American College of Bankruptcy

January 30, 2012

United States Trustee Program
EOUST
20 Massachusetts Ave., N.W.
8th Floor
Washington, D.C. 20530.

Sent via email to
USTP.Fee.Guidelines@usdoj.gov

Re: The Proposed Guidelines referred to below

Ladies and Gentlemen:

The American College of Bankruptcy (the "College") is writing to you to comment on the proposed "Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses under 11 U.S.C. § 330 by Attorneys in Large Chapter 11 Cases" (the "Proposed Guidelines"). We understand that the Proposed Guidelines would supersede in part the "Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses filed under 11 U.S.C. § 330" promulgated in 1966 (the "1996 Guidelines").

The College is an honorary association of bankruptcy professionals. Its Fellows include commercial bankruptcy attorneys, consumer bankruptcy attorneys, corporate turnaround specialists, United States trustees, bankruptcy trustees, investment bankers and other financial advisors, insolvency accountants, law professors, judges, government officials, appraisers and others involved in the bankruptcy and insolvency community. Nominees are extended an invitation to join based on a proven record of the highest standards of knowledge and professionalism and service to the profession.

The College appreciates the opportunity to comment on the Proposed Guidelines. The comments below have been formulated primarily by Fellows of the College who are commercial bankruptcy attorneys practicing in chapter 11 cases. Individual Fellows of the College may have different views on the comments.

Our comments are set forth below. After making some general observations, we comment more specifically on the provisions of the Proposed Guidelines on scope, hourly rates, non-compensable expenses and budget and staffing plans.

General Observations

We appreciate that the EOUST's purpose in developing the Proposed Guidelines is to improve the fee application process by requiring information that it thinks will assist the Bankruptcy Court in applying section 330 of title 11 of the United States Code ("Bankruptcy Code"). However, overall, we believe that the present fee and expense reimbursement regime, consisting of Bankruptcy Code § 330, applicable Federal Rules of Bankruptcy Procedure, applicable rules and fee orders promulgated by each court, the 1996 Guidelines and constantly developing case law, has been largely successful in ensuring transparency, efficiency and reasonableness in the fee and expense review process. Various requirements imposed by the 1996 Guidelines (*e.g.*, "project billing," the requirement that time be billed in tenth-of-an-hour increments, the required specificity in time entry and expense reimbursement descriptions, the limitations on certain expenses, and the summary sheet and various descriptions required in fee applications) adequately ensure the integrity of the fee application process without unduly overburdening the professionals charged with submitting fee applications or their clients.

We are concerned that the Proposed Guidelines would in some instances actually go beyond or conflict with the Bankruptcy Code and applicable case law. Of course, the Bankruptcy Court is the ultimate decision-maker with respect to compensation and expense issues. Thus, the Bankruptcy Court can and often does establish guidelines, either through local rules or an order specific to a chapter 11 case. Moreover, if the Bankruptcy Court considers it appropriate, it will appoint a fee examiner or fee committee to analyze and comment on the reasonableness of fee applications. But, in the end, it is the Bankruptcy Court that must determine reasonableness and, in doing so under the consistently-applied *Lodestar* standard,[1] must find that the hours incurred and the rates applied are reasonable when taking into account the expertise and experience required for the peculiar complexities of the case at hand. We believe that the 1996 Guidelines and the other tools at the Bankruptcy Court's disposal are sufficient for this purpose. By contrast, some of the Proposed Guidelines would introduce extraneous and

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[1] The *Lodestar* standard has been endorsed by the Supreme Court (*Penn v. Delaware Valley Citizens' Counsel for Clean Air*, 478 U.S. 546, 552 (1986)) and has been consistently applied in bankruptcy cases.

misleading information or seek to limit the Bankruptcy's Court's authority over the allowance process and, thus, are beyond the scope of the U.S. Trustee's assigned role in the fee application process.

