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Client-Focused Management of Expectations for Legal Fees in Large Chapter 11 Cases

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CLIENT-FOCUSED MANAGEMENT OF EXPECTATIONS FOR LEGAL FEES IN LARGE CHAPTER 11 CASES

NANCY B. RAPOPORT

TABLE OF CONTENTS

Introduction .................................................................................................................. 40
I. The Framework ........................................................................................................ 42
II. Dynamics Affecting Fees in Large Chapter 11 Cases ........................................ 47
   A. The Choice of Professionals and the Challenges of Being Involved
      in "Bet the Company" Litigation .................................................................. 48
   B. Limited Information About the Context of the Work that the Estate-
      Paid Professionals Have Done .................................................................. 50
   C. Risk-Adverse Behavior When Representing Fiduciaries .......................... 56
   D. The Problem With Using Billable Hours as a Measure of Value to the Client .... 61
   E. Success Fees, Transaction Fees, and Other Ill-Defined Metrics that Get
      Triggered Later in a Case ........................................................................ 66
   F. Fear of Rocking the Boat ........................................................................... 69
III. Suggestions for Inside Counsel ........................................................................... 72
   A. Think Hard About Which Professionals to Hire ....................................... 72
      1. When to Hire "Bet the Company" Counsel and When to Divvy
         up Tasks Across a Variety of Different Counsel .................................. 72
      2. If At All Possible, Slow Down and Negotiate ...................................... 74
   B. Set Up the Rules of Engagement (and Enforce Them) ................................. 77
      1. Create the Ground Rules for Billing ...................................................... 77
      2. Pay Attention to Staffing and Workflow Issues .................................... 78
      3. Monitor the Budget .............................................................................. 81
      4. Set Ground Rules About Reasonable Expenses ................................. 83
      5. Consider Recommending the Appointment of a Fee Examiner or
         Fee Committee in the Case ................................................................. 84
   C. Bring Your Bankruptcy Counsel Into the Modern Era ............................... 85
      1. Use Legal Analytics ............................................................................ 85
      2. Suggest that Bankruptcy Counsel Use Artificial Intelligence for
         More Than Just Document Production Work ..................................... 88
IV. The As-Yet Unsolved Problem: the Lawyer-Development Pyramid
   is Built on Shaky Ground Now ....................................................................... 91
Conclusion .................................................................................................................. 92

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INTRODUCTION

Inside counsel have to manage expectations in a variety of ways. They need to provide guidance to their business units; they need to ensure compliance with a network of statutes and rules relating to their organization’s industry; and they need to monitor the work and the cost of their outside counsel. Many, if not most, inside counsel have worked in law firms and understand how legal work gets billed. But what happens when inside counsel find themselves in a situation in which many of the parties involved have little incentive or ability to examine and manage the costs of the professionals involved in the case? I’m speaking, of course, of chapter 11 bankruptcies.¹

In chapter 11 cases, professionals working for the debtor or the creditors’ committee—once their employment has been approved by the bankruptcy court—are paid out of a collective pool.² They’re either paid from general unsecured funds³ or they’re paid from a carve-out of a secured creditor’s collateral.⁴ When they’re paid

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¹ The fees and expenses in the larger cases can run into the hundreds of millions. See, e.g., Mark Chediak, PG&E Spent $127 Million in Bankruptcy Costs, Fees in Two Months, BLOOMBERG (May 2, 2019), https://www.bloomberg.com/news/articles/2019-05-02/pg-e-spent-127-million-on-bankruptcy-costs-fees-in-two-months (“PG&E] expects Chapter 11 costs for this year to range from $360 million to $430 million, according to a slide presentation posted online Thursday. The costs for the first quarter included $114 million in financing and $24 million in legal and other costs,’ offset by $11 million in interest income.”); see also Tom Corrigan, Joel Eastwood & Jennifer S. Forsyth, The Power Players That Dominate Chapter 11 Bankruptcy, WALL ST. J. (May 24, 2019), https://www.wsj.com/graphics/bankruptcy-power-players/ (“In the case of Lehman Brothers, the largest and most expensive chapter 11 in history, bankruptcy professionals took home more than $2.5 billion.”). Not all of these fees and expenses, though, are due to the costs of the bankruptcy itself. Some of them would have been incurred with or without a bankruptcy filing.


³ See 11 U.S.C. § 507(a)(2) (2012). They are, of course, paid as a high priority, before the regular general unsecured creditors get paid at all.

⁴ Here’s a nice explanation of how a carve-out works:

Secured creditors may also expressly consent to payment of certain costs and expenses of administering a bankruptcy estate from their collateral. Such administrative "carve-outs" are common in chapter 11 cases involving a debtor with assets that are fully or substantially encumbered by the liens of pre-bankruptcy lenders. As part of a post-petition financing or cash collateral agreement, a pre-bankruptcy lender may agree that a specified portion of its collateral can be used to pay administrative claims, such as professional fees and expenses incurred by a DIP, trustee, or official committee; statutory fees; or "burial" costs that may be incurred if a chapter 11 case is later converted to a chapter 7 liquidation.

from general unsecured funds, the normal relationship between client and counsel, in which counsel’s fees come directly from the client’s own funds, doesn’t exist. Instead, those payments come from a pot of money that is one step removed from the client’s pocketbook. Even when the funds come from a carve-out from a particular secured creditor’s collateral, that creditor might not have enough information to be able to monitor the fees and expenses incurred by all of the court-approved professionals in the case. The lack of an incentive (or the ability) to review professionals’ fees in a

In Chapter 11 bankruptcy cases . . . a secured creditor asserts a lien on the assets of a debtor’s estate. A carve-out provision is necessary and generally included in the parties’ negotiations to provide assurance to hired bankruptcy professionals that they will be paid if the debtor liquidates after they have incurred fees and expenses. A carve-out serves in effect to give a higher-priority security interest to the professionals over the secured creditors. Notably, the bankruptcy laws specifically give high priority to administrative expenses in bankruptcy proceedings, such as attorney fees. Without a carve-out from prepetition secured liens, a secured creditor with a blanket lien over all the debtors’ assets can prevent professionals who assisted in the bankruptcy from being paid . . .


5 When fees are paid from a carve-out, the secured creditor often watches the legal costs more closely and often sets fee caps or budgets to control costs. There is far less oversight when the fees are paid from general unsecured funds. See, e.g., Matthew Adam Brackner, Crowdsourcing (Bankruptcy) Fee Control, 46 SETON HALL L. REV. 361, 381–83 (2016) [hereinafter Crowdsourcing] ("Even generally sophisticated clients may not be sophisticated consumers of professional corporate bankruptcy services."); Clifford J. White III & Walter W. Theus, Jr., Professional Fees Under the Bankruptcy Code: Where Have We Been, and Where Are We Going?, 29 AM. BANKR. INST. J., Jan. 2011 at 22, 78 (quoting In re Armstrong World Indus. Inc., 366 B.R. 278, 281 n.2 (D. Del. 2007) (pointing out that most parties in bankruptcy "typically have no motive for objecting to other professionals’ fee petitions"); id. at 79 ("Outside of 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. 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."); Nancy B. Rapoport, Rethinking Fees in Chapter 11 Bankruptcy Cases, 5 J. BUS. & TECH. L. 263, 263–65 (2010) [hereinafter Rethinking Fees] ("Contrary to what some of my colleagues think, the process for awarding professional fees isn’t completely broken, but it suffers from a fundamental [problem] of its own: although professionals’ fees typically come from the pot of money left over to divide among unsecured creditors, there’s no easy mechanism to ensure that the fees stay reasonable. We all talk about the fact that the reasonableness of fees can be a problem, especially in the larger Chapter 11 cases, but we never do anything about it.") (footnotes omitted); Robert K. Rasmussen & Randall S. Thomas, Timing Matters: Forum Shopping by Insolvent Corporations, 94 NW. U. L. REV. 1357, 1369 (2000) ("Under the Bankruptcy Code, the debtor’s attorneys are paid from the firm’s assets, ahead of all prepetition, unsecured creditors. This payment scheme creates an agency problem—the managers hire the attorneys, but then have little incentive to monitor the amount of fees paid by the estate. Instead, the group that pays these fees is the debtor’s unsecured creditors.") (footnotes omitted); Cynthia A. Baker, Other People’s Money: The Problem of Professional Fees in Bankruptcy, 38 ARIZ. L. REV. 35, 37 (1996) (discussing the difference between the monitoring of professional fees inside bankruptcy and outside bankruptcy).

6 My friend Joe Tiano has observed: "Creditors with the most at stake seem to view legal fees as a rounding error, minimally affecting the computation of the estate financial situation. In a sense, they’re right, but the
meaningful way leads to billing inefficiencies that can affect everyone involved in the case.

Large chapter 11 cases can have fees that run into the hundreds of millions of dollars. That's one of the reasons that, in 2013, the Executive Office of the United States Trustee promulgated additional guidelines that affect legal fees in large chapter 11 cases. Bankruptcy courts have been appointing fee examiners and fee committees in large cases to aid the courts in their duty to ensure that the fees and expenses of estate-paid professionals are reasonable. I've been one of those people charged with helping bankruptcy courts review fees. As such, I've seen first-hand what happens when the professionals involved in high-stakes, bet-the-company litigation serve as the actual decisionmakers, rather than involving their clients deeply in their decisions. This article will discuss the dynamics that create a disincentive for most parties to monitor fees in large chapter 11 cases and will then provide suggestions to inside counsel whose organizations find themselves involved in those cases—as the debtor, as a member of the creditors' committee, or as a secured creditor whose collateral is being tapped for the carve-out to pay the professionals' fees.

I. THE FRAMEWORK

Several people, including me, have talked about the challenges of reviewing estate-paid professionals' fees and expenses in large chapter 11 cases:

numbers can be staggering nonetheless. Comments from Joe Tiano to author on an earlier draft (on file with author).

7 See supra note 1.

8 Well, sort of. Unless a court adopts those guidelines, then only the Office of the United States Trustee is governed by them, leading to a situation in which the guidelines will foreshadow the objections that the United States Trustee might make but won't, in themselves, bind anyone else.


10 Of course, courts appointed fee examiners long before the promulgation of the large case guidelines. For example, I was appointed in In re Mirant Corp., 303 B.R. 319 (Bankr. N.D. Tex. 2003), way back in 2003, and in In re Pilgrim's Pride Corp., 421 B.R. 231 (Bankr. N.D. Tex. 2009), in 2009.


13 In other words, all big chapter 11 cases.
The bankruptcy court has oversight of the payment of professional fees, but the review of those fees can be incredibly time-consuming and is highly detail-driven. Those professionals who submit their bills for court review represent real clients, but those real clients aren't writing the ultimate checks. In most non-bankruptcy settings, there's a metaphorical moment when the professional pushes a bill across the table to the client and waits for the client to react. If the client questions a bill, the professional may well end up lowering it.

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.\(^\text{14}\)

Before I discuss the dynamics that create this odd situation, let's walk through the various Bankruptcy Code sections that allow certain professionals to be paid from funds other than from a single client's finances. We'll start with section 327\(^\text{15}\) of the Bankruptcy Code, which allows the trustee\(^\text{16}\) to hire professional persons—the lawyers, accountants, financial advisors, investment bankers, brokers, and so on—with the bankruptcy court's approval.\(^\text{17}\) Section 327(a) provides:

Except as otherwise provided in this section, the trustee, 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

\(^{14}\) **Rethinking Fees, supra** note 5, at 265 (footnotes omitted).

\(^{15}\) A good *general rule* is that the sections in chapters 1, 3, and 5 of the Bankruptcy Code apply to the other chapters, which themselves provide specific forms of debt relief. See 11 U.S.C. § 103.

\(^{16}\) In case you're saying to yourself, "this statute talks about what a trustee can do, but what about the debtor-in-possession—how can the DIP hire professionals?", the answer is found in 11 U.S.C. § 1107(a) ("Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter."). Confused about what a "debtor in possession" is? It's the entity formed once a debtor files a chapter 11 petition. *Cf. id.* § 1101(1).

\(^{17}\) *Id.* § 327(a).
are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

Professionals for official committees in the case can also hire their own professionals, predicated on bankruptcy court approval.20 The fees for performing a professional's duties (either for the debtor in possession or for the committee) can be based on hourly rates or can 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."21 If you love statutory construction, the whole process—from approval of employment through awarding

Section 328(a) provides that a court may alter the terms and conditions of a flat fee "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." However, modification under § 328(a) "is severely constrained," and any motion seeking to modify such terms "has a high hurdle to clear." Unanticipated circumstances are not enough to satisfy the improvident standard; rather, the developments and circumstances requiring modification must not have been capable of anticipation in order for the court to revisit a flat fee approved under § 328(a). As such, modification of a flat fee has been rejected where (1) a contingency-fee case was settled after 2.7 hours of work, equating to an hourly rate of $1,235; (2) the divergent positions of the debtor and unsecured creditors resulted in the rejection of multiple settlements; (3) the law firm received instructions from both the officers and shareholders of the debtor; (4) litigation was unusually long and protracted; and (5) the law firm proved to be an obstacle—not an asset—to ultimate settlement. In contrast, the following four factors, when combined, were deemed incapable of anticipation: (1) length of proceeding where initial engagement was to be for one month culminating in a sale; (2) significant unforeseen debtor management and reporting deficiencies; (3) the debtor's chief financial officer was replaced twice in the first months of the case; and (4) the lack of leadership of debtor, which had always taken instructions from a nondebtor parent.

Jerald I. Ancel & Jeffrey J. Graham, Do Alternative Fee Arrangements Have a Place for Chapter 11 Counsel?, 31 AM. BANKR. INST. J., Sept. 2012 at 42, 94–95 (footnotes omitted).
interim fees and expenses to awarding final fees and expenses—will be right up your alley, as it can get complicated. But I'm going to simplify the concepts here.\(^{22}\)

Section 330 allows a bankruptcy court to award, after notice and a hearing, reasonable fees and expenses to the court-appointed professionals.\(^{23}\) Those court-approved fees and expenses are given a high administrative priority, which means that they get paid in full before administrative claims lower in the pecking order (and all general unsecured claims) get paid at all.\(^{24}\) If one thinks of the fees and expenses of the court-appointed professionals as funding the reorganization (or the orderly liquidation) of the chapter 11 debtor-in-possession, it makes sense that the funding of those fees comes from those who are benefitting from the professionals’ efforts. As Professor Stephen Lubben puts it,

Being in chapter 11 means that creditors’ recovery on their claims becomes higher than zero. The professional fees are the cost of

\(^{22}\) Forgive me, bankruptcy mavens.

\(^{23}\) 11 U.S.C. § 330(a)(1) provides:

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 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.

\(^{24}\) In terms of who gets paid out and in what order, the reasonable fees and expenses of court-appointed professionals are second in priority, see 11 U.S.C. § 507(a)(2) ("Second [priority], administrative expenses allowed under section 503(b) of this title . . . "), meaning that the fees and expenses get paid second from the pot of money available to unsecured creditors. See also id. § 503(b) ("After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including . . . 

(2) compensation and reimbursement awarded under section 330(a) of this title "). Of course, nothing stops a court-appointed professional from agreeing to take less than the full amount of its administrative claim. Cf. id. § 1129(a)(9)(A) (stating unless otherwise provided, administrative claims in chapter 11 must be paid in cash in full on the effective date of a confirmed plan of reorganization). If you really want your head to spin, you'll want to read the spate of cases that deal with what happens when court-appointed professionals who are being paid from a carve-out from the collateral of a secured creditor discover that the carve-out isn't large enough to cover all of their fees and expenses. See, e.g., In re MolyCorp, Inc., 562 B.R. 67, 71 (Bankr. D. Del. 2017) ("[A]bsent specific language not found in the DIP Financing Order at issue here, a dollar-amount cap on professionals’ fee payment, or a carve-out, does not come into play once a Chapter 11 plan is confirmed. That is because a fundamental statutory requirement of the Bankruptcy Code is that, unless the holder of a particular claim has agreed to a different treatment, allowed professionals' fees are administrative expenses that need to be paid in full under any confirmed plan."). Compare E. Coast Miner LLC v. Nixon Peabody LLP (In re Licking River Mining, LLC), 911 F.3d 806, 810–11 (6th Cir. 2018) (finding lenders were bound to pay the estate professionals from their collateral, pursuant to a carve-out order, notwithstanding that the case had been converted to a case under chapter 7, with In re Chieftain Steel, No. 16-10407(1)(11), 2019 WL 1225716, *5–7 (Bankr. W.D. Ky. 2019) (holding secured creditor's collateral, part of which was subject to a carve-out order, was not responsible for paying the balance of the court-appointed professionals' fees and expenses after the reorganized debtor ran out of funds).
moving to that higher recovery. The notion that money paid to professionals belongs to creditors is true only if the creditors could realize that value without the professionals. 25

Courts determine the reasonableness of a court-appointed professional's fees and expenses by periodically reviewing the fee applications that the professional files. 26 These fee applications, especially in very large chapter 11 cases, can be voluminous and opaque. 27 Any large legal bill (in or out of bankruptcy) is extremely difficult to parse for reasonableness:

Think about how large and foreboding the average legal bill looks to a client. (If you've never seen a large legal bill, think back to any hospital bills that you've seen.) They can go on for pages and pages (or screens and screens), and they tend to be organized by date. For each date in a billing cycle on which work was performed, the bill lists who worked on a matter, what each professional did, how long the work took (typically, these days, in six-minute billing increments), and each professional's billing rate. For bills longer than a few pages, the amount of time it would take to go through each

26 11 U.S.C. § 331 permits periodic payment for compensation, "not more than once every 120 days after an order for relief in a case under this title," after notice and a hearing. 11 U.S.C. § 331.
27 Section 330(a) requires "notice and a hearing," and the notice part is always present, but hearings in bankruptcy cases can sometimes be quite summary, or even non-existent. Id. § 330(a); see also id. § 102 (defining how much of a hearing, if any, is required under the particular circumstances of the noticed event). Most fee applications, though, are heard in open court, even if there's no one objecting to the fees.
28 See Value Billing, supra note 2, at 127–29 (discussing how many pages can go into a set of monthly fee statements or interim fee applications in large chapter 11 cases); Nancy B. Rapoport, The Client Who Did Too Much, 47 AKRON L. REV. 121, 123–25 (2014) [hereinafter Client] (discussing the effects of any party in interest's actions on other parties in interest and the concomitant ripple effect of work and, thus, fees). For another rough estimate of how voluminous fee applications can get, see Crowdsourcing, supra note 5, at 371–74.

