UNLV | WILLIAM S. BOYD SCHOOL OF LAW

NANCY B. RAPOPORT
GORDON SILVER PROFESSOR OF LAW

DIRECT DIAL: (702) 895-5831
CELL: (713) 202-1881
E-MAIL: nancy.rapoport@unlv.edu

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VIA EMAIL (USTP.Fee.Guidelines@usdoj.gov) AND REGULAR MAIL

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

Re: Supplemental Comments to the Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases (Draft for Public Comment) [hereinafter "Proposed Guidelines"]

On December 14, 2011, I submitted comments to the Proposed Guidelines. So did several others. Most of the first round of comments to the Proposed Guidelines reflected some frustration with the suggested new procedures and requirements. Many of the comments were helpful in pointing out areas that might need further study and in suggesting revisions that would make the Proposed Guidelines less onerous.[1] I am glad that the United States Trustee Program ("USTP") has invited a second round of comments and scheduled a public meeting.

As the USTP moves forward with the Proposed Guidelines, it might be useful to distinguish what we know from what we don't yet know (and what might be helpful to learn) during the public meeting.

What we know:

1. **Most professionals keep their fees and expenses reasonable.** When there is a disconnect in a fee application, the disconnect most likely comes from a need for additional explanation on certain entries, rather than from any intent to obfuscate or mislead. There are a few outliers whose fees and expenses should trigger significant extra scrutiny, but they are the exception, not the rule.

2. **The sheer volume of fee applications in the larger chapter 11 cases—both in terms of the number of applications filed and their actual length—makes line-by-line review on a timely basis virtually impossible for the USTP and for courts.** All roads must lead to the same destination: helping the Bankruptcy Courts fulfill their duty to review fees and expenses for reasonableness. The number and length of fee applications creates a need for certain common

[1] For example, the suggestion that work done in defending objections to fee applications should be compensable from estate funds is worth considering, as is the suggestion that perhaps the monetary threshold for the size of bankruptcy case triggering the Proposed Guidelines should be raised.

formats, benchmarks, and presumptions—all designed with an eye for helping the courts fulfill this duty.[2]

3. **The funds for paying for court-approved fee applications are most often paid by the bankruptcy estate, rather than from carve-outs from collateral.** Therefore, these fee applications (which are administrative expenses) are paid out of the unsecured creditors' pockets. Unsecured creditors are a diffuse group, which is why creditors' committees are so important to the chapter 11 process. But it is very likely that even creditors' committee members are reviewing their own professionals' fee applications (and the applications of other estate-paid professionals) with the knowledge that the costs will be borne by this diffuse group, rather than by any individual unsecured creditor. When a bill is paid out of someone else's budget, the natural human instinct is to review that bill less intensely, if at all.

4. **Large chapter 11s run at lightning speed, and decisions about staffing and strategy must therefore be made rapidly.** Not only must tough decisions be made quickly, but also those professionals who represent fiduciaries must be mindful of the extra burdens that their clients carry. With the need for fast decisions and the pressure of representing fiduciaries comes a tendency to want to cover every possible avenue as thoroughly and as quickly as possible. The consequence of that tendency is higher fees. Professionals faced with a choice of doing less than their best possible effort for their fiduciary clients and scrimping on fees will most likely choose the option that helps them avoid allegations of malpractice. Again, a combination of benchmarks and presumptions could give professionals some comfort that they can do a reasonable and diligent job for their fiduciary clients without having to turn over every rock in an effort to practice the legal equivalent of defensive medicine.

5. **Many large clients outside bankruptcy have negotiated some fees that are below a professional's "book rate."** Those clients use their leverage to keep down the costs of their professionals' services. They also look for ways that they can encourage their professionals to pool certain information in order to achieve some economies of scale. Clients with leverage have an incentive to negotiate fees because those fees come out of their own budgets, thus affecting their bottom lines. Therefore, a professional's "book rate" may not be the rate that most clients are paying. A key issue in large chapter 11s is what relationship the fee structure being proposed in cases bears to a true market rate, given the problems inherent in a system in which bills are being paid with "other people's money" (see paragraph 3 above).

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[2] I've suggested the creation of benchmarks in Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. L. & TECH. LAW 117 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstractid=2039506; *see also* Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. BUS. & TECH. LAW 263 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstractid=1625102.

