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The Case for Value Billing in Chapter 11

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> *In addition to overbilling Nacchio, S&K charged Nacchio for duplicative and unnecessary work, including seven (7) attorneys to attend a court appearance, and billed patently unreasonable fees and disbursements including, but not limited to, tens of thousands of dollars for staff breakfasts, the cost of attorney underwear, and in[-]room movies. In all matters, S&K charged unreasonably high billing rates [that] far exceeded rates for similarly situated New Jersey[-]based law firms.*[1]
>
> —Nacchio & Esker v. Stern & Kil[c]ullen

> *Hourly billing pressure may be the most serious problem faced by the legal profession. It has robbed many lawyers of the possibility of balanced lives, has caused a decline in mentoring, collegial relationships, and professional satisfaction, and has had a marked corrosive effect on the integrity of many lawyers . . . . Billing pressure is partly responsible for the low esteem in which our profession is held. Billing and expense fraud is only one product of the billing mania that has taken over the culture in so many large firms. . . . As long as some lawyers deceive their clients about how much time they are spending or what they are doing, all clients worry.*[2]
>
> —Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*

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1. Complaint and Jury Demand at 9, Nacchio v. Stern & Kil[c]ullen, N.J. Super. Ct. Law Div. 2011 (No. L 002585-11).

2. Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers,* 12 Geo. J. L. Ethics 205, 225 (1999) (footnote omitted) [hereinafter *Bilking*].

In the case of the Dodgers, Dewey & LeBoeuf's 171-page bill drones on with the work of 46 lawyers and staff members, including preparing memos, drafting motions, attending meetings, going to hearings, requesting discovery, devising strategy, speaking to the news media, exchanging e-mails and talking with [Frank] McCourt.

Each job is diced into 0.1 hourly fragments as if they were legal atoms.

On July 1, Sidney Levinson billed $232.50 to answer media requests for 0.3 of an hour, or 18 minutes.

Although the only mention of him that day, according to Nexis, showed that he declined to comment to The Los Angeles Times, he might have been stealthily speaking to reporters on background.[3]

—Richard Sandomir, *To Dodgers, Bankruptcy Incurs Cost by the Hour*

I. Introduction: Studying Fees in Chapter 11

Around six years ago, I began a double life—I kept my day job as a law professor but added "occasional fee reviewer" to my résumé. I've now been the fee examiner in three large bankruptcies: *Mirant*[4] and *Pilgrim's Pride*[5] in the U.S. Bankruptcy Court for the Northern District of Texas, and *Station Casinos*[6] in the U.S. Bankruptcy Court for the District of Nevada. The assignments were both lucrative[7] and educational.[8] During (and after) my fee reviews in these three cases, I kept thinking that there must be a better way for professionals being paid from estate funds to explain their fees to the bankruptcy court. This article attempts to do just that.[9]

3. Richard Sandomir, *To Dodgers, Bankruptcy Incurs Cost by the Hour,* N.Y. Times, Sept. 3, 2011, at D7.

4. *In re* Mirant Corp., 327 B.R. 262 (Bankr. N.D. Tex. 2005).

5. *In re* Pilgrim's Pride Corp., 401 B.R. 229 (Bankr. N.D. Tex. 2009).

6. *In re* Station Casinos, Inc., No. 09-52477-GWZ (Bankr. D. Nev. 2009).

7. In each case, the court approved a monthly salary of $15,000, plus my normal hourly rate for depositions and hearings; in addition, the court allowed me to hire law students and recent law graduates at rates ranging from $20-$40/hour. To avoid any risk of using state resources for private gain, I also asked the court to approve a monthly fee of $1,000, payable to the law school or law foundation.

8. *See* Nancy B. Rapoport*, Rethinking Fees in Chapter 11 Bankruptcy Cases,* 5 J. Bus. & Tech. Law 263 (2010) [hereinafter *Rethinking Fees*]. Not only is the work educational for me, but it also gives the students and recent graduates some unusual experience. My team (the students and the recent graduates) does the major "sorting" work, reorganizing the information in the fee applications according to the protocols that I've set. Then I take over the analysis, the negotiations, and the work of drafting and filing pleadings.

9. *See id.* at 265 (observing that the bankruptcy court supervises the payment of certain professional fees, and that the review is complex and onerous); *see also* Lynn M. LoPucki & Joseph W. Doherty, Professional Fees in Corporate Bankruptcies: Data, Analysis, and Evaluation 268–70 (2011) [hereinafter Fees] (stating that the current system of controlling bankruptcy fees is not functioning properly).

A. Fees Gone Wild[10]

Professional fees are big business, especially in large Chapter 11 cases.[11] For those cases in which professionals whose employment is approved by the bankruptcy court actually *do* get paid (and, according to one study, 35% of professionals don't get paid a dime),[12] fees can run into the millions, and sometimes even billions.[13] Fees of that magnitude will get anyone's attention, and they certainly have captured mine.

The beauty of studying fees for court-appointed professionals in Chapter 11 cases is that most of those fees are a matter of public record.[14] Unlike other types of fees, which go to the client for payment and not first to a court docket, we have the luxury of being able to view the supporting documentation.[15] We can look at the fee applications themselves, any objections to the applications, and any related court orders. We can also look at the employment applications, which set forth (among other things) the proposed compensation structures that the professionals want to use. I've focused my attention on fees that financial advisors and BigLaw[16] firms charge in large Chapter 11 cases, but for those who want to study other types of fees, there's plenty of fodder in court dockets.[17]

10. I'd normally say "apologies to *Girls Gone Wild,*" http://en.wikipedia.org/wiki/Girls_Gone_Wild, but I find that show beyond abhorrent.

11. *See, e.g.*, Kevin Roose & Michael J. de la Merced, *For Lehman, Payment Plan Is Major Step In Resolution,* N.Y. TIMES, Aug. 31, 2011, at B3 (reporting that "Weil, Gotshal & Manges, the law firm representing Lehman, has alone collected more than $300 million in fees").

12. Stephen J. Lubben, *Corporate Reorganization & Professional Fees,* 82 AM. BANKR. L.J. 77, 80 (2008) [hereinafter *Corporate Reorganization*] ("Lost in the sound and fury about large professional expenses in large cases is the fact that almost 35 percent of the chapter 11 cases result in no payment whatsoever to the professionals.").

13. *See* Liz Moyer, *Lehman Fees Hit $1 Billion and Counting*, WALL ST. J., Nov. 23, 2010, at C1 (observing that "[l]ead bankruptcy counsel Weil Gotshal & Manges LLP got paid $8.8 million in fees and expenses in October, increasing the firm's total to $245.8 million"); *see also* Brian Baxter, *Bankruptcy Court Approves $31 Million More in Chrysler Legal Fees,* AM. LAW. (Oct. 27, 2009, 6:40 PM), http://amlawdaily.typepad.com/amlawdaily/2009/10/chrysler-fees.html (listing lead bankruptcy counsel Jones Day's fees as being $21.3 million for work done between the end of April 2009 and the end of August 2009, listing conflicts counsel Togut, Segal & Segal's fees for the same period as being $2.9 million, and listing special counsel Schulte Roth & Zabel's fees as being $5.1 million); Brian Baxter, *Bankruptcy Bonanza: Records Show $80 Million in Legal Fees for GM,* AM. LAW. (June 15, 2009, 11:03 AM), http://amlawdaily.typepad.com/amlawdaily/2009/06/80-million-in-legal-fees-for-bankrupt-gm.html (explaining that ". . . GM has paid more than $80 million in fees to [Weil, Gotshal & Manges, Jenner & Block, and Honigman Miller Schwartz and Cohn] over the past six months," with Weil Gotshal billing around $54 million, Jenner & Block billing $11.3 million, and Honigman billing $15.1 million).

14. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 27 (explaining that public access to bankruptcy documents is generally available via PACER, the Public Access to Court Electronic Reports system).

15. *See id.* at 28 (reporting only one instance in over one hundred cases studied in which the bankruptcy judge sealed fee applications or orders). Whether we can make heads or tails of those bills depends on whether the professionals block-billed their time or otherwise reported their time in ways that make it difficult to parse the bills.

16. *See generally* RICHARD L. ABEL, AMERICAN LAWYERS 191–99 (1989) (discussing the characteristics of large law firms (known as "BigLaw"), including salaries, number of clerical staff members, yearly billable hours, and associate-to-partner ratios).

17. Not all bankruptcy fees are available through court dockets, though. For example, many consumer debtor lawyers choose, in those jurisdictions that allow it, to charge at or below so-called "no-look" fees. Those

Take a look at these proposed fee terms for a valuation consultant for an equity security holders' committee. In this case, the debtor's financial advisors claimed that the debtor's assets were worth somewhere in the range of $624 million, with zero value available for equity:

> *The proposed fee terms . . . are as follows: (a) a nonrefundable advisory fee of $500,000.00 payable pursuant to the Court's Procedure for Professionals Order; (b) a nonrefundable expert witness fee of $25,000.00 per day, payable each day that [the proposed advisor's] employee is requested, and made available, for the purpose of deposition or testimony; (c) a nonrefundable extended assignment fee of $100,000.00 per month, payable beginning September 1, 2009, and each month thereafter; and (d) any out-of-pocket expenses.*[18]

Not surprisingly, the Unsecured Creditors' Committee and the Prepetition Secured Lenders filed an objection to this application, as well as to a similar application filed by the Unsecured Noteholders' Committee, which was requesting its own advisor.[19] Not only did the court deny the applications, it did so twice, with the second time coming after a motion for reconsideration.[20] In denying the applications, the court emphasized both the high fees themselves and their non-refundable nature: "These investment bankers, who wish to have their fees and expenses paid out of the debtor's estate, have sworn under oath that they will render services only if they immediately receive a nonrefundable fee aggregating $1.0 million. This Court declines the opportunity to endorse such arrogance. The purse is too perverse."[21]

are fees that, pursuant to local rules, lawyers may charge without having to file detailed fee applications. *See, e.g.*, U.S. BANKR. CT. S.D. OHIO LBR 2016-1(b)(2)(A) (effective Dec. 1, 2009). Under this local rule, "[f]ee applications or disclosures may be allowed up to $3,500 ('unitemized fee') without actual hearing or specific itemization for services rendered from initial interview through confirmation of the plan." *Id.*

18. *In re* Energy Partners, Ltd., 409 B.R. 211, 218–19 (Bankr. S.D. Tex. 2009).

19. That application had the following proposed compensation terms:

> The fee terms proposed in the [other advisor's application] are as follows: (a) a nonrefundable initial fee of $500,000.00; (b) a nonrefundable additional fee of $100,000.00 for August 1, 2009 through August 15, 2009; (c) a nonrefundable additional fee of $100,000.00 for August 16, 2009 through August 31, 2009; and (d) any out-of-pocket business expenses.

Id. at 219.

20. *See In re* Energy Partners, Ltd., No. 09-32957-H4-11, 2009 WL 2970393, at *1 (Bankr. S.D. Tex. 2009) ("[One of the investment banking firms and the committee that sought a court order approving that firm's employment] are unhappy because, among other things, the Opinion referred to the investment bankers as greedy, arrogant hogs. Their motion to amend requests this Court to unsay what it said and to unwrite what it wrote. This, the Court will not do.").

21. *In re* Energy Partners, Ltd., 409 B.R. at 215 (Bankr. S.D. Tex. 2009). This case isn't the only one in which non-attorney professionals sought fee arrangements that the court considered unreasonable. *See, e.g.*, *In re* The Circle K Corp., 294 B.R. 111, 115–17 (Bankr. D. Ariz. 2003) (finding an automatic $100,000.00 fee unreasonable when the applicant was under no obligation to retain records establishing and justifying the fee).

The purse isn't always perverse. Not all fees in Chapter 11 are shockingly high—or even high at all.[22] Not all employment applications or fee applications demonstrate tone-deafness to the concept of who actually pays the bills; most show very good billing judgment.[23] And, in fact, not all fees incurred in a bankruptcy case are even fees attributable to the bankruptcy case itself.[24] But because the courts reviewing these fees must make sure that the fees are reasonable, and because the way in which fees get reported often can make a determination of reasonableness well-nigh impossible,[25] it's time to develop some norms for what constitutes a "reasonable" fee.

B. How Fees Get Paid in Chapter 11 Cases

Before the estate can incur an obligation to pay professional fees, the court must approve the employment of the professional, including the terms under which the professional will be paid.[26] Section 327 of Title 11 of the U.S. Code governs the employment of professional persons working for the trustee or the debtor in possession, and the general principle is expressed in subsection (a):

> *(a) Except as otherwise provided in this section, the trustee,[27] with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested*

22. *See generally* WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS 26 (1996) [hereinafter THE HONEST HOUR] (acknowledging billing abuses, but explaining that "the existence of billing abuses [does] not necessarily indicate that excessive billing is the norm or even widespread").

23. *See generally* Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L.J. 509, 550 (2000) [hereinafter *Direct Costs*] (explaining that an empirical study of public and private bankruptcy cases revealed direct costs of 1.8% of total firm size – or 2.5% of total firm size, excluding cases involving prepackaged bankruptcies – and concluding that Chapter 11 direct costs are low relative to other corporate transactions).

24. *See generally* Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Code Question*, 39 J. FIN. 1067 (1984). Of course, not everyone agrees that fees in Chapter 11 tend to fall within reasonable limits. *See generally* Lynn LoPucki's research in this area, including his latest book, LOPUCKI & DOHERTY, FEES, *supra* note 9 (passim). The draft guidelines that the Office of the U.S. Trustee has recently proposed for larger Chapter 11 cases recognize that a significant portion of fees awarded in Chapter 11 cases would have been incurred even absent any bankruptcy. *See* Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases (Draft for Public Comment) [hereinafter "Proposed Guidelines"]; *see also infra* notes 314–38 and accompanying text.

25. *See* Rapoport, *Rethinking Fees*, *supra* note 8, at 276–80 (noting that the court, the U.S. Trustee, or a court-appointed fee expert lacks some information about a professional's choices about legal strategies that might reasonably have triggered higher rates).

26. 11 U.S.C. § 330 (2006).

27. 11 U.S.C. § 1107 gives the debtor in possession most of the rights and duties of the trustee, which means that the debtor in possession may also seek court approval for employing professionals. *Id.* § 1107(a). 11 U.S.C. § 1103 permits a committee that has been appointed under section 1102 to employ professionals for the benefit of the committee, provided that the professional may not concurrently "represent any other entity having an adverse interest in connection with the case." *Id.* § 1103(b).

> *persons,*[28] *to represent or assist the trustee in carrying out the trustee's duties under this title.*[29]

Section 327(a) is designed for those professionals who are going to do the bankruptcy-related work.[30] For those who are going to serve the trustee or debtor in possession in a more limited capacity, such as special litigation counsel or intellectual property counsel (in other words, people who will do work for the trustee or debtor in possession but not the *bankruptcy* work), the appropriate section is typically section 327(e):

> *(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.*[31]

The other statutory provision requiring court approval of employment is section 1103, which covers the employment of professionals working for committees. 11 U.S.C. § 1103 permits a committee that has been appointed under section 1102 to employ professionals for the benefit of the committee, provided that the

28. The Bankruptcy Code defines "disinterested person" as "a person that—"

> (A) is not a creditor, an equity security holder, or an insider;
> (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
> (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

Id. § 101(14). For a discussion of the infinite loop of section 101(14), see Nancy B. Rapoport, *Enron and the New Disinterestedness—The Foxes Are Guarding the Henhouse,* 13 AM. BANKR. INST. L. REV. 521, 523–28 (2005); Nancy B. Rapoport, *Ethics: Is Disinterestedness Still a Viable Concept? A Discussion,* 5 AM. BANKR. INST. L. REV. 201 (1997) (with co-panelists John D. Ayer, the Hon. Charles N. Clevert, the Hon. Joel Pelofsky & Bettina Whyte). Pursuant to Fed. R. Bankr. P. 2014, the proposed professional must disclose, in his application for employment, "to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States [T]rustee."

29. 11 U.S.C. § 327(a).

30. *Id.*

31. In essence, section 327(e) deals with employment as special counsel (which has a slightly less stringent standard than does section 327(a)'s disinterestedness standard). *Id.* § 327(e). There's also section 327(c):

> (c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

Id. § 327(c).

professional may not concurrently "represent any other entity having an adverse interest in connection with the case."[32]

Some professionals have focused their attention on section 328, which allows for a variety of creative compensation structures ("on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis").[33] But—at least for professionals employed by the trustee or debtor in possession—section 328 is more properly read as elaborating the latitude that a court has in approving compensation arrangements, rather than as separate authority for appointment.[34] Under section 328, the court may only "allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, *if such terms and conditions prove to have been improvident in light of*

32. Section 1103(a) provides:

> At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

Id. § 1103(a).

33. *Id.* § 328(a). But even section 328(a) only discusses creative types of compensation and does not provide the authority to approve employment of professionals for the trustee or debtor in possession:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person *under section 327 or 1103 of this title*, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

Id. (emphasis added). *But see* discussion of the drafting glitch in section 327, *infra* notes 38-39 and accompanying text.

That "in light of developments not capable of being anticipated" standard was fleshed out in Daniels v. Barron (*In re* Barron), 325 F.3d 690 (5th Cir. 2003). In *In re Barron,* the Fifth Circuit had remanded to the bankruptcy court a fee-reduction decision involving a contingency fee. *Id.* at 691. The bankruptcy court had reduced the award of a contingency fee on the theory that the legal work wasn't very difficult and didn't take very long; hence, the $53,000+ contingency award overcompensated the lawyer. *Id.* at 692. On remand, the bankruptcy court reiterated its reduction, explaining that it had, in fact, applied the correct standard. 325 F.3d at 693 (citing *In re* Barron, No. 95-10538, slip op. at 3 (Bankr. N.D. Miss. May 22, 2001)). The Fifth Circuit disagreed, clarifying that the test is whether there were any "intervening circumstances that were *incapable* of anticipation by the bankruptcy court *at the time it approved the award.*" *Id.* at 694 (emphasis in original).

34. *See In re* Energy Partners, Ltd., 409 B.R. 211, 223 (Bankr. S.D. Tex. 2009) (highlighting the fact that "[s]ection '328(a) is the provision which iterates [the] terms under which a trustee, debtor in possession or committee can employ a professional. It is not itself a separate source of employment approval. If such terms and conditions are not reasonable, the bankruptcy judge may exercise his discretion, and deny the employment under 11 U.S.C. § 1103(a).'") (quoting Unsecured Creditors' Comm. v. Joel Pelofsky (*In re* Thermadyne Holdings Corp., et al.), 283 B.R. 749, 755 n.9 (B.A.P. 8th Cir. 2002)); *see also* Proposed Guidelines, *supra* note 24, at 2 n.1 ("Applications for retention are always filed under section 327, not section 328. Although certain terms of the engagement may be governed by section 328, the application itself is filed under section 327."). Because the Proposed Guidelines cover only attorneys to be employed pursuant to section 327, they don't discuss the issue of the drafting glitch discussed *infra* at notes 38-39 and accompanying text. For my critique of the Proposed Guidelines, see *infra* notes 314–38.

developments not capable of being anticipated at the time of the fixing of such terms and conditions"[35]—a much more difficult standard for the court to meet.[36] In other words, compensation arrangements made pursuant to section 328 protect the professional's compensation structure far more aggressively than those made pursuant to section 327.[37]

It's a little trickier for getting court approval for those professionals whom committees want to employ. Section 1103(a) gives committees the authority to seek court approval for the employment of professionals, but section 327 speaks only of employing professionals for the trustee (and, via section 1107, for the debtor in possession). That's a drafting glitch that omits employment approval for committee professionals.[38]

How do courts then approve the employment of committee professionals? One way is via the first sentence of section 328(a): "The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment. . . ."[39] The other way is to read section 1103(a) as containing its own authorizing language.[40]

Court-appointed professionals[41] get paid as administrative expenses[42] after notice and a hearing, pursuant to section 330.[43] The watchword for section 330 is "reasonableness":

35. *Id.* § 328(a) (emphasis added). As former bankruptcy judge Wesley Steen has explained, "[s]ections 328 and 330 authorize the court to adjust the fee or to deny it in certain circumstances. For professional engagements that are based on an hourly rate, the bankruptcy judge has substantial discretion in determining the 'reasonable fee' because the number of hours, the hourly rate, and the other factors referenced in § 330 are highly fact intensive and subject to bankruptcy expertise that should be reviewable only for clear error or abuse of discretion. However, if the engagement defines the exact amount of the fee (or a formula for determining it), the bankruptcy judge has considerably less discretion." Email from Judge Steen to author (August 25, 2011) (on file with author); *see also* Riker, Danzig, Scherer, Hyland & Perretti v. Official Committee of Unsecured Creditors (*In re* Smart World Technologies, LLC), 552 F.3d 228, 234—35 (2d Cir. 2009) (discussing how difficult it is to meet section 328's "improvident in light of developments not capable of being anticipated at the time" test); *but see* discussion of drafting glitch, *infra* notes 38-39 and accompanying text.

36. *See, e.g.*, *In re* Smart World Technologies, LLC, 552 F.3d 228, 234–35 (2d Cir. 2009).

37. *See id.* at 232–33 (discussing how constrained the court is in amending the terms and conditions of compensation after it has approved them under section 328).

38. For other drafting glitches, see, e.g., 11 U.S.C. § 1114 (purporting to cover both the assumption and rejection of collective bargaining agreements, but really covering only rejection); *id.* § 1125(a) (the infamous "hanging paragraph" after section 1125(a)(9)); *id.* § 101 (demonstrating Congress's inability to renumber Code definitions when it adds new definitions to this section).

39. 11 U.S.C. § 328(a) (emphasis added).

40. Section 1103(a) provides in part that "with the court's approval, such committee may select and authorize the employment" of its professionals.

41. Creditors and custodians of the debtor in possession, as well as those professionals who have not been approved for employment by the court but who have made a "substantial contribution" to the case on behalf of creditors or committees, may also seek court approval of their expenses. 11 U.S.C. § 503(b)(3)(D), (b)(4). For a thorough discussion of how a bankruptcy court should determine "substantial contribution," see *In re* Mortgs. Ltd., No. AZ-09-1412-KiJuMk, No. 08-07465-RJH, 2010 WL 6259981, at *7–11 (B.A.P. 9th Cir. 2010) (stating that, to date, case law has not clarified the legal standard).

(a)

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

42. 11 U.S.C. § 503(b).

43. *See also* 28 C.F.R. § 58, App. A (2010) (stating that the Office of the United States Trustee Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330 are intended to complement, not supersede, local bankruptcy court rules). Regional jazz-riffs on the U.S. Trustee Guidelines widely. There are some constants, though, such as the prohibition of "clumping" or "lumping" time entries together. *See, e.g.*, *In re* Energy Partners, Ltd., 422 B.R. 68, 89–90 (Bankr. S.D. Tex. 2009) (docking a law firm 25% of its lumped entries); *In re* Poseidon Pools of America, Inc., 180 B.R. 718, 731 (Bankr. E.D.N.Y. 1995) (observing that courts have denied reimbursement for lumped services because the practice makes fee "reasonableness" determinations impossible).

(4)

(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

. . . .

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.[44]

"Reasonableness" can be difficult for a court to determine, given the highly stylized nature of most fee applications.[45] The U.S. Trustee Guidelines[46] ("Guidelines")—a jazz-riff of which can be used in a jurisdiction as part of a court's local rules—require the application to "contain sufficient information about the case and the applicant so that the court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents."[47] In practice, most applications use the components suggested by the Guidelines "to facilitate review of the application."[48] Those components are:

(1) *Information about the Applicant and the Application*. . . .
(2) *Case Status*. . . .
(3) *Summary Sheet*[49] . . .

44. 11 U.S.C. § 330.

