



Perspectives on the Brave New World of Electronic Case Filing

by the Honorable Stephen S. Mitchell and Dion W. Hayes

Bankruptcy judges and lawyers in the Eastern District of Virginia have had six years of experience with electronic case filing. The Eastern District of Virginia was one of five original pilot districts that tested electronic filing in bankruptcy cases, known within the federal judiciary by the somewhat ungainly abbreviation, “CM/ECF,” for Case Management/Electronic Case Files. The number of federal courts adopting CM/ECF has grown steadily. Twenty-one U.S. district courts and 55 U.S. bankruptcy courts have gone “live” with electronic filing. Despite some rough spots and false steps, electronic filing has been successful and has made life easier and more productive for bankruptcy attorneys. Since the U.S. Bankruptcy Court for the Western District of Virginia will accept electronic filing later this year, we will review our experience.

Most courts that have adopted electronic filing have chosen a cautious or “go slow” approach in which, at least at the outset, electronic filing is permitted but not required. The reasons are practical. Attorneys must be trained to use the system, and some attorneys will have to upgrade their computer systems and buy additional software. Theoretically, the Bankruptcy Court in the Eastern District of Virginia has been totally electronic since January 1, 2002. There are no paper files for cases begun after that date, but paper has not disappeared. Paper filings are still accepted from *pro se* litigants, as well as from attorneys who sign a certification that they are unable to file electronically in one of the two permitted modes—over the Internet or on a floppy disk. Such paper filings are digitally scanned and uploaded by the clerk’s office.

The benefits of using CM/ECF are dramatic:

- The legal fiction that “the clerk’s office is always open”¹ has become reality. Petitions and pleadings are filed, and the contents of case files are reviewed—

all day, every day. Several large Chapter 11 cases were filed electronically in the Eastern District after business hours or on the weekend, when markets were closed, and the debtor could prepare for media inquiries. Attorneys no longer need to finalize a brief by 4:30 P.M. on the due date. Now, the mad rush is delayed until midnight, which is now the practical deadline to file a timely brief.² A lawyer in Alexandria can handle cases in Richmond or Norfolk with no more difficulty than if his or her office were next door to the courthouses.

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- Attorneys are no longer hostages of the U.S. Postal Service. Attorneys who are registered participants in a case receive an e-mail notice within minutes after the filing, or a consolidated notice at the end of the day—depending on which option the attorney selects—every time a pleading or paper is filed. By local rule in the Eastern District, registered participants are deemed to have consented to electronic service. This eliminates the expense of mailing a paper copy of bulky pleadings (except, of course, to *pro se* parties and to attorneys who are not registered on the system).
- The file is always available. There are no more frustrating trips to the clerk’s office, only to discover that the file jacket is in chambers or unavailable for inspection. Copies of filed pleadings can be obtained without having to send a messenger to the clerk’s office or to employ a commercial copy service. (The cost of seven cents per page over the Internet is substantially less than the cost of copies made by the clerk, at fifty

cents per page.) Registered participants in a case get one “free look” at a document at the time it is filed, and can save it to a local hard drive or print it off at that time without charge.

- If a file is needed after a case is closed, there is no need to retrieve the closed file from the Federal Records Center. (Because of the large number of bankruptcy filings in the Eastern District of Virginia—more than 30,000 last year—and the limited storage space in the clerk’s office, closed cases were routinely sent to storage within a month or

two.) Electronic files are expected to be available on-line locally for at least five years. The electronic file is also not subject to loss or damage from a natural catastrophe (fire, flood, etc.) or potential terrorist action, since all entries into the system are replicated at an offsite remote server.

- The CM/ECF archives of a court can be a valuable source of example pleadings and briefs when an attorney has to file an unfamiliar motion or pleading. The “forms library” of attorneys has expanded to include all pleadings filed electronically in any bankruptcy court in the country, which are available to any attorney who is an authorized CM/ECF filer. Attorneys may review disclosure statements, plans of reorganization, confirmation orders and other documents filed in any CM/ECF bankruptcy court in the country. Virginia attorneys may assist clients with economic interests in cases pending in foreign jurisdictions, with their ability to review online and print pleadings filed in other

CM/ECF bankruptcy courts, including New York City, Wilmington, Delaware and Chicago.

There are advantages to CM/ECF for judges as well, although more judges than attorneys may suffer culture shock from not having a paper file with which to work. In some cases, the number of phys-

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ical file jackets can be large, and finding the response (or, in a multi-party case, the various responses) to a particular motion can be daunting since they may be spread across file jackets. With CM/ECF, locating all the pleadings connected to a motion is trivial using the “search” function provided by Internet browser software. Once located, a click of the mouse reveals the document. Although the clerk’s office efficiently tracks files, a file jacket is occasionally misplaced. While the file is usually found within a day or so, the delay can be frustrating. With CM/ECF, the file is never lost or temporarily misplaced, and it is always complete, available within minutes for the judge to review. However, summary judgment motions that require reference to numerous or voluminous exhibits, can be more difficult to review on a computer than in hard copy. Most judges—even those most supportive of a generally “paperless” court—will appreciate receiving a “courtesy” paper copy.

Electronic access may facilitate identity theft. Bankruptcy files are public records and, except where a file or document within a file has been sealed, are freely available for public inspection and copying. Nevertheless, traditional court files enjoy a certain level of what the Supreme Court has aptly termed “practical obscurity.”³ A party seeking to review a paper file must know that the case is pending, must take time and travel to the clerk’s office and so on. With electronic access,

whatever obscurity existed in the paper-based world is effectively eliminated. There are pending changes to the Federal Rules of Bankruptcy Procedure that attempt to address obvious privacy concerns by limiting display of social security and account numbers to the last four digits and by eliminating the requirement to provide the names and ages of minors.

