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The Evolving Bankruptcy Bench: How are the "Units" Faring?

Ralph R. Mabey

THE EVOLVING BANKRUPTCY BENCH: HOW ARE THE "UNITS" FARING?

RALPH R. MABEY*

Abstract: Life on the bankruptcy bench has evolved in recent years. This Article examines these changes from the perspective of bankruptcy judges themselves. Randomly selected bankruptcy judges were surveyed on a variety of topics including law clerks, job satisfaction, case management, bankruptcy appellate panel service, prior career, and publication of opinions. This Article compiles and analyzes the results of those surveys, and concludes that, overall, bankruptcy judges are satisfied and appear resilient to the changes and frustrations facing the bench.

INTRODUCTION

The "units"[1] that are the bankruptcy bench are evolving. In recent years, the composition of the bankruptcy bench has changed dramatically: consumer bankruptcy case filings have increased; the once-ubiquitous hierarchical distinctions between district court judges and their bankruptcy court colleagues have blurred considerably; greater numbers of permanent (or "career") law clerks are being hired; bankruptcy judges are performing dual judicial roles as trial judges and appellate judges; and many bankruptcy court chambers are now paperless. This Article assays some of these changes by the

* Mr. Mabey is a founder of Mabey Murray LC and heads the firm's corporate bankruptcy and restructuring practice. He is a senior lecturer at the J. Reuben Clark Law School, Brigham Young University. He served as a United States Bankruptcy Judge from 1979–83 and was the head of the international insolvency/corporate restructuring practice group of LeBoeuf Lamb Greene & MacRae, LLP for over 20 years. The author wishes to thank Adelaide Maudsley and Jared L. Inouye of Mabey Murray LC who assisted with this Article and the underlying survey.

[1] Section 151 of title 28 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151 (2000).

numbers and from the perspective of bankruptcy judges. Bankruptcy courts and bankruptcy judges are continually being asked to adapt. To do so, they are sacrificing some of the traditional accoutrements of the bench in favor of increased efficiency and productivity.

After first describing the general state of the current bankruptcy bench, this Article reports some findings of an informal survey of a group of bankruptcy judges. These findings center on the use of law clerks, judicial job satisfaction, case management techniques, bankruptcy appellate panel service, judges' prior careers, and the publication of opinions.

I. The Nuts and Bolts of the Bankruptcy Bench

There are ninety bankruptcy court districts[2] and 372 statutorily authorized bankruptcy judgeships within those districts, twenty-eight of which are presently designated "temporary" judgeships.[3]

This total includes the additional bankruptcy judgeships authorized in the Bankruptcy Judgeship Act of 2005, under which the Federal Judicial Code is amended: (i) to authorize appointments for additional temporary bankruptcy judgeships in California, Delaware, Florida, Georgia, Maryland, Michigan, Mississippi, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, South Carolina, Tennessee, and Virginia; (ii) to extend temporary bankruptcy judgeship positions authorized for the northern district of Alabama, the districts of Delaware and Puerto Rico, and the eastern district of Tennessee; (iii) to provide for one additional (permanent) bankruptcy judge each for the eastern district of California, the southern district of Georgia, the eastern district of Michigan, the southern district of Mississippi, the district of Nevada, the district of New Jersey, the eastern district of New

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[2] Unless otherwise indicated, citations in this Part are taken from profiles of the bankruptcy bench materials generously provided by Francis F. Szczebak, Chief of the Bankruptcy Judges Division of the Administrative Office of the United States Courts. Administrative Office of the Courts, Materials Discussing Bankruptcy Bench (Apr. 15, 2005) (on file with author) [hereinafter AO Materials].

[3] Temporary judgeships are temporary to the district, not to the bankruptcy judge. A temporary judgeship is one in which a vacancy occurring five or more years after the appointment of an individual bankruptcy judge resulting from the death, retirement, resignation, or removal of the bankruptcy judge shall not be filled. *See* AO Materials, *supra* note 2; *see also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1223(b), 119 Stat. 23, 196–98 (to be codified at, and amending, 28 U.S.C. § 152(a)) [hereinafter BAPCPA].

In addition, there are a fluctuating number of retired bankruptcy judges serving on recall. *See* AO Materials, *supra* note 2.

York, the northern district of New York, the southern district of New York, the eastern district of North Carolina, the eastern district of Pennsylvania, the middle district of Pennsylvania, the district of Puerto Rico, the district of South Carolina, the western district of Tennessee, the eastern district of Virginia; (iv) to provide for two additional bankruptcy judges for the southern district of Florida; (v) to provide three additional bankruptcy judges for both the central district of California and the district of Maryland; and (vi) to provide four additional bankruptcy judges for the district of Delaware.[4]

Of the bankruptcy judges, approximately 22% are female.[5] The ages of the bankruptcy judges range from thirty-eight to seventy-nine, with two retired judges, each of whom is eighty-nine, presently serving on recall.[6] The longest serving bankruptcy judge has thirty-six years of service.[7]

Most of the bankruptcy judges were bankruptcy practitioners in their prior careers.[8] A handful were state court or magistrate judges.[9] About 115 bankruptcy judges, 35% of the bench, have left the bench in the last ten years: seventy-eight retired; twelve resigned; eight were appointed to Article III judgeships; seven died while in office; and ten were not reappointed.[10]

The annual salary for bankruptcy judges is currently $149,132.[11]

The bankruptcy courts' clerks' offices are staffed with 5000 deputy clerks.[12] The number of deputy clerks for each district is determined by

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[4] BAPCPA § 1223(b), 119 Stat. at 196–98 (to be codified at, and amending, 28 U.S.C. § 152(a)). Another bill pending in the House would authorize an additional bankruptcy judgeship for the eastern district of California. *See* H.R. 684, 109th Cong. (2005) (pending before the House Subcommittee on Commercial and Administrative Law). Legislation also introduced in the House would create twenty-four new or permanent bankruptcy judgeships. *See* Federal Judgeship and Administrative Efficiency Act of 2005, H.R. 4093, 109th Cong. (2005).

