

Beyond the Quill

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Debtors Sign Tax Returns Digitally; Why Not Petitions and Schedules?

Debtors sign their federal tax returns digitally all the time. The Internal Revenue Service (IRS) allows digital signing, without reservation; the Department of Justice (DOJ) prosecutes digital signers for cheating on tax returns, without a problem; and the DOJ gets convictions against digitally signing taxpayers, frequently. So, why can't debtors digitally sign their bankruptcy petitions and schedules, too?

The *ABI Journal* recently published an excellent article as an ineffective “dinosaur.”¹ Based on reactions we have heard, the point of that article is misconstrued as proposing an easy-going use of debtors' electronic signatures (e.g., the “/s/”), instead of highly secure systems available in current technology. Our purpose here is to expand on that prior article by focusing on security.

Counterpoint

Negative reactions to the very idea of a “debtor's digital signature” are common. Here are examples: (1) digital signatures have “a potential for abuse”; (2) “I see attorneys having their clients — whom they have evidently never met — signing in the 341 waiting room”; and (3) one bankruptcy court allowed “... /s/ ... name ...” signatures for debtors, “and it was a disaster”: Many debtors “had never seen the petition docs.”

The suggestion that debtors should be allowed to sign bankruptcy documents electronically strikes fear in the hearts of many and outrage in others. “How dare you compromise the integrity of bankruptcy documents,” they exclaim. Signing a federal bankruptcy petition is a serious matter. It is not just some exercise in social media, where a signing is no more contemplated than clicking on a Facebook “Like” button for your grandmother's cookie recipe. “Shame on those who seek to undermine the signing process and invite fraud to our court system,” others exclaim.

A bankruptcy court jumped into the fray back in 2016, declaring: (1) “Treating software-generated electronic signatures as original signatures” would “increase the possibility of confusion and mischief in the signature process (especially where less scrupulous e-filers are involved),” and (2) “The conve-

nience of the debtor and the debtor's attorney pales when put up against the need to protect the integrity of the documents filed in bankruptcy cases.”²

But what about the current practice and experience of the IRS with digital signatures? This experience is reportedly working well. What about abuses within the system of “wet ink” signatures on paper documents? Those abuses are rampant.

Digital Safeguards to Improve the System

The difference between what the IRS allows and what many fear in bankruptcy is this: safeguards. The IRS adopted safeguards to protect the digital-signing process, and safeguards are also available, in current technology, for bankruptcy.

Moreover, the introduction of digital signatures with proper safeguards is a *solution* to improving and protecting the integrity of bankruptcy documents. Digital signatures with proper safeguards will actually eliminate much of the fraud and abuse that already exists in the “wet ink” signature system — and improve the signing system overall.

Digital Signing Technology Provides Safeguards

It is imperative that we understand the difference between (1) a mere “electronic signature” that is already in use in the bankruptcy court system (i.e., the “... /s/ ... name ...” system) and (2) the more secure “digital signature.” There is a tremendous difference between unverified electronic signatures and verified digital signatures that critics misunderstand.

In a digitally signed document, a third-party vendor with a secure system, such as DocuSign or Adobe Sign, is used to collect signatures. A document is uploaded to the vendor's website, and all parties are notified via email of an opportunity to sign the document. Each signer clicks on a link to view and sign the document. When all parties have signed, a secured copy of the document is immediately emailed to all parties. Got that?! Everyone has immediate proof of what they signed, and they all possess an original copy.

Such a signed document is secured by sophisticated computer-encrypting technology that prevents alterations. Every page of the digitally signed docu-



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¹ This article is in response to a previous *ABI Journal* article. See Patricia Redmond and Ashley D. Champion, “Getting Debtors Back to the Future: The Case for Abolishing the ‘Wet Ink’ Signature Requirement,” XXXVIII *ABI Journal* 10, 22-23, 73-74, October 2019, available at abi.org/abi-journal.

² *In re Mayfield*, Case No. 16-22134 (Bankr. E.D. Cal. July 15, 2016).

ment — not just the signed pages, but every single page of the digital document — is marked with an alpha-numeric code. The document is assigned a document-identification number, and the vendor keeps an original copy of the signed document in its document vault so that a signer or court official may verify what was actually signed. In addition, digitally signed documents come with an “audit trail” that details such facts as when the document was signed, what email addresses were used, the IP address of the computer used, the amount of time spent viewing the document, etc.

