**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"**
**Issued For Public Comment on November 2, 2012 and**
**Referenced as 28 CFR Part 58, Appendix B**

November 23, 2012

The National Bankruptcy Conference (NBC) is pleased to submit these comments 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," issued for public comment on November 5, 2012 and referenced as 28 CFR Part 58, Appendix B (Revised Proposed Fee Guidelines).

The NBC is committed to the improvement of the chapter 11 process, and we welcome the opportunity to work with the Executive Office of the United States Trustee (EOUST) in developing guidelines for compensation that are intended to advance that goal. Though the NBC does not agree with all of the provisions in the Revised Proposed Fee Guidelines, we appreciate the EOUST's commitment to solicit public comments and to seek fair and workable solutions. We also appreciate the EOUST's careful consideration of the NBC's prior comments.

Since November of last year, the NBC has engaged in considerable effort and deliberations to develop constructive approaches to address the concerns reflected in the Revised Proposed Fee Guidelines. Those efforts began shortly after the EOUST published the first version of the proposed Guidelines (Original Proposed Fee Guidelines) in November, 2011. The results of the NBC's deliberations were reflected in two letters, dated January 30, 2012, and February 27, 2012, respectively, and in participation by a representative of the NBC in the public meeting on the Original Proposed Fee Guidelines.

Our impression from reviewing the Revised Proposed Fee Guidelines and the accompanying "Summary of Significant Changes and Analysis of Particular Comments" is that the EOUST found the NBC's approach constructive and adopted several of the NBC's suggestions, in some cases with modifications. The NBC is pleased to have been of assistance to the EOUST.

Following its review and consideration of the Revised Proposed Fee Guidelines, the NBC has some specific comments about certain provisions in the Revised Proposed Fee Guidelines which, in the NBC's view, merit further refinement. The NBC's comments are, however, limited. Even in cases where the NBC may disagree with positions ultimately adopted in the Revised Proposed Fee Guidelines, the NBC refrains from repeating comments previously made, except in one or two cases where the Revised Proposed Guidelines take what appear to the NBC to be internally inconsistent positions. The following comments which follow are not necessarily in order of importance.

1. **Rate Increases (p. 5, § B.2(d)).** The Revised Proposed Fee Guidelines state that in reviewing fee applications, the UST will consider "[w]hether the application contains rates higher than those disclosed and approved on the application for retention or any supplemental application for retention or agreed to with the client . . . . The United States Trustee may object if the applicant fails to justify any rate increases as reasonable." Revised Proposed Fee Guidelines, at 5, § B.2(d). The NBC understands that this provision is not addressed to rate increases that result from an attorney's advance in class (for example, from second year associate to third year associate, or from third year partner to fourth year partner), but rather to rate increases for a particular class (for example, a rate increase for third year associates). The NBC believes that such a nuanced approach is more appropriate than one directed at all rate increases for an individual attorney. To avoid potential misunderstandings by those who implement the Guidelines, this distinction in types of rate increases should be clarified in the Guidelines.

2. **Sharing of Prospective Budgets and Staffing Plans by Debtors-in-Possession and Official Committees (p. 18, § E.7).** Recognizing that the prospective public disclosure of budgets and staffing plans could result in the premature and inappropriate disclosure of confidential information about legal strategy and tactics, the Revised Proposed Fee Guidelines state generally that any disclosure of a budget and staffing plan to the UST and other parties will be retrospective only, as part of the filing of fee applications. *Id.* at 18, § E.7. The NBC supports this clarification. However, the provision goes on to state that the UST may request that counsel for the debtors-in-possession and any official committees exchange their budgets with each other once they are approved by their respective clients, or whenever amended. *Id.* § E.8.

The NBC believes that any such disclosure should be on a purely voluntary basis and should not be construed as requiring the sharing of any information protected by applicable privileges. Accordingly, the NBC recommends that § E.8 be clarified accordingly.

a. The NBC is concerned that there are circumstances in which the debtor and a committee may be adversarial, and this type of prospective disclosure may result in the inappropriate disclosure of privileged information about legal strategy and tactics. As but one example, the committee may not want the debtor to know that it is working on an alternative plan; yet providing the debtor with a copy of a prospective budget that shows large sums budgeted for "plan and disclosure statement" may certainly signal that strategy to the debtor.

b. The NBC submits that there is no good reason to mandate this type of prospective disclosure, even between the debtor and an official committee, given the risk of premature disclosure of confidential information about legal strategy. Although the Revised Proposed Fee Guidelines state that such an exchange "potentially avoids duplication" (*id.* § E.8), the NBC recommends that the UST use other available methods to reduce duplication.