In a large corporate bankruptcy case, a bankruptcy court typically receives fee applications from twelve to sixteen professional firms every three months, and fee applications are usually thirty or more pages. Assuming there are twelve professional firms each filing a thirty-page application every three months for two years, Fee Controllers [defined as bankruptcy judges and Assistant United States Trustees] must closely scrutinize 2880 pages of "single-spaced, small font lines of time entries and expense details" over the course of the case. Add only four more professional firms, and Fee Controllers will have to scrutinize 3840 pages (and hundreds of thousands of lines of time and expense entries) instead.

Id. Because the fees are a matter of public record, they provide useful information to parties, to the bankruptcy court, to fee examiners, and to researchers. But, because they're a matter of public record, the professionals who file them are often worried that some of the time entries will reveal future strategies. Cf. infra note 33.
29 The size and opacity of the bills explain why fee examiners' reviews are taken so seriously by bankruptcy courts.
Inside counsel are, of course, trained to read complex and lengthy documents. Structurally, then, inside counsel for the debtor in possession, for a member of the unsecured creditors' committee (or for any unsecured creditor), or for the secured creditor whose collateral is being carved out for professional fees could comb through the various fee applications and ask probing questions of the professionals seeking payment from the estate. But there are a number of factors that might cause a review of fee applications to be a low priority.

II. DYNAMICS AFFECTING FEES IN LARGE CHAPTER 11 CASES

The sheer volume of the fee applications themselves is one reason why so few parties in interest in a case pay attention to them. But there are other dynamics at

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31 Or monthly statements, if a court enters a Knudson-type order. See U.S. Trustee v. Knudson Corp. (In re Knudson Corp.), 84 B.R. 668 (B.A.P. 9th Cir. 1988) (allowing monthly payments to court-appointed professionals, per 11 U.S.C. § 328(a), under certain conditions).

32 And, by the time that the fee application or monthly statement has been filed, the work has already been done. A better time to catch any problems or to change behavior, though, is at the beginning of the case, by setting up some good ground rules. See discussion infra Part III(B).

33 Sometimes, though, the courts order a lot of attention to the time entries attached to a fee application. See, e.g., Motion of the Official Committee of Second Priority Noteholders to Reconsider Order Granting Debtors' Application for Retention of Kirkland & Ellis LLP and Kirkland & Ellis International LLP ¶ 15, In re Caesars Entm't Operating Co., 561 B.R. 441 (Bankr. N.D. Ill. 2016) (No. 15-01145), ECF 2514 ("In fact, based on Kirkland's time entries, it appears that Kirkland lawyers (David Zott and Nicole Greenblatt) prepared a revised draft of the August board minutes on May 12, 2015 — more than two weeks before this Court granted the application."); Declaration of Joshua M. Mester in Support of Motion of the Official Committee of Second Priority Noteholders to Reconsider Order Granting Debtors' Application for Retention of Kirkland & Ellis LLP and Kirkland & Ellis International LLP ¶ 12, In re Caesars Entm't Operating Co., 561 B.R. 441 (Bankr. N.D. Ill. 2016) (No. 15-01145), ECF 2515 ("Attached hereto as Exhibit J are excerpts of the time entries attached to the First Interim Fee Application Of Kirkland & Ellis LLP and Kirkland & Ellis International LLP, Attorneys For The Debtors And Debtors In Possession, For The Period From January 15, 2015 Through And Including May 31, 2015 [ECF No. 19031.]"); Jacqueline Palank, Caesars Battles Spill Over to Lawyers, WALL ST. J. (Nov. 15, 2015), https://www.wsj.com/articles/caesars-battles-spill-over-to-lawyers-1447792427 (describing the fight between Jones Day and Kirkland & Ellis over the alleged problems with the retention of
stake as well.

A. The Choice of Professionals and the Challenges of Being Involved in "Bet the Company" Litigation

Professor Stephen Lubben has found a positive correlation between the size of a chapter 11 case and the choice of certain law firms to represent the debtor in possession:

[I]ncreases in both the number of employees and the size of the debtor's assets positively increase the probability that the debtor will select one of the three leading law firms as its bankruptcy counsel. To be sure, the model only partially explains the decision to choose these large law firms. Factors outside of the model, such as the extent of the preexisting relationship between debtor and law firm, plainly influence the choice of counsel. Also potentially important are the Bankruptcy Code's own retention rules, which may reduce the number of law firms eligible to represent a debtor.

Another potential factor, also exceedingly difficult to measure, is the prestige that debtor's management may experience from such a choice. However paradoxical it may seem that choosing bankruptcy counsel might be associated with "prestige," this is just another variant of the classic Berle and Means problem resulting from the separation of ownership and control. Management receives private benefits from telling their peers that they have hired a "big New York firm" to handle their reorganization. In addition, risk adverse managers, who may fear that bankruptcy may end their employment by the debtor, have every incentive to hire lawyers that may exceed the debtor's needs. With their jobs at stake, and the shareholders' or the junior creditors' money to spend, why not "hire the best"?31

That the larger chapter 11 debtors have a high-stakes reason for choosing an experienced and well-staffed law firm is not surprising. Chapter 11 is life or death for companies (most of the time).35 Nor is it surprising that there's a halo effect in

Kirkland & Ellis in the case); Nell Gluckman, Kirkland, Jones Day in Caesars Bankruptcy Showdown, AM. LAWYER (Jan. 15, 2015) (same).
34 Stephen J. Lubben, Choosing Corporate Bankruptcy Counsel, 14 AM. BANKR. INST. L. REV. 391, 403–04 (2006) (footnotes omitted) [hereinafter Bankruptcy Counsel], But see id. at 392 ("Predictably, large debtors tend to hire large law firms while small debtors tend to hire smaller law firms. But mid-sized debtors hire law firms of all sizes. And debtor size only explains a small part of the decision to hire one of the leading law firms as bankruptcy counsel. In short, the market defies easy, anecdotal explanation.").
35 See, e.g., Alan Brown, Thomas L. Sager & Rafael X. Zahra clen-Aravena, A Value Added Look At Corporate Bankruptcy, 34 No. 2 ACC DOCKET 76, 77 (2016) [hereinafter Value Added] ("There is no clearer
terms of the choice of firms: "Firm X was the main counsel for the debtor in possession in five large chapter 11 cases in the last year, so clearly Firm X is the firm that I should choose for our chapter 11 case." At some point, though, Firm X gets overextended and can't take on yet another large chapter 11 case, which opens the door for other, quite similar law firms to get the nod. And, if the same key law firms get hired as main counsel for the debtor in possession or for the creditors' committee precisely because of their extensive expertise in large chapter 11 cases, then there's a logical tendency for inside counsel to trust what their bankruptcy counsel are telling them. Even very experienced corporate counsel might not be experienced either in the intricacies of chapter 11 work or its cost.

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example of 'bet your company' litigation than a restructuring or liquidation under Chapter 11 of the US Bankruptcy Code."). Of course, firms that file for chapter 11, reorganize, then file another chapter 11 case (or two) later on—the "Chapter 22 or Chapter 33" cases—suggests that some reanimation may be occurring, followed by some sort of zombie afterlife. Cf. MARY SHELLY, FRANKENSTEIN (1818). For a recent chapter 22, see Jeremy Hill, Charming Charlie, Back in Bankruptcy, To Close All Stores, BLOOMBERG (July 11, 2019), https://www.bloomberg.com/news/articles/2019-07-11/charming-charlie-back-in-bankruptcy-to-close-all-stores.

Followed, of course, by another company doing pre-bankruptcy planning and deciding that, because Firm X now is main counsel in six large chapter 11 cases in the past year, it's reasonable to choose Firm X—making seven cases for Firm X, then eight, and so on.

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.

Value Billing, supra note 2, at 147 (quoting Mark Herrmann, Inside Straight: The Delusion of Personal Exceptionalism (Aug. 2011, 10:21 AM), http://abovethelaw.com/2011/08/insidestraightthedelusionofpersonalexceptionalism/); see also Client, supra note 28, at 127–28 ("If most top law firms (big or small) have well-credentialed, hard-working, smart lawyers, then it's difficult for them to compete on the basis that 'our lawyers are better than their lawyers.' It's like Lake Wobegon: all the lawyers are strong (and good-looking). If all of the potential lawyers are good, then they'd best be competing on the basis of providing faster and more complete service.") (footnotes omitted).

[A]ll indications are that general counsel offices do a good job monitoring their outside advisors. But most legal departments—especially outside of financial institutions—have very little bankruptcy expertise. This places the debtor in a position of dependence on its bankruptcy counsel: the debtor's in-house counsel will have to trust its bankruptcy counsel, and will have little insight into which matters are truly important, and which matters might be ignored.

But brand-name law firms are expensive. Not only are you paying for talent, but you're paying for all of the bells and whistles with which the fanciest law firms surround themselves.\(^{39}\) I haven't heard of many general counsel getting fired for hiring law firms with sterling reputations, despite how much those firms might cost.\(^{40}\) And the "damn the costs" attitude can be especially true in chapter 11 cases, in which estate-paid professionals are paid either from a carve-out from secured collateral or from general unsecured funds.\(^{41}\) A chapter 11 case is the classic "bet the company" litigation, all right, but the money paying for that bet is coming from an attenuated source, so there is significantly less incentive to micromanage the decisions that the bankruptcy lawyers are making.\(^{42}\)

**B. Limited Information About the Context of the Work that the Estate-Paid Professionals Have Done**

Even if inside counsel were motivated to micromanage its bankruptcy counsel's decisions, combing through the fee applications is a challenging task. Let's assume that you serve as the general counsel of the debtor-in-possession. You've engaged outside counsel (probably teams of outside counsel) and a variety of other professionals, such as accountants, financial advisors, brokers, and other professionals whose job it is to help your company reorganize.\(^{43}\) Chances are decent

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\(^{39}\) Phillip A. Pesek, *Breaking Away From the Status Quo: A Survival Guide for Managing Outside Counsel Fees*, 26 No. 9 ACC DOCKET 106, 111(2008) [hereinafter *Survival Guide*] ("If you have a 'bet the company' type of legal issue or you have an issue that requires certain specialized legal expertise, you will have the tendency to go to the top-flight law firms in the country. However, the overhead of these firms (e.g. downtown locations, the best, brightest and highly compensated lawyers, and plenty of support staff) necessitates an hourly rate structure that can be very high ").

\(^{40}\) See Joan C. Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: New Models of Legal Practice*, 67 HASTINGS L.J. 1, 6 (2015) [hereinafter *Disruptive Innovation*] ("When it comes to high-stakes, bet-the-company deals and litigation, major companies still typically seek out the most prestigious and powerful representation they can afford. One informant said, '[a]nything where your company is on the line, you need the imprimatur of a law firm. I mean, there's no cost sensitivity there, right? You're throwing all the money in the world at it, because it's way more risky not to'").

\(^{41}\) See supra Part I (discussing various Bankruptcy Code sections that allow certain professionals to be paid from funds other than from a single client's finances).

\(^{42}\) A recent study by Lynn LoPucki and Joseph Doherty suggests that the appointment of creditors' committees—which get their own set of professionals, see supra notes 17–26 and accompanying text—may not be positively correlated with successful reorganizations. Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 997–99 (2018).

\(^{43}\) You'll have your main bankruptcy counsel, of course, and in some jurisdictions, you'll also need a main local counsel. But both of those firms are likely to have some clients that will render them "not-entirely-disinterested" under the standards of 11 U.S.C. § 327(a) and the definition of disinterestedness in 11 U.S.C. § 101(14). So, your main counsel will ask the bankruptcy court for approval to employ conflicts counsel to handle those few instances in which either your main counsel or your main local counsel—or both—can't represent your interests due to conflicts. For a good discussion of the shifting conflicts in bankruptcy cases (and because I live for the day that someone, somewhere, will cite this article for the proposition that appointing conflicts counsel is a good idea), see Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913, 970–72 (1994). Then you'll want accountants, and financial advisors, and investment banks, and brokers, and other professionals. If you are a member of the unsecured creditors' committee, you'll also have your main counsel
that you'll get the "headline version" of what your bankruptcy counsel is doing on the case (the overall strategy choices), but chances are also decent that you're not being called several times a day on the myriad tactical decisions that your bankruptcy counsel is making. Unless your bankruptcy counsel is filling you in on all of the tactics, though, by the time you get the bill, you'll have to piece together what happened and why before you can start to make sense of the bill.

The problem is that you will never have enough information. You could get more information—for example, why a partner choose this associate to do a task instead of that associate, or why Partner A reviewed a draft, rather than Partner B—but the time sheets won't give that information to you. Time sheets also won't tell you if the

and possibly your main local counsel, plus your main and local conflicts counsel. And because you won't trust the debtor in possession's professionals to be entirely unbiased, you'll want to have your own accountants and financial advisors, etc., in order to ensure that you're fulfilling your committee's fiduciary duty to represent all unsecured creditors' interests.

Some law firms in other practice areas seem to be considerably more proactive about keeping the client in the loop on tactics. At least one firm, which focuses primarily on insurance defense, gives each client a report at day 15, 45 and every 90 days thereafter that sets out the action steps during the last period and for the upcoming period that were completed to achieve the agreed upon goal/strategy. E-mail from Dwayne Hermes to author (July 29, 2019) (on file with author).

And, most likely, billing you for providing you with that information.

According to the Guidelines, court-appointed professionals should get certain approvals from their clients before filing their fee applications. See Procedural Guidelines, supra note 9, at 36252 (providing the questions an applicant is required to answer in the fee application, including an indication of client approval for certain activities). Remember, though, those Guidelines aren't mandatory unless a bankruptcy court adopts them, either for a specific case or by a local rule.

Joe Tiano has pointed out that, in his experience, there's a risk of a bankruptcy premium—that firms might set billing rates higher so that they can then reduce those rates by a certain percentage across the board. "It's easier to simply grant an across the board 10% discount than scrutinize the underlying data to meaningfully address the core reasons for fee reductions." Comments from Joe Tiano to author (on file with author). That risk of a bankruptcy premium is exactly why the United States Trustee Guidelines were so insistent on getting information on a firm's non-bankruptcy rates.

Or why Junior Associate A did the research for a draft, Mid-Level Associate B did the first draft, Senior Associate C did the second draft, and Partners D, E, and F reviewed and revised the draft before Paralegal H filed it.

Nor will the narratives in the fee application itself. They're never that detailed, and they certainly don't get into the nitty-gritty of staffing choices for individual tasks.

Those risk-adverse decisions add up over time. In much of the non-bankruptcy world, a client might review a bill with a first-year (or mid-level) associate checking a docket weekly for entries and have, as we say down in East Texas, a hissy fit: why would someone billing $300/hour need to check the docket when a paralegal can do it for half the cost? That client would pick up the phone, call up the billing partner, and ask for a discount on that month's bill. But when, say, someone on the unsecured creditors' committee sees a bill where a new-ish associate has reviewed the docket and puts the report of "potentially interesting docket entries" into a memo, which every lawyer up the food chain then reads (each billing time at increasingly higher rates), and which then a paralegal spends an hour or two filing into different matters for that bankruptcy case, can that committee member really push back and say that too much work is being billed? Does that committee member know enough to make that value decision?

Conversely, when two partners draft a motion—at their much-higher rates—instead of having an associate knock down on the billing scale draft it, the committee member may be inclined to think that the partners, who can draft more quickly, will be more
reason that your bankruptcy counsel is taking a particular action is that a professional working for another constituency made a decision that created a ripple effect.⁵⁰ (Your bankruptcy counsel could tell you that information, of course, as part of an overall description of the month’s work, but in the hustle and bustle of fast-paced chapter 11 work, you’d have to establish and enforce strong ground rules for when your bankruptcy counsel loops you in on various decisions.)⁵¹ Unless you and your bankruptcy counsel have regular heart-to-heart discussions over both strategy and tactics, you’ll be getting the end result—the bill—without a full understanding of why some of the work was undertaken or why it took so long.⁵²

Even if you had all of the information about your bankruptcy counsel’s strategy and tactics, you probably still wouldn’t get a complete picture of the decisions leading up to the fees and expenses that were billed.⁵³ Nor would you be able to determine,

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50 See, e.g., Stephen J. Lubben, The Chapter 11 Attorneys, 86 AM. BANKR. L.J. 447, 471 (2012) ("The regression models in this paper show that the key factor in counsel costs is the size of the web of parties engaged in a chapter 11 case. The debtor's lead bankruptcy counsel stands in the middle of this web, and the more parties they have to interact with the greater the amount the debtor will have to pay to attorneys."); cf. supra note 31.

