

# CASE MANAGEMENT, COMPENSATION, AND REPORTING

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# CASE MANAGEMENT, COMPENSATION, AND REPORTING

- New US Trustee Guidelines
  - Applicability & need
  - Need
- Initial reactions to new Guidelines
- How are the Guidelines working out
- Other Case Management Thoughts
  - Timekeeping systems
  - Dealing with Fee Examiners
  - Training
  - Appropriate scheduling



# U.S. TRUSTEE FEE GUIDELINES

FOR ATTORNEYS IN  
LARGER CHAPTER 11 CASES

# WHAT ARE USTP FEE GUIDELINES?

- Required by Statute
- Uniform and Consistent
  - Internal guidance for fee review
  - Expectations of professionals
  - Grounds for possible objections

# PROCESS FOR ADOPTION

- Two years
- Pre-drafting consultation
- Two drafts for public comment
- DOJ Public Meeting
- Assoc. AG announced June 11, 2013

# WHEN WILL USTP APPLY THEM?

- Cases filed on or after November 1, 2013
  - Not pending cases
- Retention and fee applications
- Assets of \$50 million and liabilities of \$50 million—and up
  - Aggregated for jointly administered cases
  - Based on petition values generally
  - No single asset real estate cases

# OVERVIEW OF MAJOR PROVISIONS

1. Comparable billing disclosures—blended rate
2. Budgets and staffing plans
3. Electronic billing data
4. Client verifications and counsel statements
5. Rate increase disclosures and calculations
6. Co-counsel retention and billing guidance
7. Fee examiner or fee committee models

# 1. CUSTOMARY AND COMPARABLE DISCLOSURES

- Disclose blended hourly rates for comparison
  - Billed or collected
  - Alternative billing
  - Explain methodology
- Limited “safe harbor” without prejudice to UST’s right to:
  - Seek more information
  - File an objection
  - Offer other evidence
- Developed with substantial input from National Bankruptcy Conference



## 2. BUDGETS AND STAFFING PLANS

- Consent or court order
- Filed with fee application
- Budgets improve case management

# MAKING BUDGETS WORK

## Confidentiality

- Filed *after* budget period
- Reasonable redactions
- *Filed* budget shows no detail

## Predictability

- Short budget periods
- Amend for unforeseen
- Explain “surprises”
- Not a cap or guaranty

## 4. CLIENT VERIFICATION AND COUNSEL STATEMENTS

- Client with retention application
- Applicant with retention application
- Applicant with fee application

# THE MARKET REACTS TO THE USTP DRAFT GUIDELINES

- The USTP, Although Not Required To Do So, Sought Comments On Its Draft Fee Guidelines
  - In a Classic Example Of Be Careful What You Ask For, It Most Assuredly Received Comments.
- Over Two Rounds, 34 Sets Of Comments Were Received
  - Comments came from some to the most influential professional organizations in the country.
  - Comments came from a number of law professors, practitioners and law firms.

# THE MARKET REACTS TO THE USTP DRAFT GUIDELINES

- The Comments That Seem To Have Drawn The Biggest Reaction From The Press, If Not From The USTP, Consisted Of 14 Single Spaced Pages Signed By 119 Law Firms, Including:
  - The American College of Bankruptcy
  - The New York City Bar
  - The Boston Bar Association
  - Latham & Watkins
  - Jones Day
  - Skadden, Arps, Slate, Meagher & Flom
  - Kirkland & Ellis
  - The AIRA
  - The National Bankruptcy Conference
  - Weil, Gotshal & Manges
  - Milbank, Tweed, Hadley & McCloy
  - Akin, Gump, Strauss, Hauer & Feld
  - Holland & Knight (so as not to be accused of trying to hide)

# COMMENT CATEGORIES

- The Commentors Provided Both General Comments And Comments As to Specific Provisions Of The Guidelines
- General Comments
  - The USTP Is Exceeding Its Authority.
  - The USTP Is Returning To The Congressionally Rejected “Economy Of Administration” Standard.
  - The Existing System Was Working Just Fine.

# COMMENT CATEGORIES

- Specific Comments
  - The Threshold For The Guidelines To Be Applicable Is Too Low.
  - The Requirement to Prepare Budgets In Advance Is Ill-Advised And Impossible To Comply With And 480 Subcategories In Fee Applications Is Unworkable.
  - The Hourly Rate Comparison Information Is Irrelevant And Against Public Policy.
  - The Presumptions Of Disallowance In The Guidelines Are Not Rational And Inconsistent With Bankruptcy Code Section 330.

