDUCT (2010); MODEL CODE OF JUDICIAL CONDUCT (2010); CAL. RULES OF PROF’L CONDUCT (2007).

29. The first eighteen rules in the Model Code, *see* MODEL CODE OF PROF’L RESPONSIBILITY r.r. 1.1–18, define the ethical boundaries of the lawyer-client relationship, while only one rule relates to a lawyer’s role as a third-party neutral. *See* MODEL CODE OF PROF’L RESPONSIBILITY r. 2.4 (Counselor: Lawyer Serving As Third-Party Neutral). *See generally* Monroe H. Freedman, *What Does the Lawyer Really “Know”: The Epistemology of Legal Ethics*, in *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 51–59 (1975); David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83–122 (1983).

30. Of course, for at least a generation now, we have understood that modern American judging is not wholly passive. *See, e.g.*, Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Nevertheless, the judicial canons of ethics are still drawn with the traditional passive model firmly in mind, and even the most managerial of judges in our system avoid affirmatively and directly conducting ex parte fact investigation in the manner described here.

guidelines for themselves,³¹ but these guidelines are less generally accepted,³² and they also speak to a professional with a very different role. Mediators endeavor to resolve disputes through settlement; they do not engage in independent fact-finding or promote truth or transparency. Lawyers, judges, and mediators' ethical codes provide scant guidance for the inquisitorial examiner.

The closest familiar analogy to an inquisitorial examiner in our legal system is the criminal prosecutor.³³ Prosecutors and grand juries do employ inquisitorial methods and operate without a client in the usual sense.³⁴ But prosecutors operate in a criminal law context foreign to the

31. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. ARB. ASS'N, ABA & ASS'N FOR CONFLICT RES. 2005).

32. See James K. L. Lawrence, *Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates*, 29 OHIO ST. J. ON DISP. RESOL. 35 (2014) (describing ethical complexities presented during mediation in some contexts); Fran L. Tetunic, *Demystifying Florida Mediator Ethics: The Good, the Bad, and the Unseemly*, 32 NOVA L. REV. 205, 211–13 (2007); Andrea C. Yang, *Ethics Codes for Mediator Conduct: Necessary but Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229 (2009); see also Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 692–97, 701–06 (2001) (discussing the ethics of facilitated negotiation and of lawyers participating in mediation); Jamie Henikoff & Michael Moffitt, *Practitioner's Corner: Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 95–99 (1997) (arguing that Model Standards failed to achieve drafters' goal of serving as a guide for mediator conduct, informing mediating parties, and promoting confidence in mediation as a process of dispute resolution); Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J.L. 195, 201 (2006) (charting the development of the literature surrounding mediation ethics).

33. Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 930 (1996); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 168–69 (2004) (noting inquisitorial nature of federal criminal prosecution and suggesting “insights from the inquisitorial model provide a starting point for redressing the most pernicious effects of our quasi-inquisitorial federal criminal justice system”); see *Berger v. United States*, 295 U.S. 78, 88 (1934); MODEL RULES OF PROF'L CONDUCT r. 3.8 (Special Duties of Prosecutors); Robert H. Jackson, *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in NAT'L COLL. OF DIST. ATTORNEYS, ETHICAL CONSIDERATIONS IN PROSECUTION 2 (John J. Doglass ed., 1977).

34. Conventionally, American prosecutors are said to represent the “State,” the “Government,” or, most generically, the “People,” but prosecutors' offices are typically structured to act independently of other government officials. Unlike lawyers with “real” clients, and very much like bankruptcy examiners, “the only mind the prosecutor must make up is his own.” John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 513 (1983). Prosecutors often do identify with several constituencies: crime victims, law enforcement agencies and personnel with whom they work closely, and other officials. A prosecutor may even in some senses “represent” these constituents in the criminal process, but certainly as a formal and an ethical matter they are not his clients, and they can neither direct nor discharge him. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS std. 26-1.2(a) (2014) (reaffirming the prosecutor's role as a “member of an independent institution the primary duty of which is to seek justice,” but noting the prosecutor's client is “the public, not particular government agencies or victims”). But see Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1462 (2000) (noting that ethical rules governing prosecutors sometimes constrain prosecutorial advocacy but “at times the standards applicable to them are more adversarial than those for civil advocates”); Daniel Richman, *Prosecutors and Their Agents*,

bankruptcy examiner. Grand juries and criminal investigations are far from transparent.³⁵ Moreover, prosecutors ordinarily act within a bureaucratic hierarchy and political system that imposes internal and external constraints on them;³⁶ they have special privileges and obligations that come with holding the uniquely coercive power of the criminal law in their hands;³⁷ and unlike examiners, they act also as advocates or modified advocates with respect to the subject matter of their investigations when adversarial proceedings commence.³⁸

The thesis of this Article, therefore, is that the inquisitorial bankruptcy examiner is *sui generis* in our system³⁹ and that he faces unique ethical

Agents and Their Prosecutors, 103 COLUM. L. REV. 749, 754 (2003) (arguing prosecutors and agents are members of a “working group,” with each side monitoring the other). Interestingly, the United Kingdom has long followed a different model where the prosecutor is, in essence, counsel for the police. Flowers, *supra* note 33, at 928–29. Given these distinct prosecutorial roles in the United Kingdom and the United States, some commentators suggest that the lineage of the American prosecutor is properly traced to the European inquisitorial tradition rather than the English common law adversarial model. See LEWIS KATZ, JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 16–17 (1972); see also Richard S. Frase, *Comparative Criminal Justice As a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 542–43 (1990) (suggesting that there are similarities between the American criminal justice system and the European inquisitorial tradition).

35. Federal grand jurors are prohibited from disclosing matters occurring before the grand jury, as are any government attorney or others present at the proceeding. See FED. R. CRIM. P. 6(e)(2)(B). The secrecy of grand jury proceedings has been zealously guarded to ensure free deliberations, prevent subornation of perjury or witness tampering, encourage disclosure by those who may have information relevant to the crime, and protect targets from disclosure of the fact that they were under investigation. See James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 557–58 n.165 (2006) (quoting *United States v. John Doe, Inc.*, 481 U.S. 102, 110 (1987)).

36. See Richman, *supra* note 34, at 756–57. See generally U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL (1997).

37. See MODEL RULES OF PROF’L CONDUCT r.r. 3.6, 3.8; see also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS std. 1.2(d)(iv) (describing a prosecutor’s duty of confidentiality: “The prosecutor should [during criminal investigation] . . . seek in most circumstances to maintain the secrecy and confidentiality of criminal investigations”).

38. An examiner may not serve as the trustee or counsel to the trustee in any case in which he previously served as examiner. See 11 U.S.C. § 321(b) (2012) (disqualifying examiner from serving as trustee); *id.* § 327(f) (disqualifying examiner from employment by trustee). Ordinarily, an examiner lacks standing to assert estate causes of action. In a few cases, courts nevertheless have authorized examiners to assert estate causes of action they found to have merit in the course of their investigation. See *In re Carnegie Int’l Corp.*, 51 B.R. 252, 254 (Bankr. S.D. Ind. 1984) (authorizing examiner to sue on behalf of the estate after filing of examiner’s report); Kit Weitnauer, *Should an Examiner Prosecute Claims? A Response to Proposed Changes to the Role of Examiner Contained in the Second Report of SABRE*, 24 AM. BANKR. INST. J. 50, 76 (2005). This practice seems inconsistent with the spirit, if not the letter, of §§ 321(b) and 327(f), which evince a concern that an examiner might have an economic incentive to recommend appointment of a trustee if he were eligible to fill that office or serve as counsel to the trustee. See 3 COLLIER ON BANKRUPTCY, *supra* note 13, ¶ 321. Similar considerations suggest that an examiner should not be able to profit personally from the prosecution of any cause of action he is charged with investigating and assessing.

