



# How Will the New U.S. Trustee Fee Guidelines Impact You? August 20, 2013

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<b>Guidelines</b>	<b>Relevant ethics rules and opinions</b>
USTP has an obligation to make sure that fee applications meet the standards of 11 U.S.C. 330 (which requires fees to be reasonable) and, if they don't, to bring the noncompliance to the court's attention.	Fees must be reasonable—see MODEL RULE OF PROFESSIONAL CONDUCT R. 1.5 <sup>1</sup>
Comparable services standard	MRPC 1.5
Avoidance of staffing inefficiencies	MPRC 1.5
Rate increases	MPRC 1.5; MRPC 1.3 (communications); ABA Formal Op. 11-458 (changing fee arrangements during representation)
Transitory professionals	MRPC 1.5 (if the attorneys who are only billing a few hours of time aren't really adding value to the case)
Routine billing activities	MRPC 1.5 (if the attorneys are billing certain things to a client inside bankruptcy that they wouldn't bill to a client outside bankruptcy—note, however, that the Guidelines do allow reasonable compensation for preparing fee applications)
Block-billing or lumping	MRPC 1.5 (if it's impossible for a court to determine how much time a task actually took); MRPC 1.3
Vague or repetitive entries	MRPC 1.5; MRPC 1.3
Overhead	MRPC 1.5 (if the attorneys are billing for things that normally constitute non-compensable overhead)
Non-working travel	MRPC 1.5
Geographic variations in rates	MRPC 1.5
Budgets and staffing plans	MRPC 1.5; MRPC 1.3
Verified statements by clients	MRPC 3.1 (meritorious claims); MRPC 3.3 (candor to the tribunal)
Considerations on expenses	MRPC 1.5
General rules for how to set forth descriptions of fees and expenses	MRPC 1.3
Electronic billing records	<i>See</i> MRPC 1.3 (nothing in the rules requires electronic billing records <i>unless</i> the retention agreement with the client specifies that bills should be submitted electronically; however, electronic billing records are a way of communicating to the client what tasks were done in a way that lets the client better determine reasonableness)

Case status	MRPC 1.3
Scope of retention and compensation of co-counsel	MRPC 1.2 (scope of retention); MRPC 1.7 (conflicts of interest—concurrent representation); MRPC 1.9 (conflicts of interest—former clients)
Efficiency counsel	MRPC 1.2 (scope of retention); MRPC 1.5; MRPC 1.7 (conflicts of interest—concurrent representation); MRPC 1.9 (conflicts of interest—former clients)

*(Footnotes)*

1 Attorneys should check their own state ethics rules for the actual rules that will apply to them. Model Rules are just that—model rules without the force of law.



# U.S. TRUSTEE FEE GUIDELINES

FOR ATTORNEYS IN  
LARGER CHAPTER 11 CASES

## WHAT ARE USTP FEE GUIDELINES?

- Required by Statute
- Uniform and Consistent
  - Internal guidance for fee review
  - Expectations of professionals
  - Grounds for possible objections

# THE WALL STREET JOURNAL

February 23, 2010  
**On Billing Over \$1,000 an Hour:  
'If You Can Get it, Get It'**

May 12, 2010  
**A Bankruptcy Fee Bonanza**

June 3, 2012  
**\$1,000/Hour Bankruptcies: Attorneys Justify Their Fees**

## The New York Times

May 1, 2010  
**Who Knew Bankruptcy Paid So Well?**

“legal culture with few restraints on billing for bankruptcies”

“continuing bankruptcy bonanza”

“a feeding frenzy of sorts”

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The New York Times

## Sunday Review | The Opinion Pages

Editorial

### The Trouble With Bankruptcy Lawyers

Published: June 10, 2012

Bankruptcy lawyers moved to the top tier of corporate practice in 1978 when [a federal statute](#) allowed them to be paid top hourly fees, which courts had traditionally limited in bankruptcy proceedings. In recent years, legal fees in Chapter 11 reorganization cases have soared as deals have grown bigger and more complex.

“What the lawyers want to keep secret is actually required in the bankruptcy law, but such disclosures have not been explicitly demanded by courts.”

“By opposing these guidelines, the lawyers handling big bankruptcy cases show they are out of touch with economic realities. Worse, in resisting improvements in accountability, they undermine public confidence in the integrity of the bankruptcy process.”