[5] For comparison purposes, in 1985, although there were fewer bankruptcy judges overall, there were only fifteen female bankruptcy judges. AO Materials, *supra* note 2.

[6] *Id.*

[7] *See id.* The longest continuously serving bankruptcy judge is the Honorable John L. Peterson, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Montana. Judge Peterson retired in 1999 as the Chief Judge in Montana, but he continues to serve as a bankruptcy judge in that district on recall status. *See Judge Peterson Wins Jameson Award*, MONT. LAW. MAG., Sept. 2003, *available at* http://www.montanabar.org/montanalawyer/september2003/peterson.html.

[8] AO Materials, *supra* note 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*; *see also* Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, 118 Stat. 2809. A salary history of the bankruptcy bench is found in Appendix A of this Article.

[12] AO Materials, *supra* note 2.

a work measurement formula based upon the district's caseload.[13] For a while, the number of deputy clerks increased at a rate proportional to the increase in bankruptcy filings.[14] In 2004, however, due to budget constraints, 1350 staff members were eliminated from bankruptcy court, district court, and probation and pretrial services offices.[15]

Over the course of the last twenty-four years, total bankruptcy filings have increased from 331,265 in 1980 to more than 1.5 million in 2004.[16] Chapter 11 business bankruptcy filings have declined in recent years, going from about 21,400 in 1986, to 20,800 in 1991, to 10,600 in 2001, to 8500 in 2003, to 9200 in 2004.[17] This data will provide baseline comparisons for the stark changes expected from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Section 158(a) of title 28 provides that district courts have jurisdiction to hear appeals from final judgments and other orders of the bankruptcy court.[18] Section 158 further provides that the judicial council of a circuit "shall [absent contrary findings] establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council . . . to hear and determine, with the consent of all the parties, appeals under subsection (a) of [Section 158]."[19] Appeals from bankruptcy courts to the district court under Section 158 have steadily declined over sixteen years from 4300 in 1988 to about 2800 in 2004, attributable, in part, to the establishment of bankruptcy appellate panels in four of the circuits.[20]

Section 157 of title 28 provides for withdrawal of certain proceedings from the bankruptcy court under certain circumstances.[21] From

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] AO Materials, *supra* note 2. A chart showing total filings across various categories and chapters is found in Appendix B.

[18] *See* 28 U.S.C. § 158(a) (2000).

[19] *Id.* § 158(b).

[20] AO Materials, *supra* note 2. The following circuits presently have bankruptcy appellate panels: First, Sixth, Eighth, Ninth, and Tenth. *Id.*; Federal Judicial Center Court Links, http://www.uscourts.gov/allinks.html#4th (Sept. 22, 2005).

[21] *See* 28 U.S.C. § 157(d). Section 157(d) of title 28 provides:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceed-

1988 to 2004, the number of proceedings withdrawn from a bankruptcy court to a district court has varied widely.[22] For example, in 1988, the number of proceedings withdrawn was about 1700 (the highest number in the sixteen year period), whereas, in 2001, the number was 431 (the lowest number in the sixteen year period).[23] In 2004, the number of proceedings withdrawn was roughly 1300.[24] The explanation for the variance is not clear, but the 2004 fluctuation may be tied to the strategies pursued in a few large cases.

II. The Survey

To get a sense of life on the bankruptcy bench and the perspectives of the bankruptcy judges themselves, we prepared an informal survey (the "Survey") centered on the following areas: (i) law clerks; (ii) judicial job satisfaction; (iii) case management; (iv) bankruptcy appellate panel service; (v) prior career; and (vi) publication of opinions.[25] The results from the Survey are set forth below in narrative form and organized according to these main areas.

A. *The Survey Methodology*

The bankruptcy judges who participated in the Survey were randomly selected. We compiled a list alphabetized by last name of the bankruptcy judges as of May 31, 2005. We then drew two numbers between one and fifty—the first representing the starting point for the random selection process and the other representing the increment between selections. We selected thirty-seven for the former and thirteen for the latter, meaning that we started the random selection pro-

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ing requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

Id.

[22] A chart showing appeals and withdrawals is found in Appendix C.

[23] AO Materials, *supra* note 2.

[24] *Id.*

[25] While this survey is far from comprehensive, perhaps it will provide the groundwork for a more comprehensive survey in the future. As far as the author is aware, no one has recently undertaken a comprehensive survey of members of the bankruptcy bench. The Federal Judicial Center (the "FJC") has underway a judicial evaluation study. Telephone Interview by Adelaide Maudsley, with Beth Wiggins, Federal Judicial Center (Apr. 15, 2005). Participation by bankruptcy judges in the FJC study is voluntary. *See id.* The FJC survey is targeted at mid-term bankruptcy judges (those about five to eight years into their term) and seeks to gauge how they are doing, what improvements might need to be made, and whether they are on track for reappointment. *See id.* The FJC undertook the study partly in response to the number of bankruptcy judges who were not reappointed. *See id.*

cess with the bankruptcy judge numbered thirty-seven on the alphabetical list and then proceeded to select every thirteenth bankruptcy judge thereafter. Through this random selection process, we compiled a list of thirty-nine bankruptcy judges for participation in the Survey, anticipating that that would yield approximately a 10% sample. We then sent the Survey, accompanied by a cover letter, to these randomly selected bankruptcy judges soliciting their participation.[26]

The cover letter provided, among other things, that the results of the Survey would be published but that participants' names and responses would remain confidential. The Survey and the cover letter were sent to the initial survey participants by electronic mail, where known, and otherwise by facsimile or mail. Two of the initial survey participants declined to participate in the Survey, largely because of scheduling conflicts, in which instance the participation of the next bankruptcy judge listed in alphabetical order by last name was solicited. Thus, the final participation pool of thirty-seven Survey Participants was comprised of two alternate survey participants and twenty-four initial survey participants.

