PUBLIC MEETING ON THE UNITED STATES TRUSTEE PROGRAM'S PROPOSED GUIDELINES FOR ATTORNEY COMPENSATION IN LARGER CHAPTER 11 BANKRUPTCY CASES

Conducted by Clifford J. White, III

Director, Executive Office for

United States Trustees

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Capital Reporting

A P P E A R A N C E S

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Roberta DeAngelis, United States Trustee for Region 3

Richard Levin, on behalf of the National Bankruptcy Conference

Ramona Elliott, Deputy Director and General Counsel, Executive Office for U.S. Trustees

Nan Roberts Eitel, Associate General Counsel for Chapter 11 Practice, Executive Office for U.S. Trustees

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Damian Schaible, on behalf of the New York City Bar, Committee on Bankruptcy and Corporate Reorganization

Melissa Jacoby, Graham Kenan Professor of Law, University of North Carolina School of Law

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P R O C E E D I N G S

MR. WHITE: Good morning, everyone. And welcome to the Justice Department. I thank all of you for participating in this public meeting to discuss the U.S. Trustee Program's proposed Professional Fee Guidelines. These Guidelines would apply to all U.S. Trustee offices in carrying out our statutory duty to review the fee applications of attorneys employed in large chapter 11 bankruptcy cases.

I'm Cliff White, the Director of the Executive Office for U.S. Trustees. And our purpose this morning is to hear the views of interested persons on the proposed Guidelines and to have a chance to explore issues that were raised in written comments that were previously submitted.

In the Bankruptcy Reform Act of 1994, Congress imposed a mandate on the Program to establish uniform guidelines for reviewing applications for professional compensation in bankruptcy cases. One of the goals of that mandate was to achieve greater efficiency for the courts, for the professionals, and for the U.S. Trustee Program by ensuring consistency in

the fee application and review process nationwide.

So in 1996, the Program promulgated Guidelines and those Guidelines are statements of policy that are followed by U.S. Trustee offices. Now, insofar as the bankruptcy court, and only the bankruptcy court, awards professional fees under statutory standards, the Guidelines do not purport to change substantive law for awarding such fees.

Now, among other things, those 1996 Guidelines established threshold disclosure requirements, task-based billing requirements, and standards for the reimbursement of certain expenses. The 1996 Guidelines have been adopted in whole or in part by bankruptcy courts in many jurisdictions, and they are followed with various degrees of rigor in districts throughout the country. The original Guidelines have largely satisfied their objectives but, like most things, they are not immutable, and although the Guidelines have retained their essential validity, there have been significant changes in bankruptcy practice over the past 16 years that have rendered those Guidelines in need of updating.

First and foremost, the nature of many large bankruptcy cases has grown more complex as new financial practices and financial instruments have entered the marketplace. This development impacts the administration of a bankruptcy case, as well as the legal and other professional work required to bring a case to a successful conclusion.

In addition, the sheer amount of money at stake in the largest bankruptcy cases is staggering, and the amount of professional fees incurred in the bankruptcy process is extraordinarily large by any measure. Public confidence in the bankruptcy system is sometimes shaken by reports of fees that run into the hundreds of millions of dollars in cases in which employees have lost their jobs, pension fund investors have largely been wiped out, and creditors have been paid pennies on each dollar of debt.

And finally, there have been profound changes over the years in law firm billing practices, in law office technology, and in other aspects of the law practice, including the evolution of the relationship between lawyers and their clients. So, for example, its

common outside of bankruptcy for clients to demand discounts and budgets that are seldom imposed in bankruptcy cases. It is increasingly difficult under the current fee review process to determine whether fees paid for bankruptcy services are comparable to fees paid for services outside bankruptcy, or whether bankruptcy professionals are paid a premium for bankruptcy work because there is less billing discipline. The Bankruptcy Code allows comparable fees, but not a bankruptcy premium.

In developing the proposed Guidelines, the Program was guided by five core principles: 1) ensuring that fee review is subject to client-driven market forces, accountability and scrutiny; 2) enhancing meaningful disclosure by professionals and transparency in the billing practice; 3) decreasing the administrative burden of review; 4) maintaining the burden of proof on the fee proponent and not allowing the fee review process to shift that burden to the objecting party; and 5) increasing public confidence in the integrity and soundness of the bankruptcy compensation process.

Now, after much deliberation and consultation with stakeholders, it became apparent that the revised Guidelines needed to make distinctions between larger and smaller cases, and between attorneys and other professionals. Therefore, in order to tailor the Guidelines more precisely, the proposed Guidelines currently being considered were drafted to apply only to attorneys employed in chapter 11 bankruptcy cases of substantial size. The Program intends to propose new Guidelines applying to other professionals, and to smaller chapter 11 cases at a later date.

We disseminated the proposed large case Guidelines widely, including by posting them on the Internet on November 4 of last year, and soliciting written comments. We received nearly 30 comments from individuals, professional and Bar organizations, and law firms. Many of the commentators requested follow-up meetings with the USTP to further discuss their submissions. We determined we could best meet those requests by extending the public comment period and by conducting a public meeting. We are very grateful to all those who transmitted written comments to us. All

comments have been posted to the U.S. Trustee Program's website at www.justice.gov/ust. The comments reflect a wide divergence of views, which we expect will be presented here today, as well.

The viewpoints range from those who believe that the current fee review process encourages the award of fees by the court that are unjustifiably high, to those who contend the process for awarding fees works fine and should not be changed. We also received comments that suggested that the U.S. Trustee proposals could be streamlined to achieve their objectives in a more efficient manner.

I'm hopeful that today's commenters will propose workable solutions to questions of how to enhance transparency and provide meaningful information regarding the customary compensation charged outside of bankruptcy.

With respect to today's proceedings, several commenters have requested time to make an oral statement and we're happy to accommodate each of those requests. We'll call on each commenter who requested time and, when called upon, we would ask if each would

step forward to the speaker table here in front of the room. Each oral statement should be limited to a summary of written comments previously submitted and, if possible, please do not exceed five minutes.

After receiving the oral statement, my U.S. Trustee Program colleagues and I will ask questions of the commenter before moving on to the next speaker.

These proceedings are being transcribed and a transcript of the proceedings will be posted on our website.

Joining me today in conducting the meeting are five of my colleagues who collaborated as the primary drafters of the proposed Guidelines. They are Ramona Elliott, Deputy Director and General Counsel for the U.S. Trustee Program; Nan Eitel, the Associate General Counsel for Chapter 11 Practice; William Harrington, United States Trustee for Region 1, with responsibility for the Judicial Districts established for the States of Maine, Massachusetts, New Hampshire, and Rhode Island; Tracy Hope Davis, the United States Trustee for Region 2, with responsibility in the Judicial Districts established for the States of

Connecticut, New York, and Vermont; and Roberta DeAngelis, United States Trustee for Region 3, with responsibility in the Judicial Districts established for the States of Delaware, New Jersey, and Pennsylvania. Another important drafter, Walter Theus, Senior Trial Attorney in the Office of the General Counsel, is with us on the telephone.

We'll now hear from several commenters and I would be grateful if each of them would keep their oral summary to the requested five minutes. We'll try to be concise in our questions and I ask that responses be as concise as possible.

The commenters have much valuable information to offer and I want to be sure we obtain the benefit of their knowledge and advice in an expeditious fashion. So I will, if necessary, truncate questions and answers, but I think we should have sufficient time to receive full responses to the questions and still be able to conclude not long after noon time today.

So with that, we can proceed and I would ask that our first speaker come to the front table. Professor Rapoport, if you would, please. I appreciate

you being here today. Professor Rapoport is the Gordon Silver Professor of Law at the William S. Boyd School of Law at the University of Nevada at Las Vegas. She has been appointed as Interim Dean, effective July 1, 2012, and she is a noted authority on the issue of professional fees and bankruptcy and has served as a court appointed Fee Examiner. So, welcome, Professor. And I'd ask you now to please summarize your written commentary for us.

PROFESSOR RAPOPORT: Thank you, Director White. Any problems with hearing me? Okay, we're good. You already stole my first comment, which is I have to make sure that all the views I'm expressing today are attributed just to me, and not to UNLV since I'm stepping into the other role on July 1.

In my day job, I study the behavior of bankruptcy lawyers as a Law Professor. And most recently, I've been studying how professionals decide what to submit in their fee applications. I've also been a Fee Examiner in three large cases, so I've thought a lot about what would be helpful in fee applications for a while now.

The purpose of these new Guidelines seems to be two-fold; first, to put professionals on notice as to those billing choices that will trigger an objection by the Office of the United States Trustee, and second, as a recognition of the fact that the way an estate professional's fees are paid in chapter 11 cases creates a disincentive for the client's detailed review of bills that otherwise exists when clients are paying those fees and expenses out of their own pockets.

Unless the court adopts these new Guidelines as a local rule, like the Northern District of Texas did with the former Guidelines, they're Guidelines, and I firmly believe that the Office of the United States Trustee has the authorization to promulgate these rules. The beauty of any set of Guidelines is that it gives professionals who are being paid from estate funds a feel for what to expect from the U.S. Trustee Program. In the end, everything boils down to what will help the bankruptcy court determine reasonableness under section 330.

Based on what I've seen so far in fee applications, sometimes professionals neglect to

explain their staffing choices, or the reasons that some matters take as long as they do. They also neglect to provide some assurance to the court that what they're asking for bears a reasonable relationship to the market when people are paying fees and expenses out of their own budgets, and that they decide what to ask for in terms of discounts.

Even though it's completely fair to presume that professionals are not trying to put one over on the court, from what I've seen the universe of dishonest billing is very small. Indeed, I think that the professionals, who are human, sometimes suffer what behaviorists call anchoring bias, for example, assuming that because their firm has raised rates at the beginning of a fiscal year that that automatic rate increase somehow equals the rate that clients are actually willing to pay. It isn't always. Or in one case in which I was the Fee Examiner, spending five total weeks working for the estate and raising rates in week 3. What they're doing in terms of anchoring bias is saying -- they're anchoring -- they're focusing on one particular thing, our rates go up at the beginning

of a fiscal year, rather than focusing on 330. Courts actually have to determine the reasonableness of those fees and the fee increases.

So back to the reasonableness and how these Guidelines fit in. Although there's never completely a one-size-fits-all approach, what the Guidelines try to do is to fix some rebuttable presumptions, which I believe is the correct approach. For example, as Director White says, many clients outside bankruptcy likely do ask in advance for at least a ballpark estimate of what a particular matter might cost.

Sometimes it's brand new, and a lawyer can't say. She'll say, "It's entirely novel, we have no idea." But often, a lawyer at least might be able to say, "We can't predict everything that's going to go on in this case, but in previous similar cases, the fees and expenses have ranged from X to Y," to at least give some sort of a benchmark. And I think it's fair to be able to give the court, ultimately the arbiter for reasonableness, some sense of what certain actions might cost. Likewise, I think it's fair for professionals who have made those good faith estimates

to be able to adjust them when the presumptions that they based those estimates on do change.

But do I think budgets and some staffing choices are predictable in the beginning of even the most large chapter 11 case? Yes, I do. The firms who are the key players in this case should know what similar cases have cost because it's the same firms, they've done those other cases. They may not be able to predict everything, but they can give a ballpark figure.

Similarly, when the Guidelines say what they believe to be compensable and non-compensable items, that's not that much different from what large clients outside of bankruptcy do, too. We've read in the paper that a lot of large clients are no longer paying for first and second year associates, they're no longer paying for summer associates, they don't pay extra for secretarial overtime, and so these Guidelines are designed to tease out the real life market of what goes on in the rest of the world. Saying that the market itself is self-correcting, I don't think is that accurate. That's one of the reasons why I think these

Guidelines help give the court a feel for what estate professionals are actually charging in the rest of their world.

And, again, no one is trying to bring us back down to the old economy of administration standard. I don't get that sense from these Guidelines. I get the sense that what the U.S. Trustee Program needs to do is to get a feel not just for what book rate is, but what actual market rate is.

So a discussion about what is and isn't possible for law firms to provide to the U.S. Trustee Program is appropriate. Now, that's a different issue from what law firms might want to provide. The comments reflect a fear of revealing proprietary information, a fear of revealing confidential or privileged information, and in one of my footnotes in my supplemental comments, I address the issue of privilege and confidentiality. And I think a real sense of unease of giving the U.S. Trustee Program information in one forum that they fear will be used against them in another forum, and that's what those comments reflect. So I think the resistance primarily,

if I had to categorize the overall resistance to these proposed Guidelines, I'd categorize them as a resistance about comparables, both inside and outside bankruptcy. So the issue is, how can a professional provide the U.S. Trustee Program with information that gives the U.S. Trustee Program, and ultimately the bankruptcy court, some comfort that the rates sought are real numbers that other clients would be willing to pay? It's important to give that information because clients, no matter how sophisticated they are in terms of being large businesses, just don't have a real incentive to scrutinize their bills or push back on the professionals who are billing those fees and expenses. They're reacting to cases in real time and during periods of very high stress. And they're just not focusing on what their professionals' work is costing.

I don't recall fee applications that, when they were submitted to the bankruptcy court said, "We've already talked to our professionals and, based on those things, we've already reduced the fees by X." Maybe it's there, but I haven't seen it. What I have seen is professionals in good faith saying, "We've

already reduced our fees by X percent," and if that in turn reflects negotiations with their professionals beforehand, that's great, and I apologize if I have misinterpreted that, but normally I don't see comments like that when I review fee applications.

I do want to specifically mention how helpful I thought the National Bankruptcy Conference's supplemental comments were. Their suggestions, both about the size of the case that should trigger these new Guidelines, and about other ways to give the U.S. Trustee Program some comfort about the rates being charged and those rates being reasonable are huge steps in the right direction. Only the U.S. Trustee Program can decide if the NBC's suggestions work as a good compromise, but at least the NBC is trying to meet the Office of the U.S. Trustee half way as we go forward.

Some of the other suggestions and comments, I don't think, have been as useful. To me, it is not credible to say, as one comment did, "In firms with many offices, billing partners and attorneys, it is probably impossible or, at the very minimum, impossibly burdensome to find out what billing rate was actually

collected for a particular attorney's services in every matter in which he or she billed time." If it is true that that is the case, I am nervous about the state of law firm practice today. I am running a law school with only a $24 million budget and, if I turn to my CFO and I say I want this or that, I get it by the end of the day, so I know if a State institution can get those records, probably a law firm can too.

In some cases, some of the comments actually reflect an insensitivity to the reasonableness review that a court will have to make; for example, the comment that said, "Expenses under $500.00 should get a pass." I know expenses under $500.00 are chump change in big bankruptcies, I get that, but when you look at things like $100.00 dinners, at least to someone who is reviewing fees, those are clues to ask, "Okay, what else should I be looking for in a particular fee statement?" And the anecdotal evidence is -- I have seen a couple of things -- one in each of those fees that I have reviewed that cause me to want to scrutinize fees more closely. The professional who billed a $140.00 shirt to the estate, and the

professional who went outside for $13,000 worth of charts because apparently no one inside could run Excel. So these are the sorts of things that make me want to trigger the other fees and expenses when I review them a little more closely.

Issues that remain include whether these Guidelines should be rebuttable presumptions that a court could override with the specific first day order, or close to the first day, that sets different parameters for different cases. That might be a way to ease the one-size-fits-all concern. Another outstanding issue is whether the U.S. Trustee Program should promulgate guidelines for non-attorney professionals now, and then institute them both at the same time so that there's not confusion over what's applying to whom. A third question, and a lot of comments have raised this, is what the cutoff should be to trigger these enhanced Guidelines. But from my perspective, I applaud the U.S. Trustee Program for promulgating Guidelines that recognize the very different dynamic that large 11s create, and that put the expectations for billing upfront so that there are

no surprises.I would be happy to answer any questions.

DIRECTOR WHITE: Thank you, Professor. That was very helpful. We're grateful for your insights and I think we, if you will indulge us, do have some questions.

You provided a number of perspectives on the need for Guidelines and for the specific areas to be covered in the Guidelines. In your written commentary, you also suggested some areas where perhaps we could streamline or improve the draft. Could you pick out just a couple of areas where you think when we go to final, we ought to focus our attention and perhaps can find alternative solutions that achieve our objectives?

PROFESSOR RAPOPORT: Well, I think the key one is figuring out what comparables you should look at and how exactly to get that information so that you don't get a full court press from everyone who has been asked to apply them, or to apply them to you. That's one of the reasons I really like the NBC's three proposals on ways to get comparables to you, so that you can do your job. Your job is to be able to make an initial determination about whether you're going to

object or not to fee applications. In order for you to decide whether people are getting fairly paid for the work that they're doing, you do want to make sure that they're not taking the number inside bankruptcy that is only a book rate outside bankruptcy.

So, to the extent that you can find a way to get comparables that don't frighten the professionals into thinking that they are going to give you information that frankly they fear you're going to use against them in another forum, I think that is a useful thing to do. I don't necessarily agree with the idea that you should only look at bankruptcy fees, but I do think that's the primary focus since that's what you're supposed to be doing statutorily.

What you want to get a feel for is, now that clients really are pushing back outside of bankruptcy, what is the effective rate that they're comfortable paying. It's not that much different from when you ask a university, what's your real tuition? We know what book rate of tuition is, but no one pays that, so you want to find a way that gives you comfort when you decide not to object to a fee application, that these

are real numbers that real clients pay, and I wish I had a magic solution for that. I don't. I think that by the proposed Guidelines, you gave us a great first format, and any one of NBC's three suggestions, I think, will provide you the workable information that you need.

DIRECTOR WHITE: Thank you. One other question before I open it to my colleagues. You also commented on the advisability of setting a threshold, and we set it at the $50 million level. If we were to consider adjusting that, what are the factors that we should weigh in coming up with the right number?

PROFESSOR RAPOPORT: I think the first factor that you want to weigh is the cost benefit analysis you've already gone into, but with a little more data perhaps provided by a lot of the estate professionals.

There's no clear cutoff, you have to pick a number. No one is completely sure what the number should be, but you have to find a combination of assets and liabilities above which you're getting such a volume of fee applications, and such high figure fee application numbers, that you really do need to

standardize the information that you're getting for precisely the reason you're asking, to make sure that public confidence in the bankruptcy system is sustained. So possibly one way to look at that is to figure out at what size your office really needs to ramp up the speed of the reviews. For the largest cases, it's almost unimaginable what you and the bankruptcy courts have to go through in order to review the fees in a timely manner. In Station Casinos, when I was the Fee Examiner, we were only in and out for six months, and we saved the court over 2,100 hours of time reviewing fees. So if there's an internal threshold at which the people who report to you start panicking in terms of being able to turn things around on time, coupled with information from people behind me who I know will supply you with specific data, that's what I'd look for. At what point does the dynamic flip to "almost impossible, we need to change things"?

DIRECTOR WHITE: Okay, thank you for that.

I'll turn to my colleagues for additional questions.

MS. DAVIS: Sure. I'm Tracy Hope Davis. In

your recently published Law Review article, The Case for Value Billing in Chapter 11, you mention the Association of Corporate Counsel value challenge. What is that?

PROFESSOR RAPOPORT: That is the large client business world association and the value challenge is designed for inside counsel to get a feel for how best to get value from their outside counsel. So they've tried to come up with ways to partner with their outside counsel on alternative billing methods, or ways to keep fees and expenses within a certain budget. The reason I think that the Association of Corporate Counsel's value challenge is particularly appropriate here is that you're talking to one of the largest organizations that sets internal budgets for what they can and can't pay for legal fees. So when they're trying to wrestle with large matters, some of which are not able to be planned for or budgeted, but many of which are, and they come up with dynamic conversations they can have with their outside counsel on how best to manage their fees and expenses, while still providing quality -- high quality service to those clients -- I

think that is a wonderful place to look as an analogy.