45. In addition to the Bankruptcy Code requirements of reasonableness are legal ethics rules relating to the reasonableness of fees (*cf., e.g.,* MODEL RULES OF PROF'L CONDUCT R. 1.5 & cmt. 1), competence (*cf., e.g.,* MODEL RULES OF PROF'L CONDUCT R. 1.1), diligence (*cf., e.g.,* MODEL RULES OF PROF'L CONDUCT R. 1.3), and candor to the tribunal (*cf., e.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.3).

46. 28 C.F.R. § 58, App. A (a) (2010).

47. The Guidelines also prohibit "lumping" (a/k/a "clumping" or "block-billing"), but somehow, even the most bankruptcy-savvy firms manage to forget that rule—or fail to remind their billers of it. *Id.* § 58, App. A (b), (b)(4)(v). Even though someone at those firms must review the fee application before it gets filed, those block-billed entries keep occurring. *See supra* note 43 and accompanying text.

48. *Id.* § 58 App. A (b)(1).

49. The Office of the United States Trustee Guidelines state:

> The summary sheet must "contain a summary or cover sheet that provides a synopsis of the following information: (i) Total compensation and expenses requested and any amount(s) previously requested; (ii) Total compensation and expenses previously awarded by the court; (iii)

> (4) Project Billing Format *[including descriptions of work by defined categories*[50] *and a requirement that time entries should not be lumped together*[51]*]* . . . .
> (5) Reimbursement for Actual, Necessary Expenses. . . .[52]

Nothing in these Guidelines is objectionable. One problem with the Guidelines, though, is that the distance between the narrative for the project categories[53] and the exhibits that actually provide the detailed documentation of the work can be hundreds of pages apart.[54] Take a fee application in a large case and assume that it is about thirty pages long, excluding its exhibits (and many are much longer). Now multiply that fee application by the number of professionals filing fee applications each month (let's say nine, not counting any special counsel: the debtor's lead lawyers, the debtor's local lawyers,[55] the debtor's financial advisor, the debtor's

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> Name and applicable billing rate for each person who billed time during the period, and date of bar admission for each attorney; (iv) Total hours billed and total amount of billing for each person who billed time during billing period; and (v) Computation of blended hourly rate for persons who billed time during period, excluding paralegal or other paraprofessional time."

Id. § 58 App. A (b)(3).

50. Exhibit A of the Guidelines sets forth the project billing categories. *Id.* at Exhibit A.

51. *Id.* § 58 App. A (b)(4)(v).

> (v) Time entries should be kept contemporaneously with the services rendered in time periods of tenths of an hour. Services should be noted in detail and not combined or "lumped" together, with each service showing a separate time entry; however, tasks performed in a project which total a de minimis amount of time can be combined or lumped together if they do not exceed .5 hours on a daily aggregate. Time entries for telephone calls, letters, and other communications should give sufficient detail to identify the parties to and the nature of the communication. Time entries for court hearings and conferences should identify the subject of the hearing or conference. If more than one professional from the applicant firm attends a hearing or conference, the applicant should explain the need for multiple attendees.

Id.

52. *Id.* § 58 App. A (b)(5).

53. *Id.* § 58 App. A, Exhibit A. The Guidelines provide that, for project billing,

> (iii) Each project category should contain a narrative summary of the following information:
> (A) a description of the project, its necessity and benefit to the estate, and the status of the project including all pending litigation for which compensation and reimbursement are requested;
> (B) identification of each person providing services on the project; and
> (C) a statement of the number of hours spent and the amount of compensation requested for each professional and paraprofessional on the project.

Id. § 58 App A (b)(4).

54. *See generally* LoPucki & Doherty, Fees, *supra* note 9, at 217–18 (observing that fee applications can be hundreds, sometimes even thousands, of pages long). Another problem with the Guidelines is that there are few, if any, consequences specified when a professional fails to comply. *See infra* notes 314–38 and accompanying text.

55. The legislative history of 11 U.S.C. § 330 is useful for studying the whole issue of when parties in interest should use professionals in their area, rather than bringing in professionals from outside. Congress moved away from capping fees to save the estate some money in favor of compensating professionals more fairly for their work. For a good discussion of section 330's legislative history, see, e.g., James B. Hirsch, Note, *Bankruptcy Fee Applications: Compensable Service or Cost of Doing Business?*, 58 Fordham L. Rev. 1327, 1331–35 (1990).

auditor, the creditors' committee's lead lawyers, the creditors' committee's local lawyers, the creditors' committee's financial advisor, and conflicts counsel[56] for both the debtor and the creditors' committee),[57] and you can average 270 pages per month,[58] per case, of fee applications, plus the exhibits, which will include several single-spaced, small-font lines of time entries and expense details.[59] Reviewing those fees requires reading the bill's narratives,[60] sorting through the exhibits, looking for patterns, double-checking the fees and expenses against any appropriate local rules and guidelines, cross-checking entries across billers and across professionals, and following up with the professionals when the bills seemed to contain some facially unreasonable items.[61]

In the largest cases, combing through fees would take more time than any bankruptcy court can expect to have—especially given the volume of other pleadings that the court has to slog through in that case as well as all of the others on the court's docket.[62] With the time demands that reviewing fee applications take,

56. There's nothing in the Bankruptcy Code that specifically permits court approval of the employment of professionals who fail the "disinterestedness" test of sections 327 and 101(14), but the role of conflicts counsel has developed over time to deal with the very real problem of finding representation when everyone with experience has some type of conflicts. Not every conflict is waivable, and not every professional who seeks to circumvent the disinterestedness requirements should be allowed to do so. Professionals with pervasive and consistent conflicts really shouldn't get around them by asking the court to approve the employment of conflicts counsel. *See In re* Project Orange Assocs., 431 B.R. 363, 375 (Bankr. S.D.N.Y. 2010) (holding that a "fig leaf of conflicts counsel" was insufficient when the "proposed general bankruptcy counsel has a conflict of interest with a creditor that is central to the debtor's reorganization"); *see also In re* JMK Construction Group, Ltd., 441 B.R. 222, 233 (Bankr. S.D.N.Y. 2010) (denying approval of employment of law firm representing multiple debtors with potentially adverse contribution and other claims). But to the extent that professionals want a legitimate justification, under appropriate circumstances, for approving the employment of conflicts counsel, I've been providing that justification for years. *See, e.g.*, Nancy B. Rapoport, *The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole,* 30 HOFSTRA L. REV. 977, 979–85 (2002); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics,* 6 AM. BANKR. INST. L. REV. 45, 49–56 (1998) [hereinafter *House*]; Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy,* 26 CONN. L. REV. 913, 975–94 (1994).

57. And I'm not even including the conflicts counsel for the various local counsel.

58. Under section 331, professionals seeking payment from estate funds typically apply for interim approval to pay those funds every 120 days. 11 U.S.C. § 331 (2006). In the larger chapter 11 cases, some courts enter a so-called *Knudsen* order, which sets out a process of paying fees on a more frequent (usually monthly) basis. *See* U.S. Trustee v. Knudsen Corp. (*In re* Knudsen Corp.), 84 B.R. 668, 672–73 (B.A.P. 9th Cir. 1988) (affirming the permissibility of what are now called "*Knudsen* orders").

59. Weil Gotshal's final fee application in the WorldCom bankruptcy case was over 2,700 pages long. LOPUCKI & DOHERTY, FEES, *supra* note 9, at 217.

60. *See generally* Amy Stevens, *Ten Ways (Some) Lawyers (Sometimes) Fudge Bills*, WALL ST. J., Jan. 13, 1995 (reporting that clients should "[l]ook for signs that the lawyer may have been doing other things at the same time or was out of the office. Blanket terms referring to travel can also be questionable. Mr. Marquess of Legalgard says a few months ago he questioned a Houston lawyer's $165 charge for 'ground transportation.' It turned out to be a pair of shoes."); *see also* ROSS, THE HONEST HOUR, *supra* note 22, at 67 (referring to this incident). That behavior is an ethics violation pretty much everywhere, and it might even rise to the level of a bankruptcy crime under 18 U.S.C. § 157.

61. For a description of how I review a fee application when a court appoints me as a fee examiner, see *infra* note 206 and accompanying text.

62. *See* Clifford J. White & Walter W. Theus, Jr., *Professional Fees under the Bankruptcy Code: Where Have We Been and Where Are We Going?* 29-JAN AM. BANKR. INST. J. 22, 78 (2011) (noting that "[s]ome abuses are relatively easy to spot, but others are not unless the reviewer has followed the case extremely closely and is

it's no wonder that Professors LoPucki and Doherty have asserted that courts aren't reviewing those fee applications in any detail at all.[63] (Just as with any other assertion that relies on statistics, the fact that they might be correct in some cases—or in some parts of some cases—doesn't make their assertion correct on an across-the-board basis, but I can certainly see their point.) As the court said in *In re* Phillips, "[t]he process takes so long and is so difficult because typically there is no adversarial presentation. The presentation by counsel is unopposed, so the court must either make a decision from evidence that is not challenged and cross-examined or the court must itself read the entire file and try to maintain an appropriate balance."[64]

C. "Burying the [L]ead":[65] The Distance Between Narrative and Documentation in Fee Applications

Fee applications are highly stylized documents, especially in mega-cases.[66] To get a feel for the level of detail that they contain, a picture is certainly worth a thousand words.[67] Here's an excerpt of just a single page of a single fee application taken from one of the applications in the *Station Casinos* cases.[68]

intimately aware of all aspects of the case. It is not realistic to expect a USTP attorney to maintain this level of engagement with every chapter 11 case given the scope of responsibilities under § 586.").

63. *See generally* LoPucki & Doherty, Fees, *supra* note 9, at 148 (passim).

64. *In re* Phillips, 291 B.R. 72, 75 (Bankr. S.D. Tex. 2003) (footnote omitted). *Phillips* is a Chapter 13 case, but the principle about how long reviewing fees takes remains the same.

65. *See generally* Susan Cleary Morse, *Using Salience and Influence to Narrow the Tax Gap*, 40 Loy. U. Chi. L.J. 483, 504 (2009) (describing "bury[ing] the lead" as a "fail[ure] to highlight the most important information").

66. *See In re* Gantz, 209 B.R. 999, 1002 (B.A.P. 10th Cir. 1997) (noting that fee applications must include a "detailed statement of services rendered, time expended, expenses incurred and amounts requested"); *see also* LoPucki & Doherty, Fees, *supra* note 9, at 150 (explaining the contents of a bankruptcy fee application, including an example of a detailed 15- to 40-page case narrative plus attachments that exceeded hundreds of pages).

67. And trust me, mega-case fee applications use much more than a thousand words each month. *See* Lynn M. LoPucki & Joseph W. Doherty, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 Am. Bankr. L.J. 423, 427 (2009) [hereinafter *Routine Illegality*] (asserting that "[a] single fee application can run hundreds and sometimes even thousands of pages").

68. Fee Application ("Fee Application") at 10, *In re* Station Casinos, Inc., No. BK-09-52477-GWZ (Bankr. D. Nev. Oct. 19, 2010).

TIME DETAIL

Dept	Position	Work Date	Description	Hours	Amount	Index Number
35	Associate	09/03/10	Preparing markup of accepted changes in equityholder agreement for J Hanson and P Siroka.	1.00	525.00	13729217
35	Associate	09/03/10	Review equityholder agreement and warrant from Milbank.	2.90	1,522.50	13739213
35	Partner	09/04/10	Review and revise draft warrant.	0.80	740.00	13739214
		09/04/10	Review and revise draft equityholder agreement.	0.70	647.50	13686209
35	Of Counsel	09/06/10	Reviewed Report of Recent Proceedings and Significant Events for unsecured creditors.	0.40	400.00	13696754
35	Partner	09/07/10	Conf w/ P. Siroka and R. Tisdale re equity holder agreement.	0.50	462.50	13686213
		09/07/10	Review and revise equityholder agreement.	1.00	925.00	13739215
		09/07/10	Review draft warrant.	1.00	925.00	13739216
35	Partner	09/07/10	Review equity agreement.	2.20	2,035.00	13705097
		09/07/10	Revise website update.	0.30	277.50	13705098
		09/07/10	Telephone call with Moelis regarding various issues.	0.80	740.00	13705099
35	Associate	09/07/10	Review and submit committee website update.	0.40	220.00	13713288
35	Associate	09/07/10	Meet with J. Hanson re: documents.	2.00	1,100.00	13739217
		09/07/10	Call with C. Capeless and related follow-up.	2.00	1,100.00	13727221
35	Associate	09/07/10	Finalize August Committee update	0.30	165.00	13729471
35	Associate	09/07/10	Reviewing Dechert comments to Warrants.	0.60	315.00	13739218
		09/07/10	Reviewing Warrant with J. Hanson and P. Siroka and revising warrant per discussion.	2.30	1,207.50	13739219
		09/07/10	Researching other Warrrants for comparison.	1.00	525.00	13720376
35	Partner	09/08/10	Review Dechert and FF revisions to warrant.	1.50	1,387.50	13739220
		09/08/10	Conference with P. Siroka and R. Tisdale re warrant.	0.50	462.50	13686219
35	Associate	09/08/10	Call re: equityholders agreement.	0.50	275.00	13727224
		09/08/10	Review Dechert comments to Warrant.	1.50	825.00	13739221
		09/08/10	Comments to draft w/ R. Tisdale.	1.50	825.00	13739222
35	Associate	09/08/10	Follow up re UST committee appointments.	0.20	110.00	13729477
35	Associate	09/08/10	Revise markup of draft Warrant per J Hanson and P Siroka.	3.40	1,785.00	13739223
		09/08/10	Draft list of talking points for Equityholders Agreement and send to P Siroka in advance of call.	0.80	420.00	13727813
35	Partner	09/09/10	Conf's, calls and emails re warrant with R. Tisdale.	0.80	740.00	13686220
		09/09/10	Review revised warrant.	1.00	925.00	13739224
35	Partner	09/09/10	Review issues regarding equity agreement.	1.80	1,665.00	13705101
35	Associate	09/09/10	Draft emails to accompany markups.	0.20	105.00	13709454

Someone—in other words, someone in the bankruptcy court's chambers or someone working for a court-appointed fee examiner—has to go through each of these pages line by line.[69] Imagine how difficult that task is when multiplying this one example by hundreds of pages. How easy would it be, after one's eyes uncross, to determine reasonableness?

In one sense, going through these bills is no different from going through the bills sent to clients outside bankruptcy.[70] Detailed bills are complex documents. The bigger the distance between "here's what I did" and "here's how I staffed what I did," the more difficult it is to make sense of a bill.[71] Linking the "what" to the "how" takes time.[72]

The difference is that, outside bankruptcy, clients have more of an incentive to take that time.[73] Legal fees come out of their budgets, and they care about their

69. *Cf.* LoPucki & Doherty, *Routine Illegality*, *supra* note 67, at 427 (noting that courts are supposed to read fee applications; however, as a practical matter, the length of fee applications often precludes substantive review).

70. *See* James B. Hirsch, Note, *Bankruptcy Fee Applications: Compensable Service or Cost of Doing Business*, 58 FORDHAM L. REV. 1327, 1346–47 (1990) (explaining that both bankruptcy courts and private clients expect detailed bills).

71. *Cf.* Rapoport, *Rethinking Fees*, *supra* note 8, at 276–81 (explaining that the checks and balances on fee applications have holes because the fee reviewers are often not privy to the professionals' work allocation decisions).

72. *See id.* at 278 (noting that, in larger cases, "detailed scrutiny is very difficult" due to the voluminous bills).

73. *See, e.g.*, *id.* at 277–79, n.68 (pointing out that clients in bankruptcy cases, who are not paying the bills, have less incentive and knowledge than do non-bankruptcy clients to monitor the reasonableness of fees).

budgets.[74] Inside bankruptcy, the buck tends to get passed, intentionally or not, from the client (e.g., the debtor in possession or the creditors' committee) directly to the bankruptcy court, without the intermediate step of the client going line by line through the bill to find (and ask the professional to remove) questionable entries.[75]

Maybe the reason that the bankruptcy "client" skips that intermediate step is due to the client's fear of alienating its professionals during the representation.[76] (Inside counsel who ask their outside counsel for reductions and discounts don't seem to have that same fear, though, probably because it's easier for inside counsel to hire new professionals when they lose confidence in the old ones.)[77] Maybe the reason is that the client is too busy putting out the fires that arise during a complex bankruptcy case to worry about a thorough review of each month's fees.[78] Maybe the client really can't tell whether the hours spent on a project are too high or too low, or whether two people should have attended a hearing instead of three.[79] The underlying issue, though, is that more than a few fee applications contain some consistent flaws that may stem from the way that humans rationalize their own actions.[80]

D. Cognitive Errors in Bankruptcy Fee Applications

Many bad decisions that smart people make aren't the product of deliberate plotting.[81] They're reactions to the pressure of a situation, coupled with some hard-

74. *See generally New Fee Structure for Law Firms*, FORBES (Apr. 29, 2009, 5:30 PM), *available at* http://www.forbes.com/2009/04/29/billable-hour-retainer-entrepreneurs-law-taxation-wharton.html (reporting that clients facing budget pressures are scrutinizing their legal bills).

75. That problem may be fixed by the Proposed Guidelines, *supra* note 24, because the Proposed Guidelines will require a verified statement from the client about its review of the professional's fees before the professional submits the fee application. *See* Proposed Guidelines, C.8., at 11.

76. *See, e.g.*, LOPUCKI & DOHERTY, FEES, *supra* note 9, at 174–75 (noting that debtors in possession "seldom target their own professionals," perhaps because "the beleaguered debtor may not wish to strain his relationship with his life-rope, his attorney" (quoting *In re* Ginji Corp., 117 B.R. 983, 989 (Bankr. D. Nev. 1990))).

77. *Cf.* Ameet Sachdev, *Law Clients Demand More For the Money; Recession Changes Perspective on Existing 'Billable Hour' Model*, CHI. TRIB., Dec. 9, 2009, at C19 (reporting an overall reduction in the use of outside counsel, along with innovative competition for corporate business, such as Kraft Foods's bidding process to hire outside counsel).

78. *See* Alexander Wu, *Motivating Disclosure by a Debtor in Bankruptcy: The Bankruptcy Code, Intellectual Property, and Fiduciary Duties*, 26 YALE J. ON REG. 481, 490–91 (2009) (discussing the myriad duties of a debtor in possession during bankruptcy case proceedings).

79. *See In re* Act Mfg., Inc., 281 B.R. 468, 484 (Bankr. D. Mass. 2002) (stating that lawyers should, but often fail to, explain the reason for using several attorneys to perform the same task); *see also* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 180 (noting that over-billing is not generally detected unless it "is so extreme that it speaks for itself").

80. *See, e.g.*, Rapoport, *Rethinking Fees*, *supra* note 8, at 277 (explaining that lawyers justify some overstaffing and duplication of efforts because they want to make sure that they're providing the appropriate level of service to their clients, especially when those clients are fiduciaries).

81. *But see supra* note 60 and accompanying text (the "shoes" story).

wired cognitive errors.[82] For example, Enron's executives justified their misleading financial reports as a way of keeping the company alive.[83] WorldCom's accountants didn't dummy up the books because they were evil; they did it to meet their quarterly projections.[84] Every person who has rationalized something that was morally wrong has done so because humans have an almost unlimited capacity for fooling themselves.[85] Professionals billing the estate for fees and expenses are, well, human, and they can slip easily into some unfortunate behavior:

> *Between the two extremes of outright thievery and unfailing honesty, however, is the continuum of customary billing practices that is "legal but unethical" and the many lawyers who "are so blinded by self-interest" that they see no ethical difficulty in their billing habits.*[86]

In other words, professionals can tell themselves that everyone else is doing it.[87] And when everyone else is doing it, and you start doing it, too, you're not going to object to someone else who's doing it.[88] Given the hard-wired cognitive errors, the extreme economic pressure,[89] the crushing amount of work that a large Chapter 11 bankruptcy generates, and a "there but for the grace of God" mentality, it's no wonder that courts receive very few objections to fee applications.[90] Mind you,

82. *See, e.g.*, Nancy B. Rapoport, *The Curious Incident of the Law Firm That Did Nothing in the Night-Time*, 10 LEGAL ETHICS 98, 100–06 (2007) (reviewing MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER (2004)) [hereinafter *Night-Time*] (using Enron as an example of cognitive dissonance, diffusion of responsibility, and social pressure, all of which may lead people to rationalize unethical behavior).

83. *Id.* at 106; *see generally* NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (Foundation Press 2d ed. 2009) (reviewing the social science literature that might explain what happens when corporate executives "go wrong"); *see also* Rapoport, *Night-Time*, *supra* note 82 (same).

84. *See* CYNTHIA COOPER, EXTRAORDINARY CIRCUMSTANCES: THE JOURNEY OF A CORPORATE WHISTLEBLOWER 5 (John Wiley & Sons 2008). OK, dummying up the books actually *is* sort of evil.

85. *See, e.g.*, William G. Ross, *The Ethics of Time Based Billing by Attorneys*, 1998 PROF. LAW SYMP. ISSUE 81, 82 (1998) [hereinafter *Time Based Billing*] (suggesting that many lawyers "do not perceive any ethical difficulty" with time-based overbilling because they have "deluded themselves into believing that no amount of work is too much"). I wouldn't go quite that far. I think that lawyers, just like any other workers, can get so absorbed in the "trees" of what they're doing that they forget to look at the "forest."

86. Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 68 (2008) (citing WILLIAM G. ROSS, THE ETHICS OF TIME BASED BILLING BY ATTORNEYS, 1998 PROF. LAW SYMP. ISSUE 81, 82); *see also* Rapoport, *Rethinking Fees, supra* note 8, at 276–80 (describing the various explanations in Chapter 11 fee applications).

87. *See* Richmond, *supra* note 86, at 103–04 (suggesting that silence surrounding unethical behavior breeds unethical behavior).

88. *See id.* (noting that dishonest conduct can become an organizational norm through "pluralistic ignorance").

89. *See id.* at 106 (discussing attorney misconduct due to financial strain and billable hours pressure).

90. *See* LoPucki & Doherty, *Routine Illegality*, *supra* note 67, at 425 (stating that "[m]eaningful objections to fee requests are few"). In the three large cases in which I have been the fee examiner, we resolved virtually all issues informally, without having to file many objections with the court. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 174 (noting that fee review committees or auditors often negotiate a voluntary reduction in the fee application). The only outstanding issue—which occurred in *Pilgrim's Pride*—was whether one of the

cognitive errors aren't a BigLaw problem or a Chapter 11 problem or even a lawyer problem: they are a *human* problem.

So what are the cognitive errors that professionals might experience? There are three classic ones: cognitive dissonance, diffusion of authority, and social pressure. I've written before about how these three errors play out.[91] The short version goes as follows: cognitive dissonance occurs when someone tries to reconcile two competing moral views ("I am a good person, so I must have embezzled funds because I had a darn good reason");[92] diffusion of authority occurs when someone assumes that several people know about a problem and that, because someone else "will take care of the problem," he doesn't have to take care of the problem himself; and social pressure occurs when someone would rather comply with a group decision that he knows is wrong than become an outlier sticking to the correct decision.[93] There are all sorts of good (read: scary) social science experiments that illustrate these three types of cognitive errors.[94]

It's possible to imagine all three of these cognitive errors playing out at a fictional associates' gathering:

> *Consider, for example, a group of associates discussing their hours and billable goals when a senior associate, Lacey, perceived as a rising star in the firm, describes how he inflates his hours. He boasts that the partners for*

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professionals could get a fee enhancement after the Supreme Court's decision in Perdue v. Kenny A. *ex rel* Winn, 130 S. Ct. 1662, 1673 (2010).

91. *See, e.g.*, Rapoport, *Night-Time, supra* note 82, at 100–03.

