

## Ever More Advice and Thoughts from Judge Starzynski

prepared for

### **BANKRUPTCY 2003: The 19<sup>th</sup> Annual Year in Review**

March 5, 2004

The Honorable James S. Starzynski  
United States Bankruptcy Judge  
District of New Mexico

The following continues my "More than You Probably Wanted to Know" monologues with practitioners at the Annual Year in Review programs, which deal largely with practice and procedures in my courtroom and chambers.

These practice and procedure tips are in addition to those already listed on my chambers website. If you are interested in or need to know about these practice tips, then you need to also review the other practice tips at my chambers website. To get to my chambers website, go to [www.nmcourt.fed.us](http://www.nmcourt.fed.us), then click on U.S. Bankruptcy Court, then on General Information, then on Judges & Staff, then on Judge Starzynski's "homepage", and then start clicking on the various topics you want or need to read about. (Note that these decisions are filed chronologically and that there is a "last updated" line at the bottom of that page, which will help you remain current on what is filed on that page.) There is a wealth of other information on the chambers website as well, such as the court calendar for the upcoming six months, which is usually updated once a week and is searchable, so spending some time at that site might be useful.

1. Town Hall meetings: Given the importance of getting input from our "customers", as the Chief Judge I am initiating a process of periodic meetings with the bar. The purpose of these meetings is to allow the members of the bar to talk or ask about just about anything that goes on in the courthouse or elsewhere (other than, for example, how one of us judges is going to decide a pending matter). Either the Clerk or the Chief Deputy Clerk will also be at that meeting. After consultations with the Bankruptcy Law Section Board of Directors at their regular monthly meetings, I have decided that the first Town Hall meeting will take place in June of this year, during a lunch period (because that appears to be most workable for the most people), and will last about 45-60 minutes. The physical location will be the Animas Courtroom in Albuquerque because of its telephone/microphone capabilities (unless so few people show up that we can use my hearing room -- Room 13102); we will use the telephone system to call selected sites around the state (Farmington, Santa Fe, Las Cruces, Roswell and...) to make sure we get as broad a participation as possible. As Chief Judge I will "chair" or "moderate" the meeting, with the goal of letting everyone fully express his or her thoughts about whatever issue the attorney thinks is important.

This is really supposed to be a time for us to listen to you and respond to your questions (not unlike Hillary Clinton's "listening tour"). My thought is to have these Town Hall meetings quarterly, unless there is so little interest that having them less often makes more sense.

2. Judicial Performance Liaison ("JPL") and contacting the Court: I have implemented a system whereby persons (not limited to lawyers) can speak with Fred Hart in order to have him convey to me, in as anonymous way as possible, any criticisms or comments about the conduct of myself and my staff, in order to improve the system. (See the March 2004 NTP about this.) The purpose of this note is to reiterate that you are not limited to using that system to communicate, directly or indirectly, to or with me. For example, do not hesitate to contact me, Jim Burke or anyone in chambers directly if you have a problem or a concern (keeping in mind, of course, the prohibition on ex parte contacts in litigated matters). I have also previously announced that if you want to ask the Clerk to pass on comments or concerns, anonymously or otherwise, I have authorized the Clerk to do that. That is still in effect.
3. "Under Advisement" List: The foregoing comments about contacting chambers apply particularly if you have not received a decision in a matter, or a submitted order has not been entered, as soon as you think it should have been. As those of you who have made such inquiries can attest (I hope), no one will bite your head off, or hold it against you (including me) in any way, if you politely ask what the status of a decision or order is. And to support this approach, we have also put on the chambers website a listing of all the matters submitted to the Court and under advisement, which listing includes such information as, for example, the date of the filing of the motion at issue, the briefing dates, the status of the decision ("submitted [ready to be decided]", "[opinion in] draft [form]", etc.). The important thing is to look at this list before calling chambers to make sure that your item is on the list. Certainly, if your item is not on the list, call immediately to find out what's going on. (Occasionally, something does inadvertently slip into a crack.) If your item is on the list but you want to know when it will be decided, and especially if there is some urgency to getting a decision (for example, if you have seasonably submitted a motion for summary judgment and the trial is approaching soon enough that you need to prepare witnesses, etc.), call and let us know. We monitor and prioritize those sorts of decisions, but again our efforts are not foolproof.
4. Digital Audio Recording System (DARS): In my hearing room and in my courtroom, we are now using the digital audio recording system. (See the March 2004 NTP about this.) It is now the official court-reporting system for all hearings, including trials, that I conduct. You should know that the system is running (or supposed to be – a couple of times I have forgotten to turn it on at the beginning of a hearing and we are working on systems and practices to prevent operator [that is, "judge"] error) all the time at hearings now, both in the hearing

