

NATIONAL CONFERENCE OF BANKRUPTCY JUDGES

MEMORANDUM OF THE TASK FORCE ON COST CONTAINMENT RE CLERKS' OFFICES CONSOLIDATION DATED JUNE 21, 2011

I. INTRODUCTION

At the mid-year meeting of the National Conference of Bankruptcy Judges ("NCBJ") held on April 5, 2011, Randall L. Dunn, President of the NCBJ, appointed a task force to report and make recommendations to the membership of the NCBJ with respect to certain cost containment measures proposed to United States courts, specifically: 1) a proposal to mandate consolidation of district court and bankruptcy court clerks' offices; and 2) a proposal to eliminate Bankruptcy Appellate Panels. The following judges were appointed to serve as members of the task force: Joan Feeney (Chair), Colleen Brown, Marian Harrison, Robert Nugent, Pamela Pepper, Barry Schermer, and Mary Walrath. The task force consolidation subcommittee is comprised of Colleen Brown, Robert Nugent, Pamela Pepper, and Mary Walrath. The consolidation subcommittee was primarily responsible for writing this report which includes three appendices, Appendix A, B, and C.

II. SUMMARY OF NCBJ POSITION REGARDING CLERKS' OFFICE CONSOLIDATION

The NCBJ opposes centrally- mandated consolidation of the clerks' offices of the

United States District Courts and the United States Bankruptcy Courts as a cost containment measure. Instead, the NCBJ's position is that bankruptcy courts and district courts consider, on a case-by-case basis, whether consolidation, an alternative cost containment measure (such as sharing of resources or some other form of collaboration), or maintenance of the status quo is the most effective way to contain costs. As set forth in the following sections of this report, a number of reasons support this position.

First, as a matter of law, consolidation of clerks' offices can be accomplished only by consent of each bankruptcy court and district court considering consolidation of clerks' office's functions, and is subject to the approval of the Judicial Conference of the United States and Congress.

Second, the experiences of bankruptcy courts and district courts which have consolidated their clerks' offices have varied. In some jurisdictions, consolidation has been successful; in others, consolidation has failed and been detrimental to the merged courts. In those courts where consolidation was successful, success resulted from the confluence of a number of positive factors present in local court culture: excellent relations and cooperation among judges, clerks, and court staff; small court size; and cross-training of staff. In those jurisdictions where consolidation failed, a number of factors were present: large caseloads, conflicts in personalities, and lack of mutual respect and collegiality. Failed consolidation resulted in a number of drastic consequences to bankruptcy courts: inefficiencies in providing services to the bar and

public; increased costs; loss of control and oversight over budgeted funds, employees, and governance of the court. Failed consolidations also had the effect of further exacerbating strained relations between district courts and bankruptcy courts.

The proper functioning of consolidated clerks' offices, whether full or partial, depends primarily on mutual respect and cooperation among judges, clerks, and staff. Only where there is a culture of cooperation between courts will consolidation be likely to succeed. Accordingly, consolidation should be pursued as a cost containment measure after an in-depth investigation of the advantages and disadvantages of a merger and the conclusion by the constituencies of both courts, judges, clerks, and staff, that consolidation is the best option for both the district court and bankruptcy court in a particular jurisdiction. It is important that courts considering consolidation be assured that changes in the identities of judges, clerks, and staff will not change the culture of cooperation, collegiality, and respect which are prerequisites to successful consolidated operations. Any agreement to consolidate should be the subject of a thorough, detailed, written agreement between the court partners, entered into voluntarily without undue pressure on any party.

III. STATUTORY FRAMEWORK

The legislative history to the Bankruptcy Reform Act of 1978 indicates that when the bankruptcy court clerks' and district court clerks' offices were merged under the Bankruptcy Act of 1898, bankruptcy judges often lost control over their clerk to

the district judges who would require that they work on district court matters, such as processing criminal cases. H.R. Rep. No. 95-595, p. 15. Therefore, the Bankruptcy Code initially provided that “[e]ach bankruptcy judge may appoint a secretary, a law clerk, and such additional assistants as the Director of the Administrative Office of the United States Courts determines to be necessary.” 28 U.S.C. § 156(a). Under that provision, many bankruptcy courts hired clerks of court to oversee the bankruptcy court clerks’ office.

The Bankruptcy Code amendments in 1984 added § 156(b), which expressly provided that the bankruptcy judges for a district, upon certification to the judicial council of its circuit that the number of cases warranted it, could hire a clerk of court who would have the power to hire deputies as needed (with the approval of the bankruptcy judges and the Director of the AO). See Pub. L. 98-353, 1984 HR 5174. In 1986, § 156 was amended to add subsection (d) which provides that:

(d) No office of the bankruptcy clerk of court may be consolidated with the district clerk of court office without the prior approval of the Judicial Conference and the Congress.

See Pub. L. 99-554, 1986 HR 5316. Congressional approval was made a prerequisite to any consolidation because of the occasional conflicts between the two clerks, although consolidation was not absolutely prohibited, in light of the possible cost benefits which might be realized by a merger. 132 Cong. Rec. S 5640 (May 8, 1986).

The requirement that the bankruptcy court consent to a consolidation (whether

formal or informal) of its clerks' office is emphasized in the Guide to Judiciary Policy.

"The voluntary consent of both courts is necessary before any combining or merging of functions between district and bankruptcy court clerks' offices, whether or not the combining or merging of functions constitutes a 'consolidation' under 28 U.S.C. § 156(d)." *Id.* at § 220.10. "The consent of each court will be determined by using local governance procedures for court decisions." *Id.* at § 220.20. "If a dispute arises with respect to the voluntariness of a particular combination or merger of functions between the clerks' offices, the dispute will be resolved by the judicial council of the circuit." *Id.* at § 220.30.2.

The AO's Office of General Counsel, in an opinion dated December 28, 1990, concluded that a partial consolidation or sharing of administrative support services between the district court and bankruptcy court clerks' office was permissible without Judicial Conference and congressional approval under § 156(d).

IV. PROCEDURE TO CONSOLIDATE/DE-CONSOLIDATE

A. To Consolidate

As noted, the first requirement for consolidation is the consent of the bankruptcy court and the district court as determined by the respective court's governance procedures. The courts then submit a plan of consolidation to their Circuit Judicial Council for approval. If approved, the plan is then submitted to the Judicial Conference's Court Administration Committee, which typically consults with the

Committee on Bankruptcy Administration. If approved, the plan would be submitted to the full Judicial Conference. If the Judicial Conference approves the plan, it would be submitted to Congress for final approval (presumably through the Judiciary Committee).

B. To De-Consolidate

There are no direct guidelines on de-consolidation. However, based on experiences with those courts that have de-consolidated, the NCBJ task force subcommittee believes that the simple withdrawal of consent by the bankruptcy court to consolidation appears to work. One bankruptcy court sent a letter to its Circuit Judicial Council withdrawing its consent. Because of the lack of definitive procedures, however, there have been efforts by district courts to oppose de-consolidation. As a result, the process of de-consolidation could be delayed. (In one district, it took almost a year.)