92. Cognitive dissonance can also come into play when someone says, "*X* would *never* do that." Consider this real-life example, which is just one of many in Douglas Richmond's article:

> In another instance, at a respected Midwestern law firm, two partners noticed that a fellow partner, Stephens, was falsely billing time to a large matter on which they were doing the vast majority of work. Stephens was a highly compensated rainmaker who landed the matter. His fraud was clear; he was recording time for tasks that they knew from their direct involvement he did not perform. The partners raised their concerns with Richards, the firm's managing partner, who abruptly dismissed them on the grounds that "Stephens wouldn't do that," that there was "no reason" for him to fraudulently bill time, and that there was "no need" for him to inflate his hours. Lawyers who regularly worked with Stephens, however, saw in him traits potentially explaining his dishonesty. Among other things, he was greedy and narcissistic, and he openly envied the wealthy family who owned the private company that was his best client.

Richmond*, supra* note 86, at 114 (footnote omitted); *see also* Lerman, *Bilking*, *supra* note 2, at 259–62 (discussing attorneys who responded to charges of billing fraud by denying any improper conduct and explaining their billing decisions).

93. *See* Rapoport, *Night-Time, supra* note 82, at 105–06 (reporting that, in Enron's case, the board, accountants, and lawyers each blamed the other two groups for Enron's actions (citing to the Powers Report to the Enron Board, http://i.cnn.net/cnn/2002/LAW/02/02/enron.report/powers.report.pdf)); *see also* David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 283–84 (2003) (stating that the theory of diffusion of responsibility may explain some behavior).

94. *See* Neera K. Badhwar, *The Milgram Experiments, Learned Helplessness, and Character Traits*, 13 J. ETHICS 257, 258–59 (2009) (describing Stanley Milgram's obedience to authority experiment); *see also* Joachim Israel, *Experimental Change of Attitudes Using the Asch-Effect*, 7 ACTA SOCIOLOGICA 95, 96 (1964) (applying Solomon Asch's social pressure experiment); James M. Hudson & Amy S. Bruckman, *The Bystander Effect: A Lens for Understanding Patterns of Participation*, 13 J. LEARNING SCI. 165, 168–69 (2004) (describing the murder of Kitty Genovese as an example of the bystander effect).

> *whom he works never question his timekeeping or materially reduce his time before sending out bills. Several associates are disturbed by Lacey's comments, but no one in the group challenges him. When the associates disband, there is a real possibility that the group's collective silence in the face of Lacey's professed dishonesty will be seen by at least some who were there as tacit acknowledgement that his practices are acceptable, and they will begin billing as Lacey does. Their behavior may, in turn, influence their peers and newer lawyers with whom they work. It is easy to imagine similar scenarios, involving lawyers of varying experience levels, playing out in law firm practice groups and departments.*[95]

We could intuit that Lacey has told himself something like, "I can tack on extra hours because I should be valued more highly than I am" (cognitive dissonance). We can also predict that some associates in that meeting may copy Lacey's behavior, either because of social pressure from the "group's collective silence" or because each one assumes that someone else will ask a partner what to do about Lacey's disclosure (diffusion of authority).[96] This hypothetical engenders a hat trick[97] of cognitive errors. Those cognitive errors can erode the ability of professionals to monitor their own fees accurately.[98] This passage in an article by Douglas Richmond rings true to me:

> *Moreover, once begun, unethical billing becomes increasingly easy to rationalize and, accordingly, habitual. As one observer explained in connection with young lawyers,*
>
> > *One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and you just won't have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you'll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. However, you will promise yourself that you will repay the client at the first opportunity by doing thirty minutes of the work for the client for "free." In this way, you will be "borrowing," not "stealing."*

95. Richmond, *supra* note 86, at 104.

96. *See generally* Luban, *supra* note 93 and accompanying text; Rapoport, *Night-time*, *supra* note 82 and accompanying text.

97. In sports, a "hat trick" is a triple achievement of some objective in a single game. *See* OXFORD ENGLISH DICTIONARY 8 (2d ed. 1991).

98. *See* MILTON C. REGAN, JR., THE FALL OF THE WALL STREET LAWYER: EAT WHAT YOU KILL 41–42 (discussing the "moral universe" that allows people to rationalize immoral conduct); *see also* Rapoport, *Night-Time*, *supra* note 82, at 112 (noting that departmental norms may override firm or professional norms).

> *And then what will happen is that it will become easier and easier to take these little loans against future work. And then, after a while, you will stop paying back these little loans. You will convince yourself that, although you billed for ninety minutes and spent only sixty minutes on the project, you did such good work that your client should pay a bit more for it. After all, your billing rate is awfully low, and your client is awfully rich.*
>
> *And then you will pad more and more—every two minute telephone conversation will go down on the sheet as ten minutes, every three hour research project will go down with an extra quarter hour or so. You will continue to rationalize your dishonesty to yourself in various ways until one day you stop doing even that. And, before long—it won't take you much more than three or four years—you will be stealing from your clients almost every day, and you won't even notice it.*[99]

In other words, once you take that first large step toward fudging a bill, the second step is smaller, and successive steps are tinier still.[100] Even when a lawyer doesn't set

99. Richmond, *supra* note 86, at 107–08 (quoting Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession,* 52 VAND. L. REV. 871, 917 (1999)) (footnote omitted).

100. Lisa Lerman painted a similar picture of the ease of temptation:

> We are trained to rationalize. In law school one is asked to argue that one case is similar to or different from another. One is expected to be able to argue every side of any issue. We are trained to draw lines from any point A to any point B. . . .
>
> Rationalization is a key ingredient in the slide down the slippery slope. If you pad your hours a little, the next month, you might pad them a little more. Once you get used to padding your hours, you might bill as your own hours those that had been worked by a secretary or a paralegal. Once you get used to doing that, you might turn in a receipt for a meal with a friend, representing it to be a business meal. And so on. Rationalizing dishonesty takes practice. It gets easier over time.
>
> We might turn this into a formula:
>
> *desire for higher income + economic pressure + competition with partners + sense of entitlement + declining loyalty to partners or clients + perceived opportunity to steal undetected + profit-oriented firm culture + ability to rationalize = risk of temptation to dishonesty.*

Lisa G. Lerman, *The Slippery Slope From Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity,* 30 HOFSTRA L. REV. 879, 912 (2002) [hereinafter *Slippery Slope*] (footnote omitted). Professor Lerman suggests that one way to reduce temptation is to change the reward structure in law firms from those that reward high billers to those that reward those lawyers who produce the best quality work. *Id.* at 916; *see also* Lerman, *Bilking, supra* note 2, at 275 (pointing out that "billing and expense fraud is extremely difficult to detect. If a lawyer simply pads his timesheets, who can tell? How could an auditor tell that four hours w[ere] really two, or that a dinner at an elegant restaurant was with a date rather than with a client? *Even legal auditors cannot detect most of these deceptions.*") (footnote omitted; emphasis added). I've heard somewhere (probably on one of the *Law and Order* episodes that seem to play somewhere in the world every hour on the hour) that temptation + opportunity = crime. One of the most common temptations is when a professional decides that he has "underbilled" the client one week and then decides to compensate for that "underbilling" the next week. When a professional doesn't bill his time contemporaneously, this kind of catch-up game is easy to play. ("Hey, I didn't bill a six-minute increment when I left a phone message last week; maybe I should bill twelve minutes for a message *this* week.")

out to fudge the bill, cognitive errors can find their way into the version of the bill that the client, or the bankruptcy court, sees.[101]

In addition to these three classic cognitive errors, there's also the phenomenon of "anchoring" to consider. "Anchoring" involves "the common human tendency to rely too heavily, or 'anchor,' on one trait or piece of information when making decisions."[102] Here's how *Science Daily* illustrates anchoring:

> *Take, for example, a person looking to buy a used car—[he] may focus excessively on the odometer reading and the year of the car, and use those criteria as a basis for evaluating the value of the car, rather than considering how well the engine or the transmission is maintained.*[103]

Anchoring bias can affect fee reviews by focusing on a professional's hourly rate as a way of determining the quality of that professional. We've all seen the "rate creep" that can go on in any sort of legal representation, where the client thinks that someone is better simply because he bills at a higher rate.[104] That rate anchors our perception of quality.[105] When a professional asks for a higher rate because other

101. *See* Rapoport, *Rethinking Fees, supra* note 8, at 276–80 (discussing how lawyers rationalize fees).

102. *Anchoring Bias in decision-making,* SCIENCE DAILY, *available at* http://www.sciencedaily.com/articles/a/anchoring.htm [hereinafter *Anchoring*]. For a classic discussion of anchoring, see Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases,*185 SCIENCE 1124 (Sept. 27, 1974), *available at* http://links.jstor.org/sici?sici=0036-8075%2819740927%293%3A185%3A4157%3C1124%3AJUUHAB%3E2.0.CO%3B2-M.

103. *Anchoring, supra* note 102.

104. The same phenomenon can play out in CEO compensation as well, and even in the choice of amplifiers for a rock band. *See* THIS IS SPINAL TAP (Embassy Pictures Corp. 1984), *available at* http://www.imdb.com/title/tt0088258/quotes:

> Nigel Tufnel: The numbers all go to eleven. Look, right across the board, eleven, eleven, eleven and...
> Marty DiBergi: Oh, I see. And most amps go up to ten?
> Nigel Tufnel: Exactly.
> Marty DiBergi: Does that mean it's louder? Is it any louder?
> Nigel Tufnel: Well, it's one louder, isn't it? It's not ten. You see, most blokes, you know, will be playing at ten. You're on ten here, all the way up, all the way up, all the way up, you're on ten on your guitar. Where can you go from there? Where?
> Marty DiBergi: I don't know.
> Nigel Tufnel: Nowhere. Exactly. What we do is, if we need that extra push over the cliff, you know what we do?
> Marty DiBergi: Put it up to eleven.
> Nigel Tufnel: Eleven. Exactly. One louder.
> Marty DiBergi: Why don't you just make ten louder and make ten be the top number and make that a little louder?
> Nigel Tufnel: [*pause*] These go to eleven.

105. The Proposed Guidelines deal with the anchoring phenomenon by paying attention to geographic variations in rates:

> The United States Trustee will not object to "non-forum" rates of professionals when the "non-forum" rates are based on the reasonable rates where they maintain their primary office, even if the locally prevailing rates where the case is pending are lower (i.e., a professional may bill the same reasonable rate in any forum). Conversely, the United States Trustee will object if

professionals in the case are billing at rates greater than his, he's anchoring to that rate, rather than looking at all of the credentials. And when professionals raise their rates in the middle of a case, they're typically anchoring to their firm's hourly rate increases outside the bankruptcy department. But the Bankruptcy Code asks for information about the reasonableness of rates in light of "the nature, the extent, and the value of such services."[106] Therefore, the professionals should be introducing evidence that links the increase in rates to an increase in benefit to the estate. They *should,* but often, they don't.

Because human cognitive errors are real[107] and the odds of getting punished for submitting inaccurate bills are close to zero, any bankruptcy professional who would actually *want* to game the system would have, essentially, an open field.[108] Even if there's no desire to fudge the bills, there's still a risk of bloated bills if professionals are lax in demanding that their employees adhere strictly to expense guidelines, bill their time carefully, and staff the work efficiently.[109]

I'm not suggesting that some professionals deliberately lie on their fee applications (or, more broadly, on their bills to any of their clients). I'm not even suggesting that *any* professionals deliberately lie on their bills.[110] I am suggesting, though, that a lack of awareness—on the part of both professionals and courts—of the risks of cognitive errors makes fee applications even more opaque and difficult to review. If you're a lawyer, it's awfully easy to rationalize spending tens of hours on an eight-page response to a lift-stay motion—especially once you've already submitted the time entries for it—because your brain justifies all of that

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> professionals increase their rates based on the forum where the case is pending when they bill a lower rate where they maintain their primary office.

Proposed Guidelines, *supra* note 24, B.4.k. at 5.

106. 11 U.S.C. § 330(a)(3).

107. *See* Lerman, *Slippery Slope*, *supra* note 100, at 915–17 (noting that the pressures of BigLaw practice can "push" lawyers away from ethical behavior); *see also id.* at 887–88 (finding incidents of billing and expense fraud on the rise). *See also* Dennis Curtis & Judith Resnik, *Teaching Billing: Metrics of Value in Law Firms and Law Schools*, 54 STAN. L. REV. 1409, 1416–17 (explaining law firm economics and common billing practices such as "rounding up" to the next tenth of an hour).

108. *See generally* James P. Schratz, *I Told You to Fire Nicholas Farber—A Psychological and Sociological Analysis of Why Attorneys Overbill*, 50 RUTGERS L. REV. 2211, 2217 (1998) (commenting that lawyers who perform a cost-benefit analysis of padding bills often calculate the costs of fraud, i.e., getting caught, as *de minimis*). Speaking of games, I believe that the best analogy to the ethics rules is the game of golf. In golf, you're supposed to mark your own mistakes, even if no one is there to witness them. (That's why golf is such a good measure of a person's character, whether or not the person plays well.) The same is true of ethics rules. They're supposedly self-monitoring. *See* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1148–49 (2009) (discussing the self-regulation of lawyers).

109. *Cf.* Lerman, *Slippery Slope*, *supra* note 100, at 918–19 (suggesting that "[a]ny firm that does not want lawyers to fabricate hours needs to tell them so, and to tell them" exactly how to bill).

110. Well, a few professionals do lie deliberately. How else could one explain charging a client, say, eight hours of time for drafting a brief pulled from a "brief bank," in which the only real work involved swapping out the old parties' names for the new parties' names? *Cf.* William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 40–41 (1991) [hereinafter *Hourly Billing*] (noting that some attorneys may overbill for "unnecessary research," but it is likely that most high bills come out of concern for the client's interests, "even if that belief is at least in part a subconscious rationalization of the desire to increase the client's bill").

strategizing, research, and redrafting as "necessary."[111] Again, rationalization isn't a BigLaw problem. It's a human problem. I've seen smaller shops (and non-lawyer professionals) submit fee applications with some unusually high billable time entries, too. If the "client" paying the bill isn't vigilant, and if the bankruptcy court doesn't have the resources to comb through the bill, the checks and balances built into the system will fail.[112]

E. The "Other People's Money" Problem

> *What the professionals missed was the fact that the fees they charged were not at market rates. Market rates are what clients spend when the money is their own. The executives and committees who hired the professionals in the cases we studied were spending other people's money.*[113]
>
> —LOPUCKI & DOHERTY, FEES

> *However, as § 330 provides, the Court may only award estate funds based upon reasonable compensation for actual, necessary services. This is nothing more, nor nothing less than is, or should be, demanded by any client, whether in bankruptcy or not. The only difference is that the Court has the unpleasant task of acting as the sharp-eyed controller.* [114]
>
> —*In re* Ginji Corp.

111. The pressure of representing a fiduciary also contributes to the "no stone unturned" problem. *See* Rapoport, *Rethinking Fees, supra* note 8, at 268–69 (comparing lawyers who make sure that they follow every lead to doctors practicing "defensive medicine"); *see also* Ross, *Hourly Billing*, *supra* note 110, at 26–27 (explaining that "proponents of the 'leave no stone unturned' school of representation often consciously or unconsciously lack perspective about the real interest of the client").

112. *See generally* LoPucki & Doherty, *Routine Illegality*, *supra* note 67, at 427–28 (commenting on the factors that contribute to a breakdown in checks and balances in fee application review).

113. LOPUCKI & DOHERTY, FEES, *supra* note 9, at xv; *see also id.* at 146 (observing that bankruptcy courts, "unlike non-bankruptcy clients, pay [lawyers] with other people's money"); Cynthia A. Baker, *Other People's Money: The Problem of Professional Fees in Bankruptcy*, 38 ARIZ. L. REV. 35, 41–69 (1996) (same).

114. *In re* Ginji Corp., 117 B.R. 983, 988 (Bankr. D. Nev. 1990) (citations omitted). The court elaborated on the "other people's money" problem:

> This chore [reviewing fee applications] cannot be lightly exercised because of the very fact that the client may have little concern over the amount of fees paid as the fees are being paid from assets which would be distributed in any case. Moreover, the beleaguered debtor may not wish to strain his relationship with his life-rope, his attorney. Finally, opposition from others may be tempered by the fact they too, expect to be paid from the estate assets.

Id. at 989 (citations omitted).

In an earlier article, I described that the biggest problem with fees in Chapter 11[115] is the disconnect between what's being billed and who actually pays those bills.[116] As the Third Circuit explained in *In re Busy Beaver Bldg. Centers*:[117]

> *The debtor will often not object to its attorney's fee application because the fees will frequently be derived from its creditors' award rather than its own assets, or in any case it may be "in no position to make an objective judgment as to the value of the legal services involved, [and it may lack the] inclination to object to whatever fee is requested by the attorney who has made it possible for [it] to continue business . . . ."*[118]

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115. Fee problems occur with some frequency in the other chapters, too. *See, e.g.*, *In re* Sauer, 249 B.R. 798, 799–801 (Bankr. D. Neb. 2000) (disgorgement of fees in Chapter 7 case); *see also In re* Szymczak, 246 B.R. 774, 776 (Bankr. D. N.J. 2000) (fee dispute in Chapter 13 case).

116. As I explained in my earlier article:

> When it comes to estate-paid Chapter 11 fees, the professionals are pushing their bills across the table, but on the other side of the table, the client charged with evaluating the reasonableness of the bill may have no meaningful way to put the bill into context. Moreover, because no single client is charged with footing the professionals' entire bill, it's possible that none of the clients really cares how much these professionals are charging. In essence, the client sitting at the table is a stand-in for entities with little voice (and little individual stake) in determining how the professional makes his billable decisions. And sitting at another table, far away, is the bankruptcy court.

Rapoport, *Rethinking Fees, supra* note 8, at 265 (footnotes omitted); *see also* LoPucki & Doherty, Fees, *supra* note 9, at 7, 130 (observing that most fees of estate-paid professionals are administrative expenses—coming ahead of payments to general unsecured creditors, and thus reducing any distributions that would flow to them—but those unsecured creditors don't scrutinize the fees the way that clients spending their own money do). Clifford White, the Director of the Executive Office for United States Trustees, has recently analyzed this issue and has reached a similar conclusion:

> The problem persists throughout the bankruptcy process. Outside bankruptcy, a unitary corporate actor, driven by its business objectives, realizes all of the value from both its professionals' work and its own efforts at controlling professional fees. In bankruptcy, those functions—retention, invoice review and payment approval—are divided among the court and various actors with different responsibilities and incentives. Furthermore, any savings from controlling professional fees do not necessarily inure to the benefit of the debtor but are more likely to benefit the unsecured creditors. The debtor, therefore, does not have the same incentive in bankruptcy to control professional fees as it does outside.

White & Theus, *supra* note 62, at 79.

117. 19 F.3d 833 (3d Cir. 1994).

118. *Id.* at 843 (citations omitted) (citing *In re* Hamilton Hardware Co., 11 B.R. 326, 329–30 (Bankr. E.D. Mich. 1981), *aff'd*, 8 B.C.D. 667, 668 (Bankr. E.D. Mich. 1981)). The court went on to point out that attorneys for the creditors' committee might be reluctant to object to fee applications:

> Attorneys for the creditors may also be reluctant to oppose fee requests, whether because of perceived professional courtesy . . . ; fear of retaliation, . . . ; and/or the fact that, should it lose, the creditor's reward for fighting that battle may be a smaller distribution due to its indirect obligation to pay a proportionate share of the fee applicant's fees ascribable to the defense of his or her fee request . . . .

Id. (citations omitted).

If the parties in interest themselves don't object to unreasonable fees, then the court is the last check in the system on whether the professional exercised proper "billing judgment."[119]

Because most of the fees paid in a bankruptcy case "come from the pockets of the unsecured creditors"[120]—and because those fees don't come out of the pocket of any individual unsecured creditor (or the DIP's management)—there's a disconnect between the "client's" (think: debtor in possession or creditors' committee) incentives to keep fees reasonable and the incentives of the people running the show to worry about the reasonableness of those fees.[121] Of course, the phenomenon of spending other people's money on professional fees occurs in solvent companies, too,[122] because managers of those companies are spending the company's money, not their own, on those fees.[123] But a desire to stay solvent is at least some incentive for the managers to try to keep costs down.[124]

Although the disconnect between who pays the bills and what's being billed isn't unique to bankruptcy cases,[125] bankruptcy fees are easier to study because estate-paid professionals have to file their fee applications, rather than simply sending out bills to their clients.[126] We can, however, see how other types of clients have dealt with paying bills when they are paying with their (or their company's) own money.

119. *See* Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc., 924 F.2d 955, 958–59 (9th Cir. 1991) (attorney was required to use billing judgment and was not given "free reign to run up a tab without considering the maximum probable recovery"); *see also In re* Ginji Corp., 117 B.R. 983, 989 (Bankr. D. Nev. 1990) ("In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here.") (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983))). But "[i]f professionals will not take ownership for their actions, or be accountable to their clients for their decisions, no billing system is going to address the ills that the practice faces." Email from Geoff Berman, the President of the American Bankruptcy Institute, to author, Sept. 15, 2011 (on file with author).

120. *In re* D. Diorio & Sons, Inc., 46 B.R. 648, 650 (Bankr. N.D. Ill. 1985). Some fees come out of carve-outs by secured creditors who permit professionals to be paid from the collateral, typically with some restrictions on the types of tasks that those professionals can undertake. For a good description of how carve-outs work, see, e.g., Andrew L. Turscak Jr. & Alan R. Lepene, *Must a Secured Creditor "Pay to Play" in Chapter 11?*, 28 AM. BANKR. INST. J. 2 (Mar. 2009), *available at* www.thompsonhine.com/publications/pdf/2009/03/musta secured1792.pdf.

121. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 131 (suggesting that debtors in possession pay less attention to the reasonableness of their professionals' fees, unless a debtor in possession plans to reorganize, in which case those fees will affect the bottom line).

122. LOPUCKI & DOHERTY, FEES, *supra* note 9, at 140.

123. *Id.*

124. LOPUCKI & DOHERTY, FEES, *supra* note 9, at 131.

125. Professor Lerman explains:

> One reason that the clients in these cases are not the principal complainers is that they may not have known that they were being bilked. Some of them were apparently pleased with the legal services that they were receiving, and were not concerned about how the bills were calculated. Many of these were large corporate clients, accustomed to paying large legal bills to multiple firms every month. The corporate representatives who reviewed the bills were not personally responsible for the payments, and may have been less careful about reviewing the bills than they would have been if they were spending their own money.

Lerman, *Bilking*, *supra* note 2, at 275–76 (footnote omitted).

126. Professor LoPucki points out that many bills (such as the bills of ordinary course professionals) do not get filed and therefore are impossible to review. LOPUCKI & DOHERTY, FEES, *supra* note 9, at 14.

Take the Association of Corporate Counsel's (ACC's) "value challenge."[127] ACC believes that smart people can figure out a way to deliver efficient legal services to companies without sacrificing all profitability, and it has given inside counsel some tools for working with outside counsel to manage costs in areas such as staffing,[128] budgeting, developing creative fee structures (even for fees involving litigation matters), and using technology to increase efficiency.[129] My most recent visit to the website provided twenty-two separate downloads[130] from companies and outside counsel *on issues involving fees alone*, ranging from exemplars of RFPs[131] to descriptions by outside counsel of their alternative billing structures.[132] There were

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127. *See, e.g.*, *ACC Value Challenge*, ASS'N OF CORP. COUNSEL [hereinafter *ACC Value Challenge*], http://acc.com/valuechallenge/about/index.cfm.

