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A Value Added Look at Corporate Bankruptcy

Financial Services

Corporate, Securities, and Governance


CHAPTER 11
INVOICE

CHEAT SHEET

- ***The billing revolution.*** The rising trend in value based legal billing has been welcomed in corporate legal departments.
- ***"Bet the company" litigation.*** The high stakes involved in Chapter 11 proceedings are compounded by large legal bills from court monitored professionals.
- ***An eye to market rates.*** Wary of these concerns, the United States Trustee revised its strategy to incorporate value added fee billing practices.
- ***The billable hour persists.*** The Revised Guidelines reflect the market at large, which is still dominated by the billable hour.

There is no clearer example of "bet your company" litigation than a restructuring or liquidation under Chapter 11 of the US Bankruptcy Code. A Chapter 11 filing significantly affects not only the debtor, but can also be of critical importance to the companies that do business with the distressed company. Chapter 11 is used to address systemic problems with a company as well as sudden catastrophic issues, such as the consequences of economic, regulatory, and litigation related liability. Often, chapter 11 is used as part of a sophisticated distressed M&A practice involving competitive auctions. The debtor's business partners and suppliers are not only often left with open accounts receivable that likely will not be paid in full, but also uncertainty about key market share imperiled by the debtor-customer's condition, or the continued viability of a customer with access to strategic information, such as IP.

The status of relationships such as these will depend on the outcome of the bankruptcy process. As important as these key strategic issues are to companies involved in a bankruptcy, there is ample opportunity to render certain key aspects of the process, use alternative fee structures, and maximize the value of some of the most important — but little understood and unique — practice areas vital to the life or continuation of a company and its key relationships.

The United States Bankruptcy Code makes provision for the payment of professionals servicing the bankruptcy estate, as the company is known while it is under bankruptcy protection. These professionals manage the bankruptcy process, including all motion practice and litigation, until the debtor devises a way to leave bankruptcy through resolution of outstanding liability and its financial difficulties, usually through a sale of assets or securing alternative financing and restructuring its operations. The Bankruptcy Code also, significantly, allows for representative committees of creditors (including key suppliers and business partners) to appear and participate in the process of rehabilitating the debtor's financial condition, and those committees are allowed to retain professionals who are paid by the debtor in chapter 11, not by the creditors.

Because the professionals managing the bankruptcy process are paid from assets of the distressed company, there is a highly regulated process to review the fees and costs of these professionals, which involves filing detailed invoices and supporting legal papers with the court, which are open to objection and a hearing. Payment of these legal fees and costs is subject to court order, and also subject to final approval and possible disgorgement of prior paid fees if there are any irregularities that are discovered later in the case. Under this intense and very public scrutiny, some hefty fees have been paid in large cases which met the literal definition of "bet your company" litigation where the result can be closure of a company, the sale of substantially all the assets of a corporation, or the rebirth of a corporation if it emerges from bankruptcy as a new, reorganized entity.

There are some legal opinions related to the fee process in bankruptcy, but a lot of the oversight of the process is handled by the United States Trustee Program (USTP), the arm of the United States Department of Justice that acts as a watch dog in certain areas of the reorganization practice. The United States Trustee started a process in 2011 that culminated in the first updates in many years to DOJ policy in this area. Along the way, the bankruptcy bar and the Trustee's office borrowed from value added fee principles, with some success and some short falls in the final product. More importantly, there remains great opportunity to directly improve the process that resulted from the fee guidelines revisions. Bankruptcy is an area of practice that is frequently outside of a law department's everyday practice, but which has significant strategic and operational impact to a company if they become involved in a large bankruptcy matter, whether as a debtor, creditor, or purchaser of a target distressed company. It is a practice area where the distressed nature of the client demands efficiency and strategic use of resources, but which also calls for a serious response to serious issues.

1. The revised fee guidelines

On June 11, 2013, the Executive Office of the United States Trustee Program released proposed revisions to the Guidelines for Reviewing Applications for Compensation filed under Bankruptcy Code section 330 ("Revised Guidelines"). In June 2012, the USTP held a public meeting — in addition to a request for comments in November 2011 — and again in November 2012.[1] To its credit, the USTP took only two years from the date it issued the proposed guidelines on November 4, 2011 to consult and hear from a variety of participants in the bankruptcy process.

The final Revised Guidelines require disclosure of blended (average) rates, and with it greater transparency, so that they can be judged against market rates outside of bankruptcy, the use of budgets and staffing plans, submission of billing records in an open and searchable electronic format, the use of fee examiners, and the use of efficiency counsel. The proposed revisions are designed to meet a number of goals, as articulated by the United States Trustee (UST), including: making bankruptcy professional fees subject to market forces that would apply outside of bankruptcy; ensuring professional compensation is reasonable and necessary and maintaining the burden of proof on professionals to show their fees are reasonable and necessary; increasing transparency in compensation of estate-paid professionals; increasing client accountability for estate-paid professionals; encouraging the adoption of budgets and staffing plans by clients and their professionals; increasing efficiency; and increasing public confidence in the integrity of the bankruptcy compensation process.

The Revised Guidelines draw support from and cite to a movement in the market to change the way legal services are provided, with a particular emphasis on answering the question of whether bankruptcy professionals are getting a premium for their services. While it is a stated goal by clients to reduce costs, the underlying movement to change the way legal services are provided focuses on more than just lowering costs, and more towards improved results or "value." In defense of the guidelines, there is more to them than just discovering whether a premium is being charged, but the emphasis on them was primarily the product of input from many members of the bar. To the credit of the United States Trustee's Office, these additions to the guidelines from the bar included the common sense approach to better serving clients. What was significantly missing from the discussion was input from clients, but there is an important opportunity for those responsible for the strategic function in legal departments and members of the C-suite, particularly CFOs, to contribute on a go-forward basis.

