One Approach to Developing Good Relations With the District Court: Meet With the District Court's Law Clerks to Discuss Bankruptcy With Them

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The D.C. Circuit is unique in having only one bankruptcy judge and having 15 district court judges. Because of that, most of the district court law clerks rarely see a bankruptcy case during their tenure. But the law clerks hold brown bag lunches at which they will hear from an invited judge (about the judge's background and any other topic the judge wants to raise).

Each year, when I speak at one of those lunches, I realize this may be one of the few times the law clerks will have any introduction to bankruptcy, and I use the lunch as an occasion to expose them to:

- some of the more important aspects of the interplay between the district court and the bankruptcy court; and

- some aspects of bankruptcy of which they should be aware when they go out into the practice of law.

The presentation could just as well be tailored for a presentation to members of the bar who do not practice bankruptcy law. The materials I use are available on the NCBJ website in pdf format, and I can be contacted for the underlying WordPerfect and PowerPoint files.

PowerPoint Presentation. I start off with a PowerPoint presentation (available on the NCBJ website) that principally explains the jurisdiction of the bankruptcy court and its statutory power to hear disputes within that jurisdiction. The slides include:

- A comparison, in a sample of districts, of the number of district court judges authorized in a district versus the number of bankruptcy judges in the district. It's an eye opener to the law clerks that the ratio is usually between 2:1 or 3:1 (two or three district court judges versus one bankruptcy judge), not the 15:1 ratio in the District of Columbia.

- *Statutes Governing Bankruptcy*.

- *Rules Governing Bankruptcy Cases and Proceedings* (Federal Rules, LBRs of the Bankruptcy Court, and LBRs

of the District Court).

- A description of the appointment of bankruptcy judges, the term of their appointment, their compensation, and the availability of recalled status after retirement.

- *Jurisdiction Over Bankruptcy Cases and Proceedings*.

- Slides regarding exclusive aspects of the federal courts' bankruptcy jurisdiction, removal and remand, and abstention.

- *Referral to the Bankruptcy Court.*

- *Where are Bankruptcy Proceedings to be Filed?*

- *Referrals of Civil Actions That Are in the District Court.*

- *Litigation in the District Court of Civil Actions Affecting the Bankruptcy Case.*

- *Review of Bankruptcy Court's Decisions* (appeals vs. de novo review).

- *Rules Regarding District Court Reviewing Bankruptcy Court.*

- *Dismissal of Appeal.*

- *Withdrawal of the Reference*.

- Slides regarding *The Automatic Stay; Exemptions;* and *The Bankruptcy Discharge.*

In those slides, beyond teaching some bankruptcy basics, I try to innoculate the law clerks against their (or their judge's) making mistakes affecting traffic between the two courts:

- **As to removal**, I alert them that "a petition for removal of a bankruptcy related proceeding from the [state court] should be filed in the Bankruptcy Court." Occasionally, a removed action is docketed in the district court and stays there, so this point tells them indirectly (thereby avoiding directly telling them and intruding on a district judge's decisional authority) that such an action ought not be retained there and ought to be re-docketed in the bankruptcy court.

- **As to appeals**, I give them a checklist of items they should check re possible dismissal of the appeal:

  - Untimely notice of appeal.
  - Failure of the appellant to pay the appeal fee (unless leave to proceed in forma pauperis has been granted).
  - Failure to designate record or issues. DCt.LBR 8006-1.
  - Failure timely to file a brief. DCt.LBR 8009-1.

Surprisingly, many district court law clerks have no idea that they should be examining those issues.

Paper re Automatic Stay's Impact on Litigation in the District Court. Then I turn to the issue most frequently encountered by the district court: the impact of the automatic stay on a civil action when a party in the action files a bankruptcy case. I hand out a paper, *Impact of Automatic Stay When a Debtor in Bankruptcy is a Defendant in a Civil Action or Files a Complaint or Counterclaim in the District Court*(copy available on the NCBJ website), that touches on one aspect of the issue. (One thing that could be added to the paper is the issue of the impact on the automatic stay on co-defendants who have *not* filed bankruptcy.)

Paper re Bankruptcy for Non-Bankruptcy Attorneys. Finally, I give the law clerks a free education regarding aspects of bankruptcy of which they should be aware when they begin practicing law. I hand out a paper, *Overview of Bankruptcy With Emphasis on Issues for Non-Bankruptcy Practitioners* (copy available on NCBJ website). The paper:

- first overviews the structure of the Bankruptcy Code, and tries to highlight the ways in which bankruptcy can alter nonbankruptcy law rights (*e.g.,* via a confirmed plan or rejection of an executory contract), and

- then turns to *Some Common Pitfalls and Adverse Consequences That Arise When a Bankruptcy Case Intervenes*.

When I discuss these topics, it's clearly an eye-opener for many of the law clerks:

- I encourage them *not* to be afraid of litigating a proceeding in the bankruptcy court, pointing out that the Federal Rules of Civil Procedure largely apply with only a few exceptions.

- But I warn them that there are bar dates in bankruptcy (*e.g.*, for filing proofs of claim, objecting to exemptions, filing a complaint regarding dischargeability or to object to discharge) which are often strictly applied. As a result, I warn them, an alarm ought to go off in their heads when they learn that a debtor of their client has filed a bankruptcy case.

- My favorite pitfall topic is regarding drafting liquidated damages claims provisions in contracts. I anecdotally tell them about the case in which a contract for the purchase of property provided for only modest liquidated damages (because the purchaser thought that it would always be able to sue for specific performance). Upon the seller filing bankruptcy and rejecting the contract as a debtor in possession, poof!, the right to specific performance disappeared, and the buyer was left with a miserly liquidated damages claim.

- I additionally warn them about other consequences of a bankruptcy case:

  - the potential loss of the right to a jury trial (*e.g.*, on a fraudulent conveyance claim against their client) when their client files a proof of claim;

  - the loss of the right of a client who is a corporate officer to control the corporation's attorney-client privilege when a trustee is appointed in the corporation's bankruptcy case; and

  - the danger of thinking that the bankruptcy court has jurisdiction over any claim by or against a debtor simply because the debtor is in bankruptcy.

Finally, I turn to the topic of *Collateral Estoppel*, and urge them in preparing jury instructions as a plaintiff's counsel in civil actions elsewhere to bear in mind the standards for nondischargeability of the plaintiff's claim if the defendant should later file bankruptcy. All of us have seen, or eventually will see, some dischargeability complaint where the plaintiff would be entitled to summary judgment if only the plaintiff had carefully tailored the jury instructions in the civil action to match the standards for dischargability.

Conclusion. I think the law clerks walk away grateful for having been exposed to what bankruptcy is all about; with a better idea of how to handle a bankruptcy matter or issue that arises in their chambers; and with an enhanced view of the bankruptcy court as an important part of the federal judicial system. And by helping educate the law clerks about bankruptcy issues that may arise in their chambers, I think I earn the good will of the district court judges.

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