Having Thought About Private Matters: The Federal Court's Initial Response

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Having Thought About Private Matters: The Federal Courts' Initial Response

by

The Honorable J. Rich Leonard* 

In the Fall 2001 issue of the American Bankruptcy Law Journal, Professor Peter Alexander pointed out that remote electronic access to documents in bankruptcy cases alters the historical balance that existed in a world of paper files between public access and an individual's expectation of privacy. Using a hypothetical example, he graphically illustrated the ease with which personal data remotely retrieved from a case file could be used for nefarious purposes. He concluded that these competing interests must be reconciled quickly and suggested a process for soliciting input from advocates on all sides of the issue with rigorous public debate. Missing from this analysis was any recognition that thoughtful people within the federal courts had reached the same conclusion two years earlier, and that these individuals were attempting to develop an initial national policy for federal courts. In fact, such a policy was adopted in September of 2001, and the process that has been used is precisely the format suggested by Professor Alexander.

Part I of this Article documents those efforts and describes the basic policy approved by the Judicial Conference in the fall of 2001. Part II discusses the implementation issues, both current and those to be encountered in the future, that arise and must be resolved in the bankruptcy context. Although fascinating issues arise also in the implementation of the privacy policy in other areas (in particular in criminal cases), this Article will focus on bankruptcy.

I. DEVELOPMENT OF THE PRIVACY POLICY

A chance remark started this process. At the June 1999 meeting of the Judicial Conference Committee on Court Administration and Case Manage-

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ment, one of the district judges suggested that concerns over the privacy of federal court case files may be overblown, as the average case file contained little information of a sensitive nature. Since the Committee happened to be meeting in Wyoming, the Internet site of the local bankruptcy court (that had just started imaging all of its documents through the RACER program) was accessed and a case file downloaded at random. The Article III judges on the Committee were stunned at the level of personal detail they saw there. Social security and financial account numbers, property descriptions, identification of minor children, original signatures, employment information, addresses: the regular gist revealed in any bankruptcy filing suddenly seemed much more exposed when strangers examined it from a hotel conference room. A four-judge Subcommittee (that was soon expanded to eight with liaisons from four other committees with overlapping jurisdiction in this area) was designated, and the privacy policy initiative was launched.2

The Subcommittee spent the latter part of 1999 and the early months of 2000 gathering information. Among the many distinguished experts who shared their views were Professors Jeffrey Rosen of George Washington Law School and Karen Gross of New York Law School, Social Security Administration General Counsel Arthur Fried, and the President’s Chief Counselor for Privacy Peter Swire. After numerous meetings and conference calls to evaluate the information, the Subcommittee developed several policy options that could potentially form the basis of an electronic access privacy policy.3 These were presented to the Committee on Court Administration and Case Management in June of 2000, as well as to all of the liaison committees at

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2Formally known as the Subcommittee on Privacy and Public Access to Electronic Case Files, it was initially chaired by Chief Judge D. Brock Hornby, District of Maine. When Judge John W. Lungstrum, District of Kansas, succeeded Judge Hornby as chair of the Committee on Court Administration and Case Management (CACM), he also became chair of the Subcommittee. The other three original members of the Subcommittee from CACM were Judge Samuel G. Wilson, Western District of Virginia, Magistrate Judge Jerry A. Davis, Northern District of Mississippi, and Bankruptcy Judge J. Rich Leonard, Eastern District of North Carolina. One member from four other Judicial Conference committees then joined the Subcommittee: Judge Emmet Sullivan, District of Columbia, Committee on Criminal Law; Judge James Robertson, District of Columbia, Committee on Automation and Technology; Judge Sarah S. Vance, Eastern District of Louisiana, Committee on Administration of the Bankruptcy System; and Gene W. Lafitte, Esq., Committee on the Rules of Practice and Procedure.

3The overall policy alternatives considered included: the “no policy” option, leaving the issue to local courts and judges; the extension of existing access rules to electronic files, making them available electronically nationally in the same manner as paper files; the refinement of the contents of public files to better accommodate privacy interests; the provision of remote electronic access to only certain categories of documents; and the implementation of a “waiting period” between the filing of a document and its posting to the Internet. With regard to bankruptcy case files specifically, options included: requiring less information on petitions and schedules; creation of an “administrative file” that would be accessible to parties in interest but not to the general public; redaction of social security numbers and other account numbers; and amendment to 11 U.S.C. §107(b) to give judges additional authority to seal documents.
their summer meetings.

