U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director *Washington, DC 20530*

September 3, 2015

Mr. David C. Maurer
Director, Homeland Security and Justice
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Maurer:

The United States Trustee Program ("USTP") appreciates the insights and observations provided by the GAO's study of the USTP's development and implementation of "Guidelines for Reviewing Applications for Compensation filed by Attorneys in Larger Chapter 11 Cases" ("LCFG" or "Guidelines").[1/] The GAO report is a valuable resource for the bankruptcy community in understanding the impact of the Guidelines on the fee review process.

The GAO correctly notes that the USTP's goal in promulgating the Guidelines was to enhance transparency in the bankruptcy billing process and to ensure that bankruptcy fees do not exceed market rates. The GAO also correctly acknowledges that the recency of the promulgation of the LCFG and their application to fewer than 100 cases reviewed in the report makes definitive conclusions both difficult and premature. The GAO does not make any recommendations for the USTP to improve the Guidelines or their implementation, but we will carefully consider the GAO's and stakeholders' observations as the USTP continues its outreach to the bankruptcy community and refines its enforcement strategies.

The USTP takes this opportunity to provide some general observations on the report.

1. Initial opposition to the Guidelines by bankruptcy attorneys appears to be yielding to compliance and improved billing practices.

The report demonstrates that there has been substantial compliance with the Guidelines. Although more enforcement actions may have been expected during the initial phases of implementation, attorneys in approximately one-half of the early cases largely complied without any enforcement action by the USTP. This may be attributable to the USTP's active engagement of the public, including professionals, in the multi-year development process; its significant outreach and training upon adoption; and its adherence to the stated goal of litigating only when

[1/] The Report also addressed venue selection for large chapter 11 cases. Although 18 of 25 judges interviewed by the GAO stated that professional fees are a factor in venue selection, the USTP's role in policing venue selection is generally more limited to addressing violation of the venue statute and abuse of the process. *See, e.g., In re Houghton Mifflin Harcourt Pub. Co.*, 474 B.R. 122 (Bankr. S.D.N.Y. 2012) (debtor corporation misrepresented assets held in jurisdiction) and *In re Patriot Coal Corp.*, 482 B.R. 718 (Bankr. S.D.N.Y. 2012) (debtor corporation manufactured venue by creating an affiliate in the desired venue on the eve of bankruptcy).

necessary after consensual resolution was unreachable. It is important to note that, of the 98 formal or informal enforcement actions the Program was compelled to take, 92 were consensually resolved.

Retention and fee applications filed under the Guidelines also demonstrate improvement in billing practices and make it easier to ascertain whether the practices conform to statutory standards. For example, initial applications filed under the Guidelines have shown that some firms were charging rates to the debtor client that were higher than the rates charged to the same client prior to the bankruptcy case. Law firms would not have disclosed these rate increases in retention applications in cases filed before the LCFG went into effect. This suggests not only that the Guidelines help uncover instances in which billing practices violate statutory standards, but also that the additional disclosures may have a deterrent effect and cause changes to billing practices before the retention or fee applications are filed.

Although we have been able to avoid extensive litigation thus far, adoption of the LCFG through case law, local rules, or administrative orders promotes uniformity and consistency across judicial districts. The Guidelines do not have the force of law. As the GAO report shows, the result is that professionals and USTP personnel spend significant time and effort negotiating compliance on a case-by-case basis. Adoption of the Guidelines would preserve resources for all stakeholders by setting expectations more universally. Currently, 15 districts require compliance with the LCFG in their local rules and administrative orders.

2. The USTP should continue its outreach to explain the Guidelines to the bankruptcy community.

Some in the bankruptcy community continue to misunderstand certain aspects of the LCFG, particularly those relating to comparability data and other disclosures. As the GAO correctly notes in its report, current bankruptcy law already requires that professionals who wish to be paid from a bankruptcy estate provide evidence to support a finding that the compensation "is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than [bankruptcy cases]." 11 U.S.C. § 330(a)(3)(F). This statutory standard prohibits premiums above non-bankruptcy market rates and encourages billing discipline, including discounts and other legal cost control measures that prevail outside bankruptcy.

The LCFG simply provide the framework for practitioners to satisfy this requirement of the Bankruptcy Code. Though some contend that rates charged in bankruptcy cases are already comparable to non-bankruptcy rates, courts previously have had to make comparability findings based solely on an applicant's conclusory affidavit or declaration. Under the LCFG, applicants now must provide evidence to support their statements. This provides greater assurance to the court, the USTP, and other parties that bankruptcy lawyers are subject to the same market discipline and practices as attorneys outside of bankruptcy. The argument made by some that comparing bankruptcy and non-bankruptcy rates is like "comparing apples to oranges" is at odds with the intent of Congress.

3. The LCFG address matters relating to professional compensation and cannot be expanded to address other legitimate concerns parties may have with the chapter 11 process.

Some of the comments made by practitioners and judges with respect to the LCFG go beyond the purpose of the Guidelines and reflect general frustration about the nature of the bankruptcy process and the high cost of chapter 11 case administration. For example, one judge criticized the Guidelines for not addressing the problem of high fees when chapter 11 cases go "off the rails" or experience unexpected setbacks that cause delays or unsuccessful results for creditors. Similarly, one attorney cited the Guidelines for failing to control professional costs that result from the length of time it takes to complete a case.[2/] Although these are valid concerns about bankruptcy practices, the Guidelines cannot address matters beyond professional compensation. We believe, however, that the Guidelines do help the courts and parties improve case administration by, among other things, encouraging budgets throughout the case and requiring more complete disclosure of the reasonableness of the tasks performed by attorneys.

In conclusion, the USTP looks forward to continuing to improve the process for the award of professional compensation in bankruptcy. Such improvement is important for the bankruptcy system—and for the millions of creditors in bankruptcy whose economic recoveries are affected by every dollar paid in professional compensation and the public who are concerned about the integrity and efficiency of the bankruptcy fee approval system. The USTP strongly believes the LCFG provide for meaningful disclosure and transparency and ensure that the fee review process is subject to client-driven market forces, accountability, and scrutiny as mandated by Congress in the Bankruptcy Code.

The USTP is grateful to the GAO for undertaking the Guidelines review and providing us with useful information that will assist us in performing our responsibilities as the "watchdog" of the bankruptcy system.

Sincerely,

Clifford J. White III
Director

[2/] A major role of the USTP is to identify cases not making progress toward rehabilitation. The USTP files motions to convert to chapter 7 or dismiss a substantial portion of all chapter 11 cases filed.