AN ANALYSIS OF THE ROLE OF THE BANKRUPTCY JUDGE AND THE USE OF JUDICIAL TIME

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I. INTRODUCTION

The fundamental truth which is the basis for this article is that the bankruptcy caseload in many districts in this country is so overwhelming that the bankruptcy judges are sorely pressed in the struggle to cope with it.[1] This situation creates pressures that threaten both the quality and the speed of justice in the bankruptcy courts. This article addresses the question of what can be done to make the bankruptcy judges' workload more manageable, other than reducing the rate of bankruptcy filings or increasing the number of bankruptcy judges. While those options may be desirable in important respects, they are also very difficult to achieve. The rate of bankruptcy filings is a complex and intractable problem, and additional judges are expensive in a time of fiscal austerity in government.[2] Therefore, it is appropriate to

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[1] The volume of cases is so large in some bankruptcy courts that motion day sometimes resembles a battlefield triage scene, in which the surgeons are required to make difficult choices in setting priorities among the wounded, and then perform emergency surgery under conditions that are far from ideal. The dockets of many bankruptcy judges are so congested that they are unable to attend to all matters requiring their attention in a timely manner. For example, my docket is such that I must inform parties on matters requiring trial that unless they can convince me that the matter is a dire emergency, they will probably have to wait up to two years after the filing of the complaint for a trial date.

[2] The judiciary is facing an "unprecedented funding crisis" with an estimated shortfall of approximately $200 million this fiscal year. *Judiciary Faces Broad Spending Reductions*, 25 THIRD BRANCH 1 (Admin. Off. U.S. Cts.) Jan. 1993, at 1. There are insufficient funds for the compensation of court-appointed lawyers, the funds to pay jurors are expected to run out before the end of the fiscal year, and no money has been appropriated for the 35 new bankruptcy judgeships established in 1992. *Id.* at 7. The Judiciary recently requested a $98.4 million supplemental appropriation for this year, which initially included $12.3 million for the as yet unfunded bankruptcy judgeships. *Judiciary FY 93 and FY 94 Appropriations Requests on Center Stage*, 25 THIRD BRANCH 3 (Admin. Off. U.S. Cts.) Mar. 1993, at 1, 3. The supplemental appropriations bill was enacted into law in July, 1993, but the request for the funding for the bankruptcy judgeships was not included. The judiciary's budget situation is not likely to improve in fiscal year 1994. *See id.*

consider what else can be done about the situation.[3] This article addresses the subject from a bankruptcy judge's perspective. After this Introduction, Section II describes the extent of the problem. The article then raises questions in Sections III through VII as to whether the bankruptcy system as presently structured is using the time of the bankruptcy judges wisely. Sections VIII and IX make suggestions from the collective experience of one hundred twenty bankruptcy judges (myself included) as to how to resolve disputes and perform other functions of a bankruptcy judge swiftly and efficiently, without sacrificing due process or the quality of justice.

To gather information for this article, I developed a questionnaire regarding the use of time saving practices by bankruptcy judges, and sent it to every bankruptcy judge in the country.[4] One hundred nineteen of my colleagues, constituting approximately forty percent of the bankruptcy bench, completed the questionnaire. I am extremely grateful to them for having done so. Their responses included an abundance of valuable information which I have summarized in this article. Their generosity in completing the questionnaire has helped me in various ways already, and will continue to do so as I attempt to implement their suggestions. I hope to remain teachable and to continue to improve in the art of judging for as long as I am privileged to remain on the bench. I am also hopeful that by summarizing the judges' comments, others will benefit as well.

II. THE BANKRUPTCY EXPLOSION

Since the Bankruptcy Code became effective in 1979, the number of bankruptcy cases filed annually in this country has increased substantially.[5] The rate of increase has been dramatic

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[3] It must be emphasized, however, that the time conservation measures discussed herein are not a substitute for additional judgeships. The caseload per judge in many bankruptcy courts is so large that as an ultimate solution, time conservation measures would be, to borrow a phrase from my colleague Judge Novalyn L. Winfield, akin to rearranging the deck chairs on the Titanic. See also *infra* notes 5 & 6 for further discussion of rate of increase in caseloads.

[4] As is probably obvious from certain deficiencies in the questionnaire, I never wrote one before, and I am not a social scientist. I appreciate, however, that my colleagues overlooked those deficiencies and took the time to complete the questionnaire. I am confident that the information in the judges' answers to the questions is very valuable in spite of any shortcomings of the questionnaire itself.

[5] Bankruptcy filings have nearly tripled since 1984. *Growth in Bankruptcy Filings Eases*, 25 THIRD BRANCH 4 (Admin. Off. U.S. Cts.), Apr. 1993, at 12. The national rate of increase, however, slowed during 1992. *See id.* (explaining that "[d]uring 1992, the national increase in bankruptcy case filings was less than 3 percent, the

since 1989. Not all of the ninety-four judicial districts, however, have experienced this phenomenon. Some districts have experienced little or no increase in filings since January 1, 1989, while in others, the rate of increase has been explosive.[6] The District of New Jersey, in which I sit, is one of the latter. In 1988, there were 8000 bankruptcy cases filed in this district, and in 1992 there were more than 25,000 cases filed.[7] Our caseload in this district, therefore, tripled in the four years from January 1, 1989, through December 31, 1992. Other districts have had comparable or greater rates of increase.[8] The situation has become so oppressive in many districts that the 1992 President of the National Conference of Bankruptcy Judges, Chief Judge Paul Mannes, of the bankruptcy court for the district of Maryland, commented that "[w]hat's happening is that the pathological is becoming the norm" in the caseload of bankruptcy judges in many districts.[9]

A closer look at the impact of these statistics on the workload of the bankruptcy judge is illuminating. I will provide some examples from my own experience, which is typical of the bankruptcy judges in this district. I suspect that judges, court personnel and lawyers from many other districts will see some familiar figures in these examples as well. In fact, I know that the caseload of some bankruptcy judges is heavier than that which I am about to describe.

In 1992, a typical weekly motion calendar for chapter 7 and 11 cases consisted of between seventy and one hundred motions. Two additional half days per month in chapter 13 cases consisted of thirty to sixty motions apiece. An additional full day once a month for chapter 13 confirmation hearings and motions had an average of 150 to 200 matters on the calendar. I ruled on an average of seventy-five fee applications per month. I signed an

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smallest increase in the last eight years"). The rate of increase, of course, varied from district to district.

6 See appendix 1 for statistical chart on per judge weighted caseloads in bankruptcy courts. *See also* Gordan Bermant et al., *A Day in the Life: The Federal Judicial Center's 1988-1989 Bankruptcy Court Time Study*, 65 Am. Bankr. L.J. 491, 492 (1991) (defining the term "weighted caseloads" as "an estimate of the total amount of time required to complete the judicial work imposed by the court's annual filings" and further explaining that "weighted caseloads" are calculated by "multiply[ing] the court's annual filings in each case type by the weighting of that case type, and then sum[ming] up the resulting products").

7 *See* appendix 1.

8 *See id.*

9 *Chief Judge Paul Mannes Says Goodbye*, 23 Bankr. Ct. Dec. (CRR) No. 15, at A5 (Oct. 15, 1992).

average of approximately 860 orders per month. There are, of course, numerous other proceedings required in a given month, including trials. I began 1992 with 558 pending adversary proceedings, and 361 were terminated. There were, however, 360 new adversary proceedings commenced in my cases during 1992, and nine were transferred or reopened, leaving a total of 566 pending at the close of the year. The average time from the filing of a complaint commencing an adversary proceeding to the trial date went from less than a year on my docket in 1988, to close to two years by the end of 1992. I began 1992 with 292 pending chapter 11 cases, several of which involved estates of more than $100 million. I was assigned 184 new chapter 11 cases during 1992, and ended the year with 313 pending chapter 11 cases. I also had 3096 chapter 7 cases and 1657 chapter 13 cases pending on December 31, 1992.[10] The average number of hours per week which I spent on all judicial duties increased from approximately forty-five to fifty hours per week in 1988, to approximately sixty hours per week in 1992.

The two statistics cited above which are the most troubling to me are the average length of time waiting for trial in an adversary proceeding, and the average number of hours per week which I am working. It is my goal to see both of those averages reduced. One result of the pressure created by such a caseload is that it tends to cause scrutiny of all procedures in terms of their necessity and efficiency, and to open one's mind to question fundamental premises and assumptions as to how every aspect of court business is conducted.

One obvious way to make the caseload of bankruptcy judges more manageable is to increase the number of bankruptcy judges. Since 1979, Congress has done so several times, but the rate of increase in case filings has greatly exceeded the rate of increase in bankruptcy judgeships.[11] The process of obtaining

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[10] Moreover, I am certain that because of periodic sweeps through the caseload which we conduct by orders to show cause to clear out inactive matters, as well as prompt motions by the U.S. trustee and chapter 13 and 7 trustees to dismiss or convert cases for lack of prosecution, none of these statistics are inflated.

[11] Recently, the Administrative Office of the United States Courts released a compilation of bankruptcy statistical information which compared the rate of increase in bankruptcy judges to the rate of increase in cases filed. Specifically, the compilation maintained:

> The number of authorized bankruptcy judgeships increased from 232 to 284 in late 1986, to 291 in late 1988, and to 326 in August 1992 . . . . Despite these increases in judgeships, the average per judge caseload is much higher now than it was during the early 1980's. To-

additional judgeships has been slow, and the outcome uncertain. One inevitable result of these circumstances has been greater delay in the resolution of bankruptcy cases, which is detrimental to the public interest.

Because Congress has not authorized and funded additional bankruptcy judgeships quickly enough,[12] the existing bankruptcy judges have largely been left to rely on our own resources to cope with the excessive caseload. Many bankruptcy judges have developed time-saving case management practices and other practices which expedite matters. Bankruptcy judges often share such practices with their colleagues within a district. We occasionally do so with judges from other districts as well when circumstances permit. I have heard of some intriguing differences in case management practices at judicial conferences and seminars. This article attempts to summarize some of those practices.

As several judges noted in response to the questionnaire, ef-

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> tal case filings increased by 193% between 1980 and 1992, but the number of bankruptcy judges increased by only 41% during the same time. The per judge annual case load increased from 1,427 in 1980 to 2,980 in 1992 (based on 232 judges in 1980, and 326 judges in 1992).

ADMIN. OFF. U.S CTS. BANKR. STAT. INFO. 1993, at 5.

In 1992, the total nationwide number of bankruptcy case filings was just below one million. *Id.* at 6. *See also Magic One Million Mark Proves Elusive*, 23 Bankr. Ct. Dec. (CRR) No. 38, at A-1 (Apr. 8, 1993) (providing that the total filings for 1992 were 971,517). By contrast, total bankruptcy case filings in 1980 were 331,098. *Id.*

[12] While Congress has recognized that there has been a "dramatic increase" in bankruptcy filings, overloading courts in certain districts which are in need of additional resources, funding for additional judgeships has been extremely slow. *See* H.R. REP. No. 825, 102d Cong., 2d Sess. 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 855, 856 (citing to the Honorable Lloyd D. George, Chairman of the Judicial Conference Committee on the Administration of the Bankruptcy System). Specifically, Judge George maintained that the "dockets in many . . . courts are so congested that . . . it takes several months for matters to be heard in court. . . . It is not only the number of cases, but also the size and complexity of the cases that is increasing." H.R. REP. No. 825, *supra*, at 4, *reprinted in* 1992 U.S.C.C.A.N. at 857. Moreover, Judge George posited that "[b]ankruptcy judges in many districts are . . . unable, [due to] the sheer volume of work to administer . . . their assigned caseloads . . . [and] [i]t is clear that only additional judgeships in selected districts can address the problems caused by the staggering caseloads." *Id.*

The most recent approval of new bankruptcy judges was in the Bankruptcy Judgeship Act of 1992, which authorized 35 new judgeship positions. The Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, 106, Stat. 965 (codified as 28 U.S.C. § 152); Act of Nov. 3, 1988, Pub. L. No. 100-587, 102 Stat. 2982 (codified as 28 U.S.C. § 152); Act of Oct. 27, 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as 28 U.S.C. § 152). Of the 35 judgeships, 25 of them were intended to create permanent positions while the remaining 10 created temporary positions. H.R. REP. No. 825, *supra*, at 3, *reprinted in* 1992 U.S.C.C.A.N. at 855-56. As of August, 1993, however, none of the funding for judgeships provided by the Act has been appropriated. *See supra* note 2.

ficient case management depends upon a number of variables, including various aspects of the practice of law generally in a district, how other courts in the district operate, the characteristics of each judge, differences in the types of cases which predominate in a district, and so on. Therefore, there is no one set of case management practices which is ideal for all judges. Moreover, even if I thought that there was one such ideal, I would not be so presumptuous or foolish as to attempt to convince my colleagues to see it that way. Most judges develop very clear and firm ideas as to how to do their jobs, and I have no desire to change anyone's mind on that score. This article will simply note practices that many bankruptcy judges from districts across the country find useful. My colleagues are invited to take anything that they like, and leave the rest.

It should also be noted that several judges reminded me in their questionnaires that the judiciary should be at least as concerned about conserving the time of the bar and the public as it is concerned about conserving judicial time. I could not agree more. The judiciary exists, after all, to serve the public. While the subject of saving the public time (and therefore money) in the judicial process is extremely important, and is indirectly addressed herein in various ways, it is not the paramount focus of this article. Because of the shortage of bankruptcy judges in many districts, it is inevitable that the public will have to wait in some lines to receive a judge's attention and services. The ultimate purpose of this article, in a sense, is how to make those lines move faster without reducing the quality of judicial service rendered.

Lastly, to the extent that the burdens on our bankruptcy courts and judges are matters of public interest, it is my hope that this article may stimulate discussion regarding solutions.

III. The Role of the Bankruptcy Judge and Its Relationship to the Role of the United States Trustee

There is reason to believe that many bankruptcy judges are performing certain important duties of the United States trustees, because of the failure of United States trustees to do so. One way to conserve judicial time is to refrain from doing the jobs of others. It is, therefore, appropriate to consider the nature of the bankruptcy judge's duties and their relationship to those of the United States trustee.

It is axiomatic that the ultimate duty of a bankruptcy judge is to administer justice in bankruptcy cases.[13] The bankruptcy judge administers justice largely through the resolution of disputes in the adjudicative process. The adjudication of disputes is the essential role of all judges.[14] The bankruptcy judge, however, has traditionally had other, nonadjudicative duties which are unique to the bankruptcy process.[15] Some of these

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[13] *See, e.g.*, FED. R. BANKR. P. 1001 (stating in relevant part that "[t]hese rules shall be construed to secure the *just* . . . determination of every case and proceeding") (emphasis added). *See also* FED. R. EVID. 102 incorporated by reference through FED. R. BANKR. P. 9017 (providing that "[t]hese rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined").

[14] The essence of judicial power is the ability to decide "cases or controversies." *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 37 (1976) (stating that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies"); Flast v. Cohen, 392 U.S. 83, 94 (1968) (maintaining that "[t]he jurisdiction of federal courts is defined and limited by Article III of the Constitution. . . . [T]he judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies' "); Muskrat v. United States, 219 U.S. 346, 356 (1911) (explaining that the United States Constitution requires a "case or controversy" to be present before judicial power may be exerted). *See also* Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 76 (1982) (holding that there is no "persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts established here lie beyond the reach of Art. III").

[15] Congress noted that the extra-judicial duties of the bankruptcy judge under the Act were unusual in comparison with the duties of most judges:

> The situation is in marked contrast to most litigation, in which the parties themselves manage the progress of the case. The judge does not become involved in the case, and if a party fails to take action, the judge does not intercede on his behalf. Instead, the party is foreclosed.

H.R. REP. No. 595, 95th Cong., 2d Sess. 88 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6049. A bankruptcy judge's duties are a result of the simple fact that the nature of bankruptcy litigation is somewhat different than that of other litigation. Specifically:

> The practice in bankruptcy is different for several reasons. First, there is a public interest in the proper administration of bankruptcy cases. Bankruptcy is an area where there exists a significant potential for fraud, for self-dealing, and for diversion of funds. In contrast to general civil litigation, where cases affect only two or a few parties at most, bankruptcy cases may affect hundreds of scattered and ill-represented creditors. In general civil litigation, a default by one party is relatively insignificant, and though judges do attempt to protect parties' rights, they need not be active participants in the case for the protection of the public interest in seeing disputes fairly resolved. In bankruptcy cases, however, active supervision is essential. Bankruptcy affects too many people to allow it to proceed untended by an impartial supervisor.

H.R. REP. No. 595, *supra*, at 88, *reprinted in* 1978 U.S.C.C.A.N. at 6050.

nonadjudicative duties are very time-consuming. Because the bankruptcy judges in many districts simply do not have enough time to go around, it is useful to examine the nonadjudicative duties of the bankruptcy judge and their role in the system.

Under the Bankruptcy Act of 1898 (the Act), the predecessor to the Bankruptcy Code of 1979 (the Code),[16] bankruptcy judges had nonadjudicative duties in addition to their judicial duties, which primarily required the judge to act in a supervisory role.[17] Historically, this role was considered necessary to prevent abuse in bankruptcy cases.[18] The potential for such abuse exists in a

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16 11 U.S.C. §§ 101-1330 (1988 & Supp. II 1990). The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as 11 U.S.C. §§ 101-1330 (1988 & Supp. II 1990)), *amended by* Pub. L. No. 98-249, 98 Stat. 116 (1984); Pub. L. No. 98-271, 98 Stat. 163 (1984); Pub. L. No. 98-299, 98 Stat. 214 (1984); Pub. L. No. 98-454, 98 Stat. 1745 (1984); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986).

17 The legislative history of the Code explains that referees under the Act were required to "take an active role in supervising and administering a bankruptcy case." H.R. REP. No. 595, *supra* note 15, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 5965. The Commission on the Bankruptcy Laws of the United States noted that bankruptcy referees' extensive involvement with supervising and administering bankruptcy cases resulted in a situation where it was "obviously difficult [for the referee] to resolve questions arising in a proceeding to determine whether the debtor ought to be discharged or even whether a particular debt is dischargeable, without being influenced by information and impressions gained during his previous contact with the debtor and the papers in the case." REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 137, 93d Cong., 1st Sess., pt. I, at 93 (1973). When the Act was replaced by the Code, most supervisory functions were removed from the bankruptcy judge's responsibilities. H.R. REP. No. 595, *supra* note 15, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 5966. By removing judges from the supervision of bankruptcy cases, the drafters of the Code intended that the bankruptcy court "become a forum that is fair in fact and appearance as well." *Id.*

18 Historically, the bankruptcy system was plagued with a variety of problems which resulted in abuses:

> [These] conditions were caused by two main features of the Act which were not adapted to present business conditions: (1) slow-moving procedural machinery laid down by the Act; (2) the theory underlying the administrative structure of the Act, that of creditor control, had broken down for many reasons, some of which were that: (a) administration could not wait until creditors could be called together to elect a representative; (b) the elections were manipulated by irresponsible outsiders for their own ends; (c) courts had to take on administrative duties for which they were not competent; (d) attorneys were to play a minor role, but due to the legalistic development rather than business development of the system, attorneys had dominated, due to the 'formalities of procedure laid down by the courts in their efforts to prevent abuses and partly to the low compensation of receivers and trustees'; (e) in small and no-asset cases, which constituted the great bulk of bankruptcies, creditors were not interested in policing the Act,

number of different contexts.[19]

For example, there is a potential for excessive compensation to case professionals from the debtor's assets. Representation of a debtor in bankruptcy is often the last, and perhaps the only, relationship the professional will have with the debtor because the debtor either will not continue in business thereafter or because the case professional is a specialist who does not render services after bankruptcy. Similar factors apply to other case professionals, such as the attorneys and accountants for a trustee or a creditors' committee. Moreover, fees and expenses of case professionals are afforded administrative priority[20] and are paid out of the bankruptcy estate,[21] which often, although by no means always, contains large amounts of money and other property. The confluence of these factors means that case professionals often lack the incentive which exists in other contexts to keep fees and expenses down in the interests of keeping the client's business in the future, because there often is not any future business to obtain. This undoubtedly accounts for the fact that historically there has been a tendency for abuse in bankruptcy cases by certain professionals seeking to gouge the estate for excessive fees. One response to that tendency has been to give the bankruptcy judge certain supervisory functions, including a degree of

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> so that criminal and discharge provisions had become largely ineffective; and (f) creditors had not supervised and directed administration and this had been shifted to the courts, which were not adequate to handle the problem.

H.R. REP. No. 595, *supra* note 15, at 97, *reprinted in* 1978 U.S.C.C.A.N. at 6058-59.

[19] The legislative history to the Code contains a study known as the "Donovan Report" which describes the abuses that were occurring in the bankruptcy system under the Act. *See* H.R. REP. No. 595, *supra* note 15, at 96-99, *reprinted in* 1978 U.S.C.C.A.N. at 6057-61. The report stated that "the administration of the bankruptcy law was characterized by serious abuses and malpractices on the part of attorneys, receivers, trustees, appraisers, custodians, auctioneers and other persons and associations." H.R. REP. No. 595, *supra* note 15, at 96, *reprinted in* 1978 U.S.C.C.A.N. at 6058. The study focused on the bankruptcy practice in New York City. *See id.* Specifically, in reference to the abuses among bankruptcy attorneys, the Report stated:

> These abuses led to others and to conflicts; outright theft occurred. Twelve attorneys were indicted; one absconded and then committed suicide; two pleaded guilty and received jail sentences. The Report found that the condition in New York City was not an isolated condition; based on studies in six different cities it was concluded that "fundamental defects in administration are not restricted to New York, but exist generally throughout the country."

H.R. REP. No. 595, *supra* note 15, at 97, *reprinted in* 1978 U.S.C.C.A.N. at 6058.

[20] *See* 11 U.S.C. §§ 503(b) & 507(a)(1).

[21] *See* 11 U.S.C. § 541.

control over employment and payment of case professionals which is unique in the law.[22]

Another area with a significant potential for abuse in bankruptcy cases involves efforts by some unscrupulous creditors to deny honest debtors the benefits of the discharge which Congress intended.[23] Conversely, some debtors file bankruptcy petitions in bad faith, i.e., knowing that they do not meet the criteria for relief in bankruptcy, or without needing such relief.[24] Although creditors are the parties whose interests are most at risk in bankruptcy cases, it is an unfortunate fact that most creditors decline to participate in the case.[25] Bankruptcy judges under

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22 *See* 11 U.S.C. §§ 326-331, 1103(a). *See also* S. REP. No. 989, 95th Cong., 2d Sess. 40 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5826 (explaining that when the Bankruptcy Act was amended in 1938, bankruptcy courts were given authority to control compensation and fee collection "to guard against a recurrence of 'the many sordid chapters' in 'the history of fees in corporate reorganizations' ").

23 A discharge of debts in bankruptcy is designed to give "honest debtors a lawful 'fresh start' in their financial dealings." H.R. REP. No. 1085, 102d Cong., 2d Sess. 29 (1992). Providing the debtor with a "fresh start" is a primary objective of the bankruptcy system. For example, it has been noted that:

> The uniform national bankruptcy system, as provided in the United States Constitution, is designed to achieve two equally important objectives. The first is to provide honest debtors who have fallen on hard times the opportunity for a fresh start in life, after they have made a good-faith attempt to pay what they can. This not only helps honest debtors from being relegated to a lifetime of destitution or the functional equivalent of financial indentured servitude from which they can never hope to recover, but also helps reinforce the incentives for healthy business entrepreneurship which are the lifeblood of economic growth in a free market system.

H.R. REP. No. 996, 102d Cong., 2d Sess. 12-13 (1992).

Debts that are dischargeable in bankruptcy can, however, be "reaffirmed" by the debtor, in which case the debt in question is not discharged. 11 U.S.C. § 524(c). To prevent abuse by creditors of debtors who are not represented by an attorney, the court must approve reaffirmation agreements by such debtors. *Id.* § 524(c)(6). Because these agreements are not contested by the parties, the court is performing a supervisory function in approving such agreements. While such review is important, consideration should be given to transferring it from the court to the United States trustee.

24 Code section 707(b) allows a judge to protect the rights of creditors when the debtor's filing represents a significant abuse of the bankruptcy system. *See* 11 U.S.C. § 707(b). Section 707(b) provides:

> After notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.

Id.

25 One underlying premise of the Act was to give creditors a degree of control over the estate by allowing them to elect a trustee or appoint a creditors' committee

the Act therefore had a supervisory function in addition to their adjudicative function, to prevent such abuses by case professionals, creditors and debtors.

When the Code was enacted, it was the stated intention of Congress to relieve the bankruptcy judge of the supervisory function to provide more time for adjudication.[26] Accordingly, Congress created the position of United States trustee to take over the supervisory function which had previously been performed by the bankruptcy judge.[27]

Unfortunately, however, the United States trustee system has generally not been performing well in the opinions of the Judicial Conference of the United States and many members of the bankruptcy community.[28] This is evident in the inconsistent

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to monitor and supervise the debtor's activities. H.R. REP. No. 595, *supra* note 15, at 91-92, *reprinted in* 1978 U.S.C.C.A.N. at 6052-53. Unfortunately, however:

> The notion of creditor control, while still theoretically sound, has failed in practical terms. Creditor control in bankruptcy cases is a myth. Creditors take little interest in pursuing a bankrupt debtor. They are unwilling to throw good money after bad. As a result creditor participation in bankruptcy cases is very low.

H.R. REP. No. 595, *supra* note 15, at 92, *reprinted in* 1978 U.S.C.C.A.N. at 6053.

26 Congress decided that the bankruptcy judge should no longer perform a supervisory function, in part because it took time away from performance of judicial duties. H.R. REP. No. 595, *supra* note 15, at 88, *reprinted in* 1978 U.S.C.C.A.N. at 6049. The legislative history expressly recognized that it was "enough of a reason for change that these [supervisory] functions and duties of the bankruptcy judge constitute no part of his judicial responsibilities, and divert him from the important judicial and legal work that must be done in bankruptcy cases." H.R. REP. No. 595, *supra* note 15, at 89, *reprinted in* 1978 U.S.C.C.A.N. at 6050.

27 The legislative history to the Bankruptcy Code explained:

> [A] major change proposed by the [Code] is the creation of a Government officer to supervise the conduct of bankruptcy cases, and to serve as trustee in bankruptcy cases when private trustees are unwilling to serve. Many of the functions assigned to the new official, called the United States trustee, are currently performed by bankruptcy judges. Under the proposed system, the bankruptcy judges will be handling only judicial matters in bankruptcy cases. The proposed United States trustee will be the repository of many of the administrative functions now performed by bankruptcy judges, and will serve as bankruptcy watch-dogs to prevent fraud, dishonesty and overreaching in the bankruptcy arena.

H.R. REP. No. 595, *supra* note 15, at 88, *reprinted in* 1978 U.S.C.C.A.N. at 6049.

28 *See* appendix 2, ADMIN. OFF. U.S. CTS. INFORMATION MEMORANDUM OUTLINING THE POSITION OF THE JUDICIARY ON THE PLACEMENT AND PERFORMANCE OF THE UNITED STATES TRUSTEE PROGRAM (Nov. 1, 1989), at 3 [hereinafter INFORMATION MEMORANDUM] (asserting that "[t]he consensus among the bankruptcy judges and clerks of court and many representatives of the bankruptcy bar is that the United States trustee system is not well administered on a national basis, while local offices vary greatly in quality"). The findings and conclusions in the Information Memorandum remain as correct today as they were in 1989. Two points, however, must

and irregular performance of the supervisory functions assigned to the United States trustee under 28 U.S.C. § 586(a)(3).[29] The best example of this noncompliance is the United States trustee's review of fee applications under 28 U.S.C. § 586(a)(3)(A).[30] In some districts, there has been little or no review of fee applications by the United States trustee.[31] In others, the United States trustee's objections to fee applications have been criticized as

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be emphasized. First, the bankruptcy courts in some districts are satisfied with the performance of the United States trustee. Second, the dissatisfaction which has been expressed in other districts is not necessarily a reflection on the quality of performance by United States trustee attorneys, analysts, staff and even assistant United States trustees, many of whom perform their duties admirably under very difficult conditions. The dissatisfaction is more with the policy decisions of those who control the United States trustee system.

[29] *Id.* at 10-11. *See* 28 U.S.C. § 586(a)(3)(A)-(H). This section enumerates some of the specific functions that the United States trustee shall perform in all cases, when appropriate, under chapter 7, 11, or 13 of title 11. These functions include:

> (A) monitoring applications for compensation and reimbursement filed under section 330 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to any of such applications;
> (B) monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under sections 1125 and 1128 of such title, comments with respect to such plans and disclosure statements;
> (C) monitoring plans filed under chapters 12 and 13 of title 11 and filing with the court, in connection with hearings under sections 1224, 1229, 1324, and 1329 of such title, comments with respect to such plans;
> (D) taking such action as the United States trustee deems to be appropriate to ensure that all reports, schedules, and fees required to be filed under title 11 and this title by the debtor are properly and timely filed;
> (E) monitoring creditors' committees appointed under title 11;
> (F) notifying the appropriate United States attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States and, on the request of the United States attorney, assisting the United States attorney in carrying out prosecutions based on such action;
> (G) monitoring the progress of cases under title 11 and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress; and
> (H) monitoring applications filed under section 327 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications . . . .

Id.

[30] *See id.*

[31] New Jersey is one of those districts. Although the United States trustee used to review fee applications in this district, to my knowledge there has been little or no such review in recent years.

"too often reflexive, rather than based on merit"[32] or "rote."[33] The United States trustee's failure to fulfill its duty to review fee applications in some districts has resulted in a situation in which the bankruptcy judge is often the only person in the case who is willing to review fee applications and raise objections which should be raised. The potential for abuse in the awarding of bankruptcy fees is sufficiently great that a general failure to review fee applications would undermine the integrity of the bankruptcy system.[34] Bankruptcy judges therefore typically review such applications and raise *sua sponte* objections.

The problem from the perspective of this article is that review of all fee applications can be very time-consuming.[35] If the court could rely on the United States trustee to perform its duty under 28 U.S.C. § 586(a)(3)(A), the amount of time which the bankruptcy judges spend on reviewing such applications could be substantially reduced. It is not desirable, however, to eliminate all *sua sponte* court review and objections to fee applications, because there are cases in which the court will observe questionable professional performance which should result in reduced compensation, but which the United States trustee has not observed and which is not apparent from review of the fee applications. In such cases, the public interest requires that bankruptcy judges have the right to raise *sua sponte* objections.

With that exception, however, the primary responsibility for reviewing and objecting to fee applications is, and should be, the United States trustee's, and not the court's. The lack of confidence by the court in many districts in the extent and quality of United States trustee review of fee applications can be remedied by good-faith efforts on the part of the court and the United States trustee to agree on uniform standards in each district for fee and expense applications. Numerous variations in local practice probably make it impossible and undesirable to implement national standards on many measures of compensation. If standards for each district are developed jointly by the court and the United States trustee, however, and an agreement is reached on

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32 *See* appendix 2, INFORMATION MEMORANDUM, at 4.

33 *Id.* at 11.

34 *See supra* note 22 and accompanying text.

35 *See* Bermant, *supra* note 6, at 513-14 (maintaining that bankruptcy judges, on average, spend 62 hours per year, or 4.9% of all case-related time, reviewing fee applications, but noting further that the judges vary greatly in the time spent reviewing such applications, ranging from a low of 5.2 hours to a high of 208 hours per year).

enforcement, the court should be able to rely on the United States trustee to review and raise any appropriate objections. With such a system, the court could dispense with *sua sponte* review and objection except in the circumstances noted above. This would result in fulfillment of the United States trustee's statutory supervisory function and reduction of the time now spent by many bankruptcy judges doing the job of the United States trustee in this area.

Another statutory duty which the United States trustee has failed to fulfill in many districts is the duty under 28 U.S.C. § 586(a)(3)(B) to review disclosure statements in chapter 11 cases.[36] In some districts, there has been little or no review by the United States trustee of disclosure statements in cases which have no creditors' committee, where such review is needed, and unnecessary review by the United States trustee in cases with creditors' committees.[37] As a general rule, the United States trustee should review disclosure statements in cases which have no creditors' committee, and decline such review in cases which have a creditors' committee.[38] In either case, the court should be able to rely on such review. This would also conserve judicial time in the manner Congress intended.[39] As with fee applications, the court and the United States trustee could develop joint standards in each district for such review, reducing or eliminating the necessity for *sua sponte* court review.

The problems with the United States trustee system are pervasive and severe, and part of the ultimate solution may well be to transfer the system to the Judicial Branch.[40] Regardless of

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[36] See *supra* note 29 for full text of § 586(a)(3)(B). To my knowledge, the United States trustee does not ordinarily review disclosure statements at all in New Jersey. I do not recall ever seeing the United States trustee in this district object to or comment on a disclosure statement.

[37] *See* appendix 2, INFORMATION MEMORANDUM, at 4, 5 & 11.

[38] It is in the interests of the estate to have either a creditors' committee or the United States trustee supervising a debtor in possession, but it is duplicative to have both of those parties performing such supervision. As the Judicial Conference of the United States has explained:

> When U.S. trustees are involved in chapter 11 cases, the focus of involvement has too frequently been on large chapter 11 cases with active creditors' committees. This allocation of scarce resources is unjustified given the enormous need to monitor smaller chapter 11 cases in which there is frequently little or no creditor interest and a significant possibility of abuse.

See appendix 2, INFORMATION MEMORANDUM, at 5.

[39] See *supra* notes 26-27 and accompanying text for discussion of Congress's intent.

[40] *See* appendix 2, INFORMATION MEMORANDUM, at 14. The legislative history to

where the United States trustee system is placed, however, the Congressional intention to remove the bankruptcy judge from supervision of bankruptcy cases will not be fulfilled until the United States trustees assume such responsibility. To the extent that the United States trustees do so, the bankruptcy judges will be able to devote more of their scarce time to their primary function of dispute resolution.

It should also be noted that the Code left the court with certain supervisory functions which are more appropriate for the United States trustee.[41] Consideration should be given to amending the Code and Rules to further the transfer of supervisory functions from the court to the United States trustee.