room and in the courtroom. And the system records everything it hears. So what you say "off the record" is very likely to be recorded on DARS, even if it is not "officially" part of the record. That is, if you want something to be "off the record", you need to request that and get an affirmative ruling that what you say will be deemed to be off the record, although in fact what DARS "hears" will be recorded on the hard drives. On top of that, you need to be aware that the microphones in the courtroom, which DARS uses to hear what is going on, are also used to broadcast what is said throughout the courtroom. The mute button on each microphone only blocks or stops the particular microphone from broadcasting to the rest of the courtroom what the microphone picks up; the mute button does not stop DARS from recording what you are saying. So if you want to say something confidentially to your client, for example, you will need to whisper in the client's ear, or put your hand over the microphone, or step away from the microphone, or take other steps to ensure your voice is not picked up by DARS.

5. Reaffirmation Agreements: I continue to occasionally run across reaffirmation agreements that attorneys have approved for their clients to sign. (Of course I don't run across them very often because the Code says that whether a debtor represented by counsel should enter into a reaffirmation agreement is a decision to be made by the debtor and her or his attorney.) The worst I saw this past year was the reaffirmation of a \$63m debt for a Lincoln Navigator for the debtor's girlfriend who was making the payments anyway. Reaffirmations are serious things; remember that these debtors have to survive once their case is over. The most experienced debtors' attorneys that I have spoken with seldom approve reaffirmation agreements, especially for automobiles. If you have a debtor who is insistent that you approve a reaffirmation agreement that you think is not in the best interest of the debtor or his or her family, then consider doing what one experienced attorney did one time: ask for a hearing, bring the debtor and treat this part of the case as if the debtor were not represented by counsel. (I don't know whether other judges are receptive to this approach.)
6. Sharing Fees: (This is a repeat from last year.) It appears that the practice of paying another attorney to do part of the work in a bankruptcy case, particularly covering the § 341 meeting in another town, apparently is fairly routine. I have not decided whether such a practice constitutes fee sharing, and thus requires disclosure pursuant to Rule 2016(b), and the issue to date has not officially come to my attention, but you may want to consider that issue next time you file a Rule 2016(b) statement. I certainly have no problem with the practice itself; in this state, such an arrangement may almost be a prerequisite to conducting an economically viable debtor-representation case. The concern, rather, is disclosure. So think about that in connection with any of your pending or future cases. (Perhaps this might be applicable as well if you pay someone to cover your cases in your absence.)
7. Charges for access to ACE: Although you get charged for accessing PACER,

you are not currently being charged for access to ACE. That is likely to change within the next few months, although there has been no final decision yet on whether or when.

