

Ever More Advice and Thoughts from Judge Starzynski
Judge Starzynski's presentation version annotated and including a rough
summary of his oral comments at the presentation (in this font)

prepared for

BANKRUPTCY 2005: The 21st Annual Year in Review

March 10, 2006

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, then click on U.S. Bankruptcy Court, then on Judges, then on Judge Starzynski's “homepage”, and then start clicking on the various topics you want or need to read about. (Note that at that site there is a list of Judge Starzynski's decisions (pdf) 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 a “matters pending” list and the court calendar for the upcoming six months, which is usually updated once a week and is searchable. Spending some time at that site might be useful, especially if you are new to bankruptcy practice in this district.

1. We routinely conduct preliminary hearings (which by definition do not involve taking evidence) by telephone; that is, any party may appear by telephone. [See ¶ 10 below for new instructions on using e-mail to request to appear by telephone.] I have also permitted attorneys or witnesses to appear by telephone for evidentiary hearings, albeit rarely. For attorneys, these occasions have been for hearings that arise on very short notice and the responding party's attorney is not “close by”; *e.g.*, an attorney in New Jersey who learns of a hearing to take place the next day. For witnesses, these occasions have been when a mortgage holder needs to provide merely “clerical” evidence that does not require me to make a credibility determination. One advantage of this approach is that it keeps the costs down for one or more parties, and if that party who saves the money is the mortgage company and the result is that the debtor has a smaller attorney fee bill added to the mortgage debt, that is a good thing. And there has been some thought about, for example, allowing a mortgage company's attorney to appear by telephone and the mortgage company's “clerical” witness to also appear by telephone, for the same reason. In those instances in which someone wants to appear by telephone for an evidentiary hearing, I usually require the party to find out if the other side will oppose

that. (Almost always there is no opposition. Of course, whether there is opposition or not, the final decision is mine.) Then I make the decision, with input from whoever cares about the decision. There are obviously limits to this practice; for example, I will not allow it for debtors and their attorneys for chapter 13 confirmation hearings, nor (probably) for any attorney whose client will be at the hearing in person. However, in this brave new world of expanding telecommunications, I expect the instances of telephone hearings will likewise expand at least incrementally. And that means that we – all of you and I – need to be open to the occasions when significant costs can be saved this way *but also* to the limitations of using telephones. We need to make sure that nothing significant is lost in the process of adjudicating matters by telephone, including the personal and social interplay among witness, attorney and judge, the dignity of and respect for the adjudicatory process, etc. So that means, if the issue comes up, don't hesitate to voice your approval for or concerns about conducting any hearing by telephone. But cf. F.R. Civ. P. 7032(a)(3)(B) &(C) (100 miles, or not available due to age, infirmity, incarceration, etc.) - does it make sense to require the parties to submit a transcript of a deposition when telephone testimony would provide so much more information (intonation, pitch of voice, etc.). Problem: what authorization to depart from the Rule? - Kelly Albers says his research says there is no such authority if the parties do not agree to the telephone hearing.

2. We are also conducting significantly more evidentiary hearings by video. We do a lot of video conference hearings with Las Cruces because of the acute shortage of space in the Las Cruces courthouse. Now the district has connected Roswell so we will also be doing hearings to and from there. (Note: we will still be conducting some hearings in Las Cruces and Roswell in person, particularly for longer trials.) There are as yet no court links between Albuquerque and Farmington, Hobbs, or Carlsbad, or any other cities or towns, for that matter. But it is possible to use non-court links, such as video facilities at schools and universities, law offices, business sites, Kinko's, etc. So consider these possibilities when we have final pretrial conferences and are talking about trial settings. Of course, some of the same considerations that apply to telephone hearings also apply to conducting video hearings. And there are others as well. I have been among a group of bankruptcy judges that are addressing this issue for the Administrative Office of the United States Courts. This past summer we, together with some AO and Federal Judicial Center personnel, held a series of meetings in Washington, D.C. to address the subject, put together some very helpful information, and compiled a "best practices and recommendations" report on both telephone and video hearings. I (with a lot of valuable input from my colleagues) prepared the part of the draft that deals with video hearings. That draft is available on my chambers homepage. It includes discussions of what is now happening in various bankruptcy courts around the country (the bankruptcy courts are clearly the leading edge of the federal courts in all types of technology), proposed rules, issues of the dignity of court proceedings, whether clients feel they are getting the sort of hearing they deserve, resources for further study and implementation, etc. The upshot of all of this is, as with telephone hearings, don't

hesitate to ask about having a video hearing if it will save you significant resources, and we will see what we can do. But also don't hesitate to voice your concerns about how a video hearing might adversely affect your client or the adjudicative process.