51 See infra Part III (discussing the need to lay out and strictly adhere to ground rules).

52 As I’ve observed elsewhere,

Part of the problem with the checks and balances is that every player has limited information about the reasons for the choices that the various professionals are making about how they represent their clients. Even the court and the U.S. Trustee won’t see the strategy sessions that professionals must have to determine how to respond to a development in the case—and certainly, none of the clients (or client representatives) has access to the other parties’ strategy decisions. Each of the strategy choices that a professional makes in the case can be justified—or rationalized—as a way of best positioning the fiduciary that the professional is advising.

And I use the word “rationalized” not in a pejorative sense but because all humans rationalize their decisions, all the time. Lawyers will rationalize sending several people to a hearing, rather than one or two, because there might be issues that one of these extra people needs to cover, and the risk of not sending the right person to the hearing is a risk of a breach-of-fiduciary-duty lawsuit later. Every estate entity in a case will want its own financial advisor, in order to check the work of every other financial advisor, because the decision to rely on other entities’ financial advisors could also trigger a breach of fiduciary duty lawsuit. There’s a very real sense that the failure to act is more costly than the expense of acting.

Rethinking Fees, supra note 5, at 277–78 (footnotes omitted); see also Crowdsourcing, supra note 5, at 392–93 (discussing the failure of various checks and balances in controlling fees in chapter 11 cases).

53 The decision to write off time involves billing judgment. Some professionals are better at billing judgment—the decision that it’s not worth it, in terms of the attorney-client relationship, to bill certain fees or
in more than a general sense, the reasonableness of the fees and expenses requested.\textsuperscript{54} Why? Malcolm Gladwell, in one of my favorite articles,\textsuperscript{55} distinguishes between a puzzle and a mystery. You can solve a puzzle if you have enough information. Mysteries, though, are not necessarily dependent on having enough information—you'd need the \textit{right} information that would enable you to detect patterns that could help you decipher what's going on.\textsuperscript{56} One might think that determining the reasonableness of a fee application was a puzzle: with enough information, someone could determine reasonableness with a high degree of accuracy. But I think that determining the reasonableness of fee applications is, in the Gladwellian\textsuperscript{57} sense, more of a mystery.\textsuperscript{58} Various non-quantifiable factors will enter into a professional’s decisions about which tasks to undertake, who should do those tasks, and how long those tasks should take. Those factors can include the fear of leaving an important stone unturned,\textsuperscript{60} deep-seated and longstanding conflicts between professionals,\textsuperscript{61} snap decisions that lead to misallocating workflow,\textsuperscript{62} and the relative contentiousness of expenses—than others. See, e.g., J. Scott Bovitz, \textit{Being a Great Lawyer (as a Partner)}, in \textsc{Nancy B. Rapoport \& Jeffrey D. Van Niel, Law Firm Job Survival Manual: From First Interview to Partnership} 176–77 (2014) (discussing the value to the client relationship of the notation "no charge" on portions of a bill). Billing judgment is certainly important in long-term relationships with clients. Sometimes, though, bankruptcy professionals can forget that chapter 11 can involve repeat players, too, and not just in chapter 22s or 33s. \textit{Cf. supra} note 35. A debtor in one case might be a creditor in a different case, and vice versa.

\textsuperscript{54} Though, obviously, I think that fee examiners and fee committees certainly can help the bankruptcy judge in that determination. \textit{See infra} Part III(B)(5) (suggesting the appointment of fee examiners or fee committees because the process of monitoring fees is time-consuming).


\textsuperscript{56} If things go wrong with a puzzle, identifying the culprit is easy: it's the person who withheld information. Mysteries, though, are a lot murkier: sometimes the information we've been given is inadequate, and sometimes we aren't very smart about making sense of what we've been given, and sometimes the question itself cannot be answered. Puzzles come to satisfying conclusions. Mysteries often don't.

Gladwell, \textit{supra} note 55, at 46.

\textsuperscript{57} "Gladwellian" isn't a word, but it should be.

\textsuperscript{58} If you sat through the trial of Jeffrey Skilling, you'd think that the Enron scandal was a puzzle. The company, the prosecution said, conducted shady side deals that no one quite understood. Senior executives withheld critical information from investors . . . . We were not told enough—the \textit{classic puzzle premise}—was the central assumption of the Enron prosecution.

. . . .

But the prosecutor was wrong. Enron wasn't really a puzzle. It was a mystery.

Gladwell, \textit{supra} note 55, at 46.

\textsuperscript{59} Or any.

\textsuperscript{60} \textit{See infra} notes 74–86 and accompanying text.

\textsuperscript{61} \textit{See}, e.g., \textit{supra} note 33.

\textsuperscript{62} For example, a partner could be working on a particular project late at night, look around, discover that there are no associates to whom she could delegate some of her lower-level work, and decide that, for expediency's sake, she'll do it herself, at her higher billable rate.
of the entire case. Some of those factors may be working on a subconscious level.\textsuperscript{63} Others may be the results of deliberate thought. But all of the professionals' choices for their own particular constituents can create chain reactions for the professionals working with other constituencies. Therefore, gathering all of the facts that contribute to the fees in a case is probably impossible, even for the judge\textsuperscript{64} or for the mythical professional who manages to be at every single hearing and in every single negotiation.\textsuperscript{65} Parsing the fee applications for reasonableness, then, must be approached more as a mystery. It's not a simple puzzle, and there's an art to parsing fees.\textsuperscript{66} Computer programs that analyze fees and expenses can and do help,\textsuperscript{67} but they are not a complete substitute for the human part of the analysis: a combination of experience and intuition that leads someone to good conclusions.\textsuperscript{68}


\footnotesize{\textsuperscript{64}The judge is at every hearing (unless another judge is subbing in at a particular hearing). So one would think that the judge would be aware of everything going on in the case. But the judge is only at the center of events happening in court, not those in conference rooms or on conference calls or on email chains. \textit{Cf.} Client, supra note 28, at 122 n.7 ("My friend Ted Gavin has told me that being a judge is like sitting alone in a dark room with a television, turning the television on fifteen minutes into a show, turning it off again five minutes later, and then asking the judge to write the entire one-hour script.").}

\footnotesize{\textsuperscript{65}And no one's at every single hearing or in every single negotiation in the biggest chapter 11 cases. In essence, because no one in the case is omnipresent, the reasonableness of the fees will always be a bit of a mystery.}

In the case of puzzles, we put the offending target, the C.E.O., in jail for twenty-four years and assume that our work is done. Mysteries require that we revisit our list of culprits and be willing to spread the blame a little more broadly. Because if you can't find the truth in a mystery—even a mystery shrouded in propaganda—it's not just the fault of the propagandist. It's your fault as well.

Gladwell, supra note 55, at 53. As Professor Stephen Lubben explains:

\begin{quote}
 Fees are transparent in bankruptcy, in the sense that total amounts billed and time records must be disclosed. But are the reviews of massive fee applications really likely to disclose inefficiency in the case?

There are good reasons to doubt it. In particular, without a deep understanding of the case, which in general will be inconsistent with the attorney-client privilege, it will often be unclear if time spent on particular issues was well spent.
\end{quote}

\footnotesize{\textsuperscript{66}See discussion infra Part III(C). As Joe Tiano explains, "Software and data analytics tools can show trends not normally apparent to the naked eye. Once surfaced, the trends, particularly the aberrations, are reasonably susceptible to the question: 'Did the issue or case merit a different approach than the industry benchmark?'" Comments from Joe Tiano to author (on file with author).}

\footnotesize{\textsuperscript{67}But without the data analysis that forms the first part of fee review, all of the experience and intuition in the world can only go so far. \textit{Cf.} MICHAEL LEWIS, \textit{MONEYBALL: THE ART OF WINNING AN UNFAIR GAME} 37–38 (2004). That's why I think that fee reviewing is more of a mystery than a puzzle;}

\footnotesize{\textsuperscript{68}And to monitoring expenses.}
So, the factors affecting fees and expenses in large chapter 11 cases include the choice of bet-the-company bankruptcy counsel and the lack of complete information on the decisions that the bankruptcy counsel69 makes. But there are still more factors affecting these fees and expenses, some of which are based on the ethics rules requiring counsel to be both competent70 and diligent.71 For counsel representing fiduciaries, such as the debtor in possession, its board of directors, or any court-appointed committees,72 there's additional pressure to get everything right—meaning that there is pressure not to leave a single stone unturned—that is exacerbated when the fiduciary client isn't footing the entire bill itself.73

So how can a court, or the U.S. Trustee, or a court-appointed fee expert really tell if the fees being requested are reasonable? As my colleague Chip Bowles has said, "Fee reviewing is either rocket science or kindergarten math—there's no in-between." Either the reviewers are going to catch obvious mistakes or over-charges, or they're going to miss those fees and expenses that reflect an excess of diligence on the professional's part.

Rethinking Fees, supra note 5, at 279.

69 And all of the other court-appointed professionals.

70 See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2019) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

71 See MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2019) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

72 A bankruptcy court can always order the appointment of more than just an unsecured creditors' committee if the circumstances warrant it. See 11 U.S.C. § 1102(a)(2) (2012) ("On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation . . . .")

73 Let's not exclude the effects of rationalization here, either.

[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 strategizing, research, and redrafting as "necessary." 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.

Value Billing, supra note 2, at 137–38 (footnotes omitted); see also Legal Analytics, supra note 30, at 1275 (discussing the various factors that can create "let's pull out all the stops" decisions, including pride in one's work product, competition for clients, the risk of missing something that can come back to haunt the client—and the lawyer—later, a law firm's compensation structure, and the ethics rules requiring competence and diligence); Rethinking Fees, supra note 5, at 267–69 ("In essence, the fiduciaries might be practicing the equivalent of 'defensive medicine' in an effort to fulfill their fiduciary duties.").
C. Risk-Adverse Behavior When Representing Fiduciaries.

That pressure to get everything right, unbracketed by the limitation of a single client's finite budget, creates enormous temptations to bring every possible professional involved in a case to a meeting or hearing, to have multiple layers of review before filing documents with the court, and to chase down some rabbit holes. As Professor Lubben explains,

[D]ebtor's counsel has incentives to over-prepare the case. For example, some bankruptcy judges are known for chastising counsel who are unprepared to discuss an issue, no matter how tangential or trivial. The debtor's general counsel may not know if the company is receiving efficient representation by reviewing time records of bankruptcy attorneys, but she could well draw conclusions about counsel's competence after seeing such an exhibition play out in open court. Debtor's counsel then has strong incentives to overprepare for hearings before the judge and avoid such a fate.

Committees, both official and ad hoc, who have an expectation of having their costs reimbursed by the debtor, will use their lawyers as a resource and litigation tool without too much thought about fee accruals. After all, while in some abstract sense greater chapter 11 cost means less recovery for unsecured creditors, the cost is spread across such a large body of creditors that few individuals will be sensitive, or motivated enough, to object.

Doing more, rather than less, mitigates risk because the less chance the professional will miss something or be surprised by

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74 Even if the risk of a breach of fiduciary duty claim isn't high, lawyers still like being able to do everything that they can do for their clients. And if the client authorizing "everything" (or, more accurately, listening to the lawyer explain why he or she is already doing something to protect that client's interests) isn't the one who has to foot the entire bill, there's no real incentive to hold back. "Reasonable" fees for a client who's metaphorically sitting across the table from the professional can be very different from "reasonable" fees for clients who are each only bearing a small percentage of the bills, in the case of a committee's constituency, or who aren't bearing any of it, in the case of the DIP.

Rethinking Fees, supra note 5, at 279 (footnote omitted).

75 My friend Dwayne Hermes points out that all lawyers, as fiduciaries, face the issue of how much to do (and what to do) to represent the client's interests, and that the bracketing that keeps lawyers from sweating the fear of doing too little is the "reasonably prudent lawyer" standard. He suspects, and I'll bet that he's right, that lawyers in all fields wonder if they've done too little. See e-mail from Dwayne Hermes to author (July 29, 2019) (on file with author). But keeping the client in the loop and getting the client's take on upcoming decisions is tricky in situations in which a small group of people represents an entire class. See, e.g., supra note 44. The more attenuated the client is from its representatives—for example, the entire group of unsecured creditors, rather than the members of the unsecured creditors' committee—the harder it may be for the lawyers to serve everyone to whom their duties flow. See comments from Joe Tiano to author (on file with author).
something. There is no penalty for waste and there is actually a
reward beyond the fees insofar as counsel leaves no stone unturned,
and thus feels more prepared and less vulnerable heading into a
hearing.\textsuperscript{76}

Part of the reason, of course, that debtors in possession and creditors' committees
hire the firms with the best reputations in large chapter 11 cases is that they want the
obsessives—those lawyers who, as law students, spent long evenings fretting over
whether a period should be italicized.\textsuperscript{77} They want perfectionists because the stakes
are so high, and mistakes can be devastating.\textsuperscript{78} But perfectionism is costly and
inefficient, and—not to sound like too much of a broken record—the parties that want
the perfectionists aren't paying for that obsessive work out of their own budgets. This
dynamic has a powerful effect on fees when there's not a constant dialogue between
inside counsel and bankruptcy counsel to distinguish between those tasks that are
important to do and those that one would do if money weren't an issue. In other
words, it's important for inside counsel to establish ground rules at the beginning of
a potential engagement with bankruptcy counsel (and the other bankruptcy
professionals), and then to reinforce those ground rules.

Part of the problem is that bankruptcy counsel may truly believe that it is doing
what the client wants precisely because it's pulling out all of the stops as counsel for
a fiduciary. But even fiduciaries don't have to go down every rabbit hole. As
Professor David Wilkins explains,

> With respect to this higher-value work, cost is no longer the
dominant factor. Instead, general counsel[] are looking for firms that

\textsuperscript{76} Lubben, supra note 38 (footnotes omitted); see also Robert J. Keach, Stephen J. Lubben, Thomas J.
Salerno, Clifford J. White III & Brady C. Williamson, Professional Fees Under the Bankruptcy Code: Where
Have We Been and Where Are We Going?, Plenary Session, 1209-10 ABI-CLE 601 (2010) [hereinafter
Professional Fees] ("While some debtors might have strong inside counsel who are accustomed to managing
relationships with outside counsel, often the debtor's legal department might have dwindled at precisely the
time that enhanced scrutiny of legal and other fees is vital."). Dwayne Hermes offers this salient point: the
more a lawyer communicates the approach that he or she is taking (and also loops the client in on the staffing
choices), the less the client will have sticker shock. \textit{Cf.} E-mail from Dwayne Hermes to author (July 29, 2019)
(on file with author).

\textsuperscript{77} Periods are round. You can italicize a period, but it will \textit{still look round}. But students on law reviews are
socialized to care deeply about the minuita of legal writing, see, e.g., J.C. Oleson, You Make Me [sic]:
members who are known for being especially obsessive-compulsive are revered as superstars, and called in to
work (James-Bond style) on difficult and high-profile edits."). These are the people who end up in BigLaw.
\textit{Cf.} Malcolm Gladwell, The Tortoise and the Hare, \textit{Revisionist History Podcast} (June 27, 2019)
discussing the determinants of success in law firms).

\textsuperscript{78} See, e.g., \textit{In re} Motors Liquidation Co. v. J.P. Morgan Chase Bank, N.A. (\textit{In re} Motors Liquidation Co.),
777 F.3d 100, 101-02 (2d Cir. 2014) (per curiam) (finding a series of missed proofreading opportunities led
to the inadvertent release of over a billion dollars in collateral); see also Jeremy Byellin, Failure to Review
thomsonreuters.com/corporate-counsel/failure-to-review-paralegals-error-costs-1-5-billion/ (discussing the
case).
will provide high quality service. But companies mean something different by "quality service" than most commentators—and most outside lawyers—typically think. A recent survey by BTI Consulting Group drives the point home. When asked what they value most in an outside firm, the overwhelming plurality of general counsel responded "client focus." Not surprisingly, BTI found that this is what virtually every law firm believes that they are providing. But when the consultants asked clients and law firms what they meant by "client focus," they received very different answers. Twenty-one percent of GCs, again the overwhelming plurality, responded that "client focus" means "understanding our business." Only 10% of law firm respondents suggested a similar understanding. Instead, 21% of law firm respondents defined "client focus" as "doing what's best for the client." Only 3% of GCs offered this interpretation. Although it may not quite be fair to say that clients are from Mars and lawyers from Venus, our interviews confirm that GCs put a high premium on finding lawyers who "understand their business." 79

Understanding the business typically means more than just understanding how the business makes money, who the business's competitors are, and what threats the business faces. 80 It also means understanding the risk tolerance of the business and the relationship between that risk tolerance and how much outside help from professionals the business can afford. 81 It means understanding that not every task needs to be an all-hands-on-deck affair that produces reams of memoranda:

79 David B. Wilkins, Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship, 78 FORDHAM L. REV. 2067, 2088 (2010) (footnotes omitted); see also Brenda M. Cotter, Litigation Management: The Critical Steps to Achieve Success and Reduce Costs, 34 No. 8 ACC DOCKET 34, 37 (2016) ("In addition to confirming skill and expertise, you must evaluate how good of a partner your outside counsel will be. You can determine a lot about the partnership aspect of the relationship by three things: (1) how well the fee negotiations go; (2) how interested they are in your business goals; and (3) how responsive they are. A take it or leave it approach to fee negotiations is a huge red flag."). Michael Rappo et al., The Evolving Role of the Corporate Counsel: How Information Technology Is Reinventing Legal Practice, 36 CAMPBELL L. REV. 383, 446-47 (2013) (hereinafter Evolving Role) (discussing the importance of having a discussion between inside and outside counsel about exactly what problem the client is trying to solve).