8. Filing what you send us: One consequence of the "paperless" or, more accurately, "less paper" filing system now in effect is that there will not be filing on the "left side" of the file, since that refers to the paper files that the Clerk's office used to maintain, where it used to keep things like correspondence that were not treated as part of the pleadings. Now, if you send something to the Clerk's office or my chambers such as, for example, a letter brief, a letter in response to an order to show cause, or a letter asking for some sort of relief (although the last item is what we receive from pro se parties rather than attorneys, usually), that document will be filed as a pleading and will appear on the ACE docket.
9. A reminder of the obvious: If the Clerk's office, including particularly a case manager, contacts you about getting something done so the case can be closed, or for some other reason, please have the good sense to do what you need to do, and do it promptly.
10. Appearance of "cronyism": One of the absolute imperatives that all of us (lawyers, judges and staff) have is to convey the (accurate) impression that no one has a special "in" with the judge. That is particularly important when there are pro se parties or attorneys and clients present who do not regularly appear in bankruptcy court in this district. Therefore you should carefully avoid things such as coming back to chambers during hearings, or displaying excessive familiarity with me or my staff during hearings, settlement facilitations, etc. that I may be conducting, etc. And if I appear to be distant in the face of a demonstration of familiarity, don't take it personally; it is merely a way to demonstrate that everyone at the proceeding is being treated equally.
11. Signatures on orders: fax signatures are valid, so when you send in an order with two signatures on two pages, the first one the original of the preparer and the second one having the fax signature of the preparer and the signature of the approving party, we just discard the first signature page. In fact, with orders that have multipage signature lines, Mary occasionally cuts and pastes to get all the signatures on one or two pages total. Sending in orders with multiple signature pages, each page of which has one original signature, wastes your paper and postage and our time and disk space.
12. Cover letters: You don't need to send a cover letter either. We and the clerk's office personnel know what to do with the order when it arrives. So, unless your purpose is to remind and impress your clients with all the orders that you are sending us, you can save yourselves time and money.

13. Exhibits tendered at trial: We try to remember to remind counsel at the end of a witness's testimony or at end of the party's case about exhibits that have been discussed but not tendered as exhibits, to ensure that all exhibits which a party wants to be part of the record get into the record. The reason for this is that I want decisions to hinge on the merits rather than on mistakes or technicalities. But the ultimate responsibility for ensuring that an exhibit (or any other evidence) is in the record is on the party, not the Court.
14. Chapter 13 Confirmation Hearings and the Calendar: When the debtor files an amended chapter 13 plan, thereby seeking to cancel a confirmation hearing that has already been set, the confirmation hearing does not automatically go off the calendar. The Debtor should contact the chapter 13 trustee and any other creditor or other party in interest who has filed an objection or been noticed for the confirmation hearing, and confirm that there is no objection to the scheduled confirmation hearing going off the calendar. If there is none, debtor should submit the appropriate order, showing approval of the various other parties. If there is opposition to the confirmation hearing being taken off the calendar, debtor should bring this to the Court's attention by asking for a hearing (even an informal one) with the objecting party. If the debtor raises the request to take the confirmation hearing off the calendar at the confirmation hearing itself, the debtor should be prepared to describe what sort of notice or warning the debtor provided to the other parties, and why the request is being made only at the confirmation hearing and not before. Whether a hearing is taken off the calendar remains the decision of the Court in its sole discretion. Causing other counsel or parties to appear at a cancelled confirmation hearing when it could have been avoided may subject the debtor (or counsel, more likely) to sanctions.
15. Chapter 13 fee applications: If your fee application asks for more than about \$2,000 or so, you should provide a brief explanation in your fee application in order to permit me to facilitate my review of the application and approval of your fee order. If you do not do that, I am likely to send the order back and ask for the supplement. The supplement can be as little as an extra sentence; eg. "Counsel had to spend several additional hours negotiating the claim of the IRS." These are things that are not immediately apparent from the time sheets. Of course, if your fee application is for substantially higher amounts, then a slightly longer explanation may be in order.
16. Checklist for chapter 13 debtors: One of the issues that comes up occasionally during chapter 13 days is just how clearly the debtors understood their obligations under chapter 13 and the ramifications of undertaking a chapter 13 case. In this context, Judge Lundin has put together a realistic and comprehensive checklist of what to discuss with the debtors when they come in to visit with you about filing a chapter 13 petition. It covers a range of things that are obvious and not so obvious, including the caution about how difficult an undertaking this will be, the effect of illness, injury and pregnancy on

performance of the chapter 13 plan, the fact that chapter 13 is indeed a bankruptcy filing, etc. I had not seen this before, and was quite impressed when I saw it. The checklist is Appendix A in Volume 5 of the latest edition of his treatise, and looks like it photocopies quite easily.