39. Although at present it has no generally accepted regulatory framework, international arbitration may provide another, especially apt, analog to the inquisitorial bankruptcy

quandaries and considerations, which require a code of ethics tailored to his role if he is to achieve fully the promise of improving Chapter 11 through the introduction of inquisitorial investigative methods. This Article is my attempt to point the way toward guidelines that will regulate the conduct of examiners to mitigate real, potential, and perceived abuses.

Part I describes in broad terms how an inquisitorial investigation in Chapter 11 might proceed, abstracting from the experiences of examiners in the *In re Tribune Co.*,⁴⁰ *In re Dynegy, Inc.*,⁴¹ and *In re Residential Capital, LLC*⁴² (“*ResCap*”)—cases that I have discussed at length elsewhere.⁴³ Part II identifies the ethical framework within which inquisitorial examiners properly work. Part III addresses selected issues and offers more specific suggestions for regulating the conduct of examiners to mitigate abuse and further the legitimacy of such investigations.

I. THE INQUISITORIAL EXAMINER

Modern inquisitorial civil process does not exclude the parties in interest from participating in the investigation. Rather, it looks to the parties to help frame the issues and gather the evidence.⁴⁴ Accordingly, after employing

examiner. Scholars have long noted that the adversarial and inquisitorial traditions have been somewhat ambivalently and imprecisely commingled in the international arbitration context. William Karl Wilburn, *Mix and Match: Divergent Legal Traditions in International Arbitration*, 43 MD. B.J. 4, 9–10 (2010) (“It is imperative that a party knows under which tradition the arbitration will be conducted—or whether the arbitral process is a hybrid—because this will determine many aspects of the hearing and arbitration generally Often, rules of the administrative organization may not specifically refer to ‘adversarial’ or ‘inquisitorial’—more likely, these differences are only apparent from a close examination of the rules and their interrelationship. . . . The nationality and training of the arbitrators may also dictate how they will conduct the arbitration. For example, an arbitrator from a Civil Code country may tend to ask questions of the parties and the witnesses during the arbitration proceeding, whereas an American arbitrator may be more inclined to allow the parties’ counsel to ask questions, interfering only when the arbitrator feels that he or she requires information not addressed by counsel’s questioning or the evidence presented.”); see also Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT’L 59 (2002); Urs Martin Laeuchli, *Civil and Common Law: Contrast and Synthesis in International Arbitration*, 62 DISP. RESOL. J. 81 (2007); Hyun Song Shin, *Adversarial and Inquisitorial Procedures in Arbitration*, 29 RAND J. ECON. 378 (1998). Because arbitration is a creature of contract, parties have a special opportunity in this realm to define the investigative powers and protocols of the investigating neutral, though it appears that to date little thought has been given to this possibility. To the extent that the bankruptcy model described above is refined and proves successful, one can hope that sophisticated parties may by contract begin to consciously export that model into international arbitration.

40. No. 08-BR-13141 (Bankr. D. Del. Dec. 8, 2008).

41. No. 11-BR-38111 (Bankr. S.D.N.Y. Nov. 7, 2011).

42. No. 12-BR-12020 (Bankr. S.D.N.Y. May 14, 2012).

43. Bussel, *supra* note 1 (manuscript at 44–56) (discussing *Tribune*); *id.* (manuscript at 56–59) (discussing *Dynegy*); *id.* (manuscript at 60–63) (discussing *ResCap*).

44. *Id.* (manuscript at 20–24) (describing role of parties in modern European civil practice); see also Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1260–73 (2005) (discussing modern French civil practice); Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT’L L. 61, 69 (2003) (describing modern German civil practice).

his own legal counsel (and perhaps financial or other neutral experts),⁴⁵ a newly minted examiner following the *Tribune* model would convene a meeting with the principal parties in interest and their counsel to discuss his proposed work plan, the parties' role in the investigation and the examiner's expectations for cooperation, and issues of confidentiality and privilege. The parties would then submit their views in writing on these procedural issues, as well as the claims and defenses that they believe should be investigated and assessed. The examiner, with his counsel and financial advisors, would develop a formal work plan (including a nonbinding budget) for an investigation sufficient to enable him to assess the strength of the parties' contested claims and defenses and address the legal and factual disputes preliminarily identified. The work plan would be filed with the court and available to the parties and the public.

The parties would then submit to the examiner comprehensive legal, financial, and factual analyses of the matters under investigation in the form of opening and reply briefs. As in mediation proceedings, the briefs would be served on the examiner and the other parties, but not filed with the court, along with any documents, depositions, or analyses bearing on the factual or legal subject matter of the investigation. The parties would also identify prospective witnesses and suggest discovery to the examiner. These suggestions would not bind the examiner, but might provide a starting point for his investigation.

Authorized by the supervising court to employ compulsory process coextensive with the supervising court's jurisdiction, the examiner would then issue *subpoenae duces tecum* for documents and begin his witness interviews. As the principal fact finder, the examiner would attend all key interviews in person or by videoconference to evaluate witness demeanor and credibility, and he would actively participate in questioning. Interviews would ordinarily be under oath. The witness might have his own lawyer present but the parties would otherwise be excluded from the interviews.

45. No individual alone could possibly conduct a full investigation of a complex set of claims and defenses arising in a large Chapter 11 case. In the large cases I am talking about here, the examiner's "legal counsel" operates essentially as his staff in conducting the investigation, although it may also incidentally offer him legal advice regarding the exercise of his powers and responsibilities and represent him before the bankruptcy court in these collateral matters. It is a bit awkward to force an essentially principal-staff relationship into an attorney-client mold, but that is how these examiners have proceeded. Doing so avoids having to construct a special set of privileges and duties as between the examiner and his staff; the attorney-client mold serves well enough when the examiner undertakes the essentially legal responsibility of conducting an investigation. I note, however, that unlike the case of debtors and trustees, the Bankruptcy Code does not expressly contemplate that an examiner may retain professionals. *In re Southmark Corp.*, 113 B.R. 280, 281 (Bankr. N.D. Tex. 1990) ("The [Bankruptcy] Code does not specifically authorize an examiner to retain professional persons to assist in the performance of the examiner's duties. . . . The court may, however, issue any order necessary or appropriate to carry out the provisions of the Code."); *In re Tighe Mercantile, Inc.*, 62 B.R. 995, 1000 (Bankr. S.D. Cal. 1986) ("This Court holds that in appropriate circumstances, a bankruptcy court may rely on [11 U.S.C.] § 105(a) [bankruptcy court power to issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code] to authorize examiners to employ professional persons.").

Interviews would not be traditional adversary depositions. No evidentiary objections to questions or lines of inquiry would be made (or waived), save only assertions of privilege, which if not satisfactorily resolved informally between the examiner and the witness, might be submitted to the court for a ruling. Unlike a deposition, witness examinations would be informal (albeit under oath and recorded) with the examiner, examiner's counsel, witness, and witness's counsel engaging in colloquy, narrative exposition, and posing questions and offering clarifications under the examiner's general direction and control. Contending parties and their lawyers, however, would not attend the interviews or have any right to have their suggested lines of inquiry pursued. The examiner might also interview multiple witnesses testifying on the same basic issues together at the same time to permit interchange and discussion between the witnesses, especially in order to clarify conflicting expert testimony regarding technical matters such as valuation.⁴⁶ Witnesses might be reinterviewed as necessary as the investigation proceeds.