Further refining the policy options in light of comments, in November of 2000 the Subcommittee produced a document entitled "Request for Comment on Privacy and Public Access to Electronic Case Files" that identified all of the options still thought to be viable.\(^4\) When public comments concerning the Subcommittee's report were solicited, the response was overwhelming. Two hundred forty-two written comments were received from a spectrum of individuals, journalists, academics, investigators, data resellers, privacy advocates and bankers.\(^5\) In response to the magnitude and thoughtfulness of the comments, the Subcommittee held a public hearing in March of 2001. Fifteen individuals who had offered written comments were invited to provide additional oral remarks and to answer questions. The Subcommittee then met for a final time to consider the comments and issue a precise set of recommendations on the proposed policy. These recommendations were ratified without substantial change by the Committee on Court Administration and Case Management in June of 2001, and adopted by the Judicial Conference in September of 2001.\(^7\) This detailed chronology is set out to make the point that, although reasonable minds can certainly differ about the wisdom of the ultimate policy, the process through which it was developed has been both thorough and open to a degree rarely matched in Judicial Conference policymaking.\(^8\)

Before turning to the specific recommendations of the Committee dealing with bankruptcy records, the overall philosophy of the federal courts' policy deserves comment. Simply put, it represents a ringing endorsement of remote electronic access to court records in civil and bankruptcy cases. Its premise is

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\(^5\)Judicial Conference of the United States, Committee on Court Administration and Case Management, Subcommittee on Privacy and Electronic Access to Court Files; Notice of Request for Public Comment, 65 Fed. Reg. 67,016-03 (Nov. 8, 2000).


\(^8\)Apart from the rule making process where an opportunity to comment and public hearings are required, the only two recent issues, to the author's knowledge, on which a committee or task force of the Judicial Conference sought broad public comment and conducted public hearings were the proposed electronic citation system and proposed legislation to split the Ninth Circuit.

Similar issues have arisen in the state courts and the National Center for States Courts has established an information clearinghouse that collects information on comparable policymaking efforts by the states. This information is available at http://www.courttaccess.org (last visited Mar. 3, 2003).
that there must be consistent, nation-wide policies in the courts concerning public access to information in case files. Although local rules may be required to implement the policies, no justification was perceived for local variance in this area. The policy provides tools to litigants and their attorneys to protect sensitive information, so widespread notice of the availability of redacted disclosure must be provided. Except where noted, the policies apply to both paper and electronic records.

In two types of cases, the policy concludes that remote public access should be available only to the counsel and litigants involved in a particular case. The first is Social Security cases, where the district court sits in appellate review of the decision of the Social Security Administration. These cases involve a detailed examination of an administrative record that is itself confidential, and usually contains sensitive and detailed medical and psychological information. The Subcommittee perceived little public benefit in having these files available on the Internet, particularly when balanced against the significant intrusion into a claimant's privacy that would result.

Second, remote electronic access to criminal case records is not authorized at this time. The Subcommittee was concerned that remote electronic access could present serious law enforcement risks by identifying and endangering witnesses, victims or cooperating co-defendants. The Judicial Conference has indicated its intention to continue study in this area, and, since adoption of the policy, has authorized both remote electronic access in "high profile cases" and a limited pilot of remote electronic access to some criminal records in eleven courts. The Federal Judicial Center is involved in the design and evaluation of the pilot, and its conclusions will likely inform future policy in this area.

Three distinct requirements were established by the policy with regard to bankruptcy records. First, documents in bankruptcy cases should be made

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available to the public electronically to the same extent as in other civil cases, with the exception that certain personal identifiers should not be disclosed or should be partially redacted by the litigants. These identifiers are social security numbers, dates of birth, financial account numbers and names of minor children. Second, 11 U.S.C. § 107(b), the Bankruptcy Code provision dealing with protecting information in court files, should be amended to establish privacy and security concerns as a basis for the sealing of a document. Third, the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full social security number, but to display to the public only the last four digits. The rationale for each specific provision deserves comment.

