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November 21, 2012

Executive Office for United States Trustees
20 Massachusetts Avenue, N.W.
Eighth Floor
Washington, D.C. 20536

Re: Comments on Proposed Fee Guidelines

To Whom It May Concern:

On behalf of the Boston Bar Association (BBA), I thank you for the opportunity to comment on the recent updates to the proposed Fee Guidelines in bankruptcy. The updated proposed guidelines were reviewed by the BBA Bankruptcy Law Section, a group of attorneys who are experts in the field of bankruptcy law.

This letter supplements the comments of the BBA Bankruptcy Law Section dated February 22, 2012. The Bankruptcy Law Section supports many of the November 2 revisions proposed by the Executive Office for United States Trustees. However, the Bankruptcy Law Section does not feel that these amendments go far enough.

I am enclosing comments from members of the Bankruptcy Law Section that are intended to identify the portions of the proposed rule as to which the Bankruptcy Law Section believes that any amendments are either lacking or insufficient. These individual comments do not represent formal positions of the BBA, but we hope they will be of assistance to the office of the United States Trustee as it further considers the proposed Fee Guidelines.

If you have any questions or need further information, please do not hesitate to contact the Co-Chairs of the Bankruptcy Law Section John Morrier at (617) 426-5900 or Jeanne Darcey at (617) 338-2995.

Sincerely,

James D. Smeallie
President

cc: John T. Morrier, Esq.
Jeanne P. Darcey, Esq.

Enclosure

Boston Bar Association Bankruptcy Law Section
Specific issues concerning proposed EOUST fee standards

We appreciate the fact that the Executive Office of the United States Trustee ("EOUST") has taken so much time to consider the Rule. It is obvious from, among other things, the amount of detail in the original and amended proposed rule, the transcript of the public meeting, the public statements of the director of the EOUST, and the publication by the EOUST of the detailed "Summary of Significant Changes since Posting for Comment November 4, 2011", that the EOUST has addressed this issue with thoughtfulness. In addition, the BBA Bankruptcy Law Section's constituency uniformly holds the current Region 1 United States Trustee in high regard; he is a valued colleague and leader in the bar. His participation in the process of drafting the Rule was a factor in our realization of how seriously the EOUST has treated the issue of compensation, and we in turn have also sought to review the Rule seriously.

5,6,7. **Comparable billing history**. The proposed rule requires an analysis of firm-wide billing, both geographically and across all specialties. The exceptions for pro bono work and employee discounts are too narrow. For example, if a firm has an insurance defense practice, with the lower rates customary in such a practice, of what relevance would the billing experience in that field be, for example, in measuring whether a firm's bankruptcy work was billed at a fair rate? The Summary states in paragraphs 6 and 7 that discounts applied in subject matter A might be relevant in the determination of what is a fair rate to be charged in a bankruptcy case, and that an applicant is always free to explain why it applies discounts. The Summary, however, does not close the loop as to exactly how insurance defense rates, for example, would inform a fair rate for Bankruptcy work. Further, the proposed rule fails to take into account the impact of an applicant having to explain publicly its billing strategies in non-bankruptcy cases: data which in any other context—selling of widgets, window-washing, car manufacturing—would be regarded as proprietary, or at least sensitive. In paragraph 7, the EOUST states in essence that section 330 of the Bankruptcy Code (presumably subsection (a)(3)(F)) requires sufficient disclosure to establish comparability. However, section 330 addresses the value of "comparably skilled practitioners", not limited by what an applicant's firm may choose to bill clients in unrelated fields. The BBA Bankruptcy Law Section notes that the rule invites applicants to provide explanations as to why particular data should not apply, but that does not address the burden or amassing the information to begin with.

9. **Cost of preparing fee applications**. The Summary concludes that "sophisticated law firms" regularly maintain the information required in the proposed rule. That is an oversimplification. It is true that some "firm billing systems are just huge data bases...," as the Summary states. It is, however, true that there are firms who cannot access such information with the same ease as other firms. Many firms do not regularly amass the

information sought. The EOUST should expect to receive a large number of firms accepting its invitation, set forth in the first paragraph of its Response to paragraph 9, to explain why it is "impossible" to provide the information requested. The word "impossible" establishes a trap. For an unlimited expenditure of funds to establish a collating and reporting system, nothing is "impossible". "Impracticable" would be more felicitous, and fairer, assuming the remainder of the rule stays in place at all.

10. **Information available from outside sources**. The Summary says that the claim of confidentiality and proprietary information on the part of applicants is an invalid concern since the information is widely available, and frequently voluntarily submitted to various reporting and aggregating services. However, the Summary makes too light of the fact that the data when disseminated is disseminated anonymously, except as to each firm that has supplied data. Even if individual corporate clients choose to submit their billing information to an aggregator of such data, that still does not invalidate the interests of law firms in seeking to prevent widespread public dissemination of their fee decisions.

The penultimate sentence of paragraph 10 encapsulates the EOUST position: "The commenters, however, do not explain why their pecuniary interest in preventing transparency in billing practices should outweigh the need to produce evidence that establishes the Code's comparable services requirement." The answer is that the information about the value of the comparable services is available to each U.S. Trustee office, and indeed all other litigants. Specifically, if a U.S. Trustee believes in good faith that a legitimate question exists as to the reasonableness of fees, that U.S. Trustee will have the opportunity through discovery or access to reports of aggregating companies (for which there may well be a subscription fee) to explore the question generally, without requiring each applicant to "go naked" in disclosing its marketing strategies.

The fundamental concern of the BBA Bankruptcy Law Section is this: the Rule imposes a heavy burden of disclosure, both logistically and competitively, based on the assumption that there is a widespread misstatement of "real" comparable rates, due to what the Summary describes as routine discounts, write-offs, or similar adjustments. Presumably, the prevalence of these phenomena is so high that as a practical matter only prophylactic reporting will meaningfully address this problem. In the absence of proof—admittedly at a lesser standard than at a trial—the solution imposed by the Rule creates a burden disproportionate to the size of the perceived problem.

14. **Requirement of budgets**. More than in other litigation, the chapter 11 process is laden with uncertainty because of items unrelated to the progress of litigation: economics,

credit, business success or failure, and the like. The automatic assumption that the custom of establishing budgets in non-bankruptcy matters is transferable to bankruptcy matters is inapt. It is appropriate to encourage budgets, but not with the forced and expected detail contemplated in the rule.

28. **No compensation for responding to objections, unless the applicant prevails.** Responding to an objection is arguably necessary to the administration of the Bankruptcy case. The U.S. Trustee certainly has the responsibility to address compensation issues in many contexts, including interim applications. However, the issue of compensation for responding to objections is best left to the courts, and should not be the subject of a rule. As written, this provision imposes too high a burden for recovery and is not consistent with existing provisions of the Bankruptcy Code.

On behalf of the Bankruptcy Law Section of the Boston Bar Association,

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