

A Primer on Dealing with Fee Examiners

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A PRIMER ON DEALING WITH FEE EXAMINERS

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AGENDA

- Fee Examiners
 - Why We Need Them
 - Goals of Fee Examiners
 - How Professionals Can Be Proactive
- Baker Botts v. ASARCO
 - USTP Response
 - Recent Rulings on Creative Responses

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THE STATUTES AND RULES:

- 11 U.S.C. § 328(a) provides parties authority, with court approval, to employ a professional person on reasonable terms and conditions of employment.
 - Court may modify the allowed compensation if such terms and conditions prove to have been improvident in light of other developments.
- 11 U.S.C. § 330(a) sets standards for allowance of fees and expenses to be paid from the estate.
 - Fees must be reasonable compensation for actual, necessary services.
 - Expenses must be actual and necessary.
- Fed. R. Bankr. P. 2016(a) prescribes content of fee applications.
- 28 U.S.C. § 586(a)(3)(A) requires U.S. Trustee to review applications in accordance with uniform guidelines and to comment on or object to such applications.
- Courts have the independent obligation to review fee applications.

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FEE REVIEW UNDER BANKRUPTCY CODE

- More complex cases led to a greater number of more voluminous applications.
 - Multiplicity of professionals for both debtor and committee.
 - Placed burden on court staff and U.S. Trustee personnel.
- Private development of computer programs for fee analysis.
- Courts began retaining private fee analysts to provide reports on applications.
 - Began around early 1990s (e.g., Continental Airlines, D. Del.).
- Fee committees developed somewhat later.
 - 2002—Committees appointed in Bethlehem Steel, Worldcom, and Enron. Adelphia committee appointed in early 2003.

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WHAT ARE THE USTP FEE GUIDELINES?

- Required by Statute (1994 Bankruptcy Reform Act)
- Uniform and Consistent
 - Internal guidance for fee review
 - Expectations of professionals
 - Grounds for possible objections
- Initial UST Guidelines for all chapter 11 cases became effective in 1996.
- The revised UST Guidelines (Appendix B) for large chapter 11 cases became effective in 2013. The initial UST guidelines established in 1996 remain in effect for all chapter 11 cases that do not meet the large case threshold set forth in the revised 2013 guidelines.

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NEW FEE GUIDELINES FOR LARGE CHAPTER 11 CASES (\\

- Process for adoption:
 - Two years
 - Pre-drafting consultation
 - Two drafts for public comment
 - DOJ Public Meeting
 - Assoc. AG announced June 11, 2013
- Effective for “large” (>\$50 million in both assets and debts) chapter 11 cases filed after November 1, 2013.

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FEE COMMITTEES AND EXAMINERS UNDER LARGE CASE FEE GUIDELINES

- UST will ordinarily seek appointment of a “fee review entity” in a large chapter 11 case. Possible exceptions:
 - True prepackaged case.
 - Case where number of estate-paid professionals will clearly be small.
- UST will consult early in case with debtor and committee about stipulating to appointment of fee examiner or committee.
 - Timing is important. A delayed appointment can hamper the fee process.
 - The stipulation will be presented to the court as an order.
 - Such agreements are becoming more common.

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FEE REVIEW MODELS

- Fee Examiner (not § 1104 examiner)
 - Examples: GM, American Airlines
- Fee Committee with Independent Chair
 - Examples: Enron, Lehman Bros, Caesars
- Fee Committee
 - Examples: Worldcom, GGP, Adelphia

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FEE REVIEW VALUE

- An experienced bankruptcy professional will serve as independent member or examiner
 - More than fee auditor focused on numbers
 - Raise important legal issues for adjudication
- Rigorous review should deter bad practices. Early correction may avoid larger problems later.
- Fees reduced vs. cost of review is *not* a proper measure of success.

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TENSION BETWEEN REPRESENTING THE FIDUCIARY CLIENT AND CERTAIN CHOICES ABOUT WORK AND STAFFING:

- Fiduciary duties of estate-paid professionals tend to lead to certain choices in terms of work done and the staffing of that work.
- Fee Committee / Fee Examiner as an aid to the Court's determination of reasonableness.
 - Often different dynamic between retained professionals and fee examiner vs. fee committee.