Even the most ardent proponents of full electronic access had difficulty articulating a rationale for electronic access by the general public to unmasked personal identifiers. Most ultimately admitted that the appropriate purposes for which such personal identifiers could be used — to distinguish among persons with similar names in order to select the proper case file or to determine whether a particular transaction or relationship was correctly disclosed in the file — could be accomplished even with the modest omissions and redactions required under the new policy. On the other hand, disclosure of this kind of detailed information in our current climate can no longer be considered benign. Newspapers are replete with horrific anecdotes of individuals whose funds have been stolen or credit compromised by misuse of their personal information. The empirical evidence is more than anecdotal; it establishes that identity theft is one of the fastest-growing crimes in the nation. The decision not to allow court files to be used unwittingly for this purpose was an easy one.

In civil cases, the venerable principle that court documents are open and publicly available is largely a common-law doctrine, with (depending on the

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12Section 107(b) currently reads:

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.


circuit) some First Amendment backing. But the Supreme Court has also unequivocally stated that courts are the masters of their own records, and can take necessary steps to prevent abuse and injustice. The flexibility of this doctrine makes implementation of the privacy policy in the civil context rather straightforward.

Bankruptcy records are different. 11 U.S.C. § 107(a) expressly provides that “a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times and without charge.” The rule is not without exceptions. Under subsection (b)(1), fairly generous protection is provided to an entity with regard to “a trade secret or confidential research, development, or commercial information.” The problem comes with the narrowness of the protection provided to a “person” under subsection (b)(1), which protects only against a “scandalous or defamatory matter.” It is easy to envision litigants who legitimately need to protect information that is true and not scandalous, but the revelation of which could cause great harm. Imagine an abused spouse who, as a debtor, needs to keep her address and place of employment confidential; or a debtor who suffers from a chronic medical condition that, if deduced from his creditor matrix, might impact his employment; or a wealthy Mexican investor who, as a creditor, fears he may be kidnapped if his proof of claim reveals the amount invested along with his name and address. All these persons would be difficult to protect under the current statute. The privacy policy contemplates revised statutory language sufficiently broad to allow bankruptcy judges common-law flexibility akin to that of district judges to balance privacy interests against the presumption of public disclosure.

The third prong of the policy — that the court be authorized to continue to collect the full social security number — was a response to the pleas of court administrators that doing otherwise would endanger the integrity of several decades of court files indexed by the full number. With the frequency

16Although the Supreme Court has never definitively ruled on whether there is a right of access to court documents stemming from the First Amendment, several circuits have applied a First Amendment analysis to access to documents. In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 572 (8th Cir. 1988); Matter of Cont’l Illinois Securities Litigation, 732 F.2d 1302, 1309 (7th Cir. 1984); Publicker Indus. v. Cohen, 733 F.2d 1059, 1067 (3rd Cir. 1984).

17Nixon, 435 U.S. at 598.


19In In re I.G. Servs. Ltd., 244 B.R. 377 (Bankr. W.D. Tex. 2000), the court attempted to protect the identity of wealthy Mexican creditors who feared kidnapping and murder by allowing redacted proofs of claim to be filed containing only an account number and the name and address of counsel in order to avoid the otherwise mandatory public disclosure of § 107(a). This decision was reversed on appeal. In re Blackwell, 263 B.R. 505 (W.D. Tex. 2000).
of name changes in the United States today, the full number is the best means to uncover a repeat filer.\textsuperscript{20} And for an interested creditor or party who already legitimately has the full social security number, searching by that number rather than name is by far the most accurate method to determine if a particular person has a pending bankruptcy case. Finally, the PACER Service Center\textsuperscript{21} points out that daily it informs courts that a social security number transmitted to the national database is already associated with a case in another jurisdiction. Sometimes these cases represent repeat filers, but just as often they involve simple clerical mistakes that can be promptly corrected before any harm is done. Rarely, intentional deceptive filings are uncovered. No harm to individual privacy is inflicted and substantial protection of the integrity of records is achieved by allowing the court to collect but not disclose the full social security number.

II. IMPLEMENTATION

In civil cases, implementation of the privacy policy has been straightforward, achieved essentially through adoption by the district court of a recommended local rule authorizing the elimination or redaction of designated personal identifiers.\textsuperscript{22} The bankruptcy context is much more complex. In fact, implementation of the policy could be as difficult as its development. As is often the case, the devil is in the details.

