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May 21, 2012

Executive Office for United States Trustees
United States Department of Justice
950 Pennsylvania Avenue, NW
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By email to: ustp.fee.guidelines@usdoj.gov

Re: Proposed Fee Guidelines

With respect to the proposed new guidelines relating to fee applications, you have already received detailed, and generally insightful, comments from practitioners and groups of practitioners.

Rather than duplicating that detail, I'd like to offer observations that are more general.

I worked in the U.S. Trustee program during its first two years. When we took over the administrative responsibility of cases, one of our challenges was to simultaneously supervise that administration, and to become a source of constructive guidance to practitioners and trustees. We did it then, and the U.S. Trustee has generally maintained that balance.

However, the proposed guidelines seem needlessly confrontational, and suggest a gap between the realities embedded in ethical professional practice and the appreciation of those realities.

The U.S. Trustee has the power to be heard on the issue of fees, as can any party in interest, but it is the Court, and the Court only, which can award or deny fees. The introduction to the guidelines acknowledge those facts, but the guidelines themselves require disclosure which even exceeds the kind of automatic disclosure that a litigant involved in traditional litigation might face. A professional has the theoretical option of ignoring the guidelines, and it is even possible that some Judges will ignore the requirements of the guidelines in ruling on fees, but none of that is predictable, and there won't be many professionals who want to take the chance.

Bias of the Guidelines

The terms of the guidelines are not neutral. They identify certain activities as inherently suspect. Examples include interoffice conferences (Proposed Guideline B.4.b.), and "transitory" professionals (B.4.d). Similarly, the demand that a professional should not charge for redaction of fee applications is questionable, or at least not free from doubt (B.4.e.i.). Presumably that requirement is based on the assumption that a lawyer should maintain incomplete or inaccurate records of his or her time in order to produce a contemporaneous redaction.

As a matter of policy, the inquiry demanded of the client (B.8) is off-base. A sophisticated client may have different reasons for hiring lawyers, and must be free to do so. It isn't clear that a client has to explain why it hired a particular professional, or what it considered. Is it not possible that the answer, "I wanted a kick-ass lawyer, and I didn't care about the cost" is just as legitimate as, "I reviewed the legal budget carefully, and considered the financial issues in depth"?

My point is not to resolve the legal issues raised in this letter. Rather, it is to suggest that it should not be part of the prerogative of the U.S. Trustees to conflate their assumptions of law with what the courts may—or may not—determine is the law, and impose those assumptions on the parties.

Difficulty of Developing Statistics

Comments by others have already addressed the intrusion caused by the requirements that professionals reveal extensive details about their rate structure. I agree, but my comments reach wider: there is no meaningful way for the numbers to be reported accurately, and there is no meaningful likelihood that a U.S. Trustee will use much of that information. Following are examples of some of that uncertainty:

A. Law Firm regularly charges clients who are universities or (fill in the blanks—charities, small businesses, developing businesses, dental offices) a different rate. Does each category have to be included in the statistics sought by the guidelines, or only those related to Bankruptcy practice?

B. Law Firm charges a different rate for each practice area—ranging widely. Occasionally, the bankruptcy lawyer might have consulted on one of the less expensive cases. How is that time accounted for in the statistics? If Law Firm has a low-budget specialty in addition to its other practices, must that specialty be included in the statistical report? Why?

C. Law Firm charged one rate, but after disputes, or for market reasons, reduced the bill. The books of the firm, though, reflect the higher rate; the discounted rate may not be routinely and concurrently tracked in the firm's books. The work was intended to be at the higher rate, but things didn't turn out that way. Is any of that to be disclosed as lower rate work?

D. Law Firm charges $800 for partners in New York, and $400 for partners in Detroit. The rates are variable depending on what the nexus of the work is. How are those rates disclosed?

E. Law Firm has agreed with Bank on a fixed rate of $100,000 for the year, or a fixed rate of $5000 per foreclosure for the year. As the year progresses, that rate may turn out to be, on an hourly basis, more or less favorable than what each party may have expected. How are hourly rates determined for purposes of reporting? Since the rolling average will change from one month

to another, is there an obligation to continue to amend? Also, why should that information be disclosed?

F. Law Firm handled a semi-pro bono Bankruptcy case for $100 an hour. How is that computed in the statistics?

Impact on U.S. Trustee Program

With all of this information sought to be collected—and explained—where is the U.S. Trustee staffing to analyze these data? Which functions of the program will have to be set aside in order to accommodate the extra work this will produce? I suppose one solution is merely to ask Congress for money to add staff, but that kind of adjustment doesn't seem terribly popular.

Impact on Perception of U.S. Trustee Program

The proposals reach for unreachable data, and appear to cast a reflexive suspicion on fee applicants, and a burden on the clients. Furthermore, where there are active participants in a case, there is no immediate reason why the U.S. Trustees must rush to fill the vacuum, assuming no collusion among the parties on fees. Presumably the U.S. Trustees would feel free to use any information collected as part of any litigation process.

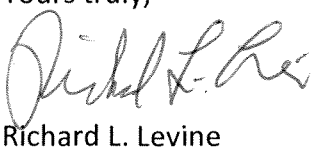
Professional firms often cannot produce the data easily, and the proposed rules seem to ignore that. Firms of all sizes participate even in large Bankruptcy cases, and for many firms the proposed rules introduce an extraordinary burden.

Many cases will not make use of this information. I can easily envision cases with no fee objection at all; others will have limited objections, such as an objection to the amount of time spent on a particular matter. Some objections in the past have been serious (inappropriate loyalties to one party or the other—an issue which, incidentally, the proposed data would not have revealed), and others have been inanely trivial (bagels, as compared with croissants (I choose to forget how the court ruled on that one), at a creditors' committee meeting).

The information proposed in the guidelines will be furnished under oath. Thus, even innocent errors—of which there will be many—will be fraught.

The U.S. Trustee program has many excellent employees, including in my own Region. My comments are intended to buttress that program, but not the adoption of these proposals.

Yours truly,



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