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GENERAL PHILOSOPHY:

- It's important to gather the facts, including asking the professionals why they made certain choices. Asking is better than assuming.
- Creating a general understanding up front saves misunderstandings later on.
 - What is presumptively reasonable in the context of a given case?
 - How do we communicate about exceptions to rebuttable presumptions?
 - Communication and planning are key.
 - Who should be primary contact on behalf of retained professional?

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SORTABLE DATA MATTERS.

- LEDES format is very useful (<https://ledes.org>)
- Not quite as useful: Excel versions of data; searchable PDFs.
 - It takes time to “unblock” block-billing and to sort through vague descriptions.
 - Don’t give away this billed time by being imprecise.
 - Descriptions matter. Don’t make the fee reviewer guess what you’re describing in terms of work done.
 - “Attention to file” has never been a useful description.

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THE 4.5 BASIC CONSIDERATIONS:

- Are the professionals doing the work that the Bankruptcy Court *authorized* them to do?
- Are they using the appropriate *staffing* to carry out their work?
- Are they spending a reasonable amount of *time* doing the work?
- What is the *quality* of the work?
- (And the .5) Are the *expenses* reasonable?
 - Real-life examples: \$140 shirt billed to the estate; in-room movies.

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FIRST THINGS FIRST: WHAT DOES THE ORDER AUTHORIZING EMPLOYMENT SAY?

- Overlay across professionals—context specific.
- “Mission Creep”
- As work expands, have the professionals gotten an amended order authorizing an expanded scope?
 - Any unannounced rate changes?
 - Changes to staffing?

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MOVING FROM THE ORDER TO THE BUDGET:

- Budget vs. Actual—any unusual variance? Explanation?
- Client sign-off on budget/actual?
- Practice Pointer: budgets are very difficult in the chapter 11 context. Periodic review and revision to previously submitted budgets will make them more useful to your fee examiner.

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“FIRST SLICES”

- % of time spent prepping the fee application.
- For each project billing category each month:
 - Sort by name, rank (partner, associate, paralegal, or some other category), and hourly rate.
 - Sort by how much time each of them spent.
 - Sort in order from the person who billed the most time to the person who billed the least time.
- Aim: “lowest efficient biller.”

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SPEAKING OF EFFICIENCY:

- How many $\geq 14+$ hours days in a row?
Explanation for having several days in a row while operating in a highly sleep-deprived environment?

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EYEBALLING THE "QUALITY":

- For work that took ≥ 20 hours of billed time, look at the work product itself.
 - Real-life example: 32 hours of work for an 8-page stay relief motion.
- Confidentiality agreements for work product that is not part of a public record.

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RED FLAGS TRIGGERING FOLLOW-UP QUESTIONS:

- Vague time entries.
- Block-billed entries.
- # of people doing a particular task at a particular time without a clear explanation of why these people were all working on a project.
 - Why multiple partners are attending certain hearings. See Order to Supplement in Caesars, Case No. 15-01145 (Bankr. N. D. Ill.) (12/18/15)
- Top-heavy (high hourly rates) billing on tasks that don't require high levels of experience and judgment.
 - What research are partners doing. See Fee Committee Second Report in Caesars, Case No. 15-01145 (Bankr. N. D. Ill.) (12/18/15).
- Things that have traditionally counted as overhead being charged to the estate.

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MORE RED FLAGS:

- .1 for reading each entry on a day's docket, or several people all reviewing the docket for the same reason.
- Not following local rules for things like car services/ meals/non-working travel time.
- Abnormally high airfare or hotel rates.
- Unusual hourly rate increases or increases that did not first get client approval.
 - What value to the estate is represented by rate increases. See Fee Committee Second Report in Caesars, Case No. 15-01145 (Bankr. N. D. Ill.) (12/18/15).

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RED FLAG REAL-LIFE EXAMPLES:

- A \$425,000 conflicts check.
- Tens of thousand of dollars to make charts (presumably from Excel data).
- Cell phones charged to the estate.
- A \$140 shirt charged to the estate.
- A \$200,000 for lobster dinner to boost “morale” for employees stuck on-site for several weeks in a row.
- And a counter-example: eating snacks from a mini-bar when there were no restaurants (or room service options) open by the time the person got back to the hotel room.