IV. The Relationship Between Code § 102(1) and the Role of the Bankruptcy Judge

Another aspect of the role of the bankruptcy judge which merits discussion is the nature and extent of the judge's responsibility to review uncontested motions.[42] There is no clear answer to this question in the Code and its jurisdictional provisions. Indeed, there are to some extent conflicting messages in the law on this issue.[43] It should therefore not be surprising that there is considerable variety among the bankruptcy judges in their approach to this basic question. The question is a very important one, because the majority of motions in bankruptcy court are uncontested. The process of reviewing these uncontested motions can be very time-consuming, and can detract substantially from the ability of the bankruptcy judges in overworked districts to re-

the Code states that the placement of the office of the United States trustee in the Department of Justice was the "result of thorough deliberations" and premised on a desire to separate the administrative and judicial functions of the bankruptcy system. H.R. Rep. No. 595, *supra* note 15, at 107-15, *reprinted in* 1978 U.S.C.C.A.N. at 6068-76. It is time, however, for Congress to reconsider that decision. Transfer of the United States trustee program to the judicial branch "could be accomplished with minimal disruption while maintaining the desirable separation of judicial and administrative functions in processing bankruptcy cases." *See* appendix 2, Information Memorandum, at 14.

[41] *See, e.g.*, 11 U.S.C. § 524(c)(6) (providing for *sua sponte* review of reaffirmation agreements by pro se debtors); 11 U.S.C. § 707(b) (providing for *sua sponte* review by the court, or by the United States trustee of chapter 7 cases for substantial abuse by debtors of the provisions of chapter 7). *See also infra* note 111.

[42] See *infra* note 163 and accompanying text regarding the nature of a motion. To the extent that the Code provides for "notice and a hearing" on matters which are not raised by motion, such as court approval of disclosure statements under Code section 1125(b), the analysis in this section applies to such matters as well.

[43] See *infra* note 51 and accompanying text for discussion of this conflict.

solve contested matters expeditiously. This section discusses this problem and suggests possible changes to the Code and/or Rules to address it, as well as measures which are within the control of bankruptcy judges.

It was the stated intention of Congress in enacting the Code that bankruptcy judges were to be relieved of administrative, clerical and supervisory functions so that they could focus primarily on the judicial function.[44] The essence of the judicial function is the resolution of disputes.[45] American notions of due process require notice to litigants of proposed actions which may affect their interests and adequate opportunity to raise objections and obtain a ruling from the court.[46] This Constitutional requirement is addressed in § 102(1) of the Code, which requires that many actions in bankruptcy cases may take place only "after notice and a hearing."[47] Specifically, § 102(1)(A) provides that notice and an opportunity for a hearing are required throughout the Code "as is appropriate in the particular circumstances."[48] Section 102(1)(B) authorizes an act without a hearing if notice is proper and if a hearing is not timely requested or there is not sufficient time to conduct a hearing.[49] Thus, the Code makes it clear that a hearing will not be required in every instance.[50]

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[44] *See supra* note 26 and accompanying text.

[45] *See supra* note 14.

[46] Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314 (1950). The *Mullane* court explained that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Id. (citations omitted).

[47] *See* 11 U.S.C. § 102(1).

[48] *Id.* § 102(1)(A). Code § 102, "Rules of Construction," defines the phrase "after notice and a hearing" as "mean[ing] after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances . . . ." *Id.*

[49] *Id.* § 102(1)(B). Code § 102(1)(B) limits the requirement of providing a hearing "*if such notice is given properly and if— such a hearing is not requested timely by a party in interest;* or there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act . . . ." *Id.* (emphasis added).

[50] Even though "hearings" may be disposed of, the requirement of "notice" remains an essential element of due process and a final order cannot be entered, consistent with the United States Constitution, in any case where a party whose interests are directly affected has not been afforded notice. *See In re* Sullivan Ford Sales, 2 B.R. 350, 355 (Bankr. D. Me. 1980) (maintaining that "[a]lthough section 102(1) dispenses with an evidentiary hearing in certain circumstances, nowhere

The Code also contains fifty-two other sections that contain the phrase "after notice and a hearing."[51] If not read in conjunction with § 102(1), these sections could be interpreted to mean that the court must rule on all motions under these Code sections, even those to which no objection is filed. As a matter of statutory construction, however, § 102(1) must be considered when determining when a "hearing" is required on motions under any of these Code sections.

The question is, what is the bankruptcy judge's duty regarding motions which do not require a "hearing" because they are uncontested? Must the judge review such motions at all? Must

does it expressly annul the requirement of 'notice . . . appropriate in the particular circumstances' ").

[51] Six of those Code sections which contain the phrase "after notice and a hearing" provide that *the trustee* may take action on certain conditions. *See* 11 U.S.C. § 363(b)(1) (maintaining that trustee "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate"); 11 U.S.C. § 505(b)(2) (providing debtor with a discharge for unpaid tax liability "upon payment of the tax determined by the court, after notice and a hearing . . ."); 11 U.S.C. § 554(a) (allowing trustee "after notice and a hearing" to "abandon any property of the debtor estate that is burdensome to the estate . . . or is of inconsequential value and benefit to the estate"); 11 U.S.C. § 725 (prescribing that "after notice and a hearing" the trustee "shall dispose of any property in which an entity other than the estate has an interest"); 11 U.S.C. § 1108 (stating that "after notice and a hearing . . . the trustee may operate the debtor's business"); 11 U.S.C. § 1206 (permitting trustee "after notice and a hearing" to "sell property . . . free and clear of any interest").

Forty-four of the sections containing such phrase provide that *the court* shall take such action on request of a party in interest after notice and a hearing. *See* 11 U.S.C. §§ 303(e), (g) & (j); 11 U.S.C. § 305; 11 U.S.C. § 324(a); 11 U.S.C. § 330(a); 11 U.S.C. § 331; 11 U.S.C. §§ 362(d), (e) & (f); 11 U.S.C. §§ 363(b)(2)(B) & (c)(2)(B); 11 U.S.C. §§ 364(b), (c) & (d)(1); 11 U.S.C. § 366(b); 11 U.S.C. § 502(b); 11 U.S.C. § 510(c); 11 U.S.C. § 523(c); 11 U.S.C. § 542(e); 11 U.S.C. §§ 543(c) & (d); 11 U.S.C. § 552(b); 11 U.S.C. § 554(b); 11 U.S.C. § 706(b); 11 U.S.C. § 707(a); 11 U.S.C. § 723(d); 11 U.S.C. § 727(d); 11 U.S.C. § 921(c); 11 U.S.C. § 930(a); 11 U.S.C. §§ 1104(a) & (b); 11 U.S.C. § 1105; 11 U.S.C. § 1112(b); 11 U.S.C. §§ 1113(d)(1) & (e); 11 U.S.C. §§ 1114(c)(1), (c)(2), (d), (e)(1)(A), (h)(1), (k)(1) & (k)(2); 11 U.S.C. § 1121(d); 11 U.S.C. § 1125(b); 11 U.S.C. § 1126(e); 11 U.S.C. § 1127(b); 11 U.S.C. § 1144; 11 U.S.C. § 1169(D); 11 U.S.C. §§ 1170(a), (c) & (d)(2); 11 U.S.C. § 1174; 11 U.S.C. § 1201(c); 11 U.S.C. §§ 1204(a) & (b); 11 U.S.C. §§ 1208(c) & (d); 11 U.S.C. §§ 1228(b) & (d); 11 U.S.C. § 1230(a); 11 U.S.C. § 1301(c); 11 U.S.C. §§ 1307(c) & (d); 11 U.S.C. §§ 1328(b) & (e); 11 U.S.C. § 1330(a). Three of the sections do not expressly require the court or the trustee to take an action for the relief in question to be granted. *See* 11 U.S.C. § 503(b) (providing for the allowance of certain administrative expenses "[a]fter notice and a hearing"); 11 U.S.C. § 1229(b)(2) (stating that "[t]he [chapter 12] plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved"); 11 U.S.C. § 1329(b)(2) (maintaining that "[t]he [chapter 13] plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved").

he or she review some such motions, but not others? If so, which ones? What are the criteria? What is the purpose of such review? What is the judge looking for when reviewing uncontested motions? To answer these questions it is necessary to consider the relationship between Code § 102(1), its legislative history and authorities regarding the nature of a hearing.

The legislative history to Code § 102(1) explains the relationship between the phrase "after notice and a hearing" and the role of the bankruptcy judge.[52] It clearly expresses Congress's intent that when a party proposes to take action under a section of the Code that requires notice and a hearing, after appropriate notice the bankruptcy judge will become involved only if an objection is raised which creates a dispute.[53] Congress explained that dispensing with a hearing unless an objection was voiced or

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[52] Knowledge of the Code's legislative history is essential to understanding the Code:

> [A]s is the situation with the Bankruptcy Code throughout, one must be thoroughly acquainted with the legislative history of the Code in its entirety and of a particular section in order to understand — and that is the paramount need, understand — what the Congress sought to effect. That it is difficult to put into the wording of a statute the complete understanding is obvious. Legislative intent is so vastly important. A Court by a surface reading and understanding of so many statutes could easily, too easily, concoct its own shallow interpretation from it.

Virginia Elec. & Power Co. v. Cunha (*In re* Cuhna), 1 B.R. 330, 332 (Bankr. E.D. Va. 1979).

It is recognized, however, that although a statute's legislative history is important in statutory construction, the express statutory language is of course controlling.

[53] Congress's desire to limit the role of the bankruptcy judge to the adjudicative function is clear from the legislative history of section 102(1):

> Paragraph (1) [of Code § 102] defines the concept of "after notice and a hearing." *The concept is central to the bill and to the separation of the administrative and judicial functions of bankruptcy judges.* The phrase means after such notice as is appropriate in the particular circumstances [to be prescribed by either the Rules of Bankruptcy Procedure or by the court in individual circumstances that the Rules do not cover. In many cases, the Rules will provide for combined notice of several proceedings], and such opportunity for a hearing as is appropriate in the particular circumstances. *Thus, a hearing will not be necessary in every instance. If there is no objection to the proposed action, the action may go ahead without court action. This is a significant change from present law, which requires the affirmative approval of the bankruptcy judge for almost every action. The change will permit the bankruptcy judge to stay removed from the administration of the bankruptcy or reorganization case, and to become involved only when there is a dispute about a proposed action, that is, only when there is an objection.*

H.R. REP. No. 595, *supra* note 15, at 315, *reprinted in* 1978 U.S.C.C.A.N. at 6272 (emphasis added). *See also* H.R. REP. No. 595, *supra* note 15, at 110, *reprinted in* 1978

a hearing was requested was "central . . . to the separation of the administrative and judicial functions of bankruptcy judges."[54] Unlike prior law, which required an affirmative action by the bankruptcy judge for nearly every aspect of a bankruptcy case,[55] Code § 102(1) requires bankruptcy judges to become involved in bankruptcy proceedings only where judicial involvement is necessary, i.e., when a Code section or rule expressly requires or when a controversy arises.[56] Thus, the legislative history of § 102(1) clearly reflects congressional intention to separate bankruptcy judges' judicial duties from many of the largely ministerial administrative duties that are an unavoidable part of bankruptcy proceedings.[57] Moreover, the legislative history indicates that the drafters of § 102(1) were concerned with proper and effective uses of judicial time.

Because the legislative history of § 102(1) instructs bankruptcy judges to provide a hearing only when one is specifically required[58] or where there is a contested matter requiring adjudication, the question of what constitutes a "hearing" under § 102(1) and other sections of the Code is an important one. Stated differently, the question is whether judicial review of uncontested motions is a form of "hearing" within the meaning of Code § 102(1). The Code unfortunately does not define the term "hearing", and there are few reported cases which attempt to define it as the Code uses it.[59] As the term ordinarily is used, it has a meaning which is well-known:

U.S.C.C.A.N. at 6071 (asserting that "[t]he courts' duties relate solely to resolving disputes that arise in bankruptcy cases").

54 *Id.*

55 *See id.*

56 *See supra* notes 24 & 26.

57 *Id.*

58 *See, e.g.*, 11 U.S.C. § 1128 (stating that "after notice the court *shall* hold a hearing on confirmation of a plan") (emphasis added).

59 One court attempted to define the term "hearing" as it is used in the Code. *See In Re* Rennels, 37 B.R. 81, 86 (Bankr. W.D. Ky. 1984). The *Rennels* court looked to *Black's Law Dictionary* to define the term "hearing" as used in Code section 524(d) and defined such term as:

> Proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which parties proceeded against have a right to be heard, and is much the same as a trial and may terminate in final order. . . . Synonymous with trial, and includes reception of evidence and arguments thereon.

Id. (citing BLACK'S LAW DICTIONARY 852 (4th ed. 1968)).

The definition of hearing which is suggested in this article is broader than the one used in *Rennels*. *See infra* note 60 and accompanying text. Because the term hearing is not defined in the Code, reasonable minds may differ on the definition.

> A "hearing" is the hearing of evidence and argument, and has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action.[60]

No fixed procedure, however, is required.[61] Moreover, there are many potential variations in the nature and form of a hearing.[62] For instance, oral argument is not necessarily required.[63] Nor is it required that a hearing take place in a courtroom, as telephonic hearings are authorized where appropriate.[64] Therefore, the essence of a hearing is the judicial examination of a request for relief, whether contested or uncontested.[65] When the judge reviews moving papers

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60 16A AM. JUR. 2D *Constitutional Law* § 841 (1979).

61 *Id.*

62 *Id.*

63 *Id. See also* 39A C.J.S. *Hear* § 157 (1976) ("It has been said that the word 'heard' does not necessarily indicate an oral presentation of a controversy, or require listening to an oral argument, but may be used in the sense of 'review,' or as meaning considered and determined as submitted, with or without oral argument."). In determining that oral argument was not required for the purpose of deciding an appeal, the court in *Groendyke Transp., Inc. v. Davis*, held:

> As with the demands of statutes and rules, nothing in the constitutional concept of due process forbids special, summary disposition without all of the marks of a traditional submission. Parties are normally assured a 'hearing' but that term does not demand that the communication be oral and audible. By long practice, and frequently by express rules important substantive or procedural issues are fully and finally disposed of by the highest of tribunals wholly on written papers without oral argument of any kind. The requisites of that portion of due process described as 'hearing' are satisfied by providing the parties with the opportunity of affirmatively advancing argument with supporting authority and a like opportunity for response and counterargument by the adversary. This may be done by briefs without oral argument. Oral argument, as such, is rarely, if ever, so essential to elemental fairness as to orbit to a constitutional apogee. Indeed the practice of Courts of disposing of cases in a variety of situations on the papers, reflects the experience of mature judges that oral argument in many, many cases adds nothing to the process of enlightenment. In these times of exploded and exploding dockets every effort must be made to allow Courts to hear and decide more cases more expeditiously.

Groendyke Transp., Inc., v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969).

64 Of the survey respondents, judges from two jurisdictions reported local rules permitting telephonic hearings. New Jersey Local Bankruptcy Rule 3(f) provides that "[t]he Court, on its own motion or on a party's request, may direct argument of any motion by telephone conference without Court appearance." D.N.J. BANKR. CT. R. 3(f). *See also* D. ALASKA BANKR. CT. R. 70(h)(5) (maintaining that "[i]n appropriate cases, hearing by phone conference may be requested by a party or held on the court's own motion").

65 C.J.S., *supra* note 63, § 157.

and any opposing papers and decides the matter on the papers alone, the judge has, in fact, conducted a form of "hearing," because the judge has listened to the written arguments of the parties.

The interplay between § 102(1) and the other sections containing the phrase "after notice and a hearing" presents another important question: if Congress intended that the bankruptcy judge should generally not review uncontested motions, but the Code requires that the court shall grant such motions on request of a party in interest, what form should the court authorization take? An order is the customary means of expressing court authorization, whether the matter in question is contested or uncontested. Bankruptcy judges generally sign most or all orders bearing their name, and they generally will not do so without first reviewing the motion in question to see what they are approving.[66] The legislative history to § 102(1), however, states that court orders are not necessary under the Code on motions which are uncontested after notice and an opportunity for a hearing.[67]

Many bankruptcy judges, myself included, spend a great deal of their time reviewing uncontested motions and signing orders ruling on them.[68] If Congress intended that relief would be granted without an order on uncontested motions made pursuant to the Code sections requiring "notice and a hearing," the Code and/or Rules should be amended to clarify that intention and to explain how a party can obtain evidence of court authorization without an order.[69]

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66 *See* appendix 3, Questionnaire, § IX, Nos. 1 & 2.

67 *See* 124 Cong. Rec. 32393 (daily ed. Sept. 28, 1978) (maintaining that "[i]n those circumstances, the court may take action 'after notice and a hearing,' if no party requests a hearing . . . [and that] *[i]n that event a court order authorizing the action to be taken is not necessary as the ultimate action taken by the court implies such an authorization*") (statement of Representative Don Edwards) (emphasis added).

It is unclear what was meant in this passage by "the ultimate action taken by the court" in lieu of an order. It may simply have contemplated entry of proof of service of the motion on the docket as evidence of notice, combined with proof that no objections were filed. See *infra* notes 69-71 and accompanying text regarding "certificates of no objection" as evidence of court authorization.

68 Bermant, *supra* note 6, at 512 (maintaining that approximately 15% of a bankruptcy judge's case-related time is spent reviewing and signing orders). In a commentary to this startling statistic, Bermant stated:

> The impression one gets from reviewing all the data is that bankruptcy judges often begin the day with a large stack of orders to be reviewed and signed. As the day progresses the stack is periodically replenished so that it is as high at the end of the day as it was at the beginning. In conversation, judges confirm the reality of that impression.

Id.

69 A number of cases have held that a trustee can sell or abandon property without an order. *See, e.g.*, *In re* Trim-X, Inc., 695 F.2d 296, 300 (7th Cir. 1982) (holding

Unless and until such changes are made, the majority view will probably continue to be that an order is required on such motions, and that the judge should ordinarily sign it. Most judges will continue to review the moving papers even if the matter is uncontested before signing the order. For the reasons stated above, however, reasonable minds can differ regarding the validity of that view.

The responses to the questionnaire gave examples of substantial differences among bankruptcy courts in resolving these issues. For instance, bankruptcy courts in several districts have local rules that provide for entry of "default orders" if no objection is filed to certain types of motions.[70] The movant must file a certification or declaration that service was proper and no objections were filed, and the court will enter the default order. Most such rules, however, do not state whether the judge or the court clerk signs such orders. Another method is utilized in the Western District of Pennsylvania, where neither the judge nor his or her staff review the moving papers on certain types of motions. Instead, the clerk signs or stamps the default order on behalf of the court.[71] In other districts,

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that a trustee may abandon property without court involvement if there are no objections by a party in interest); Geller v. Int'l Club Enter. Inc. (*In re* Int'l Club), 105 B.R. 190, 193 (Bankr. D.R.I. 1989) (finding that if no party objects, a trustee may abandon property of the debtor's estate without court order or approval); *In re* F. A. Potts & Co., 86 B.R. 853, 861 (Bankr. E.D. Pa. 1988) (positing that although a trustee must follow the 'after notice and hearing' mandate of § 363(b), a court order is not required for the trustee to sell property); *In re* Wideman, 84 B.R. 97, 101 (Bankr. W.D. Tex. 1988) (ruling that "hearing need not . . . actually be set with respect to [a motion to compel trustee to abandon] so long as appropriate parties are afforded due notice and an opportunity for a hearing").

In New Jersey, the trustee can obtain a "certificate of no objection" to the sale or abandonment from the clerk as evidence of authority to sell or abandon. No reported opinion has held, however, that action by the court, as opposed to the trustee, after notice and a hearing under Code sections other than 363 and 554 is effective without an order. See *supra* note 51 for the difference in the language of other Code sections requiring "notice and a hearing" and the effect of that difference on the role of the court.

70 *See* D. ALASKA BANKR. CT. R. 70(a)(1); D. ARIZ. BANKR. CT. R. 4001(E); C.D. CAL. BANKR. CT. R. 111(7)(a); E.D. CAL. BANKR. CT. R. 914(i)(3); N.D. GA. BANKR. CT. R. 755-2; N.D. ILL. BANKR. CT. R. 12(P); W.D. LA. BANKR. CT. R. 2.2(D); D. MD. BANKR. CT. R. 41(d)(2); D. MASS. BANKR. CT. R. 26(3)(a); E.D. MICH. BANKR. CT. R. 2.08(d) & 2.19; D. MINN. BANKR. CT. R. 1210(a); N.D. MISS. BANKR. CT. R. 13(a)(4); W.D.N.Y. BANKR. CT. R. 33; N.D. OHIO BANKR. CT. R. 4:0.8(a)(6); S.D. OHIO BANKR. CT. R. 5.4(b); W.D. OKLA. BANKR. CT. R. 12(d); E.D. PA. BANKR. CT. R. 4008.1(e) & 4008.3(e); W.D. PA. BANKR. CT. R. 9013.4(5); D.R.I. BANKR. CT. R. 10(d); D.S.D. BANKR. CT. R. 306(A)(3); M.D. TENN. BANKR. CT. R. 1.41(e); W.D. TENN. BANKR. CT. R. 6(b)(3)(v); N.D. TEX. BANKR. CT. R. 4001(b); W.D. TEX. BANKR. CT. R. 9013(b)(3) & (4); E.D. VA. BANKR. CT. R. 302(G)(2); W.D. WASH. BANKR. CT. R. 9013(j)(2).

71 *See* appendix 4, W.D. PA. BANKR. CT. R. 9013.4(5)(a) (authorizing the clerk to sign orders entering default "[i]f no written response, or a written response which

judges reported that they do not review the moving papers on certain motions if no opposition is filed, but the law clerk or other staff member will review them. Such systems are, however, a form of judicial review because the person reviewing the papers is doing so on the judge's prescribed criteria. Because it avoids judicial involvement entirely if no objection is filed, the default order system in the Western District of Pennsylvania appears to come closest at the moment to implementing Congressional intention regarding these issues, at least as to the types of motions covered by that rule.[72]

One possible solution to the problem of what form of authorization is required on uncontested motions may be to amend the

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does not object to the Motion, is received timely by the Movant by the date specified in the Notice"). This procedure is allowed for the following motions or matters: 1) relief from automatic stay; 2) abandonment; 3) lien avoidance under Rule 4003(d); 4) objections to claims (where the required 30 days' notice was given); 5) objections to claim of exemption; 6) appointment of a chapter 11 trustee when not filed by the debtor; 7) motion to determine secured status under § 506(a) when only the value of collateral is at issue; 8) motion to redeem property. *See id.*

[72] It must be remembered that whether a judge signs an order or the clerk signs it under Federal Rule of Bankruptcy Procedure 9021, the order can still be vacated or modified in appropriate circumstances. *See* FED. R. BANKR. P. 9021. For example, if a party who did not contest a motion subsequently moves to vacate or modify the order, the standards for relief from such orders are not so stringent as to cause harsh and unjust results.

There are no reported decisions on whether a motion to vacate an order granting a motion which was uncontested should be governed by Federal Rule of Bankruptcy Procedure 9006(b)(2) and its "excusable neglect" standard or by Federal Rule of Civil Procedure 55(c), incorporated by reference in Federal Rule of Bankruptcy Procedure 7055, on setting aside default judgments, and the nonbankruptcy case law thereunder. Prior to the United States Supreme Court's decision in *Pioneer Inv. Servs., Co. v. Brunswick Assocs. Ltd. Partnership*, the decision as to which rule applies could have been quite significant because there were substantial differences between the two standards. *See* Pioneer Inv. Servs., Co. v. Brunswick Assocs. Ltd. Partnership, 113 S. Ct. 1489 (1993). The *Pioneer* case eliminated these differences. *See id.*

Specifically, before *Pioneer*, the "Courts of Appeals for the Fourth, Seventh, Eighth, and Eleventh Circuits [had] taken a narrow view of 'excusable neglect' under Rule 9006(b)(1), requiring a showing that the delay was caused by circumstances beyond the movant's control." *Id.* at 1494 n.3 (citations omitted). This high standard stood in stark contrast to the standard for reopening a default judgment under Federal Rule of Civil Procedure 55. In *Hritz v. Woma Corp.*, the Third Circuit laid out a framework for the evaluation of whether a default judgment should be reopened: "The trial court must consider three factors: (1) whether the plaintiff will be prejudiced if the default is lifted; (2) whether the defendant has a meritorious defense; and (3) whether the default was the result of the defendant's culpable misconduct." Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984). *Accord* Mechan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981); United Coin Meter v. Seaboard Coastline R.R., 705 F.2d 839, 845 (6th Cir. 1983); Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984); Keegel v. Key West & Caribbean Trading Co., Inc., 627 F.2d 372, 373 (D.C. Cir. 1980). Thus, prior to *Pioneer*, the choice of whether to employ the 9006(b)(1) standard or the Rule 55 standard was quite important as the

Code and/or Rules to explicitly provide that except in specified situations, the court will generally not review uncontested motions, and that authorization for the requested relief will be reflected in a clerical certificate of no objection, or default order signed by the clerk. This could probably be done by changing the Rules, without changing the Code.

In light of the overwhelming demands on the time of many bankruptcy judges, such changes could save time without sacrificing justice, since aggrieved parties can move for reconsideration. Such changes would allow bankruptcy judges to devote most of their time to their primary function, which is the resolution of disputes.

V. The Volume of Bankruptcy Court Orders

Closely related to the question of whether bankruptcy judges are reviewing uncontested motions unnecessarily is the question of whether they are signing orders unnecessarily. Many bankruptcy judges spend too much time reviewing and signing orders.[73] In New Jersey, the bankruptcy judges each signed an average of approximately eight hundred sixty orders per month in 1992. Many of those orders were the result of routine, uncontested motions or applications. One judge from another district stated in the questionnaire that orders are "the bane of my existence," a sentiment which I share.[74] It is a ridiculous waste of the

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Rule 55 standard had a much lower threshold than Rule 9006(b)(1) and the choice of standard, therefore, would have an impact on the disposition of the motion.

The Supreme Court's recent decision in *Pioneer* resolved the circuit conflict over the proper interpretation of "excusable neglect" by adopting a flexible standard based on a multi-factor balancing test. *See Pioneer*, 113 S. Ct. at 1498. Specifically, the Court stated:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. The *Pioneer* balancing test for determining excusable neglect more closely resembles the Rule 55 standard embraced by the Third Circuit in *Hritz* than did the prior excusable neglect standard that required a showing that the delay was caused by circumstances beyond the movant's control. Because the Federal Rule of Bankruptcy Procedure 9006(b)(1) and the Federal Rule of Civil Procedure 55 standards are now similar, the question of which standard to apply has become less important in the disposition of these motions.

[73] *See supra* note 68.

[74] The judge in question declined permission to disclose the judge's identity.

scarcest judicial resource, which is the judge's time, to have a system in which fifteen percent of the judges' case-related time is spent reviewing and signing orders.[75] That statistic also highlights the extent to which the bankruptcy judge is still expected to perform a supervisory function, since the majority of orders reflect decisions on uncontested motions and other applications.

There are several questions which require scrutiny regarding the volume of orders. The first question is whether bankruptcy judges are signing orders which are clearly not required under the Code or Rules. One example of a transaction in bankruptcy court which does not require an order, but which is sometimes the subject of an order, is the withdrawal of an application or motion.[76] Other transactions which are sometimes the subject of unnecessary orders are uncontested applications by a trustee or debtor in possession for use, sale, lease or abandonment of property.[77] A chapter 12 or chapter 13 case is converted to chapter 7 without court order when the debtor files a notice of conversion,[78] but an order is often submitted and entered anyway. In addition, if the court has directed an order to be submitted reflecting a ruling and the parties fail to do so, it is usually unnecessary for the court to pursue the matter further or prepare the order itself. If the parties don't feel they need an order, the court ordinarily can dispense with one.[79] Adversary proceedings can be dismissed without order by a stipulation signed by all parties to the action,[80] but the parties often request an order anyway. A subpoena is sufficient authorization to conduct an examination under Bankruptcy Rule 2004 in most cases,[81] but an order is often requested instead. In all of the foregoing situations, and perhaps others, courts which are overburdened with orders can examine their practices to ensure that they are not entering or-

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[75] *See supra* note 68.

[76] *See* 90 ADMIN. OFF. U.S. CTS. INFO. AND MGMT. BULL. No. 2, at 3 (Feb. 1990) (positing that the "court[s'] practice of entering orders dismissing pending motions is unnecessary and is probably creating additional work for the clerk's office").

[77] *See supra* note 69.

[78] *See* FED. R. BANKR. P. 1017(d).

[79] With regard to orders terminating cases and adversary proceedings, however, the court may need to enter an order for administrative purposes. See *infra* note 80 and accompanying text for one situation in which dismissal of an adversary proceeding does not require an order.

[80] FED. R. CIV. P. 41(a)(1)(ii), incorporated by reference in FED. R. BANKR. P. 7041.

[81] *See* FED. R. BANKR. P. 2004(c) (authorizing examination or document production by subpoena). See also appendix 4 for copy of D.N.J. BANKR. CT. R. 16 (incorporating FED. R. BANK. P. 2004(c)).

ders unnecessarily.[82]

To the extent orders are necessary, the bankruptcy court can utilize Federal Rule of Bankruptcy Procedure 9021 (Bankruptcy Rules) to reduce the burden of such orders upon the bankruptcy judges.[83] Bankruptcy Rule 9021 incorporates by reference Federal Rule of Civil Procedure 58 (Federal Rules), which provides in pertinent part that the clerk shall prepare and sign a judgment (a) for a sum certain, (b) denying all relief or (c) upon a general verdict of a jury.[84] Federal Rule 58 provides that in all other cases, the court shall "approve the form" of the judgment.[85] Federal Rule 58 provides further that attorneys shall not submit forms of judgment except upon direction of the court, and that such directions shall not be given as a matter of course.[86] Bankruptcy Rule 9002(5) defines "judgment" to include any appealable order.[87] Therefore, the court is authorized, if not required, to prepare its own forms of orders and judgments to the extent possible.

Utilization of standard forms of orders and judgments serves several salutary purposes. First, it expedites entry because there is no need to wait for attorney preparation and submission of such orders, and less court review and processing is required.[88] Second, it promotes uniformity and lessens the possibility of an order becoming lost in the mail, being misplaced in the clerk's office or being misdesignated by a party submitting the order.

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82 The Bankruptcy Court for the District of New Jersey has reduced the volume of orders over the last several years as a result of review of the aforementioned practices.

83 FED. R. BANKR. P. 9021

84 *See* FED. R. CIV. P. 58

85 *Id.*

86 *Id.*

87 FED. R. BANKR. P. 9002(5).

88 This purpose was one of the driving forces behind the establishment of Federal Rule 58.

> Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

6A JEREMY C. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 58.01(8) (2d ed. 1987) (citing Committee Note of 1963 to Amended Rule 58). *See also* Matteson v. United States, 240 F.2d 517, 518 (2d Cir. 1956) (recognizing that the Advisory Committee to Rule 58 had repeatedly advocated rules mandating "prompt entry of judgments without that delay which is occasioned by awaiting the action of counsel").

Third, and perhaps most important for purposes of this article, it saves a substantial amount of the judges' time because it is unnecessary for judges to review and sign routine, standard form orders where the judges have approved the standard orders, and where the judges direct entry of particular standard orders on a case-by-case basis.[89] Use of standard orders in such situations both reduces the time the judge spends on this ministerial function and eliminates the possibility that the clerk will inadvertently sign an order that does not accurately reflect the court's decision.

The clerk's duty to prepare and sign orders and judgments is ministerial and may be performed by a deputy clerk in the name of the clerk.[90] The court may issue standing instructions to the clerk to enter judgment in certain situations without any formal interposition by the court.[91] The preparation, signing and entry of the judgment is ministerial and not a usurpation of the court's judicial powers.[92]

The Administrative Office of the Courts employs the proce-

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[89] Under New Jersey Local Bankruptcy Rule 4(b) and similar rules, a bankruptcy judge may direct the clerk to stamp the judge's signature to a particular, preapproved standard order on a case-by-case basis. See appendix 4 for copy of D.N.J. BANKR. CT. R. 4(b). The stamp is thus the official and lawful signature of the judge.

The essential purpose of a signature is to express the signer's agreement to or approval of an instrument. 80 C.J.S. *Signatures*, § 1(a) (1955) (citations omitted). A signature is affixed to a writing "for the purpose of authenticating it or to give notice of its source, and for the purpose and with the intent that the individual signing the writing shall be bound thereby". *Id.* § 1(c). In *State v. Hickman*, the court considered an argument that an arrest warrant was invalid under Florida law because a rubber stamp facsimile of the justice of the peace's signature had been affixed under the authorization of the justice. State v. Hickman, 189 So. 2d 254, 256 (Fla. Dist. Ct. App. 1966), *cited with approval in* United Bonding Ins. Co. v. Banco Suizo-Panameno, S.A., 422 F.2d 1142, 1147 (5th Cir. 1970). The *Hickman* court held that the justice's physical presence was not required to validate the use of the rubber stamp. *Id.* at 257. The court reasoned that "presence" is a variable term; it may be actual or constructive, depending on the circumstances of a particular case. *Id.* at 258. Moreover, since the issuance of the warrant was based on the invocation and exercise of the justice's judgment, "[t]he affixing of the signature, even in the form of a rubber stamp and in the hand of his chief clerk, constituted an attestation that it was his act . . . his issuance [and] his commands." *Id.* at 259.

But see Daniels v. Stovall, 660 F. Supp. 301, 303 (S.D. Tex. 1987) (asserting in dicta that the "use of a rubber stamped signature is acceptable only when used in the presence of the judge and under the direction of the judge"). The court's dicta in *Daniels v. Stovall* cannot be reconciled with the express language of Rule 58, which is not cited or discussed in the opinion. In addition, if *Daniels v. Stovall* were correct, the practice of the Administrative Office of the Courts of issuing an order of discharge in every bankruptcy case without a judge's signature would be invalid. See *infra* note 93 and accompanying text.

[90] 6A MOORE ET AL., *supra* note 88, ¶ 58.01(8).

[91] *Id.* ¶ 58.04(1) (citations omitted).

[92] *Id.* ¶ 58.04(4.2) (citations omitted).

dure provided by Bankruptcy Rule 9021 for all bankruptcy courts for the most common form of order, the order providing for the discharge of the debtor.[93] That order is generated by computer in all appropriate cases on behalf of the bankruptcy court without the signature of any bankruptcy judge.