MS. DAVIS: And further to that, you know, are there any guidelines or best practices that you would also suggest?

PROFESSOR RAPOPORT: I think the first thing for any discussion of how much a matter is going to cost should be a sit down conversation with a sense of benchmarks. What have these things cost in the past? What are we as clients -- and here it would be the estate -- what are we willing to see at, for example, hearings? How many people are we willing to see? How should they have speaking roles? How many of them should come who don't have speaking roles? Should they explain those in advance to the court so that everyone has the same understanding?

The Association of Corporate Counsel encourages a dialogue with outside counsel on exactly how much professional representation is appropriate for a given matter. One of the hardest things in chapter 11 is that estate professionals represent fiduciaries.

Fiduciaries want to pull out all the stops, that's their job. But fiduciaries who don't pay the

bills out of their own pocket sometimes get over-zealous in terms of how much lawyering, for want of a better word, they want professionals to do, and the dialogue upfront that sets the parameters avoids some messy results, avoids bills that have to be cut later, avoids misunderstanding of how to staff projects appropriately. And just as an outside client would say, "You know, we really aren't going to pay for summer associates unless their work is so impressive that they individually justify something," I don't see why you can't do that here.

MS. DEANGELIS: The National Bankruptcy Conference has suggested status conferences at the early stage of a case. Is that akin to what you're talking about in terms of the Association's recommendation?

PROFESSOR RAPOPORT: That's absolutely akin to what I'm talking about. I think it's appropriate in the larger cases for everyone to know upfront what is and is not expected of it. And a lot of times when you see Examiners, or the U.S. Trustee Program asks for fee reductions, it's because people

misunderstood what at least some of the players' sense of appropriateness was going to be, some sense of reasonableness. Those status conferences at least can explicitly set out exactly what the court thinks is going to be reasonable, and I think status conferences have the beauty of being able to be updated when circumstances change. Not everything is cut and dry, that's the beauty of a large 11; not everything is cut and dry.

MS. DEANGELIS: And by their nature, do you believe that they need to be -- that the court needs to be -- involved in that? Or is that type of a conference also helpful if it were the counsel and the parties alone, without the court?

PROFESSOR RAPOPORT: I think that because the ultimate arbiter of reasonableness is the court, if the court has time, it's useful to get that court's perspective at the beginning of a case. Less optimal, but I think equally effective, is something that doesn't include the court at the beginning, but still plays out what the parties' understanding going forward are going to be.

MS. DEANGELIS: Thank you.

DIRECTOR WHITE: Other questions?

MS. ELLIOTT: If I can ask, Professor Rapoport, on the issue of the dialogue, okay, which is what this group is interested in, when you're dealing with what everybody acknowledges is essentially big company type of scenario, which chapter 11 is for these larger organizations, how realistic do you think it is that there would be this similar kind of dialogue with respect to setting expectations prior to the filing of the actual bankruptcy case?

PROFESSOR RAPOPORT: I think that when you start with rebuttable presumptions, this is how we are going to view the behavior inside the case in terms of what you're billing for fees and expenses, and then vary those presumptions where appropriate, it's a good start. You can't always have individual dialogue in every case, but if we can agree on what the rebuttable presumptions are for things like staffing upfront, it saves a lot of time and a lot of money later.

MS. ELLIOTT: But is it realistic to expect that the General Counsel, as they see that the company

is heading towards chapter 11, that they can have that dialogue with the counsel or the other professionals in the same way that they could if you were talking about going out and doing a certain piece of litigation?

PROFESSOR RAPOPORT: Well, those are different things, absolutely those are different things. When you're not in panic mode, which you are as you're heading towards chapter 11, it's a lot easier to sit back in your armchair and say, "In an ideal world, I would pay X for this and Y for that." So it's not directly analogous, but very few companies are totally surprised by having to file a chapter 11 case, so they can at least start thinking about things ahead of time. The complexity is that the person who is paying the bill is not the person directing the action; the unsecureds are going to be paying the bill and they don't have a seat at the table at the beginning. So it's not completely analogous, you're right.

DIRECTOR WHITE: Other questions?

MS. DAVIS: I just want to turn real quickly to your suggestions about incorporating the new ABA Ethics Opinion to rate increase at engagements.

That's really very, very thoughtful, I think, and I wondered whether, in the middle of the case when there are rate increases, you would encourage some type of ownership, if you will, for the rate increase?

PROFESSOR RAPOPORT: I think rate increases, like everything else in chapter 11, really do need to be justified and, to the extent that, in a long term case and a case that lasts years and years, people's rates change for a variety of reasons. People's rates change because it's the beginning of a fiscal year, people's rates change because they've gotten more skills and are therefore more valuable to the courts for what they do, and, even in the middle of a case, some rate increases may be justified, but they shouldn't automatically be assumed that just because they have different rates on their books as of the fiscal year, that that automatically adds value to the estate that the court should consider reasonable. Those are different discussions, which is why I believe that the more upfront we are about what value is being added, the better off we are.

MS. DAVIS: Thank you.

MR. HARRINGTON: Okay, just one more question. In your written submission and in your talk today, you talked a little bit about the different types of sophistication at play here with respect to client accountability. Could you explain that a little more?

PROFESSOR RAPOPORT: A lot of businesses are exceptionally sophisticated general players. They've been in business a long time, they understand what to expect from their lawyers. But except for the Braniffs of the world, very few people are sophisticated in being chapter 11 debtors, or necessarily repeat players on creditors committees, and so they don't really have an automatic benchmark against which to judge their professionals' work on a particular chapter 11 case. They're very smart people, but just as I'm a reasonably smart person, if someone else in a different field tells me that something is necessary, I'm likely to believe that person. That's why I pay car mechanics a lot of money, and my doctors, actually a lot of money, because they know the field better than I do. So, when someone who is not used to being in a chapter 11 hears, "No, we really need to do

this, and this is appropriate," it's often hard for the smartest of people to be able to have a set of reference points to understand how to judge that.

DIRECTOR WHITE: Okay, thank you. Nan, go ahead.

MS. EITEL: Professor Rapoport, you mentioned -- I think you said -- that one of the hardest things here is to figure out what is the right comparability standard that gets to the core of the information without frightening the professionals, and I would agree with you. That's really been one of the most difficult exercises, and certainly one that has engendered, I would say, the most response. One of the things that we have looked at is -- it's called the Brass Survey. It's the billing rate -- an Associate Salary Survey -- that Price Waterhouse Coopers puts together. And I don't know whether you're familiar with it, but as I understand it, firms, some of the largest firms in the country, will contribute confidentially their data to Price Waterhouse Coopers in return for them to build a database. Then they give the database information basically back to the firms so

they can assess how comparable their rates are and their practices are and their profitability is to their peers. And so they have a number of data points, I think 19, that they ask for, but when it comes to rates, they ask for five. And given that there's been a lot of pushback on the low rate/high rate/average rate, the Brass Rates ask these type of questions, and I wonder if you think this might be an alternative to what we've proposed, or even what NBC has suggested.

They ask for a standard rate on January 1 of year one, the attorney's standard rate or the book rate on January 1 of year 2. And I asked for three averages -- the average standard rate for the prior rate, the average work rate for the prior year, and the average effective rate of the prior year. Do you think that kind of data would be helpful, or less helpful than what we've asked for, or more helpful? How does that compare to the NBC proposal on the blended hourly rates, and do you have any impressions of that?

PROFESSOR RAPOPORT: I have looked into the Brass Study and I think that one of the beauties is that it does demonstrate that, when firms are getting a

perceived advantage from providing information, they provide it. And the beauty of Brass is that they get comparables to other large law firms as to how their peers do it, without having to worry about violating antitrust concerns. Because Price Waterhouse Coopers are not directly sharing proprietary information with each other, it comes back as an industry standard so that they don't have to fear that they've been outed on their own rates.

I think that is a great indication of how we could do it here. One thing that the firms might want to carve out of that is that there's certain categories of clients that get wildly different rates from what firms provide, for the most part. Their obviously pro bono work is free, their low bono work is drastically different from their normal rates, some work that they do for Government institutions are drastically reduced rates, and so possibly what you might want to consider is a carve-out of certain categories that won't provide you the information that you're really looking for. The pro bono, low bono, and Government work isn't really as useful to you as what are clients who do

consider paying rate, what do they really pay.

MS. EITEL: Thank you.

DIRECTOR WHITE: All right, thank you, Professor.

PROFESSOR RAPOPORT: Thank you.

DIRECTOR WHITE: You were very helpful. I appreciate it.

Next, we are scheduled to hear from D.J. Jan Baker, who is a partner in the Manhattan office of the law firm of Latham and Watkins. He's Global Co-Chair of the firm's insolvency practice and currently serves as Chairman of the American College of Bankruptcy. Mr. Baker had submitted to us two comment letters on behalf of more than 100 law firms. Unfortunately, I received an email from Mr. Baker late yesterday afternoon saying that he could not be with us today. He provided a brief opening statement that he would have delivered today, and we will attach Mr. Baker's statement to the transcript that we will post on our website (Exhibit A).

Now, Mr. Baker also in his email to me said that the 100 plus law firms who submitted the comment

letters would be willing to respond in writing to any questions we may wish to pose and that a small group of those law firms would be willing to meet in the Executive Office for U.S. Trustees here in Washington. We'll consider Mr. Baker's suggestions. But several weeks ago, we had announced this open meeting as a response to requests from several commenters, including Mr. Baker, for additional meetings. We desired to make the Guideline writing process as open as possible because the Guidelines may have implications not only for the economic welfare of a finite number of large law firms, but also for other stakeholders in the bankruptcy system and the general public. So this public meeting was designed to meet the requests of the commenters and to enhance transparency. Written questions and answers diminish the opportunity to ask follow-up questions and private meetings do not afford the level of transparency that today's meeting will provide.

Now, I'm disappointed in the absence of Mr. Baker or another representative of the law firms that signed the comment letters because they presented

strong views and those strong views merit serious consideration by the United States Trustee Program. We had many follow-up questions that we would have posed in response to the comment letters, and those responses would have helped us in drafting the final Guidelines.

The law firms who submitted the joint letter said it appeared that the current fee review process already is burdensome and they appeared to oppose making any additional disclosures concerning the presence or absence of client-driven market forces in charging fees in large corporate bankruptcy cases. So we in the U.S. Trustee Program recognize we need to know more about their views and, if there are alternative approaches to obtaining the information that we think should be provided in retention and fee applications.

I'll turn now for a moment to U.S. Trustee Roberta DeAngelis to discuss some of the major areas that we would have probed with Mr. Baker had he been here today.

MS. DEANGELIS: Thank you. In the comments

provided by the 119 law firms, they spent several pages criticizing the proposed Guidelines as seeking information that they did not believe was pertinent to the issue of comparable rates. In Paragraph B4 of the revised draft Guidelines that the law firms submitted, they indicate, however, that the inquiry as to the comparable services standard is whether the professionals compensation is reasonably -- is reasonable -- as compared to the customary compensation charged by comparably skilled practitioners in non- bankruptcy matters. Yet their responses voiced opposition to disclosing information on the rates charged to non-bankruptcy clients and they did not propose any alternatives. We intended to ask them to describe the nature of the information they would propose to include in fee applications to establish the comparable services standard that they acknowledge is required.

We also would have asked them to clear up confusion surrounding the comments they made about customary rates, which appear on page 9 of their January response, and on page 1 of their April

supplement. In those comments, they say that, by definition, discounts are not customary. Yet, if a law firm regularly discounts rates for a particular client, for example, a bank or an insurance company, surely that discount is customary. We intended to seek an explanation as to why those discounted rates would not qualify as customary rates.

And we further wanted clarification of their apparent suggestion that discounts given in non-bankruptcy cases should be irrelevant to the bankruptcy court's determination of whether customary rates are being charged and whether fees are reasonable. The 119 law firms in their response oppose the provision that strongly suggests the use of budgets and staffing plans utilized in larger chapter 11 cases. They said, and I quote, "Bankruptcy is a process, not a system that produces a pre-defined outcome. As such, experience has shown that budgets are problematic because they are based on subjective judgment and predictions, and are inherently inaccurate and uncertain." End of quote.

Yet, many of the 119 law firms have sought the imposition of budgets and work plans on Examiners

appointed by U.S. Trustees, who are charged with investigating the financial affairs of the debtors, often with regard to allegations of fraud and mismanagement, and possible causes of action against the constituencies they represent, such as the debtors and creditors and management and third parties. We wanted to explore with the 119 law firms why they believe a different standard should be employed regarding counsel for the debtor and creditors committee.

The 119 law firms also voiced concern about the proposed Fee Guidelines for larger cases. Their concern is that it departs from the public policy objective of section 330 and seeks to impose substantive requirements on professionals seeking compensation. And they use as an example a request in the Guidelines that some evidence be provided that meets their burden of proof with respect to their fee request.

We intended to ask them to describe the type of proof that they currently provide in their fee applications to substantiate that the rates at which

they seek compensation are, in fact, customary based on comparably skilled lawyers in non-bankruptcy matters, and, in the absence of such proof, to acknowledge that the statements that currently appear in fee applications about usual and customary hourly rates and fees are really nothing more than boilerplate. We also intended to ask them to describe the type of review or analysis that they employ to ensure the accuracy of those sort of conclusory statements, the type of evidence they would provide to substantiate the accuracy of those statements if they became a contested matter through a U.S. Trustee objection, and to explain why they think it is unreasonable to expect law firms to meet their burden of proof on this issue absent an objection and subsequent litigation.

Finally, we wanted them to suggest an alternative procedure to assure that the law firms meet their burden, that the rates charged bear an actual relationship to the actual market rate, and that they do it in a streamlined, non-adversarial process, one that wouldn't violate their stated concerns about privileges and confidentiality.

In the revised comments that were submitted by the 119 law firms, they suggest a different standard or threshold by which to define larger chapter 11 cases. The proposed Guidelines defined it as a chapter 11 case with combined assets and liabilities of $50 million. The 119 law firms proposed the following criteria: assets exceed $250 million; unencumbered assets exceed $50 million; at least 100 pre-petition unsecured creditors, excluding current and former employees, who hold more than $100 million in general unsecured claims; and there is outstanding pre-petition debt for borrowed money in excess of $50 million held by three or more creditors and subject to common loan agreements or purchase agreements or trustee indentures or other similar type agreements, setting forth common terms and conditions, singularly applicable to at least $50 million of such debt.

We are perplexed by this proposal because it appears to exclude almost all pending chapter 11 cases. We intended to ask them to explain the rationale for this criteria, how many cases they estimate would fall within this criteria, and provide some names and

jurisdictions in which they are located.

We also wanted to explore with the 119 law firms their proposal that national firms utilize a national rate card when attorneys from multiple offices within a firm are involved in a national matter.

As we understand this proposal, it would permit attorneys with lower customary billing rates from outside New York to charge higher billing rates for New York-based matters. We are not aware of such a practice and intended to inquire whether this practice currently exists and is employed in non- bankruptcy matters for the 119 law firms, or whether this is merely a mechanism for law firms to increase their profits on specific cases.

We also wanted to inquire whether any of the law firms have used this procedure in bankruptcy cases and, if so, we wanted to understand the type of disclosures that were made with respect to billing rates. In addition, we wanted to explore why the converse situation wasn't recommended.

The 119 law firms took exception to the provision in the proposed Guidelines that seeks an

explanation for each expense charged to the estate. In their supplemental response, they state that the standard that is set forth in the Guidelines to justify individual expenses fails to take into consideration the professional time and the staff time that's necessary to document the reason for each expense. We intended to tell them that we have, in fact, considered that time and expense, and we also have considered the professional, judicial, and staff time that's expended to review those expenses.

The firms wanted to set a threshold at $500.00, as Professor Rapoport mentioned earlier, and we wanted to explain that their threshold would not capture certain charges, some of which Professor Rapoport just testified to. One that came to mind for me was a pack of gum that was charged to the estate. And so we were interested in seeking their suggestion as to how to assure that such abuses are identified and disallowed, and yet find a workable threshold that could be employed.

Although we had many other questions for the law firms, the final one that I want to mention on the

record deals with their objection to absorbing certain overhead expenses. The law firms indicated that after-hours lighting, heating and air-conditioning should be compensable from the estate and should not be an element of their overhead. Without a better understanding of the reason to charge a bankruptcy estate for this overhead expense, we found this proposal questionable. We therefore wanted to inquire whether all clients of the law firms currently are assessed their applicable pro rata share of such costs, or whether it's limited to certain clients. We also wanted them to explain why this expense isn't calculated into their billing rates, to explain who decides whether the client is to be assessed and how much, and how the charge is documented. Thank you.

DIRECTOR WHITE: Thank you, Roberta. So we will consider Mr. Baker's suggestion that we have additional meetings in another forum with representatives of the law firms that sent us the two sets of comments. With that, we'll now turn to Rich Levin on behalf of the National Bankruptcy Conference. If you wouldn't mind, Mr. Levin, coming to the table?

Mr. Levin is a partner in the New York office of the law firm of Cravath, Swaine & Moore, and among his many accomplishments is that he advised Congress on the drafting of the modern Bankruptcy Code in 1978. And today he appears on behalf of the National Bankruptcy Conference, which is a group of the nation's leading bankruptcy experts who advise policy makers on legislation and other emerging issues in bankruptcy law. The NBC transmitted two sets of comments and I would like to echo Professor Rapoport's statement earlier that the NBC comments have been extremely thoughtful and helpful, and Mr. Levin's willingness to discuss those comments in a public forum is further testimony to the service performed by the NBC to the bankruptcy system and to the public at large. So, welcome and thank you, Mr. Levin. And I invite you to make an opening statement if you care to do so.

MR. LEVIN: Thank you, Director White, and good morning to your co-panelists, as well. You say whom I'm here on behalf of. I need to say whom I'm not here on behalf of. I'm not here speaking for my firm or any of its clients. I'm speaking on behalf of the NBC

only, and of course, my own personal views may creep in from time to time, although I don't necessarily always agree 100 percent with the Conference's views. I also want to thank you and Professor Rapoport for your very kind remarks about the NBC's comments. We spent a lot of time on this, we worked hard at it, we wanted to be constructive, that has been our purpose for existing. That's what we do as an organization, and we're pleased to know that it has had a positive effect.

I'm going to limit my remarks to a few principal points about the NBC's comments, and then I'd like to address some of the things that have already been said in a general way. Inasmuch as I appreciate Professor Rapoport's overall comments, there's some details that I might want to add some comments on.

Turning to the larger comments in the summary, we agree with the goal of the Guidelines, that they are designed to help produce evidence to support a professional fee application. The professional clearly has the burden of proof and it shouldn't be on the objectors, or potential objectors, whether that's creditors or the U.S. Trustee's office, to tease out

the evidence that supports that any given fee application is reasonable -- the standard of reasonableness. There are a number of factors that go into reasonableness. We all keep focusing on one and it's a very important one, but there are a number of factors that go in, and that one is the customary compensation for comparably skilled practitioners in cases other than under the Bankruptcy Code, and that's an important one. I'm going to come back to that in a moment.

But in terms of providing evidence to support the fee application, we proposed, as you noted, three alternatives -- one was certifications that rates charged were no higher than rates charged in other cases; another was a comparison of blended hourly rates for the firm as a whole against the blended hourly rates charged in that case; and the third is a certification from the client, who has the ultimate responsibility for the fees, that the client exercised its duty in making sure that the fees were reasonable and were market-based.