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HELPFUL THINGS FOR ESTATE-PAID PROFESSIONALS TO DO:

- Much of the time, the problem isn't with the time or expense, but the professional's failure to explain it.
- Identify the time (and the value of the time) that you write off.
- Ask yourself: "If I didn't already know the case inside and out, would this description make sense to me?"
- When in doubt, ask in advance. Good fee examiners want professionals to be able to recover their reasonable fees.

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HELPFUL THINGS FOR ESTATE-PAID PROFESSIONALS TO DO (CONT'D):

- Spend meaningful time reviewing pre-bills and making necessary revisions and/or write-offs in advance.
- Have the partner in charge of the engagement involved in resolution discussions with the fee examiner.
- Create a culture of virtuous billing.
 - Every instance that a professional fills out their time sheet matters.
 - Change default rules (and potentially software) by asking firm members what needs to change and use incentives to induce virtuous billing.
 - See Virtuous Billing, Randy Gordon and Nancy B. Rapoport, *Nevada Law Journal*, Vol. 15, 2015 and 'Nudging' Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in law Firms, Nancy B. Rapoport, *St. Mary's Journal of Legal Ethics & Malpractice*, Vol. 4, p. 42, 2014

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DEFENDING “SUCCESS” FEES FOR FINANCIAL ADVISORS

- Financial advisor engagements often include “success,” “transactional,” “restructuring” or other similar fees.
- The nexus between the financial advisor’s efforts and the “success” of the plan that is confirmed is one of the factors courts consider in allowing a financial advisor’s compensation.
- Financial advisors and their counsel can illustrate this nexus by proving, for example, that the financial advisor played a leading role in settlement and plan negotiations leading to consensual confirmation of a plan. *See In re Exide Technologies*, Case No. 13-11482 (Bankr. D. Del.) (12/18/15).

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BAKER BOTTS V. ASARCO

- Discussion Topics:
 - Case Issue: Compensation for the defense of a fee application in Bankruptcy Code?
 - The USTP Approach Post-Asarco
 - *In re Boomerang Tube*
 - Creative Responses to ASARCO

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USTP POST-ASARCO

- The USTP states its Post-Asarco approach in its FAQs on Professional Compensation (Appendix B).
- Post-Asarco, the USTP will object to defense fees incurred after an objection has been filed.
- The USTP will object to professionals seeking pre-approved terms of employment that permit payment of fees-on-fees otherwise disallowed by ASARCO.
- The USTP will object to professionals seeking higher rates or enhanced compensation than that charged for comparable non-bankruptcy engagements based on the risk of non-payment for future fee litigation and resulting dilution for bankruptcy compensation.

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USTP POST-ASARCO (CONT'D)

- The USTP will object to non-legal professionals seeking reimbursement of legal fees in connection with defending objections to fee applications.
- The USTP may object to defense fees incurred negotiating or explaining fee applications before an objection is filed in court.
- The USTP will not rely on ASARCO to object to fees incurred in fee application prep.
- The USTP will continue to object to billing for the preparation of invoices submitted in support of a fee application.

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BOOMERANG TUBE

- On January 29, 2016, Judge Walrath in the Delaware Bankruptcy Court, citing ASARCO, held that section 328, like section 330, does not authorize the approval of fee defense provisions in engagement letters.
- Judge Walrath, explained that while sections 328 and 330 do not explicitly prohibit defense fees, parties cannot contractually violate provisions of the code.
- In the case, Judge Walrath rejected the argument of counsel the creditors' committee that committee counsel and the committee contracted around the American rule regarding fee-shifting.
 - The committee and its counsel could not bind the estate (a third-party) to paying its defense costs.

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BOOMERANG TUBE (CONT'D)

- Even if the retention agreements between the committee and its counsel were contractual exceptions to the American rule on fee shifting Judge Walrath ruled that the fee defense provisions were not reasonable because they only involved services performed by counsel for their own interests.
- See *In re Boomerang Tube, Inc.*, Case No. 15-11247 (Bankr. D. Del.) (1/29/16).