# GENERAL COMMENTS REDUX

- The USTP Is Exceeding Its Authority
  - The USTP's authority under 28 U.S.C. §586 is to adopt uniform procedural guidelines and not to make additions to or impose substantive requirements regarding compensation of professionals as set forth in §330 of the Bankruptcy Code or altering the requirements for retention applications under F.R.B.P. 2014.
- The USTP Is Returning To The Congressionally Rejected "Economy Of Administration" Standard
  - In enacting the Bankruptcy Code Congress made the determination to abandon the economy of administration standard, to allow professionals in Chapter 11 cases to be compensated on par with other professionals and the U.S. economy has benefitted as a result.



# GENERAL COMMENTS REDUX

- The Existing System Is Working Just Fine
  - The existing USTP Guidelines have worked in a manner consistent with Congressionally established policy, with the effect that talented professionals have entered the field, major international corporations have been restructured rather than liquidated and jobs have been saved.

# SPECIFIC COMMENTS REDUX

- The Threshold For The Guidelines To Be Applicable Is Too Low
  - A “large” Chapter 11 case is not one in which assets and liabilities aggregate \$50 million. Should be a five part test.
- The Requirement to Prepare Budgets In Advance Is Ill-Advised And Impossible To Comply With And New Fee Application Requirements Burdensome
  - Establishing a task category based budget for something as complex as a large Chapter 11 case is impossible, and using 480 subcategories in fee applications unworkable.
  - A presumption that fees incurred in excess of the budget by 10% or more is arbitrary—hitting the budget says more about budgeting skills than it does about value.
  - Preparing budgets that are seen by others tips off strategies and reveals client confidences.

# SPECIFIC COMMENTS REDUX

- The Hourly Rate Comparison Information Is Irrelevant And Against Public Policy
  - Providing information about what professionals charge on non-bankruptcy matters as a point of reference is “comparing apples and peas.”
  - Discounts to certain clients on certain matters is irrelevant to the reasonableness of rates in a large complex Chapter 11 case.
- The Presumptions Of Disallowance In The Guidelines Are Not Rational And Inconsistent With Bankruptcy Code Section 330.
  - Limiting allowable fees for court appearances to one lawyer per firm is detrimental to the client.
  - Not allowing fee application review time as compensable is unfair.
  - Not allowing fees of professionals who bill fewer than 15 hours to the file during a billing period is irrational.

# THE USTP RESPONSE

- The USTP has an obligation to announce what it will and what it will not object to.
- The criteria for application was based on a statistical study, but will be adjusted so there must be both \$50 million in assets and \$50 million in liabilities.
- Comparisons of rates with those of non-bankruptcy professionals is exactly what Congress intended, but will adjust to call for timekeeper category based blended rates.
- Budgets will only be submitted if either the parties consent or there is a court order requiring them.

# THE USTP RESPONSE

- Budgeting is a common practice outside of bankruptcy, it imposes a degree of planning and discipline, it already occurs in DIP financing and cash collateral orders.
- Budgets will not be disclosed in advance, but retrospectively and any 10% deviation will require explanation.
- “Home forum” rates will apply no matter where the case is pending.
- The 480 possible categories and subcategories of task based billing will be reduced to 24.

# HOW ARE THE GUIDELINES WORKING OUT

- Customary and Comparable Compensation Disclosures with Fee Applications
- US Trustee Model Form – A
  - Category of timekeeper
  - Comparative charts of blended hourly rate by timekeeper
    - Billed or collected for preceding year excluding bankruptcy
    - Billed in this fee application
- In re Metro Affiliates, Inc. et al., Debtors' counsel provided detail following the Model Form A comparing billed by the firm for the preceding year with billed in the application.

# HOW ARE THE GUIDELINES WORKING OUT

- Summary of Timekeepers Included in this Application
- US Trustee Model Form – B
- Similar to existing details provided in most attorney fee applications including data on date of admission and department or section
- Additional columns added for rate details
  - Hourly rate billed in the application
  - Hourly rate in the first interim application
  - Number of rate increases since the inception of the case

# HOW ARE THE GUIDELINES WORKING OUT

- BUDGETS
- US Trustee Model Forms – C-1 and C-2
  - Estimate Hours and Fees by Project Category (C-1)
  - Staffing Plan –Category of timekeeper, hours expected to work, and average hourly rate (C-2)
  - If the parties consent or the Court so directs a budget approved by the client should be attached to each interim and final fee application
  - Variances of 10% or more from budget should be explained



# HOW ARE THE GUIDELINES WORKING OUT

- Summaries of Compensation and Expense Reimbursement by Category
- US Trustee Model Forms – D-1 and D-2
  - Form D-1 lists categories of activity and both budgeted and billed hours and fees sought
  - Form D-2 details the traditional expense reimbursement categories

In re Metro Affiliates, Inc. et al., Debtors' counsel provided detail following Model Form D-1. Significant additional time over the stated budget was devoted to Asset Disposition which was discussed in the narrative portion of the fee application.