What has been left out in this discussion so

far about those three alternatives was, I think, important to our remarks. The U.S. Trustee Program is embarking on a new effort here. You know, we had the '96 Guidelines for 16 years now, we've learned a lot, but the amount and level of detail that is proposed in the new Guidelines is a quantum leap above what the old Guidelines said, and probably a quantum leap above what most firms have been providing in fee applications. We don't have any objection to that conceptually, but we note that -- we note two things about that -- one is there are many ways to skin a cat, there are many ways to prove up your case; we don't think there should be only one way of providing that evidence, but we think that it would be helpful to the bar to provide a list of what we refer to in the comments as safe harbors. That is, if you provide this evidence, we will not object on the ground that you haven't provided enough evidence; we may object to the substance of the evidence, but we won't object on the grounds that you haven't provided enough evidence. That said, there may be other ways of providing sufficient evidence that should satisfy the initial evidentiary burden of going

forward that will obviate a need for a sufficiency objection on your part, leaving aside the substantive.

The second is that, because this is sufficiently new, we think this should be treated as a pilot program. A pilot program not in the sense that it shouldn't be implemented everywhere, that's fine, we agree with that, but pilot in the sense that it ought to be reviewed soon -- two to three years after implementation, maybe four years at the most. Let's not wait 16 years to see what's working. If we're going to try something new, let's test it. You know, we did that with the U.S. Trustee Program when it first started and the results seemed to be pretty good, so we would suggest something along the same lines here.

In terms of providing evidence, I want to make one other remark that we've developed, I don't think it's in our comments themselves. The initial proposed Guidelines that you put out in November of last year suggested some things at the employment application stage, and we know that drew some objections, but we think that, if a sufficient foundation is laid at the employment application stage,

it could obviate the need for a lot of work at the fee application stage. So it's not -- as we said in our comments -- you're not setting forth statutory or substantive standards, but you're setting forth the ground rules which, in your office, might trigger an objection. So, for example, you might require less evidence at the fee application stage before you make an objection if the law firm has provided substantially greater evidence at the employment application stage. So we don't think you're amending Rule 2014 by saying, "We hope to see this information at the employment application stage," but you're really saying, "If we see it there, we don't need to see it again at the fee application stage." So that's how we would characterize that, and we're okay -- NBC is okay with allowing the evidence, which is what this is all about anyway, to come in at two places during the case. For example, the certification by what we'll call the Chief Legal Officer, whoever at the debtor-in-possession is responsible for professional fees -- certification by the Chief Legal Officer -- that he or she did what was necessary to make sure that these were market rates.

That pretty much summarizes our comments. I'd like to -- we've had, as you can imagine, members at the Conference who had further conversations about this since we submitted our remarks on February 27th, and we have some further thoughts.

One of the problems that you're going to have to get into the technical side is thinking about average rates, highest rates, lowest rates. There are tremendous timing differences between billing and collection -- between the time the work is done, the time it's billed, and the time it's collected. And sometimes that will carry over more than one what we call a "rate year," that is, place during the year where law firms typically change their rates. And in talking about either actual, or average, or realized rates, I think you're going to need to get into more definition as to whether you mean the rate put down at the beginning, the rate billed, or the rate collected, and when you're doing comparisons, because they span such a wide period, it's going to be difficult to make those comparisons properly unless you're very careful about defining time periods.

On, let's see, repeat players, many of my clients -- I used to have a very active debtor practice and at Cravath I don't have a debtor practice anymore, so I speak from past history, and I know for many of my clients bankruptcy was new to them, as Professor Rapoport said. But more and more today, we're seeing Chief Restructuring Officers, Turnaround Managers, and the like for whom bankruptcy is not new. And more and more, we're seeing creditors committees. I'm sure you see it in the committees you appoint, the three U.S. Trustees here, especially New York and Delaware, repeat players on the committees. These are not unsophisticates in the world of big bankruptcy. In fact, they make it their profession to be active in these cases. So I think we do see repeat players who know what's going on and they're not being -- if they're being taken advantage of, it's not because of their lack of experience.

Oh, a comment on whose money is at stake here. Most of the big cases we see now, not all, but most, the assets are fully encumbered, so we're not playing with the unsecured creditor's money, the

fulcrum class is really the secured. And the secureds tend to be very active in protecting their money. Now, we allow a debtor-in-possession discretion on how much to spend on paper clips, and on airplane tickets for the executives, or sales people who have to travel, and how much to spend in the plant to manufacture the product. We do that because we believe and we say that they are fiduciaries and that they will mind the shop. I think the same has become true in professional fees. My own experience in dealing with clients is that they are watching their projects and their financial reporting every bit as closely once they're in chapter 11 as before. As Professor Rapoport said, General Counsels throughout the United States, probably throughout the world for that matter, are working with their lawyers to be careful about how much they spend on fees. That is what they do for a living, that is their job, they don't lose that job the minute their company files chapter 11. We believe that they continue to exercise that kind of judgment and that, to the extent that the assets are encumbered, the secured lenders through cash collateral or DIP financing

budgets, or otherwise, are watching that equally closely. That's not to say that everybody is very good at doing that job. A bankruptcy is a certain amount, as I think Justice Scalia said in his opinion last week in RadLAX that there's a certain amount of chaos in bankruptcy, or in bankruptcy law -- I think he said -- and that's certainly true, and it's not a completely controllable process. But I wouldn't discount so quickly the incentives -- not incentives so much, but the practice that people have in controlling fees.

Finally, a lot of what's been discussed is hourly rates and number of billers, rate changes during a year, discount off of hourly rates, and, as we observe the legal market today, hourly rates are diminishing in importance. It used to be, I don't know, 20, 30 years ago, even maybe 10 years ago, what you've referred to, Director White, as "rack rates," like Professor Rapoport referred to as "book rates," were the standard. That was it, done. There were premiums, there were occasionally busted deal discounts, but there weren't much variations in the application of rack rates. That's quite a change from probably 50 or

60 years ago, before hourly rates became the be all and the end all of billing. My own personal view is that hourly rates have a very corrosive effect, and I'm pleased to see that the industry is moving away from them. My fear in the way these Guidelines are structured at this point is, because of the continued, but declining, importance of hourly rates, they may be chasing the past. Regulation tends to trail what's happening in the marketplace, it's hard to keep up, that's one reason we've suggested that this be treated as a pilot program. But given my own personal example, I was in a big debtor case quite some years ago, and our fees were being challenged, and I was put on the stand for cross examination, and the questioner said, "Was that phone call worth $300.00 to the debtor, or to the estate in this case?" And I said, "I don't know whether that phone call was worth $300.00, or whether that letter I wrote was worth $250.00, I can't judge it that way." The real way of judging this is, as the statute says, customary compensation for reasonably skilled practitioners, not customary compensation for each hour, or each minute, or each tenth of an hour. I hope

the profession will move further away from hourly rates, and faster than it already is, but I'm afraid that Guidelines that focus primarily on hourly rates are going to entomb the past. The courts have already done that because so many courts say you will not permit alternative fee structures. The only way we know whether there's precision -- and I put that in air quotes -- is because we can multiply rates times hours. I hope these Guidelines will not entomb that and prevent the movement away from hourly rates to whether it's value-based billing, or fixed fees, or contingent compensation, or some other form that really reflects the value of that phone call that I made. Thank you for inviting the National Bankruptcy Conference to appear and discuss these matters with you. I'm happy to answer any questions you may have.

DIRECTOR WHITE: All right, appreciate your statement very much. Let me just ask one question before turning to my colleagues and it goes to that issue of threshold, a trigger for that, for the Guidelines. You, in your January submission at the NBC, in its submission, suggested the trigger go from $50

million to $100 million, as I recall. Would you tell me what the basis was for calculating the $100 million?

MR. LEVIN: No.

DIRECTOR WHITE: I wanted direct answers, so those were, too.

MR. LEVIN: There is no precise answer here, there's just -- there's no way to do it. What we did is, remember, Professor LoPucki started his database in 1980 of large bankruptcy, large chapter 11, cases. He picked $100 million of assets, not combined assets and liabilities, as a cutoff. That was very large at the time; now, that's not such a big case anymore. He, in his database, has inflation adjusted that number, so now his large bankruptcy, I think, is probably around $250 million in assets. Okay, that seems a little bit high. This was strictly judgmental. We couldn't -- we don't have the data. If there is such data, it would make a meaningful difference; we don't have it. And this was a seat of the pants judgment.

DIRECTOR WHITE:Okay, thank you.

MS. DEANGELIS: Can I just follow-up on that?

Would it matter to you whether the level that is set provides for applicability to cases in the majority of jurisdictions across the country? Is that a reasonable consideration?

MR. LEVIN: I'm not sure I understand your question. Could you try me again?

MS. DEANGELIS: Yeah. What I'm trying to get at is, if you set the threshold at $100 million, is it important that there are cases being filed in a number of jurisdictions across the country where that applies, as opposed to limiting it to cases that are primarily being filed in Southern District and in Delaware?

MR. LEVIN: I'm not sure it makes much difference. I think the Guidelines should apply to the cases wherever they're filed. There are fewer big cases outside those two districts, but there are big cases. Somebody did a study a number of years ago, late '90s, I think it was a professor, that showed that the amount of assets in cases, it was kind of in what I'll call a dumbbell curve, but there were lots of cases at the very small end, you know, a million or $2 million in assets or revenues, at most, there were very few in the

middle, and then there were a lot at kind of the big end. If you could get statistics on that now, which I think you can get from the '05 Act -- it required a lot more statistics -- you could probably look at that curve and find a reasonable place to make the cutoff so that you catch the big ones. Another way of thinking about it is, if it anticipated at the beginning of the case that fees are going to exceed a certain amount, you impose the big case guidelines for that because, what we want to measure is what I'll call the overhead of doing the extra work. The overhead of doing the extra work is not worth it for a case that's going to generate $500,000 or a million dollars in fees, no matter how big that case is. You know, a pre-pack that's going to be in and out in 30 to 60 days is not going to generate a lot of fees in court. They've all been generated before and, believe me, if everybody is watching them carefully, then the Guidelines aren't necessary for that. So maybe the standards should be anticipated fees.

Now, Professor Lubben's study shows that fees tend to run four to four and a half percent of the sum

of assets and liabilities -- I think I have that right; I'd have to re-check his article on that -- that was for the ABI fee study. You might be able to use that as a rough guideline for where you think it's worth imposing the overhead for this extra work on the fees. I mean, you don't want something that's going to be 10 percent of fees to do this extra work, you know, three to five percent might be your maximum. And yet I don't know how much it costs, this extra work would require, that's also hard to tell.

MS. DEANGELIS: Yeah, right. Thank you.

DIRECTOR WHITE: Other questions?

MS. ELLIOTT: Mr. Levin, you discussed briefly the three alternate proposals and, as Director White mentioned, I mean, they're helpful. Some questions, just generally, and then I want to talk about each of them.

MR. LEVIN: Sure.

MS. ELLIOTT: You talked a little bit about this, but with respect to terming these as "safe harbors," is essentially the position that, if a professional or their client, in the last instance,

were to provide these certifications, that the party has effectively met their burden of proof, particularly, on customary --

MR. LEVIN: No, not at all, simply that they've met their burden of going forward with the evidence, that they would -- you would . . . The Guidelines are really directions to the regions as to when to object to the application. They would, in effect say, if the firm has provided this much information in this much detail, do not object on the grounds that they haven't provided enough information. You can object on any other substantive ground, but don't object on the ground that they haven't provided enough information, that's all I was saying. That's all this proposal is.

MS. ELLIOTT: That's helpful. Assuming that we adopted those alternatives, and understanding -- and ABC makes the point that, you know, there are different capabilities, particularly technical capabilities amongst different firms -- why shouldn't as a general matter -- these are proposed as alternative --

MR. LEVIN: Yes.

MS. ELLIOTT: -- why not generally require all three?

MR. LEVIN: Because they become duplicative.

Professionals are not required -- any litigant is not required -- to prove its case two or three times. Once is usually enough. And I would say the same here. Now, by the way, in setting forth these three, those were the three that we could come up with in the short time that we spent thinking about it. We are confident that there are other ways to prove, or to provide evidence, that the compensation proposed is reasonable and is the cost of -- is reasonable based on customary compensation of comparably skilled practitioners. By the way, when you think about that standard, and the case I'm talking about where I had to litigate my fees many years ago, two firms ago --

DIRECTOR WHITE: Is that the only time you're going to have to litigate your fees?

MR. LEVIN: Well, a long time, it was intensely litigated, yes. We actually went to other firms to see if we could get evidence of what they charged because this standard does not say "what does

this law firm charge in non-bankruptcy cases?" It says, "What is customary compensation for comparably skilled practitioners in non-bankruptcy cases?" So, as I say, there may be other ways of meeting the evidentiary burden, at least the burden of going forward, that is. And so we didn't mean to limit it to three at all, we meant to provide a menu -- and if you come up with two more, which we hope either the people behind me or the people in front of me will do, then I think it would be unreasonable to say you have to meet all five.

MS. ELLIOTT: Right. Well, right, no, we appreciate it. Yeah, one of the things, as the Director mentioned, is -- and we are looking for suggestions on how can we strengthen what the Guidelines provide, you know, given the goals that we've articulated.

So let me talk about these proposals, okay? The first one, which is the certification by the firm that the rate charged by certain attorneys in the bankruptcy case not exceed the rate charged by these attorneys for the majority of hours billed to non-

bankruptcy clients.

MR. LEVIN: Uh-huh.

MS. ELLIOTT: Okay, so we're talking about a universe of attorneys. So my first question is how is this certificate, or this certification, different from what I think at least some of us would acknowledge is essentially boilerplate that firms are already providing in connection with their fee applications?

MR. LEVIN: It's hard to know what goes behind the boilerplate, but the idea here is that the certifying partner signing the fee application would have to determine what rates were charged for each of the attorneys listed on that fee application, or at least the top 10, or anybody who spent more than two-thirds of their time on the case. Sometimes there will be more than 10 attorneys. They'd have to actually get data for each individual attorney and certify as to each individual attorney rather than -- as I said, I don't know what goes in the boilerplate. And I don't know, again, after further thought, I want to caution, as I did in my opening remarks, about the rates billed. Are we talking about the rates that were recorded, the

rates that were set out on the invoice, or the rates that were actually collected, and in what time period? But passing that for a moment, I think the certification will have to be more detailed and therefore gets past the boilerplate problem.

MS. ELLIOTT: Okay.

MR. HARRINGTON: Would you suggest there's a standard type of certification that would be used that would have the requisite detail? Because I could see a lot of people either modifying or using a certification to their own benefit. I mean, would you be advocating sort of a standardized certification so it's locked in as to what actual due diligence the party would have to do, sort of, behind the scenes?

MR. LEVIN: We didn't get into that much detail. I think it's worth pursuing.

MR. HARRINGTON: I guess from my perspective, similar to what you talked about with sort of the timing of the rates, the devil is in the details.

MR. LEVIN: Yes, the devil is always in the details. Absolutely.

DIRECTOR WHITE: Other questions?

MS. ELLIOTT: Yeah, let me just finish up on that. The way that the NBC's proposal is, is that this certification would be with respect to attorneys who are essentially the top 10 billing attorneys on that bankruptcy matter, and anyone who billed more than two-thirds of their billable hours to the case. So, in a large bankruptcy practice, it may be that those attorneys who fit within that definition are all bankruptcy or restructuring attorneys, so how does this certification get to the issue of comparability outside of bankruptcy?

MR. LEVIN: I understand the problem you're posing and it might not entirely get to it. On the other hand, there's two responses. One is, even restructuring lawyers do out of court work. Let's take that pre-pack I mentioned a moment ago. A lot of that took place out of court. And those are the same restructuring attorneys that would be working in court.

So, for most of these attorneys, you're going to have comparability to what they did out of court. Second, even if you didn't, there are some practice areas that have a different rate card than other

practice areas. And if these attorneys who are in the restructuring practice always charged to this rate card, and they're always in restructuring, even though somebody, say, in a comparable class in a practice area that is a more commoditized practice area, might have a lower rate, that doesn't mean that this rate is not necessarily a market rate -- that the restructuring attorney's rate is not a market rate. So, for both those reasons, we think this works.

There's no perfect solution because there's so much variability and the market is so volatile. It's not so much volatile, but it is moving. There's so many changes going on in the market right now, there's not going to be a perfect answer. And certainly providing these certifications that we proposed would not preclude any objector, including the U.S. Trustee's office, from looking deeper.

MS. ELLIOTT: All right.

MR. LEVIN: All right. We didn't intend that. But this would be initial certification that is required.

MS. ELLIOTT: Okay. With respect to the

second proposal, which is the firm-wide or office-wide blending rate, could that blended rate be calculated by category of professional?

MR. LEVIN: By category, what kind of category?

MS. ELLIOTT: For example, you have it for the case specific, which is the partners, associates, of-counsel, paralegals.

MR. LEVIN: Yes. Yeah, and I think it could be calculated by partner, associate, legal assistant -- it could be. Here's the problem more generally with this issue, and with the issue of data in general. It was interesting as we listened to the conversations in our meetings to come up with these ideas. We had, I don't know, maybe 10 different law firms represented on the call, not that they were speaking on behalf of their law firms, but everybody -- it turned out that everybody -- in each law firm had a different way of setting their rates with their clients. One firm was saying, "Well, where it's partner-heavy work, we charge a higher average rate for the partners than when it's very leveraged work, when we charge a lower rate for

everybody because the profitability gets to be comparable for that." So the firm was focusing on profitability of an assignment, rather than the hourly rates of the people working on it. Other firms had different criteria for how they would -- whether it was commoditized (ph). Some firms would say, "Well, if you, client, promise us X million dollars of work over the next year, we will do it at this kind of a discount for you, but if there is an M&A assignment in there, and we're successful on it, then we expect a premium." So there's that kind of tradeoff rather than the leveraged tradeoff, which I described a moment ago. And every firm came at it from a different perspective. Sure, now, that kind of is reflected by what we proposed here, but as to your data point, can you describe -- can firms provide -- the data for each category? Here is my answer to it. I used to be somewhat of a technologist, less so these days than I used to be, but the fact is that firm billing systems are just huge databases. The data going in is the amount of time spent and there's another input that is the hourly rate, and the firm accumulates this very large database

and, when a firm wants to do a bill, it extracts data from the database, and when it wants to do financial reporting statistics, it extracts data from the database. So can firms produce data? Sure, subject to the following caveats. One is garbage in, garbage out, and lawyers are notoriously bad at administrative tasks, including putting data in properly. And that includes not only putting the hours in -- and, well, putting the hours in for any matter -- but it also includes setting up the matter. How do they code it? Do they code it as a bankruptcy matter, as an in court, as an out of court, do they code it, you know, what goes into it? They're notoriously bad at this stuff. And law firm management -- I've been in three of them now -- have to deal -- so I know -- they have to deal with this problem all the time. Second, the more coding you ask for, the worse it's going to get. So the kind of detail that has been suggested, for example, in some of the proposals in the Guidelines and in some of the other discussions that have been had -- can the law firms produce this data? Sure. But it would require that they get more coding on all the data that goes in

because, unless it's coded when it goes in, they can't code it when it comes out, you know. Professor Rapoport says she can get her reports from the CFO right away. Sure you can get a report -- how accurate is it? In a law firm, we don't know. But we know that it's just a database. And database programs can be programmed to do almost anything, as long as the data is right.

DIRECTOR WHITE: You're not suggesting that it is billing records that are inaccurate, though, are you?