The Survey Participants completed twenty-four Surveys. Most of the Surveys were completed by telephone interview conducted by the author over approximately a three-week period. The remaining Surveys were completed by Survey Participants without a telephone interview and returned to our offices by facsimile or mail. In two instances, a Survey Participant filled out the Survey first and also participated in a telephone interview. Not all of the Survey Participants answered all of the questions on the Survey. Many of the Survey Participants answered the yes-or-no or scale questions on the Survey but did not provide additional comments.

B. *The Survey Results*

1. Law Clerks

Each bankruptcy judge is authorized a chambers staff of one law clerk and one judicial assistant, with the option of a second law clerk in lieu of a judicial assistant. Circumstances, such as participation on a Bankruptcy Appellate Panel or an unusual caseload, form the basis for an occasional additional law clerk. Irrespective of their caseload, the Survey Participants had varying opinions about the optimal number of

[26] A copy of the Survey and cover letter sent to the initial survey participants is on file with author.

staff members and their combination. Forty percent of the responding Survey Participants stated that two law clerks is optimal; 27% stated that one law clerk is optimal; 20% stated that one to two clerks is optimal; 7% stated that one law clerk plus one administrator is optimal; and 7% think that two law clerks plus one administrator is optimal. The majority of Survey Participants—78%—are satisfied with the number of law clerks permitted, while the remaining 22% feel the need for more.

a. *Permanent vs. Term?*

As becomes apparent in the results detailed and discussed below, there is a strong trend among bankruptcy judges toward hiring "permanent" or "career" law clerks. Of the 438 law clerks presently serving bankruptcy judges, 246 are "permanent" law clerks[27] and 193 are "term" law clerks.[28]

Academics have commented on this trend, or at least seen it coming in other courts, and have suggested that it may transform law clerks into "assistant judges" or even "junior judges."[29] In a comprehensive

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[27] AO Materials, *supra* note 2. For statistical purposes, the Administrative Office of the Courts considers any law clerk who stays for four or more years to be a "permanent" law clerk. *See id.* Permanent law clerks are also sometimes referred to as career law clerks.

[28] *Id.* For statistical purposes, the Administrative Office of the Courts considers any law clerk who does not qualify as a "permanent" law clerk to be a "term" law clerk. Term law clerks typically serve for one to two years. *Id.*

[29] Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 592–93 (1996). Williams adds:

> The increased . . . use of permanent law clerks to work as "assistant judges" rather than as "assistants to the judges," becomes more tempting in times of docket overload. Indeed, the employment of permanent law clerks has been rising at an alarming rate. A 1994 Judicial Conference memorandum referencing a report produced for the Judicial Conference's Judicial Resources Committee by the National Academy of Public Administration Association, expresses concern that our overworked federal judges may be tempted to abdicate genuine decisional responsibilities to a "shadow judiciary" of permanent law clerks. "Permanent" law clerks have a qualitatively different institutional position than traditional clerks, who, for largely educational purposes, commit to a one- or two-year term in a judge's chambers at a relatively modest salary. Career law clerks also differ substantially from the increasing number of law students who volunteer as "interns." Although judges depend heavily on temporary law clerks for "drafting" orders and decisions, the increasing numbers of permanent law clerks often become players in the decisionmaking process, having first-line contact with attorneys and often conducting informal conferences. In such roles, career law clerks often are correctly seen by the federal bar as "junior judges" with commensurately generous salaries.

study of law clerks in California appellate courts in 1980 (the "Oakley Study"), two commentators, John B. Oakley and Robert S. Thompson, saw fundamental, ideological differences between permanent law clerks and term law clerks.[30]

The Oakley Study focuses on the comparative virtues and vices of term law clerks versus permanent law clerks and judges' perceptions and beliefs about the impact of law clerks upon judicial decisions.[31] The Oakley Study was motivated by a "fear that the endangered species status of the traditional law clerk in the California courts of appeal presented a significant threat to legal ecology, foreboding unfortunate consequences to the quality of appellate justice in California."[32]

Oakley and Thompson comment extensively on the "traditional" role of a law clerk in the judicial process and defend this ideal as integral to notions of justice and the judicial process.[33] Oakley and Thompson articulate the traditional role as follows:

> [t]he common element that emerges from a review of the literature of law clerking from the days of Horace Gray [the first judge to employ law clerks] to the present is the dialectic between the brashness of youth and the restraint of age, between the theories of the classroom and the pragmatism of bench and bar—a dialectic that is repeated year after year as brilliant but naïve law clerks work in earnest intimacy with indulgent but independently minded judges. . . . [T]he central feature of every reported clerkship has been its limited tenure in relation to that of the judge, with this fundamental fact serving to keep the roles of clerk and judge in proper perspective.[34]

The Oakley Study examined clerkship practices in California federal and state courts, including the California Courts of Appeal, the California Supreme Court, the Ninth Circuit Court of Appeals, and California federal district courts.[35] Oakley and Thompson interviewed about sixty-

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Id.

[30] *See generally* JOHN B. OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS (1980).

[31] *See id.* at 7.

[32] *Id.* (footnote omitted).

[33] *See id.* at 36–39.

[34] *Id.* at 33–34.

[35] *See* OAKLEY & THOMPSON, *supra* note 30, at 48.

three judges and several law clerks.[36] Based on their survey results, Oakley and Thompson created a profile for each of these courts and compared them to the profiles of the other courts.[37] California state court judges generally used permanent law clerks, whereas the Ninth Circuit and federal district judges exclusively used term law clerks.[38] In analyzing state court judges' broad use of permanent clerks, Oakley and Thompson determined that the preference for permanent law clerks over term law clerks hinges on four factors: (1) caseload pressures; (2) workload per law clerk; (3) clerkship prestige; and (4) perceptions of law clerk productivity.[39] Based on these four factors, Oakley and Thompson concluded that state courts had a "negative coefficient of short-term law clerk use,"[40] whereas federal courts had a positive coefficient.[41]

In their recommendations for fostering term law clerk usage, Oakley and Thompson argue that there are possible attendant dangers and consequences of employing only permanent law clerks:

> [i]n our ideal form, the law clerk is meant to fiddle with the law, to advocate innovation, to introduce to its inner sanctums the ideas of those outside. This gives the law needed play and capacity for change. So long as law clerks come and go in judicial chambers . . . their stimulus is no threat to the integrity of the law. But to let them run parallel to the commissioned judiciary risks either the devolution of judicial power upon non-judicial officers or the evolution of stimulating law clerks into bureaucrats dedicated to continuity rather than variation.[42]

In our Survey, the bankruptcy judges were asked about their clerkship practices and preferences, the traditional law clerk ideal as articulated by Oakley and Thompson, and the possible dangers or consequences of employing permanent law clerks. Of the Survey Participants who responded to the question whether they agree or disagree with the traditional, short-term, law clerk ideal,[43] 38% agreed, while 62% disagreed.

