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PRACTITIONER'S FORUM:

UPDATE ON FEE GUIDELINES OF THE UNITED STATES TRUSTEE

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Last year, I wrote an article for this publication which discussed the United States Trustee Guidelines on Professional Compensation and Reimbursement. The Bankruptcy Reform Act of 1994 required the United States Trustee to develop these Guidelines. See, 28 U.S.C. 586(a)(3). The Guidelines became effective on May 1, 1995 and were to be applied to all cases filed after October 22, 1994.

The Fee Guidelines adopted by the Executive Director of the United States

Trustee's Office on March 22, 1995 were not intended to be final. The Executive Director wanted the opportunity to further refine the Fee Guidelines after soliciting responses and comments from members of the bench, bar and United States Trustee Offices. The Executive Director requested members of the bench, bar and U.S. Trustee's Office to submit written comments on the new Fee Guidelines on or prior to August 1, 1995.

Many comments and suggestions were received by the Executive Director. After careful consideration of these comments, the Executive Director and the Sub-Committee which assisted in this matter made **modifications to the**

Guidelines in areas which they believed modifications **were appropriate.**

On January 30, 1996, the Executive Director of the United States Trustee's Office signed an Order which adopted the revised Fee Guidelines. These revised Fee Guidelines supersede those adopted on March 22, 1995. For the most part, the revised Guidelines are not significantly different from the original Guidelines. There were, however, a few modifications which **should be noted.**

It has been said that the most significant change in the U.S. Trustee's original Guidelines was the elimination of Section II-D entitled "Evaluation Standards." The following statement

was made in this section:

The provisions of 11 U.S.C. 330(a) require the reviewer to employ a retrospective analysis in determining whether the services were necessary at the time they were rendered. Thus, fee applications should provide sufficient information to permit a meaningful review of all time entries within the context of the case at the time that the services were provided.

U.S. Trustee Fee Guidelines, Section II(D), adopted March 22, 1995.

Many who submitted comments to the Executive Director remarked that the foregoing language was ambiguous and unclear. The concern most often expressed was that this language could be interpreted to allow a "hindsight" analysis. One party suggested that a proper retrospective analysis should be based solely upon the facts and circumstances known to the parties at the time the

services were rendered.

The revised Fee Guidelines do not include the "Evaluation Standards" section. The reason for deleting this provision from the new Guidelines has not been specifically expressed. Therefore, parties must refer to case law and other legal authority in determining the evaluation standard which should be applied in reviewing a fee application.

Another significant modification to the Fee Guidelines concerns the "lumping" of services in service descriptions. The original Guidelines provided that "ministerial tasks performed in a project which total less than .5 hours, in the aggregate, can be combined or lumped together." U.S. Trustee Fee Guidelines, Section III,(B)(2), adopted March 22, 1995. In contrast, the revised Guidelines state that "tasks performed in a project which total a de minimis amount of time can be combined or lumped together if they do not exceed .5 hours on a daily aggregate." U.S. Trustee Fee Guidelines, Section

II(D)(5), adopted January 30, 1996. The revised guideline on "lumping" services is more liberal than the original guideline as it allows lumping of services which total less than .5 hours on a daily aggregate as opposed to .5 hours aggregate. Also, the applicant need not be concerned about whether the services which are lumped together are "ministerial" as this term was deleted from the revised Guidelines.

Another noteworthy modification of the Fee Guidelines concerns client approval of a fee application. The original Guidelines provided that "each applicant shall certify that the person on whose behalf the applicant is employed . . . has received . . . and approved the application." U.S. Trustee Fee Guidelines, Section II(E), adopted March 22, 1996. The revised Guidelines state that the fee application "should" provide "whether the person on whose behalf the applicant is employed has been given the opportunity to review the application and whether that person has approved the requested

amount.” U.S. Trustee Fee Guidelines, Section II(A)(5), adopted January 30, 1996. This revised language is less restrictive than that of the original Guidelines, and it does not infer, as the original Guidelines did, that the client must approve the application before it is filed.