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## BANKRUPTCY COMPENSATION AND SECTION 330 OF THE 1978 CODE

- Reasonable and Necessary
- Customary and Comparable
  - To non-bankruptcy fees and expenses
  - Economy of administration repudiated
  - But no premium allowed
  - Market standard

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## PROCESS FOR ADOPTION

- Two years
- Pre-drafting consultation
- Two drafts for public comment
- DOJ Public Meeting
- Assoc. AG announced June 11, 2013

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## WHEN WILL USTP APPLY THEM?

- Cases filed on or after November 1, 2013
  - Not pending cases
- Retention and fee applications
- Assets of \$50 million and liabilities of \$50 million—and up
  - Aggregated for jointly administered cases
  - Based on petition values generally
  - No single asset real estate cases

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## OVERVIEW OF MAJOR PROVISIONS

1. Comparable billing disclosures—blended rate
2. Budgets and staffing plans
3. Electronic billing data
4. Client verifications and counsel statements
5. Rate increase disclosures and calculations
6. Co-counsel retention and billing guidance
7. Fee examiner or fee committee models

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## 1. CUSTOMARY AND COMPARABLE DISCLOSURES

- Disclose blended hourly rates for comparison
  - Billed or collected
  - Alternative billing
  - Explain methodology
- Limited “safe harbor” without prejudice to UST’s right to:
  - Seek more information
  - File an objection
  - Offer other evidence
- Developed with substantial input from National Bankruptcy Conference

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## 2. BUDGETS AND STAFFING PLANS

- Consent or court order
- Filed with fee application
- Budgets improve case management

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## BENCHMARKING FEE APPS TO BUDGET

- Explain if fees sought:
  - Exceed budget by 10%
  - For more professionals than in staffing plan
- Discussed reasons for exceeding budget with client?

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## MAKING BUDGETS WORK

### Confidentiality

- Filed *after* budget period
- Reasonable redactions
- *Filed* budget shows no detail

### Predictability

- Short budget periods
- Amend for unforeseen
- Explain “surprises”
- Not a cap or guaranty

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### 3. ELECTRONIC BILLING DATA

- What is it?

- Invoice data in electronic format
- LEDES
  - Universal law firm and client standard for legal e-billing
  - [www.LEDES.org](http://www.LEDES.org)
  - Non-proprietary
  - Raw .txt files easily and quickly import into many programs

- Who receives it?

- Courts
- USTP
- Major parties
- Other parties on request

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### WHY ELECTRONIC DATA?

- Sort, search, and filter data for analysis by:

- Timekeeper
- Task code
- Date
- Timekeeper category
- Key words or events

- Electronic data removes chronological and manual barriers to review

- Efficient, informative, easy

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## 4. THREE STATEMENTS

- Client with retention application
- Applicant with retention application
- Applicant with fee application

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## CLIENT'S VERIFIED STATEMENT AT RETENTION

- No boilerplate
- Describe process and decision to retain counsel
- Explain process for managing counsel's fees and expenses

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## APPLICANT'S ADDITIONAL STATEMENT AT RETENTION

- Variations in:
  - Customary billing rates and terms?
  - Rates for geographic location of case?
- Disclose prepetition billing rates and terms
  - If changed postpetition, explain why and what's different
- Client approved budget and staffing plan?
- In addition to Rule 2014 disclosures

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## APPLICANT'S ADDITIONAL STATEMENT WITH FEE APPLICATION

- Variations in:
  - Customary billing rates and terms?
  - Rates for geographic location of case?
- Explain to client why exceeded budget by 10%?
- Quantify fees for:
  - Billing or timekeeping
  - Redacting bills for privilege
- Rate increases since retention?
  - Agreed or approved?
  - If no, inform client not required to accept?
- In addition to Rule 2016 statement

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## 5. RATE INCREASES

- Disclose hourly rate for each timekeeper in first and current fee application
- Disclose number of rate increases for each timekeeper
- Calculate total compensation with and without rate increases

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## 6. CO-COUNSEL/EFFICIENCY COUNSEL

- Employed for routine work at lower cost
- Retention application should:
  - Compare billing rates with lead counsel
  - Demonstrate projected savings to the estate
- Duplication must be avoided
- Different than conflicts counsel

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## 7. FEE REVIEW MODELS

- **Fee Examiner** (not section 1104)
  - GM, American Airlines
- **Fee Committee with Independent Chair**
  - Lehman
- **Fee Committee**
  - GGP, Adelphia