What we don't yet know and would be useful to learn:[3]

I. Is $50 million the appropriate cutoff for these Proposed Guidelines?

Some of the comments had suggested that a higher threshold would be more appropriate, given the additional procedures that the Proposed Guidelines would require professionals to follow. Any rule will have line-drawing problems, so if the $50 million cutoff is the wrong number, it might be useful for professionals to provide data for a reasonable alternative. Such data could include some comparisons of the complexity, length, and number of professionals in cases involving, say, $75-100 million in assets and liabilities to those involving $50 million.

For example, the Comments (Supplemental) from 118 Law Firms, filed April 16, 2012 (the Supplemental LF Comments"), suggested higher thresholds:

> [T]he LF Proposed Revised Guidelines include a requirement that there be more than $250 million in assets, with more than $50 million of unencumbered assets in the case. The requirement of significant unencumbered assets reflects both the limits on a surcharge of collateral under § 506(c) of the Bankruptcy Code, and the restraint that under-collateralized lienholders have historically brought to bear on estate professional fees. The LF Proposed Revised Guidelines also require that there be more than $250 million of unsecured debt with at least 250 unsecured creditors excluding present and former employees. Lastly, to assure that the case warrants application of the LF Proposed Revised Guidelines, there is a requirement that there be more than $50 million of syndicated debt for borrowed money. The supporting firms generally believe that all these requirements are easily satisfied in what most professionals in the bankruptcy field would consider to be a significant and large chapter 11 case warranting more involved fee application procedures.[4]

Choosing the appropriate threshold for applying the Proposed Guidelines is more of an art than a science, but it is helpful that the Supplemental LF Comments have given the USTP an alternative to consider. If the firms that signed the Supplemental LF Comments could also provide the USTP with the data underlying this suggestion, that data would also likely be useful in the USTP's own analysis.

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[3] For the purposes of distinguishing this section from the previous one, I'm using Roman numerals for these paragraphs.
[4] Supplemental LF Comments at 7.

II. Should these Proposed Guidelines be placed on hold until the USTP promulgates proposed guidelines for non-attorney professionals in similarly sized cases?

To the extent that different guidelines might create confusion between attorneys (who would be subject to the Proposed Guidelines' procedures) and non-attorney professionals in the same case (who would not be subject to them), is there a relatively simple way to create equivalent proposed guidelines for the non-attorney professionals, or are the worlds so different that it makes more sense to use the iterative process that the USTP currently contemplates? I don't know the answer to this question, but I think that, to the extent that it's not too burdensome for the USTP to promulgate any new guidelines for the non-attorney professionals in the larger cases, then having both sets of guidelines become effective at the same time might the process less complicated.

III. Are the players whose professionals are being paid from estate funds in large chapter 11s sophisticated enough that they can understand—and weigh in on—their professionals' staffing and strategy decisions when the time comes to review their professionals' fees and expenses?

Many clients in large chapter 11s are sophisticated in a general sense, but there are different types of sophistication at play here. The issue isn't whether the clients are sophisticated in terms of running their businesses but whether they're familiar enough with how chapter 11s work that they can have meaningful discussions with their professionals about their bills or those of other estate-paid professionals. First-time debtors probably can't, given that (by definition) they've never seen the way that chapter 11 cases develop over time. Repeat-player creditors possibly can, but even if they can, there's still the "other people's money" problem that I've mentioned in paragraph 3 above. In many cases, the only people weighing in about fees to help the court determine reasonableness are the U.S. Trustees, fee examiners, or a handful of really annoyed parties in interest.

IV. Is there a better way to standardize explanations for staffing and strategy decisions so that the professional's own client and later, the court, can more easily understand why certain choices were, in fact, reasonable?

Some of the original Comments criticized the proposed presumptions about staffing—for example, about having more than one attorney from the firm appear at a hearing or deposition, or placing restrictions on intra-firm conferences among attorneys—as being both unreasonable and possibly unethical because they would unreasonably interfere with the lawyer's independent professional judgment.[5] To the extent that, at or near the beginning of a chapter 11 case, the court, the U.S. Trustee, and the professionals could agree on some baseline staffing rules, maybe that agreement could set benchmarks that

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[5] Some bankruptcy courts, though, have enacted local rules that set forth presumptions about staffing and billing. *See, e.g.*, B.L.R. 9029-1, United States Bankruptcy Court, Northern District of California, available at http://www.canb.uscourts.gov/procedures/dist/guidelines/guidelines-compensation-and-expense-reimbursement-professional-and-truste; Appendix F to Local Rules of the United States Bankruptcy Court for the Northern District of Texas, available at http://www.txnb.uscourts.gov/Reference-Library/LocalRuleseffect10Sep10Revised12Apr1.pdf.

save time and disputes later.[6] Such benchmarks could be in the nature of rebuttable presumptions, rather than absolute caps. Deviations from those presumptions, when explained in terms of why such deviations were reasonable, should be able to accommodate the fast-paced nature of shifting needs within a case.