3. **Compensability of Time Spent in Connection with Fee Application Matters (p. 6, § B.2(g)).** The USTP's stated position is:

> awarding compensation for matters related to a fee application after its initial preparation is generally inappropriate, unless those activities fall within an applicable, judicially recognized and binding exception (such as litigating an objection to the application where the applicant substantially prevails). Thus, the United States Trustee may object to time spent explaining the fees, negotiating objections, and litigating contested fee matters that are properly characterized as work that is for the benefit of the professional and not the estate.

*Id.* at 6, § B.2(g). The NBC believes that this provision is overbroad; imposes unfair burdens on estate-compensated attorneys as compared to lawyers practicing in areas other than bankruptcy; and should be limited to requests for compensation for time spent explaining or defending monthly invoices or fee applications ***to the client***.

a. The Revised Proposed Fee Guidelines recognize that "*reasonable* charges for preparing interim and final fee applications . . . 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***." *Id*. at 5, § B.2.(f). By the same token, explaining, negotiating or litigating fees to or with third parties other than the client "is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid." Although the UST is correct that "professionals typically do not charge clients for time spent explaining or defending a bill" ***to the client*** outside of bankruptcy, *see id*. at 6, § B.2(g), the stated objection to compensation for time spent explaining or defending a bill to a party ***other than*** the client seemingly disregards the fact that, outside of bankruptcy (except in rare situations), a lawyer is not required to explain, negotiate or litigate its fees with fee review committees or other court-designated fee review entities, the UST, the creditors' committee, or any third party (including adverse parties who may generate fee disputes as part of their overall litigation strategy). Just as in the case of the preparation of fee applications, counsel should receive reasonable compensation for fee related services in dealing with parties other than the client that generally are "not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid."

b. In addition, a system in which creditors' committees and fee examiners are compensated by the estate (and other third parties' counsel are compensated by those third parties) for questioning and challenging counsel's fee application, without the applicant receiving reasonable compensation for responding to such questions and challenges, creates an unfairly asymmetrical construct and gives undue leverage to anyone who seeks to question or challenge a fee application. *Cf. In re Worldwide Direct, Inc.*, 334 B.R. 108, 111 (D. Del. 2005) ("If compensation is not permitted for fees incurred in defending a fee application, creditors could negotiate reductions in these fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without any hope of surviving it whole." (internal quotation marks omitted)). Such an

asymmetrical approach, and the leverage that it involves, will foster non-meritorious objections to the fee applications of estate-compensated professionals as a litigation tactic.

c. Finally, the stated position that awarding compensation for matters related to a fee application after its initial preparation is inappropriate, unless the activity falls within an "applicable, judicially- recognized and ***binding*** exception (such as litigating an objection to the application where the applicant substantially prevails)" (emphasis added) is an overly strict standard. Literally read, the term "binding" could require local UST offices in each circuit to litigate the allowability of any compensation for post-fee application matters related to a fee application (including successfully litigating an objection) until the circuit court of appeals for their circuit has specifically addressed the issue. If the USTP is prepared to recognize an exception to its position for time spent litigating an objection to a fee application where the applicant substantially prevails, it should state that point directly, rather than leaving it to local offices in circuits where there is no circuit-level authority on this issue to determine whether a decision of a bankruptcy court (which is not binding on other bankruptcy courts) or a district court (which is not binding on a Bankruptcy Appellate Panel or other district courts) should be considered "binding" on this issue. The considerations set forth in subparagraphs (a) and (b) reinforce the point that the USTP should not object to reasonable compensation for litigating an objection to a fee application by any party other than the client when the applicant substantially prevails, whether or not there is "binding" precedent to that effect in a particular circuit.