1 Rafael Zahralddin was one of the cochairs of the American Bar Association's Business Bankruptcy Committee's ad hoc working group on the Guidelines and provided commentary during the public

meeting along with his co-chair Judith Ross. Comments on the proposed revisions were due by January 31, 2012.

2. The market and billing evolution

Following the biggest financial crisis in more than 70 years, in 2008 corporate legal departments led a movement, quite successfully, to get better value for legal services. ACC noted that in the past 10 years, overall costs to companies in the United States have risen 20 percent, while legal costs have risen 75 percent.[2] The economic downturn coupled with the rise in legal fees provided the right combination of circumstances to necessitate creative approaches to the relationships between outside counsel and their clients. This environment tested the relationships among corporate legal departments and their law firms alike which resulted in far more "value" driven engagements or in some instances a parting of the ways.

Companies have turned to their legal departments to reduce legal costs and created a movement that necessitated not just a single-minded reduction of rates, but instead a complete reevaluation of how to manage legal services. Corporations such as Houston-based FMC Technologies Inc., Cisco Inc., Sun Microsystems, and Clorox have been longtime advocates for alternative fee structures — structures that reject the billable hour.

Performance-based pay, for example, is an alternative fee scheme in which firms are paid a percentage of the invoice, either reduced or enhanced, depending on performance, which includes both hitting agreed upon objectives, staying on budget, or both. Corporate Counsel magazine quoted Jeffrey Carr, the general counsel of FMC in 2009, as saying, "I don't want to buy hours, I want to buy results."[3] ACC characterizes its approach to legal services management as not "how many hours will it take," but instead "what is the value to be delivered."[4] A consistent theme in all these efforts is that both the law firm and the client gain from a value based billing approach. Aligning the economic interests of the client and the lawyer is the key to the success of value billing. The movement against the billable hour is fueled by experience and a strongly held belief by clients and lawyers that the billable hour model does not economically align client and lawyer.

Value-based billing practices are not limited to a few pioneers such as DuPont or FMC and their law firms. ACC, one of the largest in-house lawyers groups worldwide, has provided leadership in these efforts through its anti-billable hour initiative, the Value Challenge, which is a broad-based industry wide effort to eliminate the billable hour.[5]

2 ACC Value–Based Fee Primer, July 2010 at 3.

3 Tamara Loomis "Talkin' Revolution" Corporate Counsel, September 1, 2009.

4 ACC Value–Based Fee Primer, July 2010 at 8.

5 It is not surprising that measuring data is the keystone of the ACC Value Challenge because the initiative has its roots in a manufacturing efficiency methodology known as Six Sigma. Six Sigma was adopted by companies such as Motorola, AlliedSignal, and Gen. Electric, and is a statistically driven data intensive methodology for improving processes, initially in manufacturing of goods. Six Sigma has been adapted and developed for the provision of services. The DuPont Company has one of the first legal departments to use Six Sigma to manage its legal services. It started with its own legal department and continues to encourage its outside counsel to adopt many of the methodologies it employs internally. Six Sigma is a methodology for improving processes. Six Sigma derives its name

from a measurement which measures 3.4 defects for 1 million opportunities for failure. Six Sigma is a virtually defect free process. Unlike other efficiency methodologies or analyses which often degenerate into an examination of what someone believes the problem “might” be, Six Sigma actually forces parties to go back and measure and analyze data. The key to Six Sigma is measurement, all processes can be reduced to a statistical formula, and in order for the formula to work it has to be fed actual data of “what happened,” not “what you think happened,” in order to properly identify the defects.

3. Fees in bankruptcy court

The United States Bankruptcy Code allows a chapter 11 debtor and official committee of unsecured creditors to retain professionals, including attorneys.[6] The Code further empowers the court to deny compensation and disgorge any fees already advanced for, among other things, excessive fees or poor performance.[7] The court and other parties in the case can also object to terms of a professional’s retention, including rates, and usually, in most large cases, may review fees on a monthly and on a quarterly basis whereby a professional can only be paid per the terms of a court order. Fee applications to the court use detailed codes which represent substantive tasks, and are filed and made public record (with redaction for the court and the Justice Department’s eyes only if detailed time entries might reveal case strategy or confidential information).

Typically in a corporate chapter 11 proceeding, unlike many insolvency regimes around the world, the debtor continues to manage its own business affairs and operations, and the management of the debtor stays in place to effectuate either a reorganization of the company or a sale of the assets, in whole or in part. This is the “Debtor-in-Possession” principle. Several important policy considerations underlie the debtor’s right to steer its own corporate policy, including preserving the going concern value of the estate and allowing the company to reorganize and emerge from its bankruptcy without losing the tremendous economic value created by any operating business. Despite this independence and retention of control by management, a debtor is subject to government supervision by the United States Trustee, which is entrusted, among other responsibilities, with analyzing professional fees. In 1996, the UST released its original Guidelines for Reviewing Applications for Compensation filed under Bankruptcy Code section 330.[8] The use of billing codes, for example, is a practice set forth in the United States Trustee Guidelines. Although the Guidelines are not mandatory, they are useful to determine how one of the main watchdogs over the process, the UST, will react to certain fee and expense practices and are a starting point for most firms when preparing for the process of having fees approved by a bankruptcy court.