V. Should the Proposed Guidelines have separate provisions governing alternative billing arrangements (which are, by definition, not based on hourly rates), and is there a better way for the USTP to determine whether the fees and expenses being charged are the same inside and outside bankruptcy other than by asking for information about hourly rates in non-bankruptcy matters?[7]

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[6] The Supplement to Comments of the National Bankruptcy Conference on 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," filed February 27, 2012 ("NBC Supplemental Comment"), makes this suggestion. *See* NBC Supplemental Comment at 6-7 and text accompanying n. 21, *infra.*

[7] To the extent that firms do not want to supply the bankruptcy courts with information about other clients' bills (or with unredacted time entries) on the grounds that such material would reveal privileged information, that assertion is overbroad. Blanket assertions of privilege are disfavored. *See, e.g.,* U.S. v. White, 950 F.2d 426, 430-31 (7th Cir. 1991) (information given to an attorney for eventual disclosure in the client's bankruptcy petition and schedules was not privileged); In re French, 162 B.R. 541, 545 (Bankr. D.S.D. 1994) ("[Federal Rule 501] is intended to safeguard privileged *communications,* not to conceal mere facts communicated; therefore, the fact that a client has discussed a matter with an attorney does not by and of itself insulate the client against disclosing the subject matter discussed, only the discussion itself is privileged.") (emphasis in original); *id.* at 547-48 (because law firm raised a "blanket claim" of privilege and, by waiting too long—and later disclosing the information—waived the privilege, its claim of privilege to protect its client's "financial facts" was not well-taken); In re Myers, 382 B.R. 304, 309 (Bankr. S.D. Miss. 2008) (clients had no reasonable expectation that the information provided to the bankruptcy lawyer would remain confidential); *but see* In re Stoutamire, 201 B.R. 592, 596 (Bankr. S.D. Ga. 1996) (assertion of privilege in refusal to disclose whether client answered certain intake questionnaire questions was appropriate); *cf.* In re Horn, 976 F.2d 1314, 1316-18 (9th Cir. 1992) (in a situation in which the government sought obviously privileged information from a criminal defense lawyer, the normal procedure for claiming privilege—providing the potentially privileged documents to the court for *in camera* review—would not be necessary due to the government's overreaching); Schulze v. U.S., 2011 WL 4590391, *16 (D. Hawaii 2011) (explaining the narrow exception to the general rule that fee arrangements are not privileged when such disclosure would itself convey privileged information); U.S. v. Anderson (In re Grand Jury Subpoenas), 906 F.2d. 1485, 1488 (10th Cir. 1990) ("Several circuit courts have created an exception to the general rule that client identity and fee information are not protected by the attorney-client privilege where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought.") (citations omitted). Instead, the proper way to remedy claims of privilege in fee statements is to submit those fee statements to the court for *in camera* review.

In In re Las Vegas Monorail Co., 458 B.R. 553, 556-59 (Bankr. D. Nev. 2011), the bankruptcy court refused to approve redacted bills on the grounds that it had a duty to review fees for reasonableness, that the applicant had the burden of proof in establishing reasonableness, and that the redacted bills were too vague to meet that burden of proof. As the court explained, "The duty of an attorney to protect the attorney-client privilege, or to prevent the dissemination of other confidential information, does not override the court's duty to review fees." *Id.* at 558. The court also suggested several means that law firms could use to balance the interest in protecting client information with the interest in getting their fees paid: getting client consent or requesting protection under 11 U.S.C. § 107 and Rule 9018. *Id.* at 558-59; *see also* In re Rheuban, 121 B.R. 368, 384-85 (Bankr. C.D. Calif. 1990) (*in camera* review of billing statements is an appropriate mechanism when lawyer raises claim of privilege). The same protections could be used for submitting unredacted billing narratives that reveal potential strategy decisions.