Bankruptcy courts in four judicial districts — *i.e.*, the Northern District of Alabama, the District of New Jersey, the District of Utah, and the Eastern District of Virginia — reported local rules regarding signing of orders by the clerk.[94] In addition, bankruptcy courts in seven other judicial districts — *i.e.*, the Eastern District of California, the Western District of Michigan, the Northern District of Ohio, the Eastern District of Pennsylvania, the Middle District of Pennsylvania, the Northern District of Texas, and the Western District of Texas — reported general orders authorizing the clerk to sign certain orders on behalf of the court.[95] Moreover, judges responding to the questionnaire from five other districts also reported procedures permitting the clerk to sign routine orders on their behalf without a local rule or general order to that effect.[96] Bankruptcy judges responding to the questionnaire reported a general reluctance to allow their secretary or law clerk to sign orders on their behalf, and usually limited such authorization to emergencies.[97]

One very common form of order is an order terminating the automatic stay under Code § 362(d).[98] The District of New

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93 The official form for the discharge of the debtor is Official Bankruptcy Form No. 18.

94 *See* N.D. ALA. BANKR. CT. R. 12; D.N.J. BANKR. CT. R. 4(b); D. UTAH BANKR. CT. R. 535; E.D. VA. BANKR. CT. R. 106. See also appendix 4 for copies of these local rules.

95 *See* E.D. CAL. SPECIAL ORD. 87-1; W.D. MICH. GEN. ORD. 2; N.D. OHIO GEN. ORD. 588-28; E.D. PA. OMNIBUS ORD.; M.D. PA. ADMIN. ORD. 92-01; N.D. TEX. GEN. ORD. 91-2, 91-3; W.D. TEX. AMEND. ORD. AUTH. CLERK TO SIGN ADMIN. ORDS. See also appendix 5 for copies of these orders.

96 *See* appendix 3, Questionnaire, § IX, No. 9.

97 Only thirty-three percent of the judges reported that they allow their chambers staff to sign orders as a means of conserving time. Additionally, two percent of the judges reported that their staff is permitted to sign orders only if the judge will be out of town for more than three days and the orders are routine. *See* appendix 3, Questionnaire, § IX, No. 2

98 Code section 362(d) provides that the court shall grant relief from the automatic stay, upon request of a party in interest, "for cause, including the lack of adequate protection of an interest in property of such party in interest" or with regard to a stay of an act against property, if "the debtor does not have an equity in such property; and such property is not necessary to an effective reorganization." 11 U.S.C. § 362(d).

The Committee on the Judiciary, in reporting upon the proposed Bankruptcy Code stated:

Jersey has recently provided for the clerk to sign orders terminating the automatic stay on behalf of the court in certain circumstances.[99] These standard orders are used whether the motion was contested or uncontested. It also appears possible, however, to use Code § 362(e) to avoid orders altogether if a motion under 362(d) is uncontested. Section 362(e) provides that the automatic stay terminates thirty days after a request for relief under § 362(d), unless the court orders otherwise within such period.[100] Thus, because § 362(e) provides for termination of the automatic stay by operation of law if no contrary order is entered within thirty days of the filing of a motion under § 362(d), the clerk could issue a certification after the expiration of such period stating that the automatic stay has terminated by operation of law because a motion and a certification of service were filed, there were no objections filed and there were no orders entered extending the automatic stay. There is no reason why an order is legally necessary under such circumstances, or why such certification from the clerk would not be sufficient evidence of termination of the automatic stay.[101] This procedure could substantially reduce the volume of orders granting relief under § 362(d) because most such motions are uncontested. There would be a cor-

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> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

S. Rep. No. 989, *supra* note 22, at 54-55, *reprinted in* 1978 U.S.C.C.A.N. at 5840-41.

[99] *See* appendix 4, D.N.J. Bankr. Ct. R. 4 & D.N.J. Gen. Ord. Mar., 1993. Standard orders vacating the automatic stay are used as directed by the judge, and such orders cannot include any provision supplementing or modifying the standard order. This order is employed only in cases where the automatic stay is vacated without qualification, condition or other relief.

[100] Code section 362(e) provides in pertinent part:

> Thirty days after a request . . . for relief from the stay of any act against property of the estate . . . such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d). . . . The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing.

11 U.S.C. § 362(e).

[101] See *supra* note 69 regarding the usage of certificates of no objection on applications to sell or abandon property of the estate.

responding conservation of judicial time, without any detriment to parties in interest.

There undoubtedly are other means available to reduce the volume of orders in bankruptcy court without causing harm. While reasonable minds may differ on details, it cannot reasonably be disputed that it is a waste of judicial time to require bankruptcy judges to spend fifteen percent of their case-related time reviewing and signing orders. Therefore, all available means to reduce such volume warrant consideration, including any appropriate amendments to the Code and/or Rules.

VI. The Relationship Between Code § 102(1) and *Sua Sponte* Action Under Code § 105(a)

Code § 105(a) is instrumental in defining the role of the bankruptcy judge. Section 105(a) is the primary source of the equitable powers of the bankruptcy court.[102] Specifically, § 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an

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[102] Section 105(a) has been described as "an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case." Exquisito Servs. Inc. v. United States (*In re* Exquisito Serv. Inc.), 823 F.2d 151, 155 (5th Cir. 1987); *In re* Charles & Lillian Brown's Hotel, Inc., 93 B.R. 49, 54 (Bankr. S.D.N.Y. 1988). The primary purpose of section 105(a) is to empower the bankruptcy court with the ability to act in a manner which is appropriate or necessary to facilitate the exercise of its jurisdiction. *See, e.g.*, United States v. Sutton, 786 F.2d 1305, 1307 (5th Cir. 1986) (positing that section 105(a) "authorizes bankruptcy courts to issue injunctions and take other necessary steps in aid of their jurisdiction"); National Labor Relations Bd. v. Brada Miller Freight Sys. Inc. (*In re* Brada Miller Freight Sys., Inc.), 16 B.R. 1002, 1013 (N.D. Ala. 1981) (maintaining that "[t]he language of § 105(a) conveys Congress's intent to enable the bankruptcy court to do whatever is necessary to aid its jurisdiction"); *In re* Trails End Lodge, Inc., 45 B.R. 597, 601 (Bankr. D. Vt. 1984) (opining that "[t]he basic purpose of [§ 105(a)] is to enable the bankruptcy court to do whatever is necessary to aid its jurisdiction, i.e., anything arising in or relating to a bankruptcy case"); Federal Land Bank of St. Paul v. Brown (*In re* James), 20 B.R. 145, 150 (Bankr. E.D. Mich. 1982) (asserting that "[t]he basic intention of [§ 105(a)] is to enable the bankruptcy court to do whatever is necessary to aid its jurisdiction, i.e., anything arising in or relating to a bankruptcy case").

Bankruptcy courts have also historically been regarded as courts of equity with broad equitable powers. *See In re* Wilnor Drilling Inc., 29 B.R. 727, 729-30 (S.D. Ill. 1982) (noting that "[i]t is well established that 'the courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy [Code]' ") (citations omitted); *In re* Wellman, 89 B.R. 880, 883 (Bankr. D. Colo. 1988) (emphasizing that "[t]he Bankruptcy Court has long been recognized as a court of equity"); *James*, 20 B.R. at 149 (stating that "[a] bankruptcy court is a court of equity . . . as guided by equitable doctrines and principles").

> issue by a party in interest shall be construed to preclude the court from, *sua sponte*,[103] taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.[104]

The significance of the court's express grant of *sua sponte* authority under § 105(a) for purposes of this article is that *sua sponte* objections to requests for relief often take time. For example, if a court raises an objection to a motion when no one else has, because the court feels an objection should have been raised, the court may have to perform research, conduct a hearing and develop a record which parties in interest have chosen not to do.[105] Thus, a careful exami-

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103 *Sua sponte* is defined as "[o]f his [or her] own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1277 (5th ed. 1979). A judge can act *sua sponte* when "it is in the interests of orderly procedure and to prevent confusion of the issues." 60 C.J.S. *Motions & Orders* § 2 (1969).

104 11 U.S.C. § 105(a). Congress added the second sentence of section 105(a) as part of the 1986 Amendments to provide a clear statutory expression of its intent in allowing the bankruptcy court to act or to make a determination on its own volition. 132 CONG. REC. S5092 (daily ed. Oct. 3, 1986). Senator Orrin Hatch stated that "[the amendment] allows a bankruptcy court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner." *Id.* (statement of Senator Hatch). *See also* Gibbons v. Haddad (*In re* Haddad), 68 B.R. 944, 949 (Bankr. D. Mass. 1987) (positing that the addition of the second sentence in the 1986 amendments granted clear statutory authority of a bankruptcy court's power to act *sua sponte*).

105 *Sua sponte* objections may create additional work for the district and circuit courts on appeal as well. In *In re* Love, Judge A. Jay Cristol poetically addressed the subject of *sua sponte* motions. 61 B.R. 558 (Bankr. S.D. Fla. 1986). The court's entire opinion in that case consisted of the following:

> Once upon a midnight dreary, while I pondered weak and weary
> Over many quaint and curious files of chapter seven lore
> While I nodded nearly napping, suddenly there came a tapping
> As of some one gently rapping, rapping at my chamber door,
> "Tis some debtor" I muttered, "tapping at my chamber door-
> Only this and nothing more."
> Ah distinctly I recall, it was in the early fall
> And the file was still small
> The Code provided I could use it
> If someone tried to substantially abuse it
> No party asked that it be heard.
> "Sua sponte" whispered a small black bird.
> The bird himself, my only maven, strongly looked to be a raven.
> Upon the words the bird had uttered
> I gazed at all the files cluttered
> "Sua sponte," I recall, had no meaning; none at all.
> And the cluttered files sprawl, drove a thought into my brain.
> Eagerly I wished the morrow-vainly I had sought to borrow
> From BAFJA, surcease of sorrow-and an order quick and plain
> That this case would not remain as a source of further pain.
> The procedure, it seemed plain.
> As the case grew older, I perceived I must be bolder.

nation of § 105(a) is necessary to ascertain the criteria for deciding when a bankruptcy judge should take an action *sua sponte.*

Although the equitable powers of the bankruptcy court under § 105(a) are broad, they are not unlimited.[106] Section 105(a) cannot be used to contravene other provisions of the Code.[107] It can also

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And must sua sponte act, to determine every fact,
If primarily consumer debts, are faced,
Perhaps this case is wrongly placed.
This is a thought that I must face, perhaps I should dismiss this case.
I moved sua sponte to dismiss it for I knew I would not miss it.
The Code said I could, I knew it.
But not exactly how to do it, or perhaps some day I'd rue it.
I leaped up and struck my gavel.
For the mystery to unravel
Could I? Should I? Sua sponte grant my motion to dismiss?
While it seemed the thing to do, suddenly I thought of this.
Looking, looking towards the future and to what there was to see
If my motion, it was granted and an appeal came to be,
Who would be the appellee?
Surely it would not be me.
Who would file, but pray tell me, a learned brief for the appellee
The District Judge would not do so
At least this much I do know.
Tell me raven, how to go.
As I with the ruling wrestled
In the statute I saw nestled
A presumption with a flavor clearly in the debtor's favor.
No evidence had I taken
Sua sponte appeared forsaken.
Now my motion caused me terror
A dismissal would be error.
Upon consideration of § 707(b), in anguish loud I cried
The court's sua sponte motion to dismiss under § 707(b) is denied.

Id. at 558-59.

106 Lowrey v. First Nat'l Bank of Bethany (*In re* Robinson Bros. Drilling Inc.), 97 B.R. 77, 82 (W.D. Okla. 1988). *See also* Amatex Corp. v. Stonewall Ins. Co., 102 B.R. 411, 413 (E.D. Pa. 1989) (emphasizing that a bankruptcy court's powers under § 105(a) should be used with extreme caution); Nasco P.R., Inc. v. Chemical Bank (*In re* Nasco P.R. Inc.), 117 B.R. 35, 38 (Bankr. D.P.R. 1990) (cautioning that the broad powers under § 105(a) should be used sparingly); GAF Corp. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 26 B.R. 405, 415 (Bankr. S.D.N.Y. 1983) (opining that the broad powers of § 105(a) are not unrestricted); *James*, 20 B.R. at 149 (maintaining that limitations do exist on a bankruptcy court's exercise of equitable powers under § 105(a)).

107 *See* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (asserting that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); Piccolo v. Dime Savings Bank of New York, 145 B.R. 753, 757 (N.D.N.Y. 1992) (stating that "[t]hough Congress drafted section 105(a) in broad terms, a Bankruptcy Court's discretion is not unbridled . . . the power must and can be exercised only within the confines of the Bankruptcy Code"); Finney v. Smith, 141 B.R. 94, 98 (E.D. Va. 1992) (finding that "[a]lthough § 105(a) does grant the bankruptcy court general equitable powers to issue necessary and appropriate orders, these powers are not a license for the court

be inferred from comparison of the first and second sentences of § 105(a) that the *sua sponte* 105(a) power is only a sub-class of the entire 105(a) power, and is not co-extensive with the entire 105(a) power. A close examination of the statutory language supports this conclusion. The first sentence of § 105(a) provides a broad authorization of the court's general equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[108] In contrast, the second sentence of § 105(a), which authorizes the court's *sua sponte* powers, limits such authorization to two situations, *i.e.*, enforcing or implementing court orders or rules, and preventing an abuse of process. Accordingly, under the principles of *expressio unius est exclusio alterius*[109] and *noscitur a sociis*,[110] it can be inferred that Congress intended that the bank-

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to disregard the clear language and meaning of the bankruptcy statutes and rules"); *In re* PHM Credit Corp, 110 B.R. 284, 288 (E.D. Mich. 1990) (opining that the court's power under section 105(a) does not include the power to enter an order which is in conflict with other Code provisions); *Amatex*, 102 B.R. at 413 (noting that "powers [under § 105] must and can only be exercised within the confines of the Bankruptcy Code"); *In re* Federal Land Bank of Omaha, 72 B.R. 245, 247 (D.S.D 1987) (stating that section 105(a) does not grant the court authority to enter orders *sua sponte* where the Code expressly provided for the contrary); *Johns-Manville*, 26 B.R. at 415 (positing that section 105(a) "does not permit [a judge] to ignore, supersede, suspend or even misconstrue the express language of the Code").

108 See *supra* note 104 and accompanying text for full text of § 105(a).

109 This well-known maxim of statutory interpretation means that the "[m]ention of one thing implies [the] exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979). Although courts have found this maxim helpful in interpreting legislative enactments, some courts have noted that it should be applied with caution. *See also* S.E.C. v. Joiner Corp., 320 U.S. 344, 350-51 (1943) (maintaining that this statutory maxim shall be used as a mere aid in statutory construction); *In re* Eaton, 130 B.R. 74, 76 (Bankr. S.D. Iowa 1991) (providing that "[w]hile merely an aid to construction that should not defeat legislative intent, the force of this maxim . . . is strengthened when a particular thing is provided in one part of the statute and omitted in another").

110 As a principle of statutory construction, courts have interpreted the phrase to mean that "words take meaning based on their context or their association with other words in the statute." DeSisto College, Inc. v. Town of Howey in the Hills, 706 F. Supp. 1479, 1495 (M.D. Fla. 1989). *See* BLACK'S LAW DICTIONARY 956 (5th ed. 1979) (translating the phrase to mean "[i]t is known from its associates"). In utilizing this interpretive maxim, courts have explained that "[w]here one of the enumerated terms [in a statute] is a general one, it may be restricted to a narrower sense or less general meaning by the context in which it is used." *DeSisto College*, 706 F. Supp. at 1495. *See also* United States v. 88 Cases Etc., of Bireley's Orange Beverage, 5 F.R.D. 503, 504 (D.N.J. 1946) (explaining that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment") (citation omitted). Accordingly, when faced with the general-specific term dichotomy when interpreting statutes, it has been held that a statute stating "school" in general, followed by a list of specific schools, did not include colleges within its scope where

ruptcy court limit its use of *sua sponte* power to the two explicit authorizations in the second sentence.[111] Analysis of those explicit grants of power to act *sua sponte* discloses the limits on that power.

The first of the two explicit authorizations in § 105(a) for *sua sponte* actions is to enforce or implement court orders or rules.[112] The meaning and purpose of this authorization is self evident. If the court is to function effectively, it must have the authority to enforce its own orders.[113] While many or most failures to comply with an order will be raised by a party, the court's effectiveness as an institution requires the residual authority to enforce its orders on its own motion in appropriate circumstances. For example, the court

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college was not part of the specific list. *DeSisto College*, 706 F. Supp. at 1496. In addition, courts have applied *noscitur a sociis* in construing the old Bankruptcy Act of 1898. *See, e.g.*, *In re* Rouse, Hazard & Co. 91 F. 96, 100 (7th Cir. 1899) (stating that the specific provisions will govern "in respect to that subject as against general provisions contained in the same act"). *See generally* Ginsberg & Sons v. Popkin, 285 U.S. 204 (1932) (utilizing *noscitur a sociis* in construing Bankruptcy Act of 1898).

[111] Further evidence of this intent is that there are other Bankruptcy Code sections and rules which expressly provide that the court can take action *sua sponte* or on its own motion or initiative. *See* 11 U.S.C. § 107(b) (stating instances in which bankruptcy judge can, *sua sponte*, deny public access to records); 11 U.S.C. § 557(c)(1) (mandating that court may, *sua sponte*, expedite grain elevator bankruptcies); 11 U.S.C. § 707(b) (explaining that bankruptcy judge may dismiss case *sua sponte* where debtor is subject to consumer debts for the most part and granting relief would be an abuse of the bankruptcy process); FED. R. BANKR. P. 2006(f) (stating that court may *sua sponte* determine if there were infirmities with solicitation or voting of a proxy); FED. R. BANKR. P. 2017(a) & (b) (authorizing bankruptcy judge to examine, *sua sponte*, transactions between debtor and attorney); FED. R. BANKR. P. 2019(b) (permitting bankruptcy judge to *sua sponte* scrutinize representation occurring during a chapter 9 or 11 proceeding and invalidate same if exigencies so require); FED. R. BANKR. P. 3022 (providing that bankruptcy judge court can, on its own motion, enter final decree closing a bankruptcy case); FED. R. BANKR. P. 4001(d)(3) (maintaining that a bankruptcy judge can, *sua sponte*, approve or disapprove agreements regarding use of cash collateral or postpetition financing without conducting a hearing if no objection is filed); FED. R. BANKR. P. 9011(a) (permitting court to impose sanctions *sua sponte*); FED. R. BANKR. P. 9020(b) (authorizing bankruptcy judge, after notice and hearing, to determine *sua sponte* whether party should be held in contempt). *See also* 28 U.S.C. § 157(b) (providing that the bankruptcy judge shall determine whether a proceeding is core or related on the judge's own motion). Thus, because Congress has expressly authorized *sua sponte* power under the above specific provisions and rules, it appears that cases holding that the court may take any action *sua sponte* to enforce any Code requirement may be mistaken. *See In re* Gulph Woods Corp., 83 B.R. 339, 344 (Bankr. E.D. Pa. 1988) (holding that "the 1986 amendment to § 105(a) vests in us the power to take any action necessary to enforce Code requirements *sua sponte*, without any finding of harm to any interested party arising from the Code violation").

[112] See *supra* note 104 for the full text of section 105(a).

[113] Courts may enforce orders by various means, including striking the non-complying party's pleadings or by utilizing contempt proceedings, if necessary. 56 AM. JUR. 2D *Motions, Rules, and Orders* § 41 (1971).

sometimes needs to issue orders to ensure the orderly processing of papers or the timely closing of cases. The ability of the court to function smoothly requires that the court have the ability to issue *sua sponte* orders enforcing such requirements.

Similar considerations undoubtedly formed the basis for the authorization in § 105(a) for *sua sponte* actions to enforce or implement court rules.[114] There could be chaos if a court did not have the authority to control its own processes. There are various circumstances in which the court may raise objections on its own motion to rule violations in the interests, for example, of uniformity, or orderly processing of papers. Other more serious concerns may be involved as well, where, for example, an applicant hasn't proven service of the application upon affected parties as required by court rules.

The second express authorization in § 105(a) for *sua sponte* action is "to prevent an abuse of process."[115] The Code, however, does not define the term "abuse of process." The few reported cases on its meaning in § 105(a) essentially define it as "maneuvers or schemes which would have the effect of undermining the integrity of the bankruptcy system,"[116] but fail to clarify the circumstances which constitute such abuse. "Abuse of process" is a term of art in nonbankruptcy contexts referring to a species of tort. Under nonbankruptcy law, abuse of process is a misuse of properly issued judicial process.[117] This tort definition is not broad enough for pur-

114 Enforcement of local rules is vested in the discretion of trial courts. R.J. Berke & Co., Inc. v. J.P. Griffin, Inc., 388 A.2d 1260, 1262 (N.H. 1978). Court rules may be enforced by censuring or otherwise sanctioning the transgressor. *See In re* Tenure Hearing of Cowan, 224 N.J. Super. 737, 753, 541 A.2d 298, 306 (App. Div. 1988) (characterizing an explanation of court rules as an "unpleasant exercise," the court stated that violators of court rules "risk censure, sanctions, and suppression" and that in extreme cases, an appeal could be dismissed) (citations omitted). *See generally* 21 C.J.S. *Courts* § 21 (1953) (explaining further the operation and effect of court rules).

115 See *supra* note 104 for the full text of § 105(a).

116 *In re* Calder, 93 B.R. 739, 740 (Bankr. D. Utah 1988). *See also In re* Burrell, 148 B.R. 820, 824 (Bankr. E.D. Va. 1992) (characterizing abuse of process as a situation where "[i]naction by the court . . . would undermine the integrity of the bankruptcy system").

117 *See* Captran Creditors Trust v. North American Title Ins. Agency, Inc. (*In re* Captran Creditors Trust), 116 B.R. 845, 853 (Bankr. M.D. Fla. 1990) (maintaining that "[a]buse of process does not deal with the issuance of process; instead, it deals with the use of process after its issuance for an improper purpose"). The essential elements of a cause of action for an abuse of process generally include: "1) [the] issuance of process; 2) an ulterior purpose; and 3) a willful act in the use of process not proper in the regular course of the proceeding." Meyers v. Ideal Basic Indus. Inc., 940 F.2d 1379, 1382 (10th Cir. 1991). Some courts also require an additional element of the showing of damages to the plaintiff as a result of the abuse. *See, e.g.*,

poses of § 105(a), because certain actions could have the effect of undermining the integrity of the bankruptcy system without constituting the tort of abuse of process. Gouging on fee applications comes to mind as one example.[118] It follows that the definition of abuse of process for purposes of *sua sponte* action under § 105(a) will require further development in the bankruptcy case law.

Ascertaining the limits of the *sua sponte* power in § 105(a) also requires reference to the Congressional intention regarding the role of the court as reflected in § 102(1).[119] When the court rules on an uncontested motion, any ruling other than unconditional approval is a form of *sua sponte* objection. As previously noted, however, Congress intended that the role of the bankruptcy judge under the Code would primarily be to resolve disputes.[120] Congress clearly expressed in the legislative history to § 102(1) that a bankruptcy judge should "become involved only when there is a dispute about a proposed action, that is only when there is an objection."[121] It follows that if the interested parties do not see fit to object to a motion, then the bankruptcy judge ordinarily should not object *sua sponte* because

Enlow v. Tishomingo County, Mississippi, 962 F.2d 501, 512 (5th Cir. 1992) (holding that a demonstration of the damages resulting from the alleged abuse is an essential element in the cause of action); Refuse & Envtl. Sys. Inc. v. Indus. Serv. of America Inc., 932 F.2d 37, 41 (1st Cir. 1991) (finding that a resulting damage to the plaintiff is an essential element in the cause of action); Vahlsing v. Commercial Union Ins. Co., Inc., 928 F.2d 486, 490 (1st Cir. 1991) (stating that damage to the plaintiff is an essential element in the cause of action). To establish the above elements, the plaintiff must demonstrate "*some definite act or threat* by the defendant not authorized by the process." *Meyers*, 940 F.2d at 1382. *See also* W. KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 121 (5th ed. 1984) (asserting that "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required"). An action for abuse of process, therefore, cannot be established if the process is utilized for no other purpose than that for which it was intended by law. 1 AM. JUR. *Abuse of Process* § 4 (1962). Accordingly, if the process is used in the manner for which it was intended, even if the user is driven by spite or ill will, there has been no abuse. *Vahlsing*, 928 F.2d at 490.

118 *See supra* note 19 and accompanying text.

119 *See* Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991) (noting that it is appropriate for a court to inquire into a statute's legislative history where the statutory language is ambiguous); Blum v. Stenson, 465, U.S. 886, 896 (1984) (opining that "where . . . resolution of a question . . . turns on a statute and the intention of Congress, we look . . . to the legislative history if the statutory language is unclear"); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 16 (1979) (looking to a statute's legislative history after reviewing the statutory language); United States v. O'Brien, 391 U.S. 367, 383 (1968) (stating that when called upon to interpret legislation, "the Court will look to statements by legislators for guidance as to the purpose of the legislature").

120 *See supra* note 53 and accompanying text.

121 *Id.*

to do so is to do the job of a party who has chosen to default. Accordingly, bankruptcy judges should exercise their power to raise *sua sponte* objections with restraint. Free-wheeling exercise of the power to object *sua sponte* amounts to resumption of the supervisory role which Congress wanted the United States trustee to assume.[122]

I have been an advocate of *sua sponte* objection in certain circumstances where such action is expressly authorized by the Code or Rules.[123] In these sections, the language of the statute or rule clearly expresses Congress's intent to have the judge act in such capacity, and thus helps define the limits of such power. As my workload has increased, however, I have paid proportionately closer attention to the effect of *sua sponte* objections on my time. One survey question asked the bankruptcy judges if they find that they are less likely to raise objections or bring up issues *sua sponte* as their workload increases.[124] Some of my colleagues reported that response to their workloads, but a greater number answered that there has been no such reduction in their willingness to raise *sua sponte* objections. I freely admit, however, and make no apology that I have become more reluctant to raise objections or bring up issues *sua sponte* as my workload has become more and more oppressive. If our primary duty as judges is the resolution of disputes, then any action, including *sua sponte* action, which detracts from that duty should be subjected to close scrutiny.

The questionnaire responses to the frequency of *sua sponte* objections to specific types of requests for relief were most interesting, and illustrate the range of opinion on the propriety of such actions.

The questionnaire asked the judges to state whether they are ordinarily willing to raise *sua sponte* objections to certain types of requests for relief.[125] The answers were as follows:

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122 *See supra* note 27 and accompanying text.

123 See *supra* note 111 for a list of these specific statutory sections and rules. *See also* STEPHEN A. STRIPP, *Balancing of Interests in Orders Authorizing the Use of Cash Collateral in Chapter 11*, 21 SETON HALL L. REV. 562, 564 (1991) (positing that "the bankruptcy court, as a court of equity, has the right and obligation to modify [consensual cash collateral] orders [which contain provisions that violate creditors' rights to fair treatment and due process] *sua sponte* in order to balance the interests of all parties in the case"). Time constraints, however, play a major role in connection with some of these explicit authorizations for *sua sponte* action. For example, I simply do not have the time to review every chapter 7 case file looking for cases that should be dismissed *sua sponte* under section 707(b) because of substantial abuse of chapter 7. Moreover, the United States trustee also has the ability to raise such objections, and it is the United States trustee who should ordinarily exercise that supervisory function, rather than the court.

124 *See* appendix 3, Questionnaire, § X, No. 3

125 *See* appendix 3, Questionnaire, § X, No. 1. As used here, the term "request

Type of Request for Relief	Yes	No	No Response
fee applications	82%	14%	4%
motions to vacate the automatic stay	42%	51%	7%
motions to avoid liens	51%	42%	7%
chapter 13 plans	54%	33%	13%
chapter 11 plans	67%	27%	6%
chapter 12 plans	45%	35%	20%
motions to sell assets	64%	33%	3%
default judgments	63%	33%	4%
other (specify)[126]	15%	2%	83%

The questionnaire also asked the judges to describe the circumstances under which they will raise such objections *sua sponte*.[127] Although there was considerable variation in the terms used, there appeared to be two common themes. First, many judges stated essentially that they will raise *sua sponte* objections where the applicant fails to make a prima facie showing of entitlement to the relief requested. Second, other judges stated that they will raise *sua sponte* objections where their "conscience is shocked" because of a perception that the applicant is taking unfair advantage of others, the estate will be harmed, or for similar reasons.

The essence of an objection based upon the shocking of the judge's conscience or similar description is probably what Congress had in mind when it used the term "abuse of process" in section 105(a). That is, the request in question is so egregious that it threatens the integrity of the bankruptcy process or of the bankruptcy court itself. Excessive fees really fall into this category, because they offend creditors and other parties in interest who feel helpless to stop the offense, thereby engendering extensive public resentment against the bankruptcy court and process.

Sua sponte objection based merely upon failure to make a prima facie case, however, is more problematic. Reasonable minds can differ over the fundamental question of whether bankruptcy judges must or should review most uncontested motions and other requests for relief which have been served upon affected parties, and raise *sua sponte* objections based upon failure to make a prima facie

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for relief" means any request to the bankruptcy court for an order or other evidence of court authorization or approval.

[126] The types of matters identified in response to this question were agreements regarding use of cash collateral, agreements regarding adequate protection, reaffirmation agreements, objections to discharge, venue changes, enforcement of deadlines, failure to timely file plans, notice deficiencies and any matter requiring entry of an order.

[127] *See* appendix 3, Questionnaire, § X, No. 2.

showing. If the United States trustee and other parties in interest who receive notice of a motion or application do not choose to object, a serious question exists as to the circumstances under which the overburdened bankruptcy courts should do the parties' jobs for them by raising such objections. Again, in those bankruptcy courts which are not overburdened, the question may be academic. The question assumes importance, however, in direct proportion to the degree of any docket congestion.

In addition, with the exception of fee applications, it is difficult to discern any inherent differences among the types of requests for relief listed above of sufficient significance to explain the differences in the percentage of judges willing to raise *sua sponte* objections to each type. For example, forty-two percent of judges are ordinarily willing to raise *sua sponte* objections to motions to vacate the automatic stay, but sixty-seven percent are willing to raise such objections to chapter 11 plans. And yet, relief from the automatic stay often has as much significance to a case as confirmation of a plan has. For that matter, vacating the automatic stay and confirming a plan often have a more significant effect on parties in interest than allowance of a professional fee. The explanation for the willingness of some judges (including myself) to object more readily to some types of requests for relief than others is therefore not immediately apparent from the nature of the request.

It follows that it might be beneficial to engage in a study of the question of when bankruptcy judges should raise *sua sponte* objections. Further articulation of the reasons for the differences among judges could prove enlightening. Indeed, the extent of the differences is best highlighted by noting that some judges stated that they are ordinarily willing to raise *sua sponte* objections to every type of request for relief, while other judges stated that they are not ordinarily willing to raise *sua sponte* objections to any type of request.[128] Greater understanding of and agreement on the criteria for such objections is desirable.

Lastly, it should be noted that my ultimate conclusion is not that the *power* to raise *sua sponte* objections under § 105(a) should be narrowly construed, but rather that such power should be *exercised*

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[128] *See* appendix 3, Questionnaire, § X, No. 1. Thirty-four percent of responding judges stated that they are ordinarily willing to object *sua sponte* to every type of request for relief listed. By contrast, 10% of responding judges stated that they ordinarily do not object sua sponte to any such requests. Fifty-six percent of the judges (including myself) reported that they will raise *sua sponte* objections to some of the listed requests, but not others. Two percent had no response.

with restraint, informed by an awareness of the differences between the first and second sentences of the statute.

VII. Bankruptcy Court Time Constraints as a Factor In Decisions To Permit Litigation In Alternative Forums

Another question which becomes significant in bankruptcy courts with overburdened dockets is whether controversies over which the bankruptcy court has subject matter jurisdiction[129] can be adjudicated in an alternative forum without harming the bankruptcy case or its parties in interest. One way matters can be adjudicated in another forum is to grant a party's motion for per-

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[129] In defining the subject matter jurisdiction of the bankruptcy courts, section 1334 of Title 28 of the United States Code provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334. The bankruptcy court is a unit of the district court. 28 U.S.C. § 151. The district court may refer all bankruptcy cases and matters arising therein or related thereto to the bankruptcy court. 28 U.S.C. § 157(a).

In *Pacor, Inc. v. Higgins (In re Pacor)*, the Third Circuit analyzed the meaning of the term "related to" as used in section 1334. Pacor, Inc. v. Higgins (*In re* Pacor), 743 F.2d 984, 985 (3d Cir. 1984). After reviewing the congressional intent behind section 1334, the court set forth a test for determining whether a proceeding is related to a title 11 case:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Id. at 994 (emphasis omitted).

The Sixth Circuit has also commented on the meaning of "related to" as used in section 1334 positing that the circuit courts of appeals "have uniformly adopted an expansive definition of a related proceeding under section 1334(b) . . . ." Robinson v. Michigan Consol. Gas Co. Inc., 918 F.2d 579, 583 (6th Cir. 1990). After noting that the *Pacor* test for determining whether a proceeding is related to a title 11 case had been adopted by the Fourth, Fifth, Eighth and Ninth Circuits, the court stated that "[w]e too have accepted the *Pacor* articulation albeit with the caveat that 'situations may arise when an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement.' " *Id.* at 584 (citations omitted).

missive abstention under 28 U.S.C. § 1334(c)(1)[130] or mandatory abstention under 28 U.S.C. § 1334(c)(2).[131]

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[130] Section 1334(c)(1) of Title 28 of the United States Code provides in pertinent part:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1).

[131] Section 1334(c)(2) of Title 28 provides in pertinent part:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2).

If all of the requirements set forth in section 1334(c)(2) are met, the court must abstain from hearing the proceeding. Nationwide Roofing & Sheet Metal Inc. v. Cincinnati Ins. Co. (*In re* Nationwide Roofing & Sheet Metal Inc.), 130 B.R. 768, 778 (Bankr. S.D. Ohio 1991). The requirement that "the state court action can be timely adjudicated," dictates that bankruptcy judges must decide what is "timely." The burden of a particular proceeding on the bankruptcy court's docket is a relevant factor in determining what is "timely," as the judge must compare how long it will take to adjudicate the matter in state court to how long it will take in bankruptcy court. The intensity of the competition for judicial time on the bankruptcy court's docket will affect the answer to this question.