80 See Wilkins, supra note 79, at 2107 ("[L]awyers who 'understand the business'—particularly how the business measures and evaluates risk, including legal risk—may be far more valuable than [is] technical competence or skill.").

81 See, e.g., John S. Dzienkowski, The Future of Big Law: Alternative Legal Service Providers to Corporate Clients, 82 FORDHAM L. REV. 2995, 2999–3000 (2014) ("[Y]ears ago, many corporate clients started to use standard business budgeting and cost controls to more precisely limit outside legal costs . . . . Additionally, these clients have also sought to limit high hourly fees across all representations with efforts to create innovative billing practices. Corporations have relied upon technology to modernize their own business models; thus[,] they are receptive to technological advances that lead to innovation in legal services (") (footnotes omitted); Russell G. Pearce & Eli Wald, The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law, 42 HOFSTRA L. REV. 109, 131–32 (2013) (suggesting law firms embrace staffing alternatives to limit costs and better understand corporate clients); Timothy B. Corcoran, The Changing Definition of Value: What Matters Most to In-House Counsel, 39 No. 6 LAW PRAC. 46, 46–47 (Nov./Dec. 2013). For two good examples of law firms that involve the client in setting and
[C]orporate clients have reduced their reliance upon long memoranda that cost tens of thousands of dollars because they are written by teams of associates and reviewed by partners. Big Law clients do not mind paying premium rates for the advice and counsel of leading partners who have decades of experience underlying their assessments of legal problems. But they are increasingly unwilling to hire large law firms to produce overly long legal documents prepared by inexperienced, young associate lawyers.  

Understanding the business isn't necessarily the issue—at least in chapter 11 cases. The issue is that the costs of understanding, and serving, the business aren't being borne directly by the client. That said, every client still has specific goals in a bankruptcy case. A debtor in possession will hope to reorganize in some fashion. An unsecured creditor will hope to recover some or all of its debt. Those hopes can be affected by the size of the professional fees in the case, so even though the fees

Each in-house attorney—all attorneys for that matter—has his or her likes and dislikes. Here are some key "don'ts" that outside counsel should keep in mind:

- Don't increase the rates on a matter in the middle of the case.
- Don't send an invoice without reviewing for edits, adjustments, and promised discounts.
- Don't charge for luxury accommodations (e.g., first-class flights).
- Don't bill more than 10 hours in one day unless necessary.
- Don't send a bill that exceeds the budget without calling to discuss first.
- Don't bill for multiple attorneys attending a deposition or internal meeting unless such a practice is agreed upon in advance.
- Don't bill for conflict searches and attorney time resolving billing issues.
- Don't bill for learning the basic law in an area.
- Don't bill for time getting an attorney up to speed due to a staff change.
- Don't retain contract personnel without prior approval.
- Don't bill for time creating a new document when a form document is appropriate.
- Don't incur unnecessary expedited charges (e.g., express courier, overnight transcription).

Katherine A. Compton, What In-House Attorneys Wish Outside Counsel Knew About Legal Fees, 75 TEX. B.J. 710, 711 (2012)

Dzienskowski, supra note 81, at 3000 (footnote omitted). I would say that these ground rules would go without saying, but I've seen each of these behaviors in several cases. And Joe Tiano believes that BigLaw's clients are shifting away from "paying for decades of experience when data analytics projections and outcomes are a suitable surrogate for 35 years of experience." Comments from Joe Tiano to author (on file with author).  

See supra notes 23–25 and accompanying text.
are being paid as administrative claims, there are still good reasons for the client to monitor those fees.

At least one treatise has suggested that inside counsel can set ground rules for its bankruptcy counsel.\(^4\) This treatise suggested that inside counsel should reach an understanding about:

- how much new legal research is likely to be necessary (in other words, what might the non-routine parts of the case involve?);
- how much case monitoring is going on, and who will be doing the monitoring (especially useful for creditors with only very specific needs in a chapter 11 case);
- which professionals at the law firm will be working on the case, who gets added, and under what circumstances; and
- whether a fixed fee or a contingency fee for particular work would be more appropriate than using billable hours.\(^5\)

That list is a good beginning, and I will have additional suggestions in Part III. But one of the key dynamics affecting fees in chapter 11 has nothing, really, to do with bankruptcy. It has to do with the pros and cons of using the billable hour as a way of measuring value.\(^6\)

\(^5\) Id. (footnotes omitted).
\(^6\) My co-authors and I have joined the chorus of those who view billable hours as an imperfect measure of value. See, e.g., Dwayne J. Hermes, Erica R. LaVarnway & Nancy B. Rapoport, \textit{A Solutions-Oriented Approach: Changing How Insurance Litigation is Handled by Defense Law Firms}, 2017 \textit{PROF. L.} 129, 129 [hereinafter Solutions-Oriented Approach] ("Are clients well-served by their outside law firms? We think that the answer is 'not very often,' because many of the incentives that law firms use to become (and stay) profitable are at odds with their duties to their clients. As long as those perverse incentives exist, clients and their law firms aren't actually on the same team.") (footnote omitted); \textit{Virtuous Billing}, supra note 63, at 713 ("Billable hours can provide some information about how 'productive' a lawyer is and how profitable her firm is - but, to paraphrase Jane Austen, it is a truth universally acknowledged that when firms base their reward structures on billable hour totals, they're encouraging billing abuse, which is a particularly virulent form of unethical behavior.") (footnotes omitted). Not only are there disincentives for efficiency, see, e.g., Solutions-Oriented Approach at 133 ("Billable hours also penalize the fast worker: the fast reader, the fast writer, the fast thinker."), but also the description of work in time entries can often be less than illuminating. See, e.g., Legal Analytics, supra note 30, at 1293–94 n.68 ("As one of us has said before (and as we both have thought, repeatedly), 'attention to file' has never told a single client what the biller actually did.") (citing \textit{Lawyer Behavior}, supra note 63, at 86). Joe Tiano has suggested a good rubric for defining "value": "Clients receive optimal value from lawyers when the legal team: (A) indispensably contributes towards a meaningful client goal; (B) operates with peak staffing efficiency and workflow efficiency; and (C) alleviates a client's burdens." Joseph Tiano, \textit{How Lawyers Demonstrate Their Value: A Proposed Analytic Framework}, \textsc{LinkedIn} (Apr. 17, 2017), https://www.linkedin.com/pulse/how-lawyers-demonstrate-value-proposed-analytic-framework-tiano/ [hereinafter Demonstrate Value].
D. The Problem With Using Billable Hours as a Measure of Value to the Client

Billable hours, of course, tell the client who did what and how long the "what" took.\(^{87}\) Some academics believe that an experienced outside counsel's review of a bill will provide her with enough information to push back when the bill is too high.\(^{88}\) Sometimes, that's true; sometimes, it's not.\(^{89}\) So much has been written about the pros and cons of billable hours, it's difficult to make an objective judgment about their value. The hourly bill conveys two main pieces of information to the in-house counsel. It tells her the outside lawyer's hourly rate, and it tells her how the outside firm has spent its time on a matter. The in-house counsel will have an idea of how much time a matter should take, particularly if it is a routine issue and if she has contracted similar work to the law firm before. As a result, she knows what range of charges is reasonable; often, she will specify a ceiling on the number of hours that a law firm may spend on a matter or require that the firm seek authorization before exceeding a certain spend. If she finds the fees unreasonable, she can dispute them. Finally, if she feels the firm has failed to work efficiently, she can simply refuse to hire it again on future matters.

Particularly in the modern, highly competitive legal market, corporate clients do not hesitate to use all of the above tactics to extract the best deals from law firms. For example, law firms are frequently forced to "write down" their final bills when clients complain that the bills are unjustifiably high—anticipating this, many firm partners will also "write off" the hours of their associates even before submitting a bill to a client. In-house counsel can effectively enforce discipline on its outside counsel by virtue of their repeat relationship and the value of the corporation's business. Therefore, we should discard any cartoonish vision of an impotent corporate counsel simply yielding to billing abuses by law firms. In-house attorneys actively glean information from hourly bills and use that information to direct the conduct of outside counsel.

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\(^{88}\) Professor Choi makes an interesting point, but I think that, under some circumstances, inside counsel has far less leverage than one might think. See Answer Brief on the Merits at 30–31, Sheppard, Mullin, Richter & Hampton LLP v. J-M Manufacturing Co., 425 P.3d 1 (Cal. 2018) (No. S232940) (rejecting the idea that sophisticated inside counsel always have bargaining power that is superior to that of the law firms being hired). And Larry Fox has this to say about inside counsel's relative sophistication:

First, all experienced or sophisticated clients are anything but powerful and knowledgeable. Any practicing lawyer, even those at high-powered law firms, has encountered many clients, long-time clients, clients who are voracious users of legal services, clients who are titans of industry who nonetheless remain vulnerable and without bargaining power in their relationship with counsel. How many times have lawyers seen chief executive officer bravado so brazenly exercised within the corporate enterprise disappear when the latest threat to corporate prosperity arises in the legal arena? Often, these clients view "the law" as the ultimate black box and gracefully switch from being independent warriors to accepting a dependent relationship with their lawyer; indeed, a lawyer's professional stock in trade is to encourage trust among clients that will make clients feel comfortable reposing these matters with lawyers. Lawyers should not
and cons of billable hours (mostly cons) that I don't want to rehash that entire discussion here. I just want to emphasize that even the firms that have objectively reasonable billable rates still need to have a discussion with their clients, at the beginning of the case, about what starts the clock running and what doesn't—and whose clock should be starting and stopping for particular tasks.

My larger point, though, is that billable hours are an incomplete metric of value and, thus, of reasonableness. The use of billable hours is reflected in the standards that a bankruptcy judge uses to review the reasonableness of estate-paid professionals, but billed time is not the only measure of value that a court could use to determine reasonableness. My gut hunch is that law firms—not financial advisors or investment banks, which often are compensated in large chapter 11 cases with a mix of flat monthly fees and success fees—use billable hours because they're afraid that using anything else will cause them to underestimate the value of their work and thus lose money. That's a presumption that could be cured with a good dose of legal

be in the business of being obliged to warn clients that one of the things they should be alert to is possible (even likely) overreaching by their own lawyer.

Second, adding in-house counsel to the equation does not necessarily tip the balance. The proponents of this experienced client notion might have the General Counsel of General Motors in mind; yet, so often, in-house counsel, even in-house counsel for Fortune 100 companies, are unsophisticated, young, and inexperienced. In addition, there are thousands of smaller businesses that are represented by in-house counsel, or even outside counsel, in their hiring of powerhouse firms, where that counsel's presence does not right the power or information imbalance between lawyer and client that the rules correctly assume.

Lawrence J. Fox, All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics, 29 HOFSTRA L. REV. 701, 721–22 (2001). Others disagree, having been on the receiving end of strong client leverage and significant client sophistication.

90 See, e.g., Charles N. Geilich, Rich Man, Poor Man, Beggar Man, Thief: A History and Critique of the Attorney Billable Hour, 5 CHARLESTON L. REV. 173, 189–90 (2011), Scott Turow, The Billable Hour Must Die, 93 A.B.A. J. 32, 34 (2007) ("[A]s a system, billable hours is a prison. When you are selling your time, there are only three ways to make more money—higher rates, longer hours and more leverage."). Susan Saab Forney, Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements, 69 UMKC L. REV. 239, 241 (2000) ("[C]omments and study reports have identified billing pressure as the key culprit for attorney dissatisfaction.").


92 See id. § 328(a). There is a risk, though, that alternative measures that end up not reflecting value are inextricably linked to section 328(a)'s "unforeseen and unforeseeable" standard. See supra note 21. The point, though, is that no one has ever walked into a lawyer's office and said, "I think that 5,000 billable hours will help me solve the problem that I have." People do walk into a lawyer's office and say, "Can you help me solve this problem?" If we focus key performance indicators on how well the lawyer solves that problem, rather than focusing on how much time that the law firm puts into solving that problem, we will realign the client's needs with the value of the legal work.

93 See 11 U.S.C. § 328(a). Often, the orders appointing them will ask them to keep track of time in half-hour increments, but those tracked hours aren't used to determine the compensation. See also infra notes 105–112 and accompanying text.

94 In a way, even when law firms are acknowledging all of the reasons that billable hours are bad, they keep using them because as bad as they think billable hours are, they like the alternatives even less. Cf. Winston Churchill's famous statement—"Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time . . . ." But Churchill may have been quoting someone else, and the original source may have been lost to time. See Richard M. Langworth,
Many good minds have thought of other ways to create metrics that reflect the value of the services that a law firm provides. For example, DuPont's legal department was able to reconceive the value proposition for hiring outside counsel:

What if PPP [profits per partner] were redefined as Productivity Per Professional?

What would be the core questions asked of inside counsel in moving toward the creation of this new metric?

- What are we buying? (Not hours!)
- What should the pieces cost?
- What factors determine value?

Making use of The Counsel Management Group's proprietary litigation budget templates, DuPont Legal has introduced "productivity" and "value" into financial and budget discussions with outside counsel. The four key principles DuPont Legal adopted in implementing value-based billing are:

- The company wants to pay for results, not time;
- The focus is on how well services are provided, not how long it takes to provide them;
- The key expectations of both DuPont Legal and the outside firm are clearly stated and addressed early in the negotiation process; and
- The staffing and work processes are identified and adapted to working in a value-based billing model.

These four principles are one good way to restate what inside counsel should be looking for in hiring their bankruptcy counsel, but there are many other ways. The ACC Value Challenge has suggested certain metrics, some of which are also reflected in the U.S. Trustee Guidelines:

Outside Counsel Performance Metrics:

- Rate of overall success in achieving client goals (e.g., tracking "wins" where possible, or resolution of matters within expected parameters, or closing within a particular

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95 Democracy is the Worst Form of Government . . . ./, RICHARD M. LANGWORTH BLOG (June 26, 2009), https://richardlangworth.com/worst-form-of-government (emphasis omitted) (attributing the quote itself to an "unknown predecessor").

96 Thomas L. Sager, James L. Michalowicz & Gardner G. Courson, Litametrics: Analytics for Selecting Your Dream Team, 31 No. 4 ACC DOCKET 68, 74 (May 2013) [hereinafter Analytics for Selecting].

97 See Procedural Guidelines, supra note 9, at 36249 (including time spent, rates charged, necessity of services, skill of the firm, and reasonable compensation as performance metrics of outside counsel).
time period, etc.):
- Scores on qualitative measures assessed by in-house counsel, evaluating items such as creativity, responsiveness, efficiency, knowledge sharing, etc.;
- Financial metrics like the percent of matters for which a full year budget was submitted on time;
- Percent of matters managed for which forecast updates were submitted on time;
- Actual spending vs. budgeted spending, by matter;
- Comparative costs (what Law Firm A charges to produce a particular piece of work vs. what Law Firm B charges);
- Average blended rate for all law firm lawyers who billed to the client (i.e., divide total fees by number of hours billed, for each matter and across all matters); and
- Other process goals (i.e., goals relating to the process by which the work is completed), including timely completion or submission of:
  - Monthly reports;
  - Early case assessments; and
  - After action reviews / lessons learned.98

It is certainly possible to create a mix of metrics that includes billable time but also adds other measures of value.99 To create useful metrics, though, inside counsel and outside bankruptcy counsel must be explicit in the goals of the representation and must stay aware of the not-from-my-own-pocketbook dynamic that encourages over-lawyering.

Not only can billable hours themselves be an inaccurate, or at best incomplete, measure of value, but also the billable rates can be an imprecise description of a professional's skill and experience. Hourly rates are moving ever-upward in the larger

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99 One solution is to supplant the use of billable hours with other, better metrics of value. If one takes to heart Stephen Covey's Habit Number 2—"begin with the end in mind"—it is possible to discuss with a client what constitutes a successful representation and then calculate metrics that reflect that success. These metrics include average case life, budget accuracy, evaluation accuracy and return on investment measures. When a firm has a menu of metrics from which a client can choose to measure the value of the firm's representation and when the firm works with the client to identify benchmarks for those metrics, the relationship begins to look much more like a true partnership.

Solutions-Oriented Approach, supra note 86, at 134 (footnote omitted).
chapter 11 cases. Rates in some of the recent cases in which I reviewed fees were north of $1,500/hour. In the most complex chapter 11s, or in chapter 11s that present truly novel issues, it's entirely possible that some professionals are worth that rate. Other professionals, though, are clearly tempted to match the rate that has widespread market acceptance, even if they don't necessarily have the entire skill set to justify that rate. In addition to that anchoring effect, there is the issue of how often, and when, the firms will raise their hourly rates and what rough magnitude of rate increases is reasonable. My point is that just because someone wants to be worth $1,500/hour or raise his rates 20% a year doesn't mean that he is worth that amount or that increase.