Meanwhile, the examiner's financial advisor, working with his counsel, would develop any necessary financial analysis of the issues presented—for example, disputed questions relating to solvency, valuation, and relevant industry and general economic conditions, building on whatever prior work the parties and their financial advisors had made available to the examiner.⁴⁷

46. Kenneth Klee employed this device in *Tribune*. Bussel, *supra* note 1 (manuscript at 51). A version of this technique of concurrently examining multiple witnesses (known colloquially as “hot-tubbing”) is now in wide use in Australia, as a means of tempering some of the worst excesses of the adversary presentation of expert testimony. See e.g., *Federal Court of Australia Rules* 2011 (Cth) r.r. 23.12–.13; MICHAEL LEGG, *CASE MANAGEMENT AND COMPLEX CIVIL LITIGATION* 115 (Federation Press 2011); Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 L. & CONTEMP. PROBS. 159, 182–86 (2009). The practice appears to be spreading to international arbitration. See Doug Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, 24 ARB. INT'L 1, 146–48 (2008) (“Hot tubbing is frequently used in international arbitration hearings. Given the more flexible and informal nature of international arbitration, it is probably better suited to arbitral proceedings than traditional litigious methods of calling expert evidence.”). It may even make it to the great bastion of adversary practice here in the United States. DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 11.5, at 498 (2d ed. 2002) (suggesting that trial courts “[p]ermit experts from both sides not only to communicate with one another, but to testify concurrently, sitting together on a panel in which the various experts hear each other’s statements, comment on them, and possibly ask questions of each other”).

47. This use of neutral financial experts differs dramatically from usual American practice in which the parties separately engage competing experts to work with the legal team of the side engaging them, produce competing reports, and then separately testify subject to cross-examination. Although the Federal Rules of Evidence expressly authorize the court to select and engage (at the parties’ expense) an independent expert, FED. R. EVID. 706, this power is rarely invoked. See Jennifer Mnookin, *Expert Evidence, Partisanship & Epistemic Competence*, 73 BROOK. L. REV. 1009, 1021 n.31 (2008); see also Andrew W. Jurs, *Questions from the Bench and Independent Experts: A Study of the Practices of State Court Judges*, 74 U. PITT. L. REV. 47, 51–52 (2012) (“Regarding use of independent experts with Rule 706, 10 [percent] use the technique in cases with various types of expert

In the assessment phase of the investigation, the examiner, with his advisors, would weigh the relative positions of the parties and analyze the estate's potential remedies and the resulting effect on various creditor constituencies. In *Tribune*, for example, the examiner set out his independent merits conclusion as to each issue on the following continuum: (1) highly likely, (2) reasonably likely, (3) somewhat likely, (4) equipoise,⁴⁸ (5) somewhat unlikely, (6) reasonably unlikely, and (7) highly unlikely.⁴⁹ Findings and conclusions on this spectrum were supported by a four-volume report, containing more than 1400 pages of factual narrative and legal analysis, with 4600 footnotes.⁵⁰ In addition to referencing Klee's witness interviews, the report cited some six hundred case authorities and 1100 exhibits in support of its findings and conclusions.⁵¹

The examiner would file a comprehensive, public report with the bankruptcy court, thus concluding the investigation. As I have previously suggested,⁵² in subsequent judicial proceedings, this report should be viewed as the equivalent of a report and recommendation filed by a bankruptcy judge in connection with a noncore matter.⁵³

II. ETHICAL FRAMEWORK

I view the core of the inquisitorial examiner's role as publicly, honestly, and fully setting forth his findings and opinions in writing, following diligent investigation into the matters assigned to him by the court. Unlike the zealous advocate, an examiner has no client from whom he takes direction and to whom he owes undivided loyalty. Unlike a judge, he does not preside passively over an adversary contest from which truth will hopefully emerge; he actively seeks out the truth with the assistance of his own staff.⁵⁴ Unlike a mediator, he is not vested in obtaining party consent to a settlement; settlement—if it occurs—is merely incidental to his primary mission of bringing the operative facts to light and furnishing an expert assessment of their legal implications.

testimony, 16 [percent] would use it only in cases with complex expert testimony, and 74 [percent] would not appoint an expert under Rule 706.”).

48. There is some ambiguity in the *Tribune* Report's use of “equipoise.” In most instances, context suggests that “equipoise” is a determination that after full investigation, Klee found the matter evenly balanced and its resolution essentially a coin-flip. In other instances, however, the Klee Report suggests that matters outside the scope of the investigation were treated as in equipoise. Correspondence with Lee R. Bogdanoff, Esq. (Jan. 7, 2016) (on file with author).

49. *In re Tribune Company*, No. 08-BR-13141 (Bankr. D. Del. Aug. 3, 2010).

50. *Id.*

51. *Id.*

52. See Bussel, *supra* note 1 (manuscript at 94–95 & nn.295–96) and accompanying text.

53. See 28 U.S.C. § 157(c)(1) (2012). Although such reports are subject to de novo review in the federal district court, such review is generally conducted on the written record compiled below and may not, as a practical matter, differ significantly from ordinary appellate review. Daniel J. Bussel, *Power, Authority and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1068 n.28 (1994).

54. *But see supra* note 45.

Although an examiner is neither advocate, nor judge, nor mediator, he shares attributes with each of them. Like the advocate, he uses the tools of compulsory process to obtain the facts and his legal training to analyze and opine on the law. Like the judge, he seeks to determine impartially the facts and apply the law. Like the mediator, he operates largely outside of the due process constraints of the adversary system. And an examiner, like these other legal professionals, is expected to be free of conflicts of interest with respect to the matter for which he has been engaged.

In seeking the truth, the examiner must:

- remain neutral and unbiased;
- treat the parties and witnesses fairly, honestly, and consistently with their constitutional and legal rights;
- provide the parties ample opportunity to inform the investigation with evidence and argument of their own;
- diligently seek out relevant evidence;
- obtain unbiased expert assistance as necessary; impartially exercise independent judgment in determining the facts and the law;
- keep the court and the public informed;
- respect the supervising court's authority to direct and manage the investigation and its costs; and
- keep his investigation within reasonable bounds in terms of scope, costs, and duration in light of the private stakes, the public interest, and the potential negative impact of the investigation on any pending reorganization.

Moreover, an examiner has a duty to the court and the public to make his methods and his findings transparent and to set forth conscientiously his full and honest professional opinions based on diligent investigation and research.

This conception of the inquisitorial examiner's role has ethical implications for the conduct of these investigations that varies from the duties imposed on advocates, judges, and mediators in significant ways:

- With no client to obtain waivers from, conflict of interest rules must be drawn narrowly to ensure impartiality rather than loyalty.⁵⁵ Those narrower duties, however, may extend into the future after the examination is over. Examiners are disqualified from future representation of parties in the proceedings or related matters to guard against the prospect of future employment opportunities affecting the examination itself.⁵⁶

55. See generally Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEG. ETHICS 207 (2012) (criticizing expansive loyalty-based construction of American lawyers' conflict of interest rules).

56. Modern American lawyers' ethical codes draw sharp distinctions between present and former clients. Duties to the client, particularly with respect to the representation of

- Transparency, not confidentiality, takes center stage. Examiners must make disclosures that other professionals are not required, and may not be permitted, to make.
- Examiners should generally be immune from malpractice or other civil liability, placing even greater pressure on internal ethical constraints and ongoing court supervision.
- The proper scope of privileges must reflect the special relationships between the examiner and the bankruptcy estate and the examiner and his retained professionals, and it must limit opportunities for strategic manipulation of the examination by the parties in order to obtain advantages in subsequent litigation.
- Delegation must be limited. The examiner is selected and employed because his personal credibility will be attached to the report finding the facts and setting forth his legal analysis.
- The obligations of the examiner vis-à-vis the supervising court, the parties, and the witnesses vary from the ordinary expectations in the adversary system. Inquisitorial evidence gathering permits *ex parte* proceedings, informal questioning, and disregard of evidentiary rules. These special privileges, however, must be subject to recognition of limited participatory rights, for the parties to protect due process values, and to a commitment to fair treatment of witnesses. The legal rights and privileges of both parties and witnesses must be honored, of course, but these duties to ensure fairness to the parties and witnesses extend beyond narrowly protecting their clearly established legal rights.
- The examiner must exercise sound discretion in determining the scope, timing, and cost of the investigation in light of the effect of the investigation on the overall proceeding and the interests of the parties and the public.