MR. LEVIN: No, well, yes. I will tell you myself, there's lots of times that I forget to put down time, so they're inaccurate.

DIRECTOR WHITE: Only acts of omission?

MR. LEVIN: You know, but in terms of you want data about non-bankruptcy cases, that's where you're going to find coding problems. And the more detail you ask for, the more the partners have to -- the more information they have to -- put in, the more likely they are to make mistakes on what you call categorization.

MS. ELLIOTT: Uh-huh.

MR. LEVIN: In court, out of court, you know.

By the way, to your question earlier about bankruptcy lawyers in big firms who have a big bankruptcy practice, also do a lot of work for creditors, so you've got their hourly rates there, too, not just in court that are working.

MS. ELLIOTT: Right, no, absolutely. Well, let me move on to the third, which is the certification by the client. It's to assure that the proposed rates for the case are the market rates. And the way I read NBC's proposal is that it would be market rates for the bankruptcy work. So I've got two questions. One is should this -- is this -- the kind of thing that you discussed earlier that might be better to have upfront at the retention phase?

MR. LEVIN: Yes, that's exactly what I was referring to when I mentioned upfront earlier.

MS. ELLIOTT: Okay. And then, to the extent that it is the certification with respect to the market for bankruptcy cases, again, how does that get us to comparability outside?

MR. LEVIN: Well, I'm not sure we said -- did we say market for bankruptcy cases? I said we wanted certification to ensure that the law firm's compensation was at the market, and to maintain control over fees as the responsible officer would do outside of a chapter 11 case. So, let me see --

MS. ELLIOTT: I was looking at page 5 of --

MR. LEVIN: That's where I was --

MS. ELLIOTT: Okay, then I may have that wrong.

MR. LEVIN: You know, there are different markets. Markets for complicated tax transactions are different than markets for descending, you know, routine tort litigation, repetitive tort litigation, which is a very different market. The market for a big case in bankruptcy is probably more comparable to big M&A transactions, or big Bentley (ph) company type litigation, whether it's an SEC investigation, or a major securities fraud case -- so the markets are comparable, but they're never exactly the same. And so something has to be taken into account, depending on what market you're talking about, but I don't think we

were saying the market just for bankruptcy services.

MS. ELLIOTT: That's helpful. Okay, the last thing I want to touch upon before we let you go is budget and staffing plans. And you state that the failure to provide a plan, a budget, a staffing plan, should not be the basis for USTP objection where the client ordinarily does not require those for this kind of engagement. So, in your experience, in what kinds of engagements would the client require a budget or staffing plan?

MR. LEVIN: Engagements where the client -- where there's a certain amount of predictability. You know, in addition to being with three law firms, I was actually a General Counsel for three years at a company that actually made stuff, and so I feel your pain. I understand that I had one lawyer, in particular, that I had a lot of trouble controlling on the fees. But we did see some matters that were rather -- I don't want to say "routine" -- but they were somewhat predictable. When I was in the debtor practice, I often advised my clients, "you know, chapter 11 is like a war, and if we go to war, I'm going to be your General in conducting

that war, and the one reason you don't want to go to war is because, like in real war, it's totally unpredictable, you just don't know what's going to happen."

In ordinary litigation, you know it's going to be big and it's going to be bad, and in big M&A transactions, you know it's going to be big and it's going to be bad, but they're somewhat predictable. Okay. Bankruptcy less so. I think over the years we've gotten greater predictability in bankruptcy cases. We see a lot of repeat sorts of things. But, I mean, I think about the Dynegy case because it's in the news a lot now. How predictable -- how could you have budgeted that? How would a General Counsel -- leave aside that that particular management was accused of fraud, but -- or let's take like an Enron case, or a Lehman case where management changed, Enron where there was fraud, Willcom where there was fraud and management changed. How could you predict what it's going to take when you start peeling back layers of that onion? It's not like even that the company, just a two-party litigation, because there's so many parties. So I think

clients may ask for budgets in routine matters. Even in big matters, they might ask, "What do you think it's going to cost?" But, to give you an idea of the uncertainty of this, I always quote Thomas Watson, who was Chairman of IBM for many years and one of the great Chairman of IBM. He can be quoted as saying, "Every year, I give my lawyers an unlimited budget, and every year they exceed it."

DIRECTOR WHITE: Are you advocating that for bankruptcy? (Laughter)

MR. LEVIN: No. But, as I said, I share your pain.

DIRECTOR WHITE: Well, could I ask something with regard to the budget. Is there no advantage whatsoever of having a budget that serves as a benchmark? And, if that budget, as in the proposed Guidelines, is presented as part of the application after the fact, with an additional explanation needing to be provided if you have exceeded what the budget provided at that earlier period, given the unpredictability that might frequently be the case?

MR. LEVIN: I think firms that do debtor work

routinely shouldn't have a problem saying, "Well, we know there's going to be DIP financing, we know there's going to be first day orders, we know there's a going to be a plan and disclosure statement at some point, we know there's going to be reclamation litigation, we know there's going to be these things." And for each of these discrete areas, we probably can lay out a budget, okay? Budget for the whole case? That's tougher.

DIRECTOR WHITE: Well, let me ask you this, if you had a situation that you described before, in private practice where you've said, "I'm going to be your General in the war, but you don't want to go to war because it has unpredictability," suppose the client said, "Well, we've got to go to war"? Do you just not give him a number?

MR. LEVIN: You know, it's been a few years since I've done debtor work, and you can ask some of the people following me at this table about this, but budgets were not so much in use until just recently. We did talk about what things were going to cost, but they were very rough estimates for the whole case and I guess if you go back to Professor Lubben's study, or

even Professor LoPucki who has a different study as to how you measure fees, you probably can give a budget. Of course, that's for all professionals in the case, not just for debtor's counsel, or committee counsel, or whatever. So I suppose you can give an estimate. I think the more granular you make it in terms of subject matter, the easier it will be to do because, you know for example, that an incentive plan -- getting approval in an incentive plan -- is going to cost about this much if it's not contested, and about that much if it is contested. If you can break it down that way, I suppose that's a manageable sort of thing.

DIRECTOR WHITE: Thank you. Any other questions?

MS. EITEL: I have one. Mr. Levin, talking about the threshold question, you said maybe instead of looking at sort of the assets and liabilities in the case, it should be based on what the fees are anticipated to be above X level. I will tell you that we actually considered that and discarded it, and I'm curious --

MR. LEVIN: You're one step ahead of me.

MS. EITEL: Well, but because if you could cure the infirmities, however, that would be helpful because the question was whose anticipation, and at what stage do you make the anticipation? And it just seems like it was a very subjective inquiry, and so we were really in search of an objective standard that would be a little bit easier to apply. But we're not adverse, I think, to consider an alternative formulation because, you're right, I mean, the issue is not necessarily the size of every case, the issue is are the fee application volumes going to be so large that you're going to have difficulty reviewing them meaningfully and that's really where you want to apply these credit case guidelines.

MR. LEVIN: I think if you're worried about the things that the Guidelines are worried about, the number of fee applications shouldn't be a driver in deciding whether the Guidelines should consider a large case. You know, most of the courts around the country have -- many of the courts have -- mega case those -- at the local rules and local general orders -- as to, you know, the Clerk's office procedures of what's a

mega case procedure. I suppose it would be useful to look at. I suspect they tend to err on the side of being too low because what they're concerned about is processing creditor claims -- that's their main focus.

But, again, it's a useful data input. I understand your point about expected fees being a difficult measure and if you were to use either Lubben's or LoPucki's studies, it all comes back to assets and liabilities anyway.

MS. EITEL: And that was ultimately where we were at, and I think the local rules you're talking about, if I'm not mistaken. I can't attest to having looked at all of them --

MR. LEVIN: Yeah.

MS. ROBERTS EITEL: -- but most of them were, again, a tie either to an asset value or to an asset and liability value.

MR. LEVIN: Or the number of creditors.

MS. EITEL: Or the number of creditors.

But it very rarely looks to see if fees are going to be above, you know, a million dollars.

MR. LEVIN: I understand, but that --

DIRECTOR WHITE: But that might require a budget.

(Laughing)

MR. LEVIN: But to Director White's question about how did you come up with a number, maybe one way to think about it is to see what the courts are doing in their cases.

DIRECTOR WHITE: Okay. Other questions?

MR. HARRINGTON: Maybe a couple follow-up questions. You talked a bit about, you know, unpredictability in budgets, and you also talked about how most cases today are secured creditor cases where the fulcrum creditor is the secured creditor.

MR. LEVIN: The second or third lien creditor is often.

MR. HARRINGTON: But I assume in most of those cases, professionals are paid from a carve-out, as well, if that's where the money is going?

MR. LEVIN: No, I don't think so. I think, if you read the carve-outs, they all say, "This carve-out applies once there's a default." So up to that point they're being paid from the budget -- the DIP financing

budget -- not from the carve-out.

MR. HARRINGTON: And I think, then, where does that number come from that goes into the budget? I mean, I assume the professionals do -- some do -- due diligence before that number goes into the budget?

MR. LEVIN: I would assume so, yeah, and that may be the answer -- would be the answer to that, maybe. But, again, those budgets can be not on a per law firm basis. They tend to be for the case as a whole -- for debtor's counsel, creditors committee counsel, financial advisors, you know, anyone else being paid at the expense of the estate.

MR. HARRINGTON: But in your experience, I assume there is some degree of due diligence that goes into calculating those numbers before that number is put into the budget?

MR. LEVIN: You know, I'm not sure how diligent that due diligence is and how much it's just kind of a negotiated number or -- well, just what we saw in the last case, let's use it again -- I can't speak to that, I just don't know. But I wouldn't necessarily assume that it is a thoroughly vetted

thought-through detailed due diligence kind of number.

And the budgets, you know, look, good news and bad news about budgets. Budgets, they're great if people stick to them, but if you say that we're going to hold you to a budget, the budgets are going to get big. If you say we're not going to hold you to them, then how much use are they? So in the unpredictability of the process, we have a problem with budgets. I mean, I think they're a good idea. What I think is better than budgets, and we've talked about this in the NBC and I think we've proposed it in our original submission, is some process, whether it's status conference or some kind of professionals committee or client's committee upfront, that says we're not all going to have -- not every position in the case is going to do -- the same work. How many cases have you seen where the debtor-in- possession and the creditors committee counsel are doing the same thing on the same litigation over and over again? And that runs up the cost of the case, you know, creditors committees have grown in function over the last 30 some years, and they take a much more active role now than they did

originally. They're very active. So, you know, maybe that work can be divided up. Some things are going to be of more interest to the committee than to the debtor-in-possession, and some things are going to be more of interest to all parties in the estate, which the committee does not represent, it just represents one constituency. And, if you can divide that work up in advance rather than having both doing everything, that's probably better than a budget, per se.

DIRECTOR WHITE: That's a very good point. We'll make that Exhibit J to the final version.

(Laughing)

I would just say one word, last word, with regard to the budget issue and that is what we're struggling for is to find some benchmarks. Without any number at all that you're given as the case rolls along, you're left towards the end of the case with "it cost this much," and you didn't have the kind of cost controls as you went through that perhaps a number would give you. Not a binding number, but a number that is a benchmark, if you will, a rebuttable presumption, which I think may have been the term used by Professor Rapoport -- so I

didn't have the last word. Go ahead.

MR. LEVIN: Well, I'm going to give you the last word on this one. But I think you hit the nail on the head: how do you get a benchmark? You've got all the data, nobody has more data than the U.S. Trustee's office on what these cases cost. It's centralized in one place because you see them all. So if firms, as I think most do, breakdown what they've spent on, as I said, DIP financing, or first day orders, or reclamation process, and you've got it across a range of cases, you've got the data to show what it should cost. You know, kind of a mean and a median and all of that, forget the hourly rates. What's important is, is this case cost -- in this case -- $100,000 to get the DIP financing done, or $500,000 to get it done. And you have that information and you can use that as a benchmark for the next case that comes along, even more effectively than you can use a budget.

DIRECTOR WHITE: Okay. Any final questions?

MS. DEANGELIS: I just have one quick one. I want to follow-up on your question about focusing on

the hour rates and your advice about trying to implement more of the alternative types of billing procedures. How do you do that? What are your suggestions on how to do that?

MR. LEVIN: Your profession is struggling with that and there's no easy answer, but what I just suggested, for example, I had never put this into practice because I never found a law firm that was willing to spend the time and effort to do it. But, as I said a moment ago, you've got the data -- how much does a DIP financing motion cost, typically, case after case after case? You know. Suppose the range is $200,000 to $300,000 on the debtor side, or $50,000 to $100,000, whatever the range is, if there were sufficient regularity in the fees for that, and if a firm were willing to say, "I'll do it for you, fixed fee," I think you'd be surprised at how much efficiency the firm would create in staffing that matter and in getting it done. I'll tell you, one of the things in firms I've been in, when we talk about a fixed fee, they say, "Well, how does that compare to what we would have gotten on an hourly rate?" And I said, "That's the

wrong measure. How does that compare to what your cost is of doing your work? That's the right measure." And I think if you have enough data to know what things typically have been charged, even though they've been charged at hourly rates, and you set that somewhat as a benchmark, firms will find a way if you give them a fixed fee at that level to get the work done very efficiently. I mean, when I was a client, I thought hourly rates gave me the wrong incentive and gave my lawyer the wrong incentive. We each have the exact opposite incentives to what we should have had. Now, if the bar is good, well, when we walk out of this room, I'm going to get strung up for arguing (Laughing) -- and by the way, this is probably my own personal views, I don't think the NBC has gone here on fixed fees -- but I think there are a number of areas within a case that can be done for a fixed fee. And I think great American ingenuity would allow -- I don't want to offend you, but it might allow -- law firms to make greater profits than they're currently making. But it would be good for everybody.

DIRECTOR WHITE: Profits are fine, as long

asyou're within the statutory guidelines.

(Laughing)

Thank you very much, Mr. Levin. Thought provoking and helpful, appreciate it. I know at least one of our other witnesses has a plane to catch, so we'll try to move expeditiously. Next is Albert Togut. If you wouldn't mindmoving to the table. Mr. Togut is the managing partner of the New York City law firm of Togut, Segal & Segal. The firm specializes exclusively in bankruptcy law. He is also a member of the U.S. Trustee panel of chapter 7 trustees in the Southern District of New York. He currently serves as Co-Chair of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11, on which I serve as a non-voting member. Mr. Togut, you are free to summarize the written comments previously submitted.

MR. TOGUT: Thank you. And interestingly, what Rich Levin said, and what I'm going to say, very much fit together, even though I come at things from a slightly different perspective.

First off, let me say that I'm very pleased to be here today to express views different, I think,

from most that have been stated regarding this worthy effort. I think it's a very worthwhile effort that you're making to get better control over legal fees in large cases.

Most of the comments you have received say that the current system works well and does not need reform, but I believe there is room for improvement. So, in that respect, I disagree with some of what my colleagues have said, and I come to this hearing with a different perspective.

As Director White noted, I've been a part of the United States Trustee Program since 1980, when I joined the Southern District panel of trustees. I am by no means an insider, but I certainly have seen how the Program has evolved and matured and developed. And I have a keen appreciation of its goals.

I've also had a central role as an estate retained professional in some of the most famous mega cases that have ever been filed, including Enron, General Motors, Chrysler, Rockefeller Center, and many more. In those cases, I have been very much an insider because I've worked as co-counsel, or conflicts

counsel, with the main counsel in those cases, and I've seen as an insider in those cases how they were handled and where they could have been handled even better. I was inside on strategy -- in the room when strategy was being developed on how the case would be handled, and all that sort of thing.

So, for the record, let me briefly explain a little bit about what I do, what my firm does, and this is a very brief part of my remarks. I grew up in this practice working with Conrad B. Duberstein, who went on to become the Chief Bankruptcy Judge of the Bankruptcy Court, Eastern District of New York, after whom the Brooklyn bankruptcy courthouse is named. That was before the current law was enacted nearly 40 years ago. It was a time when the bankruptcy practice was dominated by specialty boutiques; large Wall Street and Park Avenue firms stayed away from the bankruptcy practice because of the compensation standard that was then in effect under the Bankruptcy Act. It was referred to as the economy of administration standard, which simply meant that if creditors could not be paid in full

either. The large firms wanted no part of that compensation system, and so the bankruptcy practice was dominated by small specialty firms, which could more efficiently run a case and still make a profit, despite being paid lower fees than the large firms would have been paid for the same work.

The current law, the Bankruptcy Code, changed all of that by making the compensation standard the cost of comparable services. In plain English, that meant being able to charge corporate clients in the bankruptcy case the same fees that they were able to charge corporate clients outside of bankruptcy. So, with the change in the compensation standard, how did the large firms develop bankruptcy departments overnight? The answer was they acquired all of the quality boutiques that existed pre-Code. They all disappeared and became the bankruptcy departments of large firms. The irony is that, while small bankruptcy boutiques had no conflicts because most did not have any regular retainer clients, once they merged into the large Park Avenue or Wall Street firms, they had conflicts galore. So I viewed that as an opportunity to

create a new business model to deal with those conflicts. The idea was that most large firms, because of their broad client base, could not satisfy the disinterestedness requirement of section 327(a) of the Bankruptcy Code. And so, in my view, a second General Counsel to handle conflicts would be needed. The combination of the two firms satisfied 327(a), which allowed the debtors to retain one or more attorneys. But to my mind, if all that the conflicts counsel did was conflicts, there would of necessity be duplication of effort. Conflicts counsel would be main counsel's shadow, attending the same hearings or meetings, but without any value added. So the only alternative to that, to being the shadow, was for conflicts counsel to be locked up in solitary confinement, ignorant about the case, and therefore unable to act effectively when needed.

I concluded that conflicts counsel needed an independent reason for being there. All chapter 11 cases have two kinds of duties, the complex work like plan formulation and complex litigation, but then there's a second category of services required, and

it's required in every single one of these cases. They're routine services -- they're less complicated tasks, such as claim objections or schedules preparation or preference analysis or preference prosecution that do not require the breadth or depth of main counsel. And using a boutique like the old line boutiques to perform bankruptcy chores does result in lower fees.

The Delaware model is for smaller local firms to partner with, say, the big New York Park Avenue or Wall Street firms. The Delaware firm performs all kinds of tasks in the case, much more than just dealing with conflicts, that relieve the large firm of having to do so. And the Delaware firms have lower billing rates and efficiencies, so everything the Delaware firm does results in a lower cost to the estate, and the more they do, the more work they do, the more the costs are lower than they would be otherwise. I adopted the Delaware model.

And in studies that have been done after a case was concluded, we can point to significant savings to the estate. I should add that the division of

duties works best when it's done at the very beginning of a case -- at the outset of the case. It's helpful for the client to know from the very beginning which firm will handle tasks, and it's also helpful for each of the co-counsel to know at the beginning who is going to be responsible for what. Anything assigned to the smaller co-counsel is theirs to handle from the very beginning.

A great example of this is the Chrysler case. That case, you will recall, moved amazingly fast from the filing of the petition to the sale of the company to Fiat. It was only 40 days -- 42 days in all including appeals. There was no time for missteps. Jones Day was main counsel; my firm was co-counsel. There were a lot of supplier issues in that case that Jones Day could not handle due to conflicts. Rather than decide on a case-by-case basis which should be handled by Jones Day, which should be handled by my firm, it was decided that my firm should do all of the supplier issues, whether it was a conflict or not. And so, as the supplier matters arose, they all went to my firm.

In Enron, 80 percent of what we did had nothing to do with conflicts, and the reason was that Stephen Cooper, experienced turnaround expert, decided that he wanted to lower the overall legal expenses to the estate, and so he insisted upon a lot of tasks being assigned to my firm and not handled by Weil.