Anchor 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. That rate anchors our perception of quality. When a professional asks for a higher rate because other 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." 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.

Value Billing, supra note 2, at 136–37 (2012) (footnotes omitted); see also Professional Fees, supra note 76 ("The top rates of the top lawyers at the most prestigious firms become the top rates of many practitioners with less experience, expertise, and overhead. This leads to an inexcusable rise in rates unrelated to the quality of the services being rendered."); Legal Analytics, supra note 30, at 1277–81 (discussing some social science explanations for high legal bills). For another example of why a particular number might not mean anything, see This Is Spinal Tap (Embassy Pictures Corp. 1984). Nigel Tufnel argues that his amplifier is "one louder" because most other amplifiers have the number ten as the maximum on their dials, and his amplifier dial "goes to eleven." See id. If the client doesn't question the rate—or negotiate it—then perhaps the bankruptcy court, before approving the rate structure, could ask the law firm to put on evidence that links experience and analytical ability to rate structure.

In some of the bankruptcy cases in which I've been the fee examiner, I've seen some yearly increases in the 20%-range, even when the national average is often in the 3-5% range. According to the Georgetown Law Center for the Study of the Legal Profession, the average annual rate increase since 2009 has been 2-4%. See GEO. L. CTR. FOR THE STUD. OF THE LEGAL PROF., 2018 REPORT ON THE STATE OF THE LEGAL MARKET 13 (Thomson Reuters 2018), http://www.legalexecutiveinstitute.com/wp-content/uploads/2018/01/2018-Report-on-the-State-of-the-Legal-Market.pdf.

Clients can often mistake high fees for high quality. But not everyone who charges high fees is consistently good, and not everyone who charges a relatively low fee is bad. But there's a Lake Wobegon effect: we pay high fees for all of our professionals, and so "all of our [lawyers] are strong, all of our [reorganization officers] are good-looking, and all of our [advisors] are above average."
E. Success Fees, Transaction Fees, and Other Ill-Defined Metrics that Get Triggered Later in a Case

If measuring results by counting billable hours is an imprecise measure of value, are success fees or transaction fees better metrics? Not necessarily. As with most things involving legal drafting, precise definitions are key. To get a feel for how such fees might be defined, *In re John Q. Hammons Fall 2006, LLC*, is illustrative:

UBS requests payment of a Restructuring Transaction Fee and a Sale Transaction Fee. Under the terms of the Agreement, those fees are due upon "consummation" of a Restructuring Transaction and a Sale Transaction, respectively. The Agreement defines "Restructuring Transaction" and "Sale Transaction":

As used in this Agreement, the term "Restructuring Transaction" means, whether effected directly or indirectly by the Company and/or through an affiliate and/or a subsidiary, any restructuring, reorganization, rescheduling, refinancing or recapitalization or the Company's (or any other Debtors or any of their respective subsidiaries) liabilities, including contingent liabilities (whether on or off balance sheet), whether through a plan of reorganization or liquidation, a comprehensive settlement arrangement, including with respect to any material litigation, an exchange, consent solicitation, repurchase, or repayment of any such liabilities, or any modification, amendment, deferral, forgiveness, restructuring, recapitalization, rescheduling, moratorium, or adjustment of the terms and/or conditions of any such liabilities.

As used in this Agreement, the term "Sale Transaction" means in one transaction or a series of transactions or potential transactions: . . . the marketing for, and the sale, transfer or other disposition of any portion of the capital stock or assets of the Company, any other Debtor or any of their respective subsidiaries by way of a tender or exchange offer, option, negotiated purchase, leveraged

In the highly competitive world of Chapter 11 representation, there are some professionals who are truly "name brands," and whose skill levels are high enough to justify their fees. Others, who may be quite good, haven't yet broken into the ranks of the nationally known, and it may be more difficult for them to get the highest-profile cases. Considering that people are choosing their professionals at a time when delay can be prejudicial to parties' rights, it's no surprise that the first professionals tapped are the best-known ones. The fact is, though, that even the best professionals can't be at the top of their game all of the time. Unfortunately, there's no fix for the link in clients' minds between high fees and high quality, other than to have some awareness that the relationship between fees and skill isn't linear.

buyout, lease or license, minority investment or partnership, joint or collaborative venture or otherwise.

If you developed a suspicion that these definitions were so expansive so as to include almost any activity in which the advisor had participated, I wouldn't disagree with you. The definitions of these types of fees are broad and are often approved under section 328(a), which incorporates that higher "approved unless improvident under unforeseen and unforeseeable conditions" standard. The advantage of not using a billable hour calculation for these types of fees is that the calculation of those fees is supposed to relate directly to results, rather than to time spent. In some cases, though, the contribution of the professional to the result

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105 *In re John Q. Hammons Fall 2006, LLC*, 600 B.R. 436, 444–45 (Bankr. D. Kan. 2019) (footnotes omitted) (emphasis in original); see also id. at 446 ("Because UBS is entitled to all fees and expenses under the Agreement regardless of what 'success fee' means, the Approval Order's use of the ambiguous term 'success fee' does not limit, or introduce any ambiguity into, the term 'Sale Transaction.'") (footnote omitted).

106 *In Hammons*, the bankruptcy court calculated the restructuring transaction fee at $7 million and took the calculation of the sale transaction under advisement, but observed that, 

[these amounts may be recalculated after Debtors' remaining assets are sold, bearing in mind that all transactions shall be considered part of a single Sale Transaction in calculating the Sale Transaction Fee. Per the Agreement, this Fee shall be offset dollar-for-dollar by the Restructuring Transaction Fee and by 50% of any Monthly Advisory Fees paid to UBS in excess of $1,050,000.]

Id. at 447–48 (footnotes omitted).

107 See supra note 21 and accompanying text. Section 328(a)’s standard, when applied to engagements with very broad definitions of "transaction" or "success," might put a bankruptcy court in the situation of having to award such fees even when the professional was not particularly helpful at all. *See In re Mirant Corp.*, 354 B.R. 113 (Bankr. N.D. Tex. 2006). In that case, the court observed:

Had the financial advisors perceived the significance of the changing gas price environment, they would have recognized that their valuations were too low. Had they advised their constituencies of this, the parties might have negotiated a consensual plan earlier. Had the Plan been agreed to earlier, substantial costs and time would have been saved. Put another way, at the one point in these cases when the financial advisors occupied center stage, they failed to predict Debtors' value anywhere near correctly, persisted in stubbornly defending erroneous values and, thus, contributed to the need for a much longer, more expensive valuation and negotiation process than was necessary. As it was, the gross underestimation of Debtors' value encouraged in some of the statutory fiduciaries a reluctance in negotiation that delayed Debtors' emergence from chapter 11 and added substantially to the cost of Debtors' reorganization.

Id. at 130 (footnotes omitted).

108 *See In re Residential Capital, LLC*, 504 B.R. 358, 370 (Bankr. S.D.N.Y. 2014) ("Instead, the standard of review for a success (or . . . a 'transaction') fee is: (1) whether the services were necessary and beneficial to the estates at the time they were rendered, and (2) whether the success fee is reasonable based on the market. In fact, with regard to 'time spent,' Judge Gonzalez noted that '[u]nder section 330(a) examination, the time spent may shed little light on the actual value that a financial advisor brought to a transaction, it is more the financial advisor's access to market opportunities and the result it achieved that warrant its compensation.'") (alterations in original) (emphasis in original) (footnotes omitted) (quoting *In re Integlogic Trace, Inc.*, 188 B.R. 557, 559 n.9 (Bankr. W.D. Tex. 1995)); see also *In re Relativity Fashion, LLC*, No. 15-11989, 2016 WL 8607005, *3 (Bankr. S.D.N.Y. 2016) ("[T]ransaction] fees usually are contingent on the consummation of a
obtained is tangential at best.\textsuperscript{109} The transaction or success fees approved prospectively under section 328(a) might not reflect value at all, but they aren't likely to be reduced. The lesson here is not that all transaction fees or success fees are bad or even suspicious, but that their definitions are critical and that approving those fees in advance as part of an employment application linked to section 328(a) carries significant risks.\textsuperscript{110} If virtually every investment bank, chief reorganization officer, or financial advisor wants broadly defined success fees or transaction fees, though, and insists on having those fees approved in advance under section 328(a), it is difficult to imagine debtors in possession or creditors' committees that will have sufficient leverage to force more reasonable and precise terms.\textsuperscript{111} The lack of leverage, coupled with an understandable lack of experience in complex bankruptcies, explains part of why so many companies are reluctant to push back on some of the terms of engagement that bankruptcy professionals request—and why so few parties in interest review the fee applications filed in a case. But there is one transaction so that they are not paid if a transaction does not occur. But apart from that condition, they often have no other requirements. They often merely require that the transaction occur with no other conditions whatsoever.\textsuperscript{106} In In re XO Comm., Inc., 398 B.R. 106, 116 (Bankr. S.D.N.Y. 2008) ("In determining the reasonableness of a transaction or success fee, in the absence of an actual determination prior to or at the time that the services were rendered of what the marketplace would bear, the court must look at the nexus between what was achieved, i.e., the restructuring of the debt, and the impact of the advisor's effort in that regard.").

\textsuperscript{109} In re Mirant again provides an illustrative example:

Perhaps because of the nature of fee arrangements for structuring transactions outside of bankruptcy, however, many financial advisors insist in a chapter 11 case on tying their compensation to a "successful" outcome of the case. This, in turn, suggests that the efforts of a financial advisor should be measured, if not in lodestar fashion, then by the contributions of the advisor to the successful outcome of the case. Logically, this means a financial advisor's compensation should be based on the advisor's part in bringing about a successful result. Certainly in the case at bar this court cannot find that the Debtors' estate and its constituencies received direct benefit commensurate with the fees now to be paid to some of the financial advisors.


\textsuperscript{110} See id. at 131 ("Nevertheless, the court cannot find that the terms of employment of the financial advisors have proven to be 'improvident' (Code § 328(a)); the court must therefore honor those terms") (footnote omitted). In In re Mirant, the bankruptcy court observed that, perhaps, the financial advisors might have agreed to a standard section 327 appointment, followed by a normal section 330 review. Id. at 128 ("The court erred seriously in entering orders which left it so little discretion in assessing the work of the financial advisors. Though the court was given to understand Debtors and the Committees could not obtain competent financial advisors without assurance that there would be substantial 'success' bonuses, whether or not each advisor could show it had earned such a fee, the court has since learned that some financial advisors, at least, will accept more conventional arrangements in terms of compensation. In the future, the court hopes and expects that parties in large chapter 11 cases in this and other districts will seek out financial advisors that are willing to have their work judged on a basis similar to the rules applied to other professionals") (footnotes omitted).

\textsuperscript{111} Cf. supra note 89 (noting corporate counsel might have less leverage in situations in which virtually every professional has take-it-or-leave-it terms of employment).
more dynamic at play: the fear that objecting to some other professionals' fees will have negative consequences for one's own fees.112

F. Fear of Rocking the Boat

As Professor Matthew Bruckner observes:

At least three reasons may explain the limited participation in chapter 11's fee control system. First, objections are expensive to prepare and prosecute. Even worse, these costs are borne by the objecting party, but successful objections do not necessarily inure to their benefit. Second, parties may be concerned that an objection will derail unrelated negotiations. Third, some have alleged that a "conspiracy of silence" exists among bankruptcy professionals. In short, this third reason argues that the existence of repeat players in corporate bankruptcy cases creates incentives that span individual cases, encouraging parties-in-interest (and their professionals) not to object to each other's fees in any one particular case because of concerns about future retribution.113

It's interesting, though: parties in interest often want their own professionals appointed so that their professionals can critique the work of every other professional,114 but they don't seem to want to object to these other professionals' fees. On this point, I agree with Professor Bruckner's observation that significant barriers prevent parties in interest from spending the time and the money to scrutinize, and object to, the fees in a large chapter 11 case.

112 Add to this issue of not "seeing" the bills accurately the human tendency to think "there but for the grace of [insert your preferred deity here] go I." That "there but for the grace" mentality contributes to a reluctance to object to fee applications on the part of lawyers whose fee applications look remarkably similar to one's own. If one firm sends five professionals to do the job of one or two, is that firm really going to object to another firm that also tends to overstaff matters? Sometimes, sure; but often, no.

Rethinking Fees, supra note 5, at 279. Or, as Joe Tiano has pointed out: "One professional group challenging another professional group's fees may find itself on the receiving end of such an assessment later. This dynamic seems to make challenging unreasonable fees a less than rigorous effort." Comments from Joe Tiano to author on an earlier draft (on file with author).


114 Cf. 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); see also Michelle M. Harner, The Potential Value of Dynamic Tension in Restructuring Negotiations, 30 AM. BANKR. INST. J., Feb. 2011 at 1, 63 ("Of [148] cases, 98 (68.5 percent) involved multiple lawyers and financial advisers. The retention of a financial adviser did not significantly impact the returns to unsecured creditors or the likelihood of the debtor reorganizing.") (footnotes omitted).
All of these dynamics\textsuperscript{115} add up to some rational—albeit frustrating—reasons that chapter 11 fees are difficult to monitor. We all have our stories to tell. Mine include the following:

- Tracking the number of people appearing at a valuation hearing that lasted approximately one month to see how many of those appearing in court had active roles;
- Asking a professional why he billed over 30 hours for an eight-page stay relief motion;
- Being deposed for approximately 30 minutes because I had objected to a professional's expenses (he expensed a shirt because he had to stay overnight),\textsuperscript{116}
- Reminding a professional whose local office consisted only of

\textsuperscript{115} The problem with monitoring estate-paid fees in larger Chapter 11 cases is that the pressure to represent fiduciaries well tends to generate additional work and overstaffing, and the bankruptcy court can easily be overwhelmed with the task of reviewing those fees. Moreover, the clients of those professionals, who normally might be able to provide input to the court about the reasonableness of those fees, may not have the knowledge base to supply useful information. It's the interaction of these several factors that causes fees in some cases to be unreasonable:

(1) the disconnect between the professionals doing the work and the clients receiving the bills, caused by the fact that no client will have to pay 100\% of the fees and expenses on those bills;
(2) the fear of dropping the ball when representing a fiduciary;
(3) the fact that relatively few of these client-fiduciaries themselves are repeat players in the bankruptcy system, and the matters being billed may be quite puzzling to them;
(4) a deep distrust of the work done by other parties' professionals, so that each constituency wants to hire its own professionals;
(5) a reluctance on the part of any professional to micromanage other professionals' decisions by filing objections to fees; and
(6) a tendency to want to choose "name brand" professionals, rather than less well-known professionals, so that the choice won't be second-guessed later.

\textsuperscript{116} I remember to this day a particularly obvious error in a case in which I had been the court-appointed fee expert. One lawyer had charged the estate for a $140 shirt. His rationale was that he'd had to stay overnight unexpectedly and needed a shirt, and that therefore the bankruptcy estate should reimburse him. Setting aside who should own that shirt—if the estate was paying for it, shouldn't the estate get the shirt?—the expense was miniscule when compared to the total fees and expenses paid in that case. But I seethed over it, because the arrogance of charging the estate for the shirt was as symbolic as it was real. If a lawyer thought that the estate owed him for a shirt, to what other expenses was this lawyer "entitled"? In another case, we uncovered an attorney who was routinely generous in tips for restaurant meals—at a consistent rate of well over 20\%. It's easy to be generous when the funds for the generosity don't come out of your own pocket.

\textit{Id}. at 279–80 (footnote omitted).
partners that assigning low-level work to those partners was unreasonable;

- Raising with a professional my objection to its increased hourly rates, because the appointment of that professional had taken place a mere five weeks before and there had been no indication in the application for employment that a rate increase was imminent, and

- Arguing about an almost 100% overlap in the work of two partners in the same firm, both of whom did identical work, because the client was more comfortable with having two partners looking out for its interests, instead of just one.

Those are just some of the ones that I've experienced. Joe Tiano, my co-author on several articles,117 noted some more:

1. A timekeeper with 1004 time entries recorded 808 of them in . . . one-tenth hour (0.1) increments[,] often ten or twenty times in a single day[,] for the task of reading a one-paragraph court order, reading an e-mail[,] or leaving a voice message. Playing within the rules of the game, but gaming the system.

2. On an international arbitration, a partner at a top 10 law firm recorded 153 line[-]item entries. 150 of 153 were in a round[-]hour (1.0, 2.0[,] etc . . . .) . . . Then[,] to make matters worse, her narrative entries were a copy[-]and[-]paste job with 10, 12, 15 narratives . . . .

3. On a single day, a patent prosecution paralegal billed 0.2 hour time entries to 47 different matter numbers/files (one file for each patent) to notify the PTO of an address change of the patent . . . registrant.118

Outside of the world of large chapter 11 cases, perhaps a client would scrutinize bills peppered with these hinky artifacts and ask for reductions.119 Inside large chapter 11s,

118 E-mail from Joe Tiano to author (July 28, 2019) (on file with author).
119 It is true that the role and function of in-house counsel has been completely transformed over the last three decades or so, shifting from second-class legal actors who assist outside counsel to powerful actors who direct and supervise the work of large law firm lawyers. As in-house counsel grew in sophistication, prestige and influence, they indeed developed the capacity to question the advice, representation, and fees of Big Law. It is also true that in-house counsel increasingly used this newfound power to question and sometimes break up long-standing relationships between corporate clients and Big Law; divide work that once went to Big Law to various components that now go
though, it would be helpful if fee examiners and the United States Trustee were not the only ones raising these types of issues. Clients need to take more control, and the benefit of taking more control will likely surpass the costs.