128. One law firm explained its staffing decisions thus:

> The distribution of experience in the firm does not fit the common "pyramid" model. In Bartlit Beck's view, the "pyramid" firm maintains large numbers of inexperienced junior attorneys at the base who do most of the work and bill most of the hours. . . . . Bartlit Beck[s'] . . . model is more akin to a "diamond" structure, with relatively fewer junior attorneys at the bottom, more experienced attorneys making up the largest middle segment, and a few very senior attorneys at the top. [Bartlit Beck] describes the firm's structure as designed to earn rewards by delivering results rather than billing useless hours.

Lindley Brenza, *Outcome-Driven Fees in High Stakes Litigation . . . Bartlit Beck's Alternative Approach,* ASS'N OF CORP. COUNSEL, http://www.acc.com/ValueChallenge/resources/avcresources.cfm?rs_vc=399.

129. *See, e.g.*, *id.*

130. *See ACC Value Challenge*, *supra* note 127 (last visited Oct. 17, 2011).

131. An RFP is a request for proposal—a solicitation of bids. *See* Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs, 955 So. 2d 647, 651 (Fla. Dist. Ct. App. 2007) (enumerating situations where RFPs are used). Office Depot's summary of its RFPs contained this language:

> For bankruptcy work/preference lawsuits, the law department pays a fixed fee each month for the firm to handle whatever comes in. How did they set the value of the fees? Using historical data from the law department and from the firms that had an existing service relationship for this type of work for the company.

Steve Calkins, *Office Depot, Inc.: Value-Based Fee and Staffing Practices for Real Estate, IP, Litigation & Beyond,* ASS'N OF CORP. COUNSEL, http://www.acc.com/ValueChallenge/resources/avcresources.cfm?rs_vc=399; *see also* Janine Dascenzo & Buck DeWolf, *General Electric Company: Successfully Using Alternative Fee Arrangements for Complex Intellectual Property Litigation,* ASS'N OF CORP. COUNSEL, http://www.acc.com/ValueChallenge/resources/avcresources.cfm?rs_vc=399:

> Once the firm is selected, the in-house legal team and the outside firm need to finalize the budget and implement the alternative fee structure arrangement. To help with this process, a budget form can be used to help the legal team conceptualize the life cycle of the matter by task, timeline, staffing and cost. Tasks for which costs can be budgeted include: Non-infringement investigation[;] Invalidity contention[;] Draft answer/early motions[;] Early settlement efforts[;] CMC[;] Company's Written Discovery[;] Responding to Discovery[;] Discovery Motions[;] Take Depositions[;] Defend Depositions[;] Markman Preparations, Briefing & Hearing[;] Damages Discovery[;] Prepare Expert Reports[;] Prepare SJ Motions[;] Oppose SJ Motions[;] Prepare for Trial[;] Trial[;] Post Trial Motions[;] Expert Costs."

132. From a partner at an outside law firm:

> Bartlit Beck handles high stakes litigation under a variety of non-hourly structures, including a hybrid fixed fee / contingent fee model. Distinct fee amounts are negotiated for various deliverables or phases within a case. The fee represents the amount to be paid for the work done or deliverable produced – not for hours spent.

See Brenza, *supra* note 128. The advantage of a hybrid fixed/contingency fee is that it takes the "must bill hours" pressure out of the equation, thus creating more incentives to work efficiently (the fixed fee part) and diligently (the contingency fee part). *See generally* Robert E. Litan & Steven C. Salop, *Reforming the Lawyer-Client* also eleven articles just about staffing legal matters.[133] And these matters aren't always small or simple.[134] One of the examples involves Nationwide Insurance's use of a rolling flat-fee arrangement in all of its class action defenses.[135] Admittedly, several of these arrangements work because companies can use their inside counsel to handle certain types of tasks.[136] The point, however, is that the rest of the legal "world" has developed ways of managing fees that the bankruptcy world hasn't explored adequately.[137]

II. The Right Moment: Law Firms at the Crossroads

We're at that point at which the pressures of law firms to stay afloat are colliding with their clients' desire to rein in the amount that they're spending on legal fees.[138] Clients that have bargaining power are asking their lawyers to give across-the-board discounts, reduce their hourly rates, and consider other ways to charge for their

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Relationship Through Alternative Billing Methods, 77 JUDICATURE 191, 194–97 (1994) (discussing alternative fee and hybrid billing arrangements).

133. *ACC Value Challenge, supra* note 127 (visited Oct. 17, 2011).

134. *See, e.g.*, Gabriel Buigas, *Hewlett-Packard Company: Value Staffing Practices- Law School Hires & Business Training*, ASS'N OF CORP. COUNSEL, http://www.acc.com/ValueChallenge/resources/avcresources.cfm?rs_vc=399 (describing HP's new initiative to hire law school graduates and train them as a part of its in-house legal team).

135. Here's how the arrangement works:

- Attorneys' fees are paid on a flat, per-case basis while the case is open[.]
- Fee amounts are fixed for a three-year cycle, and are paid quarterly[.]
- Fees cover the cost of local counsel, which Fowler White oversees and helps select.
- Nationwide maintains an in-house class action unit, staffed with lawyers who work primarily on class actions. They manage the cases internally, and also serve as liaison with regional counsel and business contacts.
- Nationwide maintains primary responsibility for document/data harvesting and storage, with assistance of Fowler White.
- Fowler White also provides support on individual matters that may impact or relate to the class actions.

E.K. Cottrell, Class Action Defense Via Flat Fees & Performance Incentives . . . Nationwide Insurance and Fowler White's Different Approach, ASS'N OF CORP. COUNSEL, http://www.acc.com/ValueChallenge/resources/avcresources.cfm?rs_vc=399.

136. *See e.g.*, *id.* (noting that Nationwide keeps an in-house class action unit).

137. *See supra* notes 128–36 and accompanying text (discussing innovative fee and staffing arrangements in non-bankruptcy practices). We might be able to get more aggressive monitoring of fees if the professionals whose fees were being paid from estate funds had some personal (not estate-paid) skin in the game. "Skin in the game" matters in pretty much everything in life. The trick is to figure out the appropriate incentives—the right "skin," as it were. *See generally* Robert E. Litan & Steven C. Salop, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods*, 77 JUDICATURE 191, 194 (1994) (stating the benefit if lawyers were able to "stand in their clients' shoes" and perform as if they were footing the bill themselves); Claude R. (Chip) Bowles, Jr. et al., *Lawyers in a Fee Quandary: Must The Billable Hour Die*?, 6 DEPAUL BUS. & COM. L.J. 487, 493 (2008) (describing lawyers as having "skin in the game" with contingent fee agreements).

138. *See* Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 92 (2011) (explaining that clients have "triaged" their legal needs, contributing to the pressure that law firms face to trim costs).

time besides billing by the hour.[139] Law firms that have been paying (read: overpaying) entry-level associates for several years are discovering that those salaries are unsustainable, resulting in large-scale layoffs.[140] Trying to raise hourly rates as a way of offsetting rising overhead costs can only work for so long.[141] At some point, clients will balk. They will force a reduction in their legal costs, or they will switch to lower-cost professionals who can provide the same quality of work.[142] In Yeats's words, "the centre cannot hold."[143]

A. Law Firms in Survival Mode

The last decade or so has seen some big—and, for many law firms, unwelcome—changes. A 2010 study conducted by the Association of Corporate Counsel and Serengeti indicated that inside counsel were setting more limits on their outside

139. *See supra* notes 128–36 and accompanying text; *see also* Burk & McGowan, *supra* note 138, at 36–38 (noting deep fee discounts at large firms despite modest increases in "rack" rates in 2009 and 2010, due to pressure from clients).

140. *See* Burk & McGowan, *supra* note 138, at 92 (discussing the large firm trend toward replacing some expensive associates with lower-cost, non-partner-track, contract lawyers).

141. *See id.* at 13, 78–79 (reporting that, although profits per equity law firm partner increased 68% from 2000 to 2007, since the recession, more in-house counsel have been cutting back on using outside firms, preferring to keep more work in-house).

142. *Id.* at 92.

143.

> Turning and turning in the widening gyre
> The falcon cannot hear the falconer;
> Things fall apart; the centre cannot hold;
> Mere anarchy is loosed upon the world,
> The blood-dimmed tide is loosed, and everywhere
> The ceremony of innocence is drowned;
> The best lack all conviction, while the worst
> Are full of passionate intensity.
> Surely some revelation is at hand;
>
> Surely the Second Coming is at hand.
> The Second Coming! Hardly are those words out
> When a vast image out of *Spiritus Mundi*
> Troubles my sight: somewhere in sands of the desert;
> A shape with lion body and the head of a man,
> A gaze blank and pitiless as the sun,
> Is moving its slow thighs, while all about it
> Reel shadows of the indignant desert birds.
>
> The darkness drops again; but now I know
> That twenty centuries of stony sleep
> Were vexed to nightmare by a rocking cradle,
> And what rough beast, its hour come round at last,
> Slouches towards Bethlehem to be born?

WILLIAM BUTLER YEATS, *The Second Coming, in* THE COLLECTED POEMS OF W.B. YEATS 184- 85 (1956).

counsel's billing rates, staffing decisions, and expenditures, as the chart excerpt below indicates.[144]

	2000	2009	Change
Require discounts from standard rates	43.8%	74.7%	**Increased by 71%**
Project budgets required	50.1%	64.6%	**Increased by 29%**
. . . .			
Travel expense rules	49.9%	60.1%	**Increased by 20%**
Early case assessments	44%	59.6%	**Increased by 35%**
. . . .			

Just this past summer, the *Wall Street Journal* reported that some clients are asking law firms to "reverse auction" their bids on client matters, with the work going to the lowest-bidding firm.[145] As other changes in large law firm economics create a downward pressure on law firm profitability,[146] the tombstones of formerly great

144. FINAL REPORT, 2010 ACC/SERENGETI MANAGING OUTSIDE COUNSEL SURVEY: ASSESSING KEY ELEMENTS OF THE IN-HOUSE COUNSEL/ OUTSIDE COUNSEL RELATIONSHIP 12 (2010) [hereinafter ACC-SERENGETI SURVEY]. The report goes on to explain these types of requirements in more detail:

> Many of these requirements stem from basic project management principles: conducting an early assessment of the project, putting a plan in place to accomplish project goals, creating a financial plan or budget, and designating a project team with the appropriate experience levels to efficiently complete the work. Requiring project plans and budgets ensures that there is a meeting of the minds between lawyer and client on the level and type of activity expected and helps to eliminate the "leave no stone unturned" approach that often generates excessive outside counsel spending. Other common requirements ensure that the project progresses according to plan, including required approval of any changes to the project team. Some policies require that service providers charge fairly for services, including discounts from standard rates and limits on expense charges by rate or amount. Finally, law departments are requiring that law firms agree to client policies, such as preferences for alternative dispute resolution, client ownership of work product, and diversity among their service providers.

Id. at 13. Some other inside counsel (roughly 63% of those who participated in the study) reported that they required their outside counsel to use associates with a minimum of five years of experience in 2009, which increased from requiring an average of 3.65 years of experience in 2009. *Id.* at 16.

145. Patrick G. Lee, *Pricing Tactic Spooks Lawyers—Companies Use of Reverse Auctions to Negotiate Legal Services Is Accelerating,* WALL ST. J., Aug. 2, 2011, at B5.

146.

> Traditional pricing has come under greater scrutiny. Though many large firms announced increases in their "rack" (*i.e.*, standard) rates in early 2009 and again in early 2010, those increases were generally more modest than prior years', and discounting appears rampant. In

law firms are popping up like mushrooms after a rainstorm.[147] The blog *Law Shucks* has been keeping track, listing these notable examples among its "Dead Pool" members:[148]

- Altheimer & Gray (1914-2003)
- Arter & Hadden (1884-2003)
- Brobeck, Phleger & Harrison (1926-2003)
- Coudert Brothers (1853-2006)
- Finley Kumble (1968-1987)
- Heller Ehrman (1890-2008)
- Howrey (1956-2011)
- Jenkens & Gilchrist (1951-2007)
- Thacher Profitt & Wood (1848-2008)
- Wolf, Block, Schorr & Solis-Cohen (1903-2009)

Although some of these firms died as a result of overexpansion (i.e., Brobeck) or alleged wrongdoing (i.e., Jenkens & Gilchrist), many just withered away, victims of a sea change in law firm economics.[149] The days of clients blithely acquiescing to

> addition, "creative" billing arrangements, such as flat fees, volume discounts, contingent fees, and "success fees" (discounted fees with enhancements for defined levels of success in the engagement), are the watchword of the day. Values like predictability and shared risk are often proffered to support such arrangements, but clients are, if anything, more vigilant and less tolerant than ever about paying premium fees for routine work. Indeed, one feature of the current unrest among pricing models is strong pressure on the client side to push and hold overall cost down, with "creative" billing providing cover for both sides to do so, at least during this period of reduced demand.

Burk & McGowan, *supra* note 138, at 36–38 (footnotes omitted); *cf.* Lerman, *Bilking*, *supra* note 2, at 208–09 (studying a rise in questionable billing due to changing economic circumstances, including increased economic pressures on law firms and clients).

147. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 771–73 (2010) [hereinafter *Big Law*] (listing local, national, and global firms that have folded under economic pressures).

148. "Dead Pool" is a pretty good moniker for *Law Shucks* to use. *See* Ribstein, *Big Law*, *supra* note 147; *see also* Ameet Sachdev, *Firm Admits to Selling Bogus Tax Shelters,* CHI. TRIB., Mar. 30, 2007, at C1. Since the submission of this article, the Howrey firm has failed. Howrey's bankruptcy case is not yet a year old, and so far, the fees in the case are over $2.9 million. *See* http://newsbankruptcy.wordpress.com/2011/10/28/providers-request-nearly-9-million-in-howrey-bankruptcy-fees/.

149. *See, e.g.*, Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century,* 96 IOWA L. REV. 1649, 1658–59 (2011) [hereinafter *Legal Education*] (explaining that recent developments, such as competition with "in-house counsel, small firms with lower costs, big firms in other countries, low-cost legal outsourcers, and technical advances" are threatening the traditional BigLaw economic model); *Law firms: A less gilded future,* THE ECONOMIST, May 7, 2011, at 74 (reporting on the three-year decline in legal jobs). *See* Ribstein, *Big Law*, *supra* note 147, at 771–72 (discussing Brobeck); *see also* Ameet Sachdev, *Firm Admits to Selling Bogus Tax Shelters,* CHI. TRIB., Mar. 30, 2007, at C1 (noting Jenkens & Gilchrist's admission about "selling fraudulent tax shelters"). Some firms may have died from taking equity positions in too many of their clients' businesses. *See, e.g.*, Stephen Miller, *Lawyer's Twist on the Firm Tapped into Start-Up Frenzy*, WALL ST. J., Oct. 7, 2009, at A16 (reporting the rise and fall of Venture Law Group, a law firm that took an equity position in Silicon Valley start-ups).

skyrocketing hourly rates and burgeoning staffing of projects (if, indeed, those days ever existed) are gone.[150]

B. The Difference Between What Clients Want and What Law Firms Want

Clients expect high quality services.[151] They also want efficiency, though, and they want some predictability of the fees that they spend on those high-quality services.[152] They have budgets, and their budgets have line items for professional services.[153] Clients hate surprises, especially those that affect their bottom lines.[154] And professionals want to make sure that they don't undervalue their services, but they also want to keep their (good) clients happy, which is why some professionals have experimented with alternative billing arrangements.[155]

That's the clients' side of the "fees" equation. As for the professionals' side of the "fees" equation, the fundamental principle is the same as for the clients: professionals want to make money. Law firms want to stay lucrative by hiring and retaining talented and productive professionals and by eking out some specialties that will help them stand out in a globally competitive market.[156] But because most law firms try to hire the same type of people (law review editors from the top

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150. *See* Miller, *supra* note 149 (describing how some innovative firms are cutting back on billable hours).

151. Whether they want "A+" quality legal work or "good enough" work—work that achieves their objectives without going the extra mile—is hard to say.

> Simply put, clients want "good enough" legal services, and outside lawyers frequently strive to deliver work worthy of an A+ on a law school exam. What are "good enough" legal services in the client's mind? Corporate counsel want just what is required to obtain the desired business objective. They don't want a grand opus when a short essay will do. . . . The incremental value of the difference between good enough and perfect legal work is simply not worth the cost to clients.

Dennis Curtis & Judith Resnick, *Teaching Billing: Metrics of Value in Law Firms and Law Schools,* 54 STAN. L. REV. 1409, 1414 n.17 (2002) (quoting Debra H. Snider, *Enough is Just Enough*, LAW.COM (Oct. 17, 2001), http://www.law.com). Clients who have a fiduciary role, though, may legitimately feel nervous about leaving any stone unturned when it comes to their legal representation, especially when all of those stones are paid for with other people's money. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at xv; *see also In re* Ginji Corp. 117 B.R. 983, 991 (Bankr. D. Nev. 1990) (discussing whether fees for researching "what if" scenarios are compensable).

152. ABA COMM. ON LAWYER BUS. ETHICS, *Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements*, 54 BUS. LAW. 175, 178–80 (1998) [hereinafter COMMITTEE].

153. *Law firms: A less gilded future,* THE ECONOMIST, May 7, 2011, at 74. And when it's really the client's funds (as opposed to the "other people's money" problem already discussed, see *supra* notes 113–37 and accompanying text), the clients do care if the fees go over budget.

154. Richard B. Friedman & Carla M. Miller, *How to Lose a Client in 10 Steps.*, 80 N.Y. ST. B.A. L.J. 1, 12 (2008). For an example of corporate controls on outside counsel, see, e.g., BANK OF AM. LEGAL DEP'T, OUTSIDE COUNSEL PROCEDURE, Jan. 2011, http://www.bankofamerica.com/suppliers/index.cfm?template=suprel_outside_counsel_proc.cfm (last visited Oct. 18, 2011).

155. *Cf.* COMMITTEE, *supra* note 152, at 181–82 (discussing the efforts by lawyers to explore alternative billing methods for reasons other than client pressure to do so).

156. *See* William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1408 (2009) (discussing reasons that law firms want to attract key lateral hires); *see also* Andrew Bruck & Andrew Canter, Note, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2094 (2008) (discussing how firms increasingly encourage specialization).

schools when they hire entry-level associates; laterals with sustainable books of business), they are very expensive to run.[157] Moreover, hiring from the same pool and doing roughly the same caliber of work makes it difficult for them to establish true market differences.[158] As one inside counsel has explained:

> *Look: We invited twelve firms to bid for this work. All twelve could (and did) tell us that their firms are exceptionally talented in this area. All twelve also told us that their firms do precisely this same work for many other clients, and those other clients are delighted with the work. Across the board, all twelve firms were willing to be flexible on fees.*
>
> *When you speak, you all sound the same. And, so far as I know, you might all be telling the truth. I don't doubt for a second that many of the finest firms in the world do good work and have satisfied clients. So the things that you insist set you apart—you say that you do good work and that your clients like you—don't set you apart at all. At best, they make you one of the pack, which gives you a one in twelve chance of winning the RFP.*[159]

Take lawyers who have a compulsion to do the very best job possible at all times,[160] add to that mix some clients who may not have the skill set to review the bills knowledgably, along with some clients who are instructing their professionals to take actions that might not be wise,[161] and stir in the factor that the funding for the bills won't come out of the client's pocket, and you get a sense of how problems

157. *See generally* Bruck & Canter, *supra* note 156, at 2092–95, 2126 (describing the pyramid hiring model and observing that starting BigLaw associate salaries in 2007 reached $160,000).

158. *See generally id.* at 2127 (describing fierce BigLaw competition to hire the top law students annually).

159. Mark Herrmann, *Inside Straight: The Delusion of Personal Exceptionalism (*Aug. 2011, 10:21 AM), http://abovethelaw.com/2011/08/inside-straight-the-delusion-of-personal-exceptionalism/. Mark Herrmann is the Vice President and Chief Counsel – Litigation at *Aon. Id.*

160. *See* Curtis & Resnik, *supra* note 151, at 1414 (stating that new lawyers, who have no prior experience to determine how much research is necessary, may do more work than they need to in order to stand out among their peers); *see also* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1391 (1997) (observing that lawyers, as a group, are highly achievement-oriented and competitive).

161. Don't assume that every client wants to save money in his legal matters. Some clients are giving their lawyers instructions that may increase overall legal costs in one case both because the clients want a certain result in that case and also because they want to take similar actions in other cases. When those clients are playing with other people's money, there's no incentive to keep the costs down—or even to behave reasonably. And professionals are under extreme pressure to comply with their clients' wishes, because clients have the option of taking their work elsewhere. Not every wish of every client, though, is worth granting. *See, e.g.*, In re Martinez, 393 B.R. 27, 34 (Bankr. D. Nev. 2008) (sanctioning lawyers for following their client's wishes when their client's wishes were just flat-out wrong to do). The more barriers that we can create to help lawyers push back on unreasonable client requests, the better off we all are. Clients won't be able to take their work to other lawyers if no lawyers are willing to do what the clients are asking them to do.

with Chapter 11 fees can build over time.[162] But ACC's value challenge demonstrates that other types of clients—non-bankruptcy clients—have figured out a way to relate fees to the value of the work performed.[163] So why haven't we been able to do that in large Chapter 11 cases? What's the roadblock?

III. BARRIERS TO BETTER FEE APPLICATIONS

> *In exercising its [fee-reviewing] role, the Court and the estate has the same right to an edited intelligible billing statement as does the attorney's non-bankruptcy client.*[164]
>
> —*In re* Ginji Corp.

Part of the roadblock is due to the fact that most of the repeat players in the system just don't have the time to think about a thorough overhaul of the fee application system.[165] Virtually all of the bankruptcy courts are overworked and understaffed.[166] The Office of the U.S. Trustee takes its marching orders from the Department of Justice, so unless the Attorney General or someone else who's in a position to set policy decides to focus on fees, there are too many other areas to pursue.[167]

In those cases in which the court has appointed a fee examiner, reports differ as to how effective those examiners have been in reviewing fees.[168] Perhaps they're

162. Rapoport, *Rethinking Fees*, *supra* note 8, at 265 (discussing how difficult it is for fee reviewers to put the bills into meaningful context); *see also* Baker, *supra* note 113, at 46–48 (confirming that the "last class in the money [most often, the unsecured creditors] foot the bill for fees").

163. *See supra* notes 127–37 and accompanying text.

164. *In re* Ginji Corp., 117 B.R. 983, 989 (Bankr. D. Nev. 1990). The court explained why the first iteration of a particular fee application needed substantial reworking. It "provided no narrative of the work performed but only a 41 page application in chronological order," and only after the U.S. Trustee objected to that application did the professional provide a more detailed narrative so that the court could "understand what was charged and why." *Id.*

165. *See In re* Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 843 (3d Cir. 1994) (commenting that "[w]e are keenly aware that many bankruptcy courts have bemoaned their duty to review fee applications as a thankless, onerous burden, one which consumes a significant share of a bankruptcy judge's time").

166. *Cf.* Michelle Arnopol Cecil, *Abandonments in Bankruptcy: Unifying Competing Tax and Bankruptcy Policies*, 88 MINN. L. REV. 723, 724–25 (2004) (noting the increase in bankruptcy filings following September 11, 2001, and warning that "[a]s the number of bankruptcy cases rises, the burden on the already overworked bankruptcy courts will continue to mount").

167. *See* 28 C.F.R. § 58 (2010). For a brief description of the role of the U.S. Trustee in bankruptcy proceedings, see Lubben, *Corporate Reorganization*, *supra* note 12, at 82. The good news is that the Office of the U.S. Trustee is starting to look at fees in a fresh way. *See infra* notes 314–38 and accompanying text (discussing the Proposed Guidelines).