The assignment of tasks to a firm that can perform them more economically has been cited in letters submitted to this study group by Professor Stephen Lubben, who spearheaded the ABI landmark chapter 11 fee study, by the American Bar Association, and by the National Bankruptcy Conference. All three of them urge, as do I, the delegation of duties to the smaller co-counsel when it can be done. Experience shows that it works and it works well.

Just one more point in closing. I took seriously your time limit.

DIRECTOR WHITE: Thank you.

MR. TOGUT: The letters sent by the 119 law firms, which included, by the way, Dewey and LeBoeuf, that I put into chapter 11 a week ago, urges against many of the proposed Guidelines for budgets -- your

point. I have been the subject of budgeting exercises in many mega cases and I know firsthand that it is sometimes an exercise in futility. You can't accurately predict the level of litigation that a case may bring, as you have heard from prior witnesses. But in my view, that misses the point. The whole point of a budget, in my opinion, is to be thought provoking. It's not so much getting the numbers right, but it's meant to focus the parties' attention on who should be doing what in the case, and who can best handle matters efficiently and economically -- when that is an option. I side with the National Bankruptcy Conference in its urging early syncing about assignment of tasks and about how to effect savings as a result of a conference at the outset of the case. That conference can take many forms. I would suggest, based on what I'm talking about, in the first instance, it should be a mandated conference between the co-counsel in which people sit down and actually divide up who should do what. The U.S. Trustee might participate in that meeting, might not; the CRO might participate, might not. But the point is, I think it's a very good idea to force that

kind of a conference to occur, to force people to think about who best can do what, and to allocate duties based on who should be handling what, and with a mind to efficiency and economy.

And one more thing. I have with many United States Trustees over the years in the Southern District of New York worked on the language of Orders for the retention of co-counsel to handle conflicts and other discreet matters. Once we get to the language of an Order -- and I've negotiated new Orders with every new U.S. Trustee -- we've tried to use that same Order in subsequent cases. It was pretty heavily negotiated. But all too often, I have found that the new firm I am to work with wants to fiddle with the language. In the best of circumstances, they want to just tweak it, in the worst of circumstances, they want to gut the meaning of the Order. There should be, in my view, with your Guidelines, a form of Order that you put out there -- a model form of Order for the co-counsel arrangement that I've described today. In addition, I think that that Order should place an affirmative duty upon main counsel and it's co-counsel for there to be a division

of duties between them to take advantage of the co-counsel's ability to handle certain classes of matters more economically. Every effort should be made to do this to the extent possible at the beginning of the case. And I would be pleased to answer any questions you may have.

DIRECTOR WHITE: Thank you, Mr. Togut. Very helpful. Your written comments and your oral presentation are primarily directed to having the Guidelines encourage the use of co-counsel that can more efficiently perform routine services in a case that doesn't require a larger and more expensive law firm. And, as was noted, the NBC has endorsed a similar concept, as did Professor Lubben in his written comments.

The first question I was going to have for you, I think you've just answered with regard to one of the issues there -- with regard to the use of efficiency counsel. If we were to try to routinize it through a guideline mechanism, how do we ensure it doesn't turn into further duplication, unnecessary costs incurred by the estate. And I guess what your

response is is a model form of Order so that that issue has to be identified right out of the box. Is that correct?

MR. TOGUT: Well, yes. There's, I mean, you have to bear in mind that the people, for the most part, the firms and the people that do these mega cases are in the business of doing mega cases. Not every firm can do them. And so you see the same firms over and over and over again filing these cases. So it's not as though anyone would come to that task without experience in how to do it. And if it's done correctly, there should be no duplication of effort. The whole idea, as Mr. Levin said -- and he's right -- you get into these big cases and there's some major piece of litigation, and the debtor and the committee are duplicating each other, right? If, though, there had been a conversation beforehand about who should do what and the sharing of information, then that duplication could be avoided. The same here. I've been in cases with main counsel that took seriously this concept of dividing duties, and once the duties were divided, they were absolutely divided. They said, for example, they

would send out a blast memo to everybody on the team that said, if there is -- in Chrysler -- a supplier issue, pencil down, it goes to the co-counsel, and the client knew that, too. So it was clearly defined who did what and there was no overlap. And Jones Day stayed away from the supplier issues; they handled dealers, the dealer issues. We stayed away from that, and so you had clearly defined areas of authority.

DIRECTOR WHITE: Thank you. Let me ask you, still in that area of avoiding the duplication of effort and realizing savings for the estate, can you quantify that at the front end of the case? Is it practical to have in the retention application a projection of the total cost savings because there is this boutique law firm involved, as opposed to main counsel handling all the routine matters?

MR. TOGUT: Here's the challenge. Part of it is a large firm's DNA. It's in their DNA that, when they approach a project, they bring every resource at their disposal to the project, and what happens is it's not the result of number of hours times the billing rate, the added ingredient that really makes a big

difference in cost is the number of people involved. Big firms, because they want to do the best job possible, bring every resource that they think is necessary for the task. Boutiques have a built-in limitation, they don't have that many people, so when you assign a task to a boutique, it's a result oriented approach, not a process oriented approach. Now, to answer your specific question, how do you quantify that? If you can figure out -- and I haven't been able to, and I've thought about this a lot -- how you factor in the number of people involved element of the overall fees, then we can answer that question. I can tell you that, looking back on cases where I compared our cost with the cost of what main counsel was doing, I can show in case after case after case a savings, but I think that's mostly the product of fewer people attacking the task, and more junior people, too, than the big firms use. And I can give you a specific example. St. Vincent's Hospital went into chapter 11 twice, and we were co-counsel twice. The first go round was Weil, the second go round was Kramer Levin.

In the first case, we did all the claim

objection work. In the second case, we did not. The costs in the second case were three times as much.

DIRECTOR WHITE: A final question before I turn to my colleagues. One of the issues we have, and you're probably aware of this, as co-counsel arrangements are worked out and we review our proposed retention agreement, how do we build in -- how do we build in -- particularly if we took the model Order approach that you described earlier -- how could we build in some protection to ensure that main counsel doesn't use the efficiency counsel to mask disqualifying conflicts of interest. So, in other words, a matter isn't just transferred under the original Order to the efficiency counsel when it is on a matter that the main firm is conflicted from in a conflict that would disqualify that firm from the entire case? How could we ensure that additional transparency in the model to work?

MR. TOGUT: Okay. Well, one thing that the model Order typically doesn't require, but should, is as soon as a matter is identified, it doesn't rise to the level of being a controversy, but it is identified

as a potential issue in the case. There should be a disclosure at least to the conflicts counsel about that. What very often happens is the main counsel is of the view that, until it matures into a controversy, there is no conflict. And so they're busy doing things, they may end up settling it without anyone realizing that that happened, so there should be earlier disclosure than there is now.

Secondly, to answer your specific question, it's a question of degree. In the Project Orange case, for example, the main counsel -- and that's a case where there was conflicts counsel-- main counsel represented General Electric. General Electric was central to everything to do with the case and the court found that it was so central to the case that that firm had to be disqualified as main counsel. The takeaway from that decision is, if it's a big, big part of the case, that's a disabling conflict. Usually it's not that big. It's usually a small part, but it's a small part that main counsel shouldn't be touching because of the firm's work for that client.

DIRECTOR WHITE: Okay, we won't go -- I opened

the doors, but I won't go -- any farther through that door with regard to conflicts. That's a whole different set of guidelines. But the notion of disclosure only to co-counsel, obviously, would give us some concerns with regard to the transparency and disclosure requirements under the Code and Rules that stand (ph). I would turn to my colleagues for any further questions of Mr. Togut.

MS. DEANGELIS: I'd like to follow up on division of duties. To what extent do you think that the retention application should specify that division? How detailed should that information be?

MR. TOGUT: In most of these cases, my experience is better main counsel firms develop what they call a task list, where they actually think about the case from beginning to end, they put in significant dates and significant tasks that can be reasonably expected to be handled throughout the course of the case, and then they usually even assign which lawyers are to work on it, or at least which lawyers are to head it up.

MS. DEANGELIS: That sounds a lot like budget

and staffing plans, doesn't it?

MR. TOGUT: It does.

MS. DEANGELIS: Okay.

MR. TOGUT: It does. And if you think about it, it's the right way to approach what needs to be done. We -- Tracy Davis and I -- have tried in a couple of cases to define upfront the duties that can be assigned. It's hard because you have so many people involved in the case until they come out and present issues, you can't really know them. But on the ordinary task stuff, a lot of it can be identified upfront. The place where we really need to deal with it, much more than the retention application, is the retention order. I'm advocating that the order provide an affirmative duty, to where tasks are identified that can be handled more efficiently and economically, to move them. Okay? No order provides an affirmative duty that I've seen.

MS. DEANGELIS: And let me just ask one further question with respect to the model. And this goes more to the issue of conflicts counsel because you haven't yet -- because the division of duties is

something that is more easily done early on. But to what extent can you assure that conflicts counsel, in the anticipation of whatever potential conflicts may arise, basically provides significant services in monitoring the case, which does not appear to be of significant value to the estate, but, of course, may be a value to conflicts counsel who ultimately may get into a matter. How do you assure against that?

MR. TOGUT: Okay, first, just as a backdrop, former Chief Judge Arthur Gonzalez wrote about this in Enron and said that, as a safeguard for the system, conflicts counsel needs to monitor the case, okay? And it's surely true. In a way, I'm a watchdog when I serve in that capacity. What we do as a practical matter to try to keep the costs under control is, if I'm in a case with Skadden, or Jones Day, or Weil Gotshal, or whoever, they send around to their team updates about pleadings that were filed, all that sort of thing. I asked to be added to that distribution list. There are coordination calls that are scheduled -- we have them in American Airlines every Thursday morning. Senior people involved in the strategy of the

case have a coordination call, and we participate on that call. If you look at our fee applications, as Tracy has very closely, you rarely see us having conferences with main counsel. That's very time consuming and we don't do that. We monitor the docket, we participate in senior strategy calls, and it seems to work pretty well.

MS. DEANGELIS: Thank you.

DIRECTOR WHITE: Any other questions?

MR. HARRINGTON: Can I ask one follow-up question? When you talked about the benefits of efficiency counsel and how to quantify that benefit, there were two areas, I think. One is lower rates, and the second area is less people.

MR. TOGUT: Yes.

MR. HARRINGTON: I think you defined it as how do you quantify the less people to make sure efficiency counsel is actually being efficient?

MR. TOGUT: Well, the old line boutiques, the reason I talked about the economy of administration standard, the mindset back in those days was how much effort should I bring to the task so that the fee can

be justified based on the result? It's a result oriented approach to doing the work, okay? We actively do that on the tasks that are assigned to us that do not involve conflicts. We look at the job, we see what's involved money-wise, and bring an effort to that job that is justified by the result you obtain. That sometimes doesn't happen with other firms because their mindset is we need to bring the people to the task that are required to perform the task, and sometimes you end up with much higher costs. So I think it's a different mindset.

MR. HARRINGTON: And one final question, from me anyway. Is there a required rate variance that you think should be factored into that model Order, or the Guidelines, that there has to be a certain discrepancy between the rates of lead counsel and efficiency counsel?

MR. TOGUT: Rate doesn't get you to where you need to be, it really doesn't, because of that added component of how many timekeepers are involved. You should look at the cost of the overall job. If you do that, you see pretty dramatic differences.

DIRECTOR WHITE: Well, take a number, any number. No one suggested they want to give numbers.

MR. TOGUT: I know, and various people on that task and I have had this conversation before, but you can't, Cliff, you can't find the right answer without factoring in the difference in the number of people.

DIRECTOR WHITE: You're absolutely right on that. Well, thank you, Mr. Togut. That was very helpful.

What we're going to do at this point -- and I know at least one of our speakers, again, has a plane to catch -- we're going to take a five-minute break.

That's a hard five-minute break, and we will reconvene at the table. We have three more witnesses and I'm sure we'll finish by 1:30. Thank you. Five minutes.

(Off the record.)

(Back on the record.)

DIRECTOR WHITE: We try to be efficient in the U.S. Trustee Program, so I appreciate your efficiency along with us. It's been a productive morning and we have a little bit more to go. I know it's very

productive, so we don't want to be overly rushed, so we took just a very short break.

So our next speakers are Judith Ross and also Rafael Zahralddin, representing the Business Bankruptcy Committee, the Business Bankruptcy Section, of the American Bar Association, and in particular, the task force that reviewed these Guidelines.

Judith Ross is a partner in the law firm of Baker Botts in Dallas, and her practice is in the area of bankruptcy litigation and advice to debtors-in-possession and creditors in complex business reorganization cases. And she is accompanied, as I said, by Rafael Zahralddin of the law firm of Elliott Greenleaf in Wilmington. So the floor is yours, Ms. Ross.

MS. ROSS: Thank you, Director White. I do want to thank you for letting us appear today and I think that this has been an extremely productive session. I thoroughly enjoyed sitting here this morning and listening to everything. I think it's been very, very productive.

I want to just make it very clear, sort of

out of the box, that I'm not speaking on behalf of the American Bar Association. To do that takes an act of Congress, apparently, and so to be clear, I am speaking on behalf of a working group that was appointed by Trish Redmond, who is here, the Chair of the Business Bankruptcy Committee of the Business Section of the ABA. She appointed both Rafael and I to co-chair a working group. The working group was comprised of multiple attorneys. In addition, we had one person who was a non-attorney, a Mr. Renick, who was a Fee Examiner in cases in New York. And so the views expressed today represent the collective views of the individuals who studied the Guidelines, not the views of their law firms or the ABA.

Let me first state that the working group embraces the goals that are being pursued in connection with these Guidelines. We view them perhaps differently than others, but we think that the goals that should be promoted here are the goals of efficiency in chapter 11 cases -- so I'm going to call them mega cases. And the availability of discounts to debtors is when available and where appropriate. What

the working group did was ask itself, how do we best achieve efficiency in a large chapter 11 case? And after reading the other comments and, in particular, Mr. Lubben's and Mr. Togut's comments today, our group reached the same conclusion they did with respect to the issue of efficiency. In cases where there are multiple lawyers and law firms, the efficiencies should be obtained in whatever manner can be done and where the local counsel can act on behalf of the estate in routine matters.

I will note, just on behalf of myself individually, that my law firm in the Esarka (ph) case did exactly that, we had local Corpus Christi counsel. We used local Corpus Christi counsel on a lot of the more routine matters, and I frankly think that good law firms will do that, as a general rule, just as Mr. Togut described to you already.

So that was our answer to the question of efficiency. We don't think that it improves efficiency to require the detailed additional disclosures that are being suggested in the proposed Guidelines.

Now, the next question we asked -- the

working group asked itself -- was how do debtors get to take advantage of discounts offered by law firms? How is that opportunity made available to them? Well, we first asked ourselves, how do clients generally get those discounts? And I will tell you how they don't get them. They don't get them by asking their lawyers to disclose to them every single discount that the law firm has ever given to other clients. That information is not provided to them and, frankly, it's not even asked for. When they ask for discounts, they never ask for the types of disclosure that you're talking about here. How do regular clients get discounts? The answer is very, very simple -- they ask for them. And they either get them, or they don't get them. It's the free enterprise system that operates. And frankly, if we go to the next question here that the working group asked itself, which was "how do bankruptcy clients get discounts?", the answer again is they ask for them, and they will either get them or they won't.

Now, I don't know if you all -- Dr. Marx, who I adore, has the same or similar -- I don't remember which one, it's in Duck Soup or something -- where he's

dictating a letter and he says, "I want to write my lawyers, Hunga Dunga, Hunga Dunga, and Hunga Dunga." And let's take the American Airlines case as an example. If American Airlines wants to negotiate a discount with Hunga Dunga, Hunga Dunga, and Hunga Dunga, I'm quite confident that they will give them a discount, I'm quite confident that many law firms will give them a discount. That's the free enterprise system. Instead, a decision was made by American Airlines that Weil Gotshal was the best firm to handle the matter with them. They wanted them to handle it. In a free enterprise system, all that, you could do that. The only question that should be asked by this panel is under what circumstances and what evidence should be required of parties when they are coming before you with a fee application. There's a statutory standard. And what we've proposed in the ABA comments that we made, we said, look, we think that it's adequate and sufficient for the law firm to say, "We have charged these types of fees in other cases that we've handled." That should be adequate evidence. In addition, the U.S. Trustee's office has available to it

fees that are charged in other cases. But nobody, I think, believes that if Hunga Dunga, Hunga Dunga, and Hunga Dunga want to give a discount, and if they ask for it, they won't give it. If somebody wants that discount, they can get it from certain law firms. And the free enterprise system, I think, does dictate that.

The working group as a whole has no problem with budgets that have been proposed. Budgeting, in our view, is not a problem. I will say this, the working group expressed concerns about the issues of privilege, which I think everybody is already aware of. And we also raised the issue about whether it is ethically acceptable for a lawyer to comply with budgets if the budget interferes with that professional's judgment. But, as a whole, the working group had no problem with budgets, particularly for more routine chapter 11 matters, such as those described by Mr. Togut in his testimony -- not his testimony, but in his discussion. But, as to the issue of requiring budgets, again, I don't think they're very useful. I'll reiterate what I think others said, that

they're not necessarily useful in a mega case. I think that was the consensus of the working group.

We simply differ on one issue, I think, on these Guidelines. The working group does not believe that requiring the added burdens of the disclosures that are suggested will accomplish the goals. We think efficiency can be accomplished in the manner that has been suggested by Mr. Lubben and Mr. Togut, and we think that, with respect to the issue of whether or not discounts are obtained, there is a free market out there. The economy has changed since 2007 when the mega cases were being filed. I think what we're going to find is that there are going to be more discounts offered. My experience is that clients ask for them. Sophisticated clients in chapter 11 request discounts and they either get them, or they don't, depending upon whether or not the law firm is prepared to give it to them. And then they can make a decision based upon what they want.

One of the goals of these proposed Guidelines is to -- I think Director White said -- was to give debtors-in-possession the benefit of client-driven

market forces. We believe that those market forces come into play and are present, and the main thing that needs to be changed here is simply narrowing the types of disclosures that are being requested. We don't have a problem with the concept, fundamentally.

I think there are a couple of questions but if I may close one thing -- I wanted to mention -- that Ms. Deangelis asked. To the extent that in connection with the 119 law firms, my firm was not a part of that list, but there was one question that our working group did discuss, and I'd like to give you the benefit of our thoughts on that issue if you'll hang on a minute, one minute here. I noticed it and I wrote it down. Oh, on the question of why is it unreasonable to require evidence on issues related to the customary fees charged. I think I would go back to what I said a moment ago. Clients may well be able to negotiate, if they have the market leverage, a discount with my firm because perhaps they provide volume work to us and we're willing to perhaps give it to them. But, when the day is done, it is -- I can assure you that the information as to what exactly we charge our other

clients is not provided to our clients, so by insisting upon this kind of disclosure, you're really causing -- asking -- for proprietary information. That concludes my remarks.

DIRECTOR WHITE: All right, thank you very much. That was certainly a sweeping set of statements there. I'd like to delve into --

MS. ROSS: Yes.

DIRECTOR WHITE: -- a few of them if we may.

On page 1, right on the beginning of your comments of January 31st, you say, "There is no reason as to why the U.S. Trustee Guidelines on fees need to be replaced." I guess you modified that a little bit now by saying efficiency counsel is a good idea and maybe have something in the Guidelines on that. But, is there really no other aspect over 16 years of the Guidelines that needs to be updated? Is there really no additional disclosure that law firms ought to make to show that they are meeting their obligations?