V. 1995 STUDY ON CONSOLIDATION/SHARED SERVICES

The AO commissioned a study by the National Academy of Public Administration (“NAPA”) of existing and alternative models of administrative organization in the district and bankruptcy courts. A summary of that report and its conclusions is attached as Appendix A; the full report is available at http://jnet.ao.dcn/Reports/Court_Management/NAPA.html. At that time, 1995, NAPA reported that only three districts (ID, MOW, and TXS) had consolidated district

and bankruptcy clerks' offices and two districts (ARE and ARW) had one bankruptcy clerks' office. The NAPA report concluded that increased sharing of services was inevitable (as budget cuts would ultimately surpass each separate unit's ability to economize and become more efficient). However, it noted that cost-savings resulting from shared services is a matter of perception only because there is no hard data and probably could not be such data given the diversity of court units (size, geography, use and skill levels of specific staff) and because of the need to analyze the quality of service provided in addition to its cost. It opined that sharing would not work if forced from above, but required the commitment and cooperation of all the sharing units. The most significant impediment to sharing is the belief that the "providing" unit will give its own needs priority and the "receiving" unit will not be well-served. In the bankruptcy court context, this is exacerbated by the suspicion of bankruptcy judges that their needs will not be given priority, borne of the experiences they had when budgets were centralized.

VI. SUMMARY OF BANKRUPTCY COURTS' EXPERIENCES WITH CONSOLIDATION

The following chart shows the seven bankruptcy courts which have experience with consolidated clerks' offices. Four of them continue to operate with a consolidated clerks' office and three have de-consolidated.

<u>District</u>	<u>Consolidation Date</u>	<u>Current Status</u>
-----------------	---------------------------	-----------------------

D. Idaho	July 1985	Consolidated
W.D. Missouri	1985-86	Consolidated
S.D. Texas	Approximately 1986	Consolidated
D. D.C.	May 2006	Consolidated
W.D. Texas	1978	Separate

(Note: The Western District of Texas did not create a separate bankruptcy court clerks' office upon enactment of Bankruptcy Code but did so effective August 1, 1993).

E.D. Pennsylvania	November 1985	De-consolidated Oct. 2, 1995
S.D. W. Virginia	February 1997	De-consolidated 2004

Members of the consolidation subcommittee spoke with at least one bankruptcy judge who is either currently on the bench in each of these districts or who was on the bench during the consolidation and/or de-consolidation process.

A. When it Worked

In the four courts where consolidation is still in place, the bankruptcy judges seem generally pleased with the way it is working, though almost universally they would like more input with respect to the hiring of staff who process bankruptcy cases and the formulation of the courts' general policies. Unique factors played into the decision to consolidate and led to the consolidation being successful. The driving force behind consolidation in one district was to save money and take advantage of the economies of scale in place in the much larger district court. The transition to a consolidated clerks' office in that case was gradual, with the initial sharing of

administrative services. In another district, the impetus was the embezzlement of trust funds by two bankruptcy trustees which the judges felt was due to a lack of adequate supervision by the bankruptcy court clerks' office. In a third, consolidation occurred when the bankruptcy court was overwhelmed with case filings (even a circuit court judge was sitting in bankruptcy court to help manage the huge case load), and bankruptcy judges had little time to attend to the administrative side of the court. In yet another district the consolidation resulted from a focus on reducing costs, particularly through a reduction in personnel in the areas of training, IT, HR, and procurement. The consolidated clerks' office reduced duplication in top-end administrators and resulted in administrative efficiencies in the targeted areas. In all instances, the bankruptcy judges voluntarily consented to consolidation and have found it to be cost-efficient.

Factors that have contributed to the success of consolidation in those courts include: (1) participating in court governance, (2) fairness in allocation of resources, (3) the personalities involved, (4) the size of the district, and (5) cross-training of personnel.

In one district, there was success in consolidating judicial governance so that all judges function as a governing "board" of the court and make decisions as a group. No judge's vote counts more because of status (Article III vs. Article I). In another of the districts, the chief judges of all courts meet once a week and all judges meet every two months. All of the judges work on all projects - bankruptcy judges do not simply resolve bankruptcy court issues. In districts where consolidation worked, resources

were generally allocated in a fair way that did not prejudice the bankruptcy court. Input into resource allocation was important, formally or informally.

In another district, the judges all share facilities. While each has a “dedicated” courtroom, they all use each other’s courtrooms whenever necessary. A close relationship among the judges enhances their ability to work collegially and as a single unit, without regard to duration of appointment. In one district, most of the judges (Article I and Article III) were friends before taking the bench. While the judges occasionally disagree on issues, they are able to work through those disputes without resorting to hierarchy.

In one district the personality of the district court clerk was critical: he understood the needs of the bankruptcy court, treated the bankruptcy judges with respect, and was totally fair in all of his dealings with all the judges in the district. After his death, that attitude and vision persisted in the consolidated clerks’ office, and consequently, consolidation still works very well there. In one district, the consolidation took place before any of the current bankruptcy judges took the bench so that they all came on the bench with the expectation of a consolidated clerks’ office. Most judges and staff there now do not remember – or never knew – what it was like to have separate clerks’ offices.

In the smaller consolidated districts, there is a strong sense that having a small number of judges has contributed to the success of the consolidated clerks’ office. In one of the districts, there is only one bankruptcy judge. In another, there are few judges

of any type (2 bankruptcy judges, 2 district court judges, 2 circuit judges, and 4 magistrate judges). In one of the districts, the arrangement works due to necessity: the district covers a wide geographic area, and by working together, they are able to accomplish more than they could in isolation. Another key to success which was mentioned is that all staff are cross-trained: each employee is capable of doing his/her job in either the bankruptcy court or the district court. As a result, there are no instances where the district court tasks get priority over bankruptcy court tasks. This includes IT or other administrative needs.

Even in the districts where consolidation has worked very well, however, the bankruptcy judges are very quick to observe that they do not advocate for universal consolidation of clerks' offices and emphasize the uniqueness of their situations.

B. When it Did Not Work

The bankruptcy courts in each district that de-consolidated did so because they found that consolidation had impeded their efficiency, increased their operating costs, reduced their autonomy, and/or diminished the quality of services they were able to provide to court users.

Some had consolidated at a time when the bankruptcy court was extremely busy and believed consolidation was an excellent way to give bankruptcy judges more time to focus on managing their enormous case load. Another district consolidated after successfully sharing services. In that case, a written agreement was reached between the district court and the bankruptcy court for consolidation, which specifically

required unanimous consent of the members of the governing board before funds allocated to one unit could be transferred for the benefit of another unit. The agreement also stated that there was to be a trial period and if there was a diminution in the quality of services to either the bankruptcy or district court users, then the consolidation would be terminated. Nonetheless, the district court pursued a formal consolidation without notice to the bankruptcy court and the official consolidation occurred without the voluntary consent of the bankruptcy court.

The anticipated efficiencies that could be gained from consolidation (including shared IT and HR functions) in those districts either did not materialize or were offset by the problems resulting from consolidation. One district reported that staffing costs actually increased after consolidation because the bankruptcy clerk was replaced by 2 or 3 chief deputy clerks whose combined salaries were more than the bankruptcy clerk's salary had been. In one district, the bankruptcy clerks became more efficient (but not the district clerks) under the consolidation. The result was that bankruptcy staff performed district clerk functions but no staff reductions occurred overall. Another district reported that the IT budget and staff were totally consumed by probation and pretrial services making it difficult for the bankruptcy court to operate. Particularly troubling was the bankruptcy court's lack of access to its own allocated funds. Often, the district court used bankruptcy court funds and did not provide services to offset this loss.