# HOW ARE THE GUIDELINES WORKING OUT

- Attorney Statement Pursuant to Appendix B Guidelines
- Appendix B Guidelines request additional information responding to five questions
  1. Agreement on variations or alternatives to customary rates, fees, or terms of service
  2. Whether budget to actual variances were discussed with the client
  3. Inclusion of time to review and edit billing records, invoices, etc.
  4. Inclusion of time to review and redact records for privileged or confidential matters
  5. Client approval of rate increases and related matters under ABA Formal Ethics Opinion 11-458
- In re Metro Affiliates, Inc. et al., Debtors' counsel provided their responsive answers in the narrative portion of the fee application.

# OTHER CASE MANAGEMENT THOUGHTS

- Engagement Letters
  - Indemnification
- Timekeeping systems
  - Compatibility with Guidelines
- Dealing with Fee Examiners
- Training
- Mentoring
- Staff continuity
- Appropriate scheduling

# A FEW EXAMPLE CASES SINCE THE IMPLEMENTATION OF THE GUIDELINES

- In re Metro Affiliates, Inc. et al. – Southern District of New York
- In re Fisker Automotive Holdings, Inc. - District of Delaware
- In re Simply Wheelz LLC, d/b/a Advantage Rent-Acar - Southern District of Mississippi
- In re C&K Market, Inc. - District of Oregon
- In re Xtreme Power Inc. - Western District of Texas
- In re Scrub Island Development Group Limited - Middle District of Florida

Mr. Darr has over 30 years of experience providing financial consulting services to business organizations experiencing significant financial and operating difficulties. He has served debtors-in-possession, secured creditors, committees of unsecured creditors and bondholders and other parties-in-interest; served as interim management in a variety of industries both in and out of the Bankruptcy system; and has served in a number of fiduciary roles (Chapter 11 trustee, Chapter 7 panel trustee, Assignee for the Benefit of Creditors and Interim Management) or has advised parties serving in those capacities. His industry experience includes healthcare, energy, telecommunications, manufacturing, wholesale and distribution, and professional services.

Mr. Darr's experience also includes providing litigation support and expert testimony in bankruptcy and non-bankruptcy matters involving a wide variety of issues.

Mr. Darr's professional qualifications include licensing as a Certified Public Accountant, Series 7 registration (Registered Securities Representative) and Series 24 (General Securities Principal), Certification on Financial Forensics and Certification in Distressed Business Valuation. He is also a Certified Insolvency and Reorganization Advisor

Mr. Darr concludes his term as Chairman of AIRA's Board of Directors at this conference.

**William K. Harrington** is the United States Trustee for Region 1 and Region 2. Mr. Harrington was appointed as the United States Trustee for Region 1 on November 8, 2010 and as the United States Trustee for Region 2 on November 26, 2013. Prior to his appointment as the United States Trustee for Region 1, Mr. Harrington was the Assistant United States Trustee for the District of Delaware. Prior to joining the Office of the United States Trustee, he practiced bankruptcy and reorganization law at Duane Morris LLP. Mr. Harrington is a member of the Boston Bar Association, the Delaware State Bar Association, the American Bar Association, the American Bankruptcy Institute and the Delaware Bankruptcy American Inn of Court. He received his undergraduate degree from the University of Pennsylvania and his J.D. from Villanova University School of Law.

James M. Lukenda, CIRA, CFF  
Managing Director, Huron Business Advisory

Over the course of a 30 plus year career, Jim Lukenda has assisted clients of varying size and scope across a wide range of industries. In 2002, Jim became one of the 25 founding Managing Directors of Huron Consulting Group.

Since focusing his practice on assisting clients with turnaround, restructuring, and bankruptcy matters, Jim has worked on behalf of companies and their directors, lenders, committees of creditors, and other parties-in-interest including individual creditors, in capacities ranging from consultant and advisor to chief restructuring officer. Jim's industry experience tracks the cycles of troubled industries in the United States and abroad: Construction Contracting, Airlines, Retail, Media, and Heavy Manufacturing to name a few. Among the hallmark cases with which Jim has been involved are Federated Department Stores, JWP, Global Crossing, Northwest Airlines, Nortel Networks, and The Great Atlantic and Pacific Tea Company. Jim has also worked on assignments involving many middle market companies involving a range of services including addressing valuation and solvency issues, avoidance matters, and forensic accounting and investigations.

Jim is a Certified Insolvency and Restructuring Advisor (CIRA), Certified in Financial Forensics (CFF), and serves the membership of the NJ Chapter of ACG as its treasurer.