III. SPECIFIC ETHICAL ISSUES

Part III offers more detailed observations on specific ethical issues raised by inquisitorial examiners under five categories: (a) due process concerns; (b) *ex parte* witness examination; (c) privileges and quasi-judicial immunity; (d) duties to the court and public; and (e) maintaining impartiality.

A. *Due Process Values*

The historic Achilles heel of inquisitorial process is its due process deficit.⁵⁷ Examiners can ensure a better and a better-accepted process by

potentially conflicting interests, are limited once the engagement has concluded. In the examiner context, however, the Bankruptcy Code quite clearly bars an examiner from serving as a trustee or counsel for the trustee in the case even after the conclusion of the examination. *See* 11 U.S.C. §§ 321(b), 327(f) (2012).

57. American courts sometimes conflate due process with adversarial justice. *See, e.g.*, *Rogers v. Richmond*, 365 U.S. 534, 541, 547–49 (1961) (holding involuntary confessions are

inviting the parties to define the claims and defenses at issue, offer evidence in support of their positions on those claims and defenses, and offer suggestions about witnesses, documents, and lines of inquiry for the examiner to investigate. As the investigation proceeds, there is nothing wrong with going back to the parties, informing them of what has been found, and asking for further suggestions.

To be sure, the alternative of fixing fair rules and then letting the parties duke it out under the supervision of a neutral umpire is one vision of due process rooted in the common law tradition.⁵⁸ Rules governing adversary litigation may do a better job of respecting the parties' autonomy and ensuring an even-handed fight between them than any form of inquisitorial process, at least if the parties are well represented and have comparable resources. Due process values, however, can still be honored (perhaps as well—perhaps only sufficiently to pass constitutional muster) by adopting the perspective of the inquisitorial model. We can learn from modern European civil procedure in this regard.⁵⁹

B. Deposing Witnesses and Regulating Ex Parte Contacts

The examiner may compel production of evidence and confront and reconfront witnesses as the investigation proceeds, recalling them as necessary. Witness interviews should be conducted in the European mode. The examiner should control all questioning, and traditional party cross-examination should be prohibited. The examiner should feel free to take narrative testimony and free the interview process from technical evidentiary rules (while preserving any evidentiary objections that may exist for a future adversary process if necessary). Discussion among the witness(es),⁶⁰ the examiner, his counsel, and the witness's counsel—as opposed to strict question and answer—may be conducive to getting at the truth. Requiring oaths and stenographic recording should be at examiner discretion. There may be situations where the only way to obtain witness cooperation is to go off the record. But in general, there are notable advantages to having the witness under oath and on the record. It eliminates quibbling about the accuracy or completeness of notes, aids the examiner in preparing and documenting his report, and is consistent with due process values. Moreover, the background threat of a perjury prosecution may dissuade witnesses who might otherwise be inclined to

disallowed under the Due Process Clause because “ours is an accusatorial and not an inquisitorial system”). Adversarial trial is often viewed as the benchmark against which due process is measured. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (suggesting that due process may dictate “that a hearing closely approximating a judicial trial is necessary”). *But see Kessler, supra* note 44, at 1181 (“[C]ontrary to our tendency to view inquisitorial procedure as unfair, equity procedure was deeply committed to due process.”).

58. *See supra* note 57 and accompanying text.

59. *See Kessler, supra* note 44, at 1267–70 (discussing French *principe du contradictoire*); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985) (“[B]y assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice.”).

60. *See supra* note 46 and accompanying text.

distort the facts or not reveal the whole truth. The examiner must ensure that the informal and ex parte nature of the witness interviews are not exploited to take unfair advantage of the witness, particularly a witness not represented by counsel at the interview.⁶¹

C. Privileges

The unique position of inquisitorial examiner raises a series of important questions concerning the proper scope and application of privileges and judicial immunity.

1. The Debtor's Privileged Material

Perhaps the most contentious methodological issue raised by inquisitorial examinations is whether the examiner, like a bankruptcy trustee,⁶² will have access to the debtor's privileged communications and work product⁶³ and

61. Many of these same ethical issues are raised by administrative investigations, but unfortunately there seems to be scant authority or commentary dealing with the proper conduct of such investigations or setting prudential or ethical boundaries. Of course, the Fourth and Fifth Amendments serve as outer boundaries on administrative investigative discretion, but Congress appears to have imposed few additional limits. See RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 275 (5th ed. 2010); see also *id.* at 276–77 (“What has happened, in broad perspective, is that regulatory agencies operating under such statutes have obtained essentially all the information they have sought from private parties. The barriers to reasonable investigation vanished through *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Agencies now conduct investigations to make rules, to determine policy, to recommend legislation, and to illuminate areas in order to find out whether something should be done and if so what.”). The breadth of these statutory powers and the penalties attached to defiance are such that ordinarily most agencies are able to obtain most of the information that they desire from private parties on a voluntary basis. PIERCE, *supra*, at 275. Moreover, modern Fourth Amendment jurisprudence on administrative searches is highly deferential, affording agencies wide discretion to conduct warrantless searches on less than probable cause at least in the increasingly large number of pervasively regulated industries or in matters touching on the ever-expanding domain of national security. *Id.* at 302–03. Fifth Amendment protections have also weakened over time in the administrative context. *Id.* at 315–16 (“Six main ways around the privilege against self-incrimination have cut down the protection to a smaller and smaller area with respect to compulsory production of records. The following six sections of the treatise deal with the six ways of reducing the protection with respect to records. The six are: (1) Records of corporations and other organizations, even including a partnership of three partners, are not subject to the privilege. (2) One person's records in the custody of another person may be denied the privilege. (3) Records of a person ‘not compelled to do anything’ may be used. (4) A person given immunity may be compelled to be a witness against himself. (5) Records required to be kept are outside the privilege. (6) Compulsory reporting is often permissible.”).

62. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985).

63. This discussion assumes a corporate debtor. Corporations may assert attorney-client privilege, but the privilege is controlled by the corporation's incumbent management at the time access or waiver is sought. See *id.* at 348 n.4. See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Future management thus have access and control over privileged documents and communications relating to legal advice obtained by prior management. See *Weintraub*, 471 U.S. at 343 (“New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors.”). The bankruptcy trustee's control of the corporate privilege is therefore only

the authority to publicly disclose privileged material.⁶⁴ Bankruptcy trustees, of course, directly control the corporate debtor's privilege. The U.S. Supreme Court has held:

In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. . . . It would often be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. The Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to retain the one management power that might effectively thwart an investigation into their own conduct.⁶⁵

For examiners to credibly exercise the trustee's investigative powers, they too require access to the debtor's privileged material. Such access places an investigative examiner in a position comparable to the trustee or debtor in possession who would otherwise be doing the investigating.⁶⁶

Weighing on the opposite side of the privilege debate is the fact that, unlike a trustee, an investigative examiner does not ordinarily step into the shoes of management and oust the board of directors.⁶⁷ During the course of the examination, the debtor's management and board remains in place and continues to have access to, and control over, the debtor's privileged material.