In bankruptcy cases, the personal identifiers that are to be deleted or redacted are now required to be disclosed by an interwoven matrix of statutes, rules and forms in order to have a legally-sufficient filing. In analyzing the various provisions, the judges tasked with implementation breathed a sigh of relief when they realized that most of the requirements come not from statutes but from rules and forms over which the judiciary has more control.\textsuperscript{23} Central to the implementation issue is Bankruptcy Rule 1005, which

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\item \textsuperscript{20}Written comment of Stuart K. Pratt, Vice President, Government Relations, Associated Credit Bureaus, Inc. (Jan. 26, 2001) at http://www.privacy.uscourts.gov/text.htm\#225 ("There are approximately 3 million marriages and divorces each year leading to a similar number of last names which change.").
\item \textsuperscript{21}PACER (Public Access to Court Electronic Records) is an electronic public access service that allows users to obtain case and docket information from the federal courts over the Internet. A detailed description of PACER is available at http://www.pacer.uscourts.gov/pacerdesc.html (last visited Mar. 3, 2003).
\item \textsuperscript{22}Memorandum from Judge John W. Lungstrum, Chair, Judicial Conference Committee on Court Administration and Case Management, Implementation of Judicial Conference Policy on Privacy and Public Access to Electronic Case Files (Mar. 29, 2002) (on file with the Administrative Office of the U. S. Courts).
\item \textsuperscript{23}Only two statutes require the disclosure of social security numbers. 11 U.S.C. § 110(c)(2) (2000) requires a petition preparer to disclose his or her individual social security number on prepared documents. 11 U.S.C. § 342(c)(2000) requires a debtor to include the social security number on any notice given by the debtor to a creditor. Although proposed legislative changes to both of these statutes have been approved by the Judicial Conference Committee on Court Administration and Case Management to con-
requires that the caption of a petition contain the "title" of the case, and which defines "title" to include "the name, social security number and employer's tax identification number of the debtor and all other names used by the debtor within six years before filing the petition." Bankruptcy Rule 9004(b) amplifies the problem, requiring the "title" of the case to appear on "each paper filed." Thus, under the current rules, a debtor's full social security number is required to appear on every filing. A number of official forms also mandate the disclosure of personal identifiers.

Moving with commendable speed, in January of 2002, the Advisory Committee on Bankruptcy Rules promulgated proposed amendments to rules and forms to implement the privacy policy. The proposals sought to amend Bankruptcy Rule 1005 to require only the last four digits of a social security number or tax identification number to appear in the "title," and also to change the disclosures required by Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C and 19. Public comments concerning the proposed rule changes were due by April 22, 2002.

On April 12, 2002, the Advisory Committee's Subcommittee on Privacy and Public Access held a focus group meeting with representatives of various interested groups to discuss the proposed amendments. A unifying chord in all of the presentations was grave concern about the difficulty and possibility of misidentification if only the last four digits of social security numbers were made available to legitimate creditors. The Internal Revenue Service convincingly demonstrated that it had virtually no ability to search its database form to the privacy policy, neither presents a serious impediment to its implementation. With regard to § 110(c)(2), an argument can be made that a petition preparer choosing to engage in a proprietary activity in the bankruptcy courts has less of a personal privacy interest than a litigant. With regard to § 342(c), the statute expressly states that failure of the notice to include the information does not invalidate the legal effect of the notice. Thus a notice with a redacted social security number would accomplish the intended purpose.


to find a particular record based solely on the four terminal digits.\(^{27}\) One of the creditor's groups presented an analysis in which the most common name in a huge national database (Will Smith) appeared 22,583 times, and in 6,615 cases the terminal four digits were repeated. In six clusters, nine separate Will Smiths shared the same terminal four digits.\(^{28}\)