168. Depending on when a fee examiner is appointed, that examiner may only have limited usefulness. *Compare* LoPucki & Doherty, *Routine Illegality*, *supra* note 67, at 427 (suggesting that fee reviewers have limited means to identify billing fraud), *with* Rapoport, *Rethinking Fees*, *supra* note 8, at 291 (stating that the a fee examiner's effectiveness turns in part on the technological tools available for those fee reviews). Appointment earlier in the case gives the fee examiner—and thus the court—an opportunity to correct problem (such as block-billing or failing to follow the U.S. Trustee's Guidelines; etc.) before too many months have gone by.

mostly useful as "extra hands" for the court.[169] Here's an example of the fee examiner reductions in GM: [170] PricewaterhouseCoopers LLP (PWC) requested approximately $2,077,069 for its tax advising and work as a special accountant for GM.[171] The fee examiner submitted an agreed disallowance of roughly $78,600.[172] That left roughly $1,998,469 for PWC to recover.[173] The reasons for the proposed reductions included block-billing ($48,402 identified; agreed reduction to $19,500); billing in half-hour increments instead of in the tenths of an hour that the applicable local and U.S. Trustee Guidelines required (agreed reduction of $37,085, representing 2% of time after the reductions); clerical or administrative non-compensable services that should have been considered overhead (agreed reduction of $15,533); and vague communications that didn't adequately describe the who/what/type (letter; email; etc.) of communication (a $30 reduction).[174] In other words, based on the magnitude of the fees and the opacity of most fee applications, even the best fee examiner has his work cut out for him.[175]

Based on my own experience, I'd rank the time savings of having a fee examiner ahead of the cost savings. For example, in *Station Casinos,* the professional fees came to just a tad over $90 million, excluding the fees of the final case to get confirmed. I negotiated reductions that came to a little over $755,000, and my own fees (including the compensation for my team members) came to a little over $220,000. That meant that the net reductions were in the neighborhood of $535,000. Although a half-million dollars is a lot of real money, it's a drop in the bucket when compared to the total fees in the cases. Could I have saved more money for the estate? Maybe, especially if I could have spoken to some of the professionals earlier in the case about the way that they were billing time and incurring expenses. But my team put in over 2,000 hours of work—work that

169. "[The Lubben study] suggests that the use of a fee examiner imposes a positive cost on the estate. This indicates that the benefits of fee examiners, if any, come from administrative assistance they offer the bankruptcy court and not from any direct cost savings in the case." Lubben, *Corporate Reorganization, supra* note 12, at 108. I wouldn't underestimate that administrative assistance, though. Bankruptcy courts just don't have the staffing or the time to review monthly fees in the largest chapter 11 cases on as timely or as intensively a basis as they'd like to be able to do.

170. Fee Examiner's Amended Report and Statement of Limited Objection to Amended First and Final Fee Application of PricewaterhouseCoopers LLP, *In re* Motors Liquidation Co. (f/k/a General Motors Corp.), No. 09-50026(REG) (Bankr. S.D.N.Y. Jan. 13, 2011). According to Clifford White, the Director of the Executive Office for United States Trustees, the court in *GM* particularly appreciated the fee examiner's work in that case. *See* Clifford J. White, *Notes for Remarks by Clifford J. White III, Director, Executive Office for United States Trustees, Before the National Bankruptcy Conference, Washington, DC, November 10, 2011,* at 8, *available at* http://www.justice.gov/ust/eo/public_affairs/index.htm.

171. *Id.* at 2.

172. *Id.*

173. *Id.*

174. *Id*. at 7–9.

175. *See generally* LoPucki & Doherty, Fees, *supra* note 9, at 218 (quoting Bankruptcy Judge Leif Clark as saying that "[t]here is no way on God's green earth that I or my law clerk have the time or the resources to go through that kind of detailed review; I do not even have the resources to do a simple audit of a fee application of that size" (quoting *The Costs of Chapter 11: Roundtable Discussion*, 1 Am. Bankr. Inst. L. Rev. 237, 258 (1993))).

definitely saved the Bankruptcy Court significant time.[176] And time is a precious commodity in large Chapter 11 cases.

Let's assume that the efficacy of fee examiners is still an open question. That's not the only reason that fees might be higher than the court (or the unsecured creditors) might want. As several people have already suggested, there's also a tit-for-tat problem with fee applications.[177] Professors Lynn LoPucki and Doherty's most recent study indicates that few parties file objections to fee applications.[178] They posit—and I tend to agree—that the small number of objections is due to the "'what goes around comes around'" theory of law practice.[179] Objections to fee applications will likely trigger counter-objections, and all of those objections are time-consuming and expensive.[180] If professionals lay low except in the most egregious of cases—or when they're really ticked off by an opponent—then they're probably safe in assuming that their fees won't be attacked, either.[181] Unfortunately, that behavior removes another check and balance from the system.[182]

Moreover, many fees are generated in response to another party-in-interest's actions. It's like the game of Go, in which early moves by one side will cause ripple effects that appear much later in the game.[183] If, say, certain unsecured creditors want to attack the composition of the unsecured creditors' committee, then motions and briefs will start piling up on the judge's desk in very little time.[184] Once the moving creditors begin the dispute, other parties will weigh in, most likely including the U.S. Trustee.[185] It's unlikely that, at the time that the creditors' committee was formed, the creditors' committee counsel could have predicted such a fight, but once the fight is "on," those unpredicted legal fees are "on" as well.

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176. Because I received a flat monthly rate, I only billed for my time when a court hearing was involved.

177. *See In re* Consol. Bancshares, Inc., 785 F.2d 1249, 1255 (5th Cir. 1986) (noting that parties in bankruptcy cases often "enter into a conspiracy of silence with regard to contesting each other's fee applications").

178. LOPUCKI & DOHERTY, FEES, *supra* note 9, at xxii.

179. *Id.* The "what goes around" theory isn't limited to the world of bankruptcy practice, either. Lawyers are repeat players in a system that depends a great deal on reputation. Good lawyers understand that.

180. *Id.* Imagine all of the forces working against objecting to fees: "if I object to yours, you're likely to object to mine"; "if I object to yours in this case, you'll use that objection against me in another case when I bill the way that you did in this case"; "if you agree to this settlement, let's also agree that we won't object to each other's fees in this case"; "if you object to my fees, that's the end of us working well together in other cases." Those same forces work against fee examiners, too, who are aware that the more aggressive they are, the less likely that professionals will support their appointment in future cases. *Cf.* Baker, *supra* note 113, at 70 ("attacking a fee application can be a bit of an atom bomb, when you want a low caliber pistol" (citing Barbara Franklin, *Passing Fee Inspection: Bankruptcy Bar Adjusts to Reduce Costs*, N.Y. L.J., May 14, 1992, at 5)).

181. Some courts refer to this behavior as a "conspiracy of silence" among lawyers. *See, e.g.*, *supra* note 177.

182. For a discussion on the Bankruptcy Code's system of checks and balances for fees, see, e.g., Rapoport, *Rethinking Fees*, *supra* note 8, at 276.

183. Walter Effross was the person who suggested to me that bankruptcy was a lot like Go. Rapoport, *House, supra* note 56, at 65 n.99.

184. *Cf. infra* note 243 and accompanying text.

185. *Id.*

Then there's "mission creep."[186] In the middle of a case, it's possible to forget the exact wording of the order appointing the professional.[187] If the professional is employed for *X* reason, and the need arises for the professional to do *more* than what the order approving her employment contemplated (let's call that the need to do *X+1*), or to do something entirely different (let's call that the need to do *Y*)[188] the professional may not think to go back to the bankruptcy court first for an order expanding the scope of employment—especially if doing *X+1* or *Y* requires a quick response.[189]

Yet another problem involves the overlap of professionals.[190] It's possible to have main counsel for the debtor as well as local counsel; main counsel for the creditors' committee and local counsel; main conflicts counsel and local conflicts counsel; and so on.[191] Because the local counsel must ensure that what gets filed is accurate, local counsel is going to have to read everything that the main counsel wants to file.[192] The need to ensure accuracy will increase fees. Moreover, local counsel, by definition, is the on-the-ground counsel to which the debtor or creditors' committee might first turn.[193] Unless the orders appointing both the main counsel and local counsel clarify who should be doing what, overlap (and therefore duplicative fees) will necessarily occur.[194]

As if these problems weren't enough, there are also problems endemic to all complex matters, such as overstaffing[195] and improper leveraging of work (using the wrong level of employee to do a task, such as having a partner make copies of

186. "Mission creep," originally a military term, is commonly used to describe the implementation of a plan whose scope has expanded mid-project or the execution of a plan that exceeds the original authorization. *See generally* Dep't of the Army, Stability Operations and Support Operations, Field Manual 3-07, 1-17 (Feb. 2003)

187. *See, e.g.*, *In re* Computer Learning Ctrs., Inc., 272 B.R. 897, 910–13 (Bankr. E.D. Va. 2001) (declining special counsel's fee application with respect to "insurance work not related to education regulatory advice" because this work was "outside the scope of [special counsel's] employment").

188. *See supra* note 186.

189. *Cf. id.*

190. *See In re* ACT Mfg., Inc., 281 B.R. 468, 484 (Bankr. D. Mass. 2002) (listing three potential sources of duplication as intra-firm duplication, local and out-of-state counsel duplication, and special/general counsel duplication); *see also* Lubben, *Direct Costs, supra* note 23, at 518 (noting that, in bankruptcy cases, multiple law firms in addition to the debtor's counsel may be involved, triggering some duplication of effort).

191. *See generally* Lubben, *Direct Costs*, *supra* note 23, at 518.

192. *See* Fed. R. Bankr. P. 9011(a) (requiring signatures on all papers filed with the court); Fed. R. Bankr. P. 9011(b) (equating the attorney's signature with his certification that the documents that the attorney has filed are "not being presented for any improper purpose[;]" "the claims, defenses, and other legal contentions . . . are warranted[;]" the contentions have "evidentiary support[;]" and "the denials of factual contentions are warranted").

193. LoPucki & Doherty, Fees, *supra* note 9, at 100.

194. *See supra* note 190 and accompanying text. Sometimes, main counsel won't give local counsel much authority, which causes its own set of complications.

195. *See, e.g.*, Ross, The Honest Hour, *supra* note 22, at 30–31 (stating that a legal auditing firm in St. Louis reported "vague time entries, excessive staffing at conferences or depositions, or billing for work product that [could not] be located" in 85 percent of their audits).

documents).[196] Determining whether there's a possible overstaffing or leveraging issue is difficult.[197] The person reviewing the bill would need to rearrange the time entries in such a way that he could figure out, for example, how many people were researching a particular topic.[198] If the exhibit to the fee application has descriptions of some of the researchers' time on page 1 and some of the time on page 35,[199] it's easy to miss the double work. And the work might not even be "double work" at all—there might be a very good explanation for why the professional divvied up the tasks.

But extra timekeepers on a bill always raise red flags.[200] At least the bankruptcy court has the opportunity to observe how many people are attending a hearing: they're right in front of the bench.[201] But there could be several months' lag time between that hearing and the fee application, and unless the court rules at the hearing that only one or two professionals will be compensated for the hearing (and which ones that would be), the extra timekeepers might pass right through.[202]

Remember, professionals file their fee applications in PDF form through PACER.[203] Going back through those time sheets requires the reviewer to look through a PDF, typically one that's in a non-searchable format. Rearranging the time sheets in a PDF version of the bill is a time-consuming process, which is why

196. *Id.* at 94, 137 (discussing inefficient and improper leveraging of work, including partners performing associate-level work).

197. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 176–78 (explaining that analyzing fee objections requires the scanning and reordering of services, which enables the court to highlight specific types of noncompliance, like overstaffing and duplication of efforts). Unfortunately, the current technology available to fee reviewers hasn't developed to the point that it can detect possible patterns across the case, such as two law firms performing the exact same work for the exact same client—each firm believing that it's the only one doing the work. For reviews of that nature, a fee reviewer has to use her judgment and experience in addition to audits and reports.

198. *Id.*; *see also* ROSS, THE HONEST HOUR, *supra* note 22, at 106 (revealing one audit in which eleven lawyers billed for the same task).

199. *See* LoPucki & Doherty, *Routine Illegality*, *supra* note 67, at 427 (stating that a single fee application may run over one thousand pages).

200. Another issue involving extra timekeepers is the phenomenon of using some timekeepers for very short assignments. Unless the assignment is self-contained, the amount of ramp-up time to bring these "spot professionals" (my term) up to speed may well exceed the benefit of using them. The Proposed Guidelines have added the use of these "spot professionals" to the list of staffing questions that the U.S. Trustees will pursue. *See* Proposed Guidelines, *supra* note 24, at B.4. (requiring the U.S. Trustees to consider "whether a professional billed few hours with no evidence of benefit to the estate").

201. Courts have also reduced fees requested for hearings that attorneys did not actually attend. *See, e.g.*, *In re* Wise, 365 B.R. 516, 524 (Bankr. E.D. Pa. 2007). I've been told by one bankruptcy judge that she keeps track of overstaffed hearings and refers to her notes when reviewing those professionals' fee applications.

202. *See generally* Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 984 (1994) (reporting that, although "96% [of judges] report that they rule on requests for interim awards at the fee hearing or within 30 days [thereafter] . . . [o]nly 79% of the lawyers [agree] . . . [and] about 3% of the lawyers report" lag times of more than 120 days). With respect to final fee requests, 97% of judges and only 78% of lawyers stated that the fee applications were granted at the hearing or within 30 days afterwards, and 7% of lawyers reported a lag time of over 60 days. *Id.*

203. LOPUCKI & DOHERTY, FEES, *supra* note 9, at 158. For a brief discussion of the transition to the PACER system, see *id.* at xiii–xiv.

many fee examiners prefer Excel spreadsheets.[204] No one files those spreadsheets, though. The inability to search or reorganize the information in a fee application makes the court's (or fee examiners) review just that much more difficult.

What bills need is a way of linking the professionals' choices on staffing and leveraging directly to each task. We need to be able to associate the reason that something was done with how it was staffed and, within the staffing, how it was leveraged.[205] Before courts can evaluate a fee application's reasonableness, they have to have answers to these questions:

- <u>Why</u> did you undertake this task? (Was it reasonable at the time you performed the task?)
- <u>How</u> did you determine the appropriate staffing / time allocation for the task?
- <u>Who</u> did which parts of a task? (E.g., answering routine emails vs. answering something major)

Without answers to those questions, it's difficult to put the fee applications in context—even more so when a court is busy managing hundreds of cases a day.[206]

204. *See generally* Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1, 75 (2010) (using Microsoft Excel to do the statistical analysis in a docket review of 576 bankruptcy cases); *see also* Lubben, *Corporate Reorganization*, *supra* note 12, at 86 (2008) (using Excel for large chapter 11 data analysis). The Proposed Guidelines are requesting that professionals use searchable electronic formats for their bills, *see* Proposed Guidelines, *supra* note 24, at C.2., which is a good idea. Submitting bills in both searchable PDFs and in Excel would be better still.

205. *See, e.g.*, *In re* ACT Mfg., Inc., 281 B.R. 468, 484 (Bankr. D. Mass. 2002) (observing that professionals should provide the court with an explanation when there is clear duplication of effort and should articulate their staffing decisions to explain their "leverage"—the choice of whom to use for which tasks).

206. The process that I've developed when I've been appointed as a fee examiner involves a combination of certain rote tasks with additional analysis that requires experience and judgment. I assemble a team of law students and newly minted lawyers, and I ask them to review each month's fee applications and draft a memorandum to me with the following information:

- The docket number of the order approving the employment of the professional, a general description of the scope of the employment (in other words, for what purposes the professional was employed) (to avoid "mission creep"); the amount of fees and expenses that the professional requested in the application; the proportion of fees that the professional incurred in preparing the fee application; whether the professional charged for a conflicts check during that period, and if so, the amount of fees associated with the conflicts check.

- A review of the fees and expenses associated with each project billing category, including who worked on each project, his or her status as a senior or junior professional, how many hours he or she worked on the project (and we tracked how many hours a professional worked in a day, in order to determine if there were so many 15+ hour days that the professional's efficiency likely was suffering), and his or her hourly rate (for leverage analysis).

- For each project category, if the task billed took more than 20 hours to do and the final work product was available on PACER, attach the resulting work product to the memorandum. If the work product was not available on PACER, indicate that the work was unavailable so that I could request it directly from the professional. (The point of requesting work that took over 20 hours of billable time was to perform a spot-check to see whether the amount of time

What courts need is some mechanism for setting default rules—norms—in certain categories. Those norms can become the context against which proposed deviation from those norms can be judged.

Even if norming wasn't always necessary, it is now.[207] In my experience as a fee reviewer, I've observed a wide disparity in how professionals bill for their work and charge for their expenses.[208] (The only consistency that I've observed is that any guidelines enacted by local rule are honored more in the breach.[209]) Many, if not most, firms that tout their extensive experience in large bankruptcy cases somehow manage to forget to un-"lump" the descriptions of their tasks, forget to describe their activities in sufficient detail to allow a court to vet those activities for reasonableness,[210] forget that overtime can't be billed to the estate, and forget to explain, in their fee applications, why so many of their people attended meetings or hearings.[211]

Part of the problem is that these sophisticated firms may not remember to check the local rules and the region's adoption of any fee and expense guidelines before beginning work on a case[212] and may never have instructed those "new to

billed for the work related well to the quality of that work and its difficulty of preparation. I didn't review all of the work product that took 20 hours or more, but I did review some of those projects—again, as a spot check.)

- Group each application's expenses into categories, such as travel and meals, and highlight any expenses that appeared unusual. Do spot-checks on, e.g., hotel prices, rental car prices, and the like to compare them to the reported expenses, and highlight specified issues that I always study when I am appointed: the rate at which travel time was billed (some jurisdictions require professionals to bill non-working travel at half the regular hourly rate; others don't specify), whether the per-meal cost appeared higher than one might expect; whether the air travel or the hotels were considered "luxury" travel (such as first-class travel or staying at hotels that were significantly more expensive than, say, a Marriott, Hilton, or Hyatt); and whether the professional expensed in-room movies, hotel laundry, or mini-bar food or drink.

For those professionals paid a flat monthly fee, the team's memoranda focused on the professionals' expenses, applying the same standards as with non-flat-fee professionals.

207. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 152–58 (finding substantial noncompliance with the U.S. Trustee Guidelines); *see also* LYNN A. STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 196 (2011) (observing that the adoption of norms may be necessary to augment actual compliance with rules).

208. *See* ROSS, THE HONEST HOUR, *supra* note 22, at 179 (reporting that a lawyer charged one client for the purchase of "suits, shirts, ties, and underwear" when he had to stay in Cleveland longer than expected, rather than dry-cleaning and laundering his clothing, because "he contended that there were not any dry cleaners in Cleveland"); *see also* Complaint and Jury Demand at 9, Nacchio v. Stern & Kil[c]ullen, N.J. Super. Ct. Law Div. 2011 (No. L 002585-11) (alleging that a lawyer charged for the purchase of underwear).

209. Lynn LoPucki has noticed this problem as well. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 152–58 (studying noncompliance with U.S. Trustee Guidelines).

210. I've seen countless billable hour entries described as "attention to email and phone calls, *x* hours," or "research, *y* hours." *See, e.g.*, *In re* Navis Realty, Inc., 126 B.R. at 143, for discussion of a fee application with multiple examples of insufficiently detailed entries.

211. *See, e.g.*, *In re* ACT Mfg., Inc., 281 B.R. 468, 492 (Bankr. D. Mass 2002) (reducing a fee allowance when no explanation is provided for out-of-state and local counsel's duplication of efforts).

212. Much like the partner who "doesn't need" to look up a statute because she's "seen it so many times before."

bankruptcy cases" professionals inside their firm about what's required in all bills that are submitted as part of fee applications.[213] But when the bankruptcy estate is paying those bills, especially the bills involving high hourly rates, a court has the right (and duty) to insist on strict compliance with any local rules and guidelines.[214] Only after the "noise" of non-compliance is removed can a court have any real ability to focus on whether the underlying work was indeed reasonable.[215]

Professor Lisa Lerman has suggested that law firms should be explicit in instructing lawyers and support staff in proper billing ethics:

> *Any firm that does not want lawyers to fabricate hours needs to tell them so, and to tell them not to bill two clients for one hour, and to tell them 100 other things about what is or is not billable. Do you bill for travel time at the usual rate? Do you bill for hours spent at dinner with the client, or only for the time spent doing business, or only for the food, or does it depend on the client? Do you bill for time spent preparing bills? If you bill in quarter hours, does a three-minute phone call count as a quarter hour? And so on.*
>
> *It is important also to train secretaries and paralegals in all of these policies, even the staff who are not billing their own hours. . . . If [support staff in a lawyer billing fraud case] had had clear instructions from firm management that such "adjustments" constitute fraud, and that anyone caught engaging in fraud would be fired and might be disbarred or jailed, I do not think they would have followed [the miscreant lawyer's] instructions. Or at least they would have tried to find the managers who set the policy to complain about those instructions.*[216]

213. *See* Mary Josephine Newborn Wiggins, *Globalism, Parochialism and Procedure: A Critical Assessment of Local Rulemaking in Bankruptcy Court,* 46 S.C. L. REV. 1245, 1246–47 (1995) (discussing the importance of understanding both federal and local bankruptcy rules and of using local counsel). *See generally* Robert J. Landry, III & James R. Higdon, *A Primer on 11 U.S.C. § 328(a) and its Use in Alternative Billing Methods in Bankruptcy*, 50 MERCER L. REV. 537, 542 (1999) (explaining that bankruptcy professionals should review local rules due to the "localized" nature of bankruptcy practice).

214. As explained in *In re* Consol. Bancshares, Inc., "this Court has a special responsibility to the creditors of bankruptcy estates when reviewing fee applications. Obviously, each dollar awarded to the attorneys and accountants is one less dollar available for payment to creditors and shareholders." *In re* Consol. Bancshares, Inc., 49 B.R. 467, 477 (Bankr. N.D. Tex. 1985), *affd in part, remanded in part*, 785 F.2d 1249 (5th Cir. 1986). Bankruptcy courts have the statutory right to adopt and amend local rules governing their practice, as long as their rules aren't inconsistent with federal statutes or rules.

215. *See, e.g.*, *In re* Affinito & Son, Inc., 63 B.R. 495, 498 (Bankr. W.D. Pa. 1986) (holding that, when firms are non-compliant and attorneys lump time descriptions together, courts are unable to determine what is or isn't compensable). *See generally* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 157 (discussing noncompliance with U.S. Trustee Guidelines).

216. Lerman, *Slippery Slope*, *supra* note 100, at 918–19 (footnotes omitted); *see also* Susan Saab Fortney, *Soul For Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 252–53 (2000) (suggesting that firms need to do a much better job of training attorneys in proper billing practices); Curtis & Resnik, *supra* note 107, at 1411, 1419, 1424–25

And it's not just the professionals billing the time who need more specific training—it's also the senior professionals who are reviewing the bills before submitting them as part of their fee applications.[217] The baseline issue is judgment: judgment about what work is necessary and what work isn't.[218] That judgment, of course, comes from experience[219] and is tempered by the incentives that link to compensation and other rewards within the professional's firm.[220]

(suggesting that law schools could do a better job of teaching the ethics of billing clients); *cf.* Richmond, *supra* note 86, at 85–97 (suggesting that the pressure of billable hour requirements contributes to overbilling). For a good read about how one's conscience might play into these decisions, *see* STOUT, *supra* note 207, at 31–44.