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WORK-AROUNDS (NEW GULF RESOURCES)

- In New Gulf Resources, Baker Botts asked for a fee premium in its application to be retained by the debtors.
- The fee premium contemplated increasing aggregate fees by 10%, which will only be waived if Baker Botts does not incur material fees and expenses defending any objection to its interim or final fee applications.
 - Baker Botts argued that this fee premium would deter meritless objections.
- After the USTP objected to the fee premium and the court advised that it would rule on the propriety of the fee premium later, Baker Botts filed a revised proposed order deferring consideration of the fee premium to a later date.
- The Court entered this revised order on January 19, 2016. See Case No. 15-12566 (Bankr. D. Del.) (1/19/16).

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WORK-AROUNDS (SAMSON RESOURCES)

- In Samson Resources, Kirkland & Ellis and Klehr Harrison tried to incorporate reimbursement provisions into their respective applications to be retained by the debtors.
 - The reimbursement provisions would have allowed Kirkland and Klehr reimbursement for fees and expenses incurred with actions relating to their legal services.
- The retention orders for both firms stated that the court would not approve those reimbursement provisions until later.
- On February 8, 2016, Judge Sontchi, citing Judge Walrath's opinion in Boomerang Tube, declined to approve the reimbursement provisions at issue.
 - Judge Sontchi recognized that even though Judge Walrath's ruling applied to a committee's retention of a law firm, the same reasoning applied to a debtors' retention of law firms.
- What next?

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CONCLUSIONS

- Q&A
- Final Thoughts
- Thank you!

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**DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR U.S. TRUSTEES
2013 FEE GUIDELINES FOR ATTORNEYS IN LARGER CHAPTER 11 CASES:
SUMMARY OF MATERIAL DIFFERENCES FROM 1996 GUIDELINES**

- 1. CUSTOMARY AND COMPARABLE COMPENSATION DISCLOSURES**
 - a. Disclose firm's non-bankruptcy blended hourly rates by category of timekeeper
 - b. Limited "safe harbor" from USTP objection
- 2. BUDGETS AND STAFFING PLANS**
 - a. By consent or court order
 - b. Hours and fees per task code; no narrative or description
 - c. Disclosed with fee application
 - d. If fee application exceeds budget by 10%, explain why
- 3. ELECTRONIC BILLING DATA**
 - a. Provide billing data as maintained by firm to court, USTP, and major parties; other parties on request
 - b. Virtually all firms and clients use LEDES (legal electronic data exchange standard) data (LEDES.org)
- 4. CLIENT AND APPLICANT STATEMENTS**
 - a. Applicant with retention application
 - b. Client with retention application (verified)
 - c. Applicant with fee application
- 5. RATE INCREASE DISCLOSURES AND CALCULATIONS**
 - a. Questions on disclosure and approval of rate increases in applicant statement (4 above)
 - b. Disclose initial rate and current rate for each timekeeper
 - c. Disclose number of rate increases since case inception for each timekeeper
 - d. Calculate total compensation requested with and without rate increases
- 6. EFFICIENCY CO-COUNSEL RETENTION AND BILLING GUIDANCE**
 - a. Encouraged for routine work at lower cost
 - b. Compare billing rates and terms with lead counsel; demonstrate projected savings to estate
 - c. Avoid duplication
- 7. FEE EXAMINER AND FEE COMMITTEE MODELS**
 - a. Three models
 - i. Fee examiner (not § 1104)
 - ii. Fee committee with independent chair
 - iii. Fee committee
 - b. Experienced bankruptcy professional
 - i. Not a prohibited special master; court must still adjudicate issues and award fees
 - ii. More than fee auditor focused solely on numbers
- 8. FIVE MODEL FORMS** (PDF fillable model forms will be available on USTP website)
 - a. Exhibit A: Customary and Comparable Compensation Disclosures
 - b. Exhibit B: Summary of Timekeepers Included in this Application
 - c. Exhibit C: Budget and Staffing Plan
 - d. Exhibit D: Summary of Compensation by Project Category
 - e. Exhibit E: Summary Cover Sheet of Fee Application