The original Fee Guidelines also contained a provision which required the applicant to state “the rates at which the applicant charges its non-bankruptcy clients for similar services.” See, U.S. Trustee Fee Guidelines, Section II(A)(4), adopted March 22, 1995. This has now been changed to read that application must contain a “statement of whether the compensation is based upon the customary compensation charged by comparably skilled practitioners in cases other than cases under Title 11.” See, U.S. Trustee Fee Guidelines, Section II(A)(3). Thus, the focus is no longer on what rates the applicant charges in similar non-bankruptcy cases, but rather it is on what rates “comparably skilled” professionals charge in non-bankruptcy

cases. It appears that this change was made because the rates charged by other professionals for similar services is more informative **on the issue of reasonableness than the rates which the applicant charges for similar services in other non-bankruptcy cases.**

The last amendment to the Fee Guidelines which is worthy of note concerns non-compliance with the Fee Guidelines. Specifically, the original Guidelines required the applicant to state the reason for omitting any provision of the Guidelines. See, U.S. Trustee Fee Guidelines, Section I(B), adopted March 22, 1995. This provision was eliminated in the revised Guidelines. Thus, a fee applicant does not have the affirmative obligation to explain why a provision of the U.S. Trustee Fee Guidelines has been omitted from the application. This is not to say, however, that an omission of information required by the Fee Guidelines is acceptable or will not elicit an objection from the United States Trustee’s office.

A new section in the revised Guidelines provides that “applications that contain the information requested in these Guidelines will facilitate review by the Court, the parties, and the United States Trustee.” U.S. Trustee Fee Guidelines, Section I(E), adopted January 30, 1996. Thus, the omission of information requested by the Guidelines generally will impair the review process by interested parties. Therefore, unless exceptional circumstances exist, the omission of such requested information will, in all likelihood, result in an objection by the U.S. Trustee’s Office and possibly other parties.

The foregoing are the only significant revisions to the U.S. Trustee Fee Guidelines. Other revisions are generally changes in tone rather than substance.

Some practitioners may be wondering whether the U.S. Trustee Fee Guidelines have been taken to task by any fee applicants. The answer is “yes.” In the case of *In Re Robert and Marilyn DeLuca*, slip opinion No. 95-11924-AM (Bankr.

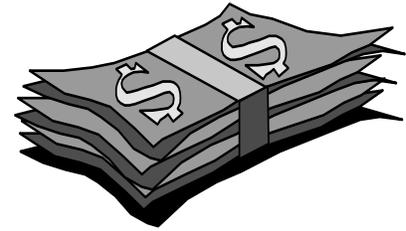
E.D. Va. Nov. 21, 1995), the U.S. Trustee objected to a fee application because it did not comply with the Fee Guidelines promulgated by the U.S. Trustee on March 22, 1995. Specifically, the application did not provide a narrative overview of the case status nor did it break-down the applicant's services by professional project or task.

The Bankruptcy Court in the DeLuca case held in favor of the U.S. Trustee. In doing so, it noted the failure to comply with the Guidelines in submission of a fee application is not an independent basis for denial of a fee application. Rather, the failure to comply with the Guidelines as such is relevant only to the extent that it impacts on the United States Trustee's statutory responsibility to review and, if appropriate, to comment upon or object to fee applications. *DeLuca* at 7.

The Court concluded that the applicant's noncompliance impair[ed] the ability of the United States Trustee to carry out his statutory responsibility

of reviewing and commenting on the application." *DeLuca* at 15. As a result, the Court denied approval of the fee application without prejudice to the filing of an amended application reasonably conforming to the Guidelines promulgated by the Executive Office of the United States Trustee.

Finally, as I mentioned in my previous article, the fee application form adopted by the Bankruptcy Court's General Order of December 22, 1992 generally requires all the information necessary to make an informed judgment on routine Chapter 13 fee applications. Therefore, Chapter 13 practitioners should continue to prepare fee applications in the form required by local rule and the Bankruptcy Court's General Order. However, in exceptional cases in which a Chapter 13 professional seeks substantial fees, an interested party may request and the applicant should provide an application which meets all the requirements of the U.S. Trustee Fee Guidelines.



Processing cut-off for checks in July will be the third (3rd) Friday of the month or July 19, 1996. Checks will be mailed on the fourth (4th) Friday of the month or July 26, 1996.

Cutoff for confirmation orders is Tuesday, July 16, 1996., which is ten (10) days prior to the check mailing.

EDITOR'S COMMENT

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