During consolidation, most of the bankruptcy courts who chose to de-consolidate

consistently lacked the resources needed to operate effectively, particularly with respect to procurement, hiring, and space. For example, when ECF upgrades were made in one district, the district court got preference despite the bankruptcy court's greater needs. In another district, the district court took all the new equipment and gave the bankruptcy court only the equipment the district court discarded. When the offices de-consolidated, the district court took the position that all the court equipment purchased through the consolidated clerks' office belonged to the district court. (The bankruptcy court needed and got a special allocation to buy itself computer equipment after the de-consolidation.) In another district, the district court took the \$25,000 in funds allocated for outfitting a new bankruptcy judge's chambers and gave the bankruptcy judge used furniture and equipment.

Another example of difficulty was in staff hiring. In one district, the district court conducted all interviews and made all hiring decisions. If a job applicant was impressive, the district court hired him/her to handle district court tasks; the bankruptcy court was only given applicants the district court did not want or were given problem personnel that the district court clerk did not want.

Allocation of space was also a problem. In one district, the district court clerk failed to allocate sufficient space to the bankruptcy court, resulting in bankruptcy files being stored in boxes in the internal hallways and even in the public hallways. The district court also refused to allow the bankruptcy court practitioners to use attorney conference rooms or mediation rooms, even when they were empty.

In some instances, consolidation did not work because there was a very strong difference of opinion and contrasting management styles of the two chief judges. In contrast to those districts where consolidation worked, in districts where it did not, the bankruptcy judges were not involved in court governance. In one district the bankruptcy judges were never invited to judges' meetings at all.

The personality of the shared clerk was also significant. In one district, the clerk was described as an empire builder interested in his own advancement. Because the district court had the "power," the clerk gave it priority over the bankruptcy court. This led to a lack of trust among the judges (and senior staff) which was detrimental to the work environment, diminished collegiality and candor, and ultimately reduced communication and productivity.

The bankruptcy judges in all three of these districts are persuaded that de-consolidation was absolutely necessary and has resulted in more cost-effective operations, more autonomy, and better service to the bankruptcy bar and the public. In one district, the bankruptcy court conducted a survey of the bar after de-consolidation which revealed that the clerks' office was dramatically more responsive and provided much higher quality services than the consolidated clerks' office had.

In another district, the bankruptcy judges report that their clerks' office has now become so efficient that they have surplus funds (which never occurred in the consolidation period). They often share those surplus funds with the district court. The consolidation and de-consolidation process usually resulted in many years of strained

relationships, before and after de-consolidation was completed. In one district, the district court judges and clerk of the court opposed the de-consolidation effort; the bankruptcy court was able nonetheless to de-consolidate.

In another district, relations remained strained many years after the de-consolidation and manifested itself in disputes over space which the bankruptcy court “leases” from the district court. One bankruptcy judge reported that because of the problems during the consolidation/ de-consolidation process, they are reluctant now to even share services with their district court.

VII. ALTERNATIVES TO CONSOLIDATION

A. Sharing Services with the District Court

As noted in the NAPA report, rather than consolidate, some courts cooperate in the sharing of services between their units while retaining a separate clerks’ office and management structure. Services courts have shared include information technology, human resources, and procurement. There may be pressure from the district court to co-administer these functions for reasons of economy, efficiency, or both. Districts should develop talking points for use in these discussions at a local level. An example of such talking points is attached as Appendix B.

There are advantages and disadvantages to formal sharing, which are set forth below.

1. Cost savings

There is a common belief that merger of administrative or automation positions produces an economy of scale that saves money. Long-term this is true for the Judicial Branch as a whole, but it is less so locally. For example, as explained in Appendix B, if a bankruptcy position paying \$70,000 is merged with a district court position paying the same, the \$70,000 “savings” will not survive the next triennial reset. Reports of “success” in this area are mixed.

2. Different tasks

The fact that a bankruptcy court employee has the same CPS as a district court employee does not mean that they do the same things or do them the same way. Most bankruptcy courts crosstask, particularly at the administrative level. As an example, in the District of Kansas, the IT manager handles FAST security, construction project assistance, phone trouble-shooting, property custodial duties, COOP coordination, upgrades for all software including chambers applications, and more. See Appendix B. District courts typically staff differently than bankruptcy courts do. For instance, their culture of clerks’ office deputies in their chambers is significantly different from many bankruptcy courts’ practices. See comparative management staffing chart, Appendix B, Exhibit 2.

3. Formal sharing experiences

The District of Kansas has had a long tradition of sharing services and resources among the two courts and probation. All of this is done ad hoc. Some “sharing” examples are:

- a. Cooperation as pilot courts for FAST in 1996;
- b. District-wide phone systems in 1997 and 2010, contributing both expertise and funding;
- c. Funding training rooms, joint workout facilities in the three courthouses, and funding courtroom construction and improvements in both court units;
- d. Funding mobile video carts, coordinating WiFi in the courthouses, shared training, and sharing courtrooms and conference rooms; and,
- e. Ad hoc cross-assistance with automation issues.

4. Memorandum of understanding

The three Kansas units (district, bankruptcy, and probation) entered into a formal Memorandum of Understanding (MOU) in 2005 wherein the units agreed to work together and “to the extent practicable and subject to appropriate legal and administrative guidelines,” make surplus funds available as agreed among unit executives and the chief judges. A copy is attached to Appendix B as Exhibit 1. Priorities are reset periodically. We suspect that other courts have reached similar accommodations, again depending entirely on the local culture of cooperation and trust. Courts without a tradition of cooperation should step lightly, perhaps experimenting with one finite project before engaging to “share services” across the board.

B. Sharing Services with Other Bankruptcy Courts

The subcommittee has learned of many instances where bankruptcy courts have

shared services with other bankruptcy courts. These have been done on an ad hoc basis, as needs and opportunities arise. For example, many bankruptcy courts have participated in developing and testing pilot programs developed by other bankruptcy courts, such as in IT projects. In other instances, bankruptcy clerks' office personnel have been shared on a temporary basis where a need was great in one court. (For example, the Southern District of Florida "lent" the District of Delaware several clerks for a week to assist it in closing no-asset cases and performing other administrative tasks). A full discussion of this option is beyond the scope of the subcommittee's province but should be explored as a means to cut costs while not losing autonomy. Such sharing does not have the same implications of loss of control as sharing with an Article III court has.

VIII. CONCLUSIONS

As other parts of this report suggest, the bankruptcy courts' experience with combining clerks' office functions, whether through consolidation or "shared services," has varied depending upon the personalities and cultures of the respective courts. Because the results are so uneven, the NCBJ should oppose centrally-mandated consolidation and instead urge that local courts be permitted to consider case-by-case whether consolidation, resource-sharing, or some other form of collaborative arrangement works within the respective courts' local culture. The AO should serve as a resource rather than a "prod" in this process. An excellent compilation of matters to consider in approaching this topic is a paper prepared by Chief Judge Ronald G.

Pearson, Bankr. S.D. W. Va., which is attached as Appendix C. The success of sharing of services or consolidation depends on the presence of the following factors:

A. Mutual Respect and Collegiality

Different courts have different levels of trust and cooperation. The primary key to success appears to be the personalities and relationship between the district court and bankruptcy court. Where the judges of both courts were friends and had mutual respect for each other, consolidation appeared to work. In districts where there is a historically low level of trust or no history of working together, it is suggested that courts begin by cooperating on one project and see if it works. The personality of the “shared” clerk is also critical to the success because of his/her role in implementation of the consolidation and assurance of equal treatment. The clerk’s leadership role also permeates down to the staff and assures mutual respect and fairness at all levels.