# Holland & Knight



## John J. Monaghan

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### Practices

Bankruptcy, Restructuring  
and Creditors' Rights

Litigation and Dispute  
Resolution

### Education

Boston University School of  
Law, J.D., *cum laude*

Middlebury College, B.A.,  
*cum laude*

### Bar Admissions

Massachusetts

**John J. Monaghan** is the national practice group leader of the firm's Bankruptcy, Restructuring and Creditors' Rights Practice Group. Mr. Monaghan is particularly focused on representing major case participants in complex commercial Chapter 11 cases. His extensive bankruptcy practice has involved representation of a wide range of clients, including Chapter 11 debtors, creditors' committees, equity committees, lenders, purchasers of assets, landlords, licensors, trustees, parties to prepetition contracts and leases, defendants in adversary proceedings and unsecured creditors. His experience crosses a broad array of industries, including finance, leasing, manufacturing, real estate, technology, telecommunications, retail, healthcare, resort and hospitality, franchise, food service, maritime and the airline industry. He advises clients on the business aspects of bankruptcy and workouts, and represents clients in matters in the Bankruptcy Court, as well as in other state and federal courts.

Matters in which Mr. Monaghan has been lead counsel have resulted in the issuance of over a dozen published opinions on topics ranging from the standing of creditors' committees to pursue a Chapter 11 debtor's causes of action to the adequate protection rights of secured parties when an estate representative seeks to return goods in satisfaction of a vendor's prepetition claim. He has been named as a top bankruptcy lawyer by *The Best Lawyers In America*, *Chambers USA*, *The Deal* and *Massachusetts Super Lawyers*. In 2008, Mr. Monaghan was inducted as a Fellow in the American College of Bankruptcy, a professional, educational and honorary association whose membership is limited to those in the profession who exemplify the highest standards of professional and ethical standards.

A frequent lecturer on bankruptcy issues, Mr. Monaghan has presented seminars on representing debtors in commercial Chapter 11 cases, debtor in possession financing, cash collateral usage and adequate protection issues and transferring assets in Chapter 11 cases for Massachusetts Continuing Legal Education (CLE) Program; competing plans of reorganization for the Boston Bar Association CLE Program; the Bankruptcy Code safe harbors for financial industry transactions, constitutional issues arising from BAPCPA and representing purchasers from Chapter 11 estates for the American Bankruptcy Institute; amendments to the Bankruptcy Code for the Practising Law Institute; as well as creditor issues in bankruptcy, asset protection, bankruptcy taxation and fraudulent conveyances to various industry groups and continuing professional education organizations.



#### Honors & Awards

American College of Bankruptcy, Fellow

American Bar Foundation, Fellow

*Chambers USA - America's Leading Business Lawyers* guide, Bankruptcy/Restructuring, 2005-2012

*The Best Lawyers in America* guide, Bankruptcy and Creditor-Debtor Rights Law/Insolvency and Reorganization Law, 2006-2013; Litigation - Bankruptcy, 2011-2013

International Who's Who of Insolvency & Restructuring Lawyers, 2011-2012

Massachusetts *Super Lawyers* magazine, 2005-2012

Massachusetts *Super Lawyers* magazine, Top 100, 2008-2009

Corporate Counsel Edition, *Super Lawyers* magazine, July 2009

New England *Super Lawyers* magazine, Top 100, 2008-2009

Boston's Best Lawyers, 2005-2009

Top Lawyer, The Deal, Business Bankruptcies, Representation of Unsecured Creditors and Number of Engagements

Boston University Law Review, Editor

#### Memberships

American College of Bankruptcy

American Bar Foundation

American Bankruptcy Institute

American Bar Association

Massachusetts Bar Association

Boston Bar Association

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Nancy A. Peterman is Chair of Greenberg Traurig's Chicago Business Reorganization & Financial Restructuring Practice. She focuses her practice on corporate restructurings, bankruptcy and creditors' rights law, and has a wide range of experience representing debtors, purchasers of assets, committees and secured creditors.

Nancy is a member of the Executive Committee and the Board of Directors of ABI and former chair of the Chicago Bar Association's Bankruptcy & Reorganization Committee. A frequent speaker and author, Nancy was co-editor in chief of *Wiley Bankruptcy Law Update*, assistant editor for *West's Norton Bankruptcy Law and Practice* treatise, and an assistant editor and a contributing author for the American Bankruptcy Institute's *Health Care Insolvency Manual*. She assisted in drafting the healthcare bankruptcy provisions of the 2005 amendments to the Bankruptcy Code.

Nancy is a Fellow in the American College of Bankruptcy, listed in *Chambers USA*, *Best Lawyers in America*, and is a Board Certified Business Bankruptcy Lawyer by the American Board of Certification. Global M&A Network named her "Restructuring Lawyer of the Year - Middle Markets" at its Turnaround Atlas Awards in 2013.

She earned her law and undergraduate degrees from the University of Michigan.