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[36] *See id.* at 49.

[37] *Id.* at 106.

[38] *See id.* at 124–29.

[39] *See id.* at 115–16.

[40] OAKLEY & THOMPSON, *supra* note 30, at 132.

[41] *See id.* at 124–29.

[42] *Id.* at 138–39.

[43] The Survey question set forth the "traditional law clerk ideal" as follows: short-term clerks are generally more intellectually assertive and vivacious and present less of a danger

Of the large majority of Survey Participants who disagreed, several bankruptcy judges said that whether dangers of undue deference, boredom, and stale routine (attributes Oakley and Thompson associate with permanent law clerks) exist depends on the particular law clerk and the particular bankruptcy judge. Some of these judges further said that their permanent law clerks have fresh outlooks, are not bored or stale, and that, in all events, the bankruptcy judges themselves do not unduly rely on their permanent law clerks. One bankruptcy judge stated that term law clerks are not more intellectually assertive and vivacious because bankruptcy is specialized and because bankruptcy courts often do not get the same quality of applicants as the federal district courts.[44]

Of the Survey Participants who agreed with the traditional, short-term, law clerk ideal, some expressed a concern that permanent law clerks present a risk of overdependence. Several of the bankruptcy judges who agreed with the traditional law clerk ideal, however, also acknowledged that whether the dangers of undue deference, boredom, and staleness exist depends upon the particular law clerk and the bankruptcy judge.

Of the Survey Participants who responded to the question whether they prefer permanent law clerks or term law clerks, 64% prefer permanent law clerks, while 36% prefer term law clerks. All of the Survey Participants who prefer term law clerks expressed a firm or a moderate preference for term law clerks. These bankruptcy judges explained that term law clerks are eager and bring new perspectives and questions. They said that term law clerks are less likely to get bored and burned out and that term law clerks "keep things from getting stale."[45] Some of these bankruptcy judges also expressed that they felt an "obligation" to provide clerkship opportunities to young lawyers. One judge stated that he did not want a clerk whose "pinnacle" was a law clerk position; rather, he wanted a "hungr[ier]" law clerk.[46]

Of the twelve Survey Participants who prefer permanent law clerks, 45% expressed a firm preference for permanent law clerks; 45% expressed a moderate preference; and 9% expressed a weak

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of undue judicial dependence on law clerks, whereas permanent law clerks "present dangers of undue deference, boredom, and stale routine." *Id.* at 33, 66–67.

[44] Survey No. 19. For purposes of this Article, each Survey received from a Survey Participant was randomly assigned a number from 1–24. That number is used herein to protect the identity of each Survey Participant.

[45] Survey No. 9.

[46] Survey No. 1.

preference. The primary reason underlying the firm and moderate preferences for permanent clerks is that permanent clerks' greater knowledge and experience made permanent law clerks more efficient and productive. One judge stated that "knowledge, experience, productivity and continuity vastly outweighs any benefits from young inexperienced and transient lawyers."[47]

Several of the Survey Participants noted that given the specialized nature of the job, permanent law clerks are valued for their knowledge and experience. Permanent law clerks usually have practiced law and, in many instances and more helpfully, bankruptcy law. Sixty-nine percent of the permanent law clerks employed by the Survey Participants previously worked as attorneys, and 56% had prior experience as bankruptcy practitioners.

The results of the Survey suggest that bankruptcy judges have two primary, related reasons for employing permanent law clerks, both of which are generally consistent with those proposed in the Oakley Study: (1) the specialized nature and quantity of the work; and (2) the large amount of time (said to be six to eighteen months) required to train new bankruptcy law clerks. Given these primary reasons underlying the Survey Participants' preferences for permanent law clerks, one conclusion that may be drawn is that these bankruptcy judges place a high value on law clerk productivity.

The contrast between the Survey Participants who prefer term law clerks (45%) and those who employ permanent law clerks (70%) suggests some bankruptcy judges prefer term law clerks, but choose to employ permanent law clerks. One bankruptcy judge expressed feeling "guilty" for employing a permanent clerk but did so to accommodate the permanent law clerk's lifestyle desires.[48] Other Survey Participants indicated that they may have one permanent law clerk and one term law clerk to lessen or obviate some of the unproductive time that necessarily attends the training of a new clerk. Some bankruptcy judges feel constrained to hire permanent law clerks in spite of their preference for term law clerks because they value continuous productivity.

The Survey results suggest that if more bankruptcy judges had two law clerks, more would choose at least one traditional, short-term law clerk because these law clerks' staggered terms would then assure continuity and productivity. The comments of the Survey Participants also point to a comparatively recent phenomenon: for family and life-

[47] Survey No. 22.
[48] Survey No. 2.

style reasons, more bright young lawyers seek out and prefer permanent law clerk positions to the long and stressful hours of law practice.

b. *Quality of Clerkship Candidates*

The number of clerkship applications received by each of the Survey Participants varies widely, reflecting the fact that many of the Survey Participants employ permanent law clerks. Thirty-three percent of the Survey Participants receive fewer than ten applications per year; 50% receive ten to fifty applications per year; and 17% receive more than fifty applications per year.