One interesting fact to note is that the 1978 US Bankruptcy Code was amended because many chapter 11 professionals in bankruptcy matters were previously paid an amount appreciably less than they could command for similar services when they were not employed by the estate. Congress explained that “[T]he policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11.”[9] Circuit courts that have addressed the issue have agreed, rejecting what was known as the “economy of administration standard,” in favor of a market based standard.[10]

High profile bankruptcies

Many high profile bankruptcies have been costly affairs. Enron’s professional fees reached US$750 million, Pacific Gas & Electric’s fees were US$462.5 million, and WorldCom’s fees were US$657 million. Large cases also cost more because of the complexity and size of the case. Fortune reported that between 2008 and 2009, debtors filed nine of the twenty largest bankruptcies in the last three decades.[1] The largest concentration of billion dollar bankruptcies was in 2009, as measured in terms of assets and liabilities.[2] The biggest cases to capture popular attention, however, have been General Motors (GM), Chrysler, and Washington Mutual.[3] Professor Edward Altman of NYU's Stern School of Business believes that the focus on fees is misguided when compared with the bigger issue of allowing companies to exit bankruptcy with the same operating issues and over-leveraged balance sheets that often result in a second or even third bankruptcy.[4] Others have noted that in these large cases, judges have appointed a fee auditor to review fees submitted by professionals, and their recommendations have resulted in fee reductions. Former US Bankruptcy Judge Arthur J. Gonzalez, now retired, appointed a fee auditor in the Enron case, which resulted in some reductions. These cases received scrutiny because of a combination of their size and the fact that some of the companies, like GM and Chrysler, were common household names for decades. In some cases, like Enron, the cases had notoriety for other reasons; such as fraud that was so widespread it arguably led to a sea change in how corporations operate in the United States. Professor Stephen Lubben, who has produced one of the few empirical bankruptcy fee studies, also argues, for example, that it is hard to tell if the costs for a merger outside of bankruptcy are more costly than in chapter 11 because there have not been proper studies on the costs of similar transactions outside of chapter 11.[5]

1 Kit R. Roane, *Corporate Bankruptcy: Costly and Often Worthless*, FORTUNE, Sept. 9, 2010.

2 *Id.*

3 *Id.*

4 *Id.*

5 See Katy Stech, *Proposed Fixes Would Try to Make Bankruptcy Cheaper*, WALL ST. J., Dec. 22, 2014.

Over the past two decades, two significant fee studies have been commissioned by the American Bankruptcy Institute which show an increase in value by bankruptcy professionals, the most recent by Professor William Lubben and the first by Professor Lynn Lopucki.[11] Many restructuring professionals and academics have lamented that it is still common to see chapter 11 described in the media as a lengthy or expensive process. Some of the popular misunderstandings of the chapter 11 process are exacerbated by the combination of large legal bills with the dire circumstances inherent in the cases themselves.

In his study, Professor Lubben noted that professional fees in either dataset total about 4 to 4.5 percent of the sum of assets and debts. In articles following the release of the results of the study, Professor Lubben articulated this finding in more detail.[12] Using the example of an IPO, he discusses the high costs involved whenever corporations make changes to their financial structure. Detailing the various professional fees involved in an IPO, he compares the underwriting fee, (which he estimates at usually 7 percent of the offering, plus the legal, accounting and advisory fees at another 3 percent or more) to the costs of a chapter 11 matter. Including underpricing, an IPO costs on average 17 percent of the value of the stock sold. Chapter 11 expenses only equal approximately 4.5 percent of a debtor's assets. He also found that substantial economies of scale make a large chapter 11 case much less expensive than other corporate transactions. What Professor Lubben finds is that a chapter 11 is comparable to the costs of the cheapest corporate finance transactions: the merger. This is not surprising because many of the larger chapter 11 cases are part of the distressed merger and acquisitions practice that has evolved in corporate restructuring.[13]

6 11 U.S.C. § 327.

7 11 U.S.C. § 329.

8 Appendix A, Guidelines for Reviewing Applications for Compensation filed under 11 U.S.C. § 330, Office of the United States Trustee, May 17, 1996.

9 *See* H.R. Rep. No. 595, 95th Cong., 2d Sess. 329-30, reprinted in 1978 U.S.C.C.A.N. 5963, 6442.

10 *See*, e.g., In re Busy Beaver Bldg. Ctrs., 19 F.3d 833 (3d Cir. 1994).

11 In December 2004, the American Bankruptcy Institute ("ABI") announced that it awarded a US$346,000 grant to Prof. Stephen Lubben to carry out a landmark chapter 11 Professional Fee Study. The study was also supported by a more modest grant from the National Conference of Bankruptcy Judges. The study examined the professional fees of more than 1,000 chapter 11 cases filed in 2004. Professor Lubben, who served as lead reporter and the principal investigator, was assisted by a sixmember advisory panel. "The fee study represents the most comprehensive set of data of a large sample of Chapter 11 cases ever compiled by an independent empirical study," noted Claude "Chip" Bowel Jr., Chair of the ABI's Professional Fee Study Advisory Board. "The high quality and vast quantity of data gathered by the fee study shows [sic] that the ABI's faith in the project and the reporter was well placed." In 2008, Professor Lubben published the results of the study, which is the ABI's leading and most comprehensive empirical study of professional fees in Chapter 11 bankruptcy cases to date. What he found was very interesting. Professor Lubben and his team of investigators found that the presence of creditors' committees, judge-appointed examiners, and first-day motions, rather than the length of bankruptcy cases, are more likely to impact costs. Professor Lubben commented, "Chapter 11 costs are largely the function of the size of the debtor and the complexity of its case. The jurisdiction the case files in or the law firm that represents the debtor does not have any independent significance in predicting costs." He also found that in larger cases fee objections are more common, with the US Trustee objecting to lead counsel's fee applications in more than 13 percent of the cases, and all parties objecting in fewer than 20 percent of the cases. Significantly, "[L]ost in the sound and fury about large professional expenses in large cases is the fact that almost 35 percent of the chapter 11 cases result in no payment whatsoever to the professionals. These are typically smaller cases that are often converted to chapter 7 or dismissed outright."