17. Tell us about settlements: Also a repeat from last year: If you settle a case (or withdraw your motion for stay relief, or whatever), bless you. You will be doubly and triply blessed, however, if you let us know about the settlement, withdrawal, etc. so we can take it off the calendar, not have to pull the file, etc. And even if you don't care about the blessing, tell us anyway.
18. Mailing disks: For those of you who are having difficulty getting an intact mailing list to the Clerk's office on a 3.5 inch floppy disk, consider the following solutions: (a) make sure you are using "fresh" floppies (note: a package of ten new diskettes currently costs \$3.91 at Staples) ; (b) if you want to use old floppies that have seen lots of wear, make a lot of copies and submit them all, and cross your fingers that at least one of them works (note: this will not save you from getting an order to show cause if none of them work); (c) bring your floppy to the Clerk's office and check it on a court computer; (d) put your mailing list on a CD and make sure it works on another computer; or (e) file electronically, using the "validate creditor mailing list" utility in ACE.
19. Hang up and drive: As an addition to my continuing focus on discouraging people from participating in hearings by telephone while operating a motor vehicle: From an article in The New York Times, Tuesday, July 1, 2003, page D8: In an experiment done in Spain, tests done on the road showed that talking with someone is more distracting than just listening, and trying to follow instructions (as in answering questions from the judge) is even worse. The ability to pay attention to what was happening on the road dropped by 1/3, and that result was the same when using a hands-free cell phone as well. In other words, when you are talking on a cell phone while driving, the problem is not so much that your hands are otherwise engaged as it is that your brain is otherwise engaged. So if you are driving when you are called for hearing, let me know and I will call you back shortly when you have had a chance to pull over.

## **Judicial Performance Appraisal Program for Judge James S. Starzynski**

Judge James S. Starzynski is initiating a performance appraisal program to obtain input from all those persons and entities who find themselves involved in a case or other proceeding assigned to Judge Starzynski in the United States Bankruptcy Court for the District of New Mexico. The purpose of this program is to ensure that Judge Starzynski, his office staff and the Clerk's office are discharging their duties and otherwise being as responsive as possible to the needs of parties and others in his cases who come into contact with the bankruptcy court system in this district.

More specifically, we are seeking opinions, observations, complaints and data (anecdotal and otherwise) about the entire bankruptcy court experience in and concerning Judge Starzynski's cases, including but not limited to judicial demeanor; courtroom ambience; treatment of attorneys and other professionals, parties, visitors and others; efficiency of motion calendars and trials; helpfulness of Judge Starzynski's web page; professionalism of staff; responsiveness of staff to inquiries and requests for assistance; timeliness of decisions; and the overall tone of the Court. This also applies to your observations about the Clerk's office and its operations. We want to know what you think we do well and what we need to improve on.

To accomplish this goal, Professor Frederick M. Hart and the University of New Mexico Law School have graciously agreed that Professor Hart will serve as the judicial performance liaison (JPL). Professor Hart has been a member of the Law School faculty and a resident of the State of New Mexico for many years, and served as the dean of the Law School. One of the leading scholars in the United States on, among other things, bankruptcy and commercial law, Professor Hart was one of the editors of *Colliers on Bankruptcy* (14<sup>th</sup> Ed.) and one of the authors of a leading treatise on commercial and secured transactions. He is a highly respected teacher and lawyer in the state and the nation. It was for these reasons, and for the additional reason that Professor Hart does not practice before Judge Starzynski, that Judge Starzynski asked Professor Hart to serve as JPL.

This program supplements and does not replace Judge Starzynski's encouragement to anyone to contact him or any of his office staff directly about any of the above subjects (keeping in mind, of course, the prohibition on ex parte contacts in litigated matters), or to contact the Clerk of the Court if the information is to be passed on confidentially. Nor, of course, does this program replace the right of any person to file a complaint with the Tenth Circuit Court of Appeals. **AND IT IS NOT A SUBSTITUTE FOR APPEALING AN ORDER, RULING OR OTHER DECISION THAT YOU MAY NOT BE SATISFIED WITH.** Rather, the reason for Professor Hart's participation is to encourage those persons to participate who might not otherwise feel comfortable in passing along information or concerns to Judge Starzynski or any court personnel about how well Judge Starzynski, his staff and the Clerk's office are doing their jobs. If you wish to convey a comment, complaint, etc. on to Judge Starzynski through Professor Hart, and to do it

anonymously, Professor Hart will take the steps necessary to "scrub" as much as possible the comments passed on from any information that identifies the source of the comments.

