haynesboone

January 20, 2012

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

Via E-mail: **USTP.Fee.Guidelines@usdoj.gov**

Re: Fee Guidelines

Dear Director White:

The proposed "Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases" ("Guidelines") raise a number of issues that should be addressed before any such guidelines are implemented. Many of these issues are addressed below.

Initially, the requirements included in the Guidelines appear to exceed the statutory basis cited for their creation. The statute, 28 U.S.C. § 586,[1] provides for guidelines to be created for reviewing "applications filed for compensation and reimbursement under section 330 of title 11." The Guidelines go well beyond reviewing final fee applications filed under 11 U.S.C. § 330 to include, among other things:

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[1] The statute, in pertinent part, provides:

(a) Each United States trustee, within the region for which such United States trustee is appointed, shall—

. . .

(3) supervise the administration of cases and trustees in cases under chapter 7, 11, 12, 13, or 15 of title 11 by, whenever the United States trustee considers it to be appropriate—

(A)

(i) reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee (which guidelines shall be applied uniformly by the United States trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under section 330 of title 11; and

(ii) filing with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application.

Haynes and Boone, LLP
Attorneys and Counselors
201 Main Street, Suite 2200
Fort Worth, Texas 76102-3126
Phone: 817.347.6600
Fax: 817.347.6650

Requiring certain specified information to be included in employment applications under 11 U.S.C. §§ 327 and 1103;

Requiring certain specified information to be included in interim applications for compensation under 11 U.S.C. § 331 as well as in final applications for compensation under 11 U.S.C. § 330;

Requiring verified statements from clients in connection with all applications for compensation (interim and final);

Requiring budgets from counsel and updates thereof – presumably for interim fee applications;

Requiring staffing plans from counsel and updates thereof – presumably for interim fee applications;

Requiring explanations of how the actual hours, fees and personnel (staffing) varied from the previous budget;

Requiring attorneys and law firms to disclose information regarding fee arrangements with their clients who are not involved in the pending bankruptcy case;

Requiring law firms to disclose information regarding attorneys who are not involved in any pending bankruptcy case to disclose information regarding fee arrangements with other clients; and,

Requiring law firms to disclose information regarding practice areas and billing rates regarding practice areas not involved in any pending bankruptcy case.

These requirements are contrary to the statement in A. 3 that "These Guidelines are statements of United States Trustee policies that the USTP will follow in the absence of controlling law or rules in a jurisdiction." The attempt to impose burdens upon parties other than the USTP exceeds the mandate and provisions of the statutory authority for the Guidelines' creation.

Accordingly, the Guidelines should make clear that guidelines created by the USTP for use by its staff do not and cannot impose obligations upon attorneys and parties that are in addition to those created and imposed under the Bankruptcy Code, local rules and procedures of the forum court and controlling case law in the relevant jurisdiction.

Specific issues with individual provisions of the Guidelines follow.

a. In A.2, the description of when the Guidelines apply should be clarified since the stated definition does not provide a sufficient benchmark or adequate clarity (they "apply only when USTP attorneys review applications for compensation filed by attorneys employed under sections 327 or 1103 of the United States Bankruptcy Code (the 'Code') in chapter 11 cases where the debtor's scheduled assets and liabilities combined exceed $50 Million (aggregated for

jointly administered cases).”). As described above, “applications for compensation” would include interim applications under § 331 – something beyond the scope contemplated by 28 U.S.C. § 586. The calculation of the $50 million amount is also problematic. In many large cases, Schedules of Assets and Liabilities are not filed until months after the petition date which could leave the case in limbo in the interim. In other cases, it is extremely rare for Schedules to be filed in advance of the “first day motions” under which the overwhelming majority of attorneys are employed which renders a benchmark tied to the Schedules somewhat troublesome. There are a number of problems embedded in the calculation of the $50 million amount. For example, would a group of four jointly administered debtors with a total of $11 million of assets among them and joint and several liability upon an $11 million debt trigger the $50 million threshold (once the assets and liabilities are combined and aggregated)? If so, the $50 million threshold appears to be too low since the cost of complying with the Guidelines could make cases of that size quite uneconomical. Finally, examples of how debts and assets that are “aggregated for jointly administered cases” are calculated would be very helpful.