3. Sharing Fees:¹ 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; such an arrangement may almost be a prerequisite to conducting an economically viable state-wide debtor-representation practice. **However, note that § 504(a), with certain exceptions, prohibits the sharing of fees or reimbursements received under, inter alia, § 503(b)(2), which in turns refers to compensation paid to counsel for chapter 12 and chapter 13 debtors under § 330(a)(4)(B).** Disclosure is an additional and separate concern; that is, if you do such sharing, it may well need to be disclosed, whether you are chapter 12 or chapter 13 debtor's counsel or not. 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.)

4. As you know, BAPCPA now permits a bankruptcy judge to waive the filing fees for debtors in certain instances. I am generally hesitant to do that, partly because it means the trustee does not get paid even the pittance of \$60 to administer the case. However, in rare cases I have approved a fee waiver, as in the case of a recently divorced woman with three children, monthly expenses of somewhat over \$1,400 (how does she support three children and herself on that amount of money?), and monthly income of \$840. (And, by the time of the hearing, she told me that income figure had been reduced to something over \$400.) If you ever have any questions about what my standards are, feel free to ask, especially if you are a trustee. **I want especially to hear from the chapter 7 trustees about the issue of payment to BPPs in this context, and BPPs usefulness generally.**

5. Some comments on chapter 13 practice on 13W:

- A. Debtor's counsel might want to keep in mind the earned income tax credit ("EITC") as a source of chapter 13 plan income. For example, it is my understanding that a couple earning \$25,000 per year with two children may be entitled to up to about \$4,000. While the numbers in this example may be somewhat off, the idea

¹ NOTE: I have addressed this issue in previous Year in Review materials, but I had previously overlooked a portion of the statute that might effect how chapter 13 (and chapter 12) debtor's counsel do their jobs and get paid. So please read this paragraph again.

is still valid. The cutoff for EITC occurs currently at \$35m for an unmarried debtor with 2 kids and \$37m for a married couple with 2 kids.

- B. Keep in mind that if you do not object to an amended chapter 13 plan, even if you have objected to the original plan, you will likely not be notified of any further confirmation hearings, and will not be one of the parties that approves the form, and perhaps substance, of the confirmation order. **Note: this advice applies *only* if the proposed change in the plan affects the issue you raised in your objection.** For example, if your objection is to how your mortgage on the debtor's house is treated, and the plan is amended to provide that the debtor's car will be paid for through the plan, then the amendment does not affect your objection, and you have no obligation to refile your objection, and you will (or certainly should) continue to get notice of the final hearing, the right to sign off on the plan, etc. All this discussion does not mean that if you want to keep your spoon in the pot, you have to object to **the plan or** each iteration of the plan; rather, all you need to do is file a response that says something like you don't object to the (amended) plan but you do want notice of the hearings in connection with it and the chance to review any confirmation order.
- C. Despite the filing of fewer cases overall, the preliminary hearing dockets on Chapter 13 days are now getting more jammed, for a variety of reasons, including BAPCPA and the congeries of new issues that is raising, as well as more self represented parties as a percentage of filers. (The data on this is rather preliminary, and it appears that in any event, many of the self represented parties's cases are getting dismissed.) So we will need to keep it short on those dockets. As you all probably know, I will have reviewed the files on motions to dismiss. That may not be the case with confirmation hearings, in part because many plans have a plethora of objections filed and so a prehearing review is not particularly efficient. In consequence, when I ask debtor's counsel for the "confirmation issues", please (a) be prepared ahead of time (i.e., know what the issues are before the hearing so you don't find yourself looking at the objections to refresh your recollection – or learn for the first time – what they are), and (b) keep your

description to just a few words, if possible. I don't need a listing of each objection raised; I only need to hear about the big issues.