12 *See* Stephen J. Lubben, "Corporate Reorganization and Professional Fees," 82 Bankr. L. J. 77 (Winter 2008).

13 This is the most extensive study to date of the professional fees and expenses awarded by US bankruptcy courts in the reorganizations of American businesses. Its database includes approximately 1,050 chapter 11 cases filed in 2004 – almost more than 1,000 more cases than the next largest American study. Similarly, the study includes chapter 11 cases of all types, ranging from very large, well-known companies like US Airways Group, Inc., which reported assets of more than US$8 billion, to decidedly less glamorous firms like Pot of Gold Porta Potties, Inc, which reported assets of just over US$950,000. Even considered alone, the big case portion of the sample is larger

than any prior study of professional fees in chapter 11.

The Final Fee Guidelines

As a result of the consultation process, the United States Trustee revised its original proposal, and struck a balance between the need for disclosure and the need to protect client confidences and legal strategy. The United States Trustee adopted disclosure of hourly blended rates by the type of timekeeper, and allowed the professional to use the methodology if the calculation included alternative billing arrangements. The solution to this issue, and the increased transparency on legal fees already existing in other areas of practice, are reflective of the marketplace where many in-house counsel already gather detailed intelligence on rates. There is, however, hope that one byproduct of all this disclosure is that the information will be used by some entity — whether it is the ABI, ACC, or creditor organizations such as the National Association of Credit Managers or the Credit Research Foundation — to analyze whether there is an artificial “premium” being charged.

The US Trustee Fee Guidelines studied elements and mechanisms that are commonly found in Six Sigma methodology and value added fee billing practices. For example, it is becoming more and more common for large corporations to request that data be submitted in an electronic format. Electronic submission of fee applications will make it easier to compare and study costs in chapter 11. The US Bankruptcy Courts, particularly in some of the busier jurisdictions, have used technology to modernize and streamline the practice of reorganization. Electronic submission in a uniform manner, such as the LEDES standard endorsed in the Revised Guidelines, would greatly assist in the collection of data, much of which is already publicly available, but harder to manage and study in its current state.

The UST also addressed budgeting and staffing plans in the Revised Guidelines.[14] Budgeting and staffing plans (which are often used by Six Sigma trained professionals), are successfully used to engage in strategic planning and assist with client expectations, and are becoming more commonplace in many attorney-client relationships today. Budgets are also very effective to help refine and clarify client communication, and explain the intricacies of a legal process to a layperson who, though sophisticated, will rarely have experience with the chapter 11 process.

Budgets are already pervasive at almost every critical turn in a bankruptcy. In order to get approval to enter into financing to fund the bankruptcy process, the Bankruptcy Code mandates that a debtor request permission from the Court. A central part of the evidentiary burden for debtor-in-possession financing approval is a budget which forecasts costs in the bankruptcy, including professional fees, in addition to operating costs and other expenses. Budgets and weekly reporting are usually not just requested by the client, but are also a requirement of the lenders financing the bankruptcy, as well as any prepetition secured lender with an interest in the debtor’s, and now the bankruptcy estate’s, assets. Some criticism or concern over budgeting at a more detailed level, and provided as part of a publicly filed fee application, is that the budget will reveal case strategy. However, this concern can be addressed by existing provisions in the Bankruptcy Code for protecting and sealing confidential information, and while the United States Trustee and its lawyers are unable to execute a non-disclosure agreement, the UST has always honored the status of a document that has been filed under seal, and already accepts as a matter of course redacted fee applications whose detailed entries might reveal case strategy.

Thus, the concern over budgets, as long as common sense and the use of existing protections under current bankruptcy practice are used in disclosures, is really a non-issue. The Revised Guidelines incorporated a common sense approach after the consultation process. The final version of the

Guidelines allows for budgets and staffing plans with the consent of the professionals or if the UST obtains a Court order.[15] The Revised Guidelines also indicate that counsel for the debtors and any official committees exchange client-approved budgets, and that the UST will receive the budgets retrospectively with fee applications. The Guidelines further acknowledge that budgets can be amended in order to reflect changed circumstances.[16] Recognizing the dynamic nature of certain projects and the need to revisit and amend the fee agreement in place is an integral part of any alternative fee arrangement. Perhaps the position most symbolic of policy positions taken by the UST in the new Guidelines is that the UST allows for budgeting to be reimbursed by the estate, which means that it understands that the planning and communication involved in budgeting add significant value to the process.[17]