The requirement of timely adjudication was scrutinized in *Allard v. Benjamin* (*In re DeLorean Motor Co.*), in which the bankruptcy court denied a motion for mandatory abstention based on the finding that the case could not be adjudicated in a timely fashion on the state level. *See* Allard v. Benjamin, (*In re* DeLorean Motor Co.), 49 B.R. 900 (Bankr. E.D. Mich. 1985). The *DeLorean* court posited that analysis of the timely adjudication requirement necessitates "an examination by the Court of the state court's calendar, the status of the bankruptcy proceeding, the complexity of the issues, and whether the state court proceeding would prolong the administration, or liquidation of the estate." *Id.* at 911.

Commentators have also addressed the timely adjudication requirement for mandatory abstention:

> The final requirement for mandatory abstention is that the state court action can be timely adjudicated. This requirement probably derives from section 57 of the Bankruptcy Act of 1898, which provided that if adjudication, estimation, or liquidation of contingent or unliquidated claims would unduly delay the administration of the estate, the claims should be disallowed. The court should consider the state court calendar and the status of the Code case. Some considerations for the bankruptcy court's determination whether to mandate abstention and await state court adjudication are the type of case, that is, if it is a Chapter 7 liquidation or a Chapter 11 reorganization case, if it is a complex case, and if it is going to take long to close the case, to administer it, or to confirm a plan.

Lawrence P. King, *Jurisdiction & Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 702 (1985).

Section 1334(c)(1) grants the bankruptcy court discretion to abstain from hearing a matter within the court's jurisdiction[132] and to permit the matter to be heard in another forum. The bankruptcy court is required to consider and balance certain factors when deciding whether it should exercise its discretion to abstain.[133]

The burden of a particular proceeding on the court's docket is a proper consideration on motions for permissive abstention under 28 U.S.C. § 1334(c)(1).[134] In fact, two of the relevant fac-

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[132] See *supra* note 130.

[133] The relevant factors for permissive abstention analysis are as follows:

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention,
> (2) the extent to which state law issues predominate over bankruptcy issues,
> (3) the difficulty or unsettled nature of the applicable law,
> (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
> (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
> (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
> (7) the substance rather than form of an asserted "core" proceeding,
> (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
> (9) the burden of the bankruptcy court's docket,
> (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties
> (11) the existence of a right to a jury trial, and
> (12) the presence in the proceeding of nondebtor parties.

Christensen v. Tucson Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990) (quoting *In re* Republic Reader's Serv., Inc., 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

See also Eastport Assocs. v. City of Los Angeles (*In re* Eastport Assocs.), 935 F.2d 1071, 1076 (9th Cir. 1991) (finding that the district court [in deciding not to abstain] effectively engaged in the sort of balancing contemplated in *Tucson Estates*").

[134] A case's burden on the bankruptcy court's existing docket is one of the factors the judge should consider when deciding whether to exercise its discretion to abstain. *Tucson Estates*, 912 F.2d at 1167. In detemining whether to abstain, the court in *Southmark Prime Plus L.P. v. Southmark Storage Assocs. Ltd. Partnership* (*In re* Southmark Storage Assocs.), maintained that it:

> [M]ust be mindful of its crowded docket, its limited resources, and the need to expeditiously address matters which require the expertise of the bankruptcy court. . . . Even if there is a delay attendant upon abstention, it "must be compared with the effect adjudicating the proceeding has upon the allocation of a court's scarce resources to essential matters concerning administration of all estates."

Southmark Prime Plus L.P. v. Southmark Storage Assocs. Ltd. Partnership (*In re* Southmark Storage Assocs.), 132 B.R. 231, 233 (Bankr. D. Conn. 1991) (citations omitted). *See also* Shop & Go, Inc. v. D.K. Patterson Constr. Co., Inc. (*In re* Shop &

tors in deciding whether it is appropriate to abstain under § 1334(c)(1) focus on the issue of time and whether abstention would hinder or expedite the administration of justice. Those factors are: (1) the effect or lack thereof on the efficient administration of the estate if the bankruptcy court abstains; and (2) the existing burden of the bankruptcy court's docket. These factors are of course interrelated. The length of time it will take to adjudicate a matter in state court and whether that will slow down the administration of the estate must be compared to how long it would take to resolve the matter in bankruptcy court. If the bankruptcy court's docket is very congested, the state court may provide a more expeditious forum and therefore further the interests of justice.[135]

Most of the bankruptcy judges who responded to the questionnaire reported that the amount of time which it will take to adjudicate a matter has no bearing on their decision on motions for abstention or for relief from the automatic stay to permit litigation in another forum.[136] Similarly, most of the respondents

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Go, Inc.), 124 B.R. 915, 918 (Bankr. M.D. Fla. 1991) (maintaining that "docket congestion does not permit [this court] to determine the merits of the state court action in any reasonably foreseeable time in the future, leaving the state court pending action here will affirmatively harm the administration of the . . . bankruptcy case").

In determining to exercise its discretion to abstain from hearing a case, the court in *Millsaps v. United States (In re Millsaps)*, eloquently expressed the need to consider the court's docket:

> The docket of this court can only be fairly described as in crisis. The number of cases filed, the complexity of the cases, the larger-than-average percentage of Chapter 11 cases, and the lack of new judgeships to keep up with the load, have all operated to prevent this court from hearing and determining cases, contested matters, and adversary proceedings promptly as contemplated by the drafters of the Bankruptcy Code and as the parties litigant have every right to expect and demand. Although this court regularly holds hearings well into the evenings and on Saturdays, Sundays, and holidays, and despite the welcomed assistance of visiting judges from both within and outside our circuit, there is simply much more to do than this court can complete with dispatch.

Millsaps v. United States (*In re* Millsaps), 133 B.R. 547, 555-56 (Bankr. M.D. Fla. 1991).

135 For example, New Jersey presently has 400 state superior court trial judges, in comparison to seven bankruptcy judges. NEW JERSEY LAWYERS DIARY AND MANUAL 503-10 (Skinder-Strauss Assocs. 1993). The backlog in the bankruptcy court system can sometimes be alleviated by allowing state courts to aid in the adjudication of certain matters, especially where the outcome is determined solely by state law.

136 *See* appendix 3, Questionnaire, § VII, No. 2. Sixty percent of responding judges answered that time considerations have no bearing on such decisions, and 37% replied that time is a factor. *Id.* Three percent had no response. *Id.*

stated that they do not abstain *sua sponte* because of time considerations.[137] When the docket load is very heavy and the time required to adjudicate a matter is substantial, however, those factors can properly be given sufficient weight as to call for abstention.[138]

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137 *See* appendix 3, Questionnaire, § VII, No. 1. Sixty-five percent of responding judges replied that they never abstain *sua sponte* because of time considerations, and 41% (including myself) replied to the contrary. *Id.* One percent of the judges did not respond. *Id.*

Note that unlike § 1334(c)(1), the statutory language of § 1334(c)(2) specifically requires a "timely motion [requesting mandatory abstention] of a party in a proceeding." 28 U.S.C. § 1334(c)(2). Under the legislative construction maxim, *expressio unius est exclusio alterius*, (the mention of one thing implies the exclusion of another), it could be inferred that the requirement of a motion by a party in a proceeding under § 1334(c)(2) precludes the judge from abstaining *sua sponte* under that section. See *supra* note 109 for a discussion *expressio unius est exclusio alterius*. The language of § 105(a) and its legislative history, however, lead to the conclusion that notwithstanding such requirement, the judge may abstain *sua sponte*. *See* Naylor v. Case and McGrath, Inc., 585 F.2d 557, 563 (2d Cir. 1978) (noting that court can abstain *sua sponte*); Scherer v. Carroll, 150 B.R. 549, 552 (D. Vt. 1993) (maintaining that "questions regarding abstention and remand may be addressed *sua sponte* by the Bankruptcy Court"); *In re* Ramada Inn-Paragould General Partnership, 137 B.R. 31, 33 (Bankr. E.D. Ark. 1992) (advocating that bankruptcy court can abstain and remand to state court *sua sponte*); *In re* Southmark Storage Assocs. Ltd. Partnership, 132 B.R. 231, 233 (Bankr. D. Conn. 1991) (positing that "abstention under 28 U.S.C. § 1334(c)(1) may be raised by the court *sua sponte*"). Specifically, the language of § 105(a) states that "[n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from sua sponte, taking any action . . . ." 11 U.S.C. § 105(a). This language was added to § 105(a) in the 1986 Amendments to the Code to clarify the court's *sua sponte* powers. WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW & PRACTICE 85 (1992-1993 ed.) [hereinafter NORTON BANKRUPTCY LAW & PRACTICE]. While § 1334 is in title 28, not title 11, it is generally thought of as part of "the Code" (*i.e.* title 11) because it provides the jurisdiction of the bankruptcy courts.

138 Recently, the Third Circuit in *First Jersey Nat'l Bank v. Brown (In re Brown)*, raised an issue *sua sponte* as to whether the bankruptcy court should decide damages in a case where the state court had determined liability. *See* First Jersey Nat'l Bank v. Brown (*In re* Brown), 951 F.2d 564 (3d Cir. 1991). After noting that no prejudice would result to the debtor in permitting the litigation to conclude in state court, the *Brown* court stated "[n]or can we overlook the impact of the flood of litigation pouring in on the bankruptcy courts, a development that requires that they carefully husband their resources." *Id.* at 570. The *Brown* court concluded that it would be inconsistent with sound exercise of discretion by the bankruptcy court to displace the New Jersey court's exercise of jurisdiction. *Id.* *See also* Packerland Packing Co., Inc. v. Griffith Brokerage Co., et al. (*In re* Kemble), 776 F.2d 802, 807 (9th Cir. 1985) (positing that judicial economy is a key factor to be considered when lifting the automatic stay); Holtkamp v. Littlefield (*In re* Holtkamp), 669 F.2d 505, 508-09 (7th Cir. 1982) (maintaining that moving the civil action forward did not prejudice debtor and was in interest of judicial economy); Transamerica Ins. Co. v. Olmstead (*In re* Olmstead), 608 F.2d 1365, 1367-68 (10th Cir. 1979) (holding that the bankruptcy court could stay its decision of dischargeability until claim was liquidated by a court of competent jurisdiction—assuming no debtor prejudice—because "it [was] obvious . . . that the bankruptcy court will save considerable time, effort and

VIII. Settlement and Alternative Dispute Resolution Procedures as Means of Relieving Bankruptcy Court Dockets

Bankruptcy court dockets can also be relieved through settlement of controversies and alternative dispute resolution procedures. The importance of these avenues increases in proportion to the degree of docket congestion.

The overwhelming majority of controversies which become the subject of litigation are resolved consensually by the parties before trial, a result often referred to as "settlement."[139] The threat of resolution by the court is often sufficient to get the parties to resolve the controversy themselves. The parties' perception of how the judge may rule typically has a significant

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money by awaiting the outcome of the liability proceeding and reviewing facts there presented to liquidate and determine dischargeability of the debt"); Banker's Trust Co. v. Carlinsky (*In re* Lebow), 397 F. Supp. 487, 489 (S.D.N.Y. 1975) (concluding that where a bankruptcy proceeding hinges upon liability in a state court action, the bankruptcy court has the discretion to defer consideration of the matter because if the court was to find "that [it was] mandated by the statute to hear and determine dischargeability of *all* claims, no matter how contingent or unliquidated, the potential of wasted judicial activity would be enormous") (emphasis in original); *In re* Pro Football Weekly, Inc., 60 B.R. 824, 826 (N.D. Ill. 1986) (maintaining that "modification of the stay will promote judicial economy by resolving all claims between . . . [the parties] in a single proceeding").

139 The term "settlement" is defined as a "meeting of [the] minds of parties to [a] transaction or controversy; an adjustment of differences or accounts; a coming to an agreement. . . . Agreement to terminate or forestall all or part of a lawsuit." Black's Law Dictionary 1372 (6th ed. 1990).

The sentiment that settlement is preferable to litigation is ingrained in American jurisprudence as evidenced by the Supreme Court's statements that "[c]ompromises of disputed claims are favored by the courts" and that "settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored." Williams v. First Nat'l Bank of Pauls Valley, 216 U.S. 582, 595 (1910) (citation omitted); St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 656 (1898).

Not only do the courts favor settlement as a means of ending litigation, they often encourage it:

> The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The resolution of controversies and uncertainties by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

15A Am. Jur. 2d *Compromise and Settlement* § 5 (1979).

See also Ahern v. Central Pac. Freight Lines, 846 F.2d 47, 48 (9th Cir. 1988) (noting that "settlement agreements are judicially favored as a matter of sound public policy [and that such] agreements conserve judicial time and limit expensive litigation").

influence on the likelihood and terms of settlement. Such perceptions are based on factors including the judge's prior decisions in similar cases, reputation and statements or rulings which he or she makes as the case progresses. Astute counsel and parties scrutinize such indicia closely to form a sense of the likely decision of the court.

Judges can, therefore, influence the likelihood and terms of settlement in various ways. One of many such ways is to require the parties to discuss settlement.[140] This approach can be useful in cases in which settlement might not otherwise be achieved for reasons including posturing by the parties and fear of being perceived as weak for bringing up settlement.

Judges from twelve judicial districts responding to the questionnaire reported local rules which are intended to facilitate settlement.[141] One hundred two out of 120 bankruptcy judges responding to the questionnaire, or eighty-five percent, reported that they actively encourage settlement as a means of conserving judicial time.[142] Fifty-three judges, or forty-four percent, reported other practices which are intended to encourage settlements.[143] Seventy-four judges, or sixty-two percent of those responding, reported that they will sometimes participate in settlement negotiations if all parties consent.[144] Twenty-one of those judges, or seventeen and one-half percent of those responding, however, said that they will only do so on rare occa-

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140 The bankruptcy court in the District of New Jersey recently adopted Local Rule 3(l), entitled "Duty to Confer," which states that "if a motion is contested, the movant shall confer with the respondent prior to the hearing to determine whether a consent order may be entered disposing of the motion, or, in the alternative, to stipulate the resolution of as many issues as possible." D.N.J. BANKR. CT. R. 3(l). A few other districts reported similar rules. *See* C.D. CAL. BANKR. CT. R. 111(3)(a) (providing that "[p]rior to the filing of any motion relating to discovery, counsel for the parties shall meet . . . in a good faith effort to resolve the discovery dispute"); S.D. CAL. BANKR. CT. R. 4001-10 (mandating that counsel meet and confer on all disputed discovery issues before the court entertains any motion regarding discovery); S.D. CAL. BANKR. CT. R. 7026-1 (stating that the "parties shall make every effort to meet and confer telephonically [on contested motions] prior to the hearing to discuss the potential for resolving the matter"); S.D. TEX. BANKR. CT. R. 1016.7(5)(e)(1) & (2) (requiring that "[r]esponses [to an objection to a motion] shall include . . . a certificate that [a] conference was held, a good faith effort to resolve the dispute was made . . . or [i]t was not possible for the required conference to be held"); E.D. VA. BANKR. CT. R. 109(E) (maintaining that "[b]efore requesting a hearing date on any motion, the proponent shall confer with opposing counsel . . . on a good faith effort to narrow the area of disagreement").

141 *See* appendix 3, Questionnaire § VI, No. 6.

142 *See* appendix 3, Questionnaire § VI, No. 1.

143 *See* appendix 3, Questionnaire § VI, No. 5.

144 *See* appendix 3, Questionnaire § VI, No. 2.

sions.[145] Other judges reported other qualifications on their willingness to participate.[146] The differences in the judges' opinions on their personal participation in settlement discussions reflects conflicting concerns as to the desirability of settlement on the one hand, and the importance of judicial impartiality on the other.[147] Many judges and litigants are concerned that once a judge learns the details of settlement negotiations, he or she will not be able to remain impartial if adjudication is required. Because judges should not participate in settlement discussions without the consent of all parties, the degree of such consensual

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145 *See id.*

146 *See id.* Some districts have a procedure in which the judges conduct settlement conferences in each other's cases, and not in their own cases. *See id.* Those judges who do conduct settlement conferences in their own cases often prefer not to make specific recommendations, but rather to make general comments regarding matters such as their impressions of the likelihood of success if the matter is tried, intended rulings on points of law, and so forth. If all else fails, however, I will occasionally ask the parties if they want me to suggest settlement terms, and if they respond affirmatively, I will make suggestions. On other occasions, parties have taken that initiative and asked me to propose settlement terms, and I have then done so. Such matters are within the discretion of each judge.

147 Such concern is especially justified in cases in which the judge is the trier of fact. *See* United States v. Pfizer, Inc. 560 F.2d 319, 322-23 (8th Cir. 1977) (finding that the district court abused its discretion in granting a motion for a bench trial where the court had already "participated in settlement negotiations to an extraordinary degree . . . [and had] express[ed] strong opinions on the merits of the case . . ."); First Wisconsin Nat'l Bank of Rice Lake v. Klapmeier, 526 F.2d 77, 80 n.6 (8th Cir. 1975) (recognizing the law's favorable policy towards settlement of litigation, the court noted that "where the judge sits as trier of fact, the judge should avoid recommending an actual settlement figure before or during trial") *But see* Honorable Noel P. Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129 (1972) (discussing the advantages and disadvantages of judicial involvement in the settlement process). Specifically, Judge Fox, in advocating judicial involvement in settlement discussions, stated:

> Some commentators feel that the judge might become prejudiced against a party because of intransigence or unreasonableness in bargaining or that his comments to the parties might appear to favor one side and convey the impression of bias. Anxious to avoid any real or imagined threat to their clients, counsel will then abandon positions held on good faith and make undesirable concessions in order to avoid possible judicial displeasure. . . . This view is extreme and inaccurate. Obviously a judge's control over the course of trial gives him the power which if misused, can emaciate the settlement process. However, experience as both a management-labor mediator and trial judge convinces me that such results are more theoretical than real, and assume a built-in bias in the situation which, in reality, does not exist. . . . If the judge demonstrates through participation in settlement and conduct at trial that his objectivity and impartiality are unassailable, any danger of hostility on the part of counsel will disappear.

Id. at 144-45.

participation is within the discretion of each judge.[148]

When matters scheduled for hearing are settled, it is imperative that the parties inform the court as soon as possible. Seventy-six of the judges responding, or sixty-three percent, reported the existence of procedures for prompt notification to the court of settlements or withdrawal of applications, to avoid wasting the court's time preparing for hearing on matters which have been resolved.[149] Judges from five districts reported local rules regarding such notification.[150]

A related problem that can cause a substantial waste of judicial time arises from the fact that settlement negotiations often are not concluded, and sometimes are not even commenced, until the date of the trial or hearing or a day or two before it. In such cases, the judge and law clerk may be expending time in preparation for hearing which will have been wasted when the matter settles. To avoid this, several judges reported that a staff member calls counsel prior to the hearing to ascertain the status. If settlement discussions are imminent or under way, the judge can then be guided accordingly in terms of his or her preparation.[151]

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148 The Code of Judicial Conduct provides that "[a] judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters." 2 GUIDE TO JUDICIARY POLICY AND PROCEDURES, CODE OF CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES, Canon 3(a)(4) (1992). *See* FED. R. BANKR. P. 7016 (maintaining that "[i]n any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it . . . for such purposes as . . . facilitating the settlement of the case"). *See also* Bank of America Nat. Trust v. Hotel Rittenhouse Assoc., 800 F.2d 339, 350 (3d Cir. 1986) (recognizing that "an activist role for judges in managing cases—and encouraging their settlement—has expressly been provided for under the federal rules"). I personally will participate in settlement discussions with the consent of all parties, if time permits.

149 *See* appendix 3, Questionnaire, § VI, No. 4.

150 *See id*; *see also* C.D. CAL. BANKR. CT. R. 114(2)(a) (providing that "[p]arties shall notify the Courtroom Deputy immediately . . . when a matter set for hearing has been scheduled"); E.D. CAL. BANKR. CT. R. 741(1) (maintaining that "it is the duty of the plaintiff or moving party to promptly notify the calendar clerk of . . . [m]atters or proceedings that have been settled"); E.D. MICH. BANKR. CT. R. 2.17 (requiring that "counsel shall notify the Court immediately upon the settlement of an adversary proceeding"); D.N.J. BANKR. CT. R. 3(m) (mandating that "[i]f a motion is settled . . . the movant shall inform the Court immediately by telephone, and send written confirmation promptly thereafter"); E.D. PA. BANKR. CT. R. 7041.2 (asserting that "counsel shall notify the clerk or the judge to whom the action is assigned that the issues between the parties have been settled . . .") and W.D. WASH. BANKR. CT. R. 9013(d)(5) (setting forth that "[p]arties shall notify the court as soon as practicable if a matter has been settled").

151 As a result of this helpful suggestion from several judges, I have adopted a version of this procedure which has been working well. My secretary calls counsel

Another way in which bankruptcy courts can save time and move calendars is by use of alternative dispute resolution procedures. Thirty-five judges, or twenty-nine percent of those responding, reported employing arbitration, mediation or other alternative dispute resolution procedures.[152] In addition, a number of judges who are not presently employing such procedures expressed interest in doing so. Bankruptcy courts in five districts presently have formal mediation programs.[153] When the docket congestion becomes severe enough, well-developed alternative dispute resolution procedures can become essential to avoiding a large-scale breakdown of the court's ability to cope with its caseload. For this reason, development of such programs may be the wave of the future in many bankruptcy courts.

IX. Conservation of Judicial Time In the Adjudicative Process

Prior sections of this article have considered questions relating to means by which demands on judicial time which compete with the adjudication of disputes can be reduced, including the extent to which the bankruptcy judges should be involved in uncontested matters,[154] the inordinate volume of orders in the bankruptcy court,[155] and the use of alternative forums or procedures to resolve contested matters.[156] This section presents various procedures that judges can use to conserve time while

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in contested matters several days before hearing and inquires about settlement discussions. If there have been no such discussions yet or they have not been concluded, I will then adjourn most such matters *sua sponte* until negotiations are concluded. The point is to avoid settlement "on the courthouse steps" after the court has expended time in preparation.

152 *See* appendix 3, Questionnaire, § VI, No. 3.

153 *See Mediation: Boon or Bane?*, 23 Bankr. Ct. Dec. (CRR), No. 30, at A1 (Feb. 11, 1993). Bankruptcy mediation was first implemented by Judge Louise DeCarl Adler in the United States Bankruptcy Court for the Southern District of California. *Id.* at A4. Presently, Texas, Florida, Oregon and Virginia are also using bankruptcy mediation. *Id.* at A1. Moreover, those courts have addressed and resolved the concerns surrounding mediation. *Id.* The American Arbitration Association and the American Bankruptcy Institute are scheduled to meet in August of 1993 to discuss implementation of three mediation pilot programs throughout the country. *Id.* at A4.

In New Jersey, Chief Bankruptcy Judge William H. Gindin has undertaken a comprehensive study of mediation procedures in preparation for proposing such a procedure here.

154 *See supra* sections III, IV & VI.

155 *See supra* section V.

156 *See supra* sections VII & VIII.

performing their adjudicative role in the bankruptcy court.[157] Conservation of time in adjudication is a stated goal of the law.[158] It is also one measure of the quality of justice.[159]

The questionnaire asked for time conservation techniques in four areas of bankruptcy litigation which collectively consume a substantial amount of most bankruptcy judges' time:[160] motions, adversary proceedings, valuation of property,[161] and chapter 13 cases. This section summarizes and discusses the merits of many of the reported measures for time conservation in these areas.[162]

1. Motion Practice

A motion is essentially a request for an order which requires notice and opportunity for hearing.[163] Unless made during a

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157 In addition, occasional reference will be made to practices which may not necessarily conserve judicial time, but which conserve the time of litigants. As previously noted, conservation of litigants' time is of great importance, but is not the principal focus of this article.

158 Federal Rule of Bankruptcy Procedure 1001, in pertinent part, states that the bankruptcy rules "shall be construed to secure the . . . speedy . . . and inexpensive determination of every case and proceeding." FED. R. BANKR. P. 1001 *See also* FED. R. EVID. 102 (providing that "[t]hese rules shall be construed to secure . . . elimination of unjustifiable expense and delay").

159 Hence the axiom that "justice delayed is justice denied." SIR EDWARD COKE, SECOND INSTITUTE 55-56 (4th ed. 1671).

160 *See* appendix 3, Questionnaire, §§ II, III, IV & V.

161 A number of Code sections and Bankruptcy Rules use the term "value" or "valuation" which often results in the court having to make a determination on the value of certain property or services. *See* 11 U.S.C. §§ 101(17)(B)(i), (31)(A) & (31)(B)(ii), (31)(B); 11 U.S.C. §§ 303(b)(1) & (g); 11 U.S.C. § 329(b); 11 U.S.C. § 330(a)(1); 11 U.S.C. § 346(j)(7)(b)(ii); 11 U.S.C. §§ 502(b)(3), (b)(4) & (j); 11 U.S.C. §§ 503(b)(4) & (b)(5); 11 U.S.C. §§ 506(a) & (b); 11 U.S.C. §§ 508(a) & (b); 11 U.S.C. §§ 522(a)(2), (d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (d)(6), (d)(8), (j) & (k)(1); 11 U.S.C. § 542(a); 11 U.S.C. §§ 547(a)(2), (c)(1)(A), (c)(4), (c)(4)(B), (c)(5), (c)(5)(B) & (d); 11 U.S.C. §§ 548(a)(2)(A), (c), (d)(2)(A), (d)(2)(B) & (d)(2)(C); 11 U.S.C. §§ 549(b) & (c); 11 U.S.C. §§ 550(a), (b)(1) & (d)(1)(B); 11 U.S.C. §§ 554(a) & (b); 11 U.S.C. § 557(h)(2); 11 U.S.C. § 560; 11 U.S.C. § 741(7); 11 U.S.C. §§ 761(9)(B)(ii)(I), (9)(C)(ii)(I), (9)(E)(ii)(I), (17)(B) & (17)(C); 11 U.S.C. §§ 766(c) & (d); 11 U.S.C. § 1111(b)(1)(B)(i); 11 U.S.C. § 1125(b); 11 U.S.C. §§ 1129(a)(7)(A)(ii), (a)(7)(B), (a)(9)(B)(i), (a)(9)(C), (b)(2)(A)(i)(II), (b)(2)(B)(i) & (b)(2)(C)(i); 11 U.S.C. § 1173(a)(2); 11 U.S.C. § 1202(b)(3)(A); 11 U.S.C. §§ 1205(b)(1), (b)(2), (b)(3) & (b)(4); 11 U.S.C. §§ 1225(a)(4), (a)(5)(B)(ii) & (b)(1)(A); 11 U.S.C. § 1228(b)(2); 11 U.S.C. § 1302(b)(2)(A); 11 U.S.C. §§ 1325(a)(4), (a)(5)(B)(ii) & (b)(1)(A); 11 U.S.C. § 1328(b)(2); FED. R. BANKR. P. 2015(a); FED. R. BANKR. P. 3012 and FED. R. BANKR. P. 6004(d).

162 See appendix 3, Questionnaire, §§ II, III, IV & V for other reported measures.

163 *See* FED. R. BANKR. P. 9013 ("A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing."). The Bankruptcy Rules do not define the terms "motion" and "application." NORTON BANKRUPTCY LAW & PRACTICE, *supra* note 137, at 617. There are,

hearing, a motion must be in writing.[164] Motions which are opposed in bankruptcy are "contested matters."[165] There is a heavy volume of motions in most bankruptcy courts. It is not uncommon for some bankruptcy judges to rule on more than one hundred motions per week, in addition to the numerous other proceedings which require their attention. Bankruptcy courts with a high volume of motions therefore tend to develop practices for swift and efficient disposition of motions. Some examples of such practices are discussed below.[166]

One way to conserve time is to limit the time allowed for oral arguments on motions[167] or to eliminate oral argument altogether.[168] Whether such limits are appropriate will typically depend upon the significance and complexity of the issues. Generally, though, if the parties have stated their arguments adequately in the papers, oral argument is often duplicative and therefore unnecessary. There are, of course, many instances

however, at least eight types of requests for relief which are designated as applications by specific rules. *See id.* at 618. The term "application" appears to be limited "to proceedings involving no apparent adverse party but requiring some judicial consideration and application of statute or rule and a resulting action." *Id.* at 620. By contrast, requests for relief by motion presumptively require notice to affected parties. *See id.* at 621. It should also be noted that a complaint commencing an adversary proceeding or a plan under chapters 9, 11, 12 and 13 of the Code are requests for relief in forms other than motion or application. In addition, the filing of a disclosure statement is a request for approval thereof which is neither a motion nor an application. It is fair to say in summary that most requests for relief in bankruptcy court are by motion, with a substantial minority of such requests by application, and with several other types of requests for relief in other forms.

164 *See* FED. R. BANKR. P. 9013. The type of "hearing" mentioned in the rule is an evidentiary hearing, in which oral motions are permitted.

165 FED. R. BANKR. P. 9014. "Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter." NORTON BANKRUPTCY LAW & PRACTICE, *supra* note 137, at 621. For example, the filing of an objection to a disclosure statement creates a contested matter. *Id.* Thus, not all contested matters are motions, and not all motions are contested matters. Contested matters are "essentially items that call for the court to determine questions of law and fact that are of a sufficiently straightforward nature as to enable their resolution on a short cause basis without offending requirements of due process." *In re* Applin, 108 B.R. 253, 257 n.5 (Bankr. E.D. Cal. 1989). Bankruptcy Rule 9014 requires that the "party against whom relief is sought" be given "reasonable notice and an opportunity to be heard." *See* FED. R. BANKR. P. 9014.

166 *See* appendix 3, Questionnaire, § II.

167 Fifty-eight percent of responding judges reported that they will set time limits on oral arguments on motions. *See* appendix 3, Questionnaire, § II, No. 2.

168 Fifty-eight percent of bankruptcy judges reported that they do not refuse to permit oral argument on motions because of time considerations, while 42% reported that they sometimes do. I am one of the latter. *See* appendix 3, Questionnaire, § II, No. 1.

where oral argument assists the court because the correct ruling is unclear from the papers. Oral argument on written motions, however, is not a matter of right; it is within the discretion of the court.[169]

Testimony is typically presented by affidavit on motions.[170] The affidavit is filed with the motion and served upon all interested parties.[171] There are, however, circumstances under which due process requires oral testimony on motions, such as where the credibility of the affiant is material to the outcome and cannot be ascertained summarily from review of the papers.

An additional method that is used in some bankruptcy courts to save time is to not set uncontested motions on the calendar for hearing at all.[172] Instead, such motions are summarily granted. Of those courts that do set uncontested motions for hearing, some judges will grant them *en masse* at the inception of the calen-

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[169] *See supra* note 63 and accompanying text.

[170] Bankruptcy Rule 9017 incorporates Federal Rule of Civil Procedure 43(e), which gives the judge broad discretion to decide whether or not oral testimony should be heard on a motion. *See* FED. R. BANKR. P. 9017. Specifically, Rule 43(e) provides that "[w]hen a motion is based on facts not appearing of record . . . the court *may* direct that the matter be heard wholly or partly on oral testimony or deposition." FED. R. CIV. P. 43(e). *See also* Miles v. Dep't of the Army, 881 F.2d 777, 784 (9th Cir. 1989) (maintaining that the "court has wide discretion in deciding whether oral testimony shall be heard in support of a motion"). Fifty-six percent of responding judges reported that they will generally permit oral testimony on motions, and 42 percent (including myself) reported that they generally will not. *See* appendix 3, Questionnaire, § II, No. 3. Of those judges who generally permit testimony on motions, one-half will set limits on such testimony because of time considerations, and one-half will not. *See* appendix 3, Questionnaire, § II, No. 4.

Rule 43(e) further provides that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties . . . ." FED. R. CIV. P. 43(e). *See Miles*, 881 F.2d at 784 (ruling that it is within the trial court's discretion to decide a motion based only on a party's declaration submitted in support of its motion).

Disposition of motions on affidavits conserves judicial time. *In re* Applin, 108 B.R. 253, 257 (Bankr. E.D. Cal. 1989). The process of constructing a record from affidavits and depositions prior to a hearing on a motion allows the court to identify and dispose of matters that are not genuinely in dispute. *Id.* This approach permits the court to focus its attention upon actual areas of dispute and to better allocate the limited time available for hearings. *Id.* In this process, the court must balance the tremendous volume of motions against the dictates of due process. *Id.*

[171] Similarly, temporary injunctive relief can be granted on affidavits. *See* Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987) (finding that it is within the discretion of the court to grant an injunction based on evidence obtained from affidavits).

[172] The most common local rule employed by bankruptcy courts to conserve time permits an order to be entered if the opposing party fails to file a timely objection to the motion. *See supra* note 70.

dar to expedite disposition.[173]

One aspect of motion practice that can be extremely time-consuming for judges is reviewing moving and responding papers before the hearing date.[174] Deciding which papers to review or not review in advance of the hearing date can save a judge considerable amounts of time. Some judges will review virtually all motion papers prior to the hearing date, while other will review the papers for only certain types of motions. The reasons for these differences are varied. For instance, motions vary enormously in complexity and difficulty, and some require no advance review or preparation by the judge. In addition, many motions are settled or withdrawn immediately before or on the hearing date. If the judge has already reviewed the papers, the judge has wasted his or her time when a motion is then withdrawn or settled. As previously noted, in the interest of minimizing such waste, I have recently instituted a measure that was suggested in several of the responses to the questionnaire. My secretary calls counsel for the parties prior to my review of the papers on contested matters to ascertain whether the parties have initiated settlement discussions and what the prospects for settlement are. If the parties have not attempted to discuss settlement or if the discussions have not been concluded, the matter is adjourned *sua sponte* to complete the discussions, unless they represent that there is no chance for settlement. This procedure is saving me countless hours of reviewing papers on motions that would have ultimately settled on or slightly before the hearing date.

Responding judges also reported a number of practices regarding the scheduling of hearings on motions which are aimed at conserving judicial time or expediting the disposition of motions.[175] A large number of jurisdictions employ a calendar sys-

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173 Twenty-three percent of responding judges (including myself) grant uncontested motions *en masse* at the inception of the calendar to expedite disposition, and 72% do not. *See* appendix 3, Questionnaire, § II, No. 7. See also *supra* note 53 and accompanying text for discussion on whether bankruptcy judges should generally rule on uncontested motions at all.

174 Seventy-nine percent of responding judges reported that they generally review these papers before the hearing date, and 18% responded that they generally do not. *See* appendix 3, Questionnaire, § II, No. 8. Thirty-eight percent of the judges reported that they ordinarily review the papers in advance for certain types of motions, but not for others. *See* appendix 3, Questionnaire, § II, No. 9.