Still, there is often information in a debtor’s file that may be embarrassing, and it is likely that privacy issues will continue to be debated.

Electronic case filing has its drawbacks. There are the costs of Internet connectivity if a lawyer does not already have Internet access, and electronic documents must be submitted as a PDF (Portable Document Format). Although a reader for PDF files is available as a free download, the software to convert a word processing file into a PDF is not free. If original documents (deeds, etc.) need to be attached as exhibits, the lawyer will also need a scanner. Computer systems that may have been adequate for word processing and time and expense billing may not have enough processor speed, memory or hard-drive space, requiring replacement or upgrading.

In the Eastern District of Virginia, as in most bankruptcy courts that have adopted electronic case filing, registered participants in a case are deemed to have consented to electronic service of pleadings. The attorney must ensure that e-mailed notices will be read, and that appropriate actions are taken, when he or she is on vacation or out of the office. It may be necessary to maintain an e-mail address for receiving court notices, separate from the e-mail address used by the attorney for personal or client communications. The account must be checked at least daily by

a secretary or paralegal. Attorneys who don’t check their e-mail daily will at least be relieved to know that electronic service is treated the same as mailed service for the purpose of calculating response times (i.e., one still gets three extra days).⁴ Attorneys should be careful to name pleadings descriptively and completely. If a pleading name is cryptic, it is difficult for a docket search on ECF to locate the pleading by word search.

It is easier to commit some forms of malpractice when filing electronically than when filing paper. It would be rare, in a paper environment, to file a petition or other paper for John Doe instead of filing one for Richard Roe. In several recent cases, however, attorneys have commenced a case in the name of one debtor but have uploaded another debtor’s petition, or have uploaded something that is not a petition (e.g., a blank page, a cover sheet or some totally extraneous document). It is an open question whether the bankruptcy automatic stay would arise if a case were opened in the name of John Doe, but the document that was uploaded as John Doe’s petition, were entirely different. There have also been instances where an attorney mistakenly uploaded a confidential memo or document with a file name similar to the pleading. Although there is a step (two clicks of a mouse) that can be taken when uploading to view the file—while there is still time to take corrective action—some busy lawyers (or their equally harried paralegals or secretaries) routinely ignore that step, with potentially embarrassing results.

Then there is the issue of signatures. The use of a court-issued password is deemed to constitute the attorney’s signature. Where PDF documents are prepared directly from word processing files, the signatures, whether of the attorney or of the client, are commonly shown in typographic form, e.g., “/s/ John Doe.” Such signatures present no problem for pleadings that may properly be signed “by

counsel.” However, where the document (for example, the bankruptcy petition or the schedules of assets and liabilities, both of which must be signed by the debtor under penalty of perjury) would be required in the paper environment to bear an original signature, the local rules in the Eastern District of Virginia require that the attorney obtain an actual signature on a paper copy and to retain the paper copy in the attorney’s files. There have been at least two attorneys who were sanctioned in the Richmond division for filing petitions that bore the debtors’ typographic signatures—even though the attorneys did not have the debtors’ actual signatures on paper copies. In one such instance, the client (who had not been able to speak with the attorney and was unaware that the attorney had filed a purported petition on her behalf to stop a scheduled foreclosure) went to another attorney. In another case, an attorney was witnessed at the meeting of creditors belatedly having the client sign paper copies of schedules that had been filed electronically weeks before bearing a typographic signature. Ethically, there is no difference between an electronic filing and a paper filing. If one is not allowed to “sign” (or, more accurately, forge) a client’s or affiant’s name to a paper document, one cannot affix a typo-

graphic signature to the equivalent electronically-filed document without first obtaining an actual signature.

Fortunately, problem filings are extremely rare. The vast majority of electronic filings by attorneys go quite smoothly. Given the significant advantages, electronic filing is no longer an exotic possibility or even “the wave of the future”—but rather a proven technology that will assist busy courts and even busier attorneys in getting their work done efficiently, with the least possible fuss. 🙏

Endnotes:

- 1 Fed.R.Bankr.P. 5001.
- 2 However, where service must be accomplished other than by ECF e-mail delivery, such as on a non-user of ECF, such service by mail or other delivery may not be delayed until midnight.
- 3 *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).
- 4 See F.R.Bankr.P. 9006(f), adding 3 days when service is effected electronically under Rule 5(b)(2)(D), Fed.R.Civ.P., which in turn is made applicable to adversary proceedings by Fed.R.Bankr.P. 7005 and to contested matters by Fed.R.Bankr.P. 9014(b). Additionally, in the Eastern District of Virginia, the “Administrative Procedures for Filing, Signing, Retaining and Verification of Pleadings and Papers in the Case Management/Electronic Case Filing (CM/ECF System)” promulgated by Standing Order No. 02-2 (May 24, 2002) provides at ¶ II.7.B.4, “If the recipient of notice or service is a registered participant, service of the ‘notice of Electronic Filing’ shall be the equivalent of service of the filing by first class mail, postage prepaid.”



The Honorable Stephen S. Mitchell was appointed on December 12, 1994, as one of the five bankruptcy judges in the Eastern District of Virginia, sitting in the Alexandria Division. He is a graduate of the University of Virginia and Yale Law School. Prior to becoming a judge, he served on active duty with the United States Marine Corps for nine years and was in private practice in Alexandria.



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