Staffing plans are a far more intriguing aspect of the Guidelines that are particularly suited to bankruptcy practice. While there are separate entities responsible for the major constituencies in the case, the professionals of the debtor and official committees charge the estate for their respective fees. In many instances, early coordination between these parties can eliminate costly duplication of efforts.[18] There will be times that certain key issues in the case require the parties to take an adversarial position in regard to certain elements of the bankruptcy process. However, there is often more compromise than there is litigation in many large cases, and using a staffing plan, even one that excludes strategic information, will still help to identify areas where the process could be more efficient.[19]

Global approaches to bankruptcy

American bankruptcy law significantly differs from many countries and has since the early days of the nation. French philosopher Alexis de Tocqueville described the approach of the US towards bankruptcy as a “strange indulgence,” noting that the American approach to bankruptcy and risk was different not only from Europe, but from all the commercial nations of his time.[1] Americans have taken the lead in the use of credit in the world economy. Credit is a sharing of risk and that propensity to embrace risk has led to economic growth in the United States. The downside of credit is that there will be times when an entity becomes insolvent. The word bankruptcy itself comes from the Italian words *banca rotta*, which means broken bench.[2] The lenders in medieval times had their bench or seat broken into two when they became insolvent, and sometimes over their head.[3] European countries are very strict with insolvent corporations — especially in comparison to the United States — and as a result, most insolvent companies in Europe end up in a receivership and in liquidation.[4] Tremendous legal value is lost when a company goes into liquidation as opposed to reorganization, or even a sale of the entity which is the result in a chapter 11 filing. The US system allows for the preservation of that going concern value,[5] and as a result there have been many legislative attempts to provide for the US system’s flexibility in other countries. News outlets have reported that companies from around the world are rejecting their home courts for a filing under chapter 11 in the United States.[6] The chapter 11 system has had many supporters, especially when viewed in the international comparative context, by some very thoughtful critics. Massachusetts Senator Elizabeth Warren argued that the conventional wisdom that chapter 11 is flawed and expensive was refuted by her and Professor Jay Westbrook’s empirical approach to the issue, which took into account companies of all sizes, not just the very large exceptions that capture media attention.[7] Harvard Business School Professor Stuart C. Gilson is another proponent of chapter 11, and credits the process with a “heroic role in helping the country rebound” during the 2008 financial crisis.[8] His quote sums it up best: “Many countries around the world have bankruptcy laws that primarily seek to liquidate distressed companies. The emphasis is on reimbursing creditors, or protecting particular stakeholders such as employees, rather than doing what’s necessary to rehabilitate the business.”[9]

Gilson credits the United States outpacing Europe's recovery following the 2008 collapse on chapter 11 and the expertise of the US restructuring professionals.[10]

1 Simon Chesterman, *Society Should Be More Forgiving of Bankrupts*, THE STRAIT TIMES, Aug. 18, 2015.

2 *European Bankruptcy Laws*, Out of Pocket, THE ECONOMIST, Dec. 30, 2008.

3 *Id*.

4 *Id.*

5 When comparing chapter 7, which is a receivership, with chapter 11, it was found that the average chapter 11 case retains value 78% better than the average chapter 7 case. See Arturo Bris, Ivo Welch, and Ning Zhu, et al., *The Costs of Bankruptcy: Chapter 7 Liquidation Versus Chapter 11 Reorganization*, 61 J. FIN. 1253, 1269 (2006).

6 Jacqueline Palank, *Q&A: Foreign Companies Seek Protection of U.S. Chapter 11*, WALL ST. J., July 25, 2013. *See also* 11 U.S.C. §109(a)(The easiest and most common manner of access to the bankruptcy process is to have property in the U.S.); and *In re McTague*, 198 B.R. 428, 431-32 (Bankr. W.D.N.Y. 1996)(A bank account holding $194 was held to be property sufficient to allow the debtor access to the U.S. bankruptcy process).

7 Elizabeth Warren and Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics,* 107 MICH. L. REV. 603 (2008).

8 Kim Girard, *How Chapter 11 Saved the US Economy*, FORBES, Mar. 25, 2013.

9 *Id.*

10 *Id*.

To the credit of the United States Trustee, the Guidelines embraced the idea of using "efficiency counsel" suggested by members of the bankruptcy bar.[20] Efficiency counsel was adapted from the use of local and conflicts counsel in many of the larger cases in Delaware and New York where highly skilled but lower cost firms had been retained in a case to do specific tasks. Using a value added structure, a routine part of the case (such as the claims objection process or avoidance action litigation) would be delegated to such counsel who would assign more experienced lawyers to the task at lower rates, especially when compared to larger law firms. Used in conjunction with budgeting and staffing plans, the use of efficiency counsel provides substantial benefits in the chapter 11 process. A committee and the debtor could use the analysis performed (usually by the debtor's professionals) to prepare a budget based on the merits of each claim or avoidance action. If firms collect information and measure how they have performed in similar cases in the past, they can better define and refine the budget, and their own appropriateness for a role in the current case. The law firm has an incentive to staff efficiently and fully leverage its resources in order to get the assignment. In order to further push for results, a modest bonus can be added for every dollar brought in to the estate above costs. This allows lead counsel, which might be at higher rates and have a wider breadth of expertise in certain areas, to focus on the larger strategic issues and conserve and maximize resources for the client and the estate by separating the strategic from the operational work.