When asked about the quality of clerkship applicants on a scale of one to ten, with ten being the highest and best qualified, 7% of the Survey Participants rate applicants between four and five, 43% rate applicants between six and seven, and 50% rate applicants between eight and nine. Most of the Survey Participants require law clerks to be in the top 25% of their law school class. Most of the Survey Participants do not require law review, journal, or moot court experience. Other requirements mentioned for applicants include having taken a bankruptcy class, writing experience, solid references, integrity, and a prior bankruptcy court externship. Most Survey Participants are usually able to hire their first choice among clerkship applicants.

c. *Duties of the Law Clerk*

Law clerks' duties and responsibilities vary from bankruptcy judge to bankruptcy judge. According to the Survey Participants, law clerks' primary responsibilities include the following: (i) drafting opinions; (ii) preparing bench memoranda; (iii) observing court proceedings; and (iv) preparing the calendar. Other duties include: (a) serving as a law clerk for the Bankruptcy Appellate Panel on which the bankruptcy judge also sits; (b) serving as a bailiff; (c) supervising externs; (d) reviewing proposed orders; and (e) taking notes during court proceedings.

Ninety-two percent of the Survey Participants require law clerks to take part in drafting opinions. Sixty-seven percent of these bankruptcy judges' law clerks contribute "considerably" to written opinions; 25% contribute "some" to written opinions; and 8% contribute "slightly" to written opinions.

Seventy percent of the Survey Participants require law clerks, at least on occasion, to prepare pre-argument or bench memoranda. Sixty-two percent of the bankruptcy judges' law clerks undertake preparation of pre-argument memoranda "several times a month"; 30% "rarely" undertake preparation of pre-argument memoranda; and 8%

"never" undertake preparation of pre-argument memoranda. Ninety-six percent of the Survey Participants discuss research issues, case status, and related matters with their law clerks "frequently" to "constantly."

Thirty-three percent of the Survey Participants' law clerks spend 50% to 75% of their time researching novel issues of law; 17% spend more than 75% of their time researching novel issues of law; 25% spend between 25% and 50% of their time researching novel issues of law; and 29% spend less than 25% of their time researching novel issues of law.

d. *Externs*

We asked the Survey Participants about their use of externs. Thirty-three percent of the Survey Participants make "light" use of externs; 33% make "moderate" use of externs; and 33% "extensively" use externs. Of those who make light use of externs, their primary reason for providing externship opportunities is to aid the extern. Bankruptcy judges who make moderate to extensive use of externs do so because it aids the extern, but also because it aids the bankruptcy judge, the law clerk, and the bar generally. There is, of course, a direct relationship between the use of externs and the bankruptcy judge's underlying motivation for doing so—bankruptcy judges tend to make greater use of externs if conditions in the bankruptcy judge's chambers are such that the externs materially aid the bankruptcy judge or the law clerk.

2. Job Satisfaction

Several of the Survey questions asked the Survey Participants to assess their individual job satisfaction and that of the bankruptcy bench generally on a scale of one to ten, with ten being the highest satisfaction rate. An overwhelming majority of the Survey Participants indicated that their job satisfaction is high—either an eight, nine, or ten, with approximately 46% selecting ten.[49] A majority of the Survey Participants indicated similar job satisfaction ratings among the bankruptcy bench generally, with 25% indicating a ten, 33% indicating a nine, and 21% indicating an eight. In many of the Surveys, there was a correlation between the scale rating the Survey Participant indicated for himself or herself and the scale rating the Survey Participant indi-

[49] Two of the Survey Participants reported their job satisfaction as an "11" when they were interviewed. For statistical purposes, 11s have been recorded as 10s. Survey Nos. 23, 10.

cated for the bankruptcy bench generally. Several Survey Participants indicated, for example, that their colleagues were just as satisfied with the job of being a bankruptcy judge as they were and probably for many of the same reasons. One Survey Participant indicated a low job satisfaction (four on the one to ten scale) but made clear that earlier in his or her long career that job satisfaction rate was much higher.[50]

One of the questions in the Job Satisfaction section of the Survey asked Survey Participants if they had observed troubling differences in treatment between bankruptcy and Article III judges.[51] Most of the Survey Participants indicated that there are no troubling differences between the Article III and the bankruptcy judges in their respective districts, though they were aware of troubling differences in treatment in other districts. A few of the Survey Participants indicated that the distinction between Article III and bankruptcy judges has blurred for the better during their tenure on the bankruptcy bench.

The Survey Participants were asked if they knew bankruptcy judges who had recently left the bench and the reasons therefor. Almost all Survey Participants responded affirmatively, citing salary considerations, retirement, and not being reappointed as the most common reasons those bankruptcy judges left the bench. Several Survey Participants commented that many retired bankruptcy judges have been recalled and are presently back on the bankruptcy bench. Others commented that bankruptcy judges make so much less annually than private practitioners that a number of excellent judges found it necessary to leave the bankruptcy bench to earn more to pay for their children's college educations.

The final series of questions in the Job Satisfaction section of the Survey asked the Survey Participants what they found to be most satisfying and most frustrating about their jobs as bankruptcy judges. Almost uniformly, the Survey Participants indicated that a primary source of satisfaction is the collegiality and excellence of the bench, a competent bankruptcy bar, and, in some instances, their chambers and clerks' office staffs. The Survey Participants also draw satisfaction from the importance of their job in resolving disputes and assisting litigants. Addi-

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[50] Survey No. 13.

[51] Article III judges include district court judges appointed pursuant to Article III, Section 1 of the Constitution of the United States. U.S. CONST. art. III, § 1. Bankruptcy judges, by contrast, are appointed pursuant to 28 U.S.C. § 152 and are not considered Article III judges but rather "serve as judicial officers of the United States district court established under Article III of the Constitution." BAPCPA, Pub. L. No. 109-8, § 1223(d), 119 Stat. 23, 198 (to be codified at, and amending, 28 U.S.C. § 152(a)(1)).

tionally, the Survey Participants stated that they enjoy the independence service on the bankruptcy bench brings, and they find their work intellectually challenging and stimulating. One Survey Participant indicated that being a bankruptcy judge is the best job in the law;[52] another said that being a bankruptcy judge is the best job a lawyer can have.[53]

When asked to identify sources of frustration in being a bankruptcy judge, the answers provided varied widely. Some found increasing and already heavy caseloads frustrating, while others are frustrated by insufficient resources committed to bankruptcy courts.