- D. And what is implied in the foregoing comments is that, so far, it seems that scheduling chapter 13 plan confirmations for a preliminary hearing first, including particularly BAPCPA cases, is working well enough to continue doing that. On the other hand, Judge McFeeley's policy for Albuquerque/Santa Fe/Farmington cases (at least as of the time of the preparation of these materials), is to schedule BAPCPA chapter 13 plan confirmations for final hearings. Given that most of the chapter 13 practitioners in this district practice before both judges, I hope you all will not hesitate to provide feedback to me about which system works best for you and your clients. And of course, that request for feedback also applies to any other aspect of our handling of chapter 13 cases, or to any aspect of anything we (or I) do or say. **Note: if a creditor has filed an objection to confirmation but does not appear for PH on confirmation, I will probably deny the objection (whether it is to valuation, interest rate, etc.).** On the other hand, if the creditor and debtor have an agreement or settlement about the one or more issues in a creditor's objection, they (or one of them) can read the agreement into the record and the debtor and creditor are bound by the deal. That is standard policy, as set out in YIR 2002 ¶ 20(f), repeated from YIR 2001. On the other hand, an agreement between the debtor and the creditor does not bind the trustee or any other party, so that if there turns out to be a final evidentiary hearing and, say, the trustee insists that the plan is not feasible with, say, a higher valuation of the collateral than is in the plan, I may side with the trustee and rule that the plan cannot be confirmed with the higher valuation number. So the creditor needs to appear at the final hearing to defend the settlement (including putting on testimony, if need be), or make sure that an agreed upon order is entered ahead of time with everyone including the trustee signing off on it, or at least get the trustee and other objecting parties to agree to the same terms that the creditor and the debtor have agreed to. (Note:

none of this discussion is intended to chill the practice of parties making deals; if that were to happen, we would all be much worse off, and the process would be much more expensive for debtors, and many more chapter 13's would fail. I still very much encourage parties to deal with each other and come to court with as much worked out as possible.)

6. Speaking of preliminary and final hearings, when we get a request from a debtor under BAPCPA to extend or impose the (no longer quite so automatic) stay because of one or more previously dismissed cases, we will do so on an expedited basis. Of course, you had better let us know you have this issue and need a hearing almost the minute you file the petition (*i.e.* **call us**); recall that the (final) hearing in connection with a request for an extension must be *completed* before the 30 days are up. We will conduct a preliminary hearing first to figure out what the factual assertions are and who the witnesses will be, and then set a final hearing shortly thereafter. And you will also need to notice out your request for an extension or imposition of the stay to those parties whom you want stayed, before the preliminary hearing. We will shorten the notice period for you (but probably not to less than the usual ten days plus three days for mailing) and give you a preliminary hearing date. But you need to act fast.

7. Adversary proceedings – we need to get these cleaned up quickly. So, for example, if you obtain an order in the main case approving a settlement in an adversary proceeding, don't forget to promptly file a judgment dismissing the adversary proceeding, or whatever. If you don't do that, Jill will call you to do that, and if you still don't submit a form of judgment, then either I will call you or we will set a presentment hearing and perhaps make you come to court even if you then submit the form of judgment.

8. Even before BAPCPA, the rising rates of pro se (self represented) filers had concerned me, not only because pro se filers slow down processing of cases and take much more of everyone's time in court, but also because without a good attorney representing them, the pro se parties may end up not getting what they are entitled to under the law. BAPCPA may have made this situation much worse. So I am thinking seriously about what I can do to get more people to at least consult an attorney before filing a petition. For example, on February 17 I appeared on the City of Albuquerque's television channel (Channel 16 – GOVTV), together with an attorney and with Judge Frank Sedillo, Chief Judge of the Civil Division of the Metropolitan Court for Bernalillo County, to talk about bankruptcy. Part of that discussion encouraged people to attend one of the State Bar/Bankruptcy Law Section sponsored free monthly programs, and to obtain a free initial consultation with a bankruptcy attorney, before filing. (That means that those of you who do initial free consultations are helping all the rest of us as well as helping potential debtors.) I also plan to talk about not using a bankruptcy petition