UNITED STATES TRUSTEE PROGRAM

FREQUENTLY ASKED QUESTIONS:
FEE GUIDELINES FOR ATTORNEYS IN LARGER CHAPTER 11 CASES

Professional Compensation in Bankruptcy

Q. How are bankruptcy attorneys paid under the Bankruptcy Code?

- A. Under the Bankruptcy Code, attorneys and other professionals who provide services for the debtor and official committees are entitled to be paid from the bankruptcy estate – the pool of assets and monies otherwise available to pay creditors – but the attorneys and other professionals must first file applications to be paid with the court and have the court approve the payments. Section 330 of the Bankruptcy Code says fees must be reasonable and necessary, and comparable to what attorneys charge outside of bankruptcy cases. Applicants must prove that their fees and expenses comply with the Bankruptcy Code before the court may enter an order directing the bankruptcy estate to pay the fees.

Q. What role does the U.S. Trustee Program (USTP) play in bankruptcy compensation?

- A. One of the U.S. Trustee's statutory duties is to review, comment, and object, where appropriate, to fee applications that do not satisfy the standards for payment under the Bankruptcy Code. Once the U.S. Trustee objects to fees, it is up to the court to decide if any or all of the fees should be awarded. Often, the USTP is the only party to object to professional compensation.

Q. If the Bankruptcy Code establishes what fees and expenses can be paid, why does the USTP have Guidelines?

- A. The Guidelines, which are mandated by law, are an important statement of policy governing the USTP's review of fee applications filed by attorneys in large chapter 11 cases. The Guidelines do not supersede statutes, rules, or court orders, but they do communicate the criteria used by U.S. Trustees in reviewing fee applications, the USTP's expectations of professionals, and possible bases for U.S. Trustees' objections to the payment of fees and reimbursement of expenses.

Q. Does the court adjudicate all USTP objections to fees?

- A. Not necessarily. Many times, the U.S. Trustee will ask questions or seek more information from the professionals before filing an objection, and the answers or information may resolve the U.S. Trustee's need to object. In other instances, the U.S. Trustee may object and then reach an accord that resolves the objection. In either case, the court must review and determine whether to award the compensation and may reach a different conclusion than did the U.S. Trustee.

Purpose and Content of the Guidelines

Q. Why did the USTP update the Guidelines?

- A. The Guidelines were originally published in 1996. Since then, there have been significant changes in the legal industry and the complexity of business reorganization cases. The nature of many large bankruptcy cases has grown more complex as new financial practices and financial instruments have entered the marketplace. In addition, enormous amounts of money are at stake in large bankruptcy cases, including huge professional fees, which can reduce public confidence in the bankruptcy system. Further, law firm billing practices and law office technology have undergone profound changes, such as the common use of discounts and budgets in non-bankruptcy cases.

Q. What are the primary goals of the Guidelines?

- A. The primary goals are (1) to ensure that attorneys' fees in larger chapter 11 bankruptcy cases are subject to the same client-driven market forces, scrutiny, and accountability that apply in non-bankruptcy cases and (2) to increase disclosure and transparency in the bankruptcy compensation process for attorneys.

Q. To what cases do the Guidelines apply?

- A. The Guidelines apply to chapter 11 cases with \$50 million or more in assets and \$50 million or more in liabilities, aggregated for jointly administered cases and excluding single-asset real estate cases (cases where the debtor's sole asset is a piece of real property). These values are based on the information in the bankruptcy petition.

Q. When do the Guidelines take effect, and what provisions apply until then?

- A. The Guidelines take effect in cases filed on or after November 1, 2013, for attorneys in larger chapter 11 cases. Until then, the 1996 Guidelines apply. On and after November 1, 2013, the 1996 Guidelines continue in effect for all other professionals and for attorneys in chapter 11 cases below the large case threshold.

Q. Overall, what do the Guidelines do?

- A. In general, the Guidelines provide for:
- A showing that rates charged reflect market rates outside of bankruptcy.
 - The use of budgets and staffing plans.
 - Disclosure of rate increases that occur during the representation.
 - Use of rates that are based on the attorney's home office location.
 - The submission of billing records in an open, searchable electronic format.
 - The use of independent fee committees and fee examiners.

