

New Chapter 11 Fee Guidelines...

Will They Really Help to Contain Attorneys' Fees?

BY TREY MONSOUR

Recently the Office of the U.S. Trustee issued new guidelines for the payment of attorneys' fees and expenses in Chapter 11 cases with \$50 million or more in assets and \$50 million or more in liabilities. According to K&L Gates' Trey Monsour, compliance will be subjective and likely expensive for attorneys in large Chapter 11 cases, with the debtor ultimately bearing the additional costs.



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On June 11, 2013, the Office of the United States Trustee issued new guidelines for the payment of attorneys' fees and expenses in Chapter 11 cases with \$50 million or more in assets and \$50 million or more in liabilities. The promulgation of the guidelines followed two comment periods spanning over one year.

These guidelines will apply to cases filed after November 1, 2013. The stated goals of these guidelines are to ensure that 1) bankruptcy attorneys are subject to the same accountability as non-bankruptcy attorneys, 2) fees sought to be paid are reasonable and necessary as compared with the market, and 3) billing practices are transparent. The United States Trustee hopes that the guidelines will also encourage discipline, predictability and client involvement to the compensation process through the adoption of budgets and staffing plans.

One criticism of the guidelines is the perception that they empower the United States Trustee to regulate matters relating to fee applications that are already addressed by the Bankruptcy Code. Section 330 of the Bankruptcy Code currently requires

bankruptcy courts, after notice to the United States Trustee and a hearing, to determine that professional fees and expenses are reasonable and necessary. Section 330 already lists a number of factors for bankruptcy courts to consider including the nature, extent and value of the services, benefit to the estate, and whether the compensation is reasonable based on customary compensation charged in cases other than bankruptcy cases. A professional must prove that his or her fees and expenses comply with the Bankruptcy Code before a bankruptcy court may approve them.

The United States Trustee has expressed that the guidelines represent its policy position and will be used in the absence of controlling law or rules in a jurisdiction. The guidelines purport to require that entities reviewing fees should review and comment on fee applications in accordance with §330 of the Bankruptcy Code and "the guidelines." The guidelines are not binding on the bankruptcy court unless on parties in interest such as debtors and creditors' committee. Yet the guidelines purport to impose a requirement that parties follow them.

According to the United States Trustee, the guidelines establish a systematic approach for it to follow when reviewing and commenting on fee applications of attorneys. The guidelines require that an attorney establish that the rates he or she charges reflect market rates outside of bankruptcy, use budgets and staffing plans (which must be routinely updated), disclose rate increases during the engagement, use rates based upon the attorney's home office location, submit billing records in an open, searchable

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electronic format and use model forms and templates for applications for compensation and expenses. The guidelines also contemplate the use of fee examiners in appropriate cases.

How does an attorney show that the rate he or she is charging is the market rate? The United States Trustee suggests that the attorney provide a “blended” hourly rate charged by attorneys at his or her firm or select representative offices within the firm. The blended rate may be the aggregate of either all of the applicant’s domestic timekeepers or all timekeepers in each of the applicant’s domestic offices in which the timekeepers collectively billed at least 10% of their hours to bankruptcy cases during the application period. Data from timekeepers practicing primarily in a bankruptcy group or section should be excluded from the calculation.

Why does the United States Trustee believe that attorneys should prepare budget and staffing plans? The United States Trustee explains that such practices are consistent with non-bankruptcy cases to manage legal costs. The guidelines propose a template used by the Association of Corporate Counsel in preparing budget and staffing plans. Bankruptcy cases today are far more complex with larger economic stakes. Many cases are litigious. Creditors’ committees are far more active. Any budget or staffing plan considering the unpredictability and complexity of large bankruptcy cases will routinely have to be amended by the attorney. Likewise, public disclosure of budgets and staffing plans could divulge privileged information or confidential information. As a result, attorneys should be very cautious about what information goes into these plans and generously budget contingencies for fees and expenses in each budget category. One must question whether these plans will be helpful and informative or merely perfunctory and burdensome.

The guidelines do permit an attorney to raise his or her rates during a bankruptcy case. The guidelines contain provisions pertaining to rate increases. The guidelines propose a form “Exhibit B” that requires the attorney include his or her title, section, date of admission, the fees and hours billed in the fee application and the number of rate increases during the inception of the case. Under the guidelines, boilerplate language in the retention application is insufficient. The guidelines empower the United States Trustee to be the arbiter of whether a rate increase is reasonable. If a client does not object to a rate increase and the client is paying the bill, the guidelines would appear to interfere with the normal attorney-client relationship.

The guidelines allow an attorney to charge customary rates from his or her “home forum” but not the higher rates in a case pending in a higher priced forum. So, if an attorney has historically been

working on matters in a location other than his or her home office and market rates in that location are less than his or her rate in the home office, what rate should the attorney charge?

While the guidelines do not impact the ability of an attorney to be compensated for the preparation of a fee application, the guidelines provide that awarding compensation for matters related to a fee application after its initial preparation is generally inappropriate subject to a few exceptions. The United States Trustee supports its position on the basis that professionals do not charge clients for time spent explaining or defending a bill. What the United States Trustee overlooks is that in a bankruptcy case

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Will these guidelines apply to other types of professionals and cases smaller than \$50 million? The United States Trustee has advised that the guidelines will be revised in phases. Until new guidelines are drafted and adopted, the 1996 guidelines will continue to govern the review of fee applications of non-attorney professionals and in all cases less than \$50 million and filed under other chapters of the Bankruptcy Code.

The guidelines present a number of unanswered questions, many of which will need to be taken up with the bankruptcy court. Compliance will be subjective and probably expensive for attorneys in large Chapter 11 cases. Ultimately the debtor will bear these additional costs. So will these guidelines really manage attorneys’ fees in large Chapter 11 cases and boost transparency as the United States Trustee protests or will the guidelines impose another costly and administrative burden on a process, which already has in place checks and balances under the Bankruptcy Code?

Time will tell. [abfj](#)

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