preparer if there is any possibility of hiring an attorney, and about using a chapter 13 plan to pay an attorney for a chapter 13 case. I probably have more leeway to do this than do the “debt relief agencies”, but I welcome any ideas you may have to address what could become an overwhelming problem for everyone in the system. Given the pervasiveness of BPP advertising, among other problems, I suspect it will take a fairly imaginative and wide-ranging campaign to make much of a difference. **In this respect, please respond to the e-mail that the Clerk’s office is sending out so we can find out what percentage of attorneys do initial free consultations. We will let you and everyone else know what the numbers are, but without disclosing the identities of who responded and what they said.**

9. Requests to appear by telephone: anyone can do this by email now, instead of just by fax, and it will count as a written request, BUT (1) put in the subject line the word “Telephone”, as in “Telephone Appearance Request” or something similar, (2) make sure you spell “telephone” correctly, (3) send the request so that it gets to us at least one business day before, or at least in plenty of time to make sure that we will get to the e-mail before the hearing starts (note: we don’t read all our e-mail the moment it hits our mail boxes), (4) make sure you put your phone number in the message, together with the hearing(s), including date, time, case number and case style, that you want to be called for, and (5) send the request to chambers, not to the Clerk’s office (and do not file your request as a pleading) and not to any one of us individually; viz., send it to starzynski@nmcourt.fed.us only. You can also use one e-mail to request to appear at more than one hearing – i.e., you don’t need to send in a separate e-mail for each hearing you want to appear at by telephone, but send us a **separate e-mail for each day** that you want to appear by telephone. Of course, if you wish to still send in your written request by fax, you may do that also, using our fax number (to be used for this purpose only): 505.348.2432. By the way, we do not send acknowledgments of such requests, by e-mail or fax or snail mail. So make sure that you keep a copy of that e-mail or fax or letter until after you have been called for the hearing at issue.

10. If you are submitting a default judgment in an adversary proceeding and asking for attorney fees, you will need to also submit an affidavit with time sheets attached. The affidavit can be extremely short – less than a page – and simply recite that you did the work or supervised it, that you reviewed the attached time sheets and they are accurate, and that they show that \$_____ in fees (\$_____), costs (\$_____), NMGRT (\$_____) and the filing fee (\$_____) were incurred. That whole process should take no more than ten minutes or so, especially if you have a form affidavit (see the preceding sentence). And you have an obligation to review the time sheets for accuracy anyway, even if you are just sending them to your clients for payment.

11. Keep in mind that if you have any comments, suggestions, complaints, etc. about how I am doing my job, or about anything else, you are welcome to drop by chambers, or send an e-mail or a letter, or communicate with us in any other way. And

that includes using the Clerk of Court or Professor Fred Hart at UNM Law School, if you want anonymity. See my chambers web page for details if you need them.

BAPCPA Webinar of 22 Sept 05 (ABI program of several BR judges around the nation speaking on BAPCPA issues_ - JSS Notes on chambers homepage (e.g., creditor's atty as a debt relief agency, dealing with utilities, keeping collateral without reaffirming, etc.)

ABI BAPCPA blog and Michael Barnett BAPCPA outline at www.abiworld.org - its free.

Read the local interim rules (e.g., credit counseling certificate required by Section 521(b) must be filed with petition according to Int LBR 1007(c)).

Want to talk about other issues not addressed here? - maybe a Town Hall meeting (but recall I am no longer CJ) - contact the BOD of the Section - about issues such as BPPs, etc.

HANDOUT re stats on fee waiver cases.

Need to request to appear by phone in writing (fax, e-mail [see ¶9 above], letter, hand delivery) even for continued hearings, even when I say at the first hearing "we will call you".

Do NOT "recycle" debtor signature pages (e.g., using the signature page the debtor signed for the petition or initial schedules for an amended schedule); this is a serious violation and if we notice it, you may well be subject to an order to show cause why you should not be sanctioned.