Related to these frustrations was a sense that Congress has been unresponsive to the bankruptcy bench on important issues. This frustration seems to take two forms. Some Survey Participants indicated that Congress has ignored, or even repudiated, the bankruptcy bench's views and expertise respecting law reform and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Other Survey Participants indicated that Congress has ignored the bankruptcy bench's needs for salary increases and benefits.

Although many of the Survey Participants commented that a competent bankruptcy bar was a source of satisfaction, several found ill-prepared attorneys and sloppy lawyering frustrating, particularly in the consumer bankruptcy area and in trial presentations. Two Survey Participants noted anecdotally their perception that bankruptcy judges do not find Chapter 13 bankruptcy practice satisfying and that handling of routine matters in any bankruptcy chapter can become a source of frustration. A small number of Survey Participants indicated that isolation from the outside world is a source of frustration, as are increased demands for technological proficiency for older bankruptcy judges.

3. Case Management

We asked the Survey Participants about their caseloads; their transitions to electronic filing and the Case Management and Electronic Case Files system ("CM/ECF"), the standardized national electronic docketing and case management system; and attendant case management issues.

When asked whether their caseloads were heavy or light or somewhere in the middle, about half of the Survey Participants indicated that their caseloads are conveniently manageable. About 12.5% indicated that their caseloads were extremely heavy; 21% indicated

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[52] Survey No. 20.

[53] Survey No. 24.

that their caseloads were heavy; and about 12.5% indicated that their caseloads were light. Correspondingly, more than half (about 58%) of the Survey Participants indicated that additional bankruptcy judges are not needed in their respective districts, while 37.5% indicated that additional bankruptcy judges are needed.

Almost all bankruptcy court districts have transitioned to electronic filing and to some form of the CM/ECF system. Individual bankruptcy judges and their chambers have followed suit. In fact, about 87.5% of the Survey Participants have fully embraced CM/ECF or a similar electronic case management system.

When asked about the impact of the CM/ECF system on their chambers and staff, about 62.5% of the Survey Participants indicated that CM/ECF has decreased the burden on their chambers and staff, while about 25% indicated that CM/ECF has increased the burden on their chambers and staff. When asked why, the Survey Participants provided mixed opinions and a variety of answers. Some Survey Participants stated that under the CM/ECF system, the staff in the clerk's office does much less now because the clerk's office does not maintain paper files, thereby shifting the burden to the bankruptcy judges' chambers to check for, sort, and organize pleadings. Others stated the opposite—that the staff in the clerk's office actually does more under the CM/ECF system because the docketing clerks are constantly watching for newly filed pleadings, correcting the electronic filing errors of attorneys, and notifying the bankruptcy judges' chambers of docket activity.

Several Survey Participants said that the increased burden derives from chambers staff having to catch and correct docketing mistakes and errors of attorneys and other electronic filers that were previously screened and fixed by the docketing clerks in the clerk's office. Some Survey Participants attribute the increased burden of CM/ECF on their chambers and staff to a learning curve. While CM/ECF has initially burdened their chambers and staff, this group is hopeful that all will become more adept and efficient at using it, eventually making the process less burdensome. A few of the Survey Participants indicated that they are still trying to assess the impact, if any, of the CM/ECF system on their chambers and staff, while a few others indicated that the CM/ECF system has had no significant impact on their chambers and staff.

When asked whether the CM/ECF system makes reviewing and maintaining pleadings more or less convenient, the Survey Participants overwhelmingly (83%) found the system more convenient. When asked why, the Survey Participants almost uniformly indicated that

CM/ECF advantageously and conveniently allows bankruptcy judges and law clerks to access pleadings and proposed orders anytime, anywhere. One Survey Participant stated the benefit of being able to access proposed orders for review and signature from the study at home or the hotel business center while traveling. The Survey Participants suggested that the CM/ECF system is, however, more convenient for some things and not others. For example, one Survey Participant suggested that signing proposed orders electronically is very easy when no changes or interlineations are required but less so when they are. In several instances, those Survey Participants who found the CM/ECF system less convenient attribute it to their age or lack of technical proficiency.

When asked whether their chambers are paperless, 42% of the Survey Participants said yes. Moreover, most of those Survey Participants have paperless chambers by choice. Many of the Survey Participants indicated that they do not require courtesy copies of pleadings. Rather, they simply access the pleadings electronically, print out those they need to review or have in hard copy, and then subsequently discard them. A number of chambers still require attorneys to submit courtesy copies of some pleadings. One Survey Participant suggested that there is no place to keep hard copies of pleadings anymore because the clerk's office does not maintain paper files, so chambers might as well, or perhaps have to, become paperless.

When asked whether recent cuts in bankruptcy clerk staff due to budget constraints have affected their chambers, most of the Survey Participants said no, although a number noted that the reduction in clerk staff requires each staff member to do more. Implicit in many of their responses was that because the CM/ECF system has shifted the burden to their chambers and staff, cuts in the clerk's office do not necessarily directly affect the bankruptcy judges. When asked whether these recent cuts in bankruptcy court staff have affected the responsibilities of law clerks, most of the Survey Participants said no. A few Survey Participants, however, indicated that the budget constraints have led to law clerks having "to pick up the slack" in some areas.[54]

We also asked Survey Participants how the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") affected the bankruptcy bench.[55] Our question was, of course, well in advance

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[54] Survey No. 6.