175 A number of districts reported local rules for the purpose of conserving judicial time in hearings on motions. *See* S.D. ALA. BANKR. CT. R. 362(b); D. ALASKA BANKR. CT. R. 70(f); D. ARIZ. BANKR. CT. R. 4001(D) & (E); C.D. CAL. BANKR. CT. R. 111(7)(a); E.D. CAL. BANKR. CT. R. 401(n), 914(f); D. COLO. BANKR. CT. R. 23(G); N.D. GA. BANKR. CT. R. 755-2; W.D. LA. BANKR. CT. R. 2.2(D); D. MD. BANKR. CT.

tem that sets similar motions on a particular day. For example, separate dockets are set for chapter 13 matters in a number of districts. Additionally, many courts place all motions on one or two specified motion days.

Finally, another practice which can conserve judicial time relates to motions on which more than one fact or point of law must be established before the party can obtain relief. In reviewing and ruling on the motion, the court can address the least time consuming element first, and then go through the others in ascending order of lengthiness. In this manner, if the movant fails to prove any conjunctive element of entitlement to relief, the court will have spent the least possible time in disposing of the motion.

2. Adversary Proceedings

An adversary proceeding is a formal lawsuit within a bankruptcy case.[176] The types of matters which require an adversary proceeding are those which typically require the procedural and discovery rules which are applicable for civil litigation in the district courts.[177] Unlike "contested matters" under Bankruptcy

R. 41(b)(5), (d)(2)(A) & (B); D. MASS. BANKR. CT. R. 26(A)(3)(a); E.D. MICH. BANKR. CT. R. 2.08(d), 2.10(b), & 2.22(b); D. MINN. BANKR. CT. R. 1210 & 1215; E.D. MO. BANKR. CT. R. 7007(a); D. NEB. BANKR. CT. R. 9014(D) & 9017(B)(1); D.N.J. BANKR. CT. R. 3(E) & (G); W.D.N.Y. BANKR. CT. R. 38(A)(3); E.D.N.C. BANKR. CT. R. 9014.1(f); N.D. OHIO BANKR. CT. R. 4:0.8(a)(1); S.D. OHIO BANKR. CT. R. 5.4(b) & 5.5; W.D. OKLA. BANKR. CT. R. 12(d) & (e); E.D. PA. BANKR. CT. R. 4008.2 (b) 4008.3(d) & (e) & 9019.2; W.D. PA. BANKR. CT. R. 9013.4(1); D.R.I. BANKR. CT. R. 10(d); D.S.D. BANKR. CT. R. 306(A)(3); M.D. TENN. BANKR. CT. R. 1.41(e); N.D. TEX. BANKR. CT. R. 4001(b), 9007(b) & (d) & 9014(a); W.D. TEX. BANKR. CT. R. 2016(b), 4001(b)(1)-(3) & (e), 7016, 9013(3) & 9014(c); E.D. VA. BANKR. CT. R. 109(K) & 302(G)(2); W.D. WASH. BANKR. CT. R. 9013(j)(2)(B). *See also* appendix 4.

[176] A separate file is opened by the clerk for each adversary proceeding.

[177] Part VII of the Federal Rules of Bankruptcy Procedure, which apply in adversary proceedings, incorporates by reference most of the Federal Rules of Civil Procedure. An adversary proceeding is:

> [A] proceeding (1) to recover money or property . . . (2) to determine the validity, priority, or extent of a lien or other interest in property . . . (3) to obtain approval . . . for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 USC § 1452.

FED. R. BANKR. P. 7001. Many of the rules in Part VII apply to contested matters as well. *See* FED. R. BANKR. P. 9014.

Rule 9014, in which the court may hear the matter on affidavits,[178] adjudication of issues of material fact in an adversary proceeding requires a trial in which witnesses testify orally in open court.[179] This section considers techniques for expediting resolution of adversary proceedings, which is a stated goal of the law.[180]

Most judges use pretrial conferences to expedite matters.[181] Pretrial conferences tend to narrow the issues and encourage settlement. Indeed, it has been my experience that merely scheduling a pretrial conference causes a good number of adversary proceedings to be settled before the conference to avoid the preparation and court appearance required for it.

Another time-saving device used by some judges is to schedule multiple trials in adversary proceedings on the same date, a practice sometimes called "deep stacking."[182] The essential premise of deep stacking is that most cases scheduled for trial on a given date will settle, and the remaining one or two can then be

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[178] *See* FED. R. CIV. P. 43(e), which is incorporated in FED. R. BANKR. P. 9017 (stating that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits").

[179] *See* FED. R. CIV. P. 43(a), which is incorporated in FED. R. BANKR. P. 9017 (requiring that "[i]n all trials the testimony of witnesses shall be taken orally in open court"). *See also* FED. R. BANKR. P. 7040 (providing for trials in adversary proceedings). By contrast, Bankruptcy Rule 7040 is not one of the rules in Part VII of the Bankruptcy Rules which Bankruptcy Rule 9014 lists as ordinarily applicable in contested matters.

[180] *See supra* note 158.

[181] Pretrial conferences are governed by Federal Bankruptcy Rule 7016 which incorporates Federal Rule of Civil Procedure 16 in adversary proceedings. *See* FED. R. BANKR. P. 7016. Rule 16(a)(1)-(5) provides:

> In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation, and; (5) facilitating the settlement of the case.

FED. R. CIV. P. 16.

Eighty-two percent of responding judges report that they generally conduct pretrial conferences in adversary proceedings. *See* appendix 3, Questionnaire § III, No. 1. Eighteen percent of responding judges, however, generally do not conduct pretrial conferences because they consider such conferences to be a waste of time in most adversary proceedings. *See id.*

[182] Forty-seven percent of responding judges reported that they employ this practice, and 52% reported that they do not. *See* appendix 3, Questionnaire, § III, No. 2. Most of the responding judges who use this practice reported that there are limits to the number of trials which they will schedule for the same date. *See* appendix 3, Questionnaire, § III, No. 3.

tried on that date. This premise is not always proven correct on a given date, however, and the result will then sometimes be inconvenience, additional expense and involuntary continuance of the trial date.[183] Successful use of deep stacking therefore requires careful balancing by the court of factors including the degree of backlog in cases awaiting trial and the potential expense in time and money to litigants when an involuntary continuance is required due to overscheduling of matters for the same date. The benefits of this practice derive from the fact that most cases do, in fact, settle before trial. As such, the failure to schedule more than one trial for the same date will therefore frequently result in a vacancy on a judge's calendar which could have been used for trial of another case which has not been settled. Moreover, in bankruptcy courts with a high volume of adversary proceedings and other contested matters requiring evidentiary hearings, scheduling of multiple trials for the same date is necessary to prevent inordinate delays in receiving a trial date.[184]

Judicial review of the parties' papers in preparation for trial can be very time-consuming. While most judges review all the papers before the trial,[185] one way that some judges are able to conserve time is by not reviewing the papers before trial for certain types of matters, such as routine complaints to determine the dischargeability of credit card debt, which tend to be simple and very fact-sensitive.[186]

Another method that some judges find very helpful is to require the parties to submit proposed findings of fact, conclusions of law and trial briefs before the trial, because they believe that such requirement compels the attorney to focus on what must be proven, which in turn tends to lessen presentation of unnecessary evidence. Some judges also require that all exhibits be premarked for identification, and filed and served before trial in a binder or notebook, because it tends to reduce delays for mark-

[183] This problem was cited by the respondents who do not use this procedure as the primary reason for declining to do so. *See id.*

[184] For example, there were 360 adversary proceedings filed in my cases in 1992, and 566 total adversary proceedings pending at the close of the calendar year. For courts with that kind of volume, deep stacking of trials is essential. Under such circumstances, occasional inconvenience and expense to litigants from waiting in the courthouse for trial or involuntary continuance of the trial date is, regrettably, one of the fortunes of war.

[185] Eighty-eight percent of responding judges generally review briefs and related papers before the trial. *See* appendix 3, Questionnaire § III, No. 4.

[186] Eighteen percent of the responding judges employ this time-saving method. *See* appendix 3, Questionnaire, § III, No. 5.

ing of exhibits during the trial.[187]

For the purpose of expediency, many judges also place certain limitations on how the trial itself will be conducted. For instance, a number of judges do not allow opening statements.[188] Other judges that do allow opening statements will nevertheless place time limits on such statements.[189] Judges almost uniformly permit closing arguments, although many will set time limits on such arguments as well.[190]

Efficient use of trial time sometimes requires restrictions on the presentation of evidence at trial.[191] In fact, the court is required to exercise reasonable control toward this end. One technique which sometimes expedites trials is to require proofs on the least time-consuming element of a cause of action or defense first and the most time-consuming element last, in ascending order. Failure to prove any element of the claim or defense can then result in the most expeditious ruling possible. This technique can not be used in every trial due to interconnection of the proofs, disruption of the flow of evidence, or for other reasons. It can often be helpful, however.

Another limitation that courts can impose is to exclude relevant evidence when its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[192] Also, the judge can require the parties to submit a summary of the contents of voluminous writings, recordings or photographs in lieu of the originals to streamline and expedite proofs.[193]

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187 *Id.* I employ both of those practices, and have found them to be beneficial. I got the idea for premarking exhibits from my colleague, Chief Bankruptcy Judge William H. Gindin of the District of New Jersey.

188 Twelve percent of the judges generally do not allow opening statements. Eighty-six percent of the judges generally permit opening statements. *See* appendix 3, Questionnaire, § III, No. 6.

189 Thirty-two percent, including myself, reported that they will set time limits on opening statements. *See* appendix 3, Questionnaire, § III, No. 7.

190 Ninety-one percent of judges reported that they generally permit closing arguments. *See* appendix 3, Questionnaire, § 3, No. 12. Forty-one percent of the judges, including myself, reported that they set time limits on closing arguments. *See* appendix 3, Questionnaire, § 3, No. 13.

191 *See supra* note 158. *See also infra* note 192.

192 *See* FED. R. EVID. 403 (providing that relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

193 FED. R. EVID. 1006. The originals must be made available to other parties for examination and/or copying. *Id.* The judge can order production of the originals in court in addition to the summaries, to be available if needed. *Id.*

Certain limitations on the manner in which testimony is presented can also be very valuable tools for conserving time. Some bankruptcy judges, most notably in the central and southern districts of California, follow a procedure entitled "trial by declaration."[194] Under this procedure, direct testimony of witnesses is submitted before trial by certification or "declaration."[195] The witness must then be present in court and available for cross-examination on the date of trial, or the declaration is not admitted into evidence. This procedure can shorten trial time in various ways.[196] The time ordinarily required to present

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[194] *See* appendix 6, The Honorable Barry Russell, United States Bankruptcy Judge for the Central District of California, *Trial By Declarations* [hereinafter *Trial By Declarations*].

[195] A declaration is defined as "an unsworn statement or narration of facts made by party to the transaction, or by one who has an interest in the existence of the facts recounted." BLACK'S LAW DICTIONARY 367 (5th ed. 1979). Section 1746 of Title 28 of the United States Code, provides that an unsworn declaration may substitute for an affiant's oath if the declaration is made under penalty of perjury. *See* 28 U.S.C. § 1746 (stating that a "matter may . . . be supported, evidenced, established, or provided by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated.").

[196] *Id. See also* S. ELIZABETH GIBSON, A GUIDE TO THE JUDICIAL MANAGEMENT OF BANKRUPTCY MEGA-CASES 23-24 (Federal Judicial Center 1992) [hereinafter BANKRUPTCY MEGA-CASES]. The primary advantage of the trial by declaration procedure is conservation of trial time. *Id.* at 24. Despite the advantages, however, questions arise as to how this procedure can be reconciled with Federal Rule of Civil Procedure 43(a) and Federal Rules of Evidence 801 and 802. *Id.* Federal Rule of Civil Procedure 43(a) requires that "in all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by [the Federal Rules of Civil Procedure], the Federal Rules of Evidence, or other rules adopted by the Supreme Court." FED. R. CIV. P. 43(a). Federal Rule of Evidence 801(c) defines the term "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Federal Rule of Evidence 802, provides that "[h]earsay is not admissible except as provided by [the Federal Rules of Evidence] or by other rules prescribed by the Supreme Court." FED. R. EVID. 802. It has been suggested that trial by declaration may be inadmissible hearsay. *See* BANKRUPTCY MEGA-CASES, *supra*, at 24. If the witness is present in court and available to testify, however, it would seem that a hearsay objection would be without merit. The witness could simply adopt and incorporate by reference all statements made by declaration. Moreover, the purpose of the hearsay objection is to preserve the Sixth Amendment right of cross-examination, and that purpose is met by requiring the presence and availability of the witness for cross-examination. *Id. See* U.S. CONST. amend. VI ("the accused shall enjoy the right to . . . be confronted with the witnesses against him . . ."). *See also* Harries v. United States, 350 F.2d 231, 236 (9th Cir. 1965) (opining that "[t]he right to cross examine a witness is fundamental in our judicial system").

Further, the Ninth Circuit has upheld the bankruptcy court's practice of trial by declaration. Adair v. Sunwest (*In re* Adair), 965 F.2d 777 (9th Cir. 1992). The *Adair* court reasoned that the bankruptcy court's procedure does not raise due process

direct testimony is eliminated and cross-examination of witnesses tends to be more focused and less time-consuming.[197] Additionally, this method facilitates pretrial settlement and enables the judge to be more prepared for trial.[198] As a result, trial by declaration may be beneficial in small and medium-sized cases as well as in mega-cases.

The judge can also expedite testimony by interrupting the attorney or the witness if the question or answer does not appear relevant to a fact in issue and requesting a proffer as to the significance of the testimony.[199] If the proffer is not acceptable the judge can bar the testimony to avoid wasting time. Additionally, the judge can sometimes limit the number of witnesses which a party may present at trial.[200] Some judges who decline to limit the number of witnesses are concerned that imposing such a limitation may create due process problems.[201] This practice is, however, sometimes an appropriate exercise of discretion under Federal Rule of Evidence 403.[202] An example is where a witness is called solely to establish facts which the judge considers established by prior witnesses.[203] An alternative to limiting the number of witnesses a party may present, or a supplement to such practice, is to limit the length of time which each side has to present its case.[204] One way to do this is to require the attorneys

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concerns because the practice allows for oral cross-examination and redirect examination in open court, which provides the judge with an opportunity to observe the witness's credibility. *Id.* at 780.

197 BANKRUPTCY MEGA-CASES, *supra* note 196, at 24. It should be noted that there may be some resulting increase in the time spent preparing for trial in analyzing the declarations. There will still be a net time savings, however, because it ordinarily takes considerably less time to read a declaration than it takes to go through the questions and answers orally on direct examination in open court.

198 *Id.*

199 *See* FED. R. EVID. 611(a)(2) (providing that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time").

200 Twenty-six percent of responding judges stated that they will limit the number of witnesses which a party may present at trial because of time considerations, and 69 percent stated that they will not. Five percent had no response. I will limit witnesses in appropriate cases. *See* appendix 3, Questionnaire, § III, No. 8.

201 *Id.*

202 See *supra* note 192 for text of Federal Rule of Evidence 403.

203 Some of the judges who reported a willingness to consider limiting the number of witnesses gave this example in support. *See* appendix 3, Questionnaire, § III, No. 9.

204 Forty-five percent of judges stated that they sometimes limit the length of time which each side has to present its case. Fifty-two percent of judges reported, however, that they do not impose such time limits. Three percent had no response. *See* appendix 3, Questionnaire, § III, Nos. 10 & 11. Occasionally, I have had to

to inform the court before trial as to how much time they will need to present their case, and then hold them to that amount. Such a practice can be an appropriate exercise of discretion under Federal Rule of Evidence 611(a)(2).

I am keenly aware that due process and fundamental fairness are paramount in trials and all other court proceedings, and I have no doubt that all of my colleagues who employ the time conservation measures in question have that awareness as well. It is therefore a given that if employment of a particular time conservation measure would deny due process or fundamental fairness in a given case, such measure cannot be used. Each case is *sui generis* in many respects, and time conservation measures which cannot be used in some cases will work very well in others. All of the aforementioned practices will be proper and effective in some cases. It must be remembered that the courts have a mandate to avoid unjustifiable expense and delay.[205]

3. Valuation of Property

Valuation of property is required in numerous circumstances under the Bankruptcy Code.[206] Valuation can be very time-consuming, for two principal reasons. First, the testimony of appraisers or other experts is often required. Second, valuation is often complex. For example, it often requires consideration of both going concern value and liquidation value, and then a judicial choice as to which standard to use under the circumstances.[207] Examples of time saving methods are discussed below.[208]

When the court is required to determine value, there are several ways it can expedite the process. One method that some judges use to simplify the process of valuation is to rule on dis-

employ this practice. *See* appendix 3, Questionnaire, § III, No. 10. *See also* BANKRUPTCY MEGA-CASES, *supra* note 196, at 23 (advocating the placement of strict time limits on the duration of a trial as a method of streamlining trials).

205 *See supra* note 158. Responding judges reported various other practices which are intended to conserve their time or expedite disposition of trials. Judges from 18 districts reported the existence of local rules for that purpose. *See* appendix 3, Questionnaire, § III, Nos. 14 & 15.

206 *See supra* note 161.

207 *See* Chaim J. Fortgang & Thomas Moers Mayer, *Valuation in Bankruptcy*, 32 UCLA L. REV. 1061, 1063-66 (1985) (defining "going concern value" and "liquidation value").

208 Judges from 17 districts reported local rules that are intended to conserve judicial time spent on valuation of property. *See* appendix 3, Questionnaire, § IV, No. 4.

putes regarding value solely on the basis of conflicting appraisals or other documentary evidence.[209] A common example of this is use of a *N.A.D.A. Used Car Guide* as conclusive evidence of the value of a motor vehicle.[210] Many such judges will, however, determine value in this manner only if the parties consent.[211] Also, in chapter 13 cases where the value of residential property is contested between the debtor and a secured creditor, some judges employ a practice in which the trustee will hire a disinterested appraiser and the parties will split the cost or the loser will bear it, and such appraiser's conclusion as to value will be dispositive. Additionally, in circumstances where value is contested and a determination is required, use of the "trial by declaration" procedure can substantially reduce the time spent in open court on appraisal testimony.[212]

Since value is frequently only one element of a claim or defense, the court can sometimes rule on the matter in question without adjudicating value. This is a corollary of the principle, mentioned previously, that the court may consider the least time-consuming elements of a cause of action or request for relief first.[213] For example, on a motion for relief from the automatic stay under Code § 362(d)(2), it is unnecessary to determine whether there is equity in the property if the court has already determined that the property is necessary to an effective reorganization.[214] Another example of this is on motions under Code § 362(d)(1) for relief from the automatic stay due to lack of adequate protection.[215] Here, value is relevant, but it is often not necessary to determine the value of the property. Instead, it is only necessary to determine whether such value, whatever it may

209 Forty-seven percent of responding judges reported that they will sometimes employ this method. I am one of those. *See* appendix 3, Questionnaire, § IV, No. 1.

210 See *infra* note 219 for specific local bankruptcy rules authorizing the use of the *N.A.D.A. Used Car Guide* for expediting valuation in chapter 13 cases.

211 Fifty-one percent of judges never determine value without live testimony and two percent had no response. *Id.*

212 *See supra* note 195 and accompanying text. *See also* appendix 6, *Trial By Declarations*.

213 *See supra* sections IX(1) & IX(2).

214 *See* 11 U.S.C. §§ 362(d)(2)(A) & (B). These sections are in the conjunctive and, therefore, both must be proven. This will, however, only apply in chapter 11, 12 and 13 cases because section 362(d)(2)(B) is automatically proven in a chapter 7 case.

215 *See* 11 U.S.C. § 362(d)(1). *See also* 11 U.S.C. § 363(e) (providing that "the court shall prohibit or condition such use, sale, or lease [of property of the estate] as is necessary to provide adequate protection of such interest [of a lienholder or co-owner]").

be, is decreasing.[216] Judges will sometimes decline to rule on value on motions for relief from the automatic stay in favor of imposing a deadline for sale of the property or confirmation of a plan.[217]

Lastly, the court should not overlook the possibility of obtaining a stipulation as to value, or at least as to lack of equity, in appropriate cases. I typically ask the parties on a motion under Code § 362(d), for example, if there is a dispute about equity for purposes of that motion, and the parties will often put an oral stipulation regarding equity on the record notwithstanding that they had not done so in their papers.

4. Chapter 13 Cases

The volume of chapter 13 cases varies greatly from district to district.[218] As with other areas of bankruptcy practice, the extent of the need for practices to expedite chapter 13 cases is proportionate to the volume of such cases.[219] In some districts the judge has minimal involvement in chapter 13 cases unless there

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216 *See* 11 U.S.C. § 361. Section 361 states that adequate protection can be provided by cash payment, additional or replacement lien, or other indubitable equivalent to the extent that operation of § 362, 363 or 364 "*results in a decrease* in the value of such entity's interest in such property." *Id.* (emphasis added).

217 *See* appendix 3, Questionnaire, § IV, No. 2. This question could have been stated more clearly, since some judges reported that they did not understand it.

218 The disparity among districts in the number of chapter 13 filings is wide. *See U.S. Bankruptcy Courts Business and Nonbusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the Twelve Month Period Ended Dec. 31, 1992*, 23 Bankr. Ct. Dec. (CRR) No. 38, at A12-A15 (April 8, 1993). The five districts with the highest filings for 1992 were the Northern District of Georgia (16,160), the Central District of California (14,090), the Western District of Tennessee (12,920), the Northern District of Illinois (8064) and the Northern District of Texas (7864). *See id.* In contrast, the five districts with the lowest filings for 1992 were the District of Guam (2), the District of North Dakota (36), the Northern District of Iowa (75), the District of Virgin Islands (40) and the District of Vermont (41). *Id.* The average number of chapter 13 filings per district for 1992 was approximately 3000. *Id.*

219 Twenty-seven districts reported local rules to conserve judicial time or expedite disposition of chapter 13 cases. *See* appendix 3, Questionnaire, § V, No. 5. *See also* E.D. ARK. BANKR. CT. R. 8(I) (allowing use of N.A.D.A. to expedite method of valuation); W.D. ARK. BANKR. CT. R. 8(I) (authorizing use of N.A.D.A. to expedite method of valuation); D.N.J. BANKR. CT. R. 31(a) (providing that court can consider modification of plan without notice to creditors and on short notice to trustee when modification would not have adverse effect on creditors); D.N.J. BANKR. CT. R. 33 (authorizing allowance of fees up to $1500 at confirmation hearing without a separate application and hearing); S.D. OHIO BANKR. CT. R. 3.18.3(g) (permitting use of *N.A.D.A.* to expedite method of valuation); E.D. VA. BANKR. CT. R. 313(E)(1) (authorizing confirmation of chapter 13 plan without a hearing if no objection filed and other requirements of confirmation are met).

is a dispute.[220]

The court can conserve time in chapter 13 cases by making the maximum possible use of the standing trustee. One example of this is to permit the standing trustee to conduct uncontested chapter 13 confirmation hearings without the judge's presence in the courtroom to conserve bench time.[221] Other practices involving the trustee include permitting the trustee to grant continuances of uncontested confirmation hearings and to dismiss cases without the judge's presence unless contested. In addition, the trustee may be able to mediate resolution of contested motions for relief from the automatic stay.[222]

Some of the time saving devices that were previously mentioned can also be particularly useful to courts with a high volume of chapter 13 filings. One example is deep stacking of chapter 13 matters.[223] Also, some judges confirm uncontested chapter 13 plans *en masse* at the inception of a calendar to expedite disposition.[224] Finally, some judges do not hold a confirmation hearing unless an objection is filed.[225]

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220 Ten percent of responding judges stated that their involvement in chapter 13 cases is limited to contested confirmation hearings and other contested matters. *See* appendix 3, Questionnaire, § V, No. 3. Customarily, uncontested confirmation hearings are not put on the calendar by those judges and are confirmed without a hearing. In some districts, the chapter 13 trustee is solely responsible for determining whether an uncontested plan will be confirmed.

221 Twenty-eight percent of responding judges, including myself, permit the standing trustee to conduct uncontested chapter 13 confirmation hearings without the judge's presence in the courtroom. Fifty-four percent do not employ this practice, and 18 percent had no response. *See id.*

222 Such mediation is being initiated by several judges in the District of New Jersey on an experimental basis.

223 *See* appendix 3, Questionnaire, § V, No. 4.

224 Thirty-seven percent of responding judges reported that they confirm uncontested chapter 13 plans *en masse* at the inception of a calendar. Fifty-two percent of judges do not employ this practice, and 11 percent had no response. *See* appendix 3, Questionnaire, § V, No. 2.

225 *Id. Compare* 11 U.S.C. § 1324 (providing that "[a]fter notice, the court shall hold a hearing on confirmation of the plan") *with* 11 U.S.C. § 102(1) (defining the phrase "after notice and a hearing"). If a hearing is required to confirm all chapter 13 plans, this raises the question of what constitutes a "hearing." See *supra* note 60 and accompanying text for discussion of what constitutes a hearing. If a hearing is required to confirm an uncontested chapter 13 plan, submission of the trustee's recommendation for confirmation as reflected in the order of confirmation, should be a sufficient "hearing." If the court can not rely on the trustee's recommendation in those situations, a fundamental problem exists in the relation between the court and the trustee.

X. Conclusion

The lack of unanimity on any of the time conservation measures mentioned in this article suggests that some of them may be controversial. In my opinion, however, no measure mentioned in this article is *per se* improper or unlawful. To the contrary, I believe that they are all proper, although the circumstances of each case and each court will dictate what is most appropriate therein. To any colleagues who may have misgivings, or worse, about any of these measures, I reiterate what I stated in the introduction to the effect that I would not be so presumptuous or foolish as to tell another court how it should conduct its business. I would also add that if my caseload had not tripled in the last four years, I probably would not have felt any need to consider many of these measures. Unrelenting pressure, however, tends to cause change. As a result, I now employ many of the measures mentioned in this article, and I will be trying others that my colleagues suggested in their answers to the questionnaire. I am not aware of any injustices having resulted. Perhaps the best way to close a discussion of these measures, therefore, is to recall the old Indian prayer to refrain from judging others until we have walked a mile in their moccasins.

Appendix 1

PER JUDGE WEIGHTED CASESLOADS IN THE BANKRUPTCY COURTS

	JUDGESHIPS		WEIGHTED HOURS PER JUDGE					
DISTRICT AND CIRCUIT	TOTAL CURRENT JUDGESHIPS	NEW JUDGESHIPS IN 1992	FY* 1992	CY* 1991	SY* 1991	CY* 1990	SY* 1990	SY* 1989
NATIONAL AVERAGE	326	(35)	1437**	1592	1471	1332	1254	1121
DIST OF COLUMBIA	1		1732	1443	1226	1227	1038	745
FIRST CIRCUIT								
MAINE	2		584	700	654	566	449	436
MASSACHUSETTS	5	(1)	2411	2893	2742	2506	2234	1070
NEW HAMPSHIRE	2	(1T)	879	2273	2209	2062	1770	967
RHODE ISLAND	1		1798	1910	1955	1681	1321	601
PUERTO RICO	3	(1T)	1413	2234	2151	1688	1488	1225
SECOND CIRCUIT								
CONNECTICUT	3	(1)	1661	2452	2178	2015	1576	939
NEW YORK (N)	2		1855	1802	1519	1329	1382	899
NEW YORK (E)	6		1904	1705	1376	1098	1025	663
NEW YORK (S)	9	(2)	1916	2144	1791	1774	1948	1077
NEW YORK (W)	3		1173	1218	1113	942	878	825
VERMONT	1		741	798	659	538	501	216
THIRD CIRCUIT								
DELAWARE	2	(1T)	848	1266	1732	1303	496	640
NEW JERSEY	8	(1)	1894	2057	1927	1539	1335	1034
PENNSYLVANIA (E)	5	(2)	1969	3210	2712	2509	2346	1819
PENNSYLVANIA (M)	2		1595	1471	1289	997	923	894
PENNSYLVANIA (W)	4		1062	1015	988	937	815	703
FOURTH CIRCUIT								
MARYLAND	4	(1)	2235	2869	2707	2309	1966	1493
NORTH CAROLINA (E)	2		1425	1553	1519	1195	1067	1109
NORTH CAROLINA (M)	3	(1T)	821	1701	1425	1212	1055	887
NORTH CAROLINA (W)	2		1470	1741	1553	1205	1096	945
SOUTH CAROLINA	3	(1T)	1336	1896	1758	1535	1694	1480
VIRGINIA (E)	5	(1)	1935	2546	2310	2022	1797	1321
VIRGINIA (W)	3		861	891	835	778	806	638
WEST VIRGINIA (N)	1		612	576	518	536	626	520
WEST VIRGINIA (S)	1		1016	1011	928	909	918	895

FY 1992 Figures include the newly authorized judgeships. * FY = Year ended September 30th, CY = Calendar year ending December 31st, SY = Year ended June 30th

** Does not include ICC rate overcharge adversary proceedings filed in the Middle District of Florida. If these matters were included, the national average would have been 1557 hours.

DISTRICT AND CIRCUIT	JUDGESHIPS: TOTAL CURRENT JUDGESHIPS	JUDGESHIPS: NEW JUDGESHIPS IN 1992	WEIGHTED HOURS PER JUDGE: FY* 1992	CY* 1991	SY* 1991	CY* 1990	SY* 1990	SY* 1989
FIFTH CIRCUIT								
LOUISIANA (E)	2		1197	1353	1311	1295	1386	1637
LOUISIANA (M)	1		640	667	629	763	947	1000
LOUISIANA (W)	3		1037	1073	1015	1075	1154	1102
MISSISSIPPI (N)	1		1726	1996	1814	1507	1461	1208
MISSISSIPPI (S)	2		1809	1606	1467	1467	1507	1530
TEXAS (N)	6	(1)	1817	2176	2306	2287	2399	2584
TEXAS (E)	2		1179	1249	1304	1247	1392	1494
TEXAS (S)	6		1484	1408	1396	1350	1366	1579
TEXAS (W)	5	(1T)	1364	1773	1854	1892	1933	1910
SIXTH CIRCUIT								
KENTUCKY (E)	2		1236	1141	1105	1160	1113	871
KENTUCKY (W)	3		790	875	943	866	760	684
MICHIGAN (E)	4		2067	1899	1706	1575	1570	1448
MICHIGAN (W)	3		1215	1349	1232	1033	928	802
OHIO (N)	8		1032	992	847	793	969	738
OHIO (S)	7		1067	1064	1098	1321	1218	813
TENNESSEE (E)	4	(1T)	1099	1841	1743	1309	1116	1153
TENNESSEE (M)	3	(1)	1721	2913	2818	2551	2466	2100
TENNESSEE (W)	4	(1)	1968	2314	1967	1742	1744	1415
SEVENTH CIRCUIT								
ILLINOIS (N)	10		1199	1141	1047	915	888	861
ILLINOIS (C)	3		886	851	843	825	931	930
ILLINOIS (S)	2	(1T)	841	1755	1739	1655	1504	1292
INDIANA (N)	3		1098	1063	1030	959	1015	956
INDIANA (S)	4		1276	1561	1462	1101	1084	894
WISCONSIN (E)	4		619	679	615	547	564	497
WISCONSIN (W)	2		855	875	885	884	912	835

FY 1992 Figures include the newly authorized judgeships. * FY = Year ended September 30th, CY = Calendar year ending December 31st, SY = Year ended June 30th

DISTRICT AND CIRCUIT	JUDGESHIPS		WEIGHTED HOURS PER JUDGE					
	TOTAL CURRENT JUDGESHIPS	NEW JUDGESHIPS IN 1992	FY* 1992	CY* 1991	SY* 1991	CY* 1990	SY* 1990	SY* 1989
EIGHTH CIRCUIT								
ARKANSAS (E)	2		1065	1180	1225	1147	1073	1108
ARKANSAS (W)	1		1553	1345	1189	1137	1024	901
IOWA (N)	2		532	529	500	574	642	554
IOWA (S)	2		609	622	658	591	574	537
MINNESOTA	4		1487	1620	1593	1505	1406	1367
MISSOURI (E)	3		1396	1371	1265	1085	1123	876
MISSOURI (W)	3		1101	1036	1025	954	948	998
NEBRASKA	2		954	1054	1035	949	1303	894
NORTH DAKOTA	1		565	620	624	623	638	821
SOUTH DAKOTA	2		317	369	399	408	435	435
NINTH CIRCUIT								
ALASKA	2		411	405	448	470	550	550
ARIZONA	7	(2)	1758	3403	3432	2654	2676	1940
CALIFORNIA (N)	9		1828	1445	1278	1188	1181	1116
CALIFORNIA (E)	6		1576	1473	1329	1247	1278	1180
CALIFORNIA (C)	21	(2)	2144	1983	1617	1515	1270	1376
CALIFORNIA (S)	4		1817	1823	1540	1316	1278	986
HAWAII	1		779	501	524	578	620	673
IDAHO	2		1012	974	1018	1037	979	969
MONTANA	1		1123	1094	1126	1316	1190	1110
NEVADA	3		1380	1346	1255	1108	1150	1064
OREGON	5		1050	1028	1012	979	912	749
WASHINGTON (E)	2		821	860	883	919	907	1075
WASHINGTON (W)	5		1267	1308	1269	1144	1212	1201

FY 1992 Figures include the newly authorized judgeships. * FY = Year ended September 30th, CY = Calendar year ending December 31st, SY = Year ended June 30th

DISTRICT AND CIRCUIT	JUDGESHIPS		WEIGHTED HOURS PER JUDGE					
	TOTAL CURRENT JUDGESHIPS	NEW JUDGESHIPS IN 1992	FY* 1992	CY* 1991	SY* 1991	CY* 1990	SY* 1990	SY* 1989
TENTH CIRCUIT								
COLORADO	6	(1T)	1260	1251	1277	1296	1544	1623
KANSAS	4		873	1029	1398	1410	1046	930
NEW MEXICO	2		1029	983	968	975	1012	907
OKLAHOMA (N)	2		960	973	946	929	926	853
OKLAHOMA (E)	1		485	653	696	694	632	666
OKLAHOMA (W)	3		930	1076	1063	1004	1077	1119
UTAH	3		1115	1141	1228	1348	1322	1563
WYOMING	1		562	614	549	572	705	675
ELEVENTH CIRCUIT								
ALABAMA (N)	6	(1T)	1595	1602	1551	1441	1345	1225
ALABAMA (M)	2		1040	1091	1105	982	921	814
ALABAMA (S)	2		644	702	645	616	699	513
FLORIDA (N)	1		1210	1320	1379	1482	1445	1188
FLORIDA (M)	8	(4)	1676**	4693	3018	2546	2616	2000
FLORIDA (S)	5	(2)	1965	3118	2767	2313	1682	1342
GEORGIA (N)	8	(2)	1682	2449	2131	1843	1719	1242
GEORGIA (M)	2 1/2	(1/2)	1567	2012	1824	1616	1554	1211
GEORGIA (S)	2 1/2	(1/2)	1382	1693	1753	1667	1513	1152

FY 1992 Figures include the newly authorized judgeships. * FY = Year ended September 30th, CY = Calendar year ending December 31st, SY = Year ended June 30th

** Does not include ICC rate overcharge adversary proceedings filed in the Middle District of Florida.
If these matters were included, the district average would have been 6590 hours.