The proposed rule and form amendments forwarded by the Advisory Committee on Bankruptcy Rules to the Standing Committee on Rules of Practice and Procedure took these concerns into consideration. Bankruptcy Rule 1005 would continue to be modified to require the "title" to include only the last four digits of the social security number, but the change was deleted with regard to the employer identification number so that the entire number will continue to be provided. More importantly, amendments to Bankruptcy Rules 1007 and 2002 (that had not been circulated for comment) were now proposed. Rule 1007 would be amended to require the debtor to submit a verified statement of his or her full social security number to the court to be entered into the court's internal database. However, the full number would not appear in the case file, either on the Internet or at the courthouse. This change would allow an entity already legitimately in possession of a social security number to do a search based on the entire number. Rule 2002 would also be amended to require the clerk to place the full social security number on the notice of the § 341 meeting served on creditors, but to show only the redacted number on the notice that appears in the case file. These amendments were approved by the Standing Committee on Rules of Practice and Procedure and by the Judicial Conference at its September 2002 meeting.\(^{29}\) Assuming approval by the Supreme Court and no objection by Congress, they are scheduled to take effect December 1 of 2003.

This prompt move to modify the rules and forms largely satisfies prongs one and three of the privacy policy discussed above as it applies to bankruptcy courts: certain personal identifiers will be deleted and redacted and, while the full social security number will be collected, it will not be disclosed. The final recommendation of the policy - that 11 U.S.C. § 107 be modified to allow bankruptcy judges to explicitly take privacy concerns into consideration when limiting access to documents - has not taken such a clear path. Obviously, congressional action is required, and so long as the possibility of a

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\(^{27}\)Letter from David D. Auffhauser, General Counsel, Department of Treasury, to Peter McCabe, Secretary, Committee on Rules of Practice and Procedure (Apr. 24, 2002) (on file with the Administrative Office of the U.S. Courts).

\(^{28}\)Letter from Stuart K. Pratt, Vice President, Government Relations, Consumer Data Industry Association, to Advisory Committee on Bankruptcy Rules (May 20, 2002) (on file with Advisory Committee on Bankruptcy Rules, Subcommittee on Privacy and Public Access).

massive bankruptcy reform bill looms, there has been little ability to tinker with provisions of the current statute. Nonetheless, the Judicial Conference Committee on Court Administration and Case Management has approved draft language to modify § 107, and the Legislative Affairs Office continues to seek an appropriate legislative vehicle to procure its passage. The suggested language is included in a new subsection (c) dealing with individuals and has two parts. The first allows the court to protect a person with respect to any "means of identification" as defined by the Identity Theft and Assumption Deterrence Act of 1998. This statute contains an exhaustive list of every kind of personal identifier whose misuse could cause harm. The second prong allows the court to protect a person with respect to "information that could cause undue annoyance, embarrassment, oppression or risk of injury to person or property." This familiar standard is derived from Rule 26 of the Federal Rules of Civil Procedure, and provides the same basis for protecting information in bankruptcy cases as in other civil cases. This provision, if adopted, would give bankruptcy judges expanded discretion to tailor privacy protection to the legitimate requirements of a particular case.

A fair approach is to return to Professor Alexander's hypothetical to see if any of the changes embodied in the courts' new privacy policy would alter the result he posits. In his example, a ne'er-do-well randomly locates a chapter 13 debtor in his hometown. He finds her address, the names and ages

30Legislation intended to dramatically reform the bankruptcy system has been proposed in the 105th, 106th, and 107th Congresses. See Consumer Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998); Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. (1999); Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001). Although the passage of each of these bills has at times appeared certain, the past three Congresses have adjourned without enacting bankruptcy reform legislation into law.

31Congress's inability to resolve the impasse over comprehensive bankruptcy reform has stalled legislative action on other bankruptcy issues that are important and noncontroversial. For example, as bankruptcy filings have skyrocketed over the past decade, provisions authorizing new judges for overwhelmed bankruptcy courts have become ensnared in the reform legislation, effectively blocking their passage. A provision that would make Chapter 12 a permanent part of the Bankruptcy Code has met a similar fate, resulting in repeated temporary extensions. See, e.g., Protection of Family Farmers Act of 2002, Pub. L. No. 107-377, 116 Stat. 3115 (2002) (extending Chapter 12 for the six-month period beginning on January 1, 2003).

32The draft language was approved by the Judicial Conference Committee on Court Administration and Case Management at its mid-year meeting, June 3, 2002. The Committee determined that the proposed amendment to § 107 fell within the original privacy policy approved by the Judicial Conference, and resubmission for approval of more precise language was not necessary.