III. SUGGESTIONS FOR INSIDE COUNSEL

There are several categories of controls that inside counsel could consider in order to monitor bankruptcy fees and expenses.120 Some of them involve decisions about which professionals to hire; others involve setting ground rules at the onset of representation (and enforcing those ground rules throughout the case); and still others involve taking advantage of new technology.

A. Think Hard About Which Professionals to Hire

1. When to Hire "Bet the Company" Counsel and When to Divvy up Tasks Across a Variety of Different Counsel

   My sense is that inside counsel generally do a good job of deciding what to "make" (what work to keep in-house) and what to "buy" (what work to give to outside counsel).121 But when they deal with a bankruptcy, they tend to buy virtually all of

   to different law firms, thus reducing the ability of rainmakers to refer work to other partners at their firms; negotiate lower, more creative fee arrangements; and even micromanage Big Law staffing and cost decisions.

   All of this, however, suggests a power shift from Big Law to corporate clients, not the Death of Big Law.

Russell G. Pearce & Eli Wald, The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law, 42 Hofstra L. Rev. 109, 119 (2013) (footnotes omitted). Professors Pearce and Wald go on to suggest that "the days of unscrutinized Big Law fee statements for 'services rendered' are gone, powerful in-house counsel are here to stay, and the asymmetry in legal information that once characterized the relationship between Big Law and their clients is much reduced." Id. at 120. That may be true in most types of work that inside counsel pass along to outside counsel, but my own experience leads me to conclude that the information asymmetry is alive and well in chapter 11 cases.

120 See Bankruptcy Counsel, supra note 34, at 400-01 (discussing different factors that may influence the choice of counsel).

121 As an example, look at how DuPont Legal began to think about its outside counsel:

When DuPont Legal embarked on creating a new model for managing litigation, one of the first steps was to perform a needs assessment. The total litigation portfolio was divided into four groups based on levels of impact.

- "Brain surgery."
- Specially litigation.
- Product liability/personal injury, and
- Commodities.

The conclusion was that the greater percentage of the litigation portfolio resided in levels three and four, and for these cases, simple, efficient legal services were required. High-impact cases required higher-impact firms, and firms without the high price tag could handle low-impact cases effectively.
their services from a large firm.\textsuperscript{122} There are many things that a large firm can do well. Whether a company is choosing counsel to take it through chapter 11 or a company finds itself a member of an official committee, taking a moment to decide if a large firm is the right choice is important. Sometimes, the magnitude or complexity of a case necessitates a heavily-staffed firm, but sometimes, a well-run regional firm can likely do the job as well, and for less cost.\textsuperscript{123} Moreover,

A common mistake made by law departments is following the "always assign the best lawyers to my cases" selection method. This often translates into hiring the most expensive lawyers or law firm for any given matter. Doing so makes sense to the degree that inside litigation counsel want the best protection in defending complex cases on their particular docket. The fear is that any case could go bad and expose both the inside counsel and the company. Unfortunately, there is another consequence from this type of behavior—spending more than what the value of the portfolio warrants; in other words, treating every case as a "best the company" case. The analogy can be made to professional football teams that overspend on high-priced, big-name free agent players. Spending money for a team of all high-priced talent does not necessarily translate to wins on the playing field or in the courtroom.

\begin{quote}
Analytics for Selecting, supra note 96, at \textsuperscript{71–72}.
\end{quote}

\textsuperscript{122} See Bankruptcy Counsel, supra note 34 and accompanying text. Of course, they'll have special counsel for certain tasks and ordinary-course counsel for other tasks, but they'll likely choose a large firm as lead counsel.

\textsuperscript{123} See, e.g., Value Billing, supra note 2, at \textsuperscript{164–65} (suggesting sometimes regional firms can "do very good work, too, at much less expense"). Here are some considerations that inside counsel could use:

New Models are benefiting from these trends in several different ways, making inroads on Big Law practices in five distinct ways. First, while Big Law still controls legal matters that require very large teams, or teams that span many different practice areas, Virtual Law Firms such as Rimon, VLP Partners LLP, and Potomac Law Group, and Virtual Law Companies such as Berger Legal LLC and Cognition LLP, and Innovative Law Firms such as GLA Law Partners and Summit Law Group compete successfully for a wide range of matters that may require high-level expertise but involve only one or a few seasoned lawyers.

Second, boutique firms are challenging Big Law's commanding market lead in specific practice areas. Boutique firms' models that compete with Big Law in specific practice areas include Landmark Law Group (real estate), Smirhsline PC (tech transactions and IP licensing), Miller Law Group (defense-side employment law), Tucker Ellis, LLP and Bartlit Beck Herman Palenchar & Scott (trial work), Valorem Law Group (complex litigation), and The California Appellate Group (appeal).

Third, Secondment Firms handle overflow from in-house legal departments and part-time in-house counsel work that might otherwise go to Big Law. This includes Canadian Delgatus Legal Services, Inc., which provides temporary lawyers to fill in for lawyers on their long maternity leaves.

Fourth, relatively routine legal work is migrating to the lowest-cost providers. The behemoth of "legal process outsourcing" is Axiom, which has commodified large companies' contracting and certain litigation functions. Also in this arena are: Counsel on Call (which does e-discovery, contract review and abstraction, and other managed services), Raymond Law Group (which specializes in price-sensitive commodity litigation work, The General Counsel, Limited (which sometimes handles all of a company's employment law matters or a different type of work for a fixed fee), and d'Arcambal Ousley & Cuyler Burk (which often handles all of a company's routine insurance work).

Fifth, other New Models target mid-market companies that have been priced out by
disaggregating the services—meaning that some services stay with the main bankruptcy counsel and others go to smaller firms—can be an efficient way of managing the many tasks that chapter 11 demands. (That's why the Guidelines specifically mention "efficiency counsel." Disaggregation is likely to continue outside of bankruptcy, given inside counsel's need to monitor their "legal spend" carefully, and it should occur inside large chapter 11 cases more often.

2. If At All Possible, Slow Down and Negotiate

Whether choosing a large law firm, a smaller one, or a set of firms, both large and small, negotiating the engagement letter is key. When there is no true emergency necessitating an immediate filing, inside counsel should try to negotiate not just the rates and the staffing of the matter, but also when certain types of work, such as document production, should be outsourced. Most debtors plan for a chapter 11

the steep rise in Big Law rates. Examples are The Mitzel Group, LLP; Phillips & Reiter, PLLC; InnovaCounsel, LLP; Avokka; The General Counsel, Limited; Exemplar Companies, Inc.; and Burton Law, LLC. Some of these firms target large companies as well.

All this adds up to a sobering picture that helps explain why Big Law's book of business is no longer growing by leaps and bounds.

Disruptive Innovation, supra note 40, at 6–7 (footnotes omitted).

Secondary counsel may be either "efficiency counsel" or "conflicts counsel." Efficiency counsel is secondary counsel employed to handle more routine and "commodified" work, such as claims objections and avoidance actions, at lower cost to the estate than lead bankruptcy counsel. Conflicts counsel is secondary counsel employed when lead bankruptcy counsel is subject to a limited, not pervasive, conflict of interest that prevents it from performing some small part of its duties.

Id. at 36256.


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. But 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. Negotiations can cover topics ranging from rates to staffing. For instance, a company engaging a major law firm to represent it in "bet the company" litigation might not blanch at paying the full rates of the firm's top partners but might insist that it will not pay first and second year associates $400 per hour to review documents.

We suspect that a corporate client's regular practices on negotiating and controlling professional fees outside of bankruptcy often break down when retaining reorganization professionals. Such a breakdown can be attributed to a number of causes. 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 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.
filing. The real crunch, actually, may be in securing representation for the committee in a timely fashion, but there, too, the members of the committee should have a checklist of negotiating points to cover when interviewing potential counsel. That checklist could include:

- Whether the firm would consider an alternative fee structure or a blended fee structure (part billable hours and part flat-rate or contingency fee);
- Whether this particular case should be subject to a fee cap and under what circumstances that cap could be adjusted upward.

*Professional Fees, supra note 76 (footnote omitted).*

The creditors' committee is in a slightly different posture than the debtor. The committee's constituency stands to lose if professional fees are exorbitant. We understand that firms often discuss fees when seeking to represent the creditor's committee at the so-called "beauty contest." Although a law firm might offer the committee a "deal," it might not be the best deal available. But the committee is often under extreme pressure to engage counsel and other professionals quickly in a major case. The committee has often just been formed, so the members might very well not know each other at all. This hardly sets the stage for a fruitful negotiation.

*Id. (footnote omitted).*

The number of different fee arrangements is limited only by the imagination. Of course, the standard time-based billing, flat fees, and contingent fees are the most common arrangements. However, professionals should be cognizant that these type of fee arrangements are not the only thing that section 328 can be used to establish. Time of payment, frequency of payments, amount of each payment, frequency of applications, and hourly rates of professionals are only a few of the variables section 328 can establish at the beginning of representation.


The bankruptcy bar and its clients could learn from the experience of other lawyers and clients who have seen the benefits of projects like the ACC Value Challenge, especially because the distressed company practice already encourages innovation. There is opportunity through the study of the various types of alternative billing arrangements that are part of value challenge so that, just like particular tasks can be matched with the appropriate professional, clients can also choose the most appropriate fee structure for a bankruptcy engagement by leveraging the billing experiences of others.

*Value Added, supra note 35, at 84; see also Value Billing, supra note 2, at 141–42 (discussing rolling flat fees or other alternative fee structures).*  

*Some fee caps can result in significant savings. See, e.g., Joan Verdon, Lawyers Biggest Winners In Toys 'R' Us Bankruptcy, Top Firm Gets $56 Million, FORBES (June 14, 2019) ("According to the court documents, that appears to be true for the lawyers as well. Kirkland & Ellis exceeded a fee cap for part of its work, and agreed to reduce its fee by $11 million."). But see cases cited supra note 24, for a discussion of how complicated fee caps can be.*
• What the budget should be for the typical components of any large chapter 11 case (with the understanding that those budgets will have to be adjusted as a given case plays out, but with the equal understanding that any adjustments should occur after discussions with the client and with client consent).153
• Whether the firm has (and uses) research banks for basic bankruptcy issues that will be plugged into various pleadings;
• Whether the firm is making good use of artificial intelligence aids generally, and under what circumstances;
• Which tasks would be done by the primary bankruptcy counsel and which tasks would be outsourced to a less-expensive provider (including, perhaps, the use of artificial intelligence for more than just document production);
• Whether the firm would agree to using a set of specific professionals for the engagement and only add or substitute different professionals with advance client consent;
• How the firm would staff various types of meetings and hearings (how many people, what level of experience each professional should have, and whether the firm would agree to limiting all-hands-on-deck meetings and hearings to certain types of events in a case);
• How many professionals will review certain types of work product before that work product is finalized;
• How the firm would determine which matters would go to efficiency counsel or local counsel and how much monitoring of a case the main counsel, efficiency counsel, and local counsel would be doing;

153 Remember, these law firms are pitching their services by touting how experienced they are in numerous complex chapter 11 cases. If they use legal analytics properly, they can tell a prospective client not only what, on average, certain components of a case will probably cost but also what the likely range will be, under certain assumptions. As Timothy Corcoran has pointed out:

Many in-house counsel report that a well-crafted project plan and an accompanying matter budget are critical to managing expectations with business leaders. Yet, law firms tend to resist such requirements, believing that the ebb and flow of complex matters, and certainly the outcomes, are beyond their control. While this is true to some extent, reports Banks, experienced lawyers can still provide directional guidance based on deep experience: "If you're using a law firm that holds itself out to be an expert in a certain area of law, you expect them to provide a budget for a matter. What most in-house lawyers are looking for is a budget that gives an order of magnitude. Is this going to take 10 hours or 50 hours or 200 hours?" For law firm partners who fear encroachment from low-priced competitors, budgets based on a nuanced understanding of the various decision trees involved in a complex case can clearly differentiate subject matter expertise from those eager to win on price alone.

Corcoran, supra note 81, at 47–48; see also discussion infra Part III(C)(1) (regarding the use of legal analytics).
• When and how the firm uses "transitory" or "itinerant" professionals (professionals who are brought into the case in medias res) and whether there is a discount for using professionals who work on a case for, say, only ten or fewer hours a month;\textsuperscript{134} and
• How often the firm increases its hourly rates, and whether the firm would be willing to institute caps in terms of the frequency of increases and the percentage of increases.

There are other items that might go into a checklist, but having a conversation with potential outside firms sets a tone that indicates that the client will be watching the bills to look for efficiency in services.

B. Set Up the Rules of Engagement (and Enforce Them)

During the negotiation of an engagement letter, inside counsel should establish the ground rules to ensure that everyone is on the same page. Inside counsel could, for example, clarify how often bankruptcy counsel will communicate the status of the case and the preferred method of communication. Inside counsel could also set certain triggers for various expected high-cost activities that would require additional discussion and advance consent, as well as set the standards for who\textsuperscript{135} should be physically present at a hearing or meeting, rather than being present by telephone or briefed later. One might think that these conversations would be overkill; after all, bankruptcy professionals are bringing an expertise to the table that the client itself probably doesn't have, and that expertise includes judgment calls about staffing and workload. A failure to have those conversations, though, ignores the dynamics of estate-paid fees that can lead to taking every possible action, not just the reasonable ones. Setting ground rules is prudent, and enforcing them is crucial. I have some suggestions for those ground rules.

1. Create the Ground Rules for Billing

\textsuperscript{134} "In medias res" means "in the midst of things." See, e.g., \textit{In re media}, 
ENCYC. BRITANNICA, https://www.britannica.com/art/in-medias-res-literature (last visited Dec. 31, 2019). Transitory or itinerant professionals are brought in for many reasons: someone who was working on the case has left the firm or is out of the office for an extended time; the firm needs more hands on deck for an immediate need; or none of the regular professionals is available. But coming up to speed comes at a cost. See, e.g., Laura Johnson, Howard Tollin, Marc Waterman & Sarah Mills-DiFram, \textit{Establishing Best Billing Practices Through Billing Guidelines: Fostering Trust and Transparency on Legal Costs}, 39 U. ARK. LITTLE ROCK L. REV. 1, 14 (2016) (hereinafter \textit{Best Billing Practices}) ("Even when an attorney has significant experience, there may still be a learning curve where he or she begins work on a case that is already in progress. A fee award may thereafter be reduced if excessive hours are billed for that attorney to learn the details of the case or of the area of law.") (footnote omitted).

\textsuperscript{135} For example, should both main counsel and local counsel attend every hearing? What if the matter is likely to be uncontested?
Even billing in tenths of an hour can become complicated if the ground rules aren't clear. Under what circumstances does the clock start and stop?\(^{136}\) How detailed should the time entries be, in order to avoid "block-billing" too many tasks together?\(^{137}\) How will bankruptcy counsel determine that its professionals are avoiding the rounded-hour phenomenon, in which a statistically significant percentage of time entries end in .1, .5, or x.0? Who in the bankruptcy group will train the non-bankruptcy professionals about the intricacies of bankruptcy fee applications and the need for clear time entries? Will the firm write off its time spent in fixing non-compliant time entries?\(^ {138}\) In terms of the time entries' descriptions, how specific should they be in order to comply with section 330's reasonableness requirement?\(^ {139}\) Specifying the billing rules at the beginning of the engagement avoids the frustration that bankruptcy counsel will experience if they have to write off a significant amount of time later.

2. Pay Attention to Staffing and Workflow Issues

Developing standards for good billing is important, but far more important is setting standards for how particular tasks are staffed and how workflow is managed.\(^{140}\) For example, there may be a need for regular, short all-hands-on-deck

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\(^ {136}\) When does the clock start and stop? What's the minimum billing increment? What happens when the minimum billing increment is still too large to use for a very short task, such as the gap between leaving a thirty-second message and a minimum 0.1-hour billing increment? Is thinking about the client while getting a cup of coffee billable time? If a lawyer spends an hour thinking about the right strategy for a matter, can the lawyer write "thinking" as the billing description?

\(^ {137}\) See, e.g., Virtuous Billing, supra note 63, at 719–20 (footnotes omitted).

\(^ {138}\) We see reviewers do searches for "X and Y" entries—"review and file," "prepare for and attend," and so on. When "and" entries are lumped together, rest assured that we will ask about them. And we won't be the only ones asking. The United States Trustee's Guidelines are clear here:

**Block billing or lumping:** Whether the entries in the application are recorded in increments of .1 of an hour and whether discrete tasks are recorded separately. The United States Trustee will object to block billing or lumping. Each timekeeper, however, may record one daily entry that combines tasks for a particular project that total a de minimis amount of time if those tasks do not exceed .5 hours on that day.

**Procedural Guidelines, supra note 9, at 36250.**

\(^ {139}\) If the firm doesn't write off that time before submitting a fee application, rest assured that both the Office of the United States Trustee and the fee examiner will spot it and ask questions.

