

E-FILING@U.S.COURTS.NOW

Are You And Your Firm Prepared for the Transition?

**ABI Southwest Bankruptcy Conference
September 9-12, 2004
The Bellagio, Las Vegas, Nevada**

Panelists: Hon. Bruce Markell, District of Nevada
Hon. Wesley Steen, District of Texas
Robert R. Kinas, Snell & Wilmer L.L.P.

Each year, more jurisdictions roll out the Electronic Court Filing System ("ECF System"). And each year, more attorneys and their law firms face the management and administrative challenges which the transition to an ECF practice presents. These challenges include (1) managing e-notices and e-service, (2) preserving the integrity of the docketing system, (3) maintaining the integrity of the internal case files, and (4) providing adequate training to all members of the bankruptcy practice group.

For the benefit of those attorneys who are about to embark on this adventure, below are the thoughts and experiences from those who have navigated the ECF journey over the past five years.

I. The ECF Roll Out - What Should You Expect in Your Jurisdiction?

When a jurisdiction announces the transition to the ECF system, the process from initial planning to mandatory participation may take three to five years. In most cases, the process begins with the clerk's office extending an ECF invitation to certain practitioners and trustees. These practitioners and trustees join the members of the Judicial, Administrative and U.S. Trustee teams and, together, the group learns the ECF System and then makes recommendations as to certain features and parameters for the ECF system.

Learning the ECF Systems requires training. Making recommendations as to the features and parameters of the ECF System requires an broader appreciation of how the management of a bankruptcy practice group interfaces with the management of the judicial process and how the ECF system can work for the benefit of both. This dialog among the practitioners, the trustees and the Judicial and Administrative teams culminates in the drafting of the Electronic Filing Procedures. These procedures, once approved by the Court, establish the electronic filing practice in that particular jurisdiction. The most-frequently encountered issues are discussed below.

A. Mastering the ECF System Requires Training.

The ECF System serves many functions. The ECF System automates the docketing process, provides the mechanism to file pleadings and attachments, and permits 24 hours access to the Court's files from remote locations. In addition, the ECF System allows searches for particular debtor cases, for specific creditor entities and for attorneys participating in an electronically managed case.

Mastering the ECF System requires training. This training allows the users to gain the necessary knowledge and skill to maximize the benefits offered by an electronic filing practice. Generally, the user obtains this knowledge and skill through the process of trial and error and error and error. Thankfully, the clerk's question and answer team is well-equipped to address the many challenges that arise.

1. Training on the ECF System.

The Clerk's office provides the initial training on the ECF System. The initial training typically takes a half day. All members of a bankruptcy practice group, including attorneys, secretaries and paralegals, benefit from this initial training. All will use various aspects of the

ECF System as part of their regular bankruptcy practices. When the attorney demonstrates a sufficient level of proficiency on the ECF System, the Clerk will issue the attorney a password. This password constitutes the attorney's e-signature for the purposes of all electronic filings.

During the clerk's training program, the users become familiar with the ECF program, learn to create the docket entry and practice uploading pleadings and exhibits into the ECF System. As with most training, the process seems straightforward at the time of instruction. Duplicating the process after returning to the law firm often proves challenging, initially, but becomes routine over time.

2. Training within the Firm's Bankruptcy Practice Group.

During the initial training, the clerk's staff had created the pleadings and exhibits which were available for immediate uploading into the ECF System. Upon returning to their law firms, the users quickly find that each may need additional training on (1) how to convert pleadings and exhibits into a format acceptable to the ECF System and (2) how to place the relevant pleading and exhibit on the user's desktop.

a. Converting Pleadings into an ECF Acceptable Format.

The ECF System generally accepts pleadings and exhibits in the PDF format. The recent versions to Word make the conversion of pleadings to the PDF format simple. Once the attorney approves the final version of a pleading, the appropriate bankruptcy team member selects "Acrobat PDF writer" as the option from the Word drop-down menu. Word then "prints" the document in the PDF format to the user's desktop and the user may upload the PDF file into the ECF System.

b. Converting Exhibits into an ECF Acceptable Format.

Exhibits also must be in a PDF format. If the exhibit is a Word document, the user simply follows the procedures set forth above. If the exhibit is paper, the user must scan the same and create a PDF file of the exhibit.

Many copying machines offer both duplication as well as scanning options. The process of scanning saves the image of the exhibit as a PDF file. The user may transfer that PDF file to the user's desktop through a floppy disk.

Firms may choose to eliminate the floppy disk transfer process by purchasing a software package such as E-Copy. These software packages route the PDF files by email from the scanner directly to the user's desktop.

c. The Recommended Size of PDF Files.

On occasion, the user may receive a "timed out" notice while attempting to file a document on the ECF System. This might occur, for example, if an unnamed attorney attempts to upload a 25 meg PDF file as a single attachment. Speaking from experience, such a notice may cause acute stress should such occur between 10 p.m. and midnight on a filing-deadline day.

In the case of a voluminous exhibit, the user should scan the document in 25-50 page increments and should create separate PDF files for each section. During the filing process, the ECF System will permit the user to upload the separate PDF files as Exhibit 1A, Exhibit 1B, Exhibit 1C etc. Such will avoid the user receiving a "time-out" or a late night call from the system's administrator.

B. Implementing the ECF System.

Implementing the ECF System requires new rules and procedures. These rules and procedures address the significant changes to the bankruptcy practice dictated by the transition to electronic filing. The process of drafting these rules and procedures begins when the jurisdiction announces the transition to the ECF System. During the months when the attorneys are receiving training and when the clerk's office is testing the ECF System, the attorneys and the trustees along with the Judicial, Administrative and U.S. Trustee teams debate and revise the proposed Electronic Filing Procedures.

