By Michelle H. Bass

Uncodified Best Practices in the Digital Age

Expectations Regarding the Reasonable Use of Technology

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While it goes without saying, given the availability of cellular and wireless service, in this day and age, attorneys must stay digitally connected. Having the ability to respond to a client or opposing counsel in a reasonable and timely manner has morphed from being a guideline for the ethical practice of law into a way of life, and one could assume that counsel for opposing parties keep the lines of communication open at all times, especially once a new development (such as a bankruptcy petition filing) changes the shape of the ongoing litigation. At least, that is the way it *should* be.

Notice of a Bankruptcy Petition Filing

As in many other practices of law, for bankruptcy practitioners and turnaround professionals, the early initiation of communication can make or break a deal. Since the petition filing under any chapter of the Bankruptcy Code results in an imposition of the automatic stay,[1] counsel for the debtor should go "the extra mile" and take it upon themselves to notify interested parties and creditors regarding the bankruptcy filing. Such a practice will often lead parties to the swift and fiscally efficient resolution of what could otherwise constitute a contested matter. For example, in case of an active wage garnishment, sending a fax or an email on the petition date will most likely prompt cessation of any garnishment attempts. Benefits of such a practice for both a consumer debtor and creditors are apparent once compared to costly protracted litigation to claw back post-petition garnished wages under Bankruptcy Rule 9014.

Although emailing or faxing a notice or any other filing may take no more than a few seconds, all too often, counsel's failure to use technology to communicate produces a lasting negative impact in a case, especially by wasting the parties' time, money and judicial resources. This is common despite the fact that both the Bankruptcy Code and Federal Rules of Bankruptcy Procedure (FRBP) impose a duty on a debtor to notify creditors when the debtor files a bankruptcy petition.

More particularly, § 521(a)(1)(A) and (B)(i) of the Bankruptcy Code requires a debtor to file a list of creditors and schedule of assets and liabilities. Bankruptcy Rule 1007(a)(1) requires that the list include the names and addresses of each creditor and requires that the list be filed with the debtor's petition. Once filed, the Bankruptcy Code and FRBP impose a duty on a bankruptcy court clerk to serve a notice of a pending bankruptcy case on the creditors.[2] Specifically, 11 U.S.C. § 342(a) groups together a number of largely unrelated provisions concerning notices in Bankruptcy Code cases.

Subsection (a) pertains to a notice given to creditors that an order for relief has been entered, either upon the filing of a voluntary petition or as the result of an involuntary petition, that states as follows: "There shall be given such notice as is appropriate ... of an order for relief in a case under this title." The manner in which such notice is to be given and the time parameters for giving the notice are left for the FRBP to prescribe. Various provisions of Bankruptcy Rule 2002 implement § 342(a) of the Code. Pertinent to this article, subsection (f)(1) requires the clerk or some other person as the court directs to give the debtor, all creditors and indenture trustees notice by mail of the order for relief.[3] Subdivision (o) requires that notice be given within 21 days of the order for relief in any case in which the debtor is an individual whose debts are primarily consumer debts.[4]

In other words, debtors have a duty to inform creditors when the petition is filed; however, their responsibility stops at the debtor's truthful and accurate completion of the schedules and list of creditors. Notice is normally sent by the clerk, but in some districts, this duty has been delegated to another entity, such as the chapter 13 trustee in chapter 13 cases.[5] The names of creditors that are to receive notice are obtained from the debtor's schedules or from the list of creditors filed pursuant to Rule 1007(a)(1). In addition, subdivision (*l*) states that the court may order a notice by publication if it finds that notice by mail is impracticable or if it is desirable to supplement the notice.[6] If notice is given by publication, it

1 *See generally* 11 U.S.C. § 362.

2 *In re Formosa*, 582 B.R. 423, 431.
3 *Id.*
4 This is the only time limitation in the Bankruptcy Rules regarding notice given under § 342.
5 3 *Collier on Bankruptcy* ¶ 342.02 (16th ed. 2018).
6 *See* Fed. R. Bankr. P. 2002(l).

must contain all names used by the debtor(s).[7] It should also be published in a newspaper reasonably likely to be read by possible claimants.[8]

As such, the vehicle for issuing notice of a case *de facto* falls squarely on the clerk of court, who, unless it elects to serve it by publication) sends notice by first-class U.S. Postal Service mail, and has 21 days to do so. Such a delay of information pertaining to a material change in the ability to litigate until the notice receipt date many adversely affect interested parties unless counsel for the debtor reaches out as a courtesy.

Duty to Communicate the Bankruptcy Petition Filing by the Debtor

Using the American Bar Association Model Rules of Professional Conduct (hereinafter, the "ABA Model Rules") as a guide, it seems intuitive that counsel has a duty to communicate by utilizing technology to the extent that it will provide a benefit to the client. Model Rules 1.3 and 2.1 instruct a lawyer to act with reasonable diligence and promptness in representing a client and require the attorney to exercise independent professional judgment. In addition, Rule 3.2 requires the lawyer to make reasonable efforts to expedite litigation consistent with the interests of the client. With these rules in mind, consider the typical situation in which a consumer debtor files a rush petition within days of a scheduled foreclosure sale. Under the Model Rules and common sense, counsel for the debtor would be exercising sound professional judgment by electronically contacting counsel for the foreclosing mortgage creditor to prevent the sale from going forward.