An investigative examiner's position with respect to privileged material is analogous to that of outside counsel engaged by a corporation to conduct an independent investigation. Such counsel has access to privileged material on the authority of the board—that access may greatly facilitate and inform the investigation—but counsel does not control the privilege, and the disclosure of privileged material to such counsel is not a waiver.⁶⁸ Nor may such counsel disclose privileged material without obtaining client or judicial authority.⁶⁹

a special, albeit particularly harsh, application of the general principles governing the assertion of the corporate privilege. Different issues are raised in the case of debtors who are natural persons.

64. Cf. A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875 (2009) (suggesting management be disinterested and able to protect the interests of all parties to the bankruptcy). See generally Jeffery A. Deller, *Examining the Examiner: Waiver of the Attorney-Client Privilege and the Outer Limits of an Examiner's Powers in Bankruptcy*, 43 DUQ. L. REV. 187 (2005).

65. *Weintraub*, 471 U.S. at 353–54.

66. See *supra* note 63.

67. See *supra* note 63.

68. A contrary rule finding waiver merely by confidential disclosure to the examiner could potentially severely disadvantage the bankruptcy estate in the event that the subject matter of the investigation evolves into future litigation with nondebtor defendants.

69. See, e.g., MODEL RULES OF PROF'L RESPONSIBILITY r.r. 1.6(a), (b)(6).

So too an examiner. He should have unfettered access to the debtor's privileged material,⁷⁰ but his access to the material should not be deemed a waiver of the privilege, nor should he be permitted to disclose the material to others without the debtor's consent. If the debtor objects to examiner access to privileged material, which the examiner believes essential to the credibility of his investigation, the issue, like other privilege disputes, must be brought to the court's attention on a confidential basis.⁷¹ Similarly, the court will have to resolve disputes between the examiner and the debtor over subsequent disclosure of privileged material essential to support the examiner's findings in his report.

2. Internal Work Product and Communication with Examiner Professionals

Perhaps the greatest strength of the inquisitorial model is that it avoids the sometimes absurd and often troubling adversary "battle of the experts." Examiners employ unconflicted experts of their choosing who are responsible to them and not the parties.⁷² Examiners and their counsel must be able to maintain confidential communications with their experts. Those experts' preliminary work product, like that of the examiners' attorneys and other advisors, should be treated as privileged work product with the privilege held directly by the examiner and not the debtor.⁷³ To the extent that examiners rely on experts' opinions in formulating their own findings and conclusions, however, the basis for those expert opinions should be disclosed in their reports and public supporting documentation.

70. Nothing in this discussion is intended to suggest that the appointment of an examiner somehow waives privileges of nondebtor parties or grants the examiner access to privileged material of nondebtor parties that would not otherwise be subject to subpoena.

71. In *Tribune*, and presumably other cases, the parties finessed the debtor's privilege issues through a process whereby the debtor would broadly deny access to privileged material but then selectively disclose privileged documents to Klee and his professionals at his specific request on a case-by-case basis. These arrangements successfully avoided litigation between Klee and Tribune over privilege issues. See Bussel, *supra* note 1 (manuscript at 93 n.288). In *In re Enron Corp.*, No. 01-BR-16034 (Bankr. S.D.N.Y. Dec. 21, 2001), the court gave the examiner authority to waive Enron's privileges at the time of appointment. Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN. ST. L. REV. 381, 443-44 (2005).

72. See *supra* note 47.

73. See Fed. R. Civ. P. 26(b)(4) (as amended in 2010, to extend work product privilege to materials and communications prepared by testifying expert). Attempts by parties and government authorities to obtain examiner work product by subpoena have been litigated and rejected in a few cases. See *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 428, 433 (S.D.N.Y. 1993) (denying discovery of examiner work product); *In re Baldwin-United Corp.*, 46 B.R. 314 (Bankr. S.D. Ohio 1985); *United States v. Rice*, No. 03-0093 (S.D. Tex. 2003); see also *Viet. Veterans Found. v. Erdman*, 1987 U.S. Dist. LEXIS 16952 (D.D.C. Mar. 19, 1987) (disqualifying examiner as witness in subsequent proceeding). Note that *ex parte* examiner communications with the court are generally forbidden, FED. R. BANKR. P. 9003(a), and accordingly, such communications should be on the record and not subject to any work product privilege.

3. *Barton* Status and Immunities

Examiner independence is as critical as judicial independence to the credibility and fairness of the process. Parties should not be able to threaten an examiner with suit or onerous discovery when dissatisfied with his findings or use him as a pawn in post-investigation negotiations or litigation. Subjecting examiners to harassment through discovery or suits will discourage qualified individuals from serving in future cases.

If a party has concerns about the examiner's report, it should bring its complaint to the bankruptcy judge in the form of demanding a review of the examiner's findings and conclusions employing traditional adversary process in accordance with the rules governing review of a report and recommendation.⁷⁴ Examiners should receive not only the protection of the *Barton v. Barbour*⁷⁵ doctrine, requiring that a party seeking to sue a court-appointed receiver must first obtain leave of the appointing court, but also quasi-judicial immunity for all acts taken in their investigative capacity.⁷⁶ A court-appointed examiner conducting an investigation and reporting back to the court and the parties is clearly exercising a judicial function. In filing a public report and publishing a supporting investigative record of exhibits, the examiner fulfills his responsibility to the court, parties, and public in making the facts available. Beyond that, absent truly exceptional circumstances, further discovery of the examiner is neither necessary nor appropriate.⁷⁷

74. *But see supra* note 53.

75. 104 U.S. 126 (1881); *see also* *Muratore v. Darr*, 375 F.3d 140, 147 (1st Cir. 2004); *SIPC v. Bernard L. Madoff Inv. Sec.*, 460 B.R. 106, 116 (Bankr. S.D.N.Y. 2011) (“[The *Barton*] doctrine has become a black letter one.”). The *Barton* doctrine has expanded beyond receiverships to include bankruptcy trustees and other bankruptcy court-appointed fiduciaries, with the effect of immunizing those fiduciaries from suit outside their supervising court. *See, e.g., In re VistaCare Grp.*, 678 F.3d 218, 224 (3d Cir. 2012) (Chapter 7 trustee); *In re Castillo*, 297 F.3d 940 (9th Cir. 2002) (standing Chapter 13 trustee); *see also* ABI REPORT, *supra* note 7, at 43 (recommending codification and extension of *Barton* doctrine to estate neutrals).

76. *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435–36 (1993) (test for quasi-judicial immunity); *In re Cedar Funding, Inc.*, 419 B.R. 807, 821–823 (B.A.P. 9th Cir. 2009) (conferring quasi-judicial immunity on bankruptcy trustee for torts committed in his investigative capacity); *Castillo*, 297 F.3d at 950 (holding that a bankruptcy trustee exercising judicial functions is entitled to quasi-judicial immunity). Bankruptcy trustees, of course, perform many nonjudicial tasks in operating the debtor's business and managing its property and do not enjoy absolute quasi-judicial immunity when acting in that capacity. *See* 28 U.S.C. § 959 (2012) (trustee's capacity to be sued and duty to obey applicable nonbankruptcy law); 11 U.S.C. § 323(b) (trustee's capacity to sue and be sued). To the extent that an examiner is given expanded powers under 11 U.S.C. § 1106(b) that encompass comparable noninvestigative duties, then his liability should track that which is imposed on a bankruptcy trustee.

77. *See, e.g., In re New Century TRS Holdings, Inc.*, 407 B.R. 558, 566 (Bankr. D. Del. 2009) (approving examiner's transfer to liquidating trustee of evidentiary materials for use in future liquidation); *In re Baldwin United Corp.*, 46 B.R. 314, 316–17 (Bankr. S.D. Ohio 1985) (“[T]he Examiner, as a nonparty to any proceeding and a nonadversarial officer of the Court, is entitled to some immunity from the whirlwind of litigation commonly attendant to large Chapter 11 cases.”).