4. **"Overhead"/Case-Specific Charges for Originating Multi-Party Conference Calls (p. 8, § B.3(e)).** The Revised Proposed Fee Guidelines state that among the expenses that the UST will ordinarily consider as non-reimbursable "overhead costs" are "telephone charges." As stated, this position seems to define as non-reimbursable "overhead" the out-of-pocket cost of originating case-specific, multi-party conference calls that can cost the originating attorney substantial sums. This cost, however, is case and client-specific and cannot fairly be characterized as general "overhead."

a. It is quite common in larger chapter 11 cases for counsel for a debtor or committee to arrange multi-party conference calls as a substitute for traveling to in-person meetings. The attorney responsible for originating the call is charged for the cost of the call. Such charges can add up to significant dollars, particularly in the case of counsel to a creditors' committee that meets telephonically on a regular basis to conduct committee business, as an alternative to expensive, in-person committee meetings that require travel (for which counsel would be compensated). The annual out-of-pocket cost of such multi-party conference calls in large cases can aggregate tens of thousands of dollars. Yet it is hard to identify any expense that is more case or client-specific than originating a conference call for the debtor or the creditors' committee in a particular chapter 11 case.

b. If reimbursement for the cost of such client and case-specific calls were objectionable as "overhead", counsel for the committee could ask a committee member (for example, the chairperson) to be responsible for originating committee conference calls; and that committee member could seek reimbursement for the out-of-pocket cost of originating such calls as part of its reimbursable expenses. Similarly, counsel for the debtor could avoid this type of expense through the cumbersome process of having the client/debtor originate such calls and

bear the cost directly. A construct that produces such inconsistencies is hard to justify. Accordingly, the NBC suggests that the parenthetical "(other than charges for multi-party conference calls incurred by counsel in connection with the case)" be added after "telephone charges" in the next-to-last line of § B.3(e) on page 8.[1]

5. **Requirement that Fee Review Entities Apply Fee Guidelines in Reviewing Fee Applications (p. 19, § F.3).** The Revised Proposed Fee Guidelines state that, "in the absence of local rules or general orders and other controlling law within the jurisdiction, a review entity should monitor, review and where appropriate object to interim and final fee applications under Section 330 in accordance with these Guidelines." Revised Proposed Fee Guidelines at 19, § F.3. The mandate that a fee review entity follow the Guidelines is, in our view, inappropriate.

a. The Guidelines are USTP promulgated guidelines for the review and, where appropriate, objections to fee applications ***on the part of the UST***. *See* Revised Proposed Fee Guidelines at 2-3, §§ A.1-5. The Guidelines are not binding on the court, unless the court has adopted them as a Local Rule. *See id.* at 3, § A.5 ("Only the court has authority to award compensation and reimbursement under Section 330 of the Code."). Similarly, the Guidelines do not constitute binding law and are not binding on any other party in interest, including a creditors' committee or a fee review entity. Requiring a fee review entity to follow the Guidelines effectively turns the fee review entity into an agency of the UST engaged to carry out the EOUST's Guidelines. We do not believe this to be the proper purpose or function of a fee review entity, whose ultimate responsibility is to the court.

b. The NBC cannot discern any basis for attempting to impose the EOUST's fee guidelines on a fee review entity, the result of which would simply cause a fee review entity to replicate an objection that the UST can already make on its own. The fee review committee would not have any operative authority. It would simply have standing either to negotiate fees with professionals whose fees are challenged, or to object to those fees – both of which the UST already has standing to do. By contrast, the fee review entity is supposed to be independent and, as such, should be able to make its own, independent determination of whether and to what extent it is appropriate for a court to apply the Guidelines and, if the fee review entity considers it appropriate, to disagree with the UST about the correctness of any of those Guidelines. The NBC respectfully suggests that the last sentence of § F.3 be rewritten to state that, "A fee review entity should monitor, review and where appropriate object to interim and final fee applications under Section 330 and, in so doing, should consider these Guidelines to the extent that the fee review entity deems it appropriate to do so."

[1] Although the NBC did comment on the "overhead" issue in its comments to the Original Proposed Fee Guidelines, it did not specifically address the "case-specific multi-party conference call" issue. In its January 30, 2012 letter, the NBC noted that although it was appropriate to include "local telephone and monthly cell phone charges" as overhead (because they are fixed charges), long distance charges allocable to a specific client should not be treated as overhead. The NBC did not address the issue of multi-party conference calls, which impose a far greater aggregate cost on the originating attorney than two-party long distance calls.