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## FEE EXAMINERS AND COMMITTEES

- **Experienced bankruptcy professionals**
  - More than fee auditor focused on numbers
  - Raise important legal issues for adjudication
- **Rigorous review is deterrent**
- **Fees reduced vs. cost of review is not measure of success**

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# CONCLUSION



# Faculty Biographies

**Van C. Durrer, II** is a partner with Skadden, Arps, Slate, Meagher & Flom LLP in Los Angeles, where he leads the firm's Corporate Restructuring Practice in the western U.S. and around the Pacific Rim. He represents public and private companies, major secured creditors, official and unofficial committees of unsecured creditors, investors and asset-purchasers in troubled-company M&As, and financing and restructuring transactions, including out-of-court workouts and formal insolvency proceedings. Mr. Durrer is a member of the Turnaround Management Association, INSOL, the Association of Insolvency & Restructuring Advisors and Asia Society, and is a member of the California, Delaware, District of Columbia, Maryland, New York and Virginia Bar Associations. He has been recognized as a "Leading Lawyer" by *Chambers USA* and included in *The Best Lawyers in America*. He also has been included in *Turnarounds & Workouts* "Outstanding Young Bankruptcy Lawyers." Mr. Durrer received his B.A. in 1990 from Johns Hopkins University and his J.D. from the University of Maryland School of Law.

**Prof. Nancy B. Rapoport** is the interim dean and Gordon Silver professor at the University of Nevada's William S. Boyd School of Law in Las Vegas, where she specializes in bankruptcy ethics, ethics in governance and depiction of lawyers in popular culture. Previously, she clerked for Hon. Joseph T. Sneed on the U.S. Court of Appeals for the Ninth Circuit, then practiced primarily bankruptcy law with Morrison & Foerster in San Francisco from 1986-91. Prof. Rapoport began her academic career at Ohio State University College of Law in 1991. She served as dean of the University of Nebraska College of Law from 1998-2000, then served as dean and professor of law at the University of Houston Law Center from July 2000 to May 2006 and as professor of law from June 2006 to June 2007, when she left to join the faculty at Boyd. Prof. Rapoport has taught contracts, sales (Article 2), bankruptcy, chapter 11 reorganization, legal writing, contract drafting and professional responsibility. She co-authored *Enron: Corporate Fiascos and Their Implications* (Foundation Press, 2004), *Enron and Other Corporate Fiascos: The Corporate Scandal Reader* (Foundation Press 2d ed., 2008) and *Law School Survival Manual: From LSAT to Bar Exam* (Aspen Publishers, 2010). Prof. Rapoport is admitted to the Bars of California, Ohio, Nebraska, Texas and Nevada and to the U.S. Supreme Court. In 2001, she was elected to membership in the American Law Institute, and in 2002, she received a Distinguished Alumna Award from Rice University. Prof. Rapoport is a Fellow of the American Bar Foundation and the American College of Bankruptcy, and she co-chairs the Association of Media and Entertainment's Law School Committee. She received her B.A. *summa cum laude* from Rice University in 1982 and her J.D. from Stanford Law School in 1985.

**Damian S. Schaible** is a partner in Davis Polk & Wardwell LLP's Insolvency and Restructuring Group in New York, where he works on a wide range of corporate restructurings and bankruptcies and represents debtors, creditors, agent banks, lenders, asset-purchasers and other strategic parties. He also regularly advises banks and potential investors in connection with distressed bank acquisitions and recapitalizations. After receiving his law degree, Mr. Schaible clerked for Hon. Danny J. Boggs of the U.S. Court of Appeals for the Sixth Circuit. He currently serves as the chair of the Committee on Bankruptcy and Corporate Reorganization of the New York City Bar Association and is co-chair of ABI's Secured Credit Committee. Mr. Schaible graduated *magna cum laude* from NYU School of Law, where he was elected to the Order of the Coif and served on the *NYU Law Review*.

**Clifford J. White, III** is the director of the Executive Office for U.S. Trustees (EOUST) in Washington, D.C., and has served in the federal government for 30 years. He was previously an Assistant U.S. Trustee and a deputy assistant attorney general within the Department of Justice, as well as an assistant general counsel at the U.S. Office of Personnel Management. Mr. White was recognized with a Presidential Rank Award for Meritorious Executive in 2006 and the Attorney General's Award for distinguished Service in 2003. He is an honors graduate of the George Washington University and of the George Washington University Law School.