[55] *See generally* BAPCPA, 119 Stat. 23 (to be codified in scattered sections of 11 U.S.C., 12 U.S.C., 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

of the effective date of most of the Act's provisions. Consequently, many of the Survey Participants indicated that they had not yet seen any noticeable impacts. One notable difference reported by several Survey Participants was an increase in filings, particularly in the consumer area and likely in response to the Act's stricter rules and limitations on consumer filings. Many Survey Participants echoed the sentiments of the one Survey Participant who commented that there has been "mass confusion" in trying to understand the Act, its implications, and its poorly drafted and sometimes conflicting provisions.[56] Other Survey Participants said that review of the Act had consumed much of their time in the last several months and that their law clerks and clerk's offices have spent many hours trying to adjust their practices and procedures and local rules to accommodate the Act's changes. One Survey Participant indicated that the Act has affected already the Chapter 13 bar and Chapter 13 trustees who are concerned about the Act's new liability and affirmation requirements.

4. Bankruptcy Appellate Panel Service

We asked the Survey Participants about service on the bankruptcy appellate panel (the "BAP").[57] Most of the Survey Participants (about 79%) are not presently serving on the BAP but many (about 38%) have been designated to serve on the BAP at one time or another. When asked how BAP service affects their service as a bankruptcy judge, several of the Survey Participants indicated that it required adjustments to their bankruptcy court trial and hearing schedule and that it substantially added to their workload. Some of the Survey Participants suggested that those bankruptcy judges who serve full-time on the BAP should have the option of employing an additional law clerk. One Survey Participant indicated that service on the BAP was "like having a second job."[58]

Nevertheless, the Survey Participants uniformly stated that service on the BAP has made them better bankruptcy judges. According to some Survey Participants, sitting on the BAP has made them more aware of the need for a complete, accurate, and detailed trial record.

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[56] Survey No. 1.

[57] The bankruptcy appellate panel (the "BAP" as it is commonly called) is the appellate court of the bankruptcy court. In many bankruptcy court districts, appeals from bankruptcy court are taken to the BAP unless the appealing parties elect to have the appeal heard by the district court. *See* 28 U.S.C. § 158(b) (2000). Not all districts have a BAP to which appeals may be taken. *See supra* note 20.

[58] Survey No. 2.

It has caused them to be more careful and deliberate in their fact-finding and to explain more fully the reasons for their decisions. Several Survey Participants acknowledged that they find the collaborative effort and consensus-building required for service on the BAP challenging and very different from what they are used to as single, independent bankruptcy judges but, at the same time, beneficial because it makes them more patient and more effective in writing decisions.

5. Prior Career

About 83% of the Survey Participants were bankruptcy practitioners before taking the bankruptcy bench. Of the 17% of the Survey Participants who were not bankruptcy practitioners, almost all came from a business law background, as commercial litigators or corporate transactional lawyers. One Survey Participant served as a magistrate before becoming a bankruptcy judge and another served as a federal prosecutor.

When asked how their prior professional experience has affected their performance as bankruptcy judges, the Survey Participants suggested that their prior professional experience has helped them in their handling of business bankruptcy cases. As a result of their prior experience, the Survey Participants are familiar with the players, the issues, and the terminology. Other Survey Participants suggested that their prior professional experience as bankruptcy practitioners was invaluable because they came to the bench well-familiar with the Bankruptcy Code, workings of the bankruptcy court, the bankruptcy court personnel, and the procedural rules. One Survey Participant felt that because bankruptcy law is such a specialized area with its own rules and terminology, one could not be a bankruptcy judge without prior bankruptcy experience. Still other Survey Participants commented that their experience as trial lawyers was beneficial because they knew how to present evidence and examine witnesses. One Survey Participant commented that his or her prior experience as a consumer bankruptcy lawyer gave him or her a practical sense of what kinds of expectations and limitations may be reasonably imposed on consumer debtors.[59]

[59] Survey No. 19.

6. Publication of Opinions

The Survey Participants each publish an average of five or six opinions per year, and have published an average of twenty-six opinions over the last five years.

The Survey asked how the Survey Participants decide whether an opinion should be published.[60] The majority of Survey Participants use two primary criteria in determining whether an opinion should be published: (i) whether the opinion addresses a novel issue of law; and (ii) whether the opinion is helpful to the bar because, for example, the opinion advises the bar as to how the bankruptcy judge will treat a common issue. Two of the Survey Participants indicated that they do not publish opinions that would be embarrassing to a lawyer. Two of the Survey Participants indicated that they published more at the beginning of their careers because it was important to let the bankruptcy bar know where they stood on certain issues.

Of the Survey Participants who responded to the question about whether bankruptcy judges should publish more or less, an overwhelming 87% of the Survey Participants thought that bankruptcy judges should publish less. This answer may not take account of the many new legal issues to be decided under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Conclusion

In the main, the job of a bankruptcy judge is an agreeable one. Short-term law clerks are, lamentably, dying out. Salaries do not keep pace. Congress does not listen. Some lawyers fumble the ball. Too many opinions are being published. But the public service aspects of the job, the collegiality, the intellectual satisfaction, and the independence seem to outweigh the negatives. And, in general, bankruptcy judges appear resilient in the teeth of change—a harbinger for the application of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

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[60] There was some mild confusion over the meaning of the term "published." In most jurisdictions, all opinions are published on the bankruptcy court's website. Sometimes Lexis or Westlaw simply takes an opinion from the bankruptcy court's website, although the opinion was not separately submitted for publication. For purposes of this Article, a "published" opinion is one that is published in the Bankruptcy Reporter.