Alternative billing arrangements are becoming more mainstream. I've read about the Association of Corporate Counsel's Value Challenge[8] and the work done to link fees with the value provided to corporate clients—much of which suggests the use of alternative billing structures. I've also been reading a lot of news stories lately about the restrictions that non-bankruptcy clients are putting on their outside law firms. These stories report that clients are refusing to allow rate increases and are, instead, asking for discounts. The stories also report that clients no longer want to pay for summer associate hours or even for the hours billed by first- and second-year associates. In this economy, those stories ring true to me. If virtually no one in the market pays for these components except in the most unusual of circumstances, why should the estate? If, though, many non-bankruptcy clients *do* pay for such components, then that data will be helpful in the USTP's consideration of the Proposed Guidelines.

At least one of the original Comments pushed back on the Proposed Guidelines' presumptions about overhead (for example, that summer associate time should not be compensable from estate funds)[9] and about standard billing terms, such as billing non-working travel at half-time—on the grounds that the presumptions failed to reflect the current market practices that often allow such fees. Perhaps some law firms could provide some additional information at the public meeting on June 4, maybe by bringing along some of their CFOs (and some statements from their larger corporate clients about which components they're willing to pay for *outside of* bankruptcy matters).

In a recent ABI presentation at the 2012 Annual Spring Meeting ("What Do Clients Want From Their Professionals?"), the panelists discussed whether they, as clients, negotiated rates. The answers ranged from "I do" to "not really, because I pass along the rates to the borrower" to "I'm more concerned about efficiency, rather than just rates" to "at the end of the day, efficiency and staffing decisions will matter more than just whether we negotiate rates."[10]

The resistance to providing the USTP with information on the rates paid by a firm's non-bankruptcy clients ran deep in the first round of comments. Many of the original Comments suggested that giving the USTP information about rates charged to (and collected from) other clients in other matters would (a) reveal proprietary information about those rates that the law firms' competitors would use to their advantage; (b) not provide useful comparisons to put the bankruptcy rates in perspective;[11] (c) potentially disclose confidential client information about the firms' other clients;[12] and (d) interfere with the normal workings of the market, which will automatically insure that the rates are reasonable.[13] To the

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[8] http://www.acc.com/valuechallenge/about/index.cfm.

[9] There may be some work product from summer associates that actually is useful. But much of what summer associates do is neither efficient nor very helpful without further contributions from more senior lawyers, and that's why many non-bankruptcy clients are unwilling to pay for that work.

[10] I agree with this last statement. Rates are important, of course, but allocating the work efficiently and making appropriate staffing and strategy decisions matters a great deal. An hour of thoughtful strategic planning by someone at the highest end of the billing rate spectrum can be exceptionally valuable. Twenty hours of strategic planning by a first-year associate, even an inexpensive one, probably won't be.

[11] For example, some matters involve fixed fees, contingency fees, or lower hourly rates combined with success fees.

[12] *But see* n. 7, *supra.*

[13] I stopped trusting the automatic corrections of the market sometime shortly after Enron filed for chapter 11 protection.

extent that there is a better way to give the USTP (and ultimately the court) a way to put proposed fee structures in context—other than stating that everyone else charges fees of a certain magnitude and therefore the fees are at the market rate—it would be useful for the professionals to suggest them.

In fact, some have. In its Supplemental Comment filed on February 27, 2012, the National Bankruptcy Conference proposed three such alternatives:

> [1.] [T]he applicant law firm [c]ould provide a certification stating, in substance, that with any exceptions noted therein, the hourly rate charged for each of the ten individual attorneys who billed the most hours to the case during the relevant fee application period (or, if fewer than ten attorneys billed on the case, all attorneys who billed on the case) is no greater than the hourly rate that the firm charged for each attorney for at least the majority of hours billed during the current "rate period" to clients other than the chapter 11 client. . . . In addition, the Proposed Fee Guidelines might require that if more than some specified threshold (for example, 10% or 20%) of the hours billed to the estate during a particular fee application period were billed at a rate that is higher by some minimum threshold, than the "customary rate," . . . , then the applicant should explain the deviation. . . . [14]
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> [2.] [T]he law firm could certify the following information **either** for the firm as a whole (excluding foreign offices that did not bill substantial time to the case) **or** for each office in which attorneys collectively billed at least 10% of the hours that the firm billed on the chapter 11 case during the relevant fee application period: (A) for either the most current "rate year," or the last full "rate year": (1) the "blended hourly rate" for the firm or office, as applicable, based on total revenues divided by total hours, excluding hours spent on "pro bono" work or work which was done at a low rate as a "public service" and (2) the respective percentages of hours billed by partners, of counsel, associates, contract attorneys, and paralegals at the firm or that office, as applicable, for the applicable rate period; (B) the blended hourly rate billed to the estate by attorneys from the firm or that office, as applicable, for the applicable fee application period; and (C) the respective percentages of the time billed to the estate for the applicable fee period by professionals at the firm or that office, as applicable, by partners, of counsel, associates, contract attorneys and paralegals. . . . A material difference between the blended hourly rate charged to the estate for a given fee application period by the firm or office, and that generally realized by the firm or that office, not accompanied by a comparable difference in the relative proportion of partners, associates, etc. could be an occasion for the UST to make further inquiry.[15]

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[14] NBC Supplemental Comment at 4.
[15] *Id.* at 5.

> [3.] [T]he general counsel or other officer of the debtor responsible for supervising outside counsel and monitoring and controlling legal costs of outside counsel [could] provide a certificate outlining the steps that such responsible officer took (i) to ensure that the law firm's compensation was at the "market" and (ii) to maintain control over fees as the responsible officer would do outside of a chapter 11 case. . . . The point of this certification would be to demonstrate that the responsible officer had engaged in the same kinds of activities and analyses to control legal fees as would have been undertaken in a non-bankruptcy matter. Therefore, the certification should be appropriately detailed so as not to become boilerplate; and substantially similar certifications for the same law firm from different debtor clients might be flagged as suggesting that further investigation is warranted.[16]

The NBC's suggestions go a long way toward answering the baseline question about whether the rates charged bear an *actual* relationship to an *actual* market rate. Ultimately, the issue will be what evidentiary proof fee applicants should provide that will give courts the information that they need to determine if the fees and expenses are reasonable.[17]

VI. Is there a better way for estate-paid professionals to provide their clients, and the court, with some broad sense of the likely range of fees and expenses in a case, based on specified assumptions?

I'm asking about budgets and staffing limits because 119 major law firms signed on to the following statement in their original joint Comments:

> Bankruptcy is a process, not a system that produces pre-defined outcomes. As such, experience has shown that budgets are problematic because they are based on subjective judgments and predictions and are inherently inaccurate and uncertain. They become exponentially more inaccurate as the permutations a matter might take on become greater. Preparing an accurate and meaningful budget and staffing plan at the commencement of a large and complex bankruptcy case is, in fact, virtually impossible. Accurate budgets are largely a function of being able to predict the legal work that will be required to bring a particular project or matter to completion. That in turn requires the necessary steps to be predictable and not subject to variation because of matters outside the control of those preparing the budget.[18]

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[16] *Id.* at 5-6.

[17] I didn't get the impression that the Proposed Guidelines were designed to return lawyers to the "economy of administration" days—although other commenters clearly did—but there's a lot of room between the old "economy of administration" standard and the "our rates are market rates because we say that they are" assertion.

[18] Comments From 119 Law Firms, January 30, 2012, at 5-6.

Those same 119 law firms had this to say about the budgets that they prepare for clients *outside* bankruptcy:

> Those budgets are generally limited to staffing and budget plans for a particular transaction, or sometimes a particular piece of litigation. Furthermore, such budgets, when they are prepared for private clients, are based on a stated set of assumptions with provisions that state they are no longer applicable if the assumptions prove not to be true. Experience has shown, moreover, that the budgeting process produces useful predictions generally only for routine matters for which the steps required to reach completion have a high degree of certainty and are under the control of those preparing the budget. They are best and most often used in situations where the scope of work is known and defined and the parties involved are small in number.[19]

Although these statements appear to overstate the situation, there might be some merit to the underlying point. In the ABI presentation that I mentioned above, the panelists discussed the use of budget estimates, arranged by staffing rank (e.g., partners, associates, paralegals). They suggested that the only advantage of such budgets was that they demonstrated the thought that the professionals had put into how they would approach whatever matter for which the budget had been designed. The panelists were skeptical about the efficacy of those budgets as those same matters progressed for months or years, especially to the extent that the budgets were based on hourly rates. Instead, they were far more comfortable with receiving the professionals' descriptions of what other similar cases actually had cost (the "historical comparisons").[20] Very detailed, line-item budgets are probably not going to be useful in the largest chapter 11, but there are certain aspects of most chapter 11 cases that can at least be described in terms of historical comparisons. If one thinks of a budget as a broad outline of the likely costs of likely events in the case, then budgets using good-faith estimates and historical comparisons—along with regular amendments to those budgets when circumstances change—would operate as all budgets are supposed to: as strategic plans with money attached to them.