The following are our comments on certain aspects of the Proposed Guidelines:

Scope

Size of the case. The Proposed Guidelines are intended to apply to chapter 11 cases where the combined assets and liabilities are more than $50 million after aggregating jointly administered cases. This threshold appears to us to be far too low given the burdens - and, hence, the expenses - that the Proposed Guidelines would impose. In addition, we think that a more appropriate threshold should be based on asset size alone. Asset size is a more reliable measure of whether the case is sufficiently large to merit the additional burdens contemplated by the Proposed Guidelines. For example, the burdens would not be merited if the debtor's liabilities were significant but the debtor's assets were nominal in value. In addition, in a voluntary chapter 11 case the applicability of the Proposed Guidelines could be determined based on the face of the debtor's petition.

Professionals to which the Proposed Guidelines apply. The Proposed Guidelines should not apply to an ordinary course professional or a professional employed under Bankruptcy Code § 327(e) for a specific purpose so long as (i) the professional is compensated in accordance with the pre-bankruptcy course of dealing between the professional and the debtor and (ii) the professional's fees and expenses are not of a sufficient magnitude to justify the burdens and costs imposed by the Proposed Guidelines.

Hourly rates

We have some general comments relating to the hourly rate provisions. A stated purpose of the Proposed Guidelines as to hourly rates, as set forth in Section B.2.a, is to "[e]nsure bankruptcy professional fees are subject to the same client-driven market forces, scrutiny and accountability that apply in non-bankruptcy engagements." However, the Proposed Guidelines as they relate to hourly rates seem to be based on the assumption that market forces do not apply to the determination of rates in large chapter 11 cases. We believe that this assumption is inaccurate. It is also inconsistent with the fiduciary duties of a board of directors both prior to and after the commencement of a chapter 11 case and the fiduciary duties of a debtor in possession or trustee. Further, the fees of professionals are determined based on market forces, *i.e.*, supply and demand for the services that they offer. No potential client is without choices and the ability

to shop, compare and negotiate. In our experience, they do so. The Proposed Guidelines indicate that the U.S. Trustee would be second-guessing the results of the market, which is inconsistent with the stated objective of ensuring that fees are determined by the market. Also, it is the Bankruptcy Court, not the U.S. Trustee, that is the ultimate decision-maker regarding fees, and the issue under Bankruptcy Code § 330 is not whether the estate is being charged the lowest possible rate, but rather whether the compensation requested is reasonable within the context of the specific circumstances of the case.

We also have some specific comments:

Fee enhancements. Contrary to the implication of Section B.4.n of the Proposed Guidelines, there is outside of bankruptcy rarely, if ever, a basis to "compel" a professional fee in excess of a contractual amount. A bonus may be a term of a retention agreement and therefore enforceable as a matter of contract law outside of bankruptcy. However, if the bonus is not a term of the retention agreement, the bonus would be based upon a voluntary adjustment agreed between the client and the professional, most often for the achievement of a favorable result at a lower than anticipated cost or a much more favorable result than expected. A bonus in a chapter 11 case should be treated basically the same way: the appropriateness of a bonus should be determined in the first instance between the client and the professional, subject, of course, to the Bankruptcy Court's determination of the reasonableness of the bonus under Bankruptcy Code § 330.

Summer associates and non-working travel time. The statement in Section B.4.o that fees for summer associates are "more properly the firm's overhead" and the implication in Section B.4.i that non-working travel should not be billed at the full rate are not market-based.

Telephone charges. The statement in B.5.e that all telephone charges are "overhead" is not market-based. Section (a)(5)(vii) of the 1996 Guidelines is correct in referring to only "local telephone and monthly cell phone charges" as overhead. Reasonable long-distance and multi-party or conference call charges that are client-specific should be reimbursed.

Disclosures regarding rates in other matters (Sections C.3.l.vii-viii & C.7.a-d). The proposed requirement of disclosing billing rates on other matters for any other clients (as opposed to clients generally) is irrelevant and misleading, difficult if not impossible to satisfy, and may well violate state ethical rules. There are a myriad of reasons why a professional and a particular client may agree to a discount, bonus, bill reduction or enhancement, or a contingent, partially contingent or fixed fee, in connection with a matter or set of matters.