Chief bankruptcy judges who are deciding how to address pressures to combine clerks’ office operations with the district court clerks’ office should carefully assess whether they and their likely successors will be able to work on an equal footing with their chief district judges. A frank appreciation of these relations and the candid airing of any concerns among the parties involved should precede making any decisions about “pairing up.” It is critical to note that judges and clerks change. While some courts were able to maintain the same level of cooperation despite changes in personnel, others found a new person in the mix created serious problems.

B. Input into Governance

There should be input by bankruptcy judges into general court governance, particularly where bankruptcy operations are impacted. Even in consolidated districts, the bankruptcy judges emphasized the need for input into who should be the shared clerk and control over the hiring of the chief deputy for bankruptcy operations. When the bankruptcy judges did not have a full voice and meaningful role in the operation of the consolidated clerks' office it reverberated negatively on many levels. On the operations side, this was particularly problematic in connection with the hiring of staff who performed or supervised bankruptcy case management; the allocation of space for bankruptcy court staff, court hearings, or meetings of creditors; and the need to communicate information that would impact bankruptcy case management to bankruptcy staff and court users in a timely way. It also had a negative impact on the work environment since the tension sometimes bled down to bankruptcy court supervisors and staff who now shared space with district court supervisors and staff.

C. Written Agreement

Any sharing of services should be predicated on both courts' consent, not one court's dominance over the other. A clearly defined agreement is important. As with all partnerships, no matter who the counter-parties are, get it in writing. Even that may not be enough, however. Although all seven of the courts that consolidated their clerks' offices had some agreement with respect to oversight of the administrative functions and budget through a single clerk, having an agreement turned out to be not enough. In some instances the agreement was either not sufficiently clear or not sufficiently

thorough to address all essential issues. In other courts, the district judges did not honor the terms of the agreement post-consolidation. In still other settings, the agreement was rejected by a subsequent chief district judge.

D. Maintaining Control of Allocated Funds

Some districts report successful combining of human resources and procurement functions. Others cooperate at some level with IT. Still others have combined staffing functions. No matter what functions are combined, the bankruptcy court needs to retain control over its own allocated funds. While the bankruptcy court may agree to the use of its allocated funds for the hiring of a shared person, the court should retain the ability to determine whether it wants to continue to share that person in the next fiscal year. The more critical the processes combined, the more important this is. Furthermore, when considering sharing services, be sure that the services to be shared are compatible. While combining IT may be facially attractive, the expense of cross-training technicians to deal with the different demands of district court and bankruptcy court on the systems may overwhelm any economies that sharing might produce. Also, hierarchical “pecking order” issues could arise concerning maintenance of a critical system.

E. Expected Cost Savings

Most important in virtually all consolidation efforts was the goal of reducing costs. This did not occur in all courts and in most courts there was at least some – and often quite a bit of – suspicion that in order to reduce costs the district court would

deprive the bankruptcy court of the funds it needed to fulfill its responsibilities and/or that the district court would allocate to itself funds that were allocated for bankruptcy court use. Unfortunately, experience shows that these suspicions were well-founded in more than one court. Moreover, even where the bankruptcy court did not suffer financially from consolidation, it took a while for judges and staff to trust that each court would have resources for all it needed and a say as to how its resources were allocated. Not surprisingly, the courts that appear to have been most successful in reducing costs were those with the most egalitarian and cooperative form of court governance, a clear agreement addressing these issues, and a well-established, good working relationship among the judges.

1. Cross-training

Cross-training was an important goal articulated by most of the courts that consolidated. Only one court appears to have been successful in actually implementing comprehensive, effective cross-training. The reasons for the difficulty in achieving this goal seem to be threefold: the work of the bankruptcy courts is much different from the work of the district courts, the cultures are quite distinct and entrenched, and the district court staff either lacked the skills or supervision to perform bankruptcy court functions.

Bankruptcy courts have traditionally been the first to try and implement new technologies and therefore their employees are generally not intimidated by (and often are excited about) new processes or technologies. As a result, they are

comfortable participating in pilot programs. The district courts, by contrast, have historically adopted and implemented technologies and programs only after the testing has been completed. Therefore, as a general rule, their employees tend to be most comfortable utilizing programs and processes which they already know well. This difference in attitude toward change appears to have played a role in making the cross-training more challenging than had been anticipated. Ultimately, many courts abandoned this goal and left their respective staffs dedicated to the case management functions of just one court.

2. Elimination of top administrators

While the easiest benefit of consolidation, and shared services, may be the elimination of top administrators at one of the courts (particularly in IT, HR and procurement), the bankruptcy court should retain a measure of control over the performance of the functions for its court. For example, the court should retain some control over the hiring and firing of that personnel, should retain control over its allocated funds for that person, and should have an objective means to evaluate whether its functions are being performed adequately in the shared services or consolidation environment.

3. Sharing of facilities

Effective sharing of space, and a reduction of total overall court space, was another goal that proved rather elusive. Some courts found that they needed to maintain separate in-take counters both because of the different information available

on the counter and because of the different level of in-person assistance each court deemed it appropriate for its staff to provide. (The number of pro se filers in bankruptcy courts is significantly higher than in district courts). There were also differing views between the district and bankruptcy courts with respect to telecommuting and flex time for staff which generated differing opinions about space allocation for staff (and management issues). All of the courts that de-consolidated their clerks' offices cited difficulty getting the space they needed as a primary concern.

4. Sharing of resources (IT, HR)

The move toward consolidation frequently began with, and focused upon the goal of, making better use of IT resources and reducing the number of IT staff. In many of the courts, the IT staff was reduced but too often the cost of that "savings" was that the bankruptcy judges and their staffs were not able to get IT assistance, or upgrades, as quickly as they had prior to consolidation. Thus, either this goal was not accomplished or its accomplishment came at the price of diminished effectiveness in the bankruptcy courts' operations. The Talking Points of the District of Kansas (which has generally had a very successful history of shared services) attached as Appendix B provide an analysis that the bankruptcy court should perform in assessing the benefits and risks of merging IT staff with the District Court.

F. Periodic Reassessment

Any sharing agreement should have a mandatory provision requiring periodic assessment of whether the relationship is working and how it can be

improved. An objective means to assess the cost-savings being realized and the quality of services being performed is essential. Detailed budget comparisons can be made to assess whether cost-savings are being realized and in what areas. Surveys of judges, the bar and bankruptcy consumers should be developed (perhaps with the assistance of the AO or FJC) and circulated to assure that quality of service does not deteriorate and to identify areas where service could improve. Periodic objective reassessments will force both courts to determine whether the anticipated benefits of consolidation are really being achieved. In addition, it will allow the courts to address problems quickly if resources are not being allocated appropriately. This should be done at the highest level of governance (chief to chief and unit executive to unit executive). Judges and clerks should meet in person when you can. Better inter-personal relations with the district court can only make the process smoother. Having an agreement to revisit the MOU from time to time will also give the bankruptcy court the ability (and the ammunition, if periodic assessments are being done) to get out if that becomes advisable.