Administrative Office of the United States Courts, Bankruptcy Division

Appendix 2

L. RALPH MECHAM
DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

WASHINGTON, D.C. 20544

November 1, 1989

Honorable Richard L. Thornburgh
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

At our recent meeting with the Chief Justice and the Executive Committee of the Judicial Conference, you requested information regarding the position of the Judiciary on the U.S. trustee programs.

The enclosed information memorandum outlines the concerns of the Conference regarding the placement of the bankruptcy estate administration oversight function in the Department of Justice, describes problems in the implementation of the program as seen by those who use the bankruptcy system, and details our reasons supporting placement of the program in the judicial branch.

The memorandum makes reference to comments and opinions of persons who use the bankruptcy system and others who have examined specific aspects of the implementation and operation of the U.S. trustee program. I believe these comments and opinions are significant both as to the large number of independent sources they reflect, and the many distinct aspects of bankruptcy estate administration they address. These independent views reinforce the long-held position of the Judicial Conference that this function should be placed in the Judiciary.

Please let me know if I can provide any additional information or respond to any questions you may have.

Sincerely,

L. Ralph Mecham
Director

INFORMATION MEMORANDUM OUTLINING THE POSITION OF THE JUDICIARY ON THE PLACEMENT AND PERFORMANCE OF THE UNITED STATES TRUSTEE PROGRAM

A. Introduction

The United States trustee program evolved from congressional intent to separate judicial from administrative functions in the bankruptcy cases. Congress envisioned the bankruptcy judges would be responsible primarily for the adjudication of factual and legal disputes, while United States trustees would oversee the administration of estates and supervise trustees and other fiduciaries.

The Judicial Conference of the United States supports the separation of administrative and judicial functions and the establishment of an effective United States trustee program. It has, however, consistently opposed placing that program under the Department of Justice. Rather, the Conference believes that the United States trustees should be reconstituted as independent statutory officers in the Judicial Branch, akin to the federal public defenders.

B. Background

The Department of Justice opposed placement of a permanent nationwide United States trustee program in the Department until 1986. Its views thus coincided with those of the Judicial Conference.[1]

In considering the Bankruptcy Reform Act of 1978, the House and Senate could not agree on where the estate administration oversight function should be placed. Accordingly, a polit-

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[1] In 1977 the Department of Justice pointed out that a serious conflict of interest was created by placing the administration of the United States trustees in the Department. Since representatives of the Department often appear in bankruptcy court as advocates on behalf of government clients, the Department could have clients on both sides of litigation. The Judicial Conference concurred in the views of the Department of Justice that same year, and formally opposed placing the United States trustee program in the Department.

The concurrence of views between the Department of Justice and the Judicial Conference is noted in the separate views of four congressmen expressed at page 542 of House Report No. 95-595: "The Attorney General believes that requiring the United States Trustees to operate under his direction may result in a conflict of interest. The Judicial Conference supports this position. The Attorney General is responsible for presenting the government's claims, particularly tax claims, against bankruptcy estates. He should not also supervise the trustee who administers these claims. . . ."

ical compromise was reached under which the United States trustee program was established on a pilot basis in 18 judicial districts under the Attorney General. No statutory arrangement was provided for the remaining 72 districts.

After enactment of the 1978 legislation, the Attorney General and the Judicial Conference continued their opposition to placement of the United States trustee program in the Department of Justice, and the Attorney General did not seek funding for the program.[2]

Since 1978, the Judicial Conference has on several occasions reaffirmed its views against placement of the program in the Department of Justice. In addition to questions regarding conflict of interest, the Conference has been concerned about duplication of clerical and administrative efforts in bankruptcy cases, excessive costs, interference with court case management efforts, politics in the selection of U.S. trustees and in the administration of estates, and potential erosion of the separation of powers between the Executive and Judicial Branches (since the courts and the United States trustees are both responsible for the same case).

In 1986 Attorney General Edwin Meese and Deputy Attorney General Arnold Burns reversed the Department of Justice's position and endorsed legislation to continue the United States trustee system on a permanent basis within the Department. The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 made the U.S. trustee pilot program permanent under the Department of Justice and expanded it to all judicial districts except those in the states of Alabama and North Carolina. In those two states the Judiciary based Bankruptcy Administrator program is authorized to perform similar functions until October 1, 1992.

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[2] Reporting to the Congress in 1984, Attorney General William French Smith stated that "our two principal concerns about the program continuing on as part of the Department of Justice are that its primary mission is different from that of the Department and that it creates at least the potential for a conflict of interest." The Attorney General went on to explain:

> *The potential for conflict of interest occurs because, in the bankruptcy arena, the Department of Justice wears two hats. The U.S. Attorneys and the Civil and Tax Divisions represent the government in its claims against bankruptcy estates, while the U.S. Trustees are charged with impartially administering cases. A U.S. Trustee could take a position in a case adverse to that taken by a U.S. Attorney. . . .*

United States Dep't. of Justice, *Report of the Attorney General on the United States Trustee System Established in the Reform Act of 1978 For the Period October 1, 1979 to December 31, 1983*, pp. 58-59.

C. Concerns Expressed About the Performance of the U.S. Trustee Program

Many of the problems foreseen by the Judicial Conference in the placement of the U.S. trustee program outside the Judicial Branch have become a reality. The consensus among the bankruptcy judges and clerks of court and many representatives of the bankruptcy bar is that the United States trustee system is not well administered on a national basis, while local offices vary greatly in quality.

1. General Concerns Expressed by Members of the Bankruptcy Community

The House Committee on the Judiciary, Subcommittee on Economic and Commercial Law, held oversight hearings on the U.S. trustee program on June 22, 1989. Although some witnesses testified in favor of the program, substantial concern was expressed over its administration. The following problems in the performance of the U.S. trustee program were noted in testimony by members of the bankruptcy community:

(A) *Politics in the selection of U.S. trustees and subordinate employees*

There is concern that U.S. trustees, assistant U.S. trustees, and others in the U.S. trustee program have been selected for political reasons rather than experience in the bankruptcy area.[3]

(B) *Internal problems in the relationships between the Executive Office for United States Trustees and local U.S. trustee offices*

There is a perception that internal relationships between the Executive Office for United States Trustees and local U.S. trustees have been marked by political strife and by animosity which has affected the quality of operations among the various U.S. trustee offices.[4]

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[3] See testimony of Richard L. Levine, first Director and Counsel of the Executive Office for United States Trustees, and Leonard M. Rosen, Chairman of the National Bankruptcy Conference.

[4] See opening statement of Congressman Jack Brooks, Chairman of the House Judiciary Committee, and testimony of Richard L. Levine, first Director and Counsel of the Executive Office for the United States Trustees.

(C) *Bureaucracy, Inefficiency, and Rigidity*

There is concern that the U.S. trustee program is overly bureaucratic.[5] Witnesses testified, for example, that:

> (1) Local U.S. trustees have developed guidelines and forms in such numbers as to make compliance by parties extremely burdensome, far outweighing any benefits to be derived therefrom. Excessive reporting requirements and administrative paperwork in particular have hampered the activity of chapter 7 trustees, and are more often seen by them as an administrative burden than a source of guidance and assistance.
>
> (2) There has been a lack of response by the Executive Office for United States Trustees when serious questions regarding the functions of local U.S. trustees have been called to that offices' attention by the practicing bar. There is a lack of a clear definition in the U.S. trustee program concerning what matters are to be governed by local versus national policy.
>
> (3) Objections to fee applications by U.S. trustees are too often reflexive, rather than based on merit.

(D) *Misplaced Priorities in Use of Resources and Excessive Costs*

There is a perception that U.S. trustees have been failing to make the best use of limited resources, resulting in a waste of taxpayers' funds.[6] Witnesses testified, for example, that:

> (1) The emphasis and resources of the U.S. trustee program have shifted away from chapter 11 cases and are too highly focused on chapter 7 trustees and reporting requirements. Chapter 7 trustees report that they are often appointed to serve as trustees in converted chapter 11 cases in which assets have been dissipated, creditors have been unreasonably delayed by obviously hopeless reorganiza-

[5] See testimony of Gary Knostman, President of the National Association of Bankruptcy Trustees; Richard L. Levine, first Director and Counsel of the Executive Office for United States Trustees; and Leonard Rosen, Chairman of the National Bankruptcy Conference.

[6] *Id.*

tion efforts, large unpaid administrative claims have been incurred, and sometimes state and federal tax returns and payments have not been made.

(2) With regard to U.S. trustee involvement in chapter 7 cases, U.S. trustees too often are looking for wrongdoing as their primary goal, rather than attempting to assist the overwhelming majority of trustees who are conscientiously attempting to perform their tasks.

(3) When U.S. trustees are involved in chapter 11 cases, the focus of involvement has too frequently been on large chapter 11 cases with active creditors' committees. This allocation of scarce resources is unjustified given the enormous need to monitor smaller chapter 11 cases in which there is frequently little or no creditor interest and a significant possibility of abuse.

(4) U.S. trustees too frequently get involved in substantive decisions in chapter 11 cases where there is an active creditors' committee and the U.S. trustee presence is neither necessary nor wanted.

2. Judiciary Concerns about the Performance of the U.S. Trustee Program

The aforementioned problems reflect the concerns of experienced members of the bar and trustees with the current U.S. trustee program as it affects their practice and the bankruptcy system. While the Judiciary shares their concerns, it has experienced, in addition, its own set of problems with the performance of the U.S. trustee program.

(A) *U.S. Trustee Challenges to Judicial Authority and Attempts to Arrogate Judicial Authority*

The Judiciary is concerned about: (1) U.S. trustee challenges to, or interference with, judicial decision-making authority based on incorrect or exaggerated interpretations of U.S. trustees' authority, and (2) U.S. trustee attempts to use the courts for the limited purpose of enforcing U.S. trustee guidelines, rather than for the benefit of parties in interest.

Examples of U.S. trustee actions that challenge judicial

decision-making authority include those which attempt to:

(1) overturn, negate, or modify orders of the bankruptcy court (*e.g.*, *In Re Sharon Steel Corp.*, 100 Bankr. 767 (Bankr. W.D. Pa. 1989));

(2) limit the power of the court to approve appointments of fiduciaries (*e.g.*, *In Re Plaza de Diego Shopping Center Inc.*, No. 88-02749 (D.P.R. July 20, 1989));

(3) pre-approve the court's approval of employment of professionals[7]; and

(4) pre-approve the court's approval of trustee final reports and accounts[8].

Examples of U.S. trustee actions that seek to use the courts for narrow U.S. trustee purposes (including rigid interpretations of the law), rather than for the benefit of estates, include those in which U.S. trustees have attempted to have the court:

(1) appoint fiduciaries, despite the opposition of all parties in interest and facts that indicate such appointments are unnecessary or detrimental to reorganization (*e.g.*, *In Re Revco D.S. Inc.*, No. C88-4392-A, (N.D. Ohio, Apr. 21, 1989));

(2) enforce onerous and unnecessary U.S. trustee reporting requirements (*e.g.*, *In the Matter of Crosby*, 93 Bankr. 798 (Bankr.S.D.Ga. 1988)); and

---

[7] The U.S. trustee office in one region follows a guideline which attempts to prohibit a debtor from filing with the court an application to employ a professional unless the debtor has first presented a copy of the application to the U.S. trustee at least five days in advance. The guideline is designed to give the U.S. trustee sufficient time to object to the employment.

Bankruptcy judges have expressed their opposition to the guideline for the following reasons: (a) the law does not require a debtor to wait five days after service on the U.S. trustee before filing an application with the court; (b) such action is unduly burdensome and unnecessary, and interferes with the debtor's right to legal representation; and (c) the U.S. trustee is attempting to pre-approve the court's approval of employment, in effect usurping judicial authority.

[8] Several U.S. trustees require that trustees file a final report and account with the U.S. trustee before filing it with the bankruptcy court. Bankruptcy judges have expressed their opposition to such guidelines on the grounds that it is in violation of the Code (sections 704(9), 1106(a)(1), 1202(b)(1), and 1302(b)(1)) and represents an attempt to pre-approve the court's approval of the final report and account.

(3) use its contempt power as device for the collection of U.S. trustee fees. (*e.g.*, *In Re Smith and Son Septic and Sanitation Service*, 88 Bankr. 375 (Bankr.D.Utah 1988)).

Inevitably, placement of the judicial and estate administration oversight functions in two separate branches of the government fosters "turf" problems, despite the good intentions of employees in both branches. These turf problems would be reduced substantially without jeopardizing congressional concern for separation of administrative and judicial functions if the U.S. trustee program were placed in the Judicial Branch.

(B) *Case Closing*

United States trustees are responsible for appointing and supervising case trustees, supervising the administration of estates, and monitoring applications for compensation pursuant to the Bankruptcy Code and 28 U.S.C. § 586(a). Auditing the reports and fees of case trustees, monitoring the distribution of estate funds, and certifying to the court that the case has been properly administered are logical extensions of the United States trustee's enumerated statutory duties. To find otherwise would inject bankruptcy judges into trustee supervision and oversight of estate administration.

The ultimate authority to close a case, however, remains a judicial responsibility. Section 350 of the Bankruptcy Code and Bankruptcy Rule 5009 provide that the court shall close a case after "an estate is fully administered" and the court has discharged the trustee. Accordingly, the court cannot perform its judicial function until it is assured that trustees have performed their administrative responsibilities.

In 1987, the Executive Office for United States Trustees and the Administrative Office jointly developed interim guidelines regarding the appropriate division of administrative responsibilities between bankruptcy clerks and local United States trustees. The guidelines were endorsed by the Bankruptcy Committee of the Judicial Conference.

One of the key features agreed upon in the guidelines is

that U.S. trustees will audit the final reports of case trustees and certify that each case has been fully administered so the bankruptcy judge may order it closed. Many bankruptcy courts report, however, that their local U.S. trustees are not performing the duties agreed upon, and are declining to certify the accuracy of trustee reports to the courts. This practice has been promoted by the Executive Office for United States Trustees in Directive T-016 [issued on June 1, 1989] which instructs U.S. trustees not to certify reports of no distribution in chapter 7 cases, except on a random basis. In addition, they are instructed not to certify reports in cases under chapters 11, 12, and 13.[9]

The failure of U.S. trustees to certify case trustee performance in individual cases delays case closings, interferes with court case management, and holds up distributions to creditors. It also encourages continued court involvement in the administration of estates and contributes to the already severe workload strain on the Judiciary's personnel resources.

The Judiciary believes that the issue of the U.S. trustees' failure to certify trustee performance to the courts is largely one of priorities rather than resources. The Judicial Conference believes that the auditing of trustee reports is a fundamental oversight function which demands greater priority by the U.S. trustee program.

The United States trustee system's budget for fiscal year 1989 was over $50 million, funded from the court's filing fees and from quarterly assessments levied on chap-

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[9] In a recent paper discussing the certification issue, three former Department of Justice employees associated with the U.S. trustee program pointed out that:

> *It is difficult to see how an individual United States Trustee can certify the propriety of the distribution without an analysis of the particular facts in the case. Any pleading signed by a lawyer is, per se, a representation of the accuracy of the facts recited therein. . . .[Bankruptcy Rule] 9011, Fed.R.Civ.P. 11. An assertion by an attorney that a representation in a pleading to the court was based on a random sample of the facts would hardly insulate the attorney from the imposition of Fed. R. Civ.P. 11 sanctions in any other context.*

J. Pearson, J. FitzSimon, and I. Picard, *Sed Qui Custodet Ipsos Custodes*, p.100 n.136 (Aug. 1989), presented at Sept. 18-19, 1989 Federal Judicial Center Workshop for Chief Bankruptcy Judges. The Honorable John K. Pearson is a bankruptcy judge for the District of Kansas and a former assistant U.S. trustee; Jean K. FitzSimon was formerly with the Department of Justice; and Irving H. Picard is a former U.S. trustee under the pilot U.S. trustee program.

ter 11 debtors. For fiscal year 1990, almost $63 million has been requested to operate the program. The United States trustee system has a staff of about 900 — 50 percent more than the Executive Office estimated to the Congress in 1986 that it would need. In addition, it pays for the services of a substantial number of Department of Justice auditors. The staffing levels of the U.S. trustee system are much greater than either the Bankruptcy Administrator program presently administered by the Judiciary in six districts or the clerks' office total estate administration, case closing, and auditing operations prior to 1986 (fewer than 300 employees in 72 districts).

(C) *Transfer of Collateral*

Without prior notification to the courts, the United States trustees in at least three regions made overbroad requests to Federal Reserve banks for the transfer of collateral in ALL bankruptcy cases from bankruptcy court accounts to United States trustee accounts. In combination with administrative errors and a lack of safeguards for the transfer of collateral in at least one Federal Reserve bank, these requests in some districts resulted in the improper transfer of collateral in bankruptcy cases outside United States trustee jurisdiction.

The above combination of factors resulted in a particularly serious situation for the bankruptcy court in at least one district where ALL collateral pledged to the court, regardless of the source of the original deposits, was transferred to the U.S. trustee account. Thus, in addition to improperly transferring collateral from certain types of bankruptcy estate funds deposited under Treasury Circular 154, the Federal Reserve transferred all collateral pledged from funds deposited to the court's registry account under Treasury Circular 176. This could have exposed the court to serious liability.

The requests for transfer of collateral by local U.S. trustee offices appear to have been accomplished with the knowledge, and possibly at the direction, of the Executive Office for United States Trustees.

The Judiciary believes that the problems created by the improper transfer of collateral—and the effort ex-

pended to rectify these problems—could have been avoided if the Executive Office for United States Trustees and local U.S. trustees had notified the courts in advance of taking action.

(D) *Automation*

Section 310 of the 1986 Bankruptcy Act required the Executive Office for United States Trustees, "in consultation with the Director of the Administrative Office of the United States Courts," to establish an electronic case management demonstration project in three judicial districts no later than one year after the effective date of the Act (i.e., by October 26, 1987). The electronic system was supposed to meet the total information needs of four categories of users: (1) the bankruptcy court (2) the local U.S. trustee; (3) other federal agencies, including the Administrative Office of the United States Courts and the Department of Justice; and (4) the public.

The Judiciary urged the Executive Office from the outset not to "reinvent the wheel" and to build on the solid foundation of the Judiciary's BANCAP automated full docketing and case management system. The Judiciary further insisted that any system designed for the bankruptcy courts (and operated by the bankruptcy clerks) must be compatible with other elements of the Judiciary's automation program. The Administrative Office of the United States Courts made it clear that once the demonstration was completed, it could not take over support for any system that was either incompatible with Judiciary standards or too expensive to operate.

The Executive Office, however, decided to build an expensive system that was not compatible with Judiciary systems. The contract for hardware, software, and implementation of the Executive Office's system was advertised in the fall of 1988, with bids due on January 23, 1989. No vendor bid on the contract.

In the wake of its failure to meet the statutory obligation for developing an electronic case management demonstration project, the Executive Office recently has reversed its position and has now agreed to develop an

automated system that will be compatible with BANCAP.

The Judiciary is pleased that the Executive Office has taken this appropriate approach. A considerable amount of time, effort, and money were needlessly wasted, however, in attempting to develop an automated system from scratch that would have been incompatible with the Judiciary's existing automated system and would have been overly costly.

(E) *Performance or Non-Performance of Statutory Functions, Generally*

Most trustee oversight and estate administration functions are by statute discretionary with each local U.S. trustee. 28 U.S.C. § 586(a)(3). If the U.S. trustee does not perform the 28 U.S.C. § 586(a)(3) functions of supervising the performance of trustees, debtors in possession, and creditors' committees, the function simply will not be performed at all because the Judiciary's responsibilities were transferred to the Department of Justice by statute. Some of these discretionary U.S. trustee functions relate directly to the court's ability to process its workload in an expeditious manner, including the following:

(a) taking action to ensure that all reports, schedules, and statements are properly and timely filed by the debtor;

(b) monitoring activity by debtors in possession and creditors' committees in chapter 11 cases;

(c) monitoring the progress of cases and taking action to prevent undue delays;

(d) monitoring trustee reports;

(e) auditing trustee and fiduciary reports; and

(f) reviewing proposed distributions to creditors.

Many of these oversight functions are not being performed regularly or consistently. This lack of performance has a negative impact on the ability of some bankruptcy courts to manage and expedite their caseloads. Failure of case trustees to properly perform their duties has resulted in extra docketing, scheduling,

> and paperwork for the clerks' offices. A larger portion of scarce personnel resources in these clerks' offices has had to be devoted to monitoring cases for inactivity than otherwise would have been necessary if U.S. trustees were properly monitoring the progress of cases to prevent undue delay.
>
> Many judges and attorneys are also concerned about rote filings by some U.S. trustees of certain types of motions — such as objections to fee and motions to dismiss or convert for failure to pay U.S. trustee quarterly fees — and unnecessary pleadings filed with regard to disclosure statements and plans in chapter 11 cases with active creditors' committees, which contribute to congestion of court calendars.

3. U.S. Trustee Conflict of Interest in the Administration of Bankruptcy Cases

The potential for conflict of interest has long been a concern of the Judicial Conference and previous Attorneys General. This potential has been documented by independent sources.

The issue was raised at the June 22, 1989 oversight hearings by House Judiciary Committee Chairman Jack Brooks. Quoting extensively from a June 1987 newspaper article, Mr. Brooks expressed concern that a bankruptcy judge had ruled in the *INSLAW* case that the Executive Office, which is supposed to be independent and treat all debtors and creditors equally, had improperly attempted to force a software firm to convert from chapter 11 to chapter 7 and may have threatened retaliatory action against the local U.S. trustee if he had failed to do so.

On September 29, 1989, the Senate Permanent Subcommittee on Investigations issued a staff report on its investigation of the *INSLAW* matter. Although the subcommittee staff found no explicit proof of a conspiracy within the Department of Justice to force INSLAW into bankruptcy, they found that the Director of the Executive Office for U.S. Trustees had improperly sought special handling for INSLAW's bankruptcy proceeding in order to secure continued support for his office from the Justice Department, a party to the proceedings.[10]

Accordingly, the Staff Report concluded that:

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[10] Staff Study on the Permanent Subcommittee on Investigations' Inquiry of the INSLAW Matter, pp. 36-37.

The inability of the EOUST to remain neutral in a case where the Justice Department is a party suggests that there may be a need to remove such cases to a more neutral and independent forum.[11]

> The Staff Report recommended that the General Accounting Office (GAO) review the operations of the Executive Office for the U.S. Trustees, and that the U.S. trustee be prohibited from playing any part in bankruptcy cases wherein the Department of Justice is party to the litigation:
>
> The U.S. Trustee program, administered by the Department of Justice, is designed to be an independent office to oversee the administration of bankruptcy cases in the United States. The Staff found that the system can be manipulated, resulting in the potential for biased handling of bankruptcy filings.
>
> . . . Two avenues for correction exist: 1) remove the Trustee program from the Executive Branch to preclude the possibility of "special treatment" to any department, agency, or office in the Executive Branch; or 2) legislate a requirement that the Trustee recuse himself in cases in which the Department is a creditor.[12]

Although the *INSLAW* case is perhaps the most latent example of a conflict of interest which can occur with placement of the U.S. trustee program in the Department of Justice, it is not the only one. A paper written by three former Department of Justice officials points to the conflict of interest problems that have arisen in the relationship between the Internal Revenue Service (and other governmental creditor agencies) and the U.S. trustee due to placement of the program in the Department of Justice:

> The I.R.S. is traditionally represented by the Department of Justice. Situations have arisen where the Department of Justice has directed the United States Trustee not to participate in cases in support of the case trustee's position. The United States Trustee has an interest in and a duty to protect the system. Thus, arguably, the United States Trustee should support a cases

[11] Staff Study on the Permanent Subcommittee on Investigations' Inquiry of the INSLAW Matter, p. 37.

[12] Staff Study on the Permanent Subcommittee on Investigations' Inquiry of the INSLAW Matter, pp. 77, 78.

> trustee in a dispute with the I.R.S. where the outcome of the dispute may have an effect on the overall administration of cases entrusted to panel trustees.[13]

The conflict of interest questions would be eliminated by transferring the U.S. trustee program to an independent office within the Judicial Branch. The transfer would restore faith in the impartiality and integrity of the U.S. trustee program in the exercise of its responsibilities.

D. Concluding Observations

1. Regarding the Judiciary's Lack of Confidence in the Current U.S. Trustee Program

The Judiciary has attempted to work with Executive Office for United States Trustees to fulfill the intent of the Congress in creating a national U.S. trustee system. Every effort has been made by the Judiciary to share information and provide the Executive Office with input. The Director of the Executive Office has bene invited, for example, to participate fully in each meeting of the Advisory Committee on Bankruptcy Rules, and his input has been sought regularly on administrative matters, such as the revision of the bankruptcy forms. He and his staff have been invited to speak to judges and clerks at their conferences and seminars and to participate in joint working groups to prepare guidelines for local clerks of court and U.S. trustees.

Many bankruptcy judges and clerks, however, believe that the Executive Office has not seriously attempted to work with the Judiciary to address mutual concerns and resolve differences.

An independent survey of bankruptcy judges conducted by the editors of *Turnarounds & Workouts* subsequent to the June 1989 congressional oversight hearing on the U.S. Trustee program produced the following noteworthy results:

> (1) Only 27 percent of bankruptcy judges thought that the U.S. trustee program should remain a section of the Department of Justice. By way of contrast, 46 percent thought that the program should be a section of the Administrative Office, 12 percent thought it should be an independent agency, and 15 percent were undecided.
>
> (2) Only 22 percent of bankruptcy judges agreed that

[13] J. Pearson, J. FitzSimon, and I. Picard, *Sed Qui Custodet Ipsos Custodes*, p. 78 (Aug 1989). See Footnote 2.

"management" by the Department of Justice has provided effective leadership during the nationwide implementation of the U.S. trustee program, compared with 39 percent of judges who disagreed and 39 percent who were undecided.

(3) 50 percent of bankruptcy judges agreed that the quality of the persons appointed U.S. trustees has suffered because the process is too politicized, compared with 30 percent who disagreed and 20 percent who were undecided.

(4) Over half the bankruptcy judges (54 percent) agreed that the U.S. trustees have imposed excessively detailed requirements on participants in the bankruptcy process, compared with 36 percent who disagreed and 10 percent who were undecided.

(5) Only 16 percent of bankruptcy judges agreed that U.S. trustees have improved the bankruptcy system by more aggressively prosecuting bankruptcy crimes, compared with 51 percent who disagreed and 33 percent who were undecided.

(6) While a majority of bankruptcy judges agreed that overall the U.S. trustees have made worthwhile contributions to the integrity and efficiency of the bankruptcy system (60 percent and 47 percent, respectively), a sizeable group of judges disagreed (30 percent and 39 percent, respectively).

2. Regarding the Benefits of Placing the U.S. Trustee Program in an Independent Office in the Judicial Branch

The Judicial Conference believes that placing the U.S. trustee program in the Judicial Branch would eliminate the aforementioned problems created by placement of the program in the Department of Justice. Moreover, transfer of the program to the Judicial Branch could be accomplished with minimal disruption while maintaining the desirable separation of judicial and administrative functions in processing bankruptcy cases. More specifically, reestablishing the program as an independent office within the Judicial Branch would ensure more efficient administration of the bankruptcy system by:

(1) Eliminating politics in the appointment and supervision of personnel;

(2) Eliminating conflict of interest questions in estate administration;

(3) Permitting more uniform performance in the estate administration oversight function;

(4) Permitting the judicial councils of the circuits and the Judicial Conference of the United States to resolve procedural differences between the courts and U.S. trustees; and

(5) Fostering more efficient use of personnel, eliminating unnecessary paperwork and reducing expenditures.

Appendix 3

Questionnaire Regarding the Use of Time-Saving Practices by Bankruptcy Judges

Name: ______________________________
Address: ______________________________
____
____
Phone No. ______________
Fax No. ______________
Year of Appointment: ______________

I. General

1. Has the number of cases filed in your district increased over the four years from 1/1/89 to 12/31/92? Yes _____ No _____ Unknown _____

2. If known, state the number of cases filed in your district in 1988 and 1992 by chapter:

chapter	1988	1992
7	________	________
9	________	________
11	________	________
12	________	________
13	________	________

3. State the number of bankruptcy judges authorized in your district: ___________

4. Has the number of hours which you spend administering your caseload increased over the past 4 years (or since you've been on the bench, if less than 4 years)? Yes _____ No _____

5. If the answer to no. 4 is "yes," estimate the average increase in hours spent administering your caseload from the later of your date of appointment and 1/1/89 to 12/31/92: Less than 5 hours per week _____ 5-10 hours per week _____ More than 15 hours per week _____ If more than 15 hours per week, state amount _____.

6. Estimate the average number of hours per week which you spent administering your caseload in 1989 (or your first year on the bench, if later) _____ and in 1992 _____.

7. Estimate the average number of hours per week which you spent on other judicial duties, such as administrative

responsibilities, in 1989 (or your first year on the bench, if later) _____ and in 1992 _____. *Summary of Answers:*

The answers to questions 1 and 2 were sporadic. These statistics are available from the Administrative Office of the Courts. The answer to question 3 can be ascertained from 28 U.S.C. § 152 and The Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, 106 Stat. 965 (codified as 28 U.S.C. § 152); Act of Nov. 3, 1988, Pub. L. No. 100-587, 102 Stat. 2982 (codified as 28 U.S.C. § 152); Act of Oct. 27, 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as 28 U.S.C. § 152).

The answers to questions 4 through 7 indicated that there was widespread misunderstanding or confusion as to the intended meaning of the phrase "administering your caseload," and as to other aspects of these questions. Therefore, the questions were not clear enough, and the answers are not being reported.

II. Motion Practice

1. Do you ever refuse to permit oral argument on motions because of time considerations? Yes _____ No _____ If yes, explain: _____

ANSWER	#	%
Yes	50	42
No	69	57
No Response	01	01

Summary of Comments:

The answers indicated that if the moving and responding papers are adequate, many judges will limit or dispense with oral argument unless the parties request it. Some judges responded that they will direct the argument toward particular issues. Some judges referred to local rules regarding oral argument. Most judges who refuse to permit oral argument cited docket congestion as the reason.

2. Do you set any time limits on oral arguments on motions? Yes _____ No _____ If yes, explain: _____

ANSWER	#	%
Yes	70	58
No	48	40
No Response	02	02

Summary of Comments:

The responding judges generally reported that they set time

limits ranging from 7 minutes per attorney up to 1 hour, with the most frequent answer being 15 minutes. These time limits are determined based upon the complexity of the issues. Some judges explained that they have no general rules for limiting time, but indicated that the less serious the issue, the less time allotted for argument. Other judges who failed to mention general rules on time limits, explained that they will simply cut off attorneys when they become redundant or long-winded. Some judges stated that they will stop an argument when they "have heard enough." One judge submitted that experienced counsel "know better," and are aware that they will be cut off if unduly long.

Some judges asserted that they render a tentative ruling at the beginning of a proceeding to focus the argument. One judge asks parties to set estimates on time needed for argument, and will then hold them to that estimate.

3. Do you generally permit live testimony on motions? Yes _____ No _____ Comments: _____________________

ANSWER	#	%
Yes	67	56
No	50	42
No Response	03	02

Summary of Comments:

Most judges reported that affidavits are usually sufficient and live testimony is rarely required. Some judges always permit live testimony. Other judges will do so only when there is a dispute as to material facts. Some judges only permit live testimony at a final hearing, while others will set a separate trial date.

4. If the answer to 3 is yes, do you set any limits on the presentation of live testimony on motions because of time considerations? Yes _____ No _____ If yes, explain. _______________

ANSWER	#	%
Yes	39	33
No	41	34
No Response	40	33

Summary of Comments:

Some judges set time limits in advance based upon the parties' estimates of the time required or the exigencies of the court's calendar on that day. Other judges will limit testimony of

appraisers by admitting the appraisal into evidence as direct testimony and limiting live testimony to cross-examination.

5. Are there any types of motions which are automatically granted if uncontested without your personal review of the moving papers? Yes _____ No _____ If yes, explain: ________

ANSWER	#	%
Yes	77	64
No	42	35
No Response	01	01

Summary of Comments:

Some judges will automatically grant all or virtually all uncontested motions, while others will raise sua sponte objections to any motion. Specific types of motions which some judges reported are automatically granted if uncontested include: Code sections 362(d) and 522(b); extension of time to file schedules or proofs of claim; motions to reopen; modification of chapter 13 plans; sale of property; objections to claims; abandonment of property and fee applications.

6. If the answer to 5 is yes, does someone on your staff or in the clerk's office review the moving papers on such motions before they are granted? Yes _____ No _____ If yes, explain:

ANSWER	#	%
Yes	78	65
No	05	04
No Response	37	31

Summary of Comments:

The position of the persons who perform this function vary. Judges reported that one or more of the following perform this function, depending upon the judge: law clerk; secretary; courtroom deputy; judicial assistant; administrative manager and other personnel in the clerk's office.

7. Do you grant uncontested motions *en masse* at the inception of a motion calendar to expedite disposition? Yes _____ No _____ Comments: ______________________

ANSWER	#	%
Yes	28	23
No	86	72
No Response	06	05

Summary of Comments:

Most judges reported that they do not employ this practice. Many judges noted in response to this question that uncontested motions are not put on the calendar at all and are summarily granted. Judges who reported granting uncontested motions *en masse* at the inception of the calendar did not have any particular comments about the practice.

8. Do you generally review moving and responding papers before the hearing date? Yes _____ No _____

ANSWER	#	%
Yes	95	79
No	22	18
No Response	03	03

Summary of Comments:

Some judges have their law clerk or courtroom deputy review and summarize the moving and responding papers, with the judge reading only such summary on certain motions. Other judges read the papers at or after the hearing.