The Electronic Filing Procedures address such items as electronic signatures, attorney log-ins and passwords, and consents to receiving electronic notices. A copy of the administrative order and the Electronic Filing Procedures for the United States Bankruptcy Court, District of Nevada is attached.

When all have reached agreement on the terms of the Electronic Filing Procedures, the Court will issue an administrative order. This administrative order implements the Electronic Filing Procedures and, at that point, the ECF System may expand from mock filings to live filings in actual cases.

Once the ECF System accepts filings in actual cases, the clerk's office will maintain a dual-filing system for a period of months, accepting filings both by electronic and traditional means. Over the next months, the Courts will encourage practitioners to seek ECF training and to participate in the ECF System. At some point, the Courts will make participation in the ECF System mandatory and will begin to limit the ability of attorneys to file by antiquated means.

II. The ECF System - The Implementation Challenges.

A. The Management of E-Service and E-Notices.

In every case where an attorney files an e-notice of appearance, the attorney will receive an e-notification of every document filed in that case. This includes notification on matters of particular importance such as motions, responses and replies as well as objections and notices of hearings. This also includes notifications of additional appearances, all proofs of claims and any other documents filed in the case. If an attorney's computer provides an auditory alert when each email arrives, that attorney should prepare to become familiar with the melodies associated with e-filing.

The large number of case-related email presents several practice group management issues including (1) how to process the e-information and (2) how to circulate the same to the attorneys involved in the case. Addressing these issues requires an understanding of how the ECF System circulates the e-notifications.

The ECF System sends e-notifications to the attorney with the ECF password. Thus, if only one attorney from the law firm has an ECF password, that attorney is the gatekeeper to the e-notifications. Pursuant to the Electronic Filing Procedures, that attorney has waived the right to receive notices by first class mail. As a result, no hard copy of the pleading is likely to follow.

At that point, this attorney, by default, must review, circulate and docket the relevant information on all the ECF cases in which the law firm is participating. This structure is not recommended given the rapid responses required in a bankruptcy practice. Under the Electronic Filing Procedures, the clock begins ticking on the relevant response deadlines from the time the ECF System sends the e-notification, not from the time the attorney opens the e-notification.

For this reason, the ECF System permits the attorney with the password to modify how the ECF System sends e-notifications on cases in which the attorney has filed an e-notice of

appearance. Under the ECF System's "Utilities" icon, the attorney with the password can add additional individuals to the e-service list. In this way, the attorney with the password may add those additional attorneys involved in the bankruptcy case and may add non-attorneys, such as paralegals and secretaries, who assist in the management of the case.

B. An Increase in PACER Charges.

The Electronic Filing Procedures provide that each attorney with a password is able to review the e-filed pleading once without a PACER charge. Additional requests to view the e-filed pleading are at the cost of \$.07 per page for the pleading and for any exhibits.

In cases where the attorney with the password has expanded the e-notifications to multiple individuals, multiple attorneys may request access to the pleading. All but one will be incurring PACER charges.

In an effort to control costs, the bankruptcy team must evaluate whether to designate one person to take advantage of the "one free look" and, during that free look, download a PDF of the pleading. The designated person, then, may circulate the PDF document to the members of the bankruptcy team. Each member of the bankruptcy team may review and print a copy without incurring an additional PACER charges.

C. Preserving the Integrity of the Docketing System.

The ECF system's e-notification evades a law firm's carefully created docketing system. In a traditional filing environment, parties served pleadings by first-class mail. Law firms designed their docketing systems accordingly. To that end, a docketing representative retrieved and opened all the mail and then docketed the relevant pleadings and deadlines before releasing the mail to the attorneys. Similarly, a docketing representative reviewed faxes and made copies of the relevant documents before circulating the same to the attorneys.

E-notifications bypass the established docketing system by proceeding directly to an attorney's in-box. A law firm must implement new procedures in order to maintain the integrity of its docketing system. Without such modifications, the person receiving the e-notifications is the attorney with the ECF password. This renders the docketing system vulnerable should the attorney fail to forward the relevant documents to docketing.

To eliminate this vulnerability, law firms typically create a new e-address for the docketing department such as "docket@swlaw.com". The attorney with the password then adds this email address as another entity to receive all e-notifications from the ECF System. The members of the docketing team review those e-notifications on a daily basis and to add the relevant information to the docketing system

D. Preserving the Integrity of the Case File.

The ECF System, in theory, should lead to the reduction and/or elimination of paper pleadings and attachments being sent to an attorney. In the traditional legal practice, paper pleadings arrive, are copied and circulated while the original is maintained in the master case file.

In an ECF environment, the attorneys receive the e-notifications, review the document using the "one free look" policy and download a PDF of the same to their desktop. At that point, the attorneys are faced with a choice of how to maintaining the integrity of the case file. The attorneys may print out the pleadings and exhibits and recreate an all-paper file or may elect to manage case electronically using in a database such as Concordance or ISYS.

While the attorneys may maintain a certain number of PDF documents on a desktop, at some point that space becomes limited and the attorney must delete or store the documents. As part of a database management plan, the law firm would store the PDF documents in a database.

Because PDF documents are images and not searchable, the software program associates each PDF document with a searchable database. The attorneys define various fields which identify the important aspects of each PDF document. These searchable fields could include the name of the pleading, the issues addressed in each pleading, and key names.

An added benefit to this case management structure is its accessibility. All members of the bankruptcy group would have access to the database from their desktop computers or from remote locations via laptops. The PDF documents would be available to each such attorney and could be accessed without PACER charges. Such also eliminates or reduces the need for a central paper file or for multiple work files for each attorney.