

## READING, WRITING, AND LISTENING IN THE BANKRUPTCY COURTS

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Bankruptcy cases give rise to a broad spectrum of disputes that vary in legal and factual complexity. The uneven expertise of attorneys, the rise in the number of debtors without counsel and the size of caseloads in many districts complicate case management and pose challenges in making written communication effective. Fortunately, the steady increase in the number of bankruptcy cases filed between 2000 and 2005<sup>1</sup> was accompanied by improvements in technology that have had a positive impact on the way in which bankruptcy courts do business. This essay briefly discusses three of those improvements.

1. Electronic Case Files. In the late 1990s, the filing of an unprecedented number of similar cases in a U.S. district court in Ohio overwhelmed the clerk's office with paper and triggered a revolution in how federal courts do business. Many bankruptcy courts around the country were already facing similar problems of managing large caseloads requiring large staffs to manage the flow of paper. The solution to the expense and inefficiencies caused by maintaining paper files was electronic filing of documents in PDF format by court personnel and attorneys alike. The software developed by the federal judiciary to eliminate most paper documents is called Case Management/Electronic Case Files or CM/ECF or more

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1. According to statistics compiled by the Administrative Office of United States Courts, in 2000, there were a total of 1,253,444 bankruptcy cases filed. In 2005, the year in which the Bankruptcy Abuse Prevention and Consumer Protection Act became effective, there were 2,078,415 bankruptcy cases filed. Filings dropped precipitously in 2006 and then rose again to 1,593,081 cases in 2010 before gradually receding. By way of contrast, there were 293,352 cases filed in the United States District Courts in 2010. For more information, see the United States Courts website at <http://www.uscourts.gov>, and click on the "Statistics & Reports" tab.

commonly just ECF.<sup>2</sup> The first five courts to use ECF were bankruptcy courts, including the Northern District of Georgia on which I sat.

ECF enables attorneys to file cases and documents electronically with an Internet connection and to retrieve free of charge virtually any document in any case in which they have appeared. Anyone else, including the public, can view dockets and retrieve documents for a modest charge without having to come to the courthouse by using the Public Access to Court Electronic Records website.<sup>3</sup> The old way of doing business using paper files now seems like ancient history.

ECF has had a major impact on the economics of law practice in the bankruptcy court. And it is fair to say that it has had a positive effect on the accuracy of statements made in motions and other documents about the procedural history of cases.<sup>4</sup> Using ECF attorneys may access documents in cases in which they have not appeared and use those documents to improve their own forms and to learn how other attorneys have handled particular types of disputes.

The extent to which ECF has altered how judges work depends in part on their comfort level with computers. To master the basics of word processing and other menu-driven applications like ECF and Westlaw is to free oneself from dependency on others for access to needed information. It is my guess that most judges prefer to read briefs and legal opinions on paper. There is no right or wrong way to read a brief, and paper has its advantages.

But reading a brief and research results on a monitor has advantages as well. With two monitors I viewed a brief or a draft order on one screen and Westlaw results on the other. I often copied case citations in a brief to Westlaw to find and read the cited cases and copied relevant portions of legal authorities to draft or-

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2. See the United States Courts website at <http://www.uscourts.gov>, and click on the "Courts Records" tab.

3. The Public Access to Court Electronic Records (PACER) website can be found at <https://www.pacer.gov/>.

4. For example, it is not uncommon for a debtor to file more than one bankruptcy case in a single year and multiple cases over several years, using different attorneys. Prior to ECF, a client might fail to mention that he had a case dismissed last week. Using ECF, an attorney can quickly find out about a debtor's prior cases and what happened in them.

ders. These kinds of processes increased my efficiency in doing legal research, eliminated the task of proofreading citations and quotations from cases, and saved time in writing draft orders and editing those prepared by my law clerk.

2. Court Websites. A byproduct of ECF has been the enhancement of courts' websites as an effective means to disseminate information useful to attorneys, litigants and the public about all aspects of the business of the courts.<sup>5</sup> The facts and details provided are often extensive and include directions to the court, phone directories, general discussion of bankruptcy law, ECF procedures, calendar procedures, local rules, and the policies of individual judges. Some judges have posted forms and guides on those websites regarding how to prepare certain kinds of motions, notices and proposed orders.<sup>6</sup>

It has also been the practice of most bankruptcy judges since about 2004 to post their unpublished as well as published decisions in PDF format on court websites.<sup>7</sup> This is an important development because many attorneys, particularly those representing consumers, simply cannot afford services such as Lexis and Westlaw. Easy access to those decisions, to forms suggested by judges and to the work of other attorneys is, I believe, having a salutary effect on the quality of briefs, motions and pleadings, particularly in consumer cases. By the same token, judges are likely to demand a higher level of proficiency in research, at least on issues that are frequently addressed in their posted decisions.

3. Electronic Reporting of Court Proceedings. Reading and writing are essential skills for a lawyer and a judge. So is listening. Unlike reading and writing, the spoken word lasts only as long as it is remembered—unless it is recorded. Electronic court reporting, which is now used in most, if not all, bankruptcy courts, makes it easy for a judge to review critical testimony and arguments of counsel during breaks, immediately following a trial or hearing or at any time thereafter. (Parties and the public may likewise obtain a copy of a recording of a court proceeding.) Because jury trials in

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5. See, e.g., the website of the Bankruptcy Court for the Middle District of Florida at [www.flmb.uscourts.gov](http://www.flmb.uscourts.gov), and the information under each of the tabs on the home page.

6. See, e.g., United States Bankruptcy Court for the Northern District of Georgia website at [www.ganb.uscourts.gov](http://www.ganb.uscourts.gov), and click on the "Attorneys Information" tab and then click on "Motion to Avoid Lien Tools."

7. See, e.g., United States Bankruptcy Court for the Northern District of Georgia website at [www.ganb.uscourts.gov](http://www.ganb.uscourts.gov), and click on the "Judges' Information" tab and then click on "Opinions."

bankruptcy cases are extremely rare, the role as finder of the facts is perhaps a judge's most important responsibility.

Writing a detailed note on what a witness just said and listening carefully to what the witness said next can be problematical. By contrast, writing down a key word or two and the time shown on the clock synchronized with the recording allows the judge to stay focused on the live testimony and to easily access that testimony later. Listening to key portions of testimony or argument a second time, particularly when the trial or hearing is still fresh on the mind, helps a judge to prepare more accurate findings of fact in a shorter time frame than might otherwise be the case. In close cases, the recording of the proceeding enables the judge to quote testimony verbatim on key points, which tends to validate findings of fact in a way that assures the parties, particularly individuals, that the judge has carefully and fairly considered the evidence. The job is to decide, and making a decision on a cold record, even with a transcript, is never easy.

Innovations such as ECF, enhanced websites and electronic court reporting (not to mention electronic research) have changed how judges and lawyers work. These tools will not make a writer out of one whose grammar or rhetorical skills are weak or an advocate out of one who cannot spot the issue. But they do provide tools that a writer, whether judge or lawyer, can use to fine tune the work product.

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