D. Duties to the Process and the Public

Examiners also are obligated to protect the interests of the public in assuring impartial, transparent, and cost-effective investigation.

1. Exercise Impartial Independent Judgment on the Merits

The examiner must reach and communicate his findings and conclusions on the key disputed factual and legal issues so that the parties and the court understand how the examiner, having concluded his investigation, would resolve the matter. The *In re Revco, D.S., Inc.*⁷⁸ model of using examiners to simply weed out legally meritless claims and defenses fails to make adequate use of the power of inquisitorial investigation to resolve disputes.⁷⁹

2. Transparency

Transparency is a key advantage of examiner investigations over settlement and litigation. The examiner's report together with the crucial supporting evidence should be publicly available except in extraordinary circumstances or to protect privileges as discussed above.⁸⁰ An examiner's investigation should result in a public, fully documented written report describing what he did, what he found, and what he thinks it means. If the examiner is a sophisticated neutral, and given sufficient resources to employ the requisite professionals to assist him, the public receives a thorough, objective analysis of what happened and the resulting legal implications.

As third party and public interests increase in weight, so does the value of transparency, even apart from the social interest in the vindication of third-party legal rights and the deterrence of future misbehavior. Fostering a public perception that justice has been done in the context of catastrophic business failures is an important independent value advanced by the transparency afforded by an independent, fully disclosed investigation.

Of course, transparency alone is insufficient. The value of an examiner's investigation is also a function of the credibility of the examiner himself. Certainly one can imagine corrupt inquisitorial systems where neither the parties nor the public have confidence in the integrity of the inquisitor or his investigation. The appointed examiner's reputation for competence, integrity, and disinterestedness is critical to achieving the goal of legitimacy.

78. 118 B.R. 468, (Bankr. N.D. Ohio 1990); *In re Revco, D.S., Inc.*, 1990 Bankr. LEXIS 2966 (Bankr. N.D. Ohio Dec. 17, 1990).

79. See Bussel, *supra* note 1 (manuscript at 36–39 & nn.115–30) (discussing the *Revco* model); *supra* note 1 and accompanying text.

80. See text accompanying notes 62–73; Bussel, *supra* note 1 (manuscript at 72 & n.233, 91–93 & nn.282–88); *supra* note 1 and accompanying text.

3. Controlling Expense and Delay

Inquisitorial investigations can cost a lot of money. The examiner's own fees are inconsequential in the context of a large Chapter 11 case, but his team of legal and financial professionals can be very expensive. Judges can fix budgets for examiners and their professionals, but a credible neutral investigation easily can cost tens of millions of dollars, and in the two largest cases, *In re Enron Corp.*⁸¹ and *In re Lehman Brothers Holdings, Inc.*,⁸² examiners incurred more than \$100 million in direct fees and costs.⁸³ Moreover, despite all hopes, these costs may actually not reduce subsequent costs of settlement or adversary litigation if the examination fails to result in a prompt resolution.

Expense and delay are longstanding problems for inquisitorial investigations. In some civil law systems (such as Italy), there is a general consensus that the civil justice system has suffered a complete breakdown because of these factors.⁸⁴ Budgets and work plans must be flexible as investigations evolve, but courts should demand them, and continuously monitor performance under them, to keep costs and scope under control. But the examiner also bears responsibility for monitoring and controlling

81. No. 01-BR-16034 (Bankr. S.D.N.Y. Dec. 21, 2001).

82. No. 08-BR-13555 (Bankr. S.D.N.Y. Sept. 15, 2008).

83. Neal Batson, the *Enron* examiner, and his professionals had combined fees just over \$100 million. Lipson, *supra* note 7, at 53 n.214. Anton Valukas, the *Lehman* examiner, and his professionals also collectively charged approximately \$100 million in fees and expenses. See Final Fee Order of Mr. Valukas and Jenner & Block, *In re Lehman Bros. Holdings* (No. 27571) (Apr. 24, 2012) (allowing fees of \$51,271,850 and expenses \$7,906,417); Final Fee Order of Duff & Phelps, *In re Lehman Bros.* (No. 23513) (Dec. 16, 2011) (allowing fees of \$42,340,075 and expenses \$781,457). In assessing the cost of these examinations, it is important to recognize the unprecedented scope and complexity of the *Enron* and *Lehman Brothers* investigations. In *Tribune*, *ResCap*, and *Dynegy*, the investigations focused on specific widely publicized transactions about which complaints had been raised. See Bussel, *supra* note 1 (manuscript at 15). The *Enron* and *Lehman Brothers* examinations, in contrast, were not about any specific transaction so much as they were broad-based inquiries into the causes of two of the most shocking and sudden corporate collapses in American history. *Enron* and *Lehman Brothers* involved businesses so complex that their own managements did not understand the scope and magnitude of the risks that had been assumed, and the ripple effects of their sudden catastrophic failures were of national economic importance. Both events ultimately resulted in substantial legislative and regulatory changes, most notoriously the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). It is unclear how investigations of this nature fit within any traditional form of civil legal process, adversarial or inquisitorial. They are perhaps more akin to something like the Iran-Contra investigation or the 9/11 Commission. See, e.g., NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

84. Elisabetta Silvestri, *Goals of Civil Justice When Nothing Works: The Case of Italy*, in GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS 79–101 (Alan Uzelac ed., 2014). Although Italy historically and popularly is classified as an inquisitorial system, modern Italian procedure delegates the fact-gathering and presentation processes to the parties. *Id.* at 94–95; see also SIMONA GROSSI & MARIA CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE 59–60 (2010) (discussing extensive delays in civil litigation in Italy and comparing U.S. practice). Of course, English Chancery, with its Roman canon law methods, was also notoriously slow and costly.

costs and preventing delay. Deadlines and budgets are important mechanisms for imposing discipline on the process.

4. Minimizing the Threat to Reorganization Posed by Investigation

Inquisitorial investigations also take time. Delay, and the substantive recommendations of the examiner, may disrupt the momentum toward confirming an otherwise desirable reorganization plan or undermine a fragile consensus around such a plan. (Of course, adversary litigation is likely to be even more disruptive.) When value-maximizing transactions are available, holding them in abeyance pending an investigation may be undesirable or impractical. Moreover, doing so may shift the focus of the case to litigation rather than more constructive and forward-looking legal and financial solutions to business failures. Investigation may breed, rather than resolve, litigation and impede more constructive reorganization efforts. Examiners must be sensitive to these potential costs and exercise internal restraint or seek guidance from the supervising court when it appears these costs are mounting. Perhaps most importantly, examiners (and their supervising courts) can mitigate this risk by expediting their work.

5. Inspector Javert Risk⁸⁵

An independent examiner investigating one case to the exclusion of all other professional activity, and given ample resources to do so, may fall victim to overzealousness. Judges and parties considering examiner appointments may fear that the examiner will over investigate and expend resources and delay resolution of the case beyond what is appropriate in obsessive pursuit of a narrow investigative agenda.

In this regard, the experience under Title VI of the Ethics in Government Act of 1978⁸⁶ is a cautionary tale. The statute was passed in the wake of the Watergate scandal to ensure independent federal criminal investigations and, when appropriate, prosecutions of high-level government officials.⁸⁷ Although it survived a constitutional challenge on separation of powers grounds,⁸⁸ by the end of the 1990s, the statute was widely criticized as overused, lacking sufficient oversight of investigating counsel, and spawning investigations that were sometimes wasteful, unnecessary, inconsistent with the larger public interest, and fundamentally unfair to those targeted.⁸⁹

85. Inspector Javert was the obsessive police inspector antagonist in Victor Hugo's *Les Misérables*.

86. 28 U.S.C. §§ 591–599 (1999) (as amended following reauthorization in 1994 and subsequently terminated in accordance with its terms under 28 U.S.C. § 598).

87. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988).

88. See *id.* at 685–97.

89. KATY J. HARRIGER, *THE SPECIAL PROSECUTOR IN AMERICAN POLITICS* 233, 245 (2d ed. 2000) (reviewing critiques and possible solutions and concluding “[t]wenty criminal investigations in twenty years that have served to weaken the presidency of each one who has served under this regime and to further undermine the public confidence in government

Bankruptcy examiners are subject to significant constraints inapplicable to the independent counsels that mitigate the risk of overzealousness. Bankruptcy courts impose work plans and budgets on examiners and must review all professional fees for reasonableness.⁹⁰ More generally, bankruptcy courts are deeply engaged in managing the large and active bankruptcy cases before them and thus exercise considerably more supervisory authority over their appointed examiners than the Court of Appeals appointing independent counsels ever would.⁹¹ Examiners do not have the awesome responsibility of administering federal criminal law with the concomitant leverage and potential for abuse it confers over targets and witnesses. Moreover, examiners' reputational interests as members of the bankruptcy professional community may limit incentives to overinvestigate.⁹² Nevertheless, the eye-popping fee applications submitted by examiners in *Enron* and *Lehman Brothers* drew significant criticism going to the scope, length, and cost of the investigations.⁹³ Although bankruptcy examiners may, by their nature and circumstances, be less likely to fall into Inspector Javert mode than independent criminal prosecutors, the risk of overzealous investigation remains a concern. In supervising examiners, courts must remain sensitive to this risk, and examiners should be vigilant and self-aware in guarding against becoming Javert.

are surely evidence of a weighing of values that is out of kilter"); CHARLES A. JOHNSON & DANETTE BRICKMAN, INDEPENDENT COUNSEL: THE LAW AND THE INVESTIGATIONS 223, 247 (2001) (discussing critiques of the independent counsel statute and noting that by 1999, "[the law] had little support among the general public, in Congress, and from the Clinton administration, as the issues of costs, accountability, and abuse of power overwhelmed the discussion"). *But see* Julian A. Cook III, *The Independent Counsel Statute: A Premature Demise*, 1999 BYU L. REV. 1367 (defending statute).

90. *See, e.g.*, Agreed Order Directing the Appointment of an Examiner, *In re Tribune Co.*, No. 08-BR-13141 (Bankr. D. Del. Apr. 20, 2010) (requiring examiner to submit for court approval of work plan and budget); Omnibus Order Approving Final Fee Applications for Kenneth N. Klee, the Examiner, and His Professionals, *In re Tribune Co.* (Oct. 22, 2010).

91. JOHNSON & BRICKMAN, *supra* note 89, at 81–85 (discussing supervisory role of D.C. Circuit after appointment of independent counsel).

92. *See* Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 156, 195 (1990) (discussing constraints of legal culture on members of the national bankruptcy community). To the extent the examiner selected is not a regular member of the bankruptcy community, these reputational constraints may diminish.

93. *See* Bussel, *supra* note 1 (manuscript at 77 n.249) (noting that examiners in *Enron* and *Lehman Brothers* each incurred in excess of \$100 million in fees and expenses); *see also* Krista R. Fuller, *Chapter 11 Examiner: The Basics and Successfully Fulfilling the Position*, 24 AM. BANKR. INST. J. 26, 58–59 (2005); Lipson, *supra* note 7, at 53 n.214; Eric Berger, *Enron Lawyer's Inquiry Is Called "Overkill"*, HOUSTON CHRON. (May 6, 2003), <http://www.chron.com/business/enron/article/May-5-Enron-lawyer-s-inquiry-is-called-overkill-2131096.php> [perma.cc/NFP4-UCNU]. The fees of the examiner and his professionals in *ResCap* came in at over \$83 million and also drew some negative comments. *See* Joseph Checkler, *ResCap Liquidator Bashes Fees of Examiner's Lawyers, Advisees*, DAILY BANKR. REV., June 17, 2014.

E. Maintaining Impartiality and Avoiding Conflicts of Interest

Finally, examiners must avoid the appearance of impropriety that stems from holding material conflicting interests.

1. Conflicts Standards

By statute, all examiners must be “disinterested person[s].”⁹⁴ They may not be a creditor; equity security holder; director, officer, or employee of the debtor; or otherwise a statutory “insider.”⁹⁵ Nor may they hold interests materially adverse to those of the estate or its creditors or equity holders, by reason of any direct or indirect relationship to, connection with, or interest in the debtor, or for any other reason.⁹⁶

Examiner conflicts of interest are not expressly regulated by any other rule or ethical standard, although as a matter of prudence, examiners have filed verified statements under Rule 2014⁹⁷ disclosing any “connection” to the debtor, creditors, other parties in interest, other professionals involved in the case, and the U.S. Trustee.⁹⁸

94. 11 U.S.C. § 1104(d) (2012).

95. *See id.* § 101(14) (defining “disinterested person”); *id.* § 101 (31) (defining “insider”).

96. *See id.* § 101(14); *see also* FED. R. BANKR. P. 5002 (prohibiting appointments of examiners related to appointing court or applicable U.S. Trustee office or in circumstances otherwise creating an appearance of impropriety).

97. FED. R. BANKR. P. 2014. The rule on its face applies to only prospective lawyers, accountants, appraisers, auctioneers, agents, or other professionals employed under §§ 327, 1103, and 1114. *Id.* Examiners are appointed pursuant to § 1104 and not employed under any of the sections identified in Rule 2014. Moreover, the examiner’s professionals are employed under § 105(a) and not § 327. *See In re Tighe Mercantile, Inc.*, 62 B.R. 995, 999–1000 (Bankr. S.D. Cal. 1986). Rule 2014’s failure to require disclosures expressly for examiners and their professionals may simply be an oversight; examiners and examiner professionals filing verified statements under the Rule seem to assume that is the case. On the other hand, I am not aware of any routine practice of trustees who do not employ their own law firms as counsel filing verified statements under Rule 2014, although the trustee’s professionals are expressly subject to the standards of § 327 and Rule 2014. *See* 11 U.S.C. § 327; FED. R. BANKR. P. 2014. Regardless of whether Rule 2014 as drafted applies to examiners and their professionals, from a policy perspective it seems sensible to subject examiners (at least examiners who are practicing lawyers) to the same disclosure requirement as debtor’s counsel or committee counsel. Even unrelated matter connections might raise legitimate concerns about an examiner’s independence that might compromise the credibility of the investigation. For example, an examiner might not appear impartial if his law firm received a substantial portion of its revenue from a party whose conduct he was to investigate (even if that revenue was derived entirely from unrelated matters and no relevant confidential information existed).

98. It has never been entirely clear under 11 U.S.C. § 101(14)(C) what sort of “connection with . . . the debtor” constitutes a disqualifying interest “materially adverse to the [estate, creditors or equity holders]” other than falling within the statutory definition of “insider.” Rule 2014 requires disclosure of all connections, not only disqualifying connections within the meaning of § 101(14)(C), and requires disclosure of connections to all parties in interest and the U.S. Trustee, as well as the parties named in the statute. FED. R. BANKR. P. 2014. The disinterestedness requirement has drawn criticism on account of its breadth and vagueness. *See* Harvey R. Miller & Michele J. Meises, *Disinterestedness—the Chapter 11 Paradigm!*, 7 J. BANKR. L. & PRAC. 359, 359 (1998) (noting the “massive confusion and expense caused by misuse of this elusive concept” and questioned whether the requirements adds “anything of value” to bankruptcy case administration). *But see* Todd J.