- The use of model forms and templates for applications for compensation and expenses.

Q. Why is the USTP so concerned about “market rates” for attorneys?

- A. Section 330 of the Bankruptcy Code requires courts to determine “reasonable compensation for actual, necessary services” based on factors that include “customary compensation charged by comparably skilled practitioners in cases other than” bankruptcy cases – in other words, the market rate.

Q. Under the Guidelines, how do attorneys provide information on market rates?

- A. Attorneys may provide an average, or “blended,” hourly rate charged by professionals in their law firm or selected offices of their law firm.

Q. Why does the USTP want budget and staffing plans, and why require a court order for them?

- A. Requesting budget and staffing plans is consistent with practices used in non-bankruptcy cases to manage legal costs. The USTP’s budget and staffing plan templates are modeled after those used by the Association of Corporate Counsel. The Guidelines provide for a court order in cases where the parties do not consent to providing a budget.

Q. Do the Guidelines permit attorneys to increase their rates during a bankruptcy case?

- A. The Guidelines contain provisions pertaining to notice and approval of rate increases. Rate increases may be significant and, therefore, the court and the parties should have the opportunity to consider whether the increases are reasonable. Case law on this issue may differ from district to district, and the USTP will seek to challenge settled law where appropriate.

Q. What if an attorney works on a case in a location other than his or her home office, and market rates are different in the two locations?

- A. The Guidelines allow attorneys to charge customary rates from their “home forum,” but not to charge higher rates in a case pending in a higher priced forum.

Q. How does the USTP enforce the Guidelines?

- A. USTP staff adhere to the Guidelines when reviewing and commenting on the fee applications of attorneys. Only the court has the authority to award compensation and reimbursement under section 330 of the Bankruptcy Code. If litigants challenge the Guidelines by asking the bankruptcy court not to follow them, the USTP will vigorously defend the Guidelines and file appeals as appropriate.

Process for Updating the Guidelines

Q. Was the public involved in the updating process?

- A. Yes, the USTP went to great lengths to solicit public input on the proposed Guidelines. In November 2011, the USTP posted an initial draft and invited public comments. In June 2012, the USTP conducted a public hearing at Department of Justice headquarters in Washington, DC. In November 2012, the USTP posted a second draft, which included an analysis of the comments on the first draft, and invited comments on the second draft before promulgating the final Guidelines.

Q. Why did the USTP publicize the proposed Guidelines so widely?

- A. The Guidelines represent a significant step forward in increasing transparency and accountability in chapter 11 professional fees. While the Guidelines are not subject to the notice and comment process of the Administrative Procedure Act, the USTP publicized them widely because of their importance to the bankruptcy system and the extraordinary amount of interest in them.

Additional Information

Q. What about the USTP Guidelines for other types of professionals and cases?

- A. These Guidelines are part of a multi-step revision process. Until the USTP adopts superseding guidelines in the next phases of revisions, the 1996 Guidelines will continue in effect for the review of fee applications filed in large chapter 11 cases by professionals who are not attorneys; in all chapter 11 cases below the large case threshold; and in cases under other chapters of the Bankruptcy Code.

Q. Where are the Guidelines published?

- A. In addition to being posted on the USTP's Web site, the Guidelines will be published in the Federal Register.

FREQUENTLY ASKED QUESTIONS (FAQS) – PROFESSIONAL COMPENSATION

The United States Trustee Program is prohibited from providing legal advice to private individuals. These questions and answers relate to general circumstances involving bankruptcy.

Questions

1. After ASARCO, will the USTP object to defense fees incurred after an objection has been filed in court?
2. Will the USTP rely on ASARCO to object to fees incurred in preparing a fee application?
3. After ASARCO, will the USTP object to defense fees incurred negotiating or explaining fee applications before an objection is filed in court?
4. Will the USTP object to professionals seeking a pre-approved term of employment that permits the payment of fees-on-fees otherwise disallowed by ASARCO?
5. Will the USTP object if a professional seeks a higher rate or enhanced compensation, i.e., a bankruptcy premium, than that charged for comparable non-bankruptcy engagements based on the purported risk of non-payment for future fee litigation and resulting dilution of its bankruptcy compensation?
6. How will the USTP handle pending cases with requests for fees incurred in defending fee applications?
7. Will the USTP continue to object to billing for the preparation of invoices submitted in support of a fee application?
8. Will the USTP object to non-legal professionals seeking the reimbursement of legal fees for defending objections to fee applications?