b. In Section B, (Considerations in Reviewing and Commenting on Fee Applications), there is no reference to any requirement for U.S. Trustees to consider or comply with applicable or controlling court precedent in the district where the case is pending. Section 4’s notation that the “Guidelines are intended to elicit information” is at odds with both 28 U.S.C. § 586 as well as the stated purpose of the Guidelines – that they to be to be used by U.S. Trustees for reviewing final fee applications. Additionally, if the requirement for Budgets and comparisons between actual and planned work (with detailed explanations of variances) comprises part of what the USTP will consider in evaluating fee applications, subsection 4.(e) should be revised to add the noted language below to clarify that “*Reasonable* charges for preparing interim and final fee applications *(including preparing budgets, staffing plans, verified statements and providing the explanations described in these Guidelines)*, however, are compensable.” Also, the statement that redacting invoices is not compensable should be deleted. While estate professionals understand that requests for compensation will be publicly filed, they should not also be penalized for providing full, complete and unredacted information in their invoices for the client to review, understand, approve and pay – especially if the USTP also requires the client receiving the bill to comply with the conflicting requirements for review and approval included in C.8 (unless those requirements are also removed).

c. In Section C, part 5 is described as “Billing Format.” Section C. 5.d provides guidance regarding “lumping” or combining services within a single time entry. By its terms, it might be interpreted to preclude a description in one entry that fully and accurately lists the services provided, provides a separate description and time information regarding each action. The requirement that each task be listed separately is excessive since one entry that describes

specific tasks and includes the amount of time required for each is adequate to provide information to enable the USTP to review the same.

d. Section C.5.g[2] might be read to require explanations in each instance of any event attended by more than one timekeeper, including meetings, conference calls, hearings, depositions, planning sessions, etc. Such a requirement would necessarily increase the time and cost required to prepare fee applications in the absence of any party questioning or challenging the staffing would, in all likelihood, cause the costs to exceed the benefit that might ever be achieved.

e. Section C.6 includes "budgets" that are presumably required for interim applications, even though the statutory basis for the Guidelines refers only to the statute applicable to final fee applications. As noted above, if budgets and staffing plans are required to be included in fee applications, the time required to create and those items should be specifically compensable.

[2] "If more than one professional from the applicant firm attends a hearing or conference, the applicant should explain the need for multiple attendees."

f. Section C.7's statements required from the professionals[3] is excessive and does not provide relevant information – particularly if yes or no answers are appropriate (as suggested). By expanding the inquiry beyond the subject case and engagement, the USTP attempts to invade the confidentiality that is likely to have been agreed upon between the lawfirm and its other clients and might violate requirements for confidentiality in certain instances. Guidelines for the USTP to use in reviewing compensation requests should not, in and of themselves, allow the USTP or parties in interest in the bankruptcy case to invade a law firm's relationship with its other clients. The Guidelines' attempt to sidestep this issue by indicating that answers could be either yes or no is not persuasive since either answer is likely to prompt an inquiry for more information – even when the firm's other engagements involve attorneys and

[3] **Statement from the Professional:** The professional applicant should answer the questions below in the fee application. Most questions require only a yes or no answer. Professionals, however, are free to provide additional information if they choose to explain or clarify their answers.

a. During the preceding 12 months, have you or your firm charged any client less than the hourly rates included in this application in other estate-billed bankruptcy engagements? Other bankruptcy engagements? Other engagements?

b. During the preceding 12 months, have you or your firm charged any client more than the hourly rates included in this application in other estate-billed bankruptcy engagements? Other bankruptcy engagements? Other engagements?

c. Did you offer your client variations from your standard or customary billing rates, fees, or terms for services provided during the period covered by the application?

d. Did you agree to any variations from, or alternatives to, your standard or customary billing rates, fees or terms for services provided during the period covered by the application?

e. Do any of the professionals included in this fee application vary their rate based on the geographic locale of the forum?

f. Does the fee application include time or fees related to entering, reviewing, or editing time records, invoices, and draft invoices, etc.? (This is limited to work involved in preparing time and billing records that would not be compensable outside of bankruptcy and does not include reasonable fees for preparing a fee application).

g. Does this application include time or fees for reviewing time records to redact any privileged or other confidential information?