217. As Professor Susan Saab Fortney points out:

> Neophyte attorneys forge into private practice with little or no experience in billing their time. Often associates start work with a "lecture" from a senior attorney who advises associates to "[b]ill every minute . . . we'll adjust the bill on the back end." This approach to billing does not recognize the traps involved in billing another attorney's time. First, it assumes that the supervisor possesses enough information on the client's legal matter to evaluate intelligently the amount of time expended. Second, the approach assumes that the supervisor can ably sift through associate time sheets, which may be "propaganda piece[s]." Finally, if the firm compensates a billing partner for the amount collected from billed clients, the billing partner may be reluctant to write off associate time.
>
> Some senior attorneys may provide additional guidance on billing in instructing associates to "write down your time the same day, be honest, use good judgment, and don't double bill." This general advice gives associates unfettered discretion because the rules on billing practices remain unclear. Even when firm managers implement general billing guidelines, attorneys still have a great deal of latitude in the way that they apply the guidelines. This was illustrated by a management consultant who found a great deal of disparity in what firm partners would bill for travel, even though the firm implemented a policy to bill for travel time. Rather than leaving attorneys in a quandary on billing practices, firm managers can clarify how and what attorneys should bill. This guidance can include written guidelines, training programs and formalized channels within the firm for open communication.

Fortney, *supra* note 216, at 252–53 (footnotes omitted).

218. *See* Curtis & Resnik, *supra* note 107, at 1414–15 (stating that a lawyer's assessment of what work is necessary is subjective).

219. *Id.* at 1415; *see also* Steven M. Zager, *How to Hire Great In-House Lawyers: Outside Counsel with Hiring Know-How Can Offer Tips to GCS*, 21 TEX. LAW. 13 (May 2, 2005) (advising attorneys to hire lawyers with good judgment, usually obtained as the result of "suffering the consequences of bad judgment").

220. Dennis Curtis and Judith Resnick contend:

> [A] ready response to the problem of the subjectivity of determining the necessity of a particular form of work for a client is to turn that judgment over to a person better situated to make it: a partner or the in-house counsel of a client. Here, of course, is where law firm reliance on large numbers of billable hours undercuts the interest in developing methods to teach young lawyers about how better to assess the amount of time to invest in a given task. Not only does the law firm have an incentive to have many hours billed, the law firm also uses the number of hours billed as a metric for assessing the quality of a particular individual. If a firm were to create an effective structure of control over the use of individual (and especially young) lawyers' time, how could the firm then use the amount of time spent by associates to evaluate the abilities of those lawyers? Further, if such structures reduced the number of hours logged, the firm's revenues would fall.

Curtis & Resnik, *supra* note 107, at 1415 (footnotes omitted).

IV. Is It Time for Norming and Alternative Billing Models in Large Chapter 11 Cases?

Although it would be difficult, if not impossible, to set "book rates" for Chapter 11 cases,[221] it should be possible to create some norms for certain issues that arise in most cases.[222] By setting norms, courts would still have the discretion to permit professionals to seek permission to vary from those norms.[223] Moreover, norms have an added advantage: they give the professionals a chance to tell their clients "no." If a client wants to put twelve people on a simple matter—cost be damned, since the client won't be paying those fees—the professionals can explain that the norms prevent them from staffing the matter that way. If a client wants a professional to do something that's legal but not particularly smart, norms give the professional an additional reason for saying "no," with some comfort that no other professional is likely to say "yes" to that client's request.[224]

Here are some such categories that might lend themselves to norming, especially if the norms are treated like default rules rather than absolute ceilings: (1) the number of lawyers who may bill for attending a hearing on behalf of a party in interest and whether those lawyers who attend such hearings should do so in person only if they expect to have a speaking role, rather than an observer's role; (2) which types of hearings are appropriate for telephone-only attendance (such as hearings in which the lawyer's appearance would be very brief); (3) under what circumstances should partners, and not associates, bill their time to do legal research; (4) what proportion of a bill should be devoted to preparing the fee application; (5) what the "normal" hourly rate, or the "normal" blended rate, should be, in cases of a certain size in a given jurisdiction; (6) what pleadings local counsel should draft when the lead counsel is from out of town; (7) if the professional intends to bill by the hour, what the procedure should be for increasing the hourly rates originally set forth in the employment application; and (8) when flat fees[225] or some other sort of billing,

221. Some bar associations used to set a "book rate" for various legal services. For a good discussion of the old fee schedules, see Ross, The Honest Hour, *supra* note 22, at 12–16. In an earlier draft of this article, I toyed with the idea of setting some "book rates" for certain activities in chapter 11, but I rejected that notion in favor of the creation of broader norms.

222. *Cf. In re* Robinson, 368 B.R. 492, 499 (Bankr. E.D. Va. 2007) (discussing the use of "no-look" fees in a chapter 13 case as a way of norming the fee application process).

223. *See id.* (noting that attorneys have the discretion to opt out of the "no-look" fee when "unusual issues" are present).

224. Oh, there will still be some professionals who will say "yes." But if those professionals don't get paid for that work, then after a while, they might be inclined to start saying "no."

225. The beauty of a flat fee is that it focuses the mind clearly on the cost-benefit analysis of undertaking specific tasks. Either there's money for the task, or there isn't. (Of course, state ethics rules require the attorney to represent the client competently and diligently, whether or not the attorney is getting paid, so there's some risk that the flat fee would run out before the attorney finishes all of the work that she needs to do.) *Cf.* Model Rules of Prof'l Conduct R. 6.2 cmt. 3 (2009) ("An appointed lawyer has the same obligations to the client as retained counsel . . . ."). Moreover, flat fees reward efficiency in a way that hourly fees never do. *But see infra* notes 253–56 and accompanying text (discussing a case in which the court's original flat fee award would have vastly overcompensated the attorney).

other than the traditional hourly billing model, would be appropriate[226] and—for those alternative billing models—what tasks should be included as part of the fee.[227] If the norms are set as default rules, then a professional who wants to deviate from

226. The Bankruptcy Code certainly contemplates billing on other than an hourly basis; that's part of the purpose of section 328. As a matter of fact, in a 1994 case, the Third Circuit forecast the possibility that bankruptcy lawyers might choose to move away from the lodestar calculation (basically, multiplying the number of hours billed by the appropriate hourly rates) to something more creative. *See In re* Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 856 (3d Cir. 1994) (predicting alternative billing structures and methods in the aftermath of changing realities and competitive pressures in the practice of law); *see also* 11 U.S.C. § 328(a) (giving courts flexibility in structuring professionals' compensation). *Accord, e.g.*, *In re* Niover Bagels, Inc., 214 B.R. 291, 294 (Bankr. E.D.N.Y. 1997) (noting the need for flexibility in compensation structures).

227. As discussed *supra* note 222, some courts have created norms for fees in Chapter 13 cases by describing what tasks are included in a "no-look fee." For example, on May 16, 2011, the "No-Look Fee" Committee for the Eastern District of Kentucky recommended a $3,500 "no-look fee" in Chapter 13 cases. In exchange for not having to file a fee application in a particular chapter 13 case, the debtor's attorney would have to provide services *worth* the amount of the fee charged (and there's a list of services in Attachment A). If the attorney provided those services and the case involved a confirmed plan:

> The attorney may accept, in lieu of filing a fee application, a presumptively reasonable fee in an amount up to and including $3,500, provided the plan is confirmed. This fee includes:
>
> - all services rendered up to and including confirmation of a plan;
> - services rendered in post-confirmation matters referenced above; and
> - representation in two (2) post-confirmation matters from the following list:
>   _____Responding a motion to dismiss the case for failure to make plan payments;
>   _____Responding to a motion for relief from stay;
>   _____Filing a motion to modify the plan to address a delinquency (including a motion to suspend plan payments);
>   _____Addressing a trustee's motion to modify the plan;
>   _____Filing an application to incur debt; or
>   _____Filing a motion to sell property.
>
> The presumptively reasonable fee does not include:
>
> - Defense of any adversary proceeding;
> - Representation in any unanticipated litigation or contested proceedings arising from the debtor's failure to provide complete and accurate information to the attorney;
> - Representation in any matter not otherwise addressed herein.
>
> The attorney's representation of the debtor continues through the time the debtor receives a discharge, the case is dismissed, the case is converted, or the court approves the attorney's withdrawal from representation (whether based on a request of the attorney or of the debtor). Therefore, the debtor's attorney is expected to provide, in addition to the services described herein, such other legal services as are necessary for the administration of the chapter 13 case. However, the attorney may seek additional compensation for such services.
>
> Any compensation sought in excess of the presumptively reasonable fee of $3,500 must be requested by filing an application for compensation, which must be set for hearing before the court.

Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, U. S. Bankr. Court, E. Dist. of Ky., Report of the Comm. on Comp. for Debtors' Attorneys in Chapter 13 Cases, (a/k/a "No-Look Fee" Comm.) Attachment A (May 16, 2011) [hereinafter "No-Look Fee" Comm.], http://www.kyeb.uscourts.gov/kyeb/comment/Ch13DebtorAttorneyCompensation.pdf.

the norm could ask the court for permission to do so.[228] If the professional's rationale makes sense, the court could approve the departure from the norm. The advantages of using norming are that everyone would operate under the same assumptions (the norms) and deviations from the norm would be explained before fees or expenses were incurred, rather than coming as a surprise as part of a fee application.[229]

Theoretically, a bankruptcy court could (with appropriate notice) set the norms for certain types of activities in a particular case; likewise, it would be legitimate for a jurisdiction to set some norms for certain activities on a district-wide basis.[230] The tricky part is to decide whether the local rules will cover all Chapter 11s, or only large ones,[231] or all business bankruptcies, or all bankruptcies, period.[232] Local rules are the appropriate mechanism. Norming with a national rule makes less sense, due to the variation of the types of cases that different jurisdictions tend to see.[233]

Federal Rule of Bankruptcy Procedure 9029(a) provides the authority for district courts (and their bankruptcy courts) to establish local rules, subject to some obvious limitations prohibiting the contradiction of the Bankruptcy Code and Rules, and preserving parties' rights for non-willful violations.[234] Before a court can adopt a rule, there must be notice and an opportunity for a hearing.[235] Therefore, a hearing to set local rules about certain fee and expense norms could involve testimony about average fees for average tasks, say, in cases of a certain size, or for average staffing in such matters as valuation hearings or lift-stay motions.[236] The

228. *See In re* Robinson, 368 B.R. 492, 499 (Bankr. E.D. Va. 2007) (reiterating that an attorney may opt out of the "no-look fee" arrangement if he comes to an agreement with the client and files a fee application with the court).

229. *See* "NO-LOOK FEE" COMM., *supra* note 227, Attachment A (stressing the importance of insuring that clients and attorneys alike understand in advance what legal services are to be provided in a Chapter 13 bankruptcy).

230. FED. R. BANKR. P. 9029(a)(1) (allowing each district to create local rules); *see also In re* Tahah, 330 B.R. 777, 783–84 (B.A.P. 10th Cir. 2005) (discussing that district and bankruptcy courts may promulgate local rules under FED. R. BANKR. P. 9029(a), and FED. R. CIV. P. 83).

231. *See* Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1, 75 (2010) (defining large bankruptcy cases as those involving companies with assets in excess of $100 million).

232. *See In re* Pineloch Enters., Inc., 192 B.R. 675, 678 (Bankr. E.D.N.C. 1996) (suggesting that the type and size of a bankruptcy case will determine whether certain fees are appropriate).

233. *See generally* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 503–04 (1993) (finding that local bankruptcy practice influences the choice of which bankruptcy chapter to use).

234. FED. R. BANKR. P. 9029(a)(1). For a good discussion of local rulemaking, see Mary Josephine Newborn Wiggins, *Globalism, Parochialism and Procedure: A Critical Assessment of Local Rulemaking in Bankruptcy Court,* 46 S.C. L. REV. 1245, 1251–57 (1995); *see also* Paul J. Stancil, *Close Enough For Government Work: The Committee Rulemaking Game,* 96 VA. L. REV. 69, 76–80 (2010) (discussing rulemaking on a national scale).

235. Fed. R. Civ. P. 83(a)(1).

236. Although Lynn LoPucki has suggested, on several occasions, the use of regression analysis as a way of determining what fees should be, *see, e.g.*, Lynn M. LoPucki & Doug Irion, *The LoPucki-Doherty Professional Fees Calculator: Prediction,* UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE, http://lopucki.law.ucla.edu/fees/

idea behind norming the expectations of staffing and leverage (or even the average number of hours that should be spent on certain matters) is to establish expectations before those fees or expenses are incurred.[237] It would, of course, be possible for a local rule to permit deviations from any established norms upon application to the court.[238] Such an application could be on shortened time, if necessary.[239]

As Dean Mary Jo Wiggins has pointed out, the problem with local rules is that, the more there are, the less uniformity there is in the practice of law[240]—a frustrating problem when it comes to those professionals with a national practice.[241] But establishing local rules on the basis of the types of cases that a court routinely sees on its calendar is doable.[242] It's necessary, too, because the only way to pierce the question of whether a professional used too many employees to staff a matter or billed too many hours on a given work product is to have some norms.[243] Spelling out those norms in local rules is better than having them stay hidden from view in the mind of a judge or fee examiner.[244]

Once local jurisdictions have set some norms for fees,[245] they could also consider establishing some flat rates or fee caps for professional compensation at the beginning of an appointment, at least for certain types of cases.[246] A jurisdiction's

feecalculatorprediction.aspx (last visited Sept. 30, 2011), I prefer setting norms by gathering information in open hearings.

237. *See, e.g.*, Landry & Higdon, *supra* note 213, at 539 (noting that preapproval of alternative fee arrangements under section 328(a) provides significant benefits).

238. *See generally In re* Walter B. Scott & Sons, Inc., 436 B.R. 582, 587 (Bankr. D. Idaho 2010) (holding that "a bankruptcy court has discretion to excuse strict compliance with local rules, especially when detrimental reliance or other prejudice has not been demonstrated" (citing *In re* Loretto Winery, 107 B.R. 707 (B.A.P. 9th Cir. 1989))).

239. *See In re* Comer, 27 B.R. 1018, 1022–23 (B.A.P. 9th Cir. 1983) (determining that the bankruptcy court's decision to consider opposition papers filed after the deadline was an appropriate exercise of discretion, particularly because there was no evidence of either detrimental reliance or other prejudice), *aff'd*, 723 F.2d 737 (9th Cir. 1984).

240. *See* Wiggins, *supra* note 213, at 1251–53 (comparing jurisdictional differences among local bankruptcy court rules in the Southern District of California, the Eastern District of California, Hawaii, and Idaho).

241. *See id.* at 1247 (noting how difficult it may be for out-of-state lawyers to master the local rules).

242. *See supra* notes 230–44 and accompanying text.

243. *Cf.* LOPUCKI & DOHERTY, FEES, *supra* note 9, at xxiii (stating that in order "[t]o catch [instances of billing too much for a task or for more work than a professional actually performed], the fee reviewer must have some sense of how much time tasks *should* take and how high fees *should* be") (emphasis in original). I may not agree with how Professors LoPucki and Doherty calculate their predicted range of fees, but I do agree that there should be some way of at least "eyeballing" the fees against some benchmark.

244. *See In re* Pineloch Enters., Inc., 192 B.R. 675, 678 (Bankr. E.D.N.C. 1996) (pointing out the benefits of instituting certain norms, such as setting flat rates, at the beginning of a case).

245. Courts "norm" fees already. No-look fees are an example. *In re* Robinson, 368 B.R. 492, 499 (Bankr. E.D. Va. 2007). Other examples include any discussion of reasonableness that begins with "in general" or "as a general rule." *See, e.g.*, *In re* Poseidon Pools of Am, Inc., 180 B.R. 718, 731 (Bankr. E.D.N.Y. 1995) (discussing a general rule involving the number of people who should bill for attending intra-office meetings).

246. Professors LoPucki and Doherty recommend that courts use regression analysis to get a better handle on the reasonableness of fees, see LOPUCKI & DOHERTY, FEES, *supra* note 9, at 262–64. They also point out that Professors Theodore Eisenberg and Geoffrey Miller have suggested a "look-up table" for fees in class actions. *See*

ability to predict the many strategic moves that a Chapter 11 case might engender is limited, of course, but certain tasks are likely to occur in virtually every (or every mega) Chapter 11.[247] Over time, bankruptcy courts might use section 328 to experiment with fee caps or flat rates, using the analogy of no-look fees for chapter 13 work.[248] And, as in Chapter 13 work, courts and professionals might be able to carve out, from that flat rate, certain tasks—either tasks that may predictably occur in some types of cases but not in others[249] or tasks that are entirely unforeseeable. Those carved-out tasks, then, would trigger separate payment terms upon a further court order.[250]

Flat fees for legal professionals in Chapter 11 cases haven't become traditional, although the compensation terms for financial advisors often include a monthly flat-fee arrangement, coupled with a success fee (typically, "success" is defined broadly).[251] Determining how to set the flat fee is where the rubber meets the road, and most professionals are skeptical about the ability to set a fair flat fee.[252]

At least one court has experimented with a flat fee. In *In re Kobra Properties*,[253] the bankruptcy court authorized the employment of debtors' counsel under 11 U.S.C. § 327 and Fed. R. Bankr. P. 2014(a) and, pursuant to section 328(a), the court fixed debtors' counsel's compensation at a flat fee of $1,200,000 plus costs.[254]

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id. at 262 (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study,* 1 J. EMPIRICAL L. STUD. 27, 72 (2004)). For an example of a case that set a fee cap under section 328, see *In re* Fed. Mogul-Global, Inc., 348 F.3d 390, 408 (3d Cir. 2003).

247. As Judge Alan Jaroslovsky explains, "I know what reasonable fees are for debtor's counsel obtaining confirmation of a plan, for secured creditor's counsel getting relief from the automatic stay, for trustee's counsel recovering a preference. In cases with unusually high fees, I know what questions to ask to determine if there was something unusual which caused higher fees." Alan Jaroslavsky, *Of Forests, Trees and Professional Fees,* ABI J. at 14 (Feb. 1994).

248. *See* Landry & Higdon, *supra* note 213, at 538–39 (discussing the use of alternative fee arrangements under section 328(a)).

249. *Id.* at 553. Perhaps, for example, in adversary proceedings.

250. *Id.*

251. LOPUCKI & DOHERTY, FEES, *supra* note 9, at 6 ("Bankruptcy judges frequently award 'success' fees or 'fee enhancements' as they are sometimes known. But success is defined so broadly that it virtually always occurs.").

252. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at 128 (calling the setting of a flat fee "difficult or impossible"). According to Professors LoPucki and Doherty, using flat fees would "shift the risk of unpredictable case-to-case variation from the estate to the professional," provide a basis for "competitive bidding" in cases, and "alter the professionals' incentives." *Id.* at 264. According to AmericanLawyer.com, more firms are getting better at estimating how much a matter might cost. *See* Allen Cohen, *Building a Breakout Firm,* AMERICANLAWYER.COM (Dec. 1, 2011) ("Last year, 88 percent of respondents said law firms and clients had insufficient experience defining or managing work on an alternative basis. This year, 73 percent think that's true. In the 2010 survey, 53 percent said it was difficult to determine the value of the work. This year, just 45 percent agree with that statement."), *available at* http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202 532848173. I know that, when I set a flat rate, I'm generally guessing how many hours a project will take. Then I estimate how "off" that guess might be, establish a likely range of hours for the project, find the midpoint of that range, and multiply that midpoint by my normal hourly rate in order to estimate a fair flat fee.

253. *In re* Kobra Props., 406 B.R. 396 (Bankr. E.D. Cal. 2009).

254. Final Order Regarding Employment of Shulman Hodges & Bastian LLP as General Counsel for the Debtors at 3, *In re* Kobra Props., No. 08-37271-C-11 (Bankr. E.D. Cal. Mar. 2, 2009). In an abundance of caution, the court reserved the right to "make equitable adjustments" to the fixed fee if a "plan of

Although the end result involved a lesser award (and although the debtors' counsel's request for the entire fixed fee became the quintessence of *chutzpah*),[255] the court was able to adjust the fixed fee downward because it had specifically provided for reexamination of the award upon the occurrence of certain conditions, including the appointment of a Chapter 11 trustee in the case.[256] The court didn't have to use the "improvidently granted" part of section 328 because it had already factored in—in its order establishing the fixed fee—the risk that the case would diverge from a traditional Chapter 11 case in any one of several possible ways.[257]

The rub with using a flat fee, of course, is that there's a very real possibility that the flat fee will undercompensate the amount of work that the professional has to do.[258] That risk, though, exists in non-bankruptcy cases as well, and as long as clients push for, and get, flat fees outside of bankruptcy, there's no reason that courts can't establish flat fees in bankruptcy cases.[259] Any sort of alternative billing structure, whether it's flat fees, default rules for staffing and estimates of time on task, or some hybrid format, would give courts and professionals much better parameters for evaluating the professionals' work.[260] If the Association of Corporate

reorganization is not confirmed, or the Debtors confirm a Chapter 11 liquidating plan, or a Chapter 11 plan of which the Debtor is not a proponent is confirmed, or the Debtors' cases are converted to Chapter 7 or dismissed, or a Chapter 11 trustee is appointed to the Debtors' cases . . . ." *Id.* at 4. The debtors stipulated to the appointment of a chapter 11 trustee a month after the fixed fee order was entered. Notwithstanding the triggering of the condition in the fixed fee order, debtors' counsel filed a fee application seeking the balance due on the fixed fee. First Application for Allowance and Payment of Fees and Reimbursement of Expenses by Shulman Hodges & Bastian LLP, Counsel for the Debtors at 28, *In re* Kobra Props., No. 08-37271-C-11 (Bankr. E.D. Cal. Mar. 24, 2010). The creditors' committee and the chapter 11 trustee both objected to the fee application. Opposition of the Official Committee of Unsecured Creditors to First Application for Allowance and Payment of Fees and Reimbursement of Expenses by Shulman Hodges & Bastian LLP, Counsel for the Debtors at 1–2, *In re* Kobra Props., No. 08-37271-C-11 (Bankr. E.D. Cal. Apr. 28, 2010); Trustee's Objection to First Application for Allowance and Payment of Fees and Reimbursement of Expenses by Shulman Hodges & Bastian LLP, Counsel for the Debtors at 1, *In re* Kobra Props., No. 08-37271-C-11 (Bankr. E.D. Cal. Apr. 28, 2010). On May 12, 2010, the court awarded debtors' counsel final fees in the amount of $440,681.92 and expenses of $76,203.79. Motion/Application for Compensation for Leonard M. Shulman, Debtor's Attorney, *In re* Kobra Props., No. 08-37271-C-11 (Bankr. E.D. Cal. May 12, 2010).

255. *Chutzpah* is defined as "shameless audacity, impudence, or brass." Webster's New World Dictionary 252 (3d ed. 1988).

256. Final Order Regarding Employment of Shulman Hodges & Bastian LLP as General Counsel for the Debtors at 4, *In re* Kobra Props., No. 08-37271-C-11 (Bankr. E.D. Cal. Mar. 2, 2009).

257. *See id.* (listing five factors that could trigger the court's reconsideration of the fixed fee, including whether "a Chapter 11 plan of reorganization is not confirmed, or the Debtors confirm a Chapter 11 liquidating plan, or a Chapter 11 plan of which the Debtor is not a proponent is confirmed, or the Debtors' cases are converted to Chapter 7 or dismissed, or a Chapter 11 trustee is appointed to the Debtors' cases").

258. *See* Ross, The Honest Hour, *supra* note 22, at 241 (because legal costs vary based on some decisions outside a professional's control, such as the actions of opposing counsel, it's important to build a cushion into any flat fee).

259. *See supra* note 253–57 and accompanying text.