G. Who Decides

Unanimously, all persons to whom the subcommittee members spoke agreed that any consolidation or sharing of services had to be consensual and had to take into account local culture and differences. Deference to local culture and mores is critical to cooperative working relationship on a local level. The many unfortunate accounts of consolidation and de-consolidation that are summarized elsewhere in this report

demonstrate why AO and Judicial Conference policy should encourage, but not mandate either consolidation or shared services. Of particular concern is assuring that there is no attempt to modify 28 U.S.C. § 156(d) and the requirement of the consent of the bankruptcy court before consolidation (or even sharing services) is mandated.

Respectfully Submitted,

Dated: June __, 2011

NCBJ Task Force on Cost Containment
and Subcommittee on Consolidation

APPENDIX A. SUMMARY OF 1995 NAPA STUDY OF CONSOLIDATION/
SHARED SERVICES

The AO commissioned a study by the National Academy of Public Administration ("NAPA") of existing and alternative models of administrative organization in the district and bankruptcy courts. The full report can be found at http://jnet.ao.dcn/Reports/Court_Management/NAPA.html. At the time it prepared the report, 1995, NAPA noted that only three districts (ID, MOW, and TXS) had consolidated district and bankruptcy clerks' offices and two districts (ARE and ARW) had one bankruptcy clerk's office. Report, ch. 2.

The NAPA report opined that the lack of consolidation between district and bankruptcy courts resulted not only from the statutory prohibition but was a "reflection of the very different types of cases they hear." Id. It noted the large amount of paper in bankruptcy files, the large number of litigants in each case (in contrast to a civil or criminal district court case), and the fact that the bankruptcy clerk's office is one unit in contrast to the district court which had support from probation and pre-trial services. Id.

The NAPA report noted that budget decentralization (which was completed in 1993) allowed each unit largely to determine how its own budget is spent. Id. Few respondents to the survey wanted to return to a centralized budgeting process because decentralization gave the local units more control over staffing

decisions and the flexibility to utilize funds in accordance with local priorities. Id., ch. 3.

The NAPA report noted that there was already substantial cooperation among unit heads even in non-consolidated districts (with 43% of the districts surveyed reported sharing of services). Id., ch. 3. It concluded that "increased use of shared services is the most likely way to improve the efficiency and quality of administrative support services." Id., ch. 2. The report noted, however, that there was a disconnect between the satisfaction expressed by those providing the shared services (very satisfied) and those receiving the shared services (not that satisfied). The NAPA report concluded that the majority of those surveyed opposed forced sharing and noted that it "cannot work unless all participants support the concept and those who receive assistance believe they are well-served." Id., ch. 3.

Typical areas in which services were shared included: sharing training courses, helping in automation management, joint procurement, shared human resources departments, space and facilities, budgeting, and sometimes sharing of funds. Id. The NAPA report noted, however, that bankruptcy courts were most likely to have full time training staff because their clerks' functions are typically different from the functions performed by the district court's clerks.

The NAPA report noted the disadvantages and advantages of decentralized versus shared services structures. (Id., Executive Summary.) The advantages of the decentralized structure are (1) it enhances the control and accountability of each court unit, (2) priorities are not unduly skewed in favor of the judges' needs or those of another unit, (3) units can use their funds differently to meet their requirements or to innovate in areas that are important to them, and (4) units can work together not because they are forced to, but as the nature of the work requires. The disadvantages of the decentralized structure are (1) administrative duties in each area may not require full-time people in both units, (2) units tend to deal with administrative issues in isolation when collaboration could result in a better less costly solution, (3) there is an increased workload at the AO and Circuit Executives level who must deal with different people at the units level on the same issues, and (4) there may be different pay for the same work in the same district and limited room for advancement for those only performing a task part-time.

The NAPA report noted that the advantages of the shared services structure are: (1) pooled staff are more likely to be full-time and therefore able to acquire higher skill levels, (2) court units can collectively fund a position that each could not do separately, (3) more flexibility to shift staff between units,

(4) cost savings (although the report notes that this is a perception only because there are no hard data to support the conclusion), (5) smaller units may see economies by joining with other units in purchasing and advertising vacancies, and (6) policies are more likely to be uniform, and (7) more likelihood for advancement because staff is working full-time in an area. The disadvantages of the shared services structure are: (1) judges' (or district courts') needs may take precedence over others even if the others' needs are more important, (2) response time may be slower (or given lower priority) if the units are in different locations, (3) when a larger unit is providing the services, the larger unit's work may take priority, (4) services may be delayed simply because the court may have to go to another unit to request the services, and (5) because shared personnel may not be familiar with the other unit's mission and operational needs, there may be less ability to identify changes that could enhance efficiency. The NAPA report noted that it would be difficult to do a cost-savings study because of the diversity of the courts, the difference in pay for the administrative personnel (depending on geography, skills and many other factors), and the need to analyze quality of service in addition to its cost.

The NAPA report stated that shared services had to be voluntary to work and "unit executives [had to] retain full

budget control but [simply] look to someone outside their unit to help them spend those funds - [for example] by managing the recruiting process of ordering supplies." Id., ch. 3. They must be assured that "those who provide the services will do so promptly and without inappropriately putting the needs of one group ahead of another."

The NAPA report concluded that (1) changes cannot be forced from the top, (2) sharing will depend greatly on the personalities and mutual trust level among the judges and clerks, (3) judges should encourage their clerks in collaborative efforts, (4) the legacy of centralized budgeting (where district courts were favored over bankruptcy courts) has created a level of distrust that must be overcome by commitment to treating all service needs as equal, (5) shared services might be inevitable because each unit can only streamline and automate so far. Id., ch. 4.

APPENDIX B

DISTRICT OF KANSAS

SHARED SERVICES TALKING POINTS

I. Cost Savings

A. Merging sister units administrative or automation positions into the District Court.

It is generally believed that through consolidation or the merging of administrative and/or automation positions, (Bankruptcy Probation/Pretrial)with District Court, produces an economy of scale and thus saves money. Although this methodology does produce marginal long-term savings for the judiciary as a whole, local District Court's financial gain is temporary. Periodic salary resets (scheduled to occur every three years) captures any merged positions new salary and reduces the salary allotment accordingly (e.g. a bankruptcy position with a salary of \$70,000 is eliminated or re-classed to a lower pay \$50,000, net gain of \$20,000 is only realized until the next salary reset).

Many districts report that their level of service delivery improved after consolidation or position merging. Most success was achieved in districts where all units were in the same building or in close proximity. In districts with divisional offices, where the administrative structure was consolidated in one division, outlying divisional offices felt somewhat isolated. Geographical logistics also led to a certain degree of lag time in processing requests. An undercurrent of perceived pecking order also added to the feeling of being underserved.

B. Sister unit administrative or automation positions are interchangeable.

Although all units administrative and automation personnel may have the same Court Personnel System (CPS) classification there tends to be a wide variety in the tasks they perform. For example in our court, because of the limited number of administrative and automation personnel, positions classified as Chief Deputy Clerk, Human Resources Manager, Property and Procurement Specialist, Systems Manager, Administrative Assistant to the Clerk and Automation Specialist comprise the majority of our administrative and automation sections. Here are a few examples of the nontraditional tasks they perform on a routine basis.