\(^ {140}\) Not only are vague time entries (e.g., "attend to file") hard to parse generally, but they're also hard to parse for section 330's reasonableness requirement. Cf. Procedural Guidelines, supra note 9, at 36250 ("The United States Trustee may object to vague or repetitive entries that are otherwise unjustified. Phrases like 'attention to' or 'review file,' without greater specificity or more detail, are generally insufficient.").

\(^ {140}\) See, e.g., Best Billing Practices, supra note 134, at 8 ("There are two main categories of overstaffing where it is inappropriate to bill to a client: (1) the use of multiple attorneys to staff routine conferences, depositions, and hearings, and (2) the use of excessive numbers of professionals to complete basic legal tasks.").
meetings to ensure that everyone knows what's going on in the case. Having those meetings may be faster and less costly than sending out email updates to a laundry list of people, all of whom may have specific questions that are better addressed in person. But all of us have been in meetings in which our presence is symbolic, rather than useful. Bankruptcy professionals billing by the hour should be able to distinguish between the first, efficient type of meeting and the second type. Likewise, the number of people at a hearing should be monitored closely. Bringing several paralegals, associates, of counsel, and partners to a hearing in case the judge might ask something known to only one of the attendees ignores the possibility that the judge would be willing to call a recess and wait for an answer if no one in the courtroom has the answer ready.

Workflow—especially the researching, drafting, revising, and finalizing of written work—can get out of hand as well, as can deciding which professional is the lowest efficient biller for a given task. Researching novel issues is one thing (and, often, such research is better performed by a more senior professional than by a novice), but giving a first- or second-year associate the task of, say, researching the

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141 Sometimes, though, the group email is a better choice than an all-hands meeting. Context matters.

142 Lawyers will justify bringing many people to a hearing or a meeting, instead of a few. After all, a diversity of experience will best serve the client, and having top-notch knowledge on hand will provide better service than having to wait for someone back at the office to provide an answer to a particular question. Lawyers who work their way up the law-firm ladder often have very specialized expertise, so having both Partner A (with expertise in one area of tax law) and Partner B (with a different expertise in tax law) in a meeting will catch any errors and help to come up with a better work product. For lawyers who are still working their way through the associate ranks, someone more senior must supervise their work. Junior Associate X's research will get supervised by mid-level Associate Y, who will do the first draft of a document, only to have senior Associate Z revise the document before handing it to a partner for final revisions. One lawyer in an office will pop into another lawyer's office to get some advice on a matter, and those pop-in meetings can span large blocks of time as the professionals spitball ideas. Even filing a pleading that simply states that one party agrees with some other party's position can result in significant billed time if more than one professional has to set eyes on the draft before it gets filed. In a time-pressured environment, such as big, bet-the-company litigation or a takeover defense, the amount of work required is extensive. Long days are de rigueur, with tens of people amassed to finalize a single project. Many hands may make light work, but they certainly also make expensive work. In some very real sense, pride ("we do good work here") and fear ("what if we've missed something?") combine to make legal fees rise exponentially. Pride and fear are the conscious explanations. But there are cognitive biases at work here, too.

Legal Analytics, supra note 30, at 1276–77 (footnotes omitted).

143 See supra note 48. The snarkiness of note 48 came about because of the frequency with which I've reviewed time entries with that workflow pattern. When Legal Decoder and I review fees, we're looking for ways to "eliminate waste, redundancy[,] and friction in workflow processes." Comment from Joe Tiano to author (on file with author).

144 Here's how one general counsel explains the concept of the "lowest efficient biller":

In my experience, there are basically five different types of team members—the experienced partner/subject matter expert, the junior partner, the experienced associate,
grounds for requesting turnover of property of the estate is not as efficient as telling that associate to check a research bank and update the caselaw. The "lowest efficient biller" concept does not mean always using the lowest available biller. Having a more junior associate draft a brief or an agreement and then having a more senior lawyer revise it can reflect sound billing judgment. Even having two or three more senior people review and revise something very complicated can demonstrate sound billing judgment—but only if each of those senior people is bringing his or her specific expertise to the table (e.g., one partner is looking at tax implications, another one is looking at provisions involving intellectual property, and so on). But there is always the temptation, when one is reviewing a document, to add stylistic comments that are in the nature of personal preferences, rather than to review the document's substance. Having too many people review a draft runs the risk of making the document worse, not better. The rest of the world seems to understand project

the new associate, and the paralegal. Each member of the team represents a different degree of expertise and a different range of hourly rates, and your core team may contain one or more of these different types of team members. The objective is to efficiently assign work to the members of the core team, who have the requisite expertise, but at the lowest billing rate. Also, an attorney who is part of the core team and familiar with your business should be more efficient than another attorney of equal expertise[ ] who has not done work for your company. The final objective is to track fees paid to each member of the team to determine if you have reached the optimal mix.

I know this may sound complicated, but it's actually pretty simple. In my experience at The Home Depot, the law department carefully analyzed the rate/mix of each firm and made necessary adjustments where necessary. There is no perfect mix. Some matters require a heavier partner mix, while others require extensive paralegal and new associate time, with little partner interaction. Using data such as this is where we discovered a phenomenon known to us a "rate creep." As you know, a first-year associate typically bills out at the lowest hourly rate. However, as that associate gains experience and progresses along the partnership track, his/her hourly rate goes up. Therefore, it may be fine for John Doe, at $125 per hour, to perform the work of a new associate, but there will come a time when his hourly rate will be too high for such work and a new associate will need to be selected to do this type of work. By using the rate/mix chart, you can keep up with these subtle changes. It is also good to review the rate/mix chart with your relationship partner at the beginning of each year when establishing the core team and their hourly rates for the coming year.

Survival Guide, supra note 39, at 108-09; see also Demonstrate Value, supra note 86 ("[T]he value that a lawyer provides often is only loosely correlated with the lawyer's price tag. The value of a $1,000/hour partner who delivers a compelling 15-minute closing argument to win a 'bet the company' case likely provided exponentially more than $250 in value whereas that same partner's 15-minute review of a standard NDA may not justify the $250 price tag.").

145 Or, as Alec Issigonis once said, "[a] camel is a horse designed by committee." BRAINY QUOTE, https://www.brainyquote.com/quotes/alec_issgonis_312014 (last visited Dec. 31, 2019).
management and process planning, and there's no reason that law firms can't use project management tools to monitor the workflow in chapter 11 cases.

3. Monitor the Budget

There's an old saying that budgets are strategic plans with numbers attached to them. That truism probably accounts for part of the resistance to budgeting that I've

146 At least one Texas firm is very, very good at process management, and here's its philosophy:

There are a number of solutions that provide for a uniform level of service delivery across the firm. The first is knowledge management, and by that we mean ensuring that the best practices and documents are shared across the firm. If the thirty-year lawyer shares her best pleading with a second-year lawyer, the more-junior lawyer is able to raise the caliber of his practice closer to the level of the thirty-year lawyer. Another solution is a case-handling workflow. The workflow is a timeline, with tasks and reminders throughout the life of the case. The timeline ensures that all tasks are completed when they need to be, and that all issues that should be considered throughout the life of the case are considered when it is appropriate to consider them. These practices ensure that the client knows what kind of service it will receive, no matter which attorney is assigned to the file . . . [T]he processes described above ensure a level of excellence across the firm, and this excellence reflects on the firm as a whole and not just the attorney handling the case.

147 As stated by Professor Larry Bridgesmith:

So if we can, as lawyers let us consider the fact that we are not as special as we think we are. We manage processes and we practice law . . . [A]s process people, can we learn from what other process experts have accomplished? In other words, can we better manage our processes so we can practice better law?

Because if process improvement and project management can build skyscrapers, put space shuttles in orbit, or even help launch military attacks, then we as legal service professionals encounter no more variability or complexity in the legal work we manage than any of those applications. So it is time to get over the notion that we are so special that project management and process improvement cannot apply to the legal services that we provide.

148 Other practice areas have used budgets and cost-controls for their outside counsel for years. See Legal Analytics, supra note 30, at 1289–90 ("In the past eight to ten years, however, larger legal departments and law firms have been hiring a new breed of industry experts to oversee legal-industry-specific business operations, such as legal analytics, technology sourcing, legal-process management, pricing, client-outside counsel relations, and financial performance.") (footnote omitted).
seen in chapter 11 cases. Explicit budgeting—budgeting that is attached to retention applications and to fee applications—can signal strategy decisions that are better done stealthily than publicly. But the budgeting communications between a client and its outside counsel are key to establishing the parameters within which outside counsel can act independently, versus those decisions that will require advance notice and consent.

Chapter 11 cases are fast-moving, and there's a risk for "budget creep" if inside counsel doesn't monitor the case's progress with regular budget-to-actual comparisons. There are two related phenomena in chapter 11 cases: "mission creep" and "scope creep." "Mission creep" occurs when a professional takes on work that should have been allocated to a different professional, such as when the main bankruptcy counsel and the conflicts counsel are both handling the same matter or when the main bankruptcy counsel and local counsel are both monitoring the docket. "Scope creep" has to do with the difference between the scope of work that

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149 The other resistance tends to be of the "we have no idea how much this case will cost" variety. But see infra notes 165–169 and accompanying text (suggesting experienced counsel should have at least a ballpark idea of how much certain components of a case will cost). Hermes Law revisits and recalibrates its matter budgets every 90 days, which increases the budget's accuracy. See E-mail from Dwayne Hermes to author (July 29, 2019) (on file with author).

150 The Guidelines require budget-to-actual comparisons, too.

**Budgets and staffing plans:** Whether the fee application sufficiently explains: (i) Any substantial increase (e.g., 10% or more) in the amount requested in the fee application as compared to any client-approved budget; and (ii) any increase in the number of professionals and paraprofessionals billing to the matter during the application period as compared to any client-approved staffing plan. The United States Trustee ordinarily will seek the use of fee and expense budgets and staffing plans, either with the consent of the parties or by court order as soon as feasible after the commencement of the case . . .

Procedural Guidelines, supra note 9, at 36249. For a sense of how inside counsel can monitor budget compliance, there's this example:

The DuPont Legal Model is ever evolving, and more and more. Litametrics is taking hold. In 2013, DuPont Legal established a position titled "chief productivity officer." Concerns about "budget creep" warranted a new approach to engaging outside counsel on strategic budget management. There was a view that too much deference was being given to DuPont Legal's outside providers regarding proposed staffing and activities on litigated matters. The chief productivity officer, armed with dynamic analytics, has new insight on outside counsel performance, similar to Billy Beane's in baseball—firms that know how to get on base (efficient delivery of work product), score runs (successful motions) and win games (case results). The chief productivity officer has an important seat at the table when inside litigation counsel engage the outside firm in those often-difficult discussions about staffing, hours required, budget, and efforts needed relative to the value of the case. This is part of change management, and the chief productivity officer helps guide inside counsel in making hard financial management decisions.

Analytics for Selecting, supra note 96, at 78.

151 For a refresher on conflicts counsel, see supra note 43 and accompanying text.

152 See Value Billing, supra note 2, at 151–52 ("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
a bankruptcy professional is permitted to do as part of the order authorizing the professional’s employment—the court-approved scope—and the professional’s decision to add on new tasks as the case develops over time.\(^{153}\) The professional may think that the new tasks are covered by the order authorizing employment, but some of those new tasks may be outside the scope, necessitating an amendment to the order authorizing employment.\(^ {154}\) Without careful thought about the new tasks, a bankruptcy professional might discover that those new tasks are non-compensable from estate funds. Looking for overlaps in the time entries of all professionals representing the client is one way of highlighting "mission creep," and paying close attention to the approved budget is one way of highlighting "scope creep." Both of those types of overlap searches are time-consuming, though.

4. Set Ground Rules About Reasonable Expenses

Most law firms already have such ground rules, such as when a professional can charge a meal to a client or when in the evening a professional can use a car service rather than take public transportation. Outside bankruptcy, the client is likely to notice whether the cost of a meal is too high or when the professional stays in a luxury hotel—and maybe the client won’t object to the occasional luxury, in exchange for exceptional professional services. Inside the world of large chapter 11 cases, though, I’ve spent far too much time talking to professionals about why the bankruptcy estate shouldn’t pay for alcohol or for group meals at Del Frisco’s or Nobu, why a Ritz-Carlton or Four Seasons hotel is not the same as a Hilton or a Marriott, or why asking a limousine driver to wait outside the courthouse during an all-day hearing is not as good a choice as is calling the driver to come to the courthouse after the hearing has ended.\(^ {155}\) When the funds paying for these expenses come out of a common pool, those luxurious choices can lead to headlines in national papers about the excesses of chapter 11 cases.\(^ {156}\)

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\(^{153}\) See Roland Bernier, *Electronic Discovery Issue: Avoiding an E-Discovery Odyssey*, 36 N. KY. L. REV. 491, 514–16 (2009) (describing scope creep as the widening of the approved scope of representation, "where we at one point had a single sentence, we now have found the task expanded to a two-part, complex sentence, and finally to [a] diagram containing four steps").

\(^{154}\) See id. at 514 (discussing the importance of "engaging in the appropriate level of planning" to "fortify the process against sanctions by the court").

\(^{155}\) But if numerous professionals are at the courthouse, then the amount of time billed for waiting for transportation can quickly exceed the cost of having a car service wait all day.

5. Consider Recommending the Appointment of a Fee Examiner or Fee Committee in the Case

As self-serving as this recommendation is (and I'm aware that it is), I still believe that fee examiners or fee committees are useful for the larger cases, precisely because the level of monitoring that I'm suggesting takes a lot of time, and inside counsel may not have that amount of free time. Fee committees are usually composed of an independent member who takes on the fee examiner role and representatives from the other key players in the case: a representative from the Office of the United States Trustee, a representative from the debtor-in-possession, and a representative from an official committee (or a representative from every committee, if there are multiple committees). I'm a fan of fee committees, for the most part, because of the additional perspective that members of the fee committee can provide, but there are always going to be tradeoffs that occur, and there are other ways to keep abreast of developments in a case. All fee reviewers come with their own costs, of course. They probably have a staff. They may need to retain outside counsel to file pleadings and appear in court. These costs are added administrative expenses, so

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157 Fee committees have several perceived benefits. A functional fee committee can, among other matters:

1. enable parties and professionals to resolve fee disputes without litigation;
2. avoid duplication of services by questioning how matters are divided among professionals and between the debtor and the creditors' committee;
3. adopt case-specific, uniform billing codes to aid in understanding what estate resources are being devoted to discrete projects;
4. retain professional fee auditors who use computers to analyze fee applications and identify problems;
5. engage those parties most knowledgeable about, and involved in, the case in scrutinizing fees; and
6. assure the court of the propriety of approving interim or final allowance of fees and expenses where the fee committee and professionals seeking payment settle any objections.

Professional Fees, supra note 76.

158 The question arises as to whether fee committees "work." A vigilant fee committee will improve the quality of applications in a case and perhaps deter unreasonable billing practices. Egregious billing abuses can be caught early and terminated, but this level of scrutiny is not inexpensive, particularly when a fee committee retains professionals. The cost of the fee committee can devour a major portion of any fee or expense reductions it obtains.

Whether fee committees can successfully address the larger issue of reasonableness is subject to question. With the exception of the U.S. Trustee and any independent chair, members of the committee are almost always members of the constituencies whose professionals' fees are under review. The dynamics of the case carry into the fee committee meetings.

White & Theus, supra note 5, at 78 (footnote omitted).

159 I affiliate with independent contractors who work with me, not for me.
recommending a fee examiner or fee committee is not cost-neutral.\textsuperscript{160} But the time savings and the expertise that a fee examiner can provide helps not just the parties in the case, but also the bankruptcy judge, who might otherwise be overwhelmed by the magnitude of the fee applications on top of an already overloaded docket.

C. Bring Your Bankruptcy Counsel Into the Modern Era

The suggestions that I've made are useful for large chapter 11 cases as most of them are run now, but given the developments occurring in several areas of the law, bankruptcy professionals can become even more efficient, with the right encouragement from inside counsel.

1. Use Legal Analytics

Legal analytics come in a variety of forms. There are analytics that help lawyers predict what a given judge is likely to do in certain situations.\textsuperscript{161} There are analytics that help law firms analyze their billable time in order to become more internally efficient and profitable (and those analytics can help bankruptcy counsel develop

\textsuperscript{160} See White & Theus, supra note 5 ("The cost of the fee committee can devour a major portion of any fee or expense reductions it obtains ") (footnote omitted).