34These include the debtor's or other person's "(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number; (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; (C) unique electronic identification number, address, or routing code; or (D) telecommunication identifying information or access device . . . ." 18 U.S.C. § 1028(d)(4)(A)-(D).

35Alexander and Slone, supra note 1, at 437-39.
of her minor children, her social security number and account numbers at an identified credit union. He discovers that she owes a great deal of money to a local oncologist for medical services. Armed with this information, he attempts to extort money. First, he threatens to reveal her medical history to her employer. When this does not work, he drops a suggestion that her minor children whom he identifies by name and age and a guess at their elementary school might come into harm's way.

As a starting point before turning to the privacy policy, it is important to focus on how our ne'er-do-well obtains access to this information. Remote access to federal court data is not anonymous. Instead, a proposed user must register with the PACER (Public Access to Court Electronic Records) Service Center and obtain a log-in and password and set up a billing account. Although the first $10 of records downloaded in a calendar year (calculated at 7 cents per page) is free, amounts after that are billed quarterly. Equally important, an electronic footprint of each user who accesses any file is created. Although this may not prevent harm, there is some deterrent effect to misusing data from a federal court file when access can be traced to a particular password.

Turning to the policy itself, when all of its provisions are in place, much of the misused information would not be available. The debtor's name and address would still appear in the case file, but her social security and financial account numbers would be redacted. Names of the debtor's minor children would not appear, so specific threats by name would not be possible. The existence of the debt to the oncology clinic may or may not be available, depending on whether the debtor and her lawyer took advantage of a broadened § 107 and asked that it be protected from disclosure as causing "undue annoyance, embarrassment, oppression or risk of injury to person or property." If, as the hypothetical assumes, the debtor had successfully kept her medical condition confidential for fear of losing her job, presumably she would take this modest step to protect this sensitive information from disclosure in her file. The most frightening aspects of the hypothetical — the threats to debtor's children and employment — would be substantially mitigated, and so perhaps a significant benefit would result from the new privacy policy.

Although in no way intended to minimize the privacy concerns under discussion, it is also critically important to note the remarkable advantages

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37 Obviously, this procedure is insufficient to deter a person who has already appropriated the personal identifiers of another person from obtaining a PACER password under a false identity. Nonetheless, the absence of anonymity in accessing federal court records does provide some, albeit unmeasurable, protection.
that come with remote public access that underscore the privacy policy's enthusiastic endorsement. As more records of the bankruptcy courts go online everyday, many of these advantages are just beginning to be understood. Several are becoming clear.

First, geographical proximity to the courthouse is becoming less important. Federal courts are not local institutions, and in many parts of the country, litigants, lawyers and citizens find themselves tens or hundreds of miles away from the nearest courthouse. Historically, those closest have enjoyed the advantage: in filing, in monitoring cases and in media coverage. Particularly when paired with electronic filing, this historical advantage is largely disappearing. A lawyer equipped with a password and laptop can review or file a document from anywhere in the district, nation, or world. A newspaper reporter on the other side of the state can read an opinion at the same time as the hometown press. A client can monitor developments in a case without traveling to the courthouse or contacting an attorney.

Second, with remote electronic access to bankruptcy files, the judicial process is perceived to be (and may in fact be) fairer because of the ability of interested parties to monitor it. For example, in the seven months following filing of the Enron case in the Southern District of New York, 6.7 million pages of documents were downloaded through the PACER system.\(^{38}\) Obviously, former employees, creditors, stockholders and others located in Texas and elsewhere are better equipped to follow developments in the case as a result of electronic access to the case file than was ever possible in a world of paper files. In a small town example, the "generous" offer of an insider to buy an encumbered parcel of the Chapter 11 debtor's property for the amount due on the loans secured by the land was upset by an unsolicited offer of twice the amount from a solvent neighbor following the case on the Internet. Prior to remote electronic access, it is unlikely the neighbor would have traveled the one-hundred miles inland required to scrutinize the paper file, and as a result, the unsecured creditors would have gone unpaid, instead of receiving a healthy dividend.\(^{39}\)

Finally, inside courts and out, work proceeds more efficiently through electronic access to bankruptcy files and information. Repetitive questions about setting and continuing hearings, receipt of filings, copies of documents, response times and a thousand other inquiries that form the gist of court processes can now be answered quickly and accurately on-line. Lawyers who have undergone the difficult transition to electronic files and filing are begin-


\(^{39}\) This occurred in one of the author's cases, In re Paramount Homes, Inc., No. 00-07634-8-JRL, in 2000.
ning to report significant savings.\textsuperscript{40} Court administrators opine that they are staying abreast of the historic increase in filing rates only because of the increased efficiencies that come with electronic files and the remote public access they permit.\textsuperscript{41} The challenge is to retain these advantages as the federal courts endeavor to further refine the protections provided for the legitimate privacy concerns of the citizens for whom the bankruptcy courts are often the only resort.

