TOGUT, SEGAL & SEGAL LLP

ONE PENN PLAZA
NEW YORK, NEW YORK 10119

(212) 594-5000

FACSIMILE
(212) 967-4258

INTERNET
eMail@TeamTogut.com

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

Clifford J. White III, Director
Executive Office for U.S. Trustees
20 Massachusetts Avenue, NW, Suite 8000
Washington, DC 20530

Re: Comments to the Proposed Fee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases

Dear Director White:

Comments have been sought to the *Draft Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases* (the "Proposed Guidelines"). We offer ours from what I suspect will be a different perspective than most you will receive based upon our 30 years of experience from the role we often serve in the larger chapter 11 cases that the Proposed Guidelines are intended to address.

Our firm was founded in 1980 with the *then* "new" Bankruptcy Code ("Code") in mind. Pre-Code, the "cost of comparable services" compensation standard was interpreted to require that fees be reduced whenever creditors could not be paid in full,[1] and that was in most of the cases. Only boutique law firms were willing to perform the work because their

[1] *See Massachusetts Mutual Life Ins. Co. v. J. H. Brock*, 405 F.2d 429, 432-33 (5th Cir. 1968), *cert. denied*, 395 U.S. 906, 89 S. Ct. 1748 (1969) ("[t]he public interest which is inherent in all bankruptcy matters must be considered in awarding fees")

smaller size and efficiencies allowed them to do so economically.[2] Major multi-disciplinary corporate law firms generally avoided working as a court-retained professional for the estate, and limited their bankruptcy work to representing individual clients for which they could be paid their going rates, without reduction.

In enacting the Code, Congress expressly rejected the Bankruptcy Act's "economy of administration standard" as outdated, and replaced it with a new standard that emphasizes the "cost of comparable services." It was expected that with the change in compensation standards,[3] major multi-disciplinary firms, that had previously avoided working for a debtor or committee, would enter the field; this was intended by the drafters of the Code.[4]

The change achieved its desired goal, and the quality of the bankruptcy practice has dramatically improved as a result. This has benefited restructuring efforts by attracting the best and the brightest legal talent. Nearly every major law firm now has a bankruptcy practice and the complex needs of the modern corporate debtor are being well served.

Initially, the way in which many larger law firms formed bankruptcy practices was by acquiring premier bankruptcy boutiques. Krause, Hirsch & Gross was merged into Stroock & Stroock & Lavan and Levin & Weintraub, Crames & Edelman was merged into Kaye Scholer, as but two examples. Most of the quality boutique practices disappeared in this fashion. And with the competition of major firms, all but a couple of the remaining boutiques whose cost advantage no longer mattered, at least in New York, also closed shop or merged into larger firms.

Whereas small boutiques rarely had any disabling conflicts because their practices were mostly transactional and because they did not have many retainer clients, the major multi-disciplinary law firms have numerous retainer clients that makes impossible their ability to satisfy the "disinterested" requirements of Code sections 327(a) and 328(c). Co-counsel is required to handle the major law firm's conflicts.

Section 327(a) allows for this solution. Section 327(a) provides that a debtor may employ "one or more attorneys"[5] as <u>general</u> counsel. So, in addition to main counsel that has conflicts, the debtor may employ co-counsel to handle matters that main counsel cannot. Co-

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2 *Robinson v. American Benefit Life Ins. Co. (In re First Colonial Corp. of America)*, 544 F. 2d 1291, 1299 (5th Cir. 1977) (a strong policy of the Bankruptcy Act was that the estate be administered as efficiently as possible).

3 *See* 124 Cong. Rec. H11091-92 (1978).

4 *See* H.R. Rep. No. 95-595, at 300 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6286.

5 Section 1103(a) of the Bankruptcy Code similarly authorizes a committee to employ "one or more attorneys."

counsel also must be retained under section 327(a). It is the combination of the two firms that satisfies the disinterestedness requirement of the Code.

This is not to suggest that conflicted firms should be retained in all cases. In smaller cases, where the complexities are fewer so that it does not require the varied services of a major firm, a conflicted firm can be disqualified in favor of retaining another that is conflict-free.[6] But today's mega-debtor tends to be a multinational corporation with complex capital structures, extremely diverse operations and many subsidiaries that requires the services of major multi-disciplinary firms; and almost without exception, these law firms have conflicts due to their massive size and diversity.

As was typically the case with pre-Code bankruptcy firms, many co-counsel's practices are devoted entirely to bankruptcy, creditors' rights and corporate reorganization matters. With no regular retainer clients, they can be free of conflicts. In the case of my firm, we have also served as sole counsel in major corporate cases and so know how to do all aspects of a megacase, from start to finish. Co-counsel can serve the larger law firm's need for having another firm with bankruptcy expertise that is effective and efficient, and that can economically supplement the work of main counsel without any unnecessary duplication of effort.

Co-counsel is best utilized when it offers an independent benefit to the estate rather than serving as main counsel's "shadow," standing behind the main counsel and billing with no direct benefit to the estate. To avoid this result, co-counsel is utilized to efficiently – and less expensively – perform routine services that do not require the breadth and depth of main counsel but that nonetheless need to be performed as part of every chapter 11 case. These are discrete bankruptcy projects such as working on issues relating to adequate assurance for utilities, claims objections, executory contract rejections, preference recoveries and preparing bankruptcy schedules, just to name a few. They are the sort of services that require sophisticated bankruptcy expertise but that do not require main counsel's heft.

