

USTP Fee Guidelines

From: Jay Kornfeld <jkornfeld@bskd.com>
Sent: Tuesday, January 31, 2012 7:38 PM
To: USTP Fee Guidelines
Cc: Gayle E. Bush; Jim Day; Aimee Willig; Christine Tobin-Presser; Katy Samiljan; Bridget Morgan; Arthur Shwab
Subject: Comments re Proposed Fee Guidelines

Dear Office of the United States Trustee:

Our firm, Bush Strout & Kornfeld LLP, is a commercial bankruptcy firm in Seattle, Washington. We maintain a practice group that is either the largest or one of the largest restructuring/bankruptcy groups in Seattle. Over the last 20 years, we have built a reputation for handling complex restructuring and Chapter 11 cases on behalf of financially-troubled companies. We have filed a substantial number of Chapter 11 debtor cases, and have also served as counsel to Unsecured Creditors Committees, trustees, secured lenders, and other constituents in the Chapter 11 process, as well as in complex Chapter 7 cases.

We appreciate the efforts of the United States Trustee's Office in drafting and circulating the Draft Guidelines for Reviewing Applications For Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases ("Proposed Guidelines"). The 8 attorneys in our firm that practice in the restructuring/bankruptcy area all read and discussed internally the Proposed Guidelines.

i) We understand that the Proposed Guidelines are designed primarily to address large, national cases that typically involve large, national law firms. The proposed definition of a "Large Case" as one with combined assets and liabilities of \$50 million appears to be considerably too small and would cause the Proposed Guidelines to apply to many cases far beyond the apparent scope intended. Instead, we suggest that the threshold be \$250 million in combined assets and liabilities. A case of that magnitude involves the complexities and the magnitude of professional fees commensurate with the level of administrative burden required by the Proposed Guidelines.

ii) Existing Bankruptcy Rules and case law provide specific requirements for content of Fee Applications and the criteria for determining the reasonableness of the compensation requested. The Proposed Guidelines, by adding extensive and specific requirements to Fee Applications, appear to be more appropriate for the rule making arena. For instance, the addition of sub-categories to the already existing requirement of including categories in which services are provided, or any discussion of providing budgets and comparisons of actual fees/costs to budgeted amounts, are specific subjects appropriately handled by the national rule-making functions of the courts or by the courts themselves, rather than in review guidelines issued by the United States Trustee.

iii) Many of the Proposed Guidelines arguably invade the attorney-client relationship. Suggestions or requirements that budgets be created and that clients sign off on budgets, or requirements that attorneys disclose certain billing practices to clients are good examples of invasion of the attorney-client relationship. Clients in large cases are generally sophisticated users of legal services and are in as good a position as any other market player to choose a law firm and arrange the details of the engagement as in any non-bankruptcy context. Active competition exists among law firms to provide services to clients that may need bankruptcy representation. It is unnecessary for the Proposed Guidelines to effectively govern how attorney-client relationships will be structured or what issues need to be addressed between the attorney and client. Those matters are appropriately left to the client and the attorney.

iv) Some of the Proposed Guidelines may well interfere with the attorney-client privilege and with legal strategy in a case. An example is the proposed requirement that a Fee Application include whether the actual amount of fees/costs in a particular category exceeded the budgeted amount. This type of information, both the amount of time initially expected to be spent on a particular category during a particular time period, as well as the amount actually spent, would arguably reveal the legal strategy of a complex case in terms of when and how much to focus on particular matters. In addition, the level of disclosure by attorney and client required by the Proposed Guidelines focuses on much of the communication between attorney and client, communication which could well be confidential and privileged.

v) The level of proposed additional and detailed requirements will dramatically increase the cost of preparing Fee Applications. As noted in the Proposed Guidelines, such time is properly compensable. The Proposed Guidelines would significantly increase the cost to bankruptcy estates as law firms work to comply with the detailed and extensive new requirements.

vi) Finally, the Proposed Guidelines require the attorney to provide substantial speculation about certain matters. For instance, a debtor's counsel would need to provide an estimate of the fees and expenses for which approval is sought that the debtor would have incurred even absent the bankruptcy. Consider the work necessary to make such an estimate in a complex case, and then add that such an estimate would be inherently speculative. The benefit, if any, would be substantially outweighed by the burden, which again, the estate would bear.

If we can provide additional information to you or provide any clarification to these comments, please feel free to contact us at the contact information below.

Sincerely,

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