6. **Retention of Conflicts Counsel Versus Disqualification of Lead Counsel (pp. 24-25).** The Revised Proposed Fee Guidelines contain a new section entitled "United States Trustee Considerations on the Retention and Compensation of Co-Counsel" that did not appear in the prior version; as such, the NBC has not previously commented on this section. Among the matters addressed in this new section is moving to disqualify lead counsel where an application is filed to retain conflicts counsel. The NBC believes that disqualification on this basis would be a drastic remedy that could be highly disruptive and costly in the large chapter 11 cases covered by the Guidelines. In most cases, the retention of conflicts counsel (or the filing of an application for such retention) should not in itself be a major factor in determining whether disqualification is warranted.

a. The Revised Proposed Fee Guidelines state that, among the factors that "should weigh in favor of a motion to disqualify the lead counsel" is that "the conflicts counsel has been retained to litigate matters in which the lead counsel has represented the debtor in settlement negotiations." Revised Proposed Fee Guidelines at 25. Importantly, however, unlike the other four factors listed at page 24 that "***may*** indicate that conflicts counsel retention is inappropriate" (emphasis added), the Revised Proposed Fee Guidelines single this factor out for what is almost a *per se* rule: "Such arrangements are ***generally objectionable*** in bankruptcy cases, both because of the duplication of effort they create and because such arrangements may raise concerns about the independence and objectivity of lead counsel during the negotiation." *Id.* at 25 (emphasis added).

b. The NBC believes that characterizing such arrangements as "generally objectionable" paints with too broad a brush and should be calibrated and refined to comport with the EOUST's stated concerns. In particular, the Revised Proposed Fee Guidelines should clarify that the filing of a motion to disqualify on this ground is appropriate only when the facts and circumstances of the particular case indicate that the judgment and efficacy of lead counsel in conducting the negotiations on behalf of the debtor (or a committee) would be impaired or compromised by lead counsel's representation of the debtor's or committee's adversary (the target entity) in an unrelated matter or unrelated matters. Moreover, the EOUST's concern regarding duplication of effort can be addressed in a far less damaging manner than a motion to disqualify.

c. To place the NBC's comments on this point in perspective, we start with the basic reality that a motion to disqualify lead counsel for the debtor or the committee in a chapter 11 case can itself be disruptive and lead to delays in the case because of the uncertainty that such a motion engenders. The actual granting of such a motion can be incredibly disruptive, damaging and costly to the case and all parties in interest, particularly where lead counsel has represented the debtor or the committee for a significant period of time. Forcing a debtor or committee to replace lead counsel who has built up substantial knowledge and familiarity with the factual background, issues and litigations in a large chapter 11 case could put the case on "hold" and delay its progress substantially while the transition of all pending matters to new lead counsel takes place. Moreover, any costs resulting from the duplication of effort that may be entailed in having different counsel handle negotiations and litigation against a particular target entity pale in comparison to the cost and expense that would be imposed on the estate in transitioning all pending matters from disqualified lead counsel to new lead counsel in a large chapter 11 case. The substantial economic cost to creditors and other parties-in-interest of such a

transition would be multiplied by the inevitable delay in the progress of a reorganization case and the ultimate distributions to creditors that can be expected to result from disqualifying lead counsel.

d. Whether lead counsel's participation in negotiating and then not litigating against a particular target entity is objectionable is case-specific and depends on the facts and circumstances of the case and the reason why counsel has made that distinction. For example, there are at least two different scenarios in which lead counsel may make this distinction, only one of which raises concerns about independence and objectivity.

(i) The first scenario – which should not raise such concerns – occurs when lead counsel represents the target entity in an unrelated matter or matters; lead counsel's relationship with the target entity in unrelated matters is not so extensive as to make it unwilling to litigate against the target entity; but lead counsel is precluded from litigating against that entity solely because ethical rules do not permit lead counsel to be adverse to the other entity, even in unrelated matters, without the other entity's consent, and that entity's consent is limited to negotiations. In that scenario, lead counsel's ability to negotiate against, but not litigate against, the target entity is wholly-unrelated to lead counsel's ability to do so independently and objectively, and is simply a function of the target entity's choice to proscribe counsel's participation in litigation against it by granting only a limited waiver.