CONCLUSION

Sensing that remote electronic access to court documents may change the historical balance between the availability of such information to the public and the litigants' expectations of privacy for the information the documents contain, the federal courts have forthrightly examined the issues and developed a national policy that provides guidance. In the area of bankruptcy, implementation of those aspects of the policy within the control of the judiciary are underway, with new rules and forms likely to become effective in December of this year. The provisions that require congressional action are being vigorously pursued. With the policy comes a recognition that the questions faced are novel and fluid, as all federal courts are implementing new electronic case management and filing systems in the context of rapidly changing technology and legislative enactments.\textsuperscript{42} The courts have commit-

\textsuperscript{40}PEC SOLUTIONS, INC., ELECTRONIC PUBLIC ACCESS FEE IMPACT STUDY (June 21, 2001) (on file with the Administrative Office of the U.S. Courts).

\textsuperscript{41}Electronic Access to Bankruptcy Courts Boon to Public, supra note 38, at 2 (quoting Kathleen Farrell, Clerk, U.S. Bankruptcy Court, S.D.N.Y., "I can't imagine how we'd be handing the crush of these cases if we were not using electronic case management.").

\textsuperscript{42}On December 17, 2002, President Bush signed into law the "E-Government Act of 2002," Pub.L. No. 107–347. Several provisions pertain to the judiciary. First, each court is required, by April 16, 2005, to establish and maintain a website containing contact information for the court, local rules and standing orders, rules of individual judges, docket information for cases, and the substance of written opinions whether intended for publication or not. By April 16, 2007, the courts must provide website access to all documents that are filed with the court electronically or converted to electronic format. The statute also requires that federal rulemaking be used to develop rules to protect privacy and security concerns stemming from the availability of electronic documents. These provisions should cause the bankruptcy community little concern. Virtually every court already has a website that contains the required information, or can do so with slight modification. By 2007, the vast majority of all bankruptcy courts will have converted to the CM/ECF system, and will have documents electronically available to the public through PACER. Finally, we have already used the rulemaking process to adopt rules protecting privacy that are due to become effective December 1, 2003.

Slightly more troublesome is a provision of the statute added at the eleventh hour with no notice to the courts that requires that, if the rules to protect privacy allow the redaction of information, the filer must be provided the opportunity to file an unredacted copy of the document maintained by the court under seal. This provision became effective on April 16, 2003, and the district courts who implemented the privacy policy by local rule have been advised to amend their rule to be consistent with the statute. Memorandum from Judge John W. Lungstrum, Chair, Judicial Conference Committee on Court Administration and Case Management, Effect of E-Government Act on Implementation of the Judicial Conference
ted to remain watchful, and in some areas (such as criminal cases) have promised future refinements. Although no one is sanguine that all of the issues have been resolved, a solid framework through which future questions can be addressed has been established.

Policy on Privacy and Public Access to Electronic Case Files (April 2, 2003) (on file with Administrative Office of U.S. Courts). This provision has no applicability to bankruptcy courts prior to December 1, 2003, when the national rules and forms permitting the submission of certain partial personal identifiers will become effective, assuming no adverse action from Congress.

Although a baffling provision, it is not likely to cause much difficulty in implementation of the privacy policy for bankruptcy cases. The new rule requirements and corresponding form effective December 1, 2003 requiring only partial personal identifiers are not inconsistent with the statute. If a filer wants to file a second version containing complete identifiers, the court is required by statute to take it and keep it under seal. However, it is difficult to imagine a circumstance in which a filing party would choose this course of action. Having protected a client's privacy by providing only partial personal data identifiers on the required forms, what purpose would then be served by this second filing under seal? Thus this provision of the statute is likely to cause little difficulty after December 1, 2003.