I applaud the NBC's suggestion for an early status conference to clarify a court's expectations regarding the likely range of fees and expenses of estate-paid professionals.[21] Speaking as someone who has sometimes been appointed to review fees after several months in a case have already passed, the suggestion that the court, the USTP, and the professionals could reach an understanding about budgets, staffing, fees, and allowable expenses near the beginning of the case seems quite sensible. After all, the motivation for clarifying expectations about fees and expenses is to lay the groundwork for the point at which the bankruptcy court must fulfill its statutory duty to review those fees and expenses for reasonableness.

It is difficult for a court to review fees for reasonableness in a vacuum. Some of the original

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[19] *Id.* at 6 (footnote omitted).
[20] Such historical comparisons are a good example of benchmarking.
[21] NBC Supplemental Comment at 6-7.

comments to the Proposed Guidelines indicated that the outside law firms have no way of knowing who's charging what hourly rates (or using which alternative fee arrangements) within their firms, or what's being collected from their clients. The American College of Bankruptcy's Comment[22] contained the following statement: "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."[23] This statement caught me off-guard, because I would have assumed that the CFO of every law firm would know, almost to the penny, what the various billing rates were, *and* what the collection rates were, for every single biller in the firm.[24] Isn't that why all of those bills are created in electronic formats and why a law firm's accounting department tracks accounts receivable? In the ABI panel's presentation that I mentioned above, one of the panelists said that, if she called her lawyers and asked how high her fees were running, she expected them to be able to give her that precise information quickly. I'm sure that she gets that information.

VII. Specific matters raised by the Supplemental LF Comments.

In addition to the questions that I have raised above, some of the specific suggestions in the Supplemental LF Comments have triggered additional questions—at least for me—that might be useful for the law firms to answer.

Page number in Comments	Suggestion	Concerns
7	Geographic variations in rates: this section suggests that, in the larger chapter 11 cases, a multi-office firm should use "a national rate card that largely or entirely eliminates local regional differences in rates."[25]	Although it is true that attorneys from a firm's regional offices who might sometimes work out of, say, a firm's New York office would be "consuming more costly New York resources," the Supplemental LF Comments have not yet made the case for "rounding up" to national rates in large chapter 11 cases.[26] Do clients who use lawyers from more than one office in *non*-chapter 11 matters routinely agree to use the higher national rate for

[22] Full disclosure: I am a Fellow of the American College of Bankruptcy.

[23] Comment filed by the American College of Bankruptcy, January 30, 2012, at 5.

[24] My guess is that firms use that information, at least in part, to evaluate the quality of the professionals' work. Collectability bears at least a tangential relationship to how valuable (solvent) clients consider that work to be. And if 118 firms are proposing that attorneys from their regional offices be allowed to charge national rates for those hours that they spend working in places like New York, *see* nn. 25-28, *infra,* and accompanying text, then I'll bet that someone at each of those firms knows who's charging what and how much the clients are paying.

[25] Supplemental LF Comments at 7.

[26] It is, however, a fair inference from the Supplemental LF Comments that firms actually are quite good at figuring out who's charging which rates in each of their offices. *Cf.* nn. 22-23, *supra,* and accompanying text (discussing the American College of Bankruptcy's statement regarding the difficulty of "find[ing] out what billing rate was actually collected for a particular attorney's services in every matter in which he or she billed time").