(ii) The second scenario, which does raise serious concerns about independence and objectivity, occurs where lead counsel's inability to litigate against the target entity results either from the fact that lead counsel has represented that entity in connection with its dealings with the debtor, or that lead counsel's relationship with the target entity as a result of extensive representation in unrelated matters rises to a level where lead counsel feels "uncomfortable" in suing a good client, or its independence and objectivity in being adverse to that client is otherwise open to question. In that situation, there may be grounds to question the appropriateness of lead counsel's involvement in negotiating a claim against the target entity that may result in litigation.

Thus, the determination of whether the UST should seek to disqualify lead counsel who negotiates with a target entity against which it cannot litigate (as an alternative to the use of conflicts counsel for the litigation) should be a case-specific one based on the circumstances that caused lead counsel to draw that distinction.

e. The determination whether to seek disqualification as an alternative to the use of conflicts counsel should also depend on the timeliness and adequacy of lead counsel's disclosure both of the fact that it may negotiate, but not litigate, against the target entity, and of the circumstances that have given rise to that distinction. Accordingly, this section of the Guidelines should make the importance of this consideration clear. Lead counsel should not wait to make this disclosure until an application for the employment of conflicts counsel to handle the litigation becomes necessary; lead counsel should do so as soon as it knows that it faces a situation when it will be negotiating against a target entity against which it cannot litigate. If lead counsel files a supplemental affidavit disclosing this situation, and litigation later becomes necessary, that disclosure should weigh against disqualification, because the UST, and any other party concerned about such circumstances, could and should address the

issue with lead counsel at the time of the disclosure and, if not satisfied with lead counsel's explanation and justification, raise the issue with the court at that time. If the court determines that it is inappropriate for lead counsel to undertake the negotiations in such circumstances, the issue can be resolved "up front" and, if appropriate, conflicts counsel retained at that time to handle both negotiations and litigation, without the disruption and unfairness that would follow from a motion to disqualify lead counsel months (or even years) into the case. On the other hand, if lead counsel fails to make timely and adequate disclosure of this issue, that would be a factor weighing in favor of a motion to disqualify, because lead counsel would effectively have deprived the UST and the court of the opportunity to address this issue on a timely basis.

f. The EOUST's concern that arrangements under which lead counsel negotiates against an entity and conflicts counsel litigates against that entity result in a wasteful duplication of effort may be valid in some cases, but not always. In many cases, settlements are fostered by the use of different counsel to negotiate and litigate. Moreover, even if the use of separate counsel might result in some duplication, there are less drastic means than disqualification to address it. A less drastic approach would be to place the burden on lead counsel to identify and demonstrate what portion of the work it performed in representing the debtor in the negotiations is not duplicative of, or otherwise reduced, work that conflicts counsel performs in litigation against the target entity.

g. Based on all of the foregoing considerations, the NBC recommends that the first paragraph on page 25 be rewritten as follows:

> One recent trend has been for law firms to obtain limited conflicts waivers that permit them to engage in settlement negotiations against certain entities ("target entities"), but which require them to assign the matter to conflicts counsel in the event that the dispute is litigated in court. Such arrangements can raise concern in bankruptcy cases, both because of the duplication of effort that they may create and because such arrangements may raise concerns about the independence and objectivity of lead counsel during the negotiation phase. In evaluating whether to seek disqualification in these circumstances, the UST will consider the facts and circumstances of the particular case, including whether those facts and circumstances indicate that the judgment and efficacy of lead counsel in conducting the negotiations on behalf of the debtor or committee would be impaired or compromised by its representation of the debtor's or committee's adversary in an unrelated matter or unrelated matters; the timeliness and adequacy of lead counsel's disclosure of the fact that it may negotiate, but not litigate, against the target entity, and of the circumstances that give rise to that distinction; and the extent to which the disqualification of lead counsel would disrupt the reorganization process or impose additional costs on the estate. In addition, in any circumstance in which lead counsel negotiates with a target entity and conflicts counsel then litigates against that entity, lead counsel will bear the burden of demonstrating the extent to which

> that portion of the work it performed in representing the debtor or committee in the negotiations was not duplicative of, or otherwise reduced, work that conflicts counsel has performed or will have to perform in litigating against the target entity.

* * *

The NBC appreciates the EOUST's consideration of the NBC's comments with respect to both the Original Proposed Fee Guidelines and the Revised Proposed Fee Guidelines, and welcomes the opportunity to be of further assistance.