The disinterestedness standard, not unlike the common law standard governing judicial recusal, focuses on competing financial interests held by the professional seeking to be employed that may be adverse to the bankruptcy estate or any creditors or shareholders.⁹⁹ Traditionally, any financial interest no matter how minor might disqualify a judge, but other sorts of connections to the parties, their professionals, or the matter *sub judice* would not force recusal, although they might be a basis for voluntary recusal.¹⁰⁰ Modern codes of judicial conduct are framed in broader terms, requiring recusal in the event that the judge's impartiality might reasonably be questioned.¹⁰¹ Prior involvement in the matter *sub judice* or close personal or professional relationships with the litigants or their professionals, as well as a financial interest, generally requires recusal under these codes.¹⁰²

Examiners in the inquisitorial setting¹⁰³ are closer to judges than lawyers.¹⁰⁴ Conflict rules should focus on ensuring impartiality, not loyalty. Moreover, as many commentators have noted, ethical rules crafted for ordinary adversary litigation fit awkwardly in the bankruptcy context.¹⁰⁵

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) (defending disinterestedness requirement).

99. 11 U.S.C. § 101(14) (defining "disinterested person").

100. See *Between the Parishes of Great Charte & Kennington*, 93 Eng. Rep. 1107, 1108 (K.B. 1726) (ruling "that a party interested could not be a Judge"); *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (K.B. 1609) (ruling that a panel of judges could not impose fines that they themselves profited from); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947) ("English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted."); Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78 (1927) ("By the common law the slightest pecuniary interest would disqualify a judge."); cf. *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1371 (7th Cir. 1994) (noting that "the appearance of justice is important in our system and the [D]ue [P]rocess clause sometimes requires a judge to recuse himself without a showing of actual bias").

101. See *infra* note 102.

102. See 28 U.S.C. § 455 (2012); MODEL CODE OF JUDICIAL CONDUCT Canons 1 & 2 (2010) (stating a judge "shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety," requiring duties be performed "impartially, competently, and diligently[,] and noting that to ensure impartiality and fairness to the parties, a judge "must be objective and open-minded"); Ziona Hochbaum, Note, *Taking Stock: The Need to Amend 28 U.S.C. § 455 to Achieve Clarity and Sensibility in Disqualification Rules for Judges' Financial Holdings*, 71 FORDHAM L. REV. 1669, 1682–83 (2003) ("[28 U.S.C. § 455(a)] is a general, 'catch-all' provision requiring that a judge disqualify himself in any proceeding in which there is an objective risk that he will be perceived as biased. Under this provision, it does not matter whether the judge is actually biased. By deferring to an objective standard, subsection (a) allows a judge to recuse herself, or an appellate court to order her recusal, without having to actually impugn her impartiality. The appearance of bias test has been criticized, however, on the grounds that it distracts both judges and policymakers from identifying what is and is not unjust.").

103. Different standards may apply, for example, if an expanded powers examiner were prosecuting claims on behalf of the estate. See *supra* note 38.

104. See, e.g., *supra* note 29 and accompanying text.

105. See Miller & Meises, *supra* note 98, at 378–79; Nancy B. Rapoport, *The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole*, 30 HOFSTRA L. REV. 977 (2002);

Broad per se rules making any financial interest disqualifying—whether or not material—and prohibiting “appearance” of impropriety rather than actual bias or conflict may be unnecessary and impractical in this context. What is most important is that the examiner be accepted as a credible, unbiased neutral by key constituents, the court, and the public—a judgment that is necessarily circumstance-dependent and discretionary rather than a matter for per se disqualification rules.

2. Mediation and Investigation May Not Mix

Susheel Kirpalani’s successful intervention as mediator following his inquisitorial examinership in *Dynegy* may seem an attractive model.¹⁰⁶ Indeed, the 2015 American Bankruptcy Institute Chapter 11 Study Commission endorsed an “estate neutral” concept, which contemplates a court-appointed neutral performing a variety of roles including both investigation and mediation.¹⁰⁷

But the roles of inquisitor and mediator do not fit comfortably together. Mediators operate under rules that enable and protect confidential communications. Inquisitors are supposed to publish the facts they find. Mediators may hold or express opinions on the subject matter of the mediation, but must remain scrupulously neutral to be effective. Inquisitors are expected not only to form their own opinions, but to take formal positions on the matters they are charged with investigating. An inquisitor who is mediating may be tempted not to pursue lines of inquiry that will complicate settlement negotiations. A mediator who is investigating may seek to defer settlement in the interest of discovering the facts. The attitude, professional norms, and objectives of these two different types of neutrals are widely divergent. Perhaps, as in *Dynegy*, after an investigation is complete and a report is filed, the investigative examiner may be well-situated to facilitate settlement. But it seems too much to ask an examiner concurrently to fill both roles and, perhaps, as is the case with examiners and trustees,¹⁰⁸ acting in both capacities in the same case should not be permitted at all.

Matthew L. Warren, *The Continuing Lack of Guidance on Professional Retention in Bankruptcy and Its Potential Impact on Corporate Debtors’ Retention of Adequate Legal Counsel*, 53 ARIZ. L. REV. 533, 533 (2011) (suggesting the current approach to state ethical codes is “inconsistent and untenable, particularly with respect to large corporate debtors”); Jessica M. Zeratsky et al., *The Ethical Considerations of Representing Multiple Parties*, 34 AM. BANKR. INST. J. 32, 32 (2015) (the “concept of ‘conflict’ can be much more subtle in bankruptcy proceedings because parties’ interests are not often directly adverse to one another”).

106. See Bussel, *supra* note 1 (manuscript at 56–59 & nn.181–95) (describing examiner’s successful mediation in *Dynegy*); *supra* note 1 and accompanying text.

107. ABI REPORT, *supra* note 7, at 32–38.

108. See 11 U.S.C. § 321(b) (2012) (noting an examiner may not serve as trustee in same case). In *Tribune*, the U.S. Trustee’s office precluded Ken Klee from serving as mediator at the time of his initial appointment. Correspondence with Kenneth N. Klee (Sept. 1, 2015) (on file with author). In *Enron*, the bankruptcy court rejected an attempt to interject the Enron examiner, Neal Batson, into ongoing negotiations regarding an intercompany settlement between Enron and its affiliate, Enron North America. Order Denying Motion of

CONCLUSION

We now have a series of precedents in *Tribune*, *Dynegy*, and *ResCap* for the conduct of inquisitorial investigations through court-appointed examiners, but unfortunately no model for regulating such examiners. I hope this Article can begin to fill that gap by providing an ethical framework for the conduct of inquisitorial investigations in the setting of Chapter 11. Constructing that framework may not only improve inquisitorial process in the large Chapter 11 cases in which we now observe a form of inquisitorial process evolving, but also encourage new inquisitorial modes of investigation in other areas where the existing options of settlement or adversary litigation are inadequate or problematic. Query whether our engrained adversarial legal culture can meaningfully export this mode of investigation, however successful in Chapter 11, to other realms. But perhaps a well-defined and well-regulated inquisitorial model for Chapter 11 investigations can serve as a template for parties who wish to experiment with that model in arbitration settings or other kinds of complex civil litigation.

the Baupost Group LLC and Racepoint Partners LP for an Order Directing the Appointment of an Examiner, *In re Enron Corp.*, No. 01-16034 (AJG) (Bankr. S.D.N.Y. Sept. 5, 2003). Mr. Batson had opposed the motion for many of the reasons discussed above. Response of Neal Batson, *In re Enron Corp.*, No. 01-16034 (AJG) (Bankr. S.D.N.Y. Aug. 29, 2003).