		those matters rather than the rates set by each office?[27] Moreover, is it a reasonable inference from the Supplemental LF Comments that, when the lawyers from their most expensive offices travel to regional offices and thereby consume less expensive resources, the lawyers' rates should decrease to the level of the regional offices' rates?[28]
7-8	Overhead: "[T]here may be instances where charges that usually constitute overhead are in fact incremental expenses attributable to the particular case. An example is after-hours lighting, heating, or air conditioning. Many current building leases exclude such items from monthly rent. In those instances, when such services are required, special arrangements need to be made with the building, and the tenant is surcharged for the after-hours lighting, heating, or air conditioning. When attributable to a particular case, such incremental costs should fairly be treated as additional expenses billable to the estate."[29]	Is it the case that when someone who is working on a *non-bankruptcy* matter stays late at the office, the firm bills the client for the incremental additional costs of after-hours lighting, heating, and air-conditioning attributable to that matter's late-night work? Based on my admittedly ancient memories of working at a large multinational law firm,[30] it's difficult for me to conceive of a major firm in which the only persons working on a matter late at night are the professionals involved in a large chapter 11 case; therefore, I would assume that a firm's standard billing rates would take the late-night work and concomitant costs into account. It might be useful for some of the signatory law firms to bring their CFOs along to explain what is, and isn't, factored in to the firms' normal rates and how any incremental expenses like lighting, heating, and air conditioning are billed to clients.
8	Threshold for justifying individual expenses: "It is entirely unreasonable to require that the reason for every individual expense be explained. Such a requirement is unheard of outside bankruptcy. The standard fails to take into consideration the professional and staff time necessary to document the reason for each	I agree that asking for reasons why a professional is charging for photocopying a given document will not contribute to the overall analysis of whether the professional's expenses are reasonable. But there is an alternative to giving law firms a "bye" on all expenses under $500. Virtually every law firm whose fees I have reviewed has a policy in place for such regularly occurring expenses as late-night cabs home, "working" meals at the office, and making

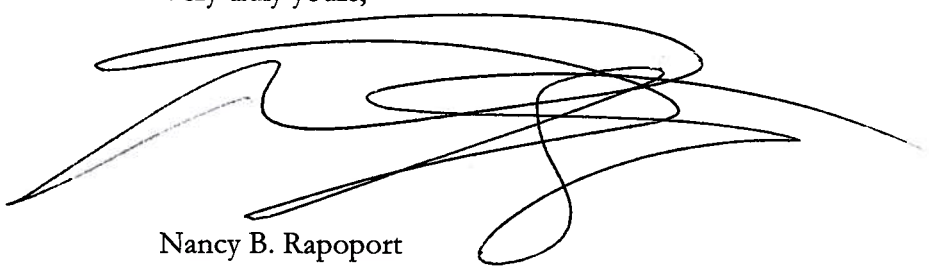
[27] That's why I can't support the proposal in the Supplemental LF Comments that propose to prohibit U.S. Trustees from objecting "to professionals charging national rates in Larger Chapter 11 Cases." Supplemental LF Comments at 43.
[28] After all, many of the cases filed in, say, the United States Bankruptcy Court for the Southern District of New York or the United States Bankruptcy Court for the District of Delaware involve debtors whose main offices are located in other parts of the country. When estate-paid lawyers travel from New York to Las Vegas to work out of their Las Vegas offices, should the New York lawyers' rates decrease to the rates of their Las Vegas colleagues?
[29] Supplemental LF Comments at 7-8.
[30] Morrison & Foerster.

	particular expense and carry it forth into the fee application. Perhaps the clearest example of this is a $0.10 photocopying charge. It seems clear therefore that the cost of documenting the reason for the expense should be significantly less than the expense itself. In addition, there seems no reason to spend estate time and resources documenting the reason for routine expenses like photocopying motion papers. While some believe that a higher threshold is appropriate, the LF Proposed Revised Guidelines settle on a threshold of $500 before an explanation of the individual expense is required."	photocopies rather than sending PDFs. Therefore, it might be possible for a firm to attach those policies to its employment application and its fee applications as an overall explanation of certain expenses or even to have a court approve those policies in advance. Questions about expenses come up, more often than not, when individual expenses seem to stray from the norm, such as one person expensing $100 for a working meal, or someone taking both a car service *and* a cab home in the same evening. Perhaps, rather than a $500 threshold for triggering individual explanations, a better fix would be requiring explanations for expenses that deviate from the firm's normal policies.

Conclusion

The second round of comments is proving extremely useful, as professionals with "skin in the game" suggest additional or alternative ways to reach the issue of reasonableness that the Proposed Guidelines are designed to address. I look forward to the discussions at the public meeting on June 4.

Very truly yours,



Nancy B. Rapoport