Fraud and Abuse in the “Wet Ink” System

Fraud and abuse in our system of “wet ink” signatures on paper documents is already widespread. Attorneys commonly alter documents that debtors have already signed because of an absence of accountability.

Consider how a bankruptcy petition and schedules are signed with wet ink on real paper. A typical set of a petition and its schedules consists of 60-80 pages, with “wet ink” signatures appearing on only five or six pages. There is no third-party verification of what the debtor signed, and there is no verification that the debtor actually received a copy of what was signed. There is no safeguard to prevent bankruptcy attorneys from thereafter changing information on unsigned pages. The opportunity for abuse is everywhere and boundless, and is a huge problem.

*In re Harmon*³ highlights the problem. In this case, the U.S. Trustee audited bankruptcy files of a law firm and found that 82 percent of the files indicated discrepancies between the paper file and what was filed with the court. The U.S. Trustee’s attorney found “discrepancies including changes to” (1) property valuation, (2) claims valuation, (3) the security status of creditors’ claims, (4) the list of creditors, (5) the statement of financial affairs, (6) the means test form and (7) the terms of the proposed chapter 13 plan. The U.S. Trustee’s attorney also found “that in almost every case, that firm modified the date [that] the debtors signed the petitions.”

Why do bankruptcy attorneys make changes to signed documents? Because they are under great pressure to file cases to stop garnishments, foreclosures and vehicle repossessions; because debtors show up to signing appointments with handfuls of additional bills, paystubs and tax returns to add to their case; and because stressed-out debtors have paid significant fees to file their cases and demand that cases be filed immediately to stop creditors. Attorneys just gather the signatures on incomplete documents, send the client home and fix things later.

Why isn’t anyone decrying such abuses in the use of “wet ink” signatures on paper documents? It is because the risks of such fraud and abuses are familiar and therefore acceptable, whereas digital signatures are unfamiliar, with risks that are unknown and imagined and therefore deemed unacceptable.

Digital Signatures Solve Problems of Fraud and Abuse

Digital signatures have the power to change the nightmare of “wet ink” signatures on paper documents. Disorganized

debtors can bring truckloads of new paperwork to a signing. The attorney can put together a rough draft of documents with the client, then email a finished version later to be reviewed, revised and signed. As the attorney finds errors in the original paperwork, corrections could be made on the fly and sent out for updated signatures. Debtors can avoid racing through rush-hour traffic to hastily sign documents before the law firm closes and can have time in the comfort of their homes to review documents carefully for errors and omissions. In short, digital signatures take the pressure out of signings and restore sanity and accountability to the signing process.

Keep in mind that every debtor who files for bankruptcy must attend a meeting of creditors and testify that they actually signed the bankruptcy documents. By contrast, no one marches into an IRS building 30 days after filing a tax return and swears under oath that they signed their federal tax return. Yet federal prosecutors seem to have no problem with convicting taxpayers who file fraudulent tax returns electronically.

No system is perfect, and highly secure systems are no exception: Hackers and criminals can, and will, attempt to abuse the system. However, to effectively hack a digitally signed document, someone would need to (1) hack the attorney’s computer system, (2) hack the debtor’s computer system and (3) hack the computer system of a highly secure system. This is because the digitally signed document is held by at least those three parties. By comparison, the debtor’s attorney has exclusive control over a paper document signed in “wet ink.” The highly secure digital system has much greater security — and it is not even a close call!

Tough Questions for Opponents of Digital Signatures

Those who oppose digital signatures must answer some tough questions. How can a court know that the unsigned pages of a bankruptcy petition and schedules were not altered after they were signed? How can the court verify whether newly printed pages were not substituted after the signing? How can the court verify whether the debtor received an exact copy of what was signed? If an attorney mails bankruptcy documents to clients for signature, how can we be sure the debtor signed the papers instead of a spouse?