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6 *See In re Project Orange Assocs., LLC*, 431 B.R. 363 (Bankr. S.D.N.Y. 2010) (holding that, notwithstanding retention of separate counsel, debtor's proposed general counsel had disqualifying conflict of interest based on firm's representation of debtor's largest unsecured creditor and essential supplier in unrelated matters); *In re Premier Farms L.C.*, 305 B.R. 717 (Bankr. N.D. Iowa 2003) (disqualifying debtor's counsel based upon its simultaneous representation of the debtor's pre-petition secured bank lender in matters unrelated to the debtor even though both the bank and debtor had waived the conflict); *(In re Filene's Basement, Inc.*, 239 B.R. 850 (Bankr. D. Mass. 1999) (finding a disqualifying conflict of interest based upon a firm's simultaneous representation of the debtor and a creditor).

As was stated by Professor Stephen J. Lubben,[7] Reporter for the American Bankruptcy Institute's landmark Chapter 11 Fee Study, in his recent article published by the New York Times:

> [B]ig corporate law firms can bring real value to a Chapter 11 case in matters requiring great speed or involving great complexity. They do not bring real value to the estate in handling common bankruptcy matters such as small preference actions, contract rejections and simple claims objections. And it surely is not efficient for these firms to have partners make court appearances on such mundane matters.
>
> A basic requirement that work be allocated to the professional who can handle it most efficiently would go much further than many, more detailed application requirements. The debtor and its professionals should be charged with such a duty at the outset of the case.[8]

Thus, the estate benefits from the smaller firm's efficiencies in handling special projects involving bankruptcy administration. Rather than duplicate main counsel's work, co-counsel does its own work. Not only does this result in a cost savings to the estate but it addresses the need of keeping co-counsel up to speed, which is essential for it to handle conflict matters. It is impossible to do the conflicts work without being fully familiar with everything in the case, including the client's strategy. Because co-counsel is fully involved in the case, it knows what is going on but without duplicating the work of main counsel.

There is a direct benefit to the estate from this approach. The main firm does the most complex work that demands the many practice groups of a major firm but its co-counsel does the routine tasks more economically. This results in lowering overall costs to the estate. Not only are co-counsel's costs not duplicative but they reduce total fees.

Indeed, the model described here has been common in the Southern District of New York where co-counsel is often used. At least in one major study, costs have been found to be less than in other parts of the Country.[9]

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7 Stephen J. Lubben holds the Harvey Washington Wiley chair in corporate governance and business ethics at the Seton Hall University School of Law, and is a respected expert on bankruptcy and particularly fee issues.

8 *See* "Time for a Fresh Approach to Bankruptcy Fees", NY Times, January 20, 2012, http://dealbook.nytimes.com/2012/01/20/time-for-a-fresh-approach-to-bankruptcy-fees/.

9 *See* Lubben, Stephen J., ABI Chapter 11 Professional Fee Study (December 1, 2007). Seton Hall Public Law Research Paper No. 1020477. Available at SSRN: http://ssrn.com/abstract=1020477 or doi:10.2139/ssrn.1020477 at page 51. A full copy of the Fee Study can be obtained from the American Bankruptcy Institute at www.abiworld.org.

Using our experience in the Enron case merely as an illustration, nearly 80% of co-counsel's work had nothing to do with conflicts. In that case, we were co-counsel to the debtors with Weil, Gotshal & Manges LLP, as the debtors' main counsel. At the time, the Enron debtors filed the largest Chapter 11 cases in U.S. history. From the outset of the case, co-counsel was responsible for a number of significant discrete projects.

Professor Lubben is correct when he says that the allocation of work to the professional who can handle it most appropriately should be done at the very beginning of the case. Once the duties are divided, the professionals in both firms know who is responsible for the discrete tasks assigned to the co-counsel so that no one renders duplicative services. And it is much easier for the client who knows from the outset who to call with its questions. It is the most efficient way by far to deal with co-counsel.

Again citing *Enron*, in which duties were divided at the very beginning of the case, the court-appointed fee committee said in its final report:

> Weil Gotshal handled all of the main work in the case; the Togut Firm, as co-counsel, was assigned discrete subsets of work either because Weil Gotshal had conflicts or because the Togut Firm, being smaller, could handle the work more efficiently. The Togut Firm coordinated its efforts with Weil Gotshal to avoid duplication of effort. Over the course of the case, Togut Firm timekeepers billed for only 10 meetings with Weil Gotshal, most of which were general status meetings. There was virtually no overlap and no duplication of effort.[10]

There are many more cases involving Kirkland & Ellis, Skadden, Dewey & LeBouf, Jones Day, Cleary Gottlieb, Fried Frank and others that had the same result.

Based on the foregoing, it is recommended that the Proposed Guidelines include a procedure for coordinating the important role of co-counsel in large Chapter 11 cases:

> At the beginning of the case, where there are more than one section 327(a) or 1103(a) general counsel, best efforts be made to assign the work to the appropriate firm to perform the task based upon the complexity, importance, and nature of the problem, issue, or task addressed, and whether one of the firms can do routine tasks more economically to take advantage of cost efficiencies.

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10 *In re Enron Corp.*, Case No. 01-16034 [AJG], Recommendation and Advisory Report of the Fee Committee on the Final Compensation of Togut, Segal & Segal LLP, (Docket No. 27437).

A meet and confer process resulting in an allocation of tasks at the beginning of the case will avoid confusion and potential duplication of effort by ensuring that both co-counsel firms have their own clear roles in the case, taking advantage of the strengths of both firms.

Respectfully yours,

/s/ Albert Togut