Each situation is *sui generis*, driven by the particular market forces that come into play between the professional and the particular client. That there have been discounts from or enhancements to customary rates in work done for other clients has no bearing on whether the fees that a professional agrees to charge a client in a chapter 11 case are reasonable under the circumstances of that case. It is like comparing "apples" and "oranges." Furthermore, the hourly rate for any particular attorney that a client actually pays can be affected, up or down, in a number of ways, some before and some after the client has been billed. In firms with many offices, billing partners and attorneys, it is probably impossible – or at the very minimum impossibly burdensome – to find out what billing rate was actually collected for a particular attorney's services in every matter in which he or she billed time. Yet, this is what the Proposed Guidelines seem to require. In addition, there are ethical concerns about disclosing information about another client without the specific consent of that client. The client may not be willing to give the consent for any number of valid reasons.

Applications for employment. The same points made above are applicable to Section E.1.

Redaction of bills. Section B.4.e of the Proposed Guidelines indicates that, while "*[r]easonable* charges for preparing . . . fee applications . . . are compensable," charges for redacting bills for privileged or confidential information are not. This position is contrary to the interest of the chapter 11 debtor or the official committee that desires full detailed billing descriptions on the understanding that the bills will be redacted before public filing. Moreover, it is not practicable for every time-keeper to be cognizant of what information might be viewed as privileged or confidential. Like preparation of fee applications, redaction of privileged or confidential information in bills is a necessary part of the fee review process in a chapter 11 case and should be compensated.

Contesting or litigating fee applications. Section B.4.j indicates that professionals should be denied compensation for defending or explaining their fee applications or monthly invoices when such fees would not be compensable outside of bankruptcy. This approach, however, is not the right test. It fails to recognize that, outside of bankruptcy, professional fees are not usually subject to review and objection by third parties. Further, Bankruptcy Code § 330, as interpreted in the majority of reported opinions, requires reasonable compensation for such activities in order to ensure that professionals' fee awards are not *de facto* reduced merely because an objection has been made and to discourage insubstantial or vexatious objections.

Budget and staffing plans

No mandatory requirement. Budgeting should not be mandatory in all chapter 11 cases. Section C.6 of the Proposed Guidelines seems to recognize this because it requires budgets to be attached to fee applications "*if* a budget and staffing plan has been adopted" (emphasis added).

Limitations. Outside of bankruptcy, budgeting is most often used in the context of discrete lawsuits and transactions. These are generally two-or-three sided activities with predictable elements. Large chapter 11 cases are different. They usually involve multiple parties with differing agendas, and much of the legal cost that debtors or official committees incur depends on the conduct of potential adversaries, which may be unanticipated or unpredictable. Given these differences, the value of budgeting in a chapter 11 case is questionable and in most instances will be more expensive that it is worth. If budgeting in a large chapter 11 case is required at all, (i) it should be limited only to transactions or contested matters or adversary proceedings that are discrete and predictable; (ii) it should be for a limited period such as three months, beyond which one enters the realm of speculation; and (iii) professionals should be permitted to update budgets as they obtain additional information.

Client determination. The principal rationale for budgeting appears to be to impose non-bankruptcy market forces in a chapter 11 case. Because requiring budgeting involves weighing both its costs and benefits in any particular situation, the client – not the U.S. Trustee – should determine whether budgets will be required. The U.S. Trustee should not object to the lack of budgeting except possibly in those limited circumstances where the debtor's own practice would have been to impose budgeting on the activity in question, but it has not done so in the case.

Confidentiality. If budgets are adopted, they should not be made public. Professional budgets are not public outside of bankruptcy – for good reason. Budgets inherently contain privileged or confidential information that would be valuable to an adversary, even if it is only what the debtor's anticipated fees and costs related to the dispute are. Requiring additional information that would indirectly disclose analysis or strategy would be particularly inappropriate. These concerns suggest that budgets should be disclosed only to the client and not to other interested parties or even to the Bankruptcy Court without appropriate safeguards being in place.

Compensation for budget and staffing plans. The Proposed Guidelines imply that professionals will be compensated for time spent on preparing budgets and

staffing plans. *See* Proposed Guidelines, Exhibit A, Project Category 5 (Budgeting (Case)). That is appropriate because it is part of the billing and fee application process.

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We hope that these comments are useful to EOUST. If it would be helpful, we would be pleased to address in more depth any issues with respect to the Proposed Guidelines, regardless of whether they are included in our comments.

Paul M. Singer
Chairman, American College of Bankruptcy

Edwin E. Smith
Chair, Bankruptcy Policy Committee