Although neither the FRBP nor the Bankruptcy Code require counsel to expedite, so to speak, electronic notification that the automatic stay is in place, taking that extra step does not go beyond the attorney's call of duty. In fact, some argue that the Model Rules dictate that counsel has an affirmative duty to act in these exigent circumstances, especially where a debtor's real or personal property interests are at stake and stand to be depleted.

The interplay between the attorney's reasonable obligations in light of what is actually required under the FRBP and the Bankruptcy Code in this digital era began to be recognized by the bankruptcy courts. Recently, in *In re Formosa*,[9] the U.S. Bankruptcy Court for the Eastern District of Michigan recommended a higher standard of best practices for both debtors' *and* creditors' counsel.

More particularly, in *Formosa*, the debtor filed a chapter 13 petition two days prior to a scheduled foreclosure sale.[10] In light of the debtor's counsel's failure to inform the mortgage creditor regarding the petition filing, it proceeded with the foreclosure sale.[11] Following the sale of the property to a third party for more than what was due on the mortgage, the mortgage creditor received a notice of a chapter 13 case.[12] Taking into account the applicability of the automatic stay, the mortgage creditor retained counsel to protect its rights as a mortgagee.[13]

Thereafter, the mortgage creditor, the debtor and a third party entered into an agreement setting aside the foreclosure sale and reinstating the mortgage, which was approved by the bankruptcy court.[14] Subsequently, the mortgage creditor filed a notice seeking an award of $12,000 in post-petition mortgage fees and expenses, to which the debtor objected; the court considered this request under Bankruptcy Rule 3002.1(e).

While the bulk of the debtor's legal argument within the objection focused on the language of the mortgage and the interplay of 11 U.S.C. § 1322(b)(5) and Rule 3002(1)(c), 1(d) and 1(e), the debtor also pointed out that the creditor did not conduct a PACER search prior to the foreclosure search.[15] Such a search, if conducted, would have disclosed whether a bankruptcy case had been filed. The creditor countered that the fees in question could have easily been avoided if the debtor had simply notified the bank when he filed his chapter 13 petition.[16] The court addressed both parties' lack of diligence and poor communication as follows:

> Despite the absence of any controlling authority imposing a duty on a foreclosing creditor to conduct a PACER search, there is no question that a foreclosing creditor would be well advised to do so. A small investment of time in conducting a PACER search or some other investigation to confirm that a borrower has not filed a bankruptcy case can go a long way toward avoiding time-consuming and costly fights such as this one. However, the law imposes no legal duty to do so....[17]

Likewise, the debtor did exactly what the Bankruptcy Code and FRBP require:

> he timely and properly listed the Bank as a creditor so that the bankruptcy court clerk could timely and properly give the mortgage company notice by mail of the order for relief in this case....
>
> That the debtor complied with his duty under the law is not to say that the Court disagrees with the Bank that the Debtor could have done more. Much of the Bank's fees and expenses undoubtedly would have been avoided if the Debtor had just taken the extra step of calling, faxing or emailing the Bank to inform them of his chapter 13 petition before the foreclosure sale — but that's not the same thing as saying that the law requires the debtor to do so.[18]

Simply put, an ounce of prevention is worth a pound of cure. In balancing the parties' respective arguments absent a willful violation of rule or law by either side, the court reduced the creditor's recovery to $2,500.[19] The court also encouraged each party to adopt a practice going forward that will prevent such issues from arising in the future, not

7 *Id.*
8 *Alderwoods Grp. Inc. v. Garcia*, 420 B.R. 609 (Bankr. S.D. Fla. 2009) (notice given to claimants who had claims relating to a cemetery in South Florida should have been given in South Florida newspaper), *vacated on other grounds*, 682 F.3d 958 (11th Cir. 2012).
9 582 B.R. 423.
10 *Id.* at 426.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 426-28, 430-31.
16 *Id.* at 430.
17 *Id.* at 431.
18 *Id.* at 432.
19 *Id.* at 436.

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because the law necessarily requires it, but because it is prudent and reasonable to do so as follows:[20]

> The Court also encourages attorneys for both debtors and creditors to adopt a "best practices" approach whereby a debtor provides telephone, fax or email notice of a bankruptcy filing to a foreclosing creditor and follows up to verify receipt; and a foreclosing creditor conducts a PACER search or other investigation to see if its borrower filed [for] bankruptcy before holding a foreclosure sale. Neither of these practices will cost much time or money and they can save an expensive and time-consuming fight later. But the Court has no authority itself to create a rule of law imposing such duty on either a debtor or a foreclosing creditor in these circumstances and therefore declines the parties' invitations to do so.[21]

20 *Id.*
21 *Id.* at 432.

Conclusion

While the *Formosa* court did not formally establish a set of requirements for counsels' reasonable exercise of prudence regarding the use of technology in certain circumstances, attorneys can certainly glean that information from this opinion, given the fact that the judiciary encourages in general both debtors and creditors' counsel to employ a set of best practices when communicating time-sensitive information.

Taking into account the ABA Model Rules requirements to act with competence, reasonableness, diligence and promptness, one point from *Formosa* is clear: Counsel *has* an obligation to do more than what might technically be required in cases where the slightest efforts can have the largest impact. Counsel should also be mindful that as the rules that guide this profession continue to evolve, so too will the acceptable use of technology in practice. abi