9. If the answer to 8 is yes, are there any types of motions which you do not ordinarily review before the hearing date because of time considerations? Yes _____ No _____ If yes, explain: ______________________________

ANSWER	#	%
Yes	46	38
No	50	42
No Response	24	20

Summary of Comments:

Some judges reiterated that they read all papers. As to those judges who don't, one inference which can be drawn from the responses to this question is that the more difficult or complex the matter, the greater the likelihood that the judge will personally read the papers. The types of matters specifically mentioned in response to this question include all uncontested matters, motions to lift stay, abandonment of property and chapter 13 matters.

10. Do you have any other practices regarding the scheduling of hearings on motions which are intended to conserve your time or expedite disposition? Yes _____ No _____ If yes, explain: ______________________________

ANSWER	#	%
Yes	88	73
No	19	16
No Response	13	11

Summary of Comments:

Many responses to this question are noted in the text. Others include: pretrial conferences; status conferences; phone conferences; docket call; only schedule hearing when timely objection is filed; use of tentative rulings to focus argument; cover sheets on stay motions; setting hearings based on estimated length.

11. Are there any local rules in your district which are intended to conserve your time or expedite the disposition of motions? Yes _____ No _____. If yes, identify rule numbers and explain: ______________________________

ANSWER	#	%
Yes	89	74
No	22	18
No Response	09	08

Summary of Comments:

See supra note 177 and accompanying test.

III. Adversary Proceedings

1. Do you generally conduct pretrials in adversary proceedings? Yes _____ No _____ Comments: ____________________

____

ANSWER	#	%
Yes	98	82
No	20	18
No Response	—	—

Summary of Comments:

See supra note 183 and accompanying text. Other comments included: pretrial conferences are conducted by phone; the law clerk conducts them; they are only conducted if it is a complex case or if the parties believe that the trial will take more than one day.

2. Do you engage in "deep stacking," i.e., the scheduling of multiple trials in adversary proceedings on the same date? Yes _____ No _____ Comments: ____________________

____

ANSWER	#	%
Yes	56	47
No	62	52
No Response	01	01

Summary of Comments:

See supra note 184 and accompanying text. Other comments include: only deep stack if trial will last less than one day; only for § 523(a)(2)(A) trials; only with out-of-town dockets; times are staggered throughout the day.

3. If the answer to 2 is yes, do you set any limits on the number of trials scheduled for the same date? Yes _____ No _____ Comments: ______________________________

____

ANSWER	#	%
Yes	49	41
No	17	14
No Response	54	45

Summary of Comments:

See supra note 184 and accompanying text. Numerical limits given ranged from 2 to 30.

4. Do you generally review any briefs or other papers related to the trial before the hearing date? Yes _____ No _____

ANSWER	#	%
Yes	106	88
No	13	11
No Response	01	01

Summary of Comments:

See supra note 187 and accompanying text.

5. If the answer to 4 is yes, are there any types of trials in which you do not review any papers before the hearing date because of time considerations? Yes _____ No _____ Explain:

____

ANSWER	#	%
Yes	21	18
No	84	70
No Response	15	12

Summary of Comments:

See supra note 188 and accompanying text.

6. Do you generally permit opening arguments? Yes _____ No _____ Comments: ______________________________

ANSWER	#	%
Yes	103	86
No	14	12
No Response	03	02

Summary of Comments:

See supra note 190 and accompanying text.

7. If the answer to 6 is yes, do you set any time limits on opening arguments? Yes _____ No _____ Explain: _______

ANSWER	#	%
Yes	38	32
No	64	53
No Response	18	15

Summary of Comments:

See supra note 191 and accompanying text. Some judges set limits of 5 to 10 minutes. Other judges stated that limits vary depending upon the complexity of the issues.

8. Do you ever limit the number of witnesses which a party may present in a trial because of time considerations? Yes _____ No _____ Comments: ______________________________

ANSWER	#	%
Yes	31	26
No	83	69
No Response	06	05

Summary of Comments:

See supra note 202 and accompanying text.

9. If the answer to 8 is yes, do you have any general policies or practices regarding such limitations? Yes _____ No _____ If yes, explain: ______________________________

ANSWER	#	%
Yes	14	12
No	27	22
No Response	79	66

Summary of Comments:

See supra note 205 and accompanying text. Some judges noted that they do not permit testimony on issues which are not disputed, or as to which the correct outcome has clearly been established by prior testimony.

10. Do you ever limit the length of time which each side has

to present its case? Yes _____ No _____ Comments: _____

ANSWER	#	%
Yes	54	45
No	62	52
No Response	04	03

Summary of Comments:

See supra note 206 and accompanying text. Some judges noted that they will only do this for emergency hearings.

11. If the answer to 10 is yes, do you have any general policies or practices regarding such limitations? Yes _____ No _____ If yes, explain: _____

ANSWER	#	%
Yes	22	18
No	35	29
No Response	63	53

Summary of Comments:

See supra note 206 and accompanying text. Some judges noted that the estimated length of trial is set at the pretrial conference, and then parties may only exceed such estimate for cause. Other judges require equal sharing of available trial time.

12. Do you generally permit closing arguments? Yes _____ No _____ Comments: _____

ANSWER	#	%
Yes	109	91
No	11	09
No Response	—	—

Summary of Comments:

See supra note 192 and accompanying text.

13. If the answer to 12 is yes, do you set any time limits on closing arguments? Yes _____ No _____ Explain: _____

ANSWER	#	%
Yes	49	41
No	60	50
No Response	11	09

Summary of Comments:

See supra note 192 and accompanying text. Some judges require the argument to focus on issues which they are still wrestling with.

14. Do you have any other practices regarding trials which are intended to conserve your time or expedite disposition? Yes _____ No _____ If yes, explain: ______________________

ANSWER	#	%
Yes	95	79
No	15	13
No Response	10	08

Summary of Comments:

See generally section IX(2) of article. In addition, some judges believe that a liberal continuance policy conserves time, while others believe that a very strict continuance policy expedites disposition. One judge stated that notes are taken on a personal computer and examined in chambers at a later time.

15. Are there any local rules in your district which are intended to conserve your time or expedite the disposition of trials? Yes _____ No _____. If yes, identify rule numbers and explain: ______________________

ANSWER	#	%
Yes	43	36
No	53	44
No Response	24	20

Summary of Comments:

N.D. ALA. BANKR. CT. R. 21
C.D. CAL. BANKR. CT. R. 119, 121(1) & (2), 122
E.D. CAL. BANKR. CT. R. 703, 738, 739, 915 & 917
S.D. CAL. BANKR. CT. R. 7016.4, 7016.10
N.D. GA. BANKR. CT. R. 220, 730
D. MD. BANKR. CT. R. 43
E.D. MICH. BANKR. CT. R. 2.15, 2.16, 2.17, 2.19 & 2.20
E.D. MO. BANKR. CT. R. 12, 13 & 15
E.D. PA. BANKR. CT. R. 3007.2, 7016.1 & 9019.2,
W.D. PA. BANKR. CT. R. 9001
D.R.I. BANKR. CT. R. 32 & 38
D.S.D. BANKR. CT. R. 309 & 310
W.D. TENN. BANKR. CT. R. 9, 14, 14(a)&(b) & 17
N.D. TEX. BANKR. CT. R. 2002, 4007, 9007 & 9014
W.D. TEX. BANKR. CT. R. 7016
D. UTAH BANKR. CT. R. 529 & 533
E.D. VA. BANKR. CT. R. 111 & 401-07
W.D. WASH. BANKR. CT. R. 16

IV. Valuation of Property

1. Do you ever determine the value of property when such value is contested without live testimony and based solely on conflicting appraisals or other documentary evidence? Yes _____ No _____. If yes, explain the circumstances under which you will do this. ____________________

ANSWER	#	%
Yes	56	47
No	61	51
No Response	03	02

Summary of Comments:

See supra note 211 and accompanying text.

2. Do you have any practices or procedures to determine applications in which the value of property is contested (e.g. motions under Code § 362(d)) without determining such value, such as by using alternative bases for your decision? Yes _____ No _____ If yes, explain: ____________________

ANSWER	#	%
Yes	28	23
No	77	64
No Response	15	13

Summary of Comments:

See supra note 219 and accompanying text.

3. Do you have any practices or procedures on applications to determine the value of property which are intended to conserve the time which you must spend on such valuation? Yes _____ No _____ If yes, explain: ____________________

____

ANSWER	#	%
Yes	59	49
No	49	41
No Response	12	10

Summary of Comments:

See generally section IX(3) of article. Some judges stated that they do not allow live testimony as to value unless absolutely necessary. One judge reported that if the parties disagree as to value, the judge takes retail or loan value and amortizes by computer program.

4. Are there any local rules in your district regarding valuation of property which are intended to conserve judicial time

spent on such valuations? Yes _____ No _____ If yes, explain:

ANSWER	#	%
Yes	25	21
No	88	73
No Response	07	06

Summary of Comments:

See supra note 210 and accompanying text.

C.D. CAL. BANKR. CT. R. 112(3) (regarding evidence on motions).

E.D. CAL. BANKR. CT. R. 401, 914, 915 & 917

M.D. GA. BANKR. CT. R. _____ (requiring that in chapter 12, the parties must exchange appraisals 5 days before a hearing).

D. KAN. BANKR. CT. R. _____ (valuing automobile and other common goods absent special circumstances at average of wholesale and retail).

W.D. LA. BANKR. CT. R. 2.2(a)(3) (allowing for relief from stay when valuation requires use of witness or appraisal).

E.D. MICH. BANKR. CT. R. 2.09

N.D. MISS. BANKR. CT. R. _____ (using average NADA trade in value for autos in chapter 13's. Rule can be rebutted by actual proof).

S.D. OHIO BANKR. CT. R. 17 (providing for averaging the wholesale and resale values from NADA Official Used Car Guide in chapter 13 cases and further requiring that in chapter 13 cases debtors submit written appraisals of real estate unless the plan is a 100% dividend or property was recently purchased).

N.D. TEX. BANKR. CT. R. 4001(e) (using preliminary hearing to lift stay based on affidavits).

W.D. WASH. BANKR. CT. R. 43(j) (precluding a party from calling more than one expert on same subject).

V. CHAPTER 13 CASES

1. Approximately what percentage of your cases are under chapter 13? _____%

Answer: The answers were sporadic. These statistics are available from the Administrative Office of the Courts.

2. Do you confirm uncontested chapter 13 plans *en masse* at the inception of a calendar to expedite disposition? Yes _____ No _____ Comments: ______________________

ANSWER	#	%
Yes	44	37
No	62	52
No Response	14	11

Summary of Comments:

See supra note 226 and accompanying text.

3. Do you permit the standing trustee to conduct uncontested chapter 13 confirmation hearings without your presence in the courtroom to conserve bench time? Yes _____ No _____ Comments: ______________________

ANSWER	#	%
Yes	33	28
No	65	54
No Response	22	18

Summary of Comments:

See supra notes 222, 223 and accompanying text.

4. Do you have any other practices regarding chapter 13 cases which are intended to conserve your time or expedite disposition? Yes _____ No _____ Explain: ______________________

ANSWER	#	%
Yes	69	58
No	35	29
No Response	16	13

Summary of Comments:

See supra note 225 and accompanying text.

5. Are there any local rules in your district which are intended to conserve your time on or expedite the disposition of

chapter 13 cases? Yes _____ No _____ Explain: ________

ANSWER	#	%
Yes	36	30
No	60	50
No Response	24	20

Summary of Comments:

See supra note 221 and accompanying text.

VI. Settlements and Alternative Dispute Resolution Procedures

1. Do you actively encourage settlements as a means of conserving your available time? Yes _____ No _____ Comments:

ANSWER	#	%
Yes	102	85
No	18	15
No Response	—	—

Summary of Comments:

See supra note 144 and accompanying text. One judge reported that the judge will never try a case without first trying to achieve a settlement. Some judges reported the belief that refusing to grant continuances encourages settlement.

2. Do you sometimes participate in settlement negotiations in your cases if all parties consent? Yes _____ No _____ Comments: ________

ANSWER	#	%
Yes	74	62
No	45	37
No Response	01	01

Summary of Comments:

See supra note 146 and accompanying text.

3. Do you ever employ arbitration, mediation or other alternative dispute resolution procedures? Yes _____ No _____ If yes, explain: ________

ANSWER	#	%
Yes	35	29
No	84	70
No Response	01	01

Summary of Comments:

See supra note 154 and accompanying text.

4. Do you have any procedures in place for prompt notification by parties of settlements or withdrawal of applications so your time is not wasted preparing for matters which have been resolved? Yes _____ No _____ If yes, explain: __________

ANSWER	#	%
Yes	76	63
No	42	35
No Response	02	02

Summary of Comments:

See supra notes 151, 153 and accompanying text.

5. Do you have any other practices regarding settlements which are intended to increase the likelihood of settlements? Yes _____ No _____ If yes, explain: ____________________

ANSWER	#	%
Yes	53	44
No	58	48
No Response	09	08

Summary of Comments:

See supra note 145 and accompanying text. All specific suggestions reported in the survey have been noted in this section or elsewhere in the article, except that one judge noted that requiring the attendance of the parties at pretrial conferences increases the possibility of settlement.

6. Are there any local rules in your district which are intended to facilitate settlements? Yes _____ No _____. If yes, identify rule numbers and explain: ____________________

ANSWER	#	%
Yes	26	22
No	84	70
No Response	10	08

Summary of Comments:

See supra notes 142, 143 and accompanying text.

VII. Litigation in Alternative Forums

1. Do you ever abstain *sua sponte* from adjudicating matters

to conserve your time? Yes _____ No _____ If yes, explain:

ANSWER	#	%
Yes	41	34
No	78	65
No Response	01	01

Summary of Comments:

See supra note 139 and accompanying text. Some judges stated that they will abstain sua sponte if matter is noncore; has minimal impact on bankruptcy case; involves § 523(a)(3) or was removed from state court to bankruptcy court without sufficient cause.

2. Does the amount of time which it will take to adjudicate a matter have any bearing on your decisions on applications for abstention and/or for relief from the automatic stay to litigate in another forum? Yes _____ No _____ If yes, explain: _____

ANSWER	#	%
Yes	44	37
No	72	60
No Response	04	03

Summary of Comments:

See supra note 138 and accompanying text.

3. Do you have any practices or policies regarding abstention and/or relief from the automatic stay for purposes of litigation (e.g. to liquidate claims or to determine liens) which are intended to conserve your time? Yes _____ No _____ If yes, explain: _____

ANSWER	#	%
Yes	25	21
No	91	76
No Response	04	03

Summary of Comments:

See generally section VII of article. One judge reported that if it's a noncore matter and parties do not consent to final order by a bankruptcy judge under 28 U.S.C. § 157(c), the judge abstains.

VIII. Applications

1. Do you have any policies or practices regarding the submission or processing of applications other than motions which

are intended to conserve your time? Yes _____ No _____ If yes, explain: ____________________

ANSWER	#	%
Yes	59	49
No	53	45
No Response	08	06

Summary of Comments:

Some such practices are noted at various places in the article. Other reported practices include: having U.S. trustee or bankruptcy administrator review fee applications; having the clerk's office review fee applications and applications to employ professionals and having the courtroom deputy, law clerk or secretary review all applications.

2. Are there any local rules in your district which are intended to conserve the time which you must spend on such applications or to expedite their disposition? Yes _____ No _____ If yes, explain: ____________________

ANSWER	#	%
Yes	33	28
No	72	60
No Response	15	12

Summary of Comments:

C.D. CAL. BANKR. CT. R. 111 & 118
D.N.J. BANKR. CT. R. 8 & 16
W.D. TENN. BANKR. CT. R. 6
N.D. TEX. BANKR. CT. R. 2016
W.D. TEX. BANKR. CT. R. 2014, 2016, 4001 & 9014
E.D. VA. BANKR. CT. R 308
D. UTAH BANKR. CT. R. 531 & 535

IX. ORDERS

1. Do you permit your clerk's office to prepare and sign any orders under Fed. R. Bankr. P. 9021 as a means of conserving your time? Yes _____ No _____ If yes, identify the types of orders. ____________________

ANSWER	#	%
Yes	75	62
No	38	32
No Response	07	06

Summary of Comments:

See generally section V of article.

2. Do you permit your chambers staff to sign any orders for you as a means of conserving your time? Yes _____ No _____. If yes, identify the types of orders. ______________________

ANSWER	#	%
Yes	39	33
No	77	64
No Response	04	03

Summary of Comments:

See supra note 98 and accompanying text.

3. Do you require parties to use a subpoena or notice to schedule examinations under Fed. R. Bankr. P. 2004 before applying to you for an order compelling such examinations? Yes _____ No _____ Comments: ______________________

ANSWER	#	%
Yes	38	32
No	73	61
No Response	09	07

Summary of Comments:

See supra note 82 and accompanying text.

4. Do you routinely sign orders granting adjournments or continuances? Yes _____ No _____ Comments: __________

ANSWER	#	%
Yes	53	44
No	61	51
No Response	06	05

Summary of Comments:

This question could have been phrased more clearly. The comments indicate that the responding judges thought the inquiry was as to their adjournment policy. The inquiry, however, was intended to relate only to use of orders as evidence of an adjournment. Therefore, the percentages reported are of questionable significance.

I do not believe that an order is ordinarily required to reflect an adjournment or continuance, with the possible exception of situations covered by Code § 362(e). *See* D.N.J. BANKR. CT. R.

3(i)(4) (providing a means of dispensing with orders under § 362(e)).

5. Do you routinely sign orders reflecting the withdrawal of motions or applications? Yes _____ No _____ Comments:

ANSWER	#	%
Yes	74	62
No	45	37
No Response	01	01

Summary of Comments:

See supra note 77 and accompanying text.

6. Do you routinely sign orders reflecting stipulations or settlements? Yes _____ No _____ Comments: _____________

ANSWER	#	%
Yes	102	85
No	12	10
No Response	06	05

Summary of Comments:

See supra note 81 and accompanying text.

7. Do you have any practices or policies regarding signing of orders which were not mentioned above and which are intended to reduce the number of orders which you must sign? Yes _____ No _____ If yes, explain: ___________________________

ANSWER	#	%
Yes	24	20
No	88	73
No Response	08	07

Summary of Comments:

See generally section V of article. Northern District of Alabama Bankruptcy Court Rule 14 allows the judge to use initials as the judge's official signature. *See* N.D. ALA. BANKR. CT. R. 14. Although the District of New Jersey does not have such a rule, I have been using initials as my signature on most orders which I am personally signing. This practice saves time and writer's cramp where there is a high volume of orders.

8. Do you routinely sign orders when requested by parties on uncontested applications for which a certification from the clerk of no objection is an alternative means of validation (e.g.

sale or abandonment of assets)? Yes _____ No _____ Comments: ________________________________

ANSWER	#	%
Yes	64	53
No	49	41
No Response	07	06

Summary of Comments:

See supra notes 70, 78 and accompanying text. Several judges noted that they sign "comfort orders" for title insurance companies and taxing authorities. While I sometimes do so as well, I am very reluctant to do so. I do not believe that as a general rule the bankruptcy court should permit title companies or others to dictate practices which require us to take actions which are not legally necessary. This is one conspicuous example of that problem.

9. Are there any local rules in your district which are intended to reduce the number of orders which you must sign? Yes _____ No _____. If yes, identify rule numbers and explain ________________________________.

ANSWER	#	%
Yes	31	26
No	79	66
No Response	10	08

Summary of Comments:

See generally section V of article. *See also supra* notes 95 & 96.

X. *Sua Sponte* Actions

1. State whether you are ordinarily willing to raise *sua sponte* objections to any of the following:

Type	Yes	No
fee applications		
motions to vacate automatic stay		
motions to avoid liens		
chapter 13 plans		
chapter 11 plans		
chapter 12 plans		
motions to sell assets		
default judgments		
other (identify):		

Summary of Comments:

See supra notes 127-29 and accompanying text.

2. If the answer to 2 is yes, describe the circumstances under which you will raise such objections. ____________

Summary of Comments:

See supra notes 127-29 and accompanying text.

3. Do you find that you are less likely to raise objections or bring up issues *sua sponte* as your workload increases? Yes _____ No _____ Comments: ____________

ANSWER	#	%
Yes	50	42
No	63	52
No Response	07	06

Summary of Comments:

See supra note 126 and accompanying text.

XI. Support Staff

1. Describe any practices or procedures by which your secretary conserves your time. ____________

Summary of Answers:

Secretaries play an important role in achieving judicial economy. Almost all judges reported that their secretary conserved judicial resources by screening calls and visitors to chambers. Some judges entrust duties to the secretary including preparing form orders, setting the calendar, dating orders for the judge's signature, using a signature stamp and calling parties before scheduled hearing dates to ascertain the status of the case.

Summary of Representative Responses:

1. Screens mail, visitors, and telephone calls — reviews orders and documents for clarity and sensibility — prioritizes the day's activities — maintains an accurate filing system.
2. Reviews motions and orders for any inconsistencies or discrepancies; handles telephone inquiries; schedules court docket and calendar.
3. Works up non-asset files for review, organizes the courtroom calendar and makes certain all files are pulled.
4. Reviews and flags Chapter 13 plans of nominal percentage payment to unsecured creditors, handles inquiries from lawyers and parties as to hearing dates and status of hearings.
5. Dates orders before forwarding them for judge's signature.
6. Maintains decisions index guide, tracks matters under advisement.

7. Calls attorneys one week before trial to check on settlement; continues cases over the phone according to established criteria; checks with attorneys 10 to 15 minutes prior to trial to be sure exhibits are marked and witnesses present.
8. Reviews all orders to ensure compliance with notes made at motion terms; reviews all fee applications for mathematical accuracy.
9. Verifies that proposed orders comport with bench decisions; has authority to authorize consent adjournments by telephone.
10. Uses signature stamp, alerts judge to any matters which need immediate attention.
11. Prepares dozens of set forms of orders with minimal instruction.
12. Signature stamps orders — those reviewed by the judge and not needing further review.
13. Reviews all pleadings brought to chambers and prepares form orders on several.
14. Date stamps signature on orders. Notes hearing status or ruling on incoming orders.
15. Reviews all orders submitted by attorneys, reviews all applications to employ professionals, drafts routine type orders from work sheet or courtroom notes.
16. Reviews all incoming orders for conformity with number of copies, envelopes, etc. Bounces nonconforming orders.
17. Reviews all chapter 13 cases and fills out an informational form on them. Coordinates all follow-ups with the law clerk.
18. Prepares form orders, reviews incoming orders.
19. Contacts all parties before contested matters to check on status of matter. This helps the cases flow more smoothly.
20. Review of final drafts of opinions and orders.
21. Uses personal computer to generate standard orders and opinion drafts.
22. Places macro on all orders which states that "inasmuch as the Bankruptcy Judges sign more than 10,000 orders annually, the Court reserves the right to make additional findings of fact and conclusions of law at a later date."
23. Matches calendar notes with proposed orders.
24. Reviews all orders for apparent defects, reviews employment applications for Rule 2014 compliance.
25. Handles all processing matters relating to adversary proceedings: receiving the first status reports; preparing standard form scheduling orders (using computer macros); and scheduling pretrial conferences.

2. Describe any practices or procedures by which your law clerk conserves your time. ______________________

Summary of Answers:

Law clerks perform various important functions to aid bankruptcy judges in dealing efficiently with their caseloads. These tasks include legal research, writing, reviewing the calendar and acting as a go-between.

Most judges reported that the primary time saving functions of a their law clerk are preparation of the calendar and review of routine applications and pleadings prior to hearing. Customarily, law clerks summarize and outline the contents of these papers to enable the bankruptcy judge to quickly review the papers. After a careful survey of the court calendar, law clerks identify problem areas and flag non-routine matters for the judge's attention. Many judges have detailed forms or "work sheets" that their law clerks complete regarding the content of various motions. Law clerks also check motions on the docket for proof of service. Particularly, law clerks perform a preliminary analysis of fee applications and review certain motions for merit, i.e., motions for summary judgment. Some judges reported that they ask their law clerks to make brief recommendations as to what action should be taken on a particular motion. Additionally, some law clerks enter routine uncontested orders.

The principal responsibility of a law clerk is legal research. Prior to hearing and trial dates, most law clerks prepare detailed bench memos on relevant case law pertaining to complex legal issues and adversary proceedings. These memos permit bankruptcy judges to conserve time by allowing them to make quick decisions or rule directly from the bench. Bankruptcy judges also rely on their law clerks for computer research on Lexis and Westlaw. Such legal research is sometimes needed on short notice, such as during a hearing or trial.

Another important task of a law clerk is handling attorney inquiries regarding procedural and scheduling matters. Some law clerks act as buffers and intercept telephone calls from lawyers and parties in interest. Some bankruptcy judges allow their law clerks to contact attorneys to discuss various matters. Many law clerks also conduct routine scheduling and pretrial conferences for complicated matters.

Writing is another vital function of a law clerk. Most judges require their law clerks to draft opinions. Bankruptcy judges who prefer to write their own opinions, however, often rely on their

law clerks to proofread and check citation format. One judge even reported having his law clerk assist in preparing speeches. Some law clerks also draft routine correspondence.

Many law clerks also act as liaison between the judge, the deputy clerk and other court personnel. They direct other staff when necessary and attempt to resolve any problems that arise. Moreover, law clerks help train new clerks, handle student interviews and supervise student interns and extern staffs. The utilization of student interns has been of great value in alleviating the backlog in many bankruptcy courts.

Additionally, law clerks perform various other functions in the bankruptcy court. Law clerks update chambers libraries and keep the judges apprised of recent case law and developments in the bankruptcy arena. For some judges the law clerk acts as a "sounding board" in discussing issues before the court.

Several bankruptcy judges employ career law clerks for long terms. Such judges believe that career law clerks are much more helpful than a clerk with a one or two year term. In the Western District of Tennessee, career law clerks serve for a term of seven and a half years. Additionally, several bankruptcy judges prefer law clerks with experience as private practitioners.

3. Describe any practices or procedures by which your courtroom deputy conserves your time. ____________________

Summary of Answers:

Many courtroom deputies review orders and simple motions. One judge reported that his deputy reviews only motions which may be granted without a hearing. The courtroom deputy reviews orders for conformity with the ruling. One judge reported using his courtroom deputy to review uncontested and contested motions as well as applications for rules compliance and proper procedure. The courtroom deputy is often responsible for ensuring that the files are available and complete for hearings and that they are properly tabbed before the hearing. For many judges the courtroom deputy is a liaison between attorneys and the judge. One judge reported that his courtroom deputy contacts attorneys at least one day before the hearing is scheduled to ascertain the status of the matter.

A few judges reported that the courtroom deputy is responsible for granting continuances and combining hearings, when possible. Some judges reported that the courtroom deputy handles the scheduling of hearings, in consultation with the judge. Some judges reported that the courtroom deputy is given discre-

tion to grant continuances without consulting with the judge. One judge reported that while his courtroom deputy is authorized to grant continuances on motions, the deputy may not do so for trials.

Some judges reported that their courtroom deputy drafts minutes of the hearing and follows up with the attorneys thereafter. Several judges reported that the courtroom deputy prepares all orders which resulted from a courtroom proceeding. One judge reported that the courtroom deputy collects exhibits after the trial as well as the names and appearances for written opinions.

Many judges reported that their courtroom deputy is in charge of tracking due dates. Some judges have the courtroom deputy appear in court on motion days to facilitate the handling of papers and files. Some judges have the courtroom deputy verify that service was proper. One judge has her courtroom deputy make sure that all the attorneys are present and ready before she enters the courtroom. Many courtroom deputies handle telephone inquiries regarding case status or courtroom procedure. Some courtroom deputies stamp the judge's signature on routine orders. Four judges reported that they do not have a courtroom deputy.

4. Describe any practices or procedures by which other personnel in the clerks' office conserve your time.

Summary of Answers:

Several judges indicated that certain functions ordinarily performed by the secretary, law clerk or courtroom deputy as stated above are instead performed by other personnel in the clerk's office.

XII. Other Remarks

Describe any other practices or procedures which you use to conserve your time.

Summary of Answers:

Any responses to this question have been noted above or in the text of the article.

I do _____ do not _____ grant permission to disclose my identity in connection with the answers given above.

If applicable, I grant permission to disclose my identity in connection with all answers given above except the following [identify section and question numbers]:

____
United States Bankruptcy Judge

Dated: 1993

Appendix 4

I. NORTHERN DISTRICT OF ALABAMA BANKRUPTCY COURT LOCAL RULE 12

RULE 12 PERFORMANCE OF FUNCTIONS DELEGATED TO CLERK

Any functions delegated by the United States Bankruptcy Court or the Judges thereof to the Clerk of the Bankruptcy Court may be exercised or performed through the deputies of such Clerk. In issuing any notice or order appropriate to the carrying out of such delegated functions, the notice or order shall be issued in the name of the Bankruptcy Judge or Judges before whom the case is pending, by the Clerk of Deputy Clerk.

II. DISTRICT OF NEW JERSEY BANKRUPTCY COURT LOCAL RULE 4 AND COMMENTS

RULE 4 JUDGMENTS AND ORDERS

(a) Any order or judgment must be a separate document. The title of an order or judgment shall identify the nature of the relief granted.

(b) The Court may approve standard forms of order and judgment pursuant to Fed. R. Bankr. P. 9021. When a decision by the Court is identical to that provided in any such standard form of order or judgment, and includes no additional relief or ruling, the clerk shall prepare, sign and enter an order or judgment on the appropriate form as directed by the Court. Where use of a standard form of order or judgment is required under this subdivision, there shall be no substitution for, or modification or supplementation of such form without the express consent of the Court.

Rules Committee Comment

Fed. R. Bankr. P. 9021 incorporates by reference Fed. R. Civ. P. 58, which provides in pertinent part that the clerk shall prepare and sign a judgment (a) for a sum certain, (b) denying all relief or (c) upon a general verdict of a jury. Rule 58 provides that in all other cases, the court shall "approve the form" of the judgment. Rule 58 provides further that attorneys shall not submit forms of judgment except upon direction of the court, and that such directions shall not be given as a matter of course. Fed. R. Bankr. P. 9002(5) defines "judgment" to include any appealable order. The court is therefore authorized, if not required, to

prepare its own forms of orders and judgments to the extent possible.

Utilization of standard forms of orders and judgments serves several salutary purposes. First, it expedites entry:

> Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. *See Matteson v. United States*, 240 F.2d 517, 518-19 (2d Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

6A *Moore's Federal Practice* ¶ 58.01[8], at 58-12 (2d ed. 1987) (citing Committee Note of 1963 to Amended Rule 58).

The second salutary purpose of utilization of standard forms of order and judgments is that it promotes uniformity and lessens the possibility of an order becoming lost in the mail, being misplaced in the clerk's office or being misdesignated by a party submitting the order.

Thirdly, by having the clerk sign such orders there is a substantial savings in the judges' time. The caseload of the judges in this district is very heavy, and continues to increase. It has been determined that bankruptcy judges spend 15% of their case-related time reviewing and signing orders. Gordon Bermont, et al., "A Day in the Life: The Federal Judicial Center's 1988-1989 Bankruptcy Court Time Study," 65 Am. Bankr. L.J. 491, 512-13 (Summer 1991). This is because of the tremendous volume of such orders. The bankruptcy judges in this district signed an average of approximately 200 orders per week during the last six months of 1992. It is, however, a waste of the judges' time to review and sign routine orders. Use of standard orders in such situations both reduces the time spent by judges on this ministerial function and eliminates the possibility that the clerk will inadvertently sign an order that does not accurately reflect the court's decision. The judges' time is better spent making decisions than reviewing and signing routine orders.

The clerk's duty to prepare and sign orders and judgments is ministerial and may be performed by a deputy clerk in the name of the clerk. *Moore's Federal Practice*, *supra*, ¶ 58.01[8], at 58-12. The court may issue standing instructions to the clerk to enter judgment in certain situations without any formal interposition by the court.

Id. ¶ 58.04[1], at 58-30 (citations omitted). The preparation, signing and entry of the judgment is ministerial and not a usurpation of the court's judicial powers. *Id.* ¶ 58.04[4.2], at 58-45 (citations omitted).

The judges will continue to sign all other orders and judgments. Subdivisions (c) and (d) provide a procedure for settling form in situations where the judge does not sign an order at the time of ruling.

III. General Order and Standard Forms of Order under Local Rule 4(b)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: :

GENERAL ORDER PROVIDING :
FOR STANDARD FORMS OF
ORDER UNDER LOCAL RULE :
4(b)

The revisions to the Local Rules of Bankruptcy Procedure ("Local Rules") shall become effective on or about April 15, 1993, subject to approval of the District Court. Local Rule 4(b) authorizes this Court to adopt standard forms of order to be prepared and signed by the Clerk. This General Order provides for such standard forms of order. In addition, this Order also provides for certain standard forms of order to be prepared by parties in interest.

Therefore, IT IS on this _____ day of March, 1993 ORDERED as follows:

1. Standard Orders 1 through 21 annexed hereto shall be prepared and signed by the Clerk pursuant to Fed. R. Bankr. P. 9021 and Local Rule 4(b) as directed by the Court. The Clerk shall use a stamp of the judge's signature, with the deputy clerk's initials, for this purpose.

2. Standard Orders 22, "Order Granting Allowances," and 23, "Order for Relief," shall be prepared by the Clerk and signed by the Court.

3. Standard Order 24, "Order Confirming Chapter 13 Plan," shall be prepared by the chapter 13 trustee and signed by the Clerk in the manner set forth in 1 above.

4. Standard Order 25, "Order to Employer or Other Party to Pay to the Trustee and Mortgagee(s)," shall be prepared by the debtor's attorney and signed by the Clerk in the manner set forth in 1 above.

5. Standard Orders 25, "Entry of Default," an 27, "Judgment by Default under Fed. R. Bankr. P. 7055(b)(1)," shall be prepared and signed by the Clerk, using the deputy clerk's signature only.

6. Standard Orders 28, "Order Vacating Automatic Stay as to Personal Property," and 29, "Order Vacating Automatic Stay as to Real Property," shall be prepared by the creditor's attorney. Each judge will have discretion as to whether to sign such orders or to direct the Clerk to do so in the manner set forth in 1 above.