parties who are not involved in the instant bankruptcy case(s). For example, the fact that a firm does bankruptcy (or other) work for either lower or higher rates is irrelevant since that other work could be staffed completely apart from the staffing of the instant matter or be provided to clients who are, or who have cases that are, materially different from the subject case(s). It could also be unworkable in today's environment of blended rates that are not "*a la carte*" hourly rate engagements from clients faced with the possibility of extinction. One can easily imagine a situation where the answer to both (a) and (b) could be identical and still not provide any useful information. (If the instant case is staffed by mid-level attorneys, there would almost always be both higher and lower rates on other matters.) Many of the questions, including (a), (b), (d) and (e), do not limit their scope to the current engagement or client or even to insolvency work. As such, answers to questions that address other engagements and types of representations are neither relevant nor helpful in the USTP's review of any application under 11 U.S.C. § 330. Questions that refer to "you or your firm" are either ambiguous or redundant since the overwhelming majority of applications for employment request the employment of a firm rather than an individual (raising the question of why "you or" is included in the questions directed to law firms).

g. Section C.8's requirement for a verified statement from the client[4] (imposing the penalties of perjury upon a client or their representative, or both) is unprecedented and has no know parallel outside of bankruptcy practice. Would the work of yet another estate paid counsel compensable for advice to the client regarding the advisability of the client signing a document under penalty of perjury since a firm seeking to be employed might conclude that it should not provide the client or its representative with advice that is solely for the benefit of that firm. Also, 28 U.S.C. § 586 neither provides nor implies that the USTP has the statutory authority to require that a client expose itself to the possibility of a perjury prosecution. If the answer to any question (or all of them) is "No," what effect would it have? Separately, if the engagement agreement that was approved by the Court included a provision for periodic rate increases (as almost all so provide), it appears that both the Court and client have reviewed and approved the increases in advance.

h. Section E, by its terms, deals with Applications for Employment – another area that is beyond the scope of 28 U.S.C. § 586. Most of the issues in Section E are addressed in the comments (above) to C.7 and the comments thereon are incorporated by reference herein. With

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[4] 8. **Verified Statement from the Client:** The client should provide a verified statement answering the questions below. Most questions require only a yes or no answer. Clients, however, are free to provide additional information if they choose to explain or clarify their answers.

a. Did you review and approve a budget and staffing plan in advance for the professional covering the time period in this application?

b. If the fees sought vs. the fees budgeted for the time period covered by this fee application are higher by 10% or more, did you discuss the reasons for the variation with the professional?

c. Did you take steps to ensure the compensation sought in this application is comparable to the compensation paid to the professional or the professional's firm for bankruptcy and non-bankruptcy engagements?

d. Before this application was filed, did you review the professional's compensation and expenses sought in this application to ensure that they are reasonable and are for actual and necessary services?

e. Did you review the application to ensure that the professional has staffed the engagement with professionals of the appropriate seniority or experience commensurate with the complexity, importance, and nature of the problem, issue, or task addressed?

f. If the application includes any rate increases since retention or the last fee application, did you review and approve those rate increases in advance?

respect to the issues mentioned in E.2 that by their terms go beyond bankruptcy work to include rates charged by attorneys in non-bankruptcy practice areas,[5] some firms may consider the rates charged by professionals for engagements that are not the subject of public filings to be either confidential or proprietary – particularly when it seeks "an average rate for all professionals by experience level or position" "during the last 12 months." There is no statutory basis or justification for this information to be required of firms simply because it provides work for a debtor or committee. This becomes even more problematic for firms that are engaged as special counsel for limited purposes since many are likely to decline to work for parties in bankruptcy if a consequence is the compulsory disclosure of unrelated engagements and fee arrangements.

I would be happy to discuss these comments with members of the USTP in the near future. Please call me at 817.347.6610 or by email at pennj@haynesboone.com if you have any questions.

Sincerely,

John D. Penn
Direct Phone Number: 817.347.6610
Direct Fax Number: 817.348.2300
pennj@haynesboone.com

[5] 2. With the application for employment, the professional should provide summary billing data comparisons between firm professionals in the bankruptcy practice group and all other practice groups combined, categorized by position held within the firm. This data is not specific to individuals in a firm but is rather the highest and lowest rate billed by any professional at every experience level or position (e.g., sr. partner, partner, shareholder, member, counsel, associate, etc.) and an average rate for all professionals by experience level or position (e.g., sr. partner, partner, shareholder, member, counsel, associate, etc.). The summary billing data should be reported for U.S. professionals only. The information should include the following for both bankruptcy practice groups and all other practice groups combined (to the extent applicable):

a. Lowest hourly rate billed in the last 12 months.
b. Highest hourly rate billed in the last 12 months.
c. Average hourly rate billed in the last 12 months.