The most disappointing aspect of the Revised Guidelines is its emphasis on the billable hour, but that really is not the fault of the UST. Some of the questions and dialogue during the Public Meeting on the United States Trustee Program's Proposed Fee Guidelines for Attorney Compensation in Larger Chapter 11 Bankruptcy Cases focused on the fact that while there is progress in the adoption of alternative fee arrangements, they are not yet prevalent in the market.[21] The success stories and the prevailing desire of corporate legal departments, both through ACC and outside of it in significant numbers, is to find alternatives since the sentiment is that the billable hour is a failed construct. The good news is that the bankruptcy bar and the United States Trustee have the opportunity to continue to refine the chapter 11 process, and to reinforce the gains made by the bar in efficiency and added value. By all accounts, the chapter 11 bankruptcy bar has improved the practice over the last two decades, with respect to expertise. Perhaps here more than any other area covered by the Guidelines, the lack of consultation and participation in the comment process with clients, through law departments, CFOs, or credit departments is especially striking.

A more detailed policy statement (that the UST would consider flat fees or hybrid arrangements, for example) does not exist in the comments to the Revised Guidelines, the subject of fee enhancements was deleted from the Revised Guidelines, and the UST comments to the Revised Guidelines leave the issue open. The UST even indicates that in extraordinary circumstances it will consider a fee enhancement retroactively if it can be shown that a professional outside of bankruptcy would be entitled to such fees. The UST comments to the final Guidelines indicate that the UST is open to fee enhancements as long as they are based on agreement between the client and professional entered into at the time of retention with the appropriate level of transparency.[22]

The greatest area for improvement in the provision of legal services is in the continued professional growth of the bankruptcy bar. This is an area of practice that requires versatility, and where there is a place for a variety of different law firms, from large firms, to boutiques, to small and midsize firms. 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.

14 Of course, more advanced legal departments and law firms are now embracing project management discipline and methodologies to complement their Six Sigma training and tools to increase communication, achieve greater project alignment, and in turn client satisfaction.

15 Exhibit F, Analysis of Comments Received and Summary of Significant Changes in Response to Comments (hereinafter "UST Summary and Comments"), Office of the United States Trustee, June 11, 2013 at 47-51.

16 *Id.*

17 *Id.* at 38,50-51.

18 Both the ABA Business Bankruptcy Working Group and Albert Togut presented statements at the June 2012 public comment meeting, and in prior written statements which suggested collaboration early in the case to avoid inefficiencies. Transcript of Public Meeting on the United States Trustee Program's Proposed Fee Guidelines for Attorney Compensation in Larger Chapter 11 Bankruptcy Cases, Office of the United States Trustee, June 4, 2012 at 97-102, 113-14.

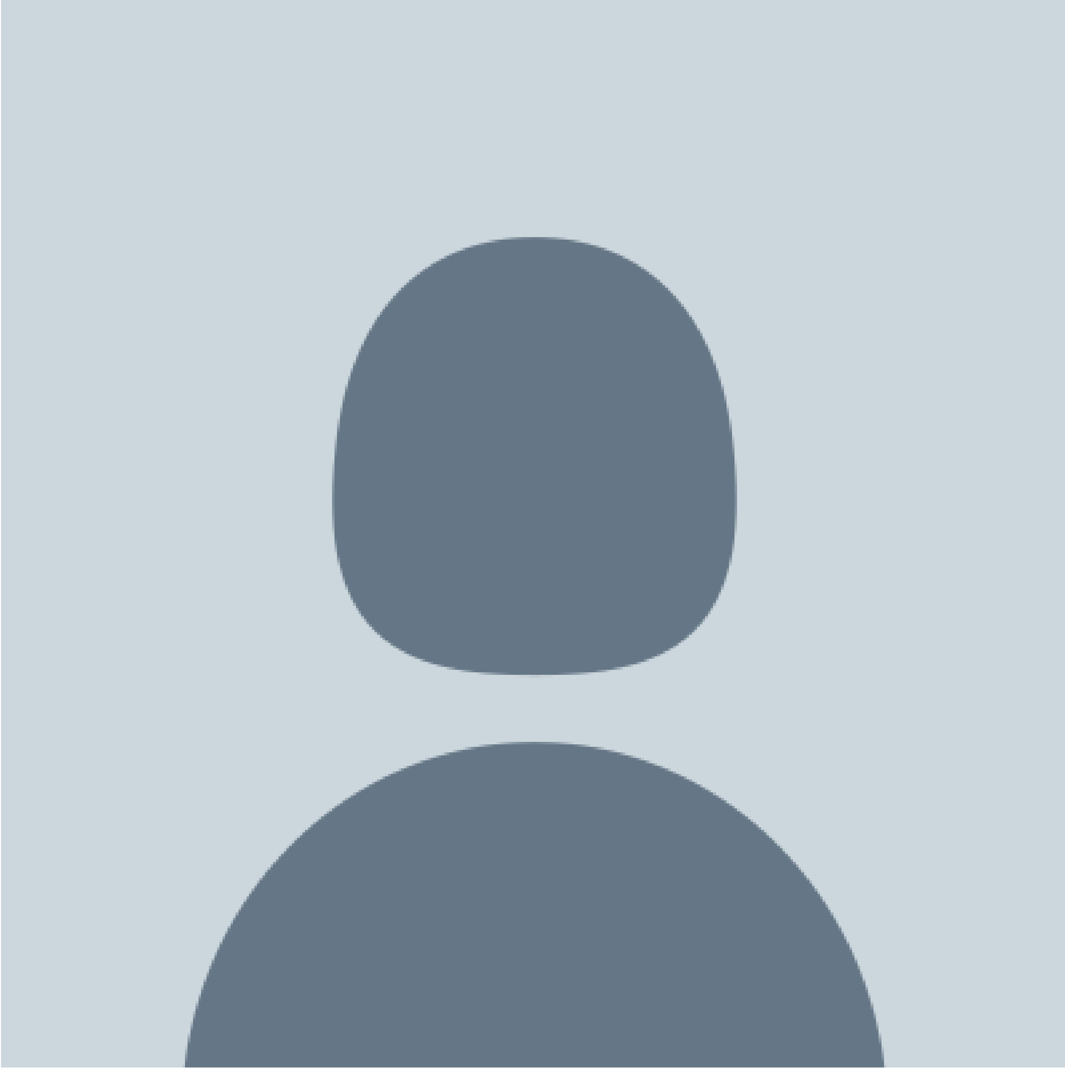
19 One of the aspects of the DuPont Legal Model that had a marked effect on costs was the recognition of the efficiency gains through the increased utilization of paralegals. A lot of bankruptcy work that is completed by young associates is likely better handled by a more experienced paralegal. Today's paralegals have more responsibilities in law firms and corporate offices than ever before as they are asked to perform many of the tasks previously done by lawyers. This is not necessarily the norm in bankruptcy cases. DuPont even holds its lawyers accountable in their evaluations for use of paralegals on their cases. DuPont's legal department is large and the projects they undertake are complex, so DuPont analyzed the situation and decided that the best way to leverage its paralegals was to give the paralegals responsibilities commensurate with their skills instead of their titles. Paralegals analyze documents for production, draft initial versions of documents, and manage litigation databases. They handle matters that have been relegated to junior lawyers in the past. Lawyers are then left to focus on the strategic issues. The Dollars and $ense of Paralegal Utilization, The DuPont Paralegal Utilization Model, 2nd Edition, A DuPont Legal Function Publication, Copyright (c) 2012, E. I. du Pont de Nemours and Company.