7. The operation of this Order may be modified as needed in a particular case in the discretion of the Court.

______________________	______________________
William H. Gindin Chief Judge	Rosemary Gambardella U.S. Bankruptcy Judge
Judith H. Wizmur U.S Bankruptcy Judge	William A. Touhey U.S. Bankruptcy Judge
Stephen A. Stripp U.S. Bankruptcy Judge	Novalyn L. Winfield U.S. Bankruptcy Judge
Gloria M. Burns U.S. Bankruptcy Judge	

IV. District of New Jersey Bankruptcy Court Standard Orders, Rule 16 and Comments

United States Bankruptcy Court
District of New Jersey

List of Standard Orders

Standard Order 01:	Order to Show Cause for Dismissal or Conversion of Chapter 11 Proceeding
Standard Order 02:	Order of Dismissal (case dismissed/discharge revoked)

Standard Order 03: Order Converting Case from Chapter __ to Chapter __
Standard Order 04: Order Reopening Case
Standard Order 05: Order Respecting Amendment of List of Creditors (Chapter 11)
Standard Order 06: Order Respecting Amendment of List of Creditors (Chapter 13)
Standard Order 07: Order Respecting Amendment of List of Creditors (Chapter 7)
Standard Order 08: Order to Show Cause for Failure to File Schedules in an Involuntary Case
Standard Order 09: Order to Show Cause for Dismissal of Adversary Proceeding for Lack of Prosecution
Standard Order 10: Order Closing Adversary Proceeding (check list)
Standard Order 11: Order Vacating Discharge of Debtor(s) (check list)
Standard Order 12: Order Vacating Final Decree
Standard Order 13: Order Extending Time to File a Complaint Objecting to Discharge and/or Determine Dischargeability of a Debt
Standard Order 14: Order Extending Debtor's Exclusive Time to File a Plan
Standard Order 15: Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejection of Plan, Combined with Notice Thereof
Standard Order 16: Final Judgment for Sum Certain and Costs
Standard Order 17: Order Denying Motion or Application for Entry of an Order to ________________
Standard Order 18: Order Denying Motion or Application for Entry of an Order to ________ (main case)
Standard Order 19: Order of Recusal (adversary case caption)
Standard Order 20: Order of Recusal (main case caption with Adversary No. included)
Standard Order 21: Order Transferring Related Case
Standard Order 22: Order Granting Allowances
Standard Order 23: Order for Relief
Standard Order 24: Order Confirming Chapter 13 Plan
Standard Order 25: Order to Employer or Other Party to Pay to the Trustee and Mortgagee(s)

Standard Order 26: Entry of Default
Standard Order 27: Judgment by Default
Standard Order 28: Order Vacating Automatic Stay as to *Personal* Property
Standard Order 29: Order Vacating Automatic Stay as to *Real* Property

RULE 16 RULE 2004 EXAMINATION

(a) If a party from whom an examination or document production is sought under Fed. R. Bankr. P. 2004 agrees to appear for examination or to produce documents voluntarily, no subpoena or court order is required.

(b) Any party in interest seeking to compel an examination or production of documents shall serve a subpoena pursuant to Fed. R. Bankr. P. 2004(c) without filing a motion or obtaining an order authorizing such examination or document production.

(c) A subpoena pursuant to subdivision (b) shall not set the examination or document production for less than 14 days after service of the subpoena except by agreement of the deponent.

(d) Upon motion of the deponent or any party in interest, the Court may quash or modify a subpoena pursuant to subdivision (b) for cause shown. The filing of such a motion prior to the date set for examination or document production shall stay the subpoena until the Court rules on the motion.

(e) If a deponent fails or refuses to comply with a subpoena served pursuant to subdivision (b) and has not filed a motion pursuant to subdivision (d), the party who obtained the subpoena may file a motion to hold the deponent in contempt pursuant to Fed. R. Bankr. P. 9016 and Fed. R. Civ. P. 45(e), and for an order directing such examination or document production under Fed. R. Bankr. P. 2004(a).

Rules Committee Comment

The practice in this District has been to apply for an order whenever a party desires to take an examination or compel document production under Fed. R. Bankr. P. 2004. However, such orders are unnecessary in light of Rule 2004(c), which authorizes examination or document production by subpoena, which is a form of court order. Since subpoenas can be issued under Fed. R. Bankr. P. 9016, it imposes an unnecessary burden upon the bankruptcy judges to apply routinely for an order under Rule 2004. Such orders shall henceforth be permitted only if the deponent fails to comply with the subpoena.

Moreover, as subdivision (a) recognizes, neither a subpoena

nor an order is necessary if the deponent agrees to appear for examination or to produce documents voluntarily.

As with all of the Local Rules, an application may be made under Rule 1(b) to modify this Rule in appropriate cases.

V. Western District of Pennsylvania Bankruptcy Court Local Rule 9013.4(5)(a)

Rule 9013.4
5. *Filings With the Clerk — Default*

(a) If no written response, or a written response which does not object to the Motion, is received timely by the Movant by the date specified in the Notice (plus 3 additional days as required by Bankruptcy Rule 9006(f) where service is by mail), not less than 7 calendar days before the scheduled hearing date,counsel shall file with the Clerk

1) in duplicate, a proposed Default Order, one copy being loose and unbound,
2) a Certificate of Default (Local Bankr. Form No. 6),
3) a Certificate of Service (Local Bankr. Form No. 5),
4) the Notice of Hearing, and
5) the Motion,

whereupon the Clerk, on behalf of the judge, shall issue an order by default against any defaulting party, in accordance with the motion.[1]

VI. District of Utah Bankruptcy Court Local Rule 535

Rule 535
Orders and Judgments Grantable by the Clerk; Approval of Bonds

(a) *Orders and Judgments.* The clerk is authorized to sign and enter the following orders without further direction by the court:

(1) Orders entering default for failure to plead or otherwise defend as provided in Federal Rule of Bankruptcy Procedure 7055 (the clerk shall notify the court forthwith);
(2) Orders on consent satisfying judgment; and
(3) Any other orders which under Fed.R.Civ.P. 77(c) do not require allowance or order by the Court. The clerk is also authorized to approve undertakings, bonds, and

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[1] Draftsman's Comment: Items in ¶5(a) or ¶5(b) should be filed together and may be attached for one combined filing, in the order indicated.

stipulations for security given in the form and amount prescribed by statute, by these rules, or by order of the court where the same are executed by approved sureties, except those required by law to be approved by a judge.

(b) *Clerk's Action Reviewable.* The actions of the clerk under this rule may be reviewed, suspended, altered or rescinded by the court upon good cause shown.

(c) *Documents Signed or Imprinted by the Clerk.* The clerk is authorized to sign or, as appropriate, imprint the court's facsimile signature upon the following documents: subpoenas, summonses, notices, orders respecting meetings or creditors, discharges, and other documents as authorized by the court.

(d) *Judgment by Default.* Judgment by default may be signed and entered by the clerk in such circumstances as are specified in Federal Rule of Bankruptcy Procedure 7055. The judgment must be accompanied by an affidavit that the person against whom judgment is sought is neither an infant or an incompetent person, nor in the armed forces within the meaning of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 520(1). Upon application of any party, the clerk shall make and file a certificate of default as to any party in default, for the convenience of the court or of the party applying for the default judgment. When application is made to the court under Federal Rule of Bankruptcy Procedure 7055 for default judgment, unless the court orders otherwise, the scheduling clerk upon request of the moving party shall set a hearing for the taking of evidence before the court. If the party against whom judgment by default is sought has appeared in the proceeding, the party seeking the default shall give due notice of the hearing to counsel for said party as required by Federal Rule of Bankruptcy Procedure 7055. With leave of the court, proof may be submitted by affidavit, but the court may order such further hearing as appears proper.

VII. EASTERN DISTRICT OF VIRGINIA BANKRUPTCY COURT LOCAL RULE 106

Rule 106 — Orders Grantable By The Clerk
The Clerk of the Bankruptcy Court is hereby authorized and directed to grant and enter the following orders without further direction by the Court, subject to suspension, alteration or rescission for cause shown:
(A) *Orders Requiring Amended Petitions, Lists, etc.*: In the event bank-

ruptcy petitions, lists, schedules and statements are filed with the Clerk and to the extent such filings are incomplete or otherwise fail to comply with the Federal Rules of Bankruptcy Procedure or with these Local Rules, on motion of a party in interest and after direction of the Court, the Clerk is empowered and authorized to direct the filing of amended petitioners, lists, schedules and statements.

(B) *Preliminary Order to Debtor*: The Court has promulgated routine orders instructing debtors of certain duties under the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, and Local Rules. The Clerk is authorized and directed to issue such an order promptly upon commencement of the case and to serve the same upon the debtor and the debtor's attorney.

(C) *Notice for Meeting of Creditors*: All notices for meetings of creditors may be signed by the Clerk of the United States Bankruptcy Court.

(D) *Discharge of Debtor*: The Clerk of the Court shall forthwith issue a discharge of the debtor and send notice of the same to the debtor and all other interested parties upon determining that:

(1) no complaint objecting to the discharge of a chapter 7 debtor has been timely filed,

(2) no motion to dismiss the case under F.R.B.P. 1017(e) is pending, and that

(3) a chapter 12 or chapter 13 trustee has filed a final report certifying that all payments have been made pursuant to the confirmed plan.

(E) *Order Closing Case*: The Clerk shall forthwith issue an order closing a case upon determining that the case is administratively ready for closure, and upon receipt of one of the following:

(1) a chapter 7 trustee's final report of no distribution,

(2) a final report from a chapter 12 or chapter 13 trustee certifying that distribution in full has been made pursuant to the confirmed plan, or

(3) entry of an order dismissing a case.

(F) *Other orders grantable by Clerk*: Any and all other orders grantable as a matter of course by the Clerk under the provisions of the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure or any federal statute, any Local Rule, or by direction of the Court.

Appendix 5

I. Eastern District of California Bankruptcy Court Special Order 87-1

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:	)	
	)	Special Order 87-1
Delegation of Duties to the	)	
Clerk of the Bankruptcy	)	Re: Sacramento Division Office
Court and his Deputies	)	
________________________	)	

IT IS HEREBY ORDERED that Special Order 81-1, dated March 3, 1981, is amended to read as follows:

RICHARD G. HELTZEL, the duly appointed Clerk of the U.S. Bankruptcy Court of the Eastern District of California and his deputies shall have the same rights and powers, shall perform the same functions and duties and shall be subject to the same provisions of Title 28, United States Code, as a clerk and other employees appointed under 28 U.S.C. § 751. Pursuant to the provisions of 28 U.S.C. § 956 and 11 U.S.C. § 105, in connection with cases and proceedings commenced under the Bankruptcy Code, and the provisions of the Bankruptcy Rules in connection with cases pending or reopened under the Bankruptcy Act, the clerk and such deputies as he may designate are authorized to sign and enter without further direction the following orders which are deemed to be of a ministerial, nondiscretionary, nonjudicial and/or administrative nature:

1. Orders and notices that establish trial, pre-trials, settlement conferences, meeting or examination dates required or requested under Title 11, United States Code, and continuances thereto provided, however, that orders for examination pursuant to Bankruptcy Rule 2004 shall be on 30 days notice to the witness and shall be held at a place within 100 miles of the residence or place of business of the witness;

2. Orders fixing the last dates for the filing of objections to discharge, objections to confirmation of plans, acceptance or rejection of plans, complaints to determine the dischargeability of debts, proofs of claim, and amendments thereto;

3. Orders permitting the filing fee to be paid in installments as provided by the Rules of Bankruptcy Procedure;

4. Orders granting discharge of debtors in chapter 7 and 13 cases in which no objection to discharge is pending, and where the debtor has not executed a waiver of discharge or been otherwise denied a discharge;

5. Orders reopening cases to administer assets pursuant to 11 U.S.C. § 350;

6. Orders limiting notice pursuant to Rule 2002(h);

7. Orders shortening time to not less than 10 days for notices pursuant to Rule 2002(a)(2) and 2002(a)(3) involving the sale of personal property or compromise of a controversy in which the value of property is less than $2,500.00, wherein the request is supported by a representation that persons receiving notice will have sufficient time to respond and that cause for shortened notice exists;

8. Orders appointing interim trustees from the panel of trustees established in accordance with 28 U.S.C. § 604, and fixing trustee bonds;

9. Unless otherwise ordered by the court, orders for distribution of dividends in a chapter 7 case (excluding orders wherein trustee, attorney, or other professional fees are more than $500.00 to any one applicant) and orders closing cases and discharging trustees wherein no objections are pending;

10. Orders closing cases deemed to be minimal funds cases pursuant to Special Order 86-1 of this court;

11. Orders necessary to close cases filed under the Bankruptcy Act or Code including orders authorizing or directing trustees, disbursing agents, or debtors to make distribution and file accounts, and final decrees, after appropriate notice to parties in interest, and no objections are pending;

12. Except orders presented pursuant to 11 U.S.C. § 1307(b), which do not require notice, and where no objections are pending, orders dismissing cases (i) under chapter 7, 11 and 12 after notice to the master mailing list and (ii) under chapter 13 to the debtor, debtor's attorney and trustee;

13. Orders converting cases (i) pursuant to a debtor's request under 11 U.S.C. § 706(a), 11 U.S.C. § 1112(a), 11 U.S.C. § 1208(a) and 11 U.S.C. § 1307(a) without notice and (ii) pursuant to other Code provisions after notice to the master mailing list, and no objection pending;

14. Except with respect to priority claims, orders substituting the transferee for the original claimant on a proof of claim pursuant to the Rules of Bankruptcy Procedure;

15. Orders requiring refund of monies to claimant where such monies were tendered to the court as undeliverable, or in minimal amounts;

16. Orders permitting employment, association, or substitution of counsel or other professional persons pursuant to sections 327-330 of the Bankruptcy Code that do not include the fixing or allowance of compensation; provided, however, that all such orders conclude with the phrase "pursuant to 11 U.S.C. § 326-§ 330";

17. Orders presented by the Chapter 13 Standing Trustee ordering or releasing the debtor or any entity from whom the debtor receives income to pay for all or part of such income to the trustee;

18. Orders confirming or modifying a chapter 13 plan where no objections to confirmation are pending and the trustee has approved the plan as satisfying the requirements of 11 U.S.C. § 1325(a);

19. Orders providing for notice to the creditor, the debtor and trustee of a claim filed on behalf of a creditor as provided in 11 U.S.C. 501(c) and Bankruptcy Rule 3004.

20. Orders appointing creditors' committees, and amendments thereto;

21. Orders pursuant to stipulation excepting, however, orders allowing compensation, disbursement of funds from any source whatsoever, approval of use, sale, or lease of property or of compromise, orders of abandonment and orders vacating or modifying the automatic stay.

22. Orders of the type specified in Rule 77(c) of the Federal Rules of Civil Procedure (costs taxed against the losing party).

23. Orders dismissing adversary proceedings for lack of prosecution after notice to the parties affording opportunity to be heard and no request for a hearing having been filed.

24. Orders reopening an estate pursuant to 11 U.S.C. § 350(b).

DATED: June 17, 1987

LOREN S. DAHL
Chief Judge

DAVID E. RUSSELL
Judge

II. Western District Of Michigan Bankruptcy Court General Order 2

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MICHIGAN

GENERAL ORDER 2

March 1, 1993

WHEREAS, the Bankruptcy Court is required to issue numerous routine, ministerial orders which require the exercise of no judicial discretion, and

WHEREAS, it appears to this Court that the power to sign such orders and notices can be delegated to the Clerk of the Court and specific deputy clerks,

NOW THEREFORE, IT IS ORDERED that the Clerk of this Court, and those deputies designated by the Clerk shall have authority to sign the following notices and orders on behalf of this Court:

1. Orders for Relief.
2. Orders and Notice of Stay — The Clerk is authorized to sign and distribute the form which is attached to this order.
3. Orders Allowing Installment Payments of Filing Fees.
4. Interim disbursement Orders — Provided that such orders are previously approved by the United States Trustee and are for a sum of $500 or less.
5. Notice and Orders of Abandonment.
6. Final Decrees.
7. Orders Approving Claims (chapter 13 cases).
8. Orders to Employer to Pay Trustee.
9. Orders Reducing Claims when requested by a creditor to reduce, disallow or withdraw that creditor's claim.
10. Orders Authorizing Debtor to Borrow Funds if previously approved by the standing trustee and if no judge is available to sign the order.
11. Writs of Garnishment, Executions and Orders to Pay.

12. Orders striking pleadings, motions or other documents intended for filing which are defective because they fail to meet requirements imposed by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or these local rules.

Honorable Laurence E. Howard
Chief Bankruptcy Judge

Honorable James D. Gregg
Bankruptcy Judge

At Grand Rapids,
Michigan this first day
of February, 1993

Honorable Jo Ann C. Stevenson
Bankruptcy Judge

III. NORTHERN DISTRICT OF OHIO BANKRUPTCY COURT ADMIN. ORDER 588-28

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

DELEGATION OF AUTHORITY TO SIGN AND ENTER CERTAIN ORDERS

ADMINISTRATIVE ORDER NO. 588-28
JUDGE WHITE-AKRON

In the interest of judicial economy and the prompt disposition of matters not subject to contest, the Clerk of Bankruptcy Court, from and after December 1, 1988, through regularly appointed deputies, may prepare, sign and enter orders as specified below for the governance of cases filed in the United States Bankruptcy Court, Northern District of Ohio, Akron, Ohio without submission to a judge, unless otherwise directed by a judge of the United States Bankruptcy Court sitting at Akron, Ohio:

1. Orders granting leave to pay filing fees in installments.
2. Orders extending the time to file schedules and statements of affairs or statements of intentions of individual debtors; provided, however, that such filings must be made by the close of business of the fourth working day prior to the date on which the meeting of creditors pursuant to 11 U.S.C. § 341 is first scheduled.

3. Payment orders entered on the employer or the debtor in chapter 13 cases.
4. Orders to appear and show cause why a case should not be dismissed for debtor's failure (a) to pay filing fee installments, (b) to appear at a meeting of creditors pursuant to 11 U.S.C. § 341,or (c) to file a plan within the time required by Bankruptcy Rule 3015.
5. Orders releasing employer or debtor from making further payments in Chapter 13 cases.
6. Orders directing compliance with Bankruptcy Rules 7008 and 7012 (core/non-core allegations) pursuant to General Order 88-2.
7. Orders relating to pre-trial conduct.
8. Such other orders as a judge of the United States Bankruptcy Court sitting in Akron, Ohio may from time to time authorize to be entered consistent herewith.

The Clerk's action herein authorized shall be accomplished by the affixing to such orders the following language:

ENTERED PURSUANT TO ADMINISTRATIVE ORDER NO. 588-28
BETH A. DICK, CLERK OF BANKRUPTCY COURT
BY ______________________________
DEPUTY CLERK

Any party adversely affected by an order so entered shall be entitled to reconsideration thereof by a judge of the United States Bankruptcy Court sitting in Akron, Ohio if, within ten days of service of notice of the entry of such order, such party files a written motion for reconsideration, which motion or memorandum attached shall state the grounds therefore, in accordance with L. Civ. R. 3.01 of the United States District Court, Northern District of Ohio, made applicable in cases before this court pursuant to L. Civ. R. 1.01. Such motions for reconsideration will ordinarily be considered by the court upon the papers submitted.

IT IS SO ORDERED.

____
H. F. White
Bankruptcy Judge

IV. Eastern District of Pennsylvania Omnibus Order

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMNIBUS ORDER

AND NOW, this 5th day of January, 1989, it is ORDERED that the Deputy Clerk in Charge of Reading Divisional Offices is hereby directed and empowered, effective immediately, to affix my official signature stamp to those proposed orders[1] of the court which parties become entitled to by reason of the filing of a certification of no response, a stipulation, a "consent order" form as well as to forms of "ministerial" orders. Upon affixing my signature stamp, as above, such proposed order shall become an original order of this Court having the same legal effect as though I had personally signed same.

Reading, Pa.

____

THOMAS M. TWARDOWSKI
Bankruptcy Judge

ORDERS AUTHORIZING USE OF FACSIMILE STAMP

Order for 341 Meeting of Creditors and Related Notice Order
Continuing 341 Meeting with Order to Show Cause
Order for Relief
Order of Consolidation
Order of Discharge
Bond of Trustee & Appointment
Confirmation of Chapter 13
Order to Show Cause-Abuse of Chapter 7 Provisions
Order on Disposition of Claims (After 20 days no opposition notice by Trustee)
Order to Receive Notices
Order Revoking and Rescinding Order for Discharge Hearing when Debtor(s) have filed Waiver of Attendance
Notice of Continued Discharge Hearing and Order to Show Cause
Order on 20 Day No Opposition Notice Where no Request for Hearing was Filed
Order Setting Last Day to File Complaints regarding Discharge in Chapter 13
Order to Debtor in Possession in Chapter 11 Cases (Per Local Rule 4.1)

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[1] Specific exceptions include Orders of Distribution, Applications for Confirmation, Motion for Use of Cash Collateral and Motions to Approve Compromises.

Order Appointing Unsecured Creditors Committee in Chapter 11 Cases
Order for Hearing on Disclosure Statement in Chapter 11 Cases
Order for Hearing on Confirmation of Plan in Chapter 11 Cases
Order Authorizing Retention of Attorney for DIP in Chapter 11 Cases
Order for Payment of Filing Fees in Installments
Order Appointing Trustee in Cases Converted to Chapter 7
Notice and Order for Abandonment and Lifting of Stay
Order granting Discharge on cases where no reaffirmation or redemption agreement is filed
Final Decree
Order Approving Disclosure Statement, Fixing Time for Filing Acceptances or Rejections of Plan, and Fixing Date for Confirmation Hearing, Combined with Notice Thereof
Order for Hearing on Disclosure Statement and Fixing Time for Filing Objections to Approval of Disclosure Statement combined with Notice Thereof
Order Appointing Committee of Unsecured Creditors
Order Relieving Trustee Appointing Successor Trustee Due to Conflict
Order Closing Adversary Proceeding
Preliminary Pretrial Order
Order and Notice of Hearing on Confirmation and Fixing of Time to File Objections
Order Converting Case under Chapter 13 to Case under Chapter 7 on Motion of Debtor
Order Dismissing Case on Motion of the Debtor (13)
Notice of Plan Completion and Order Setting Discharge
Order for Distribution
Order of Cancellation of Hearing on the Discharge Pursuant to 11 U.S.C. Section 524 Due to Failure of Debtor(s) to attend Section 341(a) Meeting
Order to Show Cause for Dismissal for Failure to Pay the Miscellaneous Administrative Fee
Order Canceling Hearing on Order to Show Cause why Case should not be Dismissed for Failure to Pay Filing Fees
Order to Show Cause why case should not be Dismissed for Failure to File Schedules
Order to Attorney for Debtor in Possession and Notice of Procedural Requirements in Chapter 12 Cases
Order to File Chapter 11 Post-Confirmation Report of Progress or Final Account with Application for Final Decree

Wage Deduction Order in Chapter 13
Chapter 13 Trustee's Motion to Withdraw His/Her Application to Dismiss
Order Setting Complaints Bar Date and Setting Discharge Hearing Date
Order on Trustee's Motion for Transmittal and Deposit of Unclaimed Funds

V. Middle District of Pennsylvania Bankruptcy Court Admin. Order 92-01

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ADMINISTRATIVE ORDER : MISC. NO. 92-01 (HBG.)

ORDER

AND NOW, this 21st day of January, 1992, IT IS ORDERED that the following routine administrative orders shall be effective and duly issued upon application of a facsimile signature stamp:

1. Order Appointing Debtor-In-Possession
2. Order for Payment of Filing Fee in Installments
3. Order for Extension of Time to File Schedules
4. Final Decree Orders
5. Order Closing Reopened Case
6. Order for Final Reports; Chapter 11 and 13
7. Order to File Final Report and Postpetition Debts; Chapters 11 and 13
8. Order Directing Filing of Claims Incurred During Proceedings; Chapters 11 and 13
9. Order Converting. (restricted to absolute right cases only)
10. Order for Dismissal. (All Chapters)
11. Order to Answer Motion to Assume/Reject Lease
12. Default Order/Lien Avoidance
13. Default Order/Automatic Stay
14. Order Approving Reduction of Notice Period
15. Discharge Order
16. Order for Deposit of Funds in Registry (unclaimed funds)
17. Order/Trustee's Rule to Show Cause

18. Appointment Order (after being held 5 days and no objections filed)
19. Order Confirming Chapter 13 Plan (preprinted form orders)
20. Order to Pay Trustee/Creditor (Chapter 13 wage attachments)

This order shall be effective on the day of issuance.

BY THE COURT,

HARRISBURG, PENNSYLVANIA ________________________

ROBERT J. WOODSIDE,
BANKRUPTCY JUDGE

VI. Northern District of Texas Bankruptcy Court General Order 91-2

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

IN RE:	§	
	§	
AUTHORITY OF CLERK TO SIGN	§	GENERAL ORDER
	§	
CERTAIN ORDERS AND NOTICES	§	NUMBER 91-2
	§	
IN THE NAME OF THE COURT	§	

After a review and consideration of the Court's practice regarding the signing and entry of notices and orders, the Court finds certain notices and orders to be ministerial in nature, not generally subject to opposition, and not to deprive any party of any right by virtue of the absence of actual review. Therefore, pursuant to 28 U.S.C. §§ 157(b) and 956,

The Court authorizes the Clerk of the Court to sign and enter the following Notices and Orders for the Court:

1. Notices which require appearances at meetings, hearings, conferences, or trials;
2. Notices to Trustees of Status Conferences
3. Notices of the Filing of Trustee's Final Reports, Applications for Compensation, Proposed Distribution and Deadline for Filing Objections;

4. Orders Discharging Trustee, Terminating Liability on Bond, and Closing or Converting Chapter 12 and Chapter 13 Cases;
5. Orders Accepting Trustee's Report and Closing Estate in No-Asset Chapter 7 Cases where the Debtor has been discharged or the case has been dismissed;
6. Orders to Show Cause, except for contempt or sanctions;
7. Orders Granting Applications to Pay Filing Fees in Installments;
8. Standing Scheduling Orders in Adversary Proceedings; and
9. Standing Scheduling Orders in Involuntary Cases.

The Court further authorizes the Clerk of Court to delegate to any deputy clerk the authority to sign, on behalf of the Clerk, any of the Notices and Orders the Clerk of Court is authorized by this Order to sign. On any Order or Notice signed by the Clerk or on behalf of the Clerk, there shall appear the legend FOR THE COURT above the signature line.

SO ORDERED, this the 13 day of June, 1991.

FOR THE COURT

Honorable Robert C. McGuire
Chief U.S. Bankruptcy Judge
Northern District of Texas

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE, AMARILLO, LUBBOCK AND SAN ANGELO
DIVISIONS

IN RE: §
§
AUTHORITY OF CLERK TO SIGN §
CERTAIN ORDERS AND NOTICES §
IN THE NAME OF THE COURT §

GENERAL ORDER NO. 91-3

On June 13, 1991 the Honorable Robert C. McGuire, Chief United States Bankruptcy Judge for the Northern District of Texas, issued General Order No. 91-2 authorizing the Clerk of the Court and deputy clerks to sign various notices and orders.

In addition to the notices and orders described in General Order No. 91-2, the Clerk of the Court and the deputy clerks in the Abilene,

Amarillo, Lubbock and San Angelo Divisions are authorized to sign on behalf of the court the following:

1. Orders discharging the Trustee and closing the estate in Chapter 7 asset cases.
2. Chapter 11 post-confirmation orders.
3. Orders upon conversion of Chapter 12 or Chapter 13 cases to Chapter 7.

DATED: AUG 02 1991 Nunc pro tunc to July 18, 1991

____

JOHN C. AKARD, BANKRUPTCY JUDGE

VII. Western District of Texas Bankruptcy Court Amended Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AMENDED ORDER AUTHORIZING CLERK TO
SIGN CERTAIN ADMINISTRATIVE ORDERS

Pursuant to Title 28, United States Code, Section 956, the Clerk of each Court and his Deputies and Assistants can exercise the powers and perform the duties assigned to them by the Court. Accordingly, it is ordered that the Clerk or his designated representative are authorized and directed to sign on behalf of the Judges of this Court the orders and notices set forth below:

1. Order Combined with Notice of Commencement of Case under Various Chapters of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates.
2. Order Setting Bar Date for Filing Proofs of Claim or Interest, including authority of the Clerk to set a bar date for filing proofs of claim or interest approximately ninety (90) days after the First Meeting of Creditors.
3. Pay Order to Employers in Chapter 13 cases.
4. Order to Allow Claims in Chapter 13 cases.
5. Order to Allow Additional Claims in Chapter 13 cases.
6. Order Closing Estates and Discharging Trustees.
7. Order to Pay Fees in Installments.
8. Order Converting Cases as a Matter of Right.
9. Discharge Orders in Chapter 7 and 13 cases.
10. Order Relative to Pretrial in Adversary Proceedings.
11. Order to Obtain Service of Process in Adversary Proceedings.

12. Order to Seek Default Judgment in Adversary Proceedings.
13. Order to Pay Small Dividends into Registry of the Court.
14. Order to Pay Unclaimed Funds into Registry of the Court.
15. Order Granting Trustee Applications to Defer Filing Fees in Adversary Proceedings until final disposition of the bankruptcy case.

This Amended Order supersedes all previous Orders entered on this subject.

Signed this 26 day of November, 1991.

Larry E. Kelly
Chief Bankruptcy Judge

Leif M. Clark
United States Bankruptcy Judge

Ronald B. King
United States Bankruptcy Judge

Frank R. Monroe
United States Bankruptcy Judge

Appendix 6

Trial by Declarations

Barry Russell
U.S. Bankruptcy Judge

The attached "Order re Presentation of Evidence by Declarations for Court Trial . . ." concerns a procedure which I have been using for several years with excellent results, in my opinion, for Court trials. The second introductory paragraph of the Order states:

> The purpose of this procedure is to ensure a fair and expeditious trial. The procedure is similar to a motion for summary judgment, except that the admissibility of a declaration is dependent upon the presence of the declarant at trial subject to cross-examination.

Using this procedure, I have been able to try matters that would normally take one to two weeks in one-half to one or two days. Since almost all direct testimony is admitted into evidence by the witnesses' declarations, the in-court time for this testimony is generally eliminated. This procedure does not work well unless both sides are represented by counsel.

Because counsel are forced to carefully prepare the declarations that are admissible under the Federal Rules of Evidence, I have found the declarations to be very brief and far more direct than if the direct testimony were given orally in open court. I have also found that cross-examination is much shorter and frequently waived. I believe this may be due in part to the fact that many attorneys feel compelled to cross-examine witnesses, especially when the client is present in Court, and after the other side's counsel has spent considerable time questioning its witnesses on direct examination.

This procedure is most beneficial to the Judge's needs. In addition to saving a great deal of time, I have found that I am much better prepared to decide the matter. By requiring that briefs be filed with the declarations, I am often ready to decide the matter on the declarations submitted prior to trial. That is to say, in many trials (usually the more simple matters) both sides submit on the declarations without any cross-examination and without argument (they have already argued in the pre-trial briefs).

Naturally, to make the procedure work, the Judge must take the time to read the declarations and the briefs prior to trial. This can

be done at the Judge's leisure, either in Chambers or at home relaxing by the pool, etc. An additional benefit is that by requiring the parties to be fully prepared, they often settle matters which I believe would otherwise have gone to trial.

The following comments relate to specific suggestions I have concerning certain aspects of the attached Order.

1. Declarations:

(a) Since this is a trial, the admissibility of evidence is governed by the Federal Rules of Evidence. I have found that "hearsay" and "irrelevant" are by far the most frequent objections and are easily determined by this procedure. Try not to waste your time by hearing arguments on these unless you are really unsure. In any case, you will decide the relevancy when you render your decision. I would suggest generally overruling objections relating to the form of the answer as opposed to those objections relating to substance. I have found that very few objections of any kind are made to the declarations, and the objections made are easily decided.

(b) Some counsel may hold back evidence that should have been in their declarations as part of their case-in-chief and claim it is merely rebuttal. If you strictly enforce your Order they will soon learn that you will not tolerate such attempts to circumvent your Order. I would stress this and other points at a status hearing with all counsel present.

(c) Requiring exhibits to be attached to the declaration makes the reading of the declaration easier and more understandable. You may have to modify this requirement if there are a large number of exhibits. In that case, the declarant should refer to the exhibits which should be provided to the Court and counsel as part of the Pre-trial Order.

(d) The filing of a declaration by counsel, concerning witnesses for whom declarations cannot be obtained, helps to reduce surprises and is important for the Judge and opposing counsel to be aware of all the evidence to be presented by both sides.

(e) It is important to strictly adhere to the requirements of the Order. If a declarant does not appear at the trial, the declarant's declaration may not be introduced into evidence. The decision to continue the trial because of an unavailable witness is the same as it would be at a trial without declarations.

In the beginning you may encounter some counsel, as I

have, who don't believe you mean it and will appear at trial with witnesses for whom they have not served and/or filed declarations. If you comply with your Order and refuse to allow the witnesses to testify, that particular counsel and others will quickly realize that you really mean it.

2. Time for Filing Declarations, Etc.:

I generally set the time for filing the declarations so that the last one is filed two weeks before the trial or pre-trial hearing. I usually give the plaintiff about three to four weeks to file its declarations; defendant, two to three weeks to file its reply declarations; and the plaintiff, one to two weeks to reply. Any evidentiary objections must be filed with that party's declarations with the defendant filing its objections, if any, to plaintiff's reply declarations, at least one week before trial or pre-trial.

3. Time for Filing Briefs:

I don't order the filing of briefs but I do order that if thy are filed, they may only be filed in accordance with the Order. Almost all counsel file briefs and it is nice *not* to have them handed to you as you start the trial.

4. Pre-Trial Orders:

I almost always, except in the simplest matters when everyone knows what is in issue, require a Pre-trial Order. In Los Angeles, we have a Local Rule which spells out the requirements. Many Judges issue their own order. In either case, I require the Pre-trial Order to be filed on the same date as the plaintiff's declarations. I do that to force the parties to get together as soon as possible.

5. Setting of Trial or Pre-Trial:

I generally order the reply declarations to be filed two weeks prior to trial. If I don't have a good idea how long the trial will take, I set it for a pre-trial hearing with the reply declarations to be filed two weeks before the hearing. I have found it helps to emphasize to counsel that you *will* try their two day trial in one hour, or their one week trial in one half a day. There is no need for opening statements, and closing arguments should be kept to a minimum unless the cross-examinations have revealed new facts.

I would advise issuing your Order at a status hearing with all

counsel present to orally emphasize those points you wish to emphasize, and to answer any questions of counsel. This is especially important when you first initiate this procedure.