Your candid participation and offering of constructive comments are essential to the success of this program. Professor Hart needs and invites comments, by phone, in person, by email, or any other method of communication. Professor Hart will meet periodically with Judge Starzynski to pass any input on to him. Professor Hart may also contact you to solicit input. Please feel free to communicate with Professor Hart. Neither Judge Starzynski nor anyone on his staff will ever inquire into the identity of the source of any comment; that information will only be disclosed if the source specifically requests or permits the disclosure.

Professor Hart can be contacted as follows:

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## **Digital Audio Record of Proceedings for Judge Starzynski's Hearings and Trials**

In all hearings, including trials, that Judge James Starzynski conducts beginning March 1, 2004, the proceedings will be recorded by a digital audio recording system, the trade name of which is FTR. There will no longer be a human being present as a court reporter. This is applicable to hearings taking place in the bankruptcy court hearing room and the Animas Courtroom in Albuquerque, as well as any hearings he conducts elsewhere in the District of New Mexico.

The system uses a laptop and sets of microphones to pick up what is said. When the system is plugged into the court network (as it usually will be for all hearings conducted in Albuquerque), it transmits the data directly to two hard drives on the court servers. When hearings are taking place outside the courthouse in Albuquerque, the data is stored on the hard drive of the laptop, and then later transferred to the court servers. What is created is a digital audio file. If you need a copy of the audio file, you can receive it on a compact disk (as an audio file) together with a file for downloading the free FTR file-reading software. Or you can call us to make arrangements to have it e-mailed to you together with the web link for the FTR file-reading software. That web link is <http://www.ftrgold.com/intro.asp>. Copies of each CD are available from the Clerk's office for a fee of \$26; the same charge will be applicable for each file e-mailed to you. (The fee and the amount of the fee are mandated by the Administrative Office of the Courts; however, CDs or e-mail files are provided free of charge to court reporters who need them to prepare written transcripts.) As with stenographic and audio-taped court records, written transcripts, if required, may be obtained by using the services of a certified court reporter who may charge no more than the rates allowed by the AO.

This particular digital technology has certain limitations, risks and benefits that you need to be aware of. Among these (and this is not intended to be a comprehensive list) are the following:

- a. If you want to hear (literally) what the proceedings were, you can simply order the recording (CD or e-mailed file) and do that; you don't need to rely only your notes or get a written transcript.
- b. Since each file has a full day's proceedings on it, you will want to remember about what time during the day your hearing took place, or at about what time the particular part you are interested in took place. In both the hearing room and the courtroom in Albuquerque, there will be a big digital clock near the FTR computer that will be synchronized with the FTR recording.
- c. Since you need to be heard by the microphones to be recorded, make sure you are near a microphone whenever you want to be heard. For example, if you leave the microphone at the podium to approach a witness, stop talking until you get back to the podium.

d. On the other hand, the system records everything it hears. So what you say "off the record" is very likely to be recorded on the system, even if it is not "officially" part of the record. That is, if you want something to be "off the record", you need to request that and get an affirmative ruling that what you say will be deemed to be off the record, although in fact what the system "hears" will be recorded on the hard drives. On top of that, you need to be aware that the microphones in the Animas courtroom, which the system uses to hear what is going on, are also used to broadcast what is said throughout the courtroom. The mute button on each microphone only blocks or stops the particular microphone from broadcasting to the rest of the courtroom what the microphone picks up; the mute button does not stop the system from recording what you are saying. So if you want to say something confidentially to your client, for example, you will need to whisper in the client's ear, or put your hand over the microphone, or step away from the microphone, or take other steps to ensure your voice is not picked up by system.

e. You will need to identify yourself every time you speak, whether you are appearing by telephone or in person.

f. The system is not running all the time; we turn it on before the hearings start in the morning and turn it off at the end of the hearings, and sometimes in between. During the test period, there were a couple times when I forgot to turn the equipment on in the hearing room when we came back in for hearings after a break. So if you notice that I have forgotten to turn the equipment on, please bring it to my attention.