260. *Cf.* Mark D. Wolf, *Update: How Value Billing Helps Both the Client* and *the Law Firm*, 28 Alternatives to the High Cost of Litigation 1, 5 (2010) (discussing an alternative fee arrangement in which in-house counsel gives a law firm a "report card" based on "defined, agreed-upon criteria–for example, appreciation of the client's goals, expertise, efficiency, responsiveness, predictive accuracy, and effectiveness, among others"). Having these agreed-upon criteria built into an order approving employment will in turn make a court's evaluation of the reasonableness of the fee much easier. In addition, aside from better evaluation by

Counsel can suggest a variety of ways in which outside law firms can work with inside counsel to keep fees reasonable, including "fixing prices by stage of work or type of matters, setting maximum staffing ratios, creating knowledge banks shared by preferred outside counsel . . . and having law firm attorneys work on the client's site,"[261] why can't we? Even the American Bar Association has developed some uniform billing codes for lawyers (especially litigators), which means that it's possible to come up with some uniform categories of tasks.[262] If law firms can work with inside counsel on creative ways to manage fees, they should be able to work with bankruptcy courts to do the same.[263]

To get started on developing some norms, the mantra is simple: "If I were paying this bill out of my own pocket, would I consider it to be reasonable?"[264] Here are

professionals and courts, law firms will benefit from increased efficiency. *Cf. id.* at 6–7 (discussing a fee arrangement in which a law firm is given a flat budget, but receives success and efficiency bonuses, upping the firm's rate if calculated per hour and increasing the firm's "inventory" of billable hours available to use on other clients). *But see* ROSS, THE HONEST HOUR, *supra* note 22, at 237 (noting that, despite significant dissatisfaction with hourly billing and alternative billing options, hourly billing remains "the dominant mode of billing").

261. *ACC Value Challenge Session Summary Report February 4, 2010*, ASS'N OF CORP. COUNSEL, http://www.fclaw.com/seminar/materials/ACC%20Value%20Challenge%20%20Session%20Summary%20(Feb %204%202010).pdf (discussing the need for lawyers to focus on value-based billing). The report compared companies' increase in general costs (20%) to their increase in legal costs (75%) over the past 10 years. *See also id.* at 5 (discussing fee management options for litigation matters—such as fixed fees and holdbacks until matters conclude at or below budget—and transactional matters—such as success fees); Bradley A. Ullrick, Comment, *The Alternative Billing Diner: Serving Up a New Billing Scheme for the Technological Age*, 5 J. TECH. L. & POL'Y 2, 10 (2000) (discussing the "DuPont network," which encourages DuPont's preferred law firms to share information as a way of controlling fees); *see also supra* notes 125–39 and accompanying text.

262. *See Uniform Task-Based Management System: Background, Definitions, Principles and Assumptions*, AM. BAR ASS'N, http://www.americanbar.org/groups/litigation/resources/uniform_task_based_management_system/background_definitions_principles_and_assumptions.html (last visited Sept. 20, 2011) (discussing definitions of billing codes, principles, and assumptions about a uniform task-based management system); *see also* ROSS, THE HONEST HOUR, *supra* note 22, at 242 (describing the ABA's suggested uniform billing codes); Hope Viner Samborn, *It's About Time: When it Comes to Tracking Billable Hours, Match the Software to the Uniqueness of Each Practice*, 84 A.B.A. J. 70, 70 (1998) (explaining that the uniform billing codes are "designed to allow clients to audit bills easily and compare charges against those of other firms").

263. For example, the staffing guidelines for the U.S. Bankruptcy Court for the Northern District of California require professionals to justify using more than one professional or paraprofessional at conferences, hearings, and depositions; the penalty for failing to supply such justification can be that compensation is allowed "for only the person with the lowest billing rate." BANKR. N.D. CAL. COMPENSATION GUIDELINES 16 (2011), *available at* http://www.canb.uscourts.gov/print/446/.

264. *See* LOPUCKI & DOHERTY, FEES, *supra* note 9, at xv (defining market rates as what people spend when the money that they're spending is their own). If I were paying fees out of my own pocket, I'd be tempted to set a flat rate or a fee cap. The beauty of a flat fee or a fee cap in most bankruptcy cases is that it would provide a real-time reality check: "Is this work really necessary?" It would push a professional toward asking whether certain work might be overkill, and thus unnecessary; or to consider whether the work might be controversial, triggering objections or motions of some sort. Responding to such objections or motions would, of course, come out of that flat fee or fixed cap as well, which means that professionals might think twice before doing something that they can't reasonably justify. *See* Darlene Ricker, *The Vanishing Hourly Fee*, 80 A.B.A. J. 66, 70 (1994) (quoting a lawyer discussing flat fees: "'The more efficiently [an attorney] works, the more money he makes in a shorter period of time . . . . Both the attorney and the client benefit.'"). Another possibility for a creative fee—say, for DIP counsel—could be a combination of a very low hourly rate coupled with a large success fee if the debtor reorganizes. (But that type of combination fee had better include a claw-back for debtors who file another bankruptcy within a certain number of years after confirmation.).

some of the questions that we would want to ask as we developed any proposed local rules.

A. Are "Brand-Name" Professionals Important?

Those professionals—law firms, financial advisors, auditors, and the like—with high-profile reputations have some advantages.[265] They have experience in a wide variety of businesses and have seen lots of situations before, so they should be able to get up to speed on difficult issues more quickly.[266] The odds of them doing slipshod work, although higher than zero, are low.[267] But more regional professionals can do very good work, too, at much less expense.[268] Perhaps one topic for consideration as a local rule is whether a party-in-interest should have to explain why it prefers, in an application for employment, professionals without

265. Under § 330(a)(3)(E), the court "shall consider" factors such as board certification and the "demonstrated skill and experience in the bankruptcy field." 11 U.S.C. § 330(a)(3)(E) (2006); *see also In re* Fibermark, Inc., 349 B.R. 385, 396 (Bankr. D. Vt. 2006) (stating that "[i]t is in the best interest of the estate to compensate professionals commensurate with their expertise and the benefit their efforts yield to the estate. Therefore, in certain circumstances, the Court may approve the retention and compensation of professionals that charge a greater amount than is common in this District, so long as the professional's billing rate is comparable to fees and rates charged by comparably skilled professionals in non-bankruptcy cases.")

266. *See id.* ("It is a tautology that without competent and experienced advisors, debtors-in-possession would have little likelihood of success in their reorganization efforts."); *see also In re* Granite Partners, L.P., 219 B.R. 22, 27 (Bankr. S.D.N.Y. 1998) (finding that a bankruptcy trustee who required "competent and experienced counsel to assist him" had appropriately hired a firm known for its experience and reputation in bankruptcy; the court thus awarded fees and expenses in excess of $2 million).

267. Noting the recession's effect on the traditional preference for BigLaw representation, Bernie Burk and David McGowan have explained:

> [T]he widely articulated view had long been that the elite firms hired the "best" graduates of the "best" schools to devote to the "best" work that the "best" clients had to offer. Elite law firms were not generally retained to do just a good enough job on routine work and, as the drumbeat for the "best" reflects, neither the firms nor their clients were inclined to think of themselves in that more prosaic light. We suspect that outside lawyers and their clients both were slow to reconsider the credentials and qualifications necessary to do adequate legal process and similarly routinized work, even as 28% of recent law graduates (a good deal more than the crème de la crème by any measure) found themselves working in private firms of over 100 lawyers, many in richly compensated, dead-end positions that provided them with little opportunity for professional development or growth.
>
> The recession, with its widespread law-department budget cuts and thousands of large-firm layoffs, seems to have awakened everyone involved to the forces that had been building for years, and brought those forces more fully into play. Clients triaged their legal work and, as to what was indispensable, began to scrutinize which constituent tasks truly needed high-end staffing and which required not the "best," but just those good enough to accomplish the task cost-effectively. Law firms economized by shedding expensive associates whose services were no longer in demand at prevailing rates, instead spot-contracting with foot-soldiers in the new army of the unemployed for legal process and similar work at much lower cost and more flexible commitment. Out-of-work associates often had few options other than lower-wage contract or staff attorney positions, and legal process outsourcers had greater access to licensed lawyers with legal process experience and a need for work.

Burk & McGowan*, supra* note 138, at 91-92 (footnote omitted).

268. *See* LoPucki & Doherty, Fees, *supra* note 9, at 108–12. LoPucki and Doherty did not find any significant difference in expenses when lead counsel weren't based in the region, but out-of-town counsel taking the lead seems to me to be an automatic accelerator for fees.

local offices. Perhaps, too, at the time of the hearing on the employment application, the party in interest seeking approval of a professional's appointment should have to explain the process by which it chose to proffer that particular professional.[269] Because those non-local professionals might trigger the need for local professionals as well, it's not a bad idea to start with the presumption that local professionals are sufficient.[270] "Local," after all, can include national professionals with local branches.[271] If there's a reason to look outside the local market, the party-in-interest should be able to explain it to the court.

B. Attendance at Hearings and Meetings; the Use of Multiple Professionals Generally

> *How many attorneys does it take to change a light bulb? Let's see. One to check the socket. Another to order the bulb. Three or four to do research on how to change a bulb. Another to write a memo about how to do it. And still another to proof-read the memo. One to twist in the bulb. Somebody to advise the bulb twister. Two more to serve as witnesses. Another to stand by if needed. And one or two to write a memo to file about the operation. Or, as some frustrated clients might complain, as many as the attorneys can persuade the client to pay for.*[272]
>
> —WILLIAM G. ROSS, THE HONEST HOUR

> *A review of the record reveals that, on average, there were five to six attorneys representing the Debtors at every hearing during the period covered by the first interim fee applications.*[273]
>
> —*In re* Fleming Cos.

Clients place limits on staffing outside bankruptcy,[274] so I find it hard to believe that they (or bankruptcy courts) couldn't place limits on staffing in a bankruptcy case.[275]

269. For example, a creditors' committee could explain that it sought bids for fees from several law firms. *See* Lee, *supra* note 145. The DIP could walk the court through the process by which it chose the proffered DIP counsel.

270. *Cf. In re* ACT Mfg., Inc., 281 B.R. 468, 487 (Bankr. D. Mass. 2002) (commenting that out-of-state lawyers should delegate certain tasks to local counsel in order to generate significant cost savings to the estate).

271. *See In re* R & B Institutional Sales, Inc., 65 B.R. 876, 885 (Bankr. W.D. Pa. 1986) (holding that the fee application by the creditors' committee's accountant was "completely unacceptable" because "[a] multitude of accounting firms having local offices would have been more than competent" to do the work done by that out-of-state firm).

272. ROSS, THE HONEST HOUR, *supra* note 22, at 99.

273. *In re* Fleming Cos., 304 B.R. 85, 91 (Bankr. D. Del. 2003).

274. *See* ROSS, THE HONEST HOUR, *supra* note 22, at 106 ("Exxon Company U.S.A.'s guidelines provide that the 'law firm should limit the number of attorneys attending routine meetings, depositions, or court proceedings to only those essential to the performance of the task.'"); *see also Outside Counsel Guidelines*, WAL-MART STORES, INC. 13 (2007), http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=

In fact, the United States Bankruptcy Court for the Northern District of California's Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees has codified its expectations: "Professionals should be prepared to explain the need for more than one professional or para-professional from the same firm at the same court hearing, deposition or meeting. Failure to justify this time may result in compensation for only the person with the lowest billing rate."[276]

Another issue is whether every party-in-interest needs its own set of experts, or whether the jurisdiction could establish some norms creating a "lead" expert and then employing experts for other parties-in-interest for the limited purpose of reviewing and critiquing the lead expert's work.[277] Better yet, the court could appoint its own experts, who are less likely, as we say in Texas, to "have a dog in the hunt."[278] As the court said in *In re High Voltage Engineering Corp.*,[279] "[t]he intention is to avoid accountants and investment bankers/advisors massaging the same numbers twice when one trip to the masseuse would generally suffice."[280]

It's easy to see why there's a proliferation of advisors and experts in big cases: when one group gets them, the other groups think that they're disadvantaged if they don't have their own.[281] That's what happened in the *Energy Partners* case:

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security/getfile&pageid=40433&title=Wal-Mart%20Outside%20Counsel%20Guidelines ("[o]utside Counsel should limit the number of attorneys attending routine meetings, hearings and court proceedings to those essential to the performance of the task. Unless otherwise approved in advance, the Company will not pay for more than one attorney to attend a trial, motion hearing, meeting or deposition.").

275. Unfortunately, too often neither the client nor the court can grapple effectively with the problem of out-of-control fees and expenses. *See* Nelson D. Schwartz & Julie Creswell, *Who Knew Bankruptcy Paid So Well?*, N.Y. TIMES, May 2, 2010, at BU1 (reporting that the firm overseeing Lehman's bankruptcy used 150 people and billed between $13 million to 18 million in fees per month from 2008 to 2010. In June 2009, Kenneth Feinberg was appointed to review the fees in the *Lehman* case.). There are too many roadblocks in our current system of fee review, especially when it comes to large chapter 11 cases.

276. BANKR. N.D. CAL. COMPENSATION GUIDELINES 16 (2011), http://www.canb.uscourts.gov/print/446/. Those same Guidelines require the professionals to submit their bills to their clients on a monthly basis and at least 20 days before any fee application hearing. *Id.* at 7.

277. *See* A.B.A. SECTION OF BUS. LAW. BUS. BANKR. COMM., *First Report of the Select Advisory Committee on Business Reorganization*, 57 BUS. LAW. 163, 205 (2001) [hereinafter *SABRE Report*] (discussing a proposal for court-appointed independent financial/business experts on which all parties in interest shall rely, "unless a party in interest demonstrates a compelling reason why separate experts for separate parties should be appointed" in order to promote the sharing of neutral business information).

278. *Id.* When I've done fee reviews (as opposed to when I've testified about the reasonableness of fees), I've done so as the court's appointed expert. Michelle Harner has suggested a similar idea. *See generally* Michelle M. Harner, *Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives,* 16 AM. BANKR. INST. L. REV. 69, 108 (2008) (exploring the possibility of a neutral fiduciary representing the bankruptcy estate).

279. *In re* High Voltage Eng'g Corp., 311 B.R. 320 (Bankr. D. Mass. 2004).

280. *Id.* at 334 (quoting *In re* Drexel Burnham Lambert_Group, Inc., 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991)). Energy Partners quoted that sentence, too. *In re* Energy Partners, Ltd., 409 B.R. 211, 235 (Bankr. S.D. Tex. 2009).

281. *See id.* at 220 (rejecting fee applications from two investment banks hired by the equity holders' committee and unsecured creditors' committee, respectively, where valuations had already been prepared for each committee because "[t]he primary driver of this application is the recent formation of the Equity Committee and their announced intention to hire a valuation consultant and, at a minimum, engage in discussions about valuation and the potential for litigation over valuation . . . ."). Professor Harner found in a recent study that, "*[o]f [148] cases, 98 (68.5 percent) involved multiple lawyers and financial advisers.* The

> *Oblivious to recent congressional and public criticism over executives of publicly-held corporations who are paid monumental salaries and bonuses despite running their companies into the ground, two investment banking firms now come into this Court requesting that they be employed under similarly outrageous terms. They do so because two committees in this Chapter 11 case have filed applications to employ these investment banking firms to perform valuation services even though two other independent firms have already performed similar valuations.*[282]

If we could move to a system in which the court appoints its own experts—or if we could figure out a way to employ a "lead" expert for one party and "reviewing" experts for everyone else—we would be able to reduce the duplication of effort.[283]

C. Increases in Hourly Rates

Every application for employment that I can recall over the past five years has included a statement to the effect that the professional reserves the right to increase fees on a regular basis, often without additional notice to the court.[284] What the applications for employment and the subsequent fee increases don't indicate, though, is what happens to those increased rates for clients outside of bankruptcy. According to the ACC-Serengeti survey,

> *Over the last decade, the annual increase in law firm hourly rates has fallen dramatically from over 9% in 2000 to this year's increase of 1.48%, the lowest in the survey's history. Furthermore, in-house counsel predict that this record will hold at least for the coming year—projecting on average an annual increase of only 1.52%. These numbers clearly show the impact that in-house counsel and a weak economy are having on their law firms' power to increase revenues each year simply by raising their rates.*[285]

The slowdown (or decline) in hourly rate increases over the past decade[286] is a result of increased client bargaining power.[287] Theoretically, debtors in possession or

retention of a financial adviser did not significantly impact the returns to unsecured creditors or the likelihood of the debtor reorganizing." Michelle M. Harner, *The Potential Value of Dynamic Tension in Restructuring Negotiations,* 30-FEB AM. BANKR. INST. J. 1, 63 (2011) (footnotes omitted and emphasis added).

282. *In re* Energy Partners, Ltd., 409 B.R. at 215.

283. *See SABRE Report*, *supra* note 277, at 207 (asserting that "neutral experts should reduce costs, duplication of efforts, and litigation over divergent recommendations urged by partisan experts for competing parties").

284. *See* 11 U.S.C. § 330(a)(1) (for Chapter 11 fees, the statute requires only initial notice to parties in interest, the United States Trustee, and the court).

285. *See* ACC-SERENGETI SURVEY, *supra* note 144, at 18.

286. The ACC-Serengeti Survey compared the projected and actual annual hourly rate increases in this chart:

creditors' committees would have some bargaining power as well, but because of the "other people's money" problem, there's less insistence on holding the line on hourly rate increases.[288] Nothing prevents a jurisdiction, though, from creating norms on how often hourly rates should increase or what type of proof a professional should have to put on in order to receive permission for an increase.[289]

The Office of the United States Trustee has seen this "rate creep" coming:

> *Thus, fees in bankruptcy may not reflect what firms earn in non-bankruptcy engagements. Every fee application lists the professionals and their regular billing rates. No doubt these are the rates that the firms would like to charge their clients. There is an entire body of literature and substantial evidence showing how corporate counsel can — and do — negotiate with outside counsel to lower the cost of representation. A corporate client's regular negotiation and control of fees outside bankruptcy often break down when retaining reorganization professionals because, among other reasons, a potential debtor is not in a strong negotiating posture when engaging bankruptcy counsel. If every large firm is quoting essentially the same fee structure, deciding who[m] to retain will likely turn on factors other than fees. This is particularly true where the debtor will not have post-confirmation operations that would benefit from lower fees.*[290]

Year (of Rate Increases)	Projected Increase	Actual Increase
2000	Not available	9.27%
2001	5.57%	6.28%
2002	5.19%	5.44%
2003	3.57%	5.02%
2004	2.95%	5.74%
2005	4.14%	5.15%
2006	4.76%	5.95%
2007	5.28%	6.47%
2008	5.02%	4.76%
2009	0.00%	1.48%
2010	1.52%	tbd

Id. at 21.

287. Karen Sloan, *Billing Blues; The New Normal: Billing Rate Increases of 5% or Less; Continued Pricing Pressure From Clients Means Firms Are Limited to Modest Yearly Rate Increases*, 33 NAT'L L.J. 1 (2010), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202475696179&slreturn=1 (reporting that several law firms and consultants "expect pricing pressure from clients to remain high for the foreseeable future, thus limiting the ability of firms to fall back on across-the-board rate increases upwards of 5%").

288. *See supra* notes 113-25 and accompanying text. *But see, e.g.*, Fee Examiner's Twelve-Month Report and Summary of Responses to Fourth Interim Fee Applications at 6, *In re* Motors Liquidation Co., No. 09-50026 (Bankr. S.D.N.Y. Dec. 9, 2010) (objecting to large increases in hourly rates).

289. *See* FED. R. BANKR. P. 9029(a)(1) (allowing each district to create local rules).

290. White & Theus, *supra* note 62, at 79 (footnote omitted). A friend of mine who is both a lawyer and a turnaround expert in a number of high-profile cases has suggested that the increase in fees due solely to rate increases is likely significant.

To help a court review any increase in hourly rates, the professionals should place those increases in context.[291] Many of these professionals are in organizations that routinely accede to fee reduction requests by inside counsel.[292] How, then, can a law firm say in its fee application that its firm has raised its hourly rates without also saying how many of its clients outside bankruptcy are actually paying the non-discounted hourly rates?[293] A norm that sets out what evidence the professional needs to introduce[294] will clarify the difference between a true market rate and an Enronesque faux mark-to-market fantasy.[295]

291. *Cf. In re* Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 855 (3d Cir. 1994) (under section 330(a), reasonable compensation turns on "the nature and value of the services, as measured by the cost of comparable services"). The Third Circuit discussed reasonableness determinations by placing them in context:

> As another basis for adjudging the reasonableness of charges for services, upon appointment or selection of the debtor's counsel a bankruptcy court might request that counsel provide the court with a confirmed, detailed schedule of fees which counsel actually charges to bankruptcy clients, and where possible to non-bankruptcy clients as well, including the types of paralegal services for which he or she bills and the rates therefor, before he or she commences representing the debtor.

Id. at 854–55 (citing § 329(a)). The proof that the professional puts on should include comparisons to the hourly rates charged by non-bankruptcy professionals in the firm. *See, e.g.*, *In re* Fleming Cos., 304 B.R. 85, 92 (Bankr. D. Del. 2003). The professional should include information not just on the "rack rate" that the firm charges but also the hourly rate that the firm's clients *actually* pay. *In re* Busy Beaver Bldg. Ctrs., Inc., 19 F.3d at 855–56. *Cf.* Proposed Guidelines, *supra* note 24, at C.7. Of course, the one type of increase that clients both inside and outside bankruptcy cases never seem to notice is the increase that comes from yearly promotions. If an associate is promoted without having really acquired the skill set that the promotion represents, there's a lag between the promoted associate's new billing rate and his skill set.

292. The Association of Corporate Counsel/Serengeti report stated:

> In-house counsel state that they "frequently" reduce legal bills for what they perceive to be time not well spent, as well as for administrative problems with bills, specifically in order of priority: overstaffing at hearings/meetings, administrative work/filing/organization, time billed to the wrong matter, unauthorized hourly rates/rate increases, time billed to wrong matter, and duplicate invoices. The most common bill reductions that in-house counsel make "occasionally" are for: over-staffing at hearings, meetings, etc.; startup work/file review; unauthorized personnel/personnel don't add value; billed amount exceeds the value; and bill exceeds budget/plan.

ACC-Serengeti Survey, *supra* note 144, at 28–29.

293. Firms aren't raising rates significantly these days:

> The average firmwide billing rate–a combination of associate and partner rates- increased by 2.7% in 2010, according to The National Law Journal' s annual survey of hourly billing rates. It's the second straight year of growth rates less than 3%, which is a far cry from the standard 6% to 8% increases from 2004 until 2008 and just slightly higher than the rate of inflation.

Sloan, *supra* note 287. Some firms are even cutting their rates. *See, e.g.*, Brian Baxter, *MF Global Creditors Hire Dewey, Hughes Hubbard Seeks Expenses,* Am. Law Daily (Nov. 9, 2011) (law firm is willing to cut its hourly rates by 10%), *available at* http://amlawdaily.typepad.com/amlawdaily/2011/11/mf-global-dewey.html.

294. The Proposed Guidelines require the professional to answer several questions about the basis for hourly rates as well as their collectability. *See* Proposed Guidelines, *supra* note 24, at C.7.

295. *See In re* Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 622–23 (S.D. Tex. 2002); *see also* Enron: Corporate Fiascos and Their Implications 108–09 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (describing how Enron divisions that used mark-to-market accounting showed profits, but divisions that used other methods showed no profits).

D. Improper Leverage

> *Nor do we approve the wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals or less experienced associates. Routine tasks, if performed by senior partners in large firms, should not be billed at their usual rates. A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn.* [296]
>
> —Ursic v. Bethlehem Mines

In an ideal world, work allocation would go to that professional with exactly the experience and skill set to handle the assignment. (That would be why first-year associates are best delegated to doing research, rather than to negotiating complex cash collateral stipulations, and why paralegals are better at a lot of tasks than are first-year associates.)[297] To give a newer professional more experience and a bigger skill set, a more senior person can review and supervise the work.[298] Based on the information that the ACC Value Challenge has on its website, clients can and do force their lawyers to pay attention to staffing decisions, and several of them refuse to pay for junior associates' work.[299]

That kind of across-the-board limitation is too extreme for bankruptcy cases, and it would exacerbate the problems that law firms face now with determining how to pay for the training of their associates. If clients aren't paying for the work of junior associates, money for training will have to come out of the firm's coffers. But jurisdictions could establish norms for when professionals should use senior employees and when they should use junior ones, as well as when senior employees should delegate work to the juniors, reserving more of the supervisory functions for themselves.[300]

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296. Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983); *see also* Stevens, *supra* note 60 (describing an associate's 6.5 hour time entry for "preparing closing room," which meant that the associate charged $245 per hour to put documents on tables and make sure that there were appropriate supplies).