MS. ROSS: Yeah, I'm going to let him answer this. I think we've indicated we're prepared to have some disclosures, but go ahead.

MR. ZAHRALDDIN: I don't think it was necessarily. We wanted to know a lot of what we've talked about today. The ACC Value Challenge, it's all driven by metrics. When the ACC came out and decided to pursue this value challenge type of approach to billing, they measured, they looked, they did a study and there have been several case studies that have come out and provided information out of the ABI. There was an earlier fee study, I think that LoPucki was involved in, and we just didn't see the connection. When we sat down and talked, we wanted to look behind the curtain and see what the math was from the U.S. Trustee's office, find out what your reasoning and rationale was to get to some of these things, so then we could better respond. And so I think that's why, as we've gotten more information, we were able to get back together and collectively engage on some of this stuff, and then come back and say, "Well, you know what? This is a good idea and it does reflect some of the things we've seen out there."

DIRECTOR WHITE: So what additional disclosures do you think attorneys ought to make that

they're not now making in 327 or 330 applications?

MR. ZAHRALDDIN: Well, I think what we found, and I think it's consistent with -- and I'll let Judy answer as well -- is that getting numbers in the aggregate avoids the antitrust issues that we see were also out there. So, instead of saying give us individually your numbers, instead go out and figure what is it in New York City, what is it in Delaware, what is it in Los Angeles, and those numbers are fairly readily available. I mean, ALM puts them out and we've discussed the Price Waterhouse as well. It seems like those avoid -- the problem isn't so much the first firm that comes in. If I'm Skadden and I get hit with the first request, the problem is Jones Day. Wow, the other traditional firms who then sit there and start taking notes, and whether they do it or not, it is an implied antitrust violation and price fixing for the legal side of it, but it is certainly very anti-competitive from the point of view of both the firms and the client afterwards. That's what we identified as a potential problem.

DIRECTOR WHITE: That's a rather novel

argument. I want to assure you, as part of the Department of Justice, we're not urging anyone to violate any antitrust laws.

(Laughing)

MR. ZAHRALDDIN: We figured you guys weren't either.

DIRECTOR WHITE: I'm not sure I follow the logic, but let me move on with -- follow on with -- what you said. You also in your submission said, "There's no requirement that the court look at what the law firm itself charges for comparably skilled practitioners."

And I know exactly what the text says in 330, and it refers to comparably skilled professionals outside of bankruptcy. But is your view that it is irrelevant to making that comparable services determination that the law firm charges higher rates for its bankruptcy professionals than it does for all its other professionals? Is that your position?

MR. ZAHRALDDIN: I don't think so. I think I'm --

DIRECTOR WHITE: I'm just going from your

letter. It was sweeping, it was a sweeping letter.

MS. ROSS: Well, I want to be very clear. What we're saying is that the relevant inquiry is whether or not the fees in question fall within the range of what the firm charges. There certainly are going to be discounts that are provided to other clients, perhaps, but those are negotiated and they are typically negotiated, at least in case -- at my law firm -- it is typically done in the context of volume discounts. So, for example, if I have a client that has high volume, I'm going to give them a discount.

DIRECTOR WHITE: Okay, let's take that. Do you object to disclosing the fact that you give discounts?

MS. ROSS: I don't as a generic matter have a problem with it. What I do have a problem with is being required to disclose the details of my arrangements with clients.

DIRECTOR WHITE: Where in the Guidelines do they do that? Can you point to it? Because I don't know where they do that.

MR. ZAHRALDDIN: Well, we weren't sure whether

they did either. There was a little bit lack of detail on some of that, and so that's why we wanted to be engaged and put it in as questions. I mean, nothing --

DIRECTOR WHITE: First, I thought we had too little detail. We were told before that the exhibits were too detailed. So I'm a little confused.

MR. ZAHRALDDIN: On this particular issue? No, we think that there's several instances in here where everyone on our committee thought that there should have been a little more detail in terms of how these things were going to be implemented. The devil is in the details, as has been said often today. But I don't think that we were in any way saying that it would be completely irrelevant.

DIRECTOR WHITE: Would you object to a requirement that there be disclosure by a law firm that it charges out its bankruptcy professionals at a higher rate than it charges out any of its other professionals? Would you object to that?

MS. ROSS: If that's the case, then I would think that you would not be able to say honestly that what you're charging your bankruptcy clients is

comparable to what you charge your other clients.

DIRECTOR WHITE: I would agree. It wouldn't be consistent.

MS. ROSS: So it would not be consistent. I think, Director White, you're making the assumption that most law firms do that.

DIRECTOR WHITE: I'm not making any assumption. We're asking for information so that there can be a determination whether statutory standards have been met. Let me move along on the same lines, though, with regard to discounts. You said that the law firm will either give them, or it won't.

MS. ROSS: Uh-huh.

DIRECTOR WHITE: I cannot disagree with that.

MS. ROSS: Right.

DIRECTOR WHITE: I suspect in bankruptcy the answer is we don't. Perhaps it's the more prevalent answer, but we want to understand whether discounts are being given in bankruptcy on a comparable basis to what they are out of bankruptcy. Now, you try to give as a counter to that that you're in favor of the free enterprise system and, therefore, a client can ask. But

aren't you really challenging the whole basis of the statute that bankruptcy is a little bit different because you have a multiplicity of interests? But it's, at best, a compelling case that, when the company goes in for its survival into chapter 11, the dynamics are different. And also it's not just one client, one law firm, but rather there are the interests of so many other creditors, employees, and other parties in interests in the case. That is why, in fact, there is section 330 at all. Isn't that why, in fact, the court has to approve the fees under statutory standards? Isn't it a little bit different than in the non-bankruptcy context, can you see that? Or would you rather 330 was simply (inaudible)?

MS. ROSS: No, there is no doubt that there is a statutory standard, but I think where we're differing is, in this regard, if I sign a certificate stating that my law firm is not -- is -- charging in the bankruptcy case fees that are comparable to what's being charged in other cases, that's going to be the absolute truth. What I think is underlying -- and may be the U.S. Trustee's office wants to investigate that,

they're absolutely free to do it --

DIRECTOR WHITE: On a case-by-case basis.

MS. ROSS: On a case-by-case basis. I'm not suggesting that it's not relevant --

DIRECTOR WHITE: Isn't it more efficient if you can have disclosures that are uniform -- which is, after all what Congress said the Guidelines are to do -- for greater efficiency and consistency in analyzing applications for the benefit of --

MS. ROSS: I understand the concerns, and I'm sorry to interrupt. You can ask your question, I'm sorry.

DIRECTOR WHITE: Well, I was countering your -- your --

MS. ROSS: Yeah, no, I understand the issue, but I can assure you, I mean, I think here there is an absolute ability on the part of the U.S. Trustee's office to take discovery in those cases where it believes that the statement in question is not correct. But I can -- at least with respect to my law firm, me as a person, as an individual person -- that was why I was quibbling with you earlier. I would never sign a

certificate stating that the fees I'm charging are comparable to what I'm charging other clients if that were not true.

DIRECTOR WHITE: Oh, I don't doubt that everything you sign you believe to be true and correct, but it's not unusual amongst lawyers to ask for evidence to see if everyone agrees with your certification, right?

MS. ROSS: And in which case that evidence would be provided.

DIRECTOR WHITE: But only on a case-by-case basis, not for uniform guidelines.

MS. ROSS: What I'm suggesting is that I think that is not something -- if what the U.S. Trustee's office is suggesting is that it is customary and normal for clients to demand and receive that kind of detailed information, I just think that's not correct.

DIRECTOR WHITE: Well, let me move on to the issue of --

MS. ROSS: That's where we differ.

DIRECTOR WHITE: Okay. On rate increases, in

your supplemental comments in April, you address the issue of whether or not increases during the life of the case require separate disclosures. In there, you say that the Guidelines should not request an explanation of annual rate increases that are 10 percent or less and exclusive of seniority raises, whatever raise is given as, say, an associate moves from one year to the next and with an increase in rate.

Is it your view that a 10 percent annual rate increase is presumptively reasonable, even in the current economic environment of law firms?

MS. ROSS: I would say yes, or we wouldn't have selected that number. But that was the collective view of the entire committee.

DIRECTOR WHITE: The collective view is that the 10 percent rate increase is presumptively reasonable in this environment?

MS. ROSS: That was, yes.

DIRECTOR WHITE: Okay. Other questions? Go ahead.

MR. ZAHRALDDIN: Let me address that piece of it, and I also want to go back and explain something

else(inaudible). I know we all -- and we thought it was funny too when we talked about antitrust and the Justice Department -- but one of the things that we tried to do when we analyzed this, since we're the American Bar Association, is take a look at the ethical implications here. That's why, though we had plenty of comments wherever else we could help, we've tried to focus on the confidentiality and independent judgment of the lawyer. And those really helped the framework because we had a diverse group of folks. We had folks from large law firms, big firms, we had small firms, we had a fee examiner who was a non-bankruptcy lawyer. So you have to understand that, while some of these comments were in there and became the product of this letter by committee, that what our over-arching goal was was to analyze this from the point of view of an ethical requirement. I will tell you on the rate increases, in Delaware, I interpret our ethical obligation to be that I tell my client way ahead of time, I mean, it's in all my retention letters outside of bankruptcy, and it shouldn't be any different within bankruptcy, when we're going to have rate increases,

what the conditions will be, and whether or not those can be done unilaterally or have to be done in consultation with the client.

DIRECTOR WHITE: Were they 10 percent in the last year?

MR. ZAHRALDDIN: Well, no, they haven't, but my point is that that's something where I personally and I think ethically am required differently in Delaware to what the Committee says. And I think that that's an important point to make, is I think there are ethical rules out there that would require someone, and particularly retention in a bankruptcy case that is premised upon court approval, would require someone -- it would be my advice to my folks, and I think my ethics internal counsel would also tell me the same thing, that I would have to go back and do an additional disclosure, if not, do a modification of an order for my retention because I don't think I can go ahead and just unilaterally change my rate without giving that kind of disclosure.

DIRECTOR WHITE: But you're saying only if it exceeds 10 percent?

MR. ZAHRALDDIN: No, no, no, no. I'm saying that, as a Delaware lawyer, my ethical requirements would make me do something different regardless of what we have in the letter, and I think that's something we also discussed as a collective group.

MS. ROSS: Right.

DIRECTOR WHITE: Okay. Do colleagues have questions?

MS. EITEL: I do.

MS. ROSS: Yes.

MS. EITEL: I do on the ethics question about the rate increases. Professor Rapoport suggested that we incorporate under the Guidelines the ABA recently issued Formal Ethics Opinion, it's 11458. It says, you know, if there's a rate increase in the middle of a case, the lawyer must show it's reasonable under the circumstances, and the lawyer has to tell the client that the client doesn't have to agree to the increase to have the representation continued. And so she suggested that we modify the proposed client certification about did the attorney give you the opportunity to decline their requested rate increase.

Is that something that you think should be incorporated into the Guidelines consistent with the ethical duties regarding rate increases?

MS. ROSS: Yeah, I have not, of course, discussed it with the working committee, so I'm at a little bit of a disadvantage here. But, I mean, this particular working group was, in fact, very concerned that we comply with whatever ethical duties there are, and if that is an ethical duty that is imposed, then it seems to me to be appropriate. And that's answering the question off the cuff.

MR. ZAHRALDDIN: And I think we were trying to make sure, to reconcile them, so as those things evolve, we would like that to be the case. I mean, I think that's something that should be part of the Guidelines and should be part of the process.

MS. EITEL: That's helpful because I think that was Professor Rapoport's point, which is there is this certain universal opinion out there and that maybe it's binding in courts (ph), but we can put it in the Guidelines and make it consistent across districts.

MS. ROSS: I think that's probably a good

idea.

MS. EITEL: That's helpful to know.

Mr. Zahralddin, one of the things you said in your remarks, or answer to questions, is it's all driven by metrics and that these numbers are readily available, such as Price Waterhouse Coopers and the Brass Survey and --

MR. ZAHRALDDIN: In the aggregate, yes.

MS. EITEL: Right, in the aggregate, and I understand and I would agree with you. I mean, one of the core concepts in the proposed Guidelines is letting us have the metrics that the profession seems to have and letting the courts have the metrics that the profession seems to have, so that we can level the playing field when we're going in to evaluate fees. On the Price Waterhouse Coopers and the Brass Survey, that's not readily available, as I understand. Does your firm participate in that?

MR. ZAHRALDDIN: No, we don't, but I know that the ALM reports by city, by partner, by associate, they are -- or they're available for purchase. They have them readily available.

MS. EITEL: Great. And the National Law Journal 250, as well?

MR. ZAHRALDDIN: Yeah, that's right.

MS. EITEL: And, for example, the National Law Journal's 250 Billing Survey that reports billing rates by specific firm and by category of timekeeper, correct?

MR. ZAHRALDDIN: Yes, and I will tell you something else too. About maybe five or six years ago, right after Lehman filed for bankruptcy, Tom Sager who was the current General Counsel to Dupont, invited me up to a three-day seminar up in New York that was essentially 200 or 300 general counsels and myself and a few other outside lawyers, and they spent three days talking about billing practices, the metrics, and the think tanks that they all have. So, I'm fairly confident that, if you went to the ACC, or to other groups of general counsels, they would be more than happy to get to you the aggregate results that they have, not just by city, etc., and current, but also to a dizzying level of detail. Now, a lot of that is because they've internalized and have adopted certain

types of electronic billing, etc. But they've collected the information because they've wanted to be smart about how they go about engaging with their outside counsel, and setting up a dialogue where they can get accurate -- instead of saying, "Hey, we think this is what this might cost," they can go back and look at it. Now, we're lucky in the bankruptcy court because we do put --

MS. EITEL: Okay, but you said the general counsels are engaged because they want to find out what the real cost is, not what the standard rate is. And that's the same inquiry that I think the bankruptcy courts are trying to make.

MR. ZAHRALDDIN: It is, except for the one thing that's been missing from this entire conversation is that -- and it was touched on by both Mr. Levin and Mr. Togut -- is that what you want to do is align the economic interests of the lawyer and the client. Flat fees don't do that sometimes because somebody loses on that, someone works too much, someone works too little. The billable hour has been rejected categorically by the ACC, it's not even part of their value added

projects. In the primer, there is a footnote that says if you want to give us a discount, that's great, but we're not even going to talk about that because it's irrelevant. That seems to have been anecdotally and also in discussions with lots of GCs to be the best way to have a set of rates, so a flat rate for all professionals, milestones established and identified, and then an enhancement kit, and given to law firms so that both the client and the lawyer share it at the same time. And it's that type of discussion in terms of billing arrangements that I think would be most helpful here. And, in essence, all the comments have kind of touched on pieces of that instead of having to walk through it. So that's the type of metrics that I'm talking about.

MS. EITEL: And I understand that corporate counsel value billing challenge. We've looked exhaustively to those materials, but the other thing that we also can understand, ALM, they did their benchmarking survey and they said, well, there's all this talk about these alternate billing arrangements, and clearly those pressures are coming, but as of now,

the most alternative billing arrangement, they said that, oh, about 72.8 percent of -- excuse me, 77.8 percent of -- alternative billing arrangements were nothing more than a discounted rate.

MR. ZAHRALDDIN: Yeah, except for the one that Dupont has an outside counsel project where they were targeting defendants, and I speak of this only because I used to be in a preferred law firm for Dupont. They've created value I think anywhere from $2 to $4 billion in the last six years being the plaintiff and not the defendant, so they have not done that by getting discounts from their outside law firms. Their primary way of doing that has been a hybrid arrangement, which is a combination of a discount and the enhancements, with carefully crafted milestones as you go along.

MS. EITEL: Understood that, but you know, getting back to what's really going on, if the standard is comparability, what's really going on, at least according to the Benchmark Survey of General Counsels is that alternative billing arrangements are predominantly -- are discounts.

MR. ZAHRALDDIN: And those are for long term relationships or volume work where I say I'm going to give you X millions of dollars per year and you're going to get this as a result. It's not on a one-on-one basis from what I've seen in all the literature.

MS. EITEL: And that's the presumption, but I think that's the conventional wisdom. But, here's an interesting use of metrics. The CT Time Metrics (ph), the real rate report that just came out, they showed that, in fact, when corporations consolidate their work, firm rates go up, not down, in about 90 percent of the cases. And that's the most recent release of the CT Time Metrics, so I think there's an assumption being made. But the data that's most recently come out doesn't verify that assumptionabout consolidation of work leading to more discounts.

MR. ZAHRALDDIN: Well, understood, but my point is that we're trying to look at a very compartmentalized set of tasks within a bankruptcy process, as opposed to a long term relationship. You may have that sometimes if you do a lot of committee work with certain creditors, but we're trying to be

more efficient and look at what seems to be more reflected in the market that might be more efficient here. Pure discounts or getting information about discounts isn't necessarily going to be helpful.

MS. EITEL: I understand. We're getting, I know, tight on time, just one or two quick questions for Ms. Ross.

MS. ROSS: Uh-huh.

MS. EITEL: You know, one of the difficulties here is clearly what's the right disclosure, what's the amount of disclosures, what's the right question to ask so we can get the right answers. Collier on Bankruptcy actually had this statement in section 330, and I thought it was really interesting. The treatise said there are three comparisons on the 330 that would almost always be relevant. One is to compare the professional's rate charged to the bankruptcy estate to the professional's rate charged where the estate is not being billed.

Secondly, in the general practice firm, compare the fees charged by lawyers in bankruptcy to the firm's charges in other practice areas. And

the last one says compare the professional's fees to customary fees of professionals whose fee is not being charged in an estate such as those doing out-of-court workouts or representing parties. Is Collier wrong?

MS. ROSS: I don't think I see anything inconsistent with what we're saying.

MS. EITEL: Well, but in the statement you said the Code doesn't require you to look internally at a firm, suggesting that really the only metric that counts is going on externally. And, you know, I think Collier's point is well taken, that external data may be helpful, but there's internal data that can be helpful, too, in establishing comparability.

MS. ROSS: Right and I don't think that anybody is disputing that if there is a question about the issue and you want to seek that information internally that it can be provided through discovery.

MS. EITEL: But, again, going to the Director's point, that's a very inefficient way of going about it on a case-by-case basis, rather than just having upfront a disclosure that needs to be made so we can avoid all of this effort trying to get to the

core.

MS. ROSS: May I ask a question? Is there a specified percentage of cases in which you think that the rates being charged are, in fact, higher for bankruptcy lawyers?

MS. EITEL: We don't have that information. That's what we're trying to get. Someone else may have a different view, but certainly there have been representations made by people that, "Yay, bankruptcy, we get our rack rates," that's the only engagement --

MR. ZAHRALDDIN: Let me ask, one of the things that we struggled with, and I'll share it with you, is trying to figure out what was comparable. The GCs that I talked to said, and I think it's been made mention of here, that bet-the-company litigation and M&A work were comparable. Professor Lubben also refers to that, and he tries to do a comparison of how much it costs to do an M&A transaction vs. the cost in a lot of the major bankruptcy fee study materials. But the issue becomes what is comparable. The Guidelines don't say how many, you know, we think M&A work with bet-the-company litigation is it. The Guidelines just say,

"Give us every rate for every lawyer on every task."

MS. EITEL: But section 330 of the Code says compared to non-bankruptcy engagements.

MR. ZAHRALDDIN: And I understand that, but a non-bankruptcy engagement could be an -- if we had definition or some sort of idea, if it's bet-the-company litigation, I'm sure we can discretely pull that out and hand that over.