20 Both the ABA Business Bankruptcy Working Group and Albert Togut presented statements at the June 2012 public comment meeting, and in prior written statements which endorsed the use of efficiency counsel. Mr. Togut was instrumental in bringing this aspect of the practice to the forefront.

21 Transcript of Public Meeting on the United States Trustee Program's Proposed Fee Guidelines for Attorney Compensation in Larger Chapter 11 Bankruptcy Cases, Office of the United States Trustee, June 4, 2012 at 56-58.

22 UST Summary and Comments, Office of the United States Trustee, June 11, 2013 at 57.

Alan Brown



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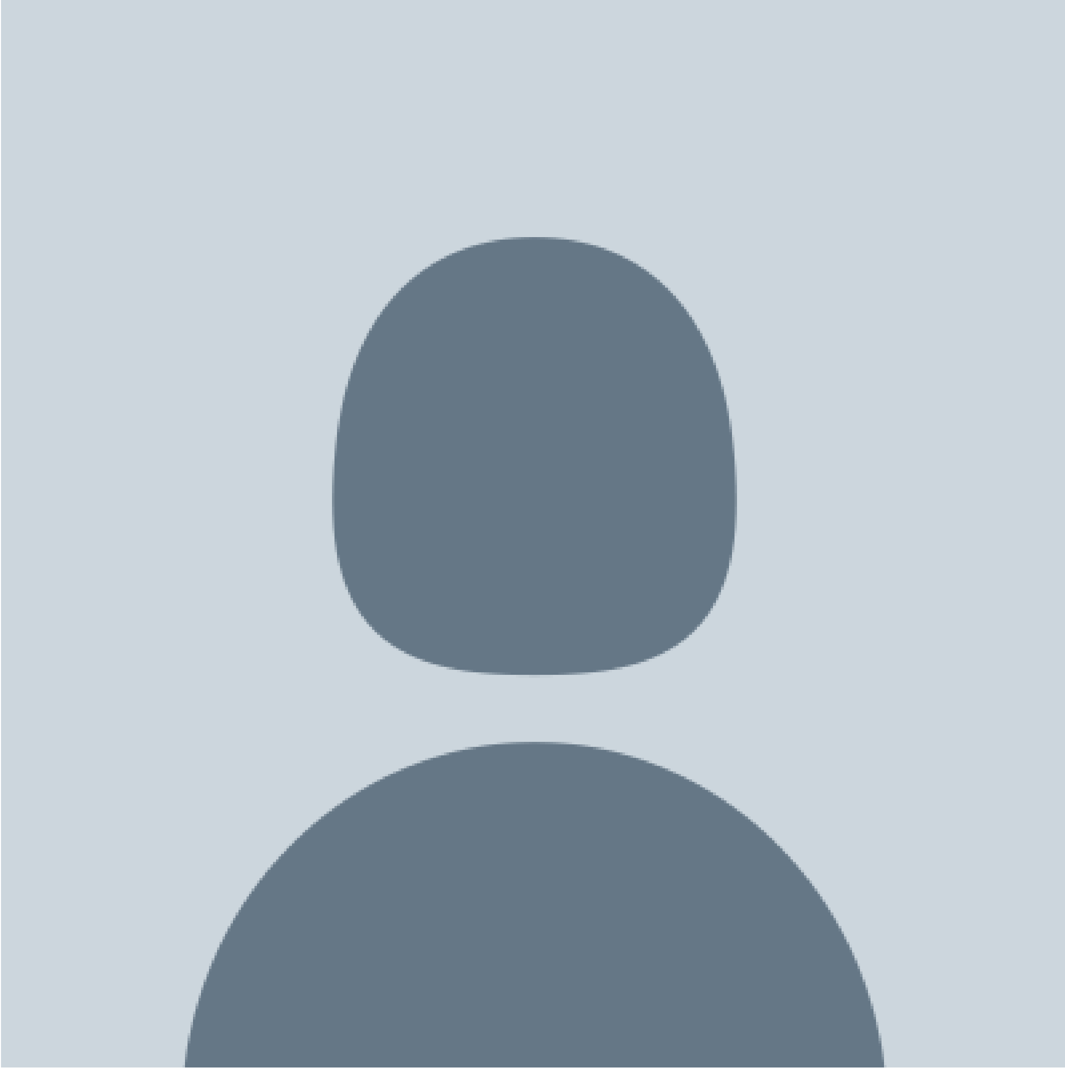
3M’s office of the general counsel