Chief Deputy Clerk

- IT Supervision
- CM/ECF data dictionary oversight
- CM/ECF related projects (e.g CHAP, Weighted Caseload Reports, Case Assignments, etc)
- Bankruptcy noticing center reconciliations
- Various ad hoc data extracts
- Preparation of quarterly unscheduled leave reports

- CM/ECF attorney registration and limited creditor registration oversight
- CM/ECF helpdesk oversight
- Pro Hac Vice admission processing
- Liaison for U.S. Treasury programs like pay.gov, ttlplus.gov, and CashLink
- Monitor and oversee courtroom sound system troubleshooting and repairs
- Provide statistical information to news media
- Technical support for administrative staff
- Website design and development
- Development of IT related policies and procedures (e.g. Automation Users Guide, Social Networking Policy, etc)
- Preparation of Early Out/Buyout Plans
- Review and update staffing indicator spreadsheets and budget preparation
- Coordinate CM/ECF changes with bar, trustees, and UST
- CM/ECF bounced email message review and follow-Up

Human Resources Manager:

- Responsible for reconciliation of the Personnel Projection System
- Working with the Clerk and Chief Deputy on scenarios and special issues.
- Serve as scribe to the Management Team and produce monthly minutes; in addition to serving as scribe for various special projects such as COOP, Hazardous Weather Policy, Telework, etc.
- Serve as EDR Coordinator

Property and Procurement Specialist:

- Make revisions to the Local Rules and coordinate their publication annually
- Compile the monthly SARD statistics and distribute those to the Judges and supervisors
- Provide oversight on court projects and attend weekly progression meetings
- Backup for the HRMIS Leave Tracking
- Administrative assistant to the clerk's backup
- Reconcile the monthly BNC report and certify it on InfoWeb

Systems Manager:

- FAST Security: setup and maintain user accounts, modify profiles, participate in testing and implementation of new versions, answer to audits on same
- Construction project management assistance
- Telephone trouble shooting and maintenance
- Manages to Automated Call Distribution system
- Serve as the districts property custodial officer
- Manages and controls our automated inventory system
- District COOP coordinator
- Develops, designs, implements and manages upgrades for Eorders
- Develops, designs, implements and manages upgrades for QAX (case administration automated quality control)

- Develops, designs, implements and manages upgrades for CHAP (Judge's calendaring and note taking program)
- Develops, designs, implements and manages upgrades for WebServers
- Develops, designs, implements and manages upgrades for UST/EOUST data extracts and support
- Plans and serves as faculty for 10th Circuit automation meetings

Administrative Assistant to the Clerk:

- Back Up Financial in all areas and keep up to date on issues
- Back Up Human Resources in most areas and keep up to date on issues
- Back Up Procurement (as needed)
- Training: Track Administration and Systems Training Hours, Input the whole bankruptcy courts training hours
- Assist Bankruptcy Staff with software questions/issues
- Work Comp (all)
- Set up all Travel arrangements and Travel Vouchers for Bankruptcy Staff

II. Past and Present Shared Services

A. A rich history of sharing services.

Long before shared services rose to prominence in the judiciary our court had a legacy of working together for our mutual interests.

Some examples:

1. In 1996 we were one of four pilot courts engaged in developing a brand new financial accounting system. Termed the Financial Accounting System for Tomorrow (FAST) hundreds of hours were spent in this joint venture that led to the system we presently use.
2. in 1997 all court units were in desperate need of new telephone instruments. When district court and probation were short on funds, bankruptcy transferred enough money to make sure that every chambers and every employee would receive a new phone.
3. By combining funding and purchasing power a fully furnished joint training room was completed in Topeka in time to provide attorney training for the new CM/ECF initiative.
4. Long before anyone can remember every unit in every divisional office contributed funding and space to provide an opportunity for our employees to improve their health in our joint workout facilities.
5. Over the years the court and its practitioners have benefited from the proceeds of attorney admittance fees.
6. The joint participation in committees such as Building Security, Space and Facilities Holiday festivities, has led to a greater understanding and appreciation of the court family.

7. In 2005, to further demonstrate our districts ongoing commitment to sharing services all units entered into a memorandum of understanding. This memorandum more formally documented shared expectations.
8. Bankruptcy purchased mobile video carts for all three divisions, District Court provided ISDN lines.
9. Rotation of naturalization ceremonies.
10. Share mail handling facilities in all three divisions.
11. Prominently share courtrooms, and judges conference rooms in the Wichita division.
12. Multiple training opportunities, sharing costs and personnel.
13. Systems Coordinated management of ISDN, Pacernet, DCN, Lotus Notes, and Attorney Wifi
14. Sound and Video Design of Courtrooms
15. Help District Court/Probation support their automation systems on an ad hoc basis.

B. How sharing opportunities have flourished: Within the last two years three major projects have come to fruition as a result of service sharing.

1. In an effort to improve the quality of our telephone services, reduce costs and gain control of our communication requirements, a shared services initiative began in 2005. Through continual diligence this cooperative endeavor resulted in a much improved telecommunications system in 2010.
2. Although nationally, most Continuity of Operations Plans (COOP) are completed separately, the unique logistics (all three court units are located in the same facility in all three divisional offices) in the District of Kansas provided a opportunity to form a joint one.
3. In Wichita, a bankruptcy court room located on the second floor of the courthouse, was last renovated in the early 1960s. Although nostalgic, this courtroom no longer had any practical value in a modern technological era. Through a shared effort of talent and resources this new, fully renovated shared courtroom, represents what is possible when our district cooperates in a common goal.

III. Differences between merging a bankruptcy court and a probation/pretrial unit.

A. Certainly probation/pretrial units have their unique characteristics, service needs and structure (particularly in large districts) that may be better served by their own administrative and automation services. However, in small to medium-sized districts, organizationally they fit a profile more of a department than a separate entity, within the court structure. For the most

part, nationally, merging probation and pretrial with District Court operations has been successful.

Next, most chief probation/pretrial officers have come to the federal judiciary from State systems. Very few State systems possess an organizational structure where probation and pretrial are separate entities with their own administrative and automation staff. This allows administrators (chief probation and pretrial officers) to concentrate on what they view as their core mission, the evaluation, classification and supervision of offenders.

B. Since the early 70s, when Congress established bankruptcy courts as separate units within the District Court, bankruptcy courts, with very few exceptions, have operated as distinct courts with their own administrative and automation staff. With the exception of some financial, prisoner and juror responsibilities, the bankruptcy courts have the same, albeit on a smaller scale, structure and responsibility of the District Courts. Bankruptcy courts have judges, chambers, courtrooms, Clerk's staff, Administration and Automation needs roughly equivalent to that of the District Court.

Unlike Chief Probation/Pretrial Officers, Clerks of the bankruptcy court come to the federal judiciary with substantial experience as administrators. Minimum employment criteria generally requires 10 years of progressive administrative experience. These Clerks of court come to the judiciary expecting court administration to be their core function.

IV. Constituency service expectations.

A. Judges: having a dedicated administrative and systems staff, determined to meet any judicial need on a moments notice, has produced certain expectations. Meeting those expectations has resulted in a high level of customer satisfaction. It is difficult for our judges to believe that they would receive that same level of dedicated service when administrative staff or systems personnel are spread across the entire district, with an established hierarchy (Article 3 Judges, Magistrate Judges, Bankruptcy Judges).