\textsuperscript{161} Lex Machina "mine[s] litigation data, [for] insights about judges, lawyers, parties, and the subjects of the cases themselves, culled from millions of pages of litigation information." This platform is similar to Ross, as both rely on third party information for their augmented drafting technology versus reliance on an attorney providing the necessary information. The benefits of Lex Machina are palpable. It provides "litigation insights on courts, judges, lawyers, law firms, and parties, mined from millions of pages of docket entries and documents, enabling lawyers to predict the outcomes that different legal strategies will produce. Legal Analytics is currently available for patent, trademark, copyright, antitrust, securities, commercial, employment, product liability, and bankruptcy litigation in federal courts."

useful budgets).\textsuperscript{162} There are analytics that help a law firm execute efficient workflow.\textsuperscript{163} In essence, legal analytics let law firms play Moneyball.\textsuperscript{164}

These analytics can be incredibly precise:

How much is this going to cost? From both the sophisticated client as well as the average consumer, this is a major question raised prior to, or early in, legal representation. . . . In an effort to defend their fees or more generally avoid the commoditization of their work, lawyers commonly highlight the unique properties of the current dispute, transaction, or matter. So the mantra goes, "These things are hard to predict—you know every case is different." While each case may be different, and although its entire structure cannot be fully captured by measurements, metrics, etc., these are no longer the days of "[f]or professional services rendered." There is an acute and growing understanding within the market regarding the arbitrage opportunity that exists in intelligently assisting clients in reducing

\textsuperscript{162} Law firms are using AI to understand the distribution of their costs when providing legal services to clients. Law firms are using AI to dig deeper into their client billing history to better understand the resources required to handle different kinds of client matters. Clients increasingly request fixed-fee engagements or alternative fee agreements from law firms. But if those firms do not understand their costs, a fixed-fee engagement poses a serious risk of cost overruns borne by the firm.

So instead of hand coding and curating past bills, firms are using AI to understand the range and distribution of costs, computing the mean and median costs for similar matters, and looking for facts that create outlier conditions. Firms are using tools, such as Digiory Legal or Fastcase's AI Sandbox, to analyze their billing data in this way. Understanding costs mitigates risk for clients and for law firms, and it can help those firms be more competitive when seeking new business.

\textsuperscript{163} The use of litigation analytics helps discover and map litigation needs. Firms that have or develop litigation analytical tools have an advantage in a market where corporate counsel disburse their litigation widely across multiple firms. Armed with these tools, those firms are well positioned to comprehensively manage the entirety of a client's portfolio despite the complexities of the technologies, data, and cultural issues.


\textsuperscript{164} See Lewis, supra note 68 (demonstrating how investment in scientific analytics improved the efficiency of how the Oakland As played baseball); cf. e.g., Legal Analytics, supra note 30, at 1270–71 (suggesting the use of data is superior to a billing partner's gut hunches).
their legal spending. Several analytics companies are actively working to both aggregate large-scale datasets and leverage approaches from the world of procurement to identify value propositions throughout the legal service marketplace.

Benchmarking, analyzing, and projecting future legal spending costs while also contesting existing legal bills is a significant portion of what the modern general counsel must do as he or she operates as the maestro of the company's global legal supply chain.

With respect to the costs of legal services, it is hard to underestimate the amount of disruption this class of technology potentially introduced. Is this lawyer really worth a $125 wage premium? Can we shift this matter over to a cheaper firm? Can we send this matter to the Raleigh office instead of the New York office? Once the purchasers of legal services start asking these types of questions, there is no retreat to the good old days of "[f]or professional services rendered.\textsuperscript{165}

Not only are analytics useful once the professionals have been hired, but analytics are useful in choosing among professionals in the first place.\textsuperscript{166} Analytics can help with sorting through the many variables that might lead to a successful outcome in chapter 11 cases.\textsuperscript{167} Analytics can also help in terms of deciding which work to keep with

\textsuperscript{165} Katz, supra note 162, at 929--32 (footnotes omitted).

\textsuperscript{166} Evolving Role, supra note 79, at 443 (discussing how legal procurement departments can benchmark data to enable better comparisons across law firms). What else is useful? At least one inside counsel checks out the tech-savviness of potential law firms. See D. Casey Flaherty, \textit{Could you pass this in-house counsel's tech test? If the answer is no, you may be losing business}, ABA J. (July 17, 2013), http://www.abajournal.com/legal rebels/article/could_you_pass_this_in-house_counsels_tech_test (discussing Kia Motors's technology audit).

\textsuperscript{167} As Warren Agin explains:

\begin{quote}
In many Chapter 11 cases, attorneys and courts make decisions about potential viability by reviewing the relevant information available in the case and qualitatively evaluating the case's prospects. Sometimes these decisions are easy ones. For example, assume that the debtor operates a retail store, the lease was terminated pre-petition, and the landlord is asking the court for permission to evict. Here, predicting a conversion or dismissal is easy. In many other cases, however, deciding whether a case will succeed is very difficult using qualitative methods. Quantitative financial analysis is often employed to ascertain potential outcomes, but the courts themselves are limited to the analysis provided to them by the parties, and—especially in smaller Chapter 11 cases—the parties lack access to financial professionals capable of doing an adequate job using quantitative methods. In any case, financial professionals of case parties are often tasked with providing a quantitative basis to support a particular outcome; these analyses are valuable but not statistically relevant. Statistical models can certainly supplement other techniques, as well as provide a mechanism for decision making using smaller information sets.
\end{quote}
main bankruptcy counsel and which work should go to efficiency counsel, to contract attorneys, or to computers.\textsuperscript{168} There is always going to be a role for human judgment in the high-level tasks of the most skilled and experienced lawyers, but good judgment is best accompanied by good data.\textsuperscript{169}

2. Suggest that Bankruptcy Counsel Use Artificial Intelligence for More Than Just Document Production Work

There are now artificial intelligence programs that support legal research and basic contract drafting, and the use of such programs will increase over time. Artificial intelligence, when coupled with human intelligence,\textsuperscript{170} can create significant efficiency in the delivery of legal services,\textsuperscript{171} and the firms that use artificial intelligence appropriately can set themselves apart from the more traditional law firms.\textsuperscript{172} Why couldn't main bankruptcy counsel use computers to develop first

Warren E. Agin, Predicting Chapter 11 Bankruptcy Case Outcomes Using the Federal Judicial Center IDB and Ensemble Artificial Intelligence, 35 GA. ST. U. L. REV. 1093, 1114 (2019); see also id. at 1115 ("If systematically deployed in a decision process, these models can enhance human judgment and intuition . . . . AI and machine-learning-based models can provide dynamic and statistically accurate results to support decision-making in ways not currently available.").

\textsuperscript{168} See Legal Analytics, supra note 30, at 1292 (discussing how legal analytics can refine and improve staffing decisions).

\textsuperscript{169} Interpreting data correctly, of course, is a skill all its own.

\textsuperscript{170} See Solutions-Oriented Approach, supra note 86, at 137 ("Lawyers should ask themselves what processes can be automated with technology and seek to implement that automation. This approach frees up lawyers to focus on the aspects of their practice that truly require human judgment."). see also Katz, supra note 162, at 929 ("In sum, for the appropriate tasks, the age of quantitative legal prediction is about a mixture of humans and machines working together to outperform either working in isolation. The equation is simple: Humans + Machines > Humans or Machines.").

\textsuperscript{171} And, from an ethics viewpoint, lawyers should be on the lookout for better ways to serve clients competently. See Walters, supra note 162, at 1079 ("[T]he Model Rules actually propel lawyers and their firms forward. Rule 1.1, read in conjunction with Comments 5 and 8, requires law firms to employ measures, including AI and data analytics, to ensure that they meet standards of reasonable competence in representation.").

\textsuperscript{172} New York-based Risk Enterprise Management ("REM"), a third-party insurance claims administrator, developed an outsourcing partnership with Legal Research Center ("LRC") on the recommendation of the Association of Corporate Counsel. Overall, REM was implementing convergence strategies with its outside counsel and, as most corporations, seeking to reduce litigation costs . . .

REM and LRC launched a pilot program with approximately 70 of REM's outside law firms. REM involved its outside counsel in the development of the program to help enlist their support. The pilot program proved successful—both in verifying the potential cost savings and the ability to outsource and improve the overall quality of its legal research—and was expanded and institutionalized.

Under the program, LRC administered a database of REM's critical, reusable legal knowledge. REM outside counsel submitted briefs and memoranda of law to LRC for archiving in the REM database. When outside counsel considered an issue, they first consulted the LRC database for existing research. The database contained approximately 2,000 documents covering an average of three issues each—about 6,000 total issues. Almost one in four inquiries resulted in a "hit" that translated into cost savings.
In addition to the savings from reusing legal research, REM enjoyed savings by encouraging its outside counsel to outsource REM’s legal research to LRC. According to REM, since LRC attorneys specialize in legal research, they perform the work more efficiently, at a lower cost, and often achieve superior results.

In addition to legal research, REM called on LRC to perform factual research on experts, opposing counsel, and other background information. Finally, REM asked LRC to perform surveys of injury awards to help them value cases appropriately and plan their case strategy.

The effectiveness of unbundling legal research can be obtained by rolling out a research management program with just one group within a corporate legal department. In 2009, Legal Research Center rolled out a program like that used with REM for the litigation group of a Fortune 500 company. Work product reuse is being observed and additional cost savings achieved as a result of changes in law firm behavior beyond the cost savings projected solely from using an outsourced provider. Even after a convergence program, law firms respond favorably to creating a sense of competition between outside counsel. One way to instill a sense of competition is to let the outside counsel firms know that they are being measured on their degree of participation in contributing research to the system, using the system to find reusable research, and using the preferred research provider. A simple measure like tracking the requested delivery timeframes for research can be used to show general counsel the outside counsel firms who are better at planning and managing the research aspects of their matters. A firm that consistently requests research on a short time-frame demonstrates less planning and project management skill than those who are able to better plan in advance for research needs. If the research provider’s fees are tied to delivery timeframes, then you can see a tangible financial benefit associated with using the latter group of firms. If the outside counsel firms are advised that they are being measured in this manner, the drive to excel at customer satisfaction can increase the overall level of planning exhibited across the firms.

Vance K. Opperman et al., 1 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 19:35 (Apr. 2019) (footnotes omitted). At least one high-profile law firm is already using artificial intelligence to assist in drafting incorporation documents, saving both time and money:

Legal forms are hardly new. Since the middle ages when lawyers used forms of action, templates helped reduce the cost of law. But machine intelligence will revolutionize the use of legal forms. Most obviously, machine intelligence will help tailor these forms to meet individual situations.

... Fenwick & West, a firm whose principal office is in Silicon Valley, developed a program that automatically creates the documents for incorporating startups. Matt Kesner, their technology officer, said: "It reduced the average time we were spending from about 20 to 40 hours of billable time down to a handful of hours... In cases with even extensive documents, we can cut the time of document creation from days and weeks to hours."

In the future, machine processing will be able to automate a form, tailor it according to the specific facts and legal arguments, and track its effect in future litigation. As hardware and software capacity improves, so too will the generated documents. We predict that within ten to fifteen years, computer-based services will routinely generate the first draft of most transactional documents.

drafts of more documents? Why can't law firms turn to computers for basic legal research on non-novel concepts? Admittedly, the more useful that computers are, the less training in traditional work the first-year and second-year associates will receive, and that phenomenon bodes ill for the professional development of good lawyers. And I'm not sure that even IBM's Watson can replicate the kind of "happy coincidence" research in which one answer triggers a potentially useful additional line of thinking. Even the most sophisticated computers have their limits. But inside counsel can and should be asking each law firm pitching its services to discuss how the firm would determine the most efficient allocation of workload, and getting an answer of "we figure out it as we go" is a sign for inside counsel to look elsewhere.

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173 See Great Disruption, supra note 172, at 3052 ("Ultimately, these kinds of programs will be able to provide drafts of briefs and memos, as well as connect to legal research programs, which will provide data for the writing program. As with legal search, we expect substantial progress in programs over the next fifteen years until they deliver very useful drafts. In the decade or two after that, such programs may deliver more finished products, at least for low-value transactions:"); see also Kevin D. Ashley, Automatically Extracting Meaning From Legal Texts: Opportunities And Challenges, 35 GA. ST. U. L. REV. 1117, 1119 (2019) (discussing the many companies that can assist in computer-drafted legal work); Artificial Intelligence, supra note 161, at 469 (describing computer-assisted drafting services).

174 Another job traditionally given to junior lawyers was legal research. It was much cheaper for a junior lawyer to research the latest law on a given matter at a lower charge out rate than a partner. Now, AI driven programs are revolutionizing legal research, building upon the digitalization that has occurred over the last 20 years. A number of companies have developed applications that are able to conduct legal research and this process will improve the more it is used. The providers of legal research applications include Ravel Law, ROSS Intelligence, Lexis Answers, Westlaw Answers, and Blue J Legal, all of which claim to offer artificial intelligence, machine learning, and natural language processing to identify key cases, and to extract relevant passages of judgments based on natural language search terms. Already, these applications are providing faster and more relevant answers to legal searches than any junior lawyer could.

175 Guinea, supra note 88, at 451–52 (footnotes omitted).

176 But computers probably won't go down too many rabbit holes, either, unlike baby lawyers. Even if the computers do go down every rabbit hole, they'll do so much more quickly than humans can.

177 AI [artificial intelligence] programs cannot read legal texts like lawyers can. Using statistical methods, AI can only extract some semantic information from legal texts. For example, it can use the extracted meanings to improve retrieval and ranking, but it cannot yet extract legal rules in logical form from statutory texts... ML [machine learning] may yield answers, but it cannot explain its answers to legal questions or reason robustly about how different circumstances would affect its answers. Third, extending the capabilities of legal text analytics requires manual annotation to create more training sets of legal documents for purposes of supervised ML.

Ashley, supra note 173, at 1120.
IV. THE AS-Yet UNSOLVED PROBLEM: THE LAWYER-DEVELOPMENT PYRAMID IS BUILT ON SHAKY GROUND NOW

One problem with all of my suggestions is that they may lead to fewer professional training opportunities for the newest lawyers. Gone are the days when new lawyers learned by watching more experienced lawyers take depositions or negotiate deals.178 Also gone are the days when big litigation led to several lawyers and paralegals working long days, holed up in document production rooms, sifting through mountains of potentially relevant material. Computers do that work faster—at least the first cut of sifting—without getting bored or hungry in the process. Where are the opportunities for training the newest entrants into our profession? Law schools probably can't pick up the slack. Most "podium" professors179 are often far removed from the current practice of law, and clinics have to grapple with the limits of an academic calendar. The problem with using computers to do basic legal work is that some law-trained human has to analyze that work and determine its accuracy and usefulness. If we're cutting the newest lawyers out of the grind of tasks like document production or contract drafting, then how will they develop the skills that they'll need to become truly competent? I don't have an answer for that, and I don't have an answer for the question of how, exactly, law firms are supposed to be able to make ends meet if their billable hours decrease due to increased efficiency.180 As is almost always true, David Wilkins says it best:

One of the most important promises that firms make to those whom they recruit is that they will provide these young lawyers with excellent training in the skills and dispositions that they need to become accomplished and skilled practitioners. In recent years, however, this promise has grown increasingly illusory. The reasons for this trend are undoubtedly multiple and mutually reinforcing. Clients, weary of an ever-changing cast of untrained—and undoubtedly relatively unproductive—junior lawyers shuffling in and out of their projects, are increasingly unwilling to pay for the

178 Gone, too, are the days when clients would pay for "learn by watching" training.
179 Those who don't teach in clinics.
180 It is clear that a good part of the systematized work of the junior lawyer such as research, discovery review and contract review for due diligence, for so long the entree into legal work for lawyers, will eventually be performed by machines involving also perhaps only a supervising senior lawyer . . . . [Sean] Larkan, a law firm consultant, argued that consistent low leverage (the ratio of junior lawyers to partners) leads to a range of unsatisfactory outcomes for partners, lawyers, and clients including that: "[p]artners are forced to do work that would normally be delegated down to the lowest competency level. This may mean higher writeoffs, where certain types of work do not justify high rates, and unhappy clients."

Guihot, supra note 88, at 459 (footnotes omitted).
work of first-year and second-year associates. At the same time, partners eager to boost their profits per partner are unwilling to absorb this cost either. The result, as Ben Heineman and I have elsewhere argued, is a "lost generation" of associates who are coming of age in law firms without proper supervision or training. This is a disaster for both firms and clients. Law firms (at least until the current downturn) were shedding associates at prodigious rates—in many cases up to twenty-five percent per year. Although young lawyers change jobs for many reasons, recent research on the attitudes and careers of junior associates suggests that a perceived—and, I would argue real—lack of training and mentoring in large law firms is a significant cause. For their part, clients are likely to have increasing difficulty finding trained third-year and fourth-year associates—particularly ones with experience in handling (and understanding) their business—if most of the talented first-year and second-year lawyers have already left.181

In other words, the suggestions that I’m making for controlling costs in large chapter 11 cases carry the very real risk that the next generation of bankruptcy lawyers will have less hands-on experience in a variety of situations. That result is bad for bankruptcy law, and it's bad for companies going through chapter 11. But I don't have a solution.

CONCLUSION

Efficiency isn't the only important factor in a chapter 11 case. Chapter 11 cases also require creativity, negotiation skill, dogged determination, emotional intelligence, and luck. But efficiency still matters in terms of controlling the size of the administrative expenses associated with court-appointed professionals. And bankruptcy courts can't possibly find all of the inefficiencies that can emerge from the combination of the fast-paced nature of chapter 11 cases and the attenuated link between fees and the estate-based payment of those fees. In order to keep those fees reasonable, inside counsel can do a great deal to set the ground rules, in much the same way that they do with non-bankruptcy work. We need their help.

181 Wilkins, supra note 79, at 2108-09 (footnotes omitted). It's possible, though, that by finding ways to decrease overhead, law firms might be able to work more training into the care and feeding of new associates without sacrificing overall profitability. Without such training, firms are eating their own seed corn.