Appendix A: Salaries of Bankruptcy Judges

Effective Date	Amount	Authority of Action
October 1, 1956	$15,000	P.L. 84-518
Retroactive to 7/1/1964	$22,500	P.L. 88-426
April 1, 1969	$30,000	P.L. 90-206 JCUS 3/69
November 1, 1972	$31,650	P.L. 92-210 JCUS 3/72
October 1, 1975	$33,200	P.L. 94-B2 JCUS 9/75
March 1, 1976	$37,800	P.L. 94-217 (fixed by Congress)
March 31, 1977	$48,500	Pay Commission per P.L. 90-206
November 6, 1978	$50,000	P.L. 95-598
October 1, 1979	$53,500	*Foley v. Carter*
October 1, 1980	$58,400	COLA Ex. Ord. No. 12248
October 1, 1981	$61,200	COLA Ex. Ord. No. 12330
October 1, 1982	$63,600	COLA Ex. Ord. No. 12387
January 1, 1984	$65,800	COLA. Ex. Ord. No. 12456
January 1, 1984	$66,100	COLA Ex. Ord. No. 12487
January 1, 1985	$68,400	Ex. Ord. No. 12496
January 1, 1987	$70,500	Ex. Ord. No. 12578
March 1, 1987	$72,500	Ex. Ord. No. 12622
January 1, 1989	$82,340	Ex. Ord. No. 12663
January 1, 1990	$88,872	Ethics Reform Act of 1989
January 1, 1991	$115,092	COLA Director Memo 11/8/90
January 1, 1992	$119,140	COLA, P.L. 102-140
January 1, 1993	$122,912	COLA, P.L. 102-395
January 1, 1998	$125,764	
January 1, 1999	$129,996	
January 1, 2001	$133,492	
January 1, 2002	$138,000	
January 1, 2003	$142,134	Ex. Ord.
January 1, 2004	$145,452	Ex. Ord.
January 1, 2005	$149,132	COLA, P.L. 108-447

Source: Administrative Office of the Courts, Materials Discussing Bankruptcy Bench (Apr. 15, 2005) (copy of original) (on file with author).

Appendix B: Bankruptcy Filings by Chapter and Nature of Debt
Calendar Years 1980–2004

Year	Total	Business	Nonbusiness	Chapter 7			Chapter 11			Chapter 12	Chapter 13			All Other
				Total	Bus	Nonbus	Total	Bus	Nonbus		Total	Bus	Nonbus	
1980	331,265	43,671	287,594	247,083	33,096	213,987	6753	6293	460	-	77,420	4273	73,147	9
1981	363,946	48,086	315,860	260,744	34,108	226,636	10,042	8933	1109	-	93,156	5041	88,115	4
1982	380,252	69,242	311,010	257,674	44,961	212,713	18,821	16,639	2182	-	103,748	7633	96,115	9
1983	348,881	62,412	286,469	234,551	38,319	196,232	20,284	17,248	3036	-	94,038	6837	87,201	8
1984	348,521	64,214	284,307	234,861	39,272	195,589	20,325	17,873	2452	-	93,315	7049	86,266	20
1985	412,510	71,277	341,233	281,053	43,400	237,653	23,376	20,401	2975	-	108,069	7464	100,605	12
1986	530,438	81,235	449,203	374,786	50,704	324,082	24,773	21,397	3376	607	130,257	8512	121,745	15
1987	577,999	82,446	495,553	409,595	46,984	362,611	20,078	17,299	2779	6125	142,161	11,998	130,163	40
1988	613,465	63,853	549,612	437,769	38,635	399,134	17,684	15,544	2140	2037	155,945	7607	148,338	30
1989	679,461	63,235	616,226	476,470	37,333	439,137	18,281	16,307	1974	1445	183,214	8099	175,115	51
1990	782,960	64,853	718,107	543,334	36,394	506,940	20,783	18,282	2501	1346	217,468	8802	208,666	29
1991	943,987	71,549	872,437	656,460	39,101	617,359	23,989	20,794	3195	1496	262,006	10,123	251,883	36
1992	971,517	70,643	900,874	681,663	38,125	643,538	22,634	19,436	3198	1608	265,577	11,439	254,138	35
1993	875,202	62,304	812,897	602,980	34,565	568,415	19,174	16,156	3018	1244	251,773	10,309	241,464	31
1994	832,829	52,374	780,455	567,240	29,689	537,551	14,773	12,508	2265	900	249,877	9238	240,639	39
1995	926,601	51,959	874,642	626,150	29,102	597,048	12,904	11,535	1369	926	286,588	10,363	276,225	33
1996	1,178,555	53,549	1,125,006	810,400	30,659	779,741	11,911	10,738	1173	1083	355,123	11,031	344,092	38
1997	1,404,145	54,027	1,350,118	989,372	32,255	957,117	10,765	9694	1071	949	403,025	11,095	391,930	34
1998	1,442,549	44,367	1,398,182	1,035,696	27,774	1,007,922	8386	7524	862	807	397,619	8221	389,398	41
1999	1,319,465	37,884	1,281,581	927,074	22,510	904,564	9315	8609	706	834	382,214	5903	376,311	28
2000	1,253,444	35,472	1,217,972	859,220	20,335	838,885	9884	9197	687	407	383,894	5494	378,400	39
2001	1,492,129	40,099	1,452,030	1,054,975	23,482	1,031,493	11,424	10,641	783	383	425,292	5542	419,750	55
2002	1,577,651	38,540	1,539,111	1,109,923	22,321	1,087,602	11,270	10,286	984	485	455,877	5361	450,516	96
2003	1,660,245	35,037	1,625,208	1,176,905	20,631	1,156,274	9404	8474	930	712	473,137	5138	467,999	87
2004	1,597,462	34,317	1,563,145	1,137,958	20,192	1,117,766	10,132	9186	946	108	449,129	4701	444,428	135

Source: Administrative Office of the Courts, Materials Discussing Bankruptcy Bench (Apr. 15, 2005) (on file with author).

Appendix C: Appeals to District Court and Withdrawals of Reference Actions 12 Months Ended 9/30/1988-2004

Fiscal Year	Appeals 28 U.S.C. § 158	Withdrawal 28 U.S.C. § 157
1988	4300	1724
1989	4108	691
1990	4330	849
1991	4332	718
1992	4626	779
1993	4892	1410
1994	4558	939
1995	4312	734
1996	3872	693
1997	3475	664
1998	3313	520
1999	2956	469
2000	2785	576
2001	2519	431
2002	2636	1464
2003	2658	647
2004	2882	1323

Source: Administrative Office of the Courts, Materials Discussing Bankruptcy Bench (Apr. 15, 2005) (on file with author).