B. Certainly there is a degree of overlap in administrative services. After all we must all abide by the Guide to Judicial Policies and Procedures. However, with a seasoned administrative staff representing 120 years of experience, there isn't much this staff hasn't seen or worked through.

C. Automation/System Staff: the bankruptcy court has developed some highly specialized programs to assist our judges, the public, legal practitioners and our staff in completing their respective responsibilities. Without a comprehensive understanding of bankruptcy processes this level of customization would not be possible. This constituency heavily relies upon automated solutions to complex problems. Developing those solutions has been the hallmark of our system staff.

V. Summary

In doing a critical analysis of the advantages and disadvantages of merging administrative or systems staff with the District Court we are left with one basic question. What does bankruptcy have to gain from a merger? With virtually no long-term cost savings, no clear interchangeable

positions, no real additional shared services, and a risk of reduced service level resulting in lowered constituency satisfaction, the answer from bankruptcy's perspective is, probably nothing. Certainly the continued exploration of sharing opportunities will be investigated and with merit, implemented. That is a win-win posture we have pursued with positive results and high satisfaction levels from all court units.

EXHIBIT 1 TO APPENDIX B

MEMORANDUM OF UNDERSTANDING
BETWEEN

United States District Court, United States Bankruptcy Court,
AND
United States Probation Services, all of the District of Kansas

This MEMORANDUM OF UNDERSTANDING is hereby made among the United States District Court (District Court), the United States Bankruptcy Court (Bankruptcy Court), and United States Probation Services (Probation), all of the District of Kansas and known severally as the Court Units.

1. PURPOSE:

The purpose of this memorandum is to develop and expand a framework of cooperation among the Court Units to develop mutually beneficial programs, projects and activities at the District level. These programs, projects and activities comprise part of the shared services goals of our District.

2. STATEMENT OF MUTUAL BENEFIT AND INTERESTS:

Benefits include an active partnership to plan, construct and maintain designated shared services activities throughout our judicial district. The benefit to all participants through this cooperative effort is maximizing the use of scarce resources, while preserving the high quality of services our court, legal, and public constituency expects.

3. THE COURT UNITS AGREE TO:

- a. Work together to identify shared services opportunities and jointly pursue same.
- b. To the extent practicable, and subject to appropriate legal and administrative guidelines, make unit surplus funds available for use as agreed among the unit executives and the Chief Judges.

FY 2005 priorities are: the purchase and installation of portable videoconferencing equipment for each divisional court.

- c. Share technical expertise in the support of microcomputers and standard software throughout the district.
- d. Review this agreement annually and modify as necessary.
- e. This Memorandum is an agreement to agree and in no way obligates funds. Any transfer of anything of value involving reimbursement or contribution of funds between and among the units will be handled in accordance with applicable Administrative Office guidelines.

PRINCIPAL CONTACTS. The principal contacts for the respective Court Units are:

*United States Bankruptcy Court district
of Kansas*

Fred W. Jamison, Clerk
Phone: 316-269-6433 (Wichita)
E-Mail:
Fred_Jamison@ksb.uscourts.gov

*United States District Court District of
Kansas And United States Probation
Office District of Kansas*

Ralph DeLoach, Clerk
Gary Howard, Chief Probation Officer
Phone: 913-551-5734 (Kansas City)
Phone: 316-269-6369 (Wichita)
E-Mail:
Ralph_DeLoach@ksd.uscourts.gov
Gary_Howard@ksp.uscourts.gov

DATE

DATE

DATE

District Court Consolidated Services/Bankruptcy Court Administrative Automation Services Comparison

District Court

Clerk of Court (JSP)
 Chief Deputy Clerk (JSP)
 Chief Probation Officer (JSP)
 Chief Deputy Probation Officer (JSP)
 Outreach Specialist (CL 28)

Director of Consolidated Court Administration (CL 31)
 Deputy Director of Consolidated Court Administration (CL 30)

Financial Manager (CL 30)
 Procurement Administrator (CL 27)
 Criminal Debt Analyst (CL 25)
 Financial Specialist (CL 26)
 Financial Support Specialist (CL 24)
 Procurement Technician (CL 13)

HR Specialist (CL 27)
 HR Generalist (CL 26)

~~Information Systems Manager (CL 30)~~
~~Assistant IT Manager (CL 29)~~
~~Programmer Analyst (CL 28)~~
~~Database Administrator (CL 28)~~
~~Courtroom Technology Specialist (CL 27)~~
~~Automation Support Specialist (CL 25)~~
~~Automation Support Specialist (CL 25)~~
~~Automation Support Specialist (CL 25)~~
~~Systems Engineer (CL 27)~~
~~Network Administrator (CL 27)~~
~~Network Administrator (CL 26)~~

Bankruptcy Court

Clerk of Court (JSP)
 Chief Deputy Clerk (JSP)

Adm. Asst. to Clerk/Special Projects (CL 26)

Financial Administrator (CL 28)
 Prop. & Proc. Specialist (CL 27)

Human Resources Manager (CL 29)

Systems Manager (CL 29)

Systems Analyst/Programmer (CL 27)

Automation Specialist (CL 27)
 Automation Specialist (CL 27)
 Automation Specialist (CL 27)

Automation Specialist (CL 27)

APPENDIX C

Major Points to Consider Prior to Consolidation of Clerks Offices or Sharing Services and Personnel Between Bankruptcy and District Court Units *Ronald G. Pearson, Chief Bankruptcy Judge, Southern District of WV*

I. Constitutional and Statutory Issues

- A. The Constitutional grant to Congress in Article I, Section 8, is for the establishment of “uniform laws on the subject of Bankruptcy”. Pursuant to this Constitutional grant, the Congress has established a nationwide code governing bankruptcy and corporate reorganization, and annually appropriates funds for support of the uniform bankruptcy system. Further, Article III, Section 2 provides that “the citizens of each state shall be entitled to all privileges and immunities of citizens in several states”. To maintain the Constitutional mandates, uniform laws are required and these laws must be administered with some uniformity of resources from District to District across the United States. The integrity of the Federal Court process that insures that the laws of the United States and the Bankruptcy Code are implemented uniformly requires consistent, thoughtful administration of Court Clerk services throughout the nation.
- B. The Administrative Office of the U.S. Courts uses a case-weighted system, developed by work measurement analysis and formula, to distribute the funds that Congress has appropriated for support of a nationwide bankruptcy system to the various Bankruptcy Courts across the country.
- C. A specialized Bankruptcy Clerk’s office, staffed with trained Bankruptcy Deputy Clerks as prescribed by these case weighted statistics, promotes confidence in the judiciary and in the nation’s insolvency laws, and ensures that people of all states are provided equal access to the nation’s insolvency courts.
- D. Congress has enacted legislation giving Bankruptcy Courts the right to manage the financial and human resources made available by allocation of the Administrative Office of the U.S. Courts in the resolution and adjudication of litigation advanced before the Bankruptcy Courts. Once a Bankruptcy Court determines that a Bankruptcy Clerk is necessary, the Bankruptcy Court may certify that necessity to the Director of the Administrative Office of the U.S. Courts with notice to the Circuit Judicial Council where the court is located; the vast majority of districts have made that election. 28 U.S.C. § 156. In order to deliver services to Bankruptcy Court users and the public, Bankruptcy Courts must be able to control the financial resources allocated to the Bankruptcy Court in order to provide uniformity of service consistent with that available in other court districts.
- E. It is a statutory duty of the Director of the Administrative Office to act on a Bankruptcy Judge’s request for a separate Clerk. 28 U.S.C. § 156(b) authorizes the

Bankruptcy Court to certify to the Director of the Administrative Office the need for appointment of a Bankruptcy Clerk. Congress has authorized the Director of the Administrative Office to hire staff and make expenditures to support the Courts. Appointment of a qualified Bankruptcy Clerk to manage bankruptcy funds and to supervise bankruptcy employees, ensures that the work of a Bankruptcy Court is performed uniformly in all Bankruptcy Courts and for Bankruptcy Court users throughout the country. This assures not only that the mandates of the constitution are followed, but also that funds coming to the district are not used contrary to the laws governing appropriations. To maintain Congressional trust, it is essential that funds appropriated by Congress for Bankruptcy Courts, be used for bankruptcy purposes.