The truth is, unless courts require that every page of a bankruptcy petition be signed and dated and that a scanned or original copy of those documents be filed with the court, the integrity of bankruptcy documents shall be no greater than the integrity and capacity for error of the attorney who files the case. As the U.S. Trustee investigation revealed in the *Harmon* case, paper petitions are inherently unsecure.

Additional Safeguards

The proper use of digital signatures does not compromise the integrity of bankruptcy documents. Instead, with proper safeguards, digital signatures actually increase the trustworthiness of the documents. Courts considering whether to allow digital signatures might consider requiring the following additional safeguards:

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- require attorneys to file a notice with the court and trustee that the petition was signed digitally;
- require a copy of the digitally signed document to be filed with the court and sent to the trustee;
- require the debtor's attorney to mail a printed copy of the digital document to the client; and
- require the debtor to sign a paper form with a "wet ink" signature that authorizes the debtor to sign documents digitally, similar to IRS Form 8829 required for electronic tax returns.

Digital signatures are coming to bankruptcy courts, and, if combined with sensible safeguard rules, they will usher in an era of improved document integrity. For the first time in bankruptcy court history, we can actually have absolute proof of what a debtor signed.

The Nebraska Rule, and a Lesson

The U.S. Bankruptcy Court for the District of Nebraska became the first in the nation to allow debtors to digitally sign bankruptcy documents using highly secure systems, rather than requiring a "wet ink" signature on paper documents. On Feb. 5, 2018, Hon. **Thomas L. Saladino** amended the court's Local Rule 9011-1 to do so. Here are portions of amended Local Rule 9011-1:

A. Petitions, lists, schedules and statements, amendments, pleadings, affidavits, and other documents which must contain original wet ink signatures or which require verification under Fed. R. Bankr. P. 1008, or an unsworn declaration as provided in 28 U.S.C. § 1746, shall be filed electronically and may include, in lieu of the original wet ink signature, the signature forms described in this Local Rule.

B.... all of the following shall constitute a signature on an electronically filed document.... 2. An image with a signature captured electronically at the time of document creation, and signatures created and verified by use of special software programs for electronic signatures, such as DocuSign and SignEasy.

Chief Bankruptcy Judge Saladino explained that this amended local rule "was established through a cooperative effort with the bankruptcy bar," and that "the attorneys requested the change and participated in drafting the rule." Shortly after adoption of the local rule, one attorney wrote:

This is fantastic! My client signed, we were notified, I signed, all before I could even drop her hard copy

in the mail (mail leaves [our small central Nebraska town] at 12:30, so timing-wise, we have a completed document before the mail left the building)! I am so pumped!

In the intervening time since adoption of Local Rule 9011-1, Nebraska's experience with the process has been an outstanding success: (1) the "electronic signatures, such as DocuSign and SignEasy," provision has been well received by the practicing bar; (2) the level of accuracy and accountability for information in documents signed in that way is higher than with wet signatures alone; and (3) the counterpoint concerns raised above have not materialized.

Here is a lesson learned from all of this: Every bankruptcy court needs to update its local rules (usually under Rule 9011) to clarify whether the term "original" document includes digitally signed documents or not. The term "original" document was invented prior to the advent of digital signatures, and ambiguities exist. Technically, a digital signature is as "original" as a "wet ink" signature, but in the minds of many (especially those in the bifocal generation), the term "original" means "wet ink" only.

Local rules need to declare one way or the other. Here are examples of why: (1) when Mr. Turco asked our local court (prior to the amendment of Local Rule 9011-1) whether digital signatures were allowed, they did not know; and (2) it is the same ambiguity that resulted in a Central California attorney getting sanctioned in *Mayfield*. We feel sorry for that attorney; he serves as the fall guy in a rapidly expanding world of digital technology. Clarity for practitioners in each court, on this point, is essential.

Conclusion

The time has come to allow debtors to sign bankruptcy documents digitally, using highly secure systems with proper safeguards. Authorizing digital signatures will not only provide accountability, convenience and integrity to the document-signing process, it will also eliminate much of the fraud and abuse that is currently rampant in our current wet-ink-on-paper system.

Digital signatures on IRS tax returns are one example of their successful use. At first, fears of fraud and abuse prevailed at the agency, but the IRS put safeguards in place and instituted the digital-signature system. This system is working well, and no one wants to go back! **abi**

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