Answers

1. **After ASARCO, will the USTP object to defense fees incurred after an objection has been filed in court?**

A: Yes. The Supreme Court ruled that attorneys' fees for defending objections to applications for compensation ("defense fees" or "fees-on-fees") are *per se* prohibited because section 330 does not expressly alter the American Rule against fee shifting. *See generally Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158, 2167 (2015). Although the U.S. Trustee Fee Guidelines for Attorneys in Larger Chapter 11 cases ("LCFG") state that billing the estate for defending fee applications is "generally inappropriate" unless the defense fees fall "within a judicial exception applicable within the [judicial] district," LCFG, B.2.g., there are no applicable judicial exceptions after ASARCO.

2. **Will the USTP rely on ASARCO to object to fees incurred in preparing a fee application?**

A: No. The Court in ASARCO did not disallow reasonable compensation for preparing a fee application and noted that "preparation of a fee application is best understood as a 'servic[e] rendered' to the estate administrator under § 330(a)(1)." 135 S. Ct. at 2167. Thus, reasonable charges for preparing interim and final fee applications are compensable because section 330(a)(1) allows them, and section 330(a)(6) requires that the compensation for the fee application be reasonable in relation to the level and skill required to prepare it. *See also* LCFG, B.2.f. (preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid).

3. After ASARCO, will the USTP object to defense fees incurred negotiating or explaining fee applications before an objection is filed in court?

A: Generally no, but it depends on the facts and circumstances of each case. Work that is an extension of fee application preparation will not generally be objectionable. Thus, good faith communications and negotiations regarding a well-prepared fee application may be considered an extension of fee application preparation. But patently poor and deficient fee applications that elicit extensive inquiries or negotiations and require extensive amendment may not be considered part of the fee application preparation. For example, fees related to repeated billing errors, such as vague descriptions or block-billing, will draw an objection. In the absence of further court guidance post-ASARCO, the USTP will consider many factors in determining whether such defense fees appear to be for the professional's benefit or for the client's and, therefore, objectionable or not. The USTP's goal is to apply ASARCO faithfully, while encouraging sound billing practices and professional cooperation and compliance short of litigation, where possible.

4. Will the USTP object to professionals seeking a pre-approved term of employment that permits the payment of fees-on-fees otherwise disallowed by ASARCO?

A: Yes. Professionals' employment and compensation rights in bankruptcy arise by statute. ASARCO's analysis is relevant to all Bankruptcy Code sections dealing with employment and compensation. First, section 328 permits a professional to seek court approval for any reasonable terms and conditions of employment. But section 328, like section 330, does not contain explicit statutory authority for deviating from the American Rule against fee-shifting. Second, section 328 terms must both relate to the scope of the professional's employment and be reasonable. Paying fees-on-fees is neither a term of employment nor is it reasonable for the estate to pay for work that is not a client service. Third, section 330(a)(1) governs the award of compensation, subject to sections 326, 328, and 329, and ASARCO expressly precludes an award of fees-on-fees under section 330 (a)(1). (A section 330 award is what gives the professional an administrative claim against estate assets under section 503(b)(2)).

In addition, estate-paid professionals cannot by consent or contract create an exception to pay what the Code does not allow. See *In re Lehman Bros. Holdings, Inc.*, 508 B.R. 283, 294 (S.D.N.Y. 2014). The Code, through sections 326-331 and 503, regulates both professional compensation and administrative expenses paid from the estate in a comprehensive way that parties are not free to rewrite. See *id.* Thus, fees cannot be shifted by a contract that violates a statute, and the USTP will generally object to efforts to pay fees-on-fees in circumvention of ASARCO.

5. Will the USTP object if a professional seeks a higher rate or enhanced compensation, i.e., a bankruptcy premium, than that charged for comparable non-bankruptcy engagements based on the purported risk of non-payment for future fee litigation and resulting dilution of its bankruptcy compensation?