DIRECTOR WHITE: Can you pull this out about your bet-the-company litigation? Probably not. There's going to be some level of imprecision and breadth of what you have to disclose.

MR. ZAHRALDDIN: At the same time, though, it shouldn't be an unmitigated request for everything because --

DIRECTOR WHITE: Well, I don't think it's an unmitigated request for everything. We don't go case-by-case, although we are interested, particularly some of the points made by the NBC with regard to use of blended rates and so forth, but are you more concerned with the fact there's a disclosure? Or is it that you're concerned about conclusions people will reach

after you make a disclosure?

MR. ZAHRALDDIN: No, no, no. I think the concern of the committee, not my person, the concern of the committee collectively, was that disclosure was not something that people were against.

The problem is that, when you start to disclose everything that's there, and there's no guideline from you, or no specificity as to what is comparable and what you actually want, that you are going into the realm of what is protected under the Code. As well, proprietary information for the participants in here are protected, they can be put under seal, etc. And also --

DIRECTOR WHITE: I'm sorry, are you saying it is proprietary to say what your rates are if it's not key to a specific case?

MR. ZAHRALDDIN: I think my competitors, I think Ms. Ross' competitors, and everybody else behind me, would love to know what we charge on every one of our other cases, yes, I do.

DIRECTOR WHITE: Do you not know what any of them charge who are in back of you? Do you not have

some ballpark number from your own review of fee applications and knowledge of the bankruptcy system?

MR. ZAHRALDDIN: We do from fee applications, yes, but in terms of other engagements, litigation, what they charge from --

MS. ROSS: That's the only place you're going to get it is through public records, or the National Law Journal Surveys, what about these other --

MR. ZAHRALDDIN: But those are in the aggregate, they're not specific to the firms.

MS. EITEL: No, the National Law Journal 350 Survey is firm specific.

MR. ZAHRALDDIN: And that's why we don't participate in it.

MS. EITEL: But many do, so I would say many firms take a very different view as to whether the billing rate information is confidential or proprietary.

MR. ZAHRALDDIN: But that was the concern the committee expressed. You asked me what was the concern with disclosure, was it just any disclosure, and, no, it was the specifics.

MS. ROSS: I think there's a problem with disclosure, generally. The question is what specific information needs to be disclosed and, you know, it may well be that people who have participated in that survey are prepared to disclose that kind of information.

DIRECTOR WHITE: What would you disclose?

What do you think would be appropriate to disclose?

MS. ROSS: What would Judy Ross disclose?

DIRECTOR WHITE: Yes.

MS. ROSS: Well, I mean, I would absolutely be prepared to disclose anything if it was confidential and not made public.

MR. ZAHRALDDIN: And that was the other consideration.

DIRECTOR WHITE: What about something not confidential? What would you disclose that you cannot put under seal?

MS. ROSS: Well, I mean, I would disclose what I charge in other bankruptcy matters. I

don't think I'd have a problem with that. I don't think I'd have a problem with disclosing information related to fees that are charged generally by my clients. But the amount of discounts, even an average rate may not be a problem, but the question is where do you draw the line on it. And, again, I don't think most clients are able to demand and request that kind of information.

DIRECTOR WHITE: So blended rates wouldn't bother you if you had to do blended rates?

MS. ROSS: Of the firm overall average?

DIRECTOR WHITE: Well, let's start with that.

What about by category of professional?

MS. ROSS: That might not be a problem. I mean, I think it's, again, the question here is -- I think the perspective of most of the people in the working group was that, if a statement is being made that the fees in question are commensurate with what is charged generally, similar cases, then we think that's what the statute demands.

DIRECTOR WHITE: Other questions.

MR. HARRINGTON: Can I just ask a question on

that. Because those types of certifications are included in some fee applications right now, what due diligence do those firms do before making those certifications today? Because those certifications are in fee applications today.

MS. ROSS: Well, you know, all I can do is speak for what due diligence my firm would do, which would be to make certain that it's correct.

DIRECTOR WHITE: How do you make certain it's correct?

MS. ROSS: Well, that's a good question.

DIRECTOR WHITE: Well, do you sign those?

Do you certify?

MS. ROSS: Well, if generally speaking I look at the fee applications of others and my fees are within -- in line with -- what is being charged by Weil Gotshal next door, I'm going to be pretty comfortable that I'm allowed to sign the certificate.

DIRECTOR WHITE: Is that what you do?

MS. ROSS: Generally, yes, I think so. Which, I mean, it depends on the certification you're talking about. What certification are you referring

to?

MR. HARRINGTON: I am saying I have seen fee applications that are currently on file. A certification, or a statement, that the rates being charged in this fee application are comparable to rates being charged in other matters.

MS. ROSS: Yeah, and that's -- I mean -- the answer is I'm going to look at it and know whether or not it's true. If it's my billing rate and that's what I generally collect, then I think I'm going to be comfortable with that statement.

DIRECTOR WHITE: Okay. Other questions? Thank you both for your time.

MS. ROSS: Thank you.

MR. ZAHRALDDIN: Thank you.

DIRECTOR WHITE: We appreciate it very much.

Next, I would ask Damian Schaible to step forward to the speaker's table. Mr. Schaible is a partner in the insolvency and restructuring group in the Manhattan office of the law firm of Davis Polk, and I note that Mr. Schaible transmitted his comments on the proposed fee guidelines back in January, in which

he in fact urged us to hold a public meeting before finalizing the Guidelines. So this meeting is in part favorable to Mr. Schaible's request. So I invite you to make a brief statement, Mr. Schaible.

MR. SCHAIBLE: Absolutely. Thank you, Director White. Thank you panel for both the opportunity for the committee to review the proposed Guidelines and provide comments in the first instance, and also, as you stated, the opportunity for this conversation. I think it's a useful path forward.

Just by way for a second, the New York City Bar Association is comprised of 23,000 members. In New York City, the Bankruptcy Committee, of which I am the Chair, is comprised of approximately 50 members, and we draw our members from different areas of restructuring practice purposefully. So we have practitioners; we have scholars; we have bankruptcy court judges; we have government officials, including Ms. Hope Davis, who did not particpate in our discussions on these Guidelines, although who takes part in many other discussions very helpfully; and we are careful to draw our members from different areas of practice, as well.

So, we have people who represent debtors and creditors, and people who represent creditors committees, and different parties in interest, so that hopefully we have a fairly broad spectrum. We put together a subcommittee which reviewed the Guidelines and tried to provide comments.

I am going to go off script, although I have a very nicely typed up script, but given that we have gone on very helpfully this morning, I think a lot of the points I would have covered in my script were covered by others, and given the time and people's patience levels, and the fact that we all have other thing we have do, including eat lunch, I am going to go off script and instead --

DIRECTOR WHITE: Who has to do that?

MR. SCHAIBLE: It will cost less than $20.00, I promise. I'm going to go off script and just touch on a few of the things that have been discussed today and then, frankly, ask if I can be helpful with respect to questions. I should tell you that, I again recommend our letter, of course, to the panel. We pointed out a number of things which I'm not going to

touch on today, a number of specific both micro minutiae type points, though I think ones that are very important, and also macro points. I'll talk about a couple of the macro points; I will leave the minutiae points to hopefully further conversations and further consideration, although I do recommend the focus on them because part of the concern that the committee has with an amendment of the Guidelines, is very important.

The Guidelines as you know and as you stated earlier, are adopted by virtually all, or many, important bankruptcy courts in whole. Professionals are required -- either expressly required, or implicitly required -- to be bound by them down to the very detail. And so that makes details important and there can be places where the goal of the Guidelines is perfect and laudable and a great one, and one that we should focus on, but that the actual words and the actual requirements when looked at in the practical practice of law in a restructuring case can actually be problematic. And we point some of those out in our letter, and I will not discuss those today.

Broadly, on a more macro approach, I guess I

would say a couple of things, and then I'll turn to addressing some of the things that are discussed. We do have a concern with the one-size-fits-all approach. I understand the Director's point, and it's a very valid one, which is you can't just leave it out there to case-by-case. Well, we'll object to this here, we'll object to that there. The whole purpose of uniformity is an important one, and efficiency is an important one. But when you're using a blunt tool, I think it makes it all the more important that we provide for flexibility. I quite liked, you know, not to add to the clamor of other people's agreements, but the NBC's approach of having alternatives. As you noticed in our letter, we proposed one alternative which was essentially one of the alternatives that they propose. I also think that a blended rate is something that could be usable.

The question, really, from my perspective and from the committee perspective is, how do we get the most bang for the buck from an efficiency standpoint and provide information that's useful and helpful without throwing the baby out with the bath water,

without causing real angst and problems for firms, or real angst and problems or additional costs for debtors, or for their management, at exactly the time that debtors and their management can't be sort of running through treadmills just to run through treadmills. Let's find a way to get information that's useful in as efficient a manner as possible, and that's what we were headed toward in our letter, and I think that's what the NBC's approach with blended rates goes a long way towards doing. Of course, the devil is always in the detail.

The blended rate issue is a very thorny one. There's been a lot of discussion about the public reports.

Unfortunately, from recent experience that we're all well aware of in other law firms, we recently became aware what the whole world knows, which those reports are largely garbage, unfortunately. You know, they're only garbage in, garbage out. They're only as good as the self reporting that's done by the firms, and there's no catching, so what is self reported is not always correct, and so you have to be careful with

those sort of public reports.

The other thing I would say is that, you know, as I said before, the devil is in the details with respect to how do you get an answer to a question that's actually useful. To ask the question, with all due respect, what's the lowest rate that was charged by your entire law firm in the past year is not a useful question. It's just not. Of course, there are practice areas that are cost centers, that every big client expects your practice at your firm, a big firm, to have, and those practice areas charge massively lower rates. They're not there to make a profit. They're there to be service centers for our clients from more profitable areas. So that's just one of many examples why asking what the lowest rate ever charged is just not going to be useful to you. Also, I think that's not what the Code provides. That's not what, you know, most favored nation status is -- not what is provided for -- with all due respect to the Bankruptcy Code. It's reasonable, it's average, it's the middle, those types of things to use in a benchmark, I think, are very useful. And so, something where you would say, you

know, not even necessarily requiring firms to say what was your actual blended rate last year, but, instead, do the rates reflected in this fee application, or reflected in this retention application, are they greater than -- are they within -- 10 percent of your blended rate in the past year? Are they more than 10 percent above? And if they are, explain why. That type of disclosure, I think, would be useful without causing undue complexity.

One of the things I would note that Mr. Togut discussed, which concerns me, and I should back up, I am the Chair of the City Bar Committee, and I should note that I am here only in that capacity and speaking only on behalf of the committee, so not on behalf of Davis Polk. Certain members of the partnership of Davis Polk probably would prefer me not to be here, but I'm here in my capacity on the Committee, and Mr. White knows exactly who I'm talking about. (Laughing) As do most the people in the room.

But I am here speaking only in my capacity as Committee Chair. What I will say, though, I do a lot of debtor work -- I do creditor work and debtor work, but

I do a lot of debtor work -- and what I would say is, I was cringing when Mr. Togut was discussing case plans and timelines. It's true, we do them. They are very important, but we do not publicly disclose them because publicly disclosing case plans and timelines provides a great deal of unfair advantage to counterparties, and you need to be cognizant of that. If a counterparty knew how long I think a case is going to take, or when I think I'm going to file this type of motion, or when I'm going to head towards this, they can use that to the disadvantage of my client, the debtor.

The other thing I need to respectfully take disagreement with is Professor Rapoport, who I noticed had to leave. Professor Rapoport, to the extent I understood her comments correctly, seemed to be suggesting that, at least for debtor's counsel, that management in debtor cases are not incentivized to keep costs down because it's not their money. That is the furthest thing from the truth, in my very real world of experience as a debtor's lawyer. I spend a great deal of very difficult time with general counsels of potential debtors and debtors talking about fees, and I

can tell you that I've been asked on multiple occasions to -- and I have -- lowered fees and provided discounts at the outset of a case, at the request of General Counsel. And the fact that the General Counsel has or has not been involved in a bankruptcy case before is irrelevant. They all go to the ACC and they all are big on asking for discounts and requiring all kinds of creative funky discounts, and we provide them. And we footnote in our fee application the dollars that are taken off each of our fee applications on account of the discounts that were provided. And so I must respectfully disagree to the extent that their presumption was that management is signed out because it's not their money. They're very signed in because they have to live up to their budgets, they have to live up to their DIP budgets, they have to live up to their internal reporting budgets, and the General Counsel is held to task very much, in my experience, by senior management, by the CFO, and by the treasurer, if he is keeping up with the bills and keeping bills down. And I think that some form of a budgeting exercise in certain circumstances can be helpful, but it really

does need to be focused and understand the fact that bankruptcy cases are completely unpredictable. You never know what's going to come, you never know what's going to happen, and the best laid plans . . . The only thing you know at the outset, if you were to undertake a budgeting process, is that you are not going to be correct. So as long as people understand that going in and you're cognizant of the fact that you can't be giving away secrets to the public with respect to when you think things are going to happen, how long you think things are going to take -- as long as that's understood -- then the concept of having a conversation with the General Counsel about how much you think things are going to cost is very sensible. And I have had those conversations at the outset of cases with the General Counsel, where they say, "How much do you think this aspect of a case is going to cost? How much do you think the case as a whole is going to cost? How much do you think you're going to cost on a monthly basis?" Having those conversations with the General Counsel happens in my experience quite frequently, and saying in a Guideline that that should happen is perfectly

wonderful. I guess I would ask this group whether you could consider having the requirement, though, be something that the General Counsel, that we certify that we've had these conversations with the General Counsel, rather than making us lay out the detail for the world to see and potentially use against us. So there are many more things I could say, but I do want to be cognizant of the time and respectful of people's bandwidth, and so I will conclude with that. Just before I conclude, my proposal would be to this group to consider particularly -- I had this written in my written remarks, which I am going through and have read none of, for the record, so everyone understands, everyone else on this transcript read their remarks, I'm making them up as I go along, so I don't look stupid.

My conclusion, which I did write, was that we would propose forming a special review committee, a blue ribbon committee, or something along those lines, which would include, obviously, mostly, members of the U.S. Trustee Program, but also include practitioners and judges and scholars, and importantly, clients, to

talk about the minutiae of things, to talk about what's workable, what's not workable. Sometimes a debtor's lawyer like me could point out things that people who are not debtor's lawyers might not understand why this would be a problem, but I can also be creative in helping define other solutions to get to the same end.

So with that, I will conclude and thank the panel.

DIRECTOR WHITE: Thank you for your time. I have just a couple of questions and then I'll open it up to my colleagues. First, an observation that leads to a question with regard to the issue of budgets. It may well be that there are other ways to address the kind of -- to get the kind of -- information we need that modifies the way we described budgeting in the proposed Guidelines, and we certainly will reflect upon the information we've received today and in the written comments, but if you look at consumer bankruptcies, for example, chapter 13 debtors have to give a five-year budget for all of their expenses, and that's generally accepted and has been for decades. Most of the commercial world works

through budgets. It cannot possibly be, can it, that everybody works through budgets except bankruptcy lawyers? So, it seems as if there's something there, there's some valid information that is accepted in all aspects of financial life that involve budgets for planning going forward and benchmarking.

Now, you make a point that we've received in other comments with respect to the issue of budgeting and disclosure of information. You're quite correct that, if you were to give a budget to your client as to the likelihood of litigation and the risks and the amount of time it might take, that is information you wouldn't give to a party opponent. However, in these Guidelines, we are suggesting that the budget be retrospective, in other words, the budget -- I should perhaps phrase it differently -- the budget would not be disclosed until after the fact, so it's only a benchmark.

So every quarter, let's say, you provide what the budget was for that quarter that was worked out with the client, and then describe whether or not you went above it, below it, and what the reasons were.

So it's a benchmark, it's a rebuttable presumption. Is that offensive to you if you take a requirement in the sense that I just described it?

MR. SCHAIBLE: Certainly nothing that I read was offensive to me, but the concern that I would have is just a timing one. So, in other words, I understand that the budget number is only disclosed ex post (ph), but what of a situation where a door in any given corner -- I'm involved in an 1113 process and I'm concerned that I'm going to reach loggerheads with a given Union in a given quarter, and I think I may need to file an 1113 motion and ramp up an incredible amount of work that goes into that, and I propose, and I budget, that I may need to do that during that quarter, and then the next quarter comes by, I then disclose this high number under labor and employment in the category, and we weren't anywhere near that number. The Union then knows effectively that we believe that we are going to be litigating in that quarter. And I guess, again, I'm not quibbling -- I'm not quibbling -- with the concept of budgeting. I guess my only question is, again, how valuable is the information?

And at what cost? So I would argue, although I've never been involved in a chapter 13, and I hope never to be, personally, I would argue that those five-year budgets based just on what you've described are probably fairly useless, at least on the out years. In other words, like how can anyone budget what they're really in the real world going to spend? And so it's just a utility game. And so, again, I think there's nothing wrong with suggesting that there be a best practice that clients and law firms discuss budgeting, and that they even potentially have budgets and then disclose if you've gone over the budget, and disclose why you've gone over the budget. It's just the devil is in the details of do the exact dollars at each quarter that I've budgeted internally with my client, are they really relevant to the world ex post, and what do they tell the world that I may not want the world to know?

DIRECTOR WHITE: With regard to your issue of confidentiality and if a matter arose during the course of the case, and you think that making a disclosure even three months later will provide information to a party opponent, don't you run into that situation now

occasionally with regard to your time entries? And don't you deal with that through a redaction process?

MR. SCHAIBLE: That's correct. We do. I'm not sure how you could redact, though, the fact that I believed that there was going to be a ramp up in litigation in the past quarter that may now be coming.

DIRECTOR WHITE: So you don't think the way that you currently handle, and for years have had to handle in bankruptcy practice, where there were time entries that shouldn't be disclosed? That's handled all the time by courts.

MR. SCHAIBLE: That's correct. When I was a first year Associate and I was doing that, I would have argued that it was the worst thing in the world, but now there's some times --

DIRECTOR WHITE: Let me ask you another question with regard to the disclosure of the information and the timing. Have you ever been in a case where there's been an Examiner?

MR. SCHAIEBLE: I have.

DIRECTOR WHITE: Was there a budget that -- did the Examiner produce a budget in that case? It's

not done in all cases, but we certainly never oppose it and it's frequently insisted upon by debtor and creditor committee counsel.

MR. SCHAIBLE: I'm sorry to say that I don't know. All I do know is that the Examiner spent -- in the case that I was involved with Mr. Harrington -- the Examiner spent quite a copious amount of time and money and it was just -- the secured creditors were very focused on the fact that a great deal of money was being spent, but it was the view of everyone, including us, that it was worthwhile.

DIRECTOR WHITE: Okay, let me ask one other question before I turn to my colleagues, with regard to the dollar threshold. In your comments, you suggest that $50 million is too low, and we are going to visit that issue. Are you in a position to suggest a different number?

MR. SCHAIBLE: I'm going to follow the venerable Mr. Levin. I thought a lot about it and I'm not sure that I know of a better -- you know, the sense of the committee, and this was not something that I was as focused on, but the sense of the committee was that

$50 million would be too broad a net. But you have a very difficult task on your hands in many regards, including that one.

DIRECTOR WHITE: Okay. I'll turn to my colleagues now.

MS. DEANGELIS: Could I follow-up on that one? Do you have an opinion with respect to the standard that was requested or proposed by the 119 law firms?