II. District and Bankruptcy Courts Serve Very Different Court Users and Thus Provide Unique Services

- A. The individuals served by the District and Bankruptcy Clerks' Offices are much different. To a large extent, visitors to District Court Clerk's offices throughout the nation are non-CM/ECF lawyers and those who are caught up in the criminal justice system. These individuals do not require the same kind of services as are required by petitioners and creditors who come to the Bankruptcy Clerks' offices and who are largely involved in litigation to determine whether they retain or release their home to a creditor and retain or release a vehicle that might be needed to transport children to school and the individual to work. It can be said, therefore, that there are vast differences between the clientele the District and Bankruptcy Courts serve, who often appear personally in the respective Clerks' offices.

Bankruptcy Deputy Clerks must respond to numerous creditors impacted by bankruptcy filings each year. These creditors can be former spouses of a filing party, employees, former employees, non-commercial or commercial creditors. The filing of a large Chapter 11 case by an employer may put hundreds or thousands of employees in direct contact with the Clerk's offices, where they obtain proof of claim forms, explanations of terminology and events, and other significant information regarding events that are important to creditors' claims or rights. Therefore, there is a vast difference in the questions and services the District and Bankruptcy Court Clerks and their deputies are called upon to answer and provide. Having a specialized, trained staff of Bankruptcy Deputy Clerks to respond to and serve the thousands of citizens impacted each year in any District by bankruptcy filings is important to help parties know when something is going on, how it may impact them, when they may have to do something, or what kind of counsel they may need to employ to represent their interests. This service is one that should, and does, generate confidence in the Federal judiciary.

- B. The cases and work of the District and Bankruptcy Courts are very different. District Court Clerks, and the Deputy Clerks they employ, serve the law firms and many parties being processed by the criminal justice system, as well as a substantial civil

docket. The civil litigation handled by most District Courts, and the communication to parties and counsel relative to it, is conducted in large part by District Court law clerks who serve the various District Court judges. Because the work of the District Court Clerk's office is so varied and complex, involving numerous issues of state and federal law, pleadings must almost always receive the attention of a law clerk, if not a judge.

In contrast, Bankruptcy proceedings are processed in large part by Bankruptcy Deputy Clerks. A single Bankruptcy Judge often handles thousands of bankruptcy cases each year, making it impossible for the Bankruptcy Judge or law clerk to review all of the documents filed on a daily basis. Many of the documents will never require detailed individual attention by a judge or law clerk. Instead, after routine but skillful review by a Bankruptcy Deputy Clerk, these documents can be processed for notice and opportunity for hearing to parties, with final review and approval of the Bankruptcy Judge. However, as a result of pending events such as home foreclosure, account attachment, support payments for family members, or access to working capital, Bankruptcy Deputy Clerks must be able to discern from the documents when routine processing is not appropriate and immediate consideration by a Bankruptcy Judge is required. Bankruptcy Deputy Clerks must be constantly trained and retrained to recognize and schedule matters as required by the Federal and local rules and procedures, and in the interests of justice. The Bankruptcy Court finds itself very dependent on conscientious, careful Deputy Clerks to ensure that documents are properly processed for notice, hearing or other action, and must retain oversight of this work by the Deputy Clerks.

- C. Automation services are the central means by which Bankruptcy Court users gain access to the files, notice creditors, manage case information, view documents, and indexes of items for retrieval. It is essential that any court have control over the integrity of those files, access to them and the ability to generate work related to those files. Therefore, even in courts with consolidated automation services, it is imperative that the Bankruptcy Court retain the right to direct and supervise those persons employees who control the systems that provide access to and manipulation of case information and filings, as well as the retrieval, editing and drafting of the notices, orders and documents generated in the course of a case.

III. Giving District Courts Budgetary Power Over Bankruptcy Courts Creates Independence Issues of Grave Importance, Because District Courts Are Appellate Courts for Bankruptcy Matters

- A. Congress, in 28 U.S.S. §1334, has established the United States Bankruptcy Courts as units of the District Court and has provided the District Courts with appellate jurisdiction over Bankruptcy Court decisions, providing for de novo review by the District Court of Bankruptcy determinations of matters of law and providing that Bankruptcy Court factual determinations be reviewed using a "clearly erroneous" standard.

- B. This District Court appellate jurisdiction over Bankruptcy Court decisions has an important bearing on the relationship between the Courts, as has been discussed by Judge William Swarzer, former Director of the FJC, in an enlightening article published in *The Administrative Relationship Between the District and Bankruptcy Court*, 17 Bankr. Dev. J. 9 (2000). This article also cites opinions of the General Counsel of the Administrative Office of the U.S. Courts.
- C. District Court appellate jurisdiction over Bankruptcy Court decisions and the Code of Conduct for the United States Judges requires that District Courts not interfere with the work of the lower court in deciding cases and contested matters advanced through the Bankruptcy Court. District Court Judges should not impose their views on a Bankruptcy Judge's independence in considering and deciding cases (i.e., how they process the pleadings to reach a decision and/or what a decision should be), except by published Local Rule, decision on appeal, or in a case where reference has been withdrawn. Just as if Circuit Courts could control District Court budgets, control over how a lower court spends its funding can and will interfere with the independence of the lower court.

IV. Expressed Sentiments of a Member of the Bankruptcy Bar Who Experienced Consolidation and Deconsolidation in the Southern District of West Virginia

- A. The proper focus of a District Court Clerk must be upon the functions, needs and demands of the District Court and District Court Judges; the focus of a Bankruptcy Court Clerk must be upon the functions, needs and demands of the Bankruptcy Court and Bankruptcy Judges. The focus of a Clerk of a consolidated office cannot be given undividedly to either but must be apportioned between the functions, needs and demands of the District Court and the Bankruptcy Court. This divided focus denies both the District Court and the Bankruptcy Court, as well as the respective bars and public that each serves, the undivided focus to which each is entitled. The divided focus also risks placing unrealistic demands upon the Clerk to balance and meet the respective functions, needs and demands of each Court without doing so at the expense of the other. Just as the functions, needs and demands of a District Court should not come second to those of a Bankruptcy Court, the functions, needs and demands of a Bankruptcy Court should not come second to those of the District Court. In the Southern District of West Virginia, approximately 1½ years after deconsolidation of the District and Bankruptcy Clerk's office, an independent survey of the of the U.S. Trustee, trustees and bankruptcy bar was performed. The survey confirmed that the services of the deconsolidated Bankruptcy Clerk's office were more responsive and of higher quality than those previously provided by the consolidated Clerk's office.