Brown has served on several unsecured creditors’ committees, and handles matters for 3M in the credit, collections, and restructuring areas. He is the team leader managing all of 3M’s bankruptcy involvement nationally, including litigation and retention and management of outside counsel.

Thomas L. Sager

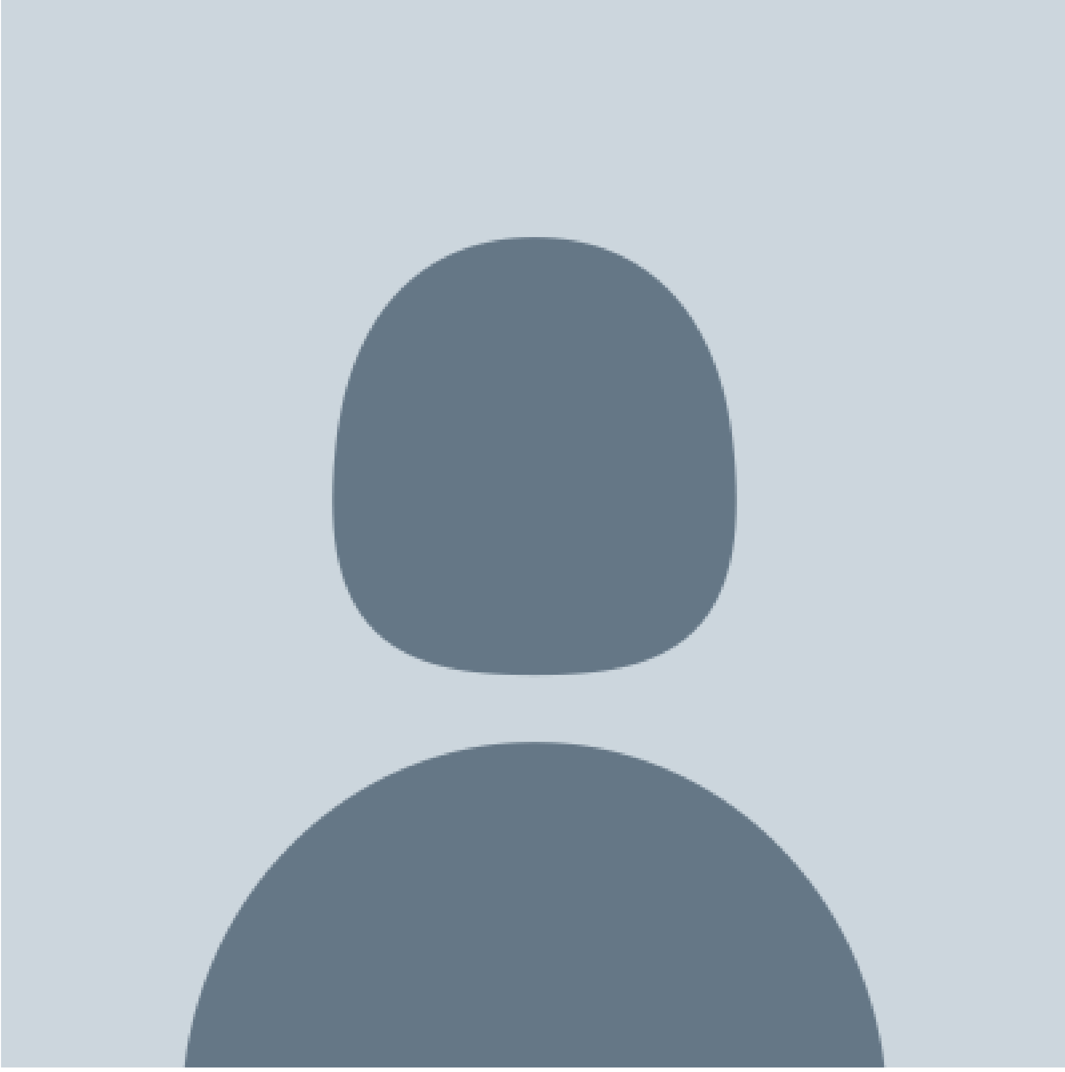


Former Senior VP and GC

DuPont Legal

He started his career with DuPont in August 1976 as an attorney in the labor and securities group. Sager helped pioneer the DuPont Convergence and Law Firm Partnering Program and continues to have oversight responsibility.

Rafael X. Zahralddin-Aravena



Director and Shareholder

the law firm of Elliott Greenleaf

He is chair of the firm’s commercial bankruptcy and restructuring practice. Formerly, he was a lawyer in the DuPont Convergence and Law Firm Partnering Program and is a Six Sigma Greenbelt.