A: Yes. The Court in ASARCO considered—and rejected—the idea of bankruptcy premiums or enhancements based on the risk of “dilution.” “In our legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization. Requiring bankruptcy attorneys to pay for the defense of their fees thus will not result in any disparity between bankruptcy and nonbankruptcy lawyers.” ASARCO, 135 S. Ct. at 2168. This analysis is consistent with section 330(a)(3)'s standard that a bankruptcy practitioner's reasonable compensation is what is customary and comparable to a non-bankruptcy practitioner's, i.e., market rates and billing practices. See 11 U.S.C. § 330 (a)(3)(F). To the extent the

Fifth Circuit suggested otherwise in its earlier *ASARCO* decision, 751 F.2d 291 (5th Cir. 2014), the Supreme Court disagreed.

Moreover, dilution risk is minimal. *ASARCO* is an exceedingly rare case for many reasons. First, *ASARCO* involved the very unusual circumstance where management of the reorganized debtor was again controlled by the parent upon confirmation. Post-confirmation management was uniquely motivated to be hostile to debtor's bankruptcy counsel because bankruptcy counsel had represented the debtor in obtaining an extraordinarily large judgment against the parent during the bankruptcy—and any reduction in fees would have been a dollar-for-dollar economic benefit to the parent. Second, the fee defense costs were \$5 million, reflecting again the very unusual nature of the case. Third, in many cases, the USTP is the only party that objects to a fee application. See *In re Busy Beaver Building Centers, Inc.*, 19 F.3d 833 (3rd Cir. 1994). Finally, because an objecting party must pay its own attorneys' fees to pursue fee objections, this should discourage frivolous objections. And to the extent there are bad faith or frivolous fee objections, the Court noted that a bankruptcy professional can avail itself of Rule 9011 sanctions. 135 S. Ct. at 2168, n.4.

6. How will the USTP handle pending cases with requests for fees incurred in defending fee applications?

A: Any newly filed interim application and any final application containing a request for defense fees for the first time should be reviewed under the standards discussed above. That is, if the fees-on-fees resulted from fee litigation, an objection is generally appropriate. If no fee objection was ever filed, then whether the fees-on-fees are objectionable depends on the facts and circumstances of the case.

If fees-on-fees have been previously awarded on an interim application that would have been disallowed under *ASARCO*'s ruling, the USTP should determine whether an objection at the final application stage is advisable based on controlling law within the jurisdiction.

7. Will the USTP continue to object to billing for the preparation of invoices submitted in support of a fee application?

A: Yes. There is no statutory authorization to shift fees for preparing invoices (as opposed to fee applications) to the estate, and the Court in *ASARCO* did not rule otherwise.

As explained in the LCFG, "routine billing activities . . . typically are not compensable outside of bankruptcy. Most are not compensable because professionals do not charge a client for preparing invoices, even if detailed. Reasonable charges for preparing interim and final fee applications, however, are compensable, because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid." LCFG, B.2.f. This rationale applies to all cases, including those not subject to the LCFG.

8. Will the USTP object to non-legal professionals seeking the reimbursement of legal fees for defending objections to fee applications?

A: Yes, using standards analogous to those discussed above that apply to attorneys seeking compensation for fee defense work. Regardless of whether the fee defense request is made by a legal or financial professional, the result must be the same based on *ASARCO*: A professional's legal fees for litigating fee objections cannot be paid. Non-lawyer professionals, such as financial advisors, are entitled to no better and no worse treatment than lawyers with respect to legal fees for defending objections to fee applications in a bankruptcy case.

Because legal fees for defending fee application objections cannot be paid as compensation under section 330(a)(1)(A), those same legal fees cannot be reimbursed as expenses under section 330(a)(1)(B). Section 330(a)(1)(B) allows the award of "necessary" expenses. But those expenses must relate and be incident to the work for which the professional can be compensated under section 330(a)(1)(A). Otherwise, in ASARCO, Baker Botts need only have retained outside counsel to defend its fee applications and expensed the legal fees for reimbursement rather than seek compensation for them.

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