297. *See* Ross, The Honest Hour, *supra* note 22, at 89, 187 (stating that lawyers have "an ethical obligation to try to assign projects to lawyers whose billing rates reflect the level of expertise that is needed on a case" and that "[t]here is nothing unethical about billing clients for paralegal time").

298. *See id.* (stating "the use of associates to draft pleadings with continuing supervision and final approval by an experienced attorney is a fee reducing measure which should be encouraged") (quoting McPherson v. Sch. Dist. No. 186, 465 F. Supp. 749, 757 (S.D. Ill. 1978)).

299. *Cf.* Claire Zillman, *Law Firm Leaders Survey 2010 The New Normal*, Am. Law. (Online) (Dec. 1, 2010) (reporting on a recent survey of law firm leaders, in which "nearly 47 percent of respondents said that clients have refused to pay for work done by first- or second-year associates"); *see also* David Segal, *What They Don't Teach Law Students: Lawyering,* N.Y. Times (Nov. 20, 2011), *available at* http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=3&pagewanted=1&ref=business (recapping Am. Law. survey).

300. *See supra* note 298.

E. The Issue of Enhancements and Bonuses

> *Legal auditor John J. Marquess contends that premium billing is perverse since a client has a right to expect that a lawyer will always do the very best job possible. He points out that a medical patient would flee in horror from a physician who sought $10,000 for an operation and $20,000 for a successful operation.*[301]
>
> —WILLIAM G. ROSS, THE HONEST HOUR

> *It is self-evident that a high hourly rate presumes high quality work. To augment the lodestar on the basis of a "quality" factor, counsel must demonstrate either service or a result of an exceptional nature.*[302]
>
> — Ursic v. Bethlehem Mines

The issue of whether court-appointed professionals should seek bonuses for doing their job is still up for grabs. Some courts have disallowed bonuses;[303] others have permitted them when they find extraordinary circumstances.[304] The fights about bonuses often involve a combination of wildly successful work and excess assets—not surprising, since no one's going to spend time asking for bonuses where there are no assets left to pay them.[305] Perhaps the best way to deal with when, if ever, bonuses make sense is to establish the norm that treats a bonus like a pre-approved success fee.[306] If a professional is planning a "Hail Mary pass,"[307] that professional could ask the court for pre-approval of an enhancement to the fee if the miracle

301. *See* ROSS, THE HONEST HOUR, *supra* note 22, at 240 (citing John J. Marquess, *Legal Audits and Dishonest Legal Bills,* 22 HOFSTRA L. REV. 637, 638 (1994)).

302. Ursic v. Bethlehem Mines, 719 F.2d 670, 674 (3d Cir. 1983).

303. *See, e.g.*, Perdue v. Kenny A. *ex rel* Winn, 130 S. Ct. 1662, 1673 (2010) (articulating the standard for awarding enhanced fees in a non-bankruptcy case as requiring "rare" and "exceptional" circumstances) (internal citation omitted).

304. *See, e.g.*, Joel Millman, *Baker Botts Fees Upheld in Asarco Case,* WALL ST. J., Aug. 22, 2011, at B2 (awarding a bonus of $4 million for "exceptional results that were unanticipated at case commencement").

305. *Cf. In re* Manoa Fin. Co., 853 F.2d 687, 691 (9th Cir. 1988) (stating that there is less risk for an attorney in a bankruptcy case than in a true contingent fee arrangement because "the risk of nonpayment in bankruptcy cases generally arises only in the event of insufficient funds in the estate to pay for the services rendered").

306. *See In re* Intelogic Trace, Inc., 188 B.R. 557, 560 (Bankr. W.D. Tex. 1995) (analogizing a success fee in bankruptcy to the incentives that induce lawyers to take on contingency fee cases); *see also In re* XO Commc'ns, Inc., 398 B.R. 106, 112 n.8 (Bankr. S.D.N.Y. 2008) (distinguishing a success fee from a bonus because courts award success fees as they would approve any other transaction fees, but they award a bonus only if a professional achieves a "rare and extraordinary" outcome).

307. A "Hail Mary" pass is "a long pass thrown high into the air in a last-ditch attempt to score a touchdown with time running out; aptly named because so few are completed, it does not amount to much more than a prayer." FOOTBALL MADE SIMPLE: A SPECTATOR'S GUIDE 116 (4th ed. 2002) (emphasis omitted).

result is achieved. A big win would mean an earned enhancement.[308] Of course, not all Hail Mary passes work. Therefore, the court could also create a mechanism for reviewing the fees for the failed Hail Mary passes so that they're not automatically disallowed. Norming what constitutes the type of exceptional work deserving of an enhancement avoids the bait-and-switch that comes with a professional who argues, at the end of the case, "Hey, I cut my rate to take this matter and then did such a good job that nobody could have predicted it."[309]

The point of asking for bonuses is that, for some situations, the professional doesn't think that his hourly rate has fairly compensated him for his groundbreaking work.[310] In the old(er) days, hourly rates were just the starting point, and bills were adjusted for exceptional results.[311] Personally, I'm torn. Some cases (very, very few of them) involve results that truly are spectacular and entirely unexpected; on the other hand, the professionals who get those results already tend to demand high hourly rates.[312] Maybe the right test is some variation of pulling something other than a mere rabbit out of a hat.[313] But giving the court a chance to think about the possibility of an extraordinary result in advance—and to rule in advance on what a fair bonus would be—is a good start.

308. *See e.g.*, *In re* Aminex Corp., 15 B.R. 356, 358 (Bankr. S.D.N.Y. 1981) (awarding a premium to professionals when "there was scarcely any reason to believe that the debtors would survive," and "three and one-half years later, these Chapter XI cases have been confirmed, [and] the total assets of the estate amount to $20.9 million . . . and the plans, as confirmed, provide for one-hundred percent payment to creditors") (footnote omitted).

309. Not only do I personally have a problem with a professional who sets his rate at a fair price and then asks for a bonus at the end, *see* Rapoport, *Rethinking Fees, supra* note 8, at 283–84, but I think that the Supreme Court does, too. *See* Perdue v. Kenny A. *ex rel* Winn, 130 S. Ct. 1662, 1673 (2010). As the Supreme Court indicated in *Perdue,* the awarding of a bonus should be an exceptionally rare occurrence. *Id.*

310. *Cf.* In re Bigler, 422 B.R. 638, 643 (Bankr. S.D. Tex. 2010) (approving the fee application of the Debtors' Chief Restructuring Officer, who overcame the court's "presumption of unreasonableness in any proposed retention by a professional who requires a tail period in addition to the other requested categories of compensation—such as, for example, a monthly fee in a fixed amount").

311. As Professor William Ross points out,

> Perhaps the most viable form of billing would be a system in which hours are used as the basis of the bill, but are adjusted to reflect the quality of the work and other special circumstances. Such a system is anything but novel. . . . [T]his is the system originally envisioned by the law firm management experts who advocated time keeping, and it was the system that most attorneys used during the years in which hourly billing was becoming prevalent. Only in recent years have attorneys begun to base their bills solely on billable hours.

Ross, The Honest Hour, *supra* note 22, at 246.

312. *See* Proposed Guidelines, *supra* note 24, at B.4.n. (requiring "the applicant [to identify] any facts or theories that, outside of bankruptcy, would enable a professional to compel its client to pay a professional fee in excess of the contractual amount due").

313. *See* Rapoport, *Rethinking Fees, supra* note 8, at 283 n.84 (remarking that "pulling a rabbit out of a hat at the price at which one regularly pulls rabbits out of hats shouldn't trigger a bonus; however, pulling a rhino out of that hat perhaps should merit one").

F. The New Proposed U.S. Trustee Guidelines—The Start of a Fix for the Problem

Recently, the Office of the U.S. Trustee promulgated new draft Guidelines (the "Proposed Guidelines").[314] The comment period ends on January 31, 2012. I have filed comments suggesting some tweaks to the proposed Guidelines. But, on the whole, these Proposed Guidelines represent a marked improvement over the present ones. Here's how the Office of the U.S. Trustee describes the major changes:

> 1. ***Electronic Data:*** *Fee applications should be submitted in an open electronic data format. The use of electronic billing has become common, if not standard, with respect to most significant engagements outside of bankruptcy. This requirement would impose little or no additional burden on applicants.*
>
> 2. ***Categories and Tasks:*** *To more precisely capture key actions in a bankruptcy case, new project categories, as well as activity-based sub-categories, have been added. These additions are generally consistent with the Uniform Task-Based Management System ("UTBMS") Bankruptcy Code Set and other codes developed or ratified by the UTBMS governing bodies.*
>
> 3. ***Verified and Other Statements:*** *Clients should provide verified statements in connection with a fee application to disclose, among other matters, whether the client reviewed fees and compared them to its approved budget, whether the attorney and client discussed billing rates and terms compared to the attorney's other engagements, and whether the client gave prior approval for any rate increases.*
>
> *Further, attorneys should answer specific questions regarding, among other matters, billing rates for other engagements, whether the attorney offered and agreed to any variations from standard rates, and whether the application includes any entries for reviewing and redacting billing records for privileged information.*
>
> *Attorneys also should answer additional questions in conjunction with the retention application that could affect future applications for compensation, including whether the attorney informed the client how fees and terms for the engagement compare to the firm's other engagements and whether any firm client was charged lower or higher rates in the preceding 12 months.*

314. *New Proposed Fee Guidelines*, DEP'T OF JUSTICE, Mar. 1, 2012, http://www.justice.gov/ust/eo/rules_regulations/guidelines/proposed.htm.

4. ***Budgets and Staffing Plans:*** *To bring predictability and accountability to the attorney-client relationship, and to provide a benchmark for evaluating fee applications, budgets and staffing plans will be encouraged.*

5. ***Additional Disclosures:*** *For all professionals included in a fee application, the United States Trustee will seek disclosure of the lowest, highest, and average rates billed for the preceding year for estate-paid bankruptcy work and for all other work combined. The United States Trustee will also seek disclosure of information by professional category (e.g., partner, associate, etc.) about a firm's lowest, highest, and average rates for the preceding year in its bankruptcy practice and all its other practices combined, if any. Applicants should also disclose the amount of fees attributable to any rate increases since the inception of the case. Applicants representing debtors should estimate the fees sought that would have been incurred regardless of the bankruptcy.*

6. ***Special Fee Review Procedures:*** *The proposed guidelines set forth models and principles for the use of independent fee examiners, fee committees, and fee committees with independent chairs.*[315]

The Proposed Guidelines also suggest some standards for disclosures made in conjunction with employment applications.[316] There are some quirks in these guidelines, though: they're meant only for the larger Chapter 11 cases—those in which "the debtor's scheduled assets and liabilities combined exceed $50 [m]illion (aggregated for jointly administered cases)"[317]—and they only apply to "attorneys appointed under section 327 or 1103"[318]—not to other professionals (accountants, financial advisors, etc.) appointed under those sections, or to requests for reimbursement of expenses under section 503(b)(3), or to requests for compensation under section 503(b)(4).[319]

315. *Id.*

316. Proposed Guidelines, *supra* note 24, at 2 ("Because terms and conditions of employment approved by the court when the professional is retained will often affect later applications for compensation, these Guidelines also address disclosure of information in applications for retention filed under sections 327 and 1103 of the Code."); *see also id.* E. at 14-15 (requiring additional information concerning the attorneys' rates).

317. *See id.* at 1 (limiting the applicability of the Proposed Guidelines to these larger cases).

318. *Id.*

319. Draft guidelines for other professionals in large Chapter 11 cases may come later. *See* White, *supra* note 170, at 3.

Although reimbursement of expenses under section 503(b)(3) and requests for compensation under section 503(b)(4) aren't reviewed in quite the same way as are requests for fees and expenses under section 330, the concept of reasonableness still applies, and the documentation that the Proposed Guidelines would require would certainly assist a court in determining whether to grant section 503(b)(3) or (b)(4) requests.

1. The Improvements.

The Proposed Guidelines focus on whether the fees that attorneys are seeking are reasonable, in part, by "compar[ing them] to the market measured both by the professional's own billing practices for bankruptcy and non-bankruptcy engagements and those of its peers and whether the applicant provided sufficient information to evaluate comparability."[320] Moreover, the Proposed Guidelines crack down on overstaffing and improper leverage issues,[321] address the issue of fee increases requested during the duration of the case,[322] and request additional information when some of the professionals billing time worked on the case for only a few hours (thus triggering ramp-up time that might not be compensable).[323] In addition, they set a cap on the amount of time that may be lumped together (.5 hours),[324] and they clarify that billing descriptions like "review file" will generally be considered to be too vague to be compensable.[325] They also clarify that summer associates' time is generally not compensable.[326] In those cases for which attorneys are seeking fee enhancements, they require the attorneys to "identif[y] any facts or theories that, outside of bankruptcy, would enable a professional to compel its client to pay a professional fee in excess of the contractual amount due."[327]

The Proposed Guidelines also create new client-approved budgeting requirements: simply requiring a budget at all is a good start, and these guidelines go even farther by requiring attorneys to explain budget variances of more than 10%[328] and requiring clients to submit verified statements "regarding [their] budgeting, review, and approval process for fees and expenses."[329] To make the review of fees easier, the Proposed Guidelines require submission of the detailed billing statements in "an open electronic data format that is searchable."[330] To help

320. Proposed Guidelines, *supra* note 24, B.4.a. at 4; *see also id*. C.7. at 10-11 (requiring attorneys, in their fee applications, to answer certain questions about their rates).

321. *Id.* B.4.b.; *see also id*. C.5.g. at 9 ("If more than one professional from the applicant firm attends a hearing or conference, the applicant should explain the need for multiple attendees.")

322. *Id.* B.4.c.; *see also id*. C.m. at 8 ("The effect of any rate increases since the order approving retention on the fee application. That is, if a professional has increased rates during a case, the total compensation sought in the fee application (interim and final) should be calculated for comparison purposes under originally approved rates and current rates. The application should also indicate who approved the rate increase(s) for the client and when.").

323. *Id.* B.4.c.; *see also* discussion of the use of "spot professionals" *supra* note 200.

324. *Id.* B.4.f.; *see also id*. C.5.c. at 9 ("A disproportionate number of entries billed in half- or whole-hour increments may indicate that actions are being lumped or not accurately billed."); *id.* C.5.d. ("Services should be described in detail and not combined or "lumped" together, with each service showing a separate time entry; however, tasks performed in a project which total a de minim[i]s amount of time can be combined or lumped together if they do not exceed .5 hours on a daily aggregate.").

325. *Id.* B.4.g.

326. *Id.* B.4.o. at 6.

327. *Id.* B.4.n. at 6; *see also id*. C.6. at 10 (providing more detail about the new budget requirements).

328. *Id.* B.4.l. at 5.

329. *Id.* B.4.m. at 5; *see also id*. C.8. at 11-12 (requiring clients to file verified statements regarding their budgets and their attorneys' compliance with their budgets).

330. *Id.* C.2. at 7.

the court determine which of the fees and expenses are purely attributable to the bankruptcy case and which ones would have occurred absent any bankruptcy, the Proposed Guidelines require the debtor's attorneys to estimate the latter as part of their fee applications.[331] Finally, and near and dear to my heart, the Proposed Guidelines also establish some parameters for when fee review committees or fee examiners should be used.[332]

2. Where the Proposed Guidelines Still Fall Short.

The biggest beef that I have with the current guidelines is the same beef that I have with the Proposed Guidelines: there are no consequences for failing to comply.[333] Sure, the U.S. Trustee can object to any fee applications that violate the guidelines, but nothing in the current or new guidelines links a failure to comply with any particular reduction in fees or expenses. Take a look:

Proposed Guideline	**What Would Constitute Non-Compliance?**	**Consequence for Non-Compliance**
B.4.a.	Insufficient proof of market rate, both in terms of hourly rates for bankruptcy work and for nonbankruptcy work.	None.
B.4.b.	Overstaffing or leverage issues.	None.
B.4.c.	Surprise rate increases during case.	None.
B.4.d.	Spot-use of professionals for only a few hours.	None.
B.4.e.	Billing for non-compensable activities.	None.
B.4.f.	Block-billing.	None.
B.4.g.	Vague entries.	None.
B.4.h.	Billing for overhead.	None.
B.4.g.	Non-working travel billed at full rate.	None.
B.4.l.	Failure to comply with appropriate budgets and staffing plans.	None.

331. *Id.* C.3.n. at 8.

332. *Id.* F. at 16–18 (describing the various options for fee reviewers, what their duties should include, and how they should be compensated). There are some ambiguities in this section of the Proposed Guidelines. For example, I *think* I know what the Proposed Guidelines mean by "[f]ee examiners and professionals retained by a Fee Review Committee should not be subject to any monthly compensation processes otherwise applicable in the case," *see id.*, but I'm not positive that I do.

333. Courts could, of course, fix this problem by adopting local rules that provide specific consequences for violations of their guidelines.

B.4.m.	Failure to provide verified statement by client concerning compliance with budget and staffing plans.	None.
B.4.n.	Failure to prove theory for entitlement to fee enhancement.	None.
B.4.o.	Billing for summer associate time.	None.
B.5.a.	Failure to prorate expenses.	None.
B.5.b.	Luxury travel.	None.
C.3.m.	Failure to calculate fees based on both original rates and any increased rates; failure to include information on who approved the rates.	None.
C.3.n.	For debtors only: failure to separate out those fees and expenses that would have been incurred even absent any bankruptcy.	None.
C.5.e.	Time records not kept contemporaneously.[334]	None.
C.5.g.	Failure to explain the need for multiple professionals at hearings.	None.

Without some well-defined consequences, there's simply no incentive for professionals to take the time to comply with the guidelines—either the current ones or the Proposed Guidelines.

Some regions' guidelines do spell out consequences, demonstrating that it's possible, at least for courts, to create compliance incentives. For example, the guidelines for the United States Bankruptcy Court for the Northern District of California link the failure to explain the need for multiple professionals at hearings with the risk that the court will allow compensation only for the lowest biller at the hearing.[335] It's just a risk, not a guarantee, but at least it's a potential consequence for noncompliance. The Proposed Guidelines could set presumptive penalties for non-compliance, such as an automatic reduction of 25% of all block-billed fees. Without consequences, there's no downside to doing a less-than-thorough job on fee applications.

334. I have to admit to some skepticism in those situations in which I've identified block-billing that goes back several months and the professional is suddenly able to resurrect, down to tenths of an hour, the "unlumped" time.

335. BANKR. N.D. CAL. COMPENSATION GUIDELINES 16 (2011), http://www.canb.uscourts.gov/print/446/.

Even if the Proposed Guidelines did provide specific consequences for non-compliance, there would still be some open questions. First, why limit the Proposed Guidelines only to attorneys?[336] Even if most other professionals have compensation schemes approved under section 328, all fees have to be reasonable under either section 330 or under section 503(b). If these Proposed Guidelines are useful for reviewing attorneys' fees, why aren't they useful for reviewing all other professionals' fees as well?

Second, there will be some unnecessary gaps between fees reviewed under the old Guidelines and those reviewed under the Proposed Guidelines.[337] The Proposed Guidelines carve out the situations in which the old Guidelines will still apply: "Until the USTP adopts other superseding guidelines, the 1996 guidelines will continue in effect for the review of applications filed under section 330 in (1) larger chapter 11 cases by those seeking compensation who are not attorneys, (2) all chapter 11 cases below the $50 million threshold, and (3) cases under other chapters of the Bankruptcy Code."[338] That carve-out leaves us with a problem that I can illustrate with this table:

Current Guidelines	**Proposed Guidelines**
All professionals (if they must seek court approval for their fees) in Chapter 11 cases up to, but not more than, $50 million in combined assets and liabilities, aggregated for jointly administered cases.	All *attorneys* (if they must seek court approval for their fees) in Chapter 11 cases with more than $50 million in combined assets and liabilities, aggregated for jointly administered cases.
All non-attorney professionals (if they must seek court approval for their fees) in Chapter 11 cases with more than $50 million in combined assets and liabilities, aggregated for jointly administered cases.	
All professionals (if they must seek court approval for their fees) in cases under Chapters 7, 9, 12, or 13.	

Third, although submitting bills in an electronic, searchable format is extremely helpful, it would be better yet for the bills to be submitted both in a searchable PDF

336. If other draft guidelines are coming later on, then eventually this issue would resolve itself. According to Clifford White, those other guidelines are coming. *See* White, *supra* note 170, at 3.

337. Any new guidelines covering other professionals would eventually fix this issue as well.

338. *Id.* at 1.

and in an Excel spreadsheet. That way, courts, the U.S. Trustees, and fee examiners could reorganize the data in a variety of ways to get a better picture of the services rendered.

Still, the Proposed Guidelines represent an acknowledgment that employment applications and fee applications in the larger Chapter 11 cases present certain systematic issues that need attention. As such, they are a big step in the right direction. Combining the Proposed Guidelines with some locally established norms would be even better.

V. Conclusion

Bankruptcy fees in large Chapter 11 cases are big business, even in these difficult economic times.[339] Congress has long recognized that bankruptcy professionals deserve fair compensation for their work, and the fee application process is supposed to provide checks and balances to help a bankruptcy court determine whether the fees and expenses sought are reasonable. Given the staggering workload that bankruptcy courts face, there has to be a way to provide better benchmarks for that determination of reasonableness. Creating local rules that establish norms, providing alternative methods for setting the value of work done (other than merely using billable hours and the lodestar method[340]), and solidifying a link between the choices that professionals make in serving their clients and the bills that result from those choices should make the bankruptcy court's review of fees easier.[341]

339. Or maybe *because* of these difficult economic times. Right now, the bankruptcy business as a whole is booming, even if the large Chapter 11 cases are few and far between. *See, e.g.*, Debra Cassens Weiss, *Bankruptcy Boutiques Are* '*Quietly Booming*,' A.B.A. J. Online (Nov. 9, 2009, 2:42 PM), http://www.abajournal.com/news/article/bankruptcy_boutiques_are_quietly_booming/.

340. Perdue v. Kenny A. *ex rel* Winn, 130 S. Ct. 1662, 1669 (2010), defined "lodestar" as "the number of hours worked multiplied by the prevailing hourly rates." *See also* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."); *In re* Placide, 2011 WL 5341295. *7 (B.A.P. 9th Cir. 2011) ("A court computes the lodestar by multiplying the number of hours reasonably expended by a reasonable hourly rate." Lodestar, however, is not the only method of calculating a reasonable fee).

341. And setting norms before doing the work is a lot better than getting fees cut due to 20-20 hindsight. *See, e.g.*, *In re* Pro-Snax Distributors, Inc., 157 F.3d 414, 426 (5th Cir. 1998). In *Pro-Snax,* the Fifth Circuit decided that section 330 didn't just require a reasonable-at-the-time-of-doing-the-work analysis; it required the fee applicant to demonstrate that the work must have also "resulted in an identifiable, tangible, and material benefit to the bankruptcy estate." *Id.* I disagree with *Pro-Snax* because I believe that it unfairly penalizes professionals who made reasonable decisions but who eventually ended up losing. *Pro-Snax* makes professionals the guarantors of their own efforts. But I have a sneaking suspicion that the Fifth Circuit was trying to suggest that professionals need to do a cost-benefit analysis of their work throughout the case, and not just at the time the decision to do something is made.