MR. SCHAIBLE: Would you mind if I respectfully not take the bait. (Laughing) We were not a signatory to that letter and, you know, I think that, in general, simpler is better. So I think I personally, Damian Schaible, not even now representing the committee, would recommend a number and just sort of call it a day. It's just to be cognizant, again, my focus really -- and where I would implore this group to be focused, as I know you are -- is on, as I said before, efficiency gains vs. cost. And agreed, a number of the things listed in the proposed Guidelines would lead to additional costs, and it's just make sure that you're applying that additional cost in cases where it's useful to you.

MS. DEANGELIS: Okay, just one more question on it. One of the other proposals suggested, I think it was the supplement by the ABA, suggested $100 million in assets. Any thought on whether the threshold should be all assets and liabilities, assets only, liabilities? I mean, any parameters that you've thought about that you think are more relevant?

MR. SCHAIBLE: I wish I could be more thoughtful. Honestly, I think I view it all as a little bit discretionary and imperfect, and I'm not sure that I, at least, can think of one standard rather than another. Obviously, if you include assets and liabilities, then you're ratcheting down the level.

Clearly, I think of cases, personally, in terms of assets and the liabilities because that's a better -- I guess in my mind -- that's a better indicator of the complexity of a case, right? Because you could end up with a case with a high number, theoretically, of assets. But the liability picture is not as problematic, so it's hard for me to say other than, if you include the two, then the numbers probably should be higher.

DIRECTOR WHITE: Other colleagues with questions?

MR. HARRINGTON: If I could just ask a couple questions, and I'll go back to where I left off with the ABA and back to the certification. I think you suggested that one of the things that is similar about the New York Bar Association's letter and the NBC's letter was some type of certification that would be required. And I think the suggested language, at least that is used in the Southern District of New York, is fees and disbursements are billed at rates in accordance with practices customarily employed by the applicant and generally accepted by the applicant's clients. What exactly does that mean?

MR. SCHAIBLE: It's a very good question. I guess I would second what my colleague representing the ABA said, "When I sign something, I take it very seriously." And so I actually chafe a little bit -- I know there's no presumption here -- but I would chafe at a presumption or an assumption that merely including a declaration becomes boilerplate and that lawyers don't take it seriously, or do work behind it, because

then I think those lawyers are doing something wrong.

If I sign a fee application, I have done everything -- and I don't want to disclose at risk of many, many things, I'd prefer not to disclose the specifics, you know, specific mechanics that I go into when looking at something like that, but I can tell you that what it means to me is that that is no higher than what we generally charge. And I can tell you that, in many circumstances, we, at least at my firm, lower our rates for bankruptcy cases, not raise them, so I think it's generally a pretty easy thing for me to say because I know what I charge outside of bankruptcy and it's actually higher on an hourly rate than what I charge in cases where I am retained by the estate. So I can say that, for me, it's somewhat easy, but that is what it means to me. What it means to me is that you're not jacking up your rates because this is, you know, a bankruptcy assignment in New York where you can do so.

But can I just say one thing, I think it's important not to lose sight of the complexity. People talked a lot about what the market can bear and market basis, and you do, and others on this dais have, as

well. I think that's all very important, but it's important to pay attention to what that really means. In a time where the economy is down and the world is hurting in many respects, and companies are hurting in many respects, there is a premium on the talent of being able to restructure companies. And there is real talent there, and there is experience that is required, and there is a premium on that experience. And so, to say that bankruptcy lawyers should not charge more than, I don't know, call it -- I don't want to just say I'm in another group -- but X group lawyers -- it's a little bit unfair if you're in 2007 and the world is melting down. I can tell you that certain people who have experience restructuring companies are extraordinarily in demand, and I do not think that the Bankruptcy Code, or the Rules, or any Guidelines promulgated by the U.S. Trustee Program, respectfully, should say that those people should not be able to command rates that clear the market, essentially, so long as you have a market mechanism. And I understand the point that, you know, people call up X law firm and they're in distress and they're freaking

out, and they're just going to sign whatever that law firm says, and pay whatever that law firms says. I can tell you that, in my experience, maybe it's just because I'm maybe not one of those guys, that's not the reality I've experienced. I've experienced a very real negotiation with every general counsel that I've worked with, but you know, I understand the risk there. What I would just say is that it's not necessarily right to compare bankruptcy lawyers during a time of distress with employment lawyers when there's not a lot going on in the employment market.

DIRECTOR WHITE: But aren't you really taking issue there with what the result ought to be -- the conclusion drawn from the disclosures. So, if the disclosures simply say what other comparably skilled professionals are charging outside of bankruptcy, then you let the fact finder, ultimately the judge, make the determination as to what's the proper bankruptcy amount. And there's nothing in the Guidelines, is there -- because if you can identify it, I would want to rectify it -- that draws the conclusion. Rather it asks for the information so proper decision makers can

draw the conclusions.

MR. SCHAIBLE: That's very much understood, point taken, and a very important point made. The only thing I would say to that is that the rubber is where the rubber hits the road, and this panel and the U.S. Trustee Program is very important as it needs to be in chapter 11 cases. And please don't lose sight in your consultations and your considerations of how important it is when a statement in a proposed Guideline says that "the best practice is" and "you shall disclose if you are over your blended rate," very quickly in the real world -- I bet that you'll find when you reconvene Mr. Levin's session a couple years from now, I bet you will find that in the real world it became a requirement -- even if you're saying that it's not, and shouldn't be.

DIRECTOR WHITE: Other questions?

MR. HARRINGTON: Let's go back to -- and, again, I guess looking at it from our perspective, realizing that it's always on the firm, the burden of proof has to show what's comparable services in every application that they're filing, and it's not sort of

our burden to ferret out that information through discovery. What information other than a certification should we be asking for, in your opinion?

MR. SCHAIBLE: If you want my true unvarnished opinion, I think that a certification from an officer of the court here who is representing a client in chapter 11 should be sufficient. But --

MR. HARRINGTON: Taking that to another level, and you said -- and I won't ask you about your specific due diligence because you asked me not to do that -- but what should we include so we know that that same level of due diligence is being done by everyone else who is signing those certifications?

MR. SCHAIBLE: It's an excellent and fair point and, again, I do not want to minimize the difficulty of your task. I understand that you may want more than the certification backed up by an officer of the court, and I also understand that consistency is important. And, again, to the public reports, part of the problem with the public reports in my experience is that there is no consistency. Some firms take the position that if they bill X amount,

they're going to say that this was essentially what they did; other firms take the position that it's only the dollars that come in -- when do dollars come in on an annual basis. You very quickly get very, very confused and I worry that you very quickly end up with apples being compared not only to oranges, but to stones, and the comparisons become very, very difficult very quickly when you get into detail beyond the sort of understanding of you know it when you see it. And, you know, if a firm is regularly charging X rates and then they get filed in bankruptcy and they are -- sorry -- they are representing a debtor in bankruptcy, and they have Y rates(inaudible) which are higher, we all understand that that's not acceptable and that's what we're going for here. The concern is just how do you find a metric -- if you want a metric -- how do you find a metric that's actually useful in the real world where people discount for clients in different ways? Some lawyers write time off to discount, some lawyers discount hourly rates, other lawyers back-end fees and front-end fees. All of those things change a blended rate and they can change a blended rate pretty

significantly. So you could end up with a) on one side, mischief with people, you know, doing blended rates in ways that make their numbers look better, which then become less useful to you; or you can have people who are spending so much time focused on the minutiae of the blended rates that you're really, again, not getting much bang for your buck. So unfortunately, I'm not sure that I can give you a proposal beyond saying that blended rates over the past year across the firm is probably not the end of the world for a useful comparison. Just understanding that there are some clients in certain circumstances that are charged much less, and some are charged much much more.

MS. EITEL: I have one quick question.

DIRECTOR WHITE: One final question?

MS. EITEL: One quick question. You and several others have expressed concern about disclosing the lowest rate, as I think the Director suggested, suggesting that we're looking for that to be the conclusion. How come nobody has complained about us asking for the highest rate being disclosed?

MR. SCHAIBLE: Oh, just because, I mean, you know, again, I think the highest rates are as useless a number as the lowest rate, but they're less problematic, right. If I put a lowest rate into a fee application, it's publicly disclosed, the Wall Street Journal then picks it up. I get phone calls from every single client at the firm in non-bankruptcy issues saying, "I want that rate." And it's just not fair to professionals who are trying to run a business.

MS. EITEL: But then you have the average, which gives you the information that is -- it equalizes it, should it not? If you have one lowest rate and one day you billed that, you look at the average and then, so, you crack the information that any misperception that may arise that that's really a rate that gets billed very often.

MR. SCHAIBLE: It's not perfect and I could give you a treatise which would bore you a bit on why I think that that is not a very perfect metric, or a particularly massively useful one, but I will tell you, it is much less problematic and it is the one that I would recommend you consider if in fact you do want a

metric.

DIRECTOR WHITE: Okay --

MS. EITEL: We're running out of time.

DIRECTOR WHITE: Thank you very much.

MR. SCHAIBLE: Thank you.

DIRECTOR WHITE: Thank you, I appreciate it. It was very helpful to us.

Last and certainly not least, Professor Melissa Jacoby. I appreciate very much, Professor, your patience with us today. And Melissa Jacoby is the Graham Kenan Professor of Law at the University of North Carolina in Chapel Hill, where she teaches debtor, creditor, and commercial law courses, and where she was recognized this year with the Pro Bono Publico Faculty Member of the Year Award, congratulations on that. And among her distinctions is serving as a member of the American Law Institute and the National Bankruptcy Conference. So, thank you again for taking time to be with us today, Professor, and we look forward to your statement.

PROFESSOR JACOBY: Well, thank you, Director White and the panel. Good afternoon. I now have to say

I'm here speaking only for myself. So I'd like to make some points that I don't think were addressed too much today, or at least at a different, more conceptual level. Some may hearken back to Director White's opening remarks this morning.

So oversight is one of several contexts in which bankruptcy courts are given a very difficult task. They're told to exercise an independent duty to scrutinize the fees, and yet are not really given a structure with which to exercise that task in a way that can lead always to meaningful change. This challenge is not limited to bankruptcy; there are analogies especially in the class action context. Some bankruptcy lawyers do not like that comparison, but I think it has some useful analogies there. And both within bankruptcy and outside, the judges interpret these duties in very different ways, and that's created similar conversations across different contexts.

Now, in this context, Congress has told the U.S. Trustee Program that it is to play a significant role in reviewing fees, as well as other obligations in the chapter 11 and bankruptcy system, so I think the

question ultimately is how the U.S. Trustee Program can optimally improve the process.

So there are two different ways I would frame this issue. First, I want to go back to Director White's mention of the perception problems, and I want to distinguish that from whether there's an actual over-billing problem. I think the perception problem needs its own recognition. So, by design, the bankruptcy system awards 100 percent dollars to administrative costs, but ongoing stakeholders and creditors are expected to endure really substantial cuts and financial sacrifices, and sometimes putting them at risk of filing for bankruptcy themselves. And often the people that are affected by a bankruptcy don't have direct representation in hearings like this, not for the fault of the Committee or the Director who has invited anyone who wants to speak, but because of other structural issues that make that difficult.

But if the perception issues are not managed, there's going to be further erosion of the collective process that is so central to bankruptcy. And there is plenty of research that suggests that people's view of

a process and whether they view it as fair is just as important, and sometimes more important, than how they can perceive the outcome in financial terms to themselves. So I do think that the U.S. Trustee Program has an important role to play in the system, generally, but also in addressing the perception problems. An administrative body can help restore public confidence in markets -- dare I make the comparison to the Consumer Financial Protection Bureau, cop on the beat sense. But there's lots of literature across a variety of disciplines about administrative agencies restoring confidence in markets. We're talking about a market for legal services, so I think that there's relevance here.

Now, all that being said, there's still a question of the details of these proposed Guidelines. There's been plenty of discussion already about whether there's a match between the substance of the Guidelines and the goal. I'm not going to say too much about that.

But there's also a question about the mechanism of the Guidelines and the problem. Now, these

Guidelines do seem qualitatively different from the 1996 Guidelines, and unless courts uniformly enforce them, they won't produce the desired objectives. And what I think is important for the perception issue is transparency and that may not require the level of detail that's been discussed by prior commentators. I can leave that to questions.

But one idea I wanted to suggest was to consider that some components of the issues that the U.S. Trustee Program is considering could be proposed as changes to the Federal Rules of Bankruptcy Procedure, or more particularly, the Forms Modernization Project.

So the part that I find most appealing about the proposed Guidelines is the idea of data-enabled forms and the submission of materials in a readable format for spreadsheets and the like. There's been, I think, no discussion of that so far. I assume that means it's not controversial --

(Laughing)

DIRECTOR WHITE: Nine months left (ph).

PROFESSOR JACOBY: -- and therefore not

a problem. I think that could be done as a start in the Guidelines, but I would suggest some consideration of proposing that to the Rules Committee, given that they are already doing forms modernization and data-enabled forms. It might fit that project well.

Now, I'll try to say less about the separate question of the actual charging, or actual over-compensation of professionals because of shortcomings in oversight. This is a difficult issue to really address. There is some support for this allegation, at least for some subset of cases. I haven't heard a refutation of the LoPucki and Doherty statistic of finding a 9.5 percent increase yearly in professional fees in their study. I haven't heard some explanation of that that fully matches that number. More I've heard a counter-statistic for those who think that it's wrong. Now, that's a much narrower set of cases than what you're proposing to cover here.

There also are the murmuring's of clients and, dare I say, judges at times that something more does need to be done. They do see problems, and yet maybe either don't feel comfortable being here, or

don't see how their own interest would necessarily be furthered in the case of clients. I think it's unrealistic to expect professionals to challenge the fees of their peers. It's possible that some firms have either official or unofficial policies against challenging the fees of other lawyers, and as I mentioned before, judges have vastly different interpretations of how to fill their role. This creates a situation where it is at least structurally possible that there's some over-compensation, or some over-charging. On the other hand, I would like to see the Department of Justice through the United States Trustee Program and its capacity either through these Guidelines, or through proposing the rules, to help develop better data on these points. And I think the data-enabled forms and having things submitted in a way that can be sorted really would get to the heart of this issue more, and would enable a more apples to apples comparison, and allow more parties and the judge to evaluate for him or herself whether the compensation is fair and adequate and reasonable in any given situation. I don't think that should be done to the

preclusion of the development of more project-based or flat fee billing, so I wouldn't want to see something that would prevent that.

But I do have some pause about some of the very specific pieces of the Guidelines that may be somewhat putting the cart before the horse to the extent you haven't developed an empirical dataset to fully study this. I say that with all due recognition that an incredible amount of work has gone into what you've collected here, so I don't mean to suggest that it was without a basis. That is not at all what I'm saying. But I think that a lot of credibility could come to this issue from having a more systematic data collection effort. And at that point, there may be more basis, and perhaps less opposition, to being able to come forward with some more specific proposals, which then may lead more courts to be comfortable adopting them, so that's why, although I shorthanded this in my written comments, I suggested perhaps bifurcating the data-enabled forms part from the more substantive -- or, I shouldn't say more substantive -- more detailed changes to the Guidelines.

To close, I would say that the U.S. Trustee Program does have an important role to play here, and that it is in a very good position to shed more light on the problem, but that doesn't need to be manifested only through the procedural Guidelines. Although, of course, that is an authorized avenue, there are other ways to create the conditions where people will have more confidence in this market, and that interested parties can better evaluate the fees and expenses.

And I would finally note, back to the class action context, or other Federal court context, there may be comparative learning that can be done by looking at some of the debates that have gone on there. I've mentioned to some of you, the Third Circuit did a task force about 10 years ago on the problems they were seeing with class action fees, not only necessarily over-charging, but just feeling that it was a very difficult task for courts to be having to weigh-in on this, and some courts had taken very innovative approaches, including auctioning off the right to be class counsel and the like, and they were trying to get a handle on that. So I will end there.

DIRECTOR WHITE: Thank you very much, that was very, very helpful. I will ask one question before opening it to my colleagues and that is whether you think that the Guidelines ought to apply to all cases, or should we make a distinction between larger chapter 11 cases and other cases?

PROFESSOR JACOBY: Well, I think that depends on what the Guidelines actually say, so the more that the Guidelines are trying to get the basic data collection such as through data-enabled forms and spreadsheet forms, the more comfortable I am opening it up. The more detailed they get, I think that your Program was correct to limit them to larger cases. I think that, to many in the population, $50 million already is a very large number. I recognize that to bankruptcy lawyers, that's not always the case, but that already is covering pretty high. But I also see the points made by some that where to set the line is difficult to say. But given the substance of the Guidelines now, I definitely think -- the proposed Guidelines -- I think it's appropriate to limit them to the largest cases, issues scaled back from that, and

then use that data collection to better inform a more detailed set of Guidelines. I think I would be comfortable with broader application.

DIRECTOR WHITE: All right, thank you. My colleagues.

MS. EITEL: Professor Jacoby, thank you. You said something about there would be more credibility to the effort if we had some time for more consistent data collection and it might reduce the opposition or concerns about it. I'm not sure I exactly follow what you are suggesting in terms of more consistent data collection because, if we just bifurcate it and said, "Okay, give us this," and it leads, you know, to open electronic data format so we can put it into an Excel spreadsheet, we would still be getting the same information that we've gotten before, and nothing about comparability. So I guess I'm not following your point as well as perhaps I should.

PROFESSOR JACOBY: Well, fair enough. I guess one part that I had in my written remarks that I didn't mention because it has consumed a lot of discussion today is the comparability to non-bankruptcy cases. And

in my brief written remarks, I endorsed the National Bankruptcy Conference approach, so I don't mean to suggest it helps with that part. I do think that there is a lot of value to being able to measure as between bankruptcy cases how much is being spent, and then if there are different ways that that could be evaluated. Professors LoPucki and Doherty have done that; Professor Lubben has done that. It enables the development of predictive tools to get a sense of how much something could cost. I know that Professor LoPucki and his colleague, Joe Doherty, have done it both ways, sort of looking at ways to predict going forward, but also, at the end of a case, saying what we can learn from -- what we can attribute certain fees to, depending on how they've done their professional fee generator. So that's more what I have in mind. And I think that the more transparent and accessible the information is about what's being charged, the more that we could get beyond the discussion of how much is too much, or picking out limited anecdotes that do attract the attention of the press, but don't necessarily really get to the heart of whether there's

widespread overcompensation. Again, I understand from the perception standpoint why the press is interested in individual expenses, but in terms of trying to bring real value to the bankruptcy estate and increase the returns to stakeholders, sometimes I think that they can be blown out of proportion. And so that's why I think it would make more information available, and especially to the court, perhaps to do some actuarial analysis.

MS. EITEL: This may be beyond sort of the scope of your comments, if it is, I apologize. But there obviously has been a lot of discussion about what's comparable. What do you look at from not only kind of the metrics that firms keep, but, for example, what other practice areas. And so I guess I'm just curious about your interpretation of section 330, if you have one, of what do customary and comparable mean. Mr. Schaible, for example, said, well, you know, these companies are in a downward spiral and so there is a premium in 2007 to save them versus so you should only look at the M&A firms -- you shouldn't compare us to maybe over-billing an insurance defense type

practice. What do you think that means under 330?

PROFESSOR JACOBY: Well, I think Mr. Schaible makes a good point with respect to determining market rates may be context dependent. I don't have a very detailed answer for you on this. I note that section 330 refers to comparable cases, it doesn't refer to comparable matters, or representations, or the like. I have not independently researched that question of why it was written that way. I don't know how much that has to direct where things go from here, but there was a word choice there that does seem to narrow the universe of what the comparison is supposed to be. But, again, I suspect there is case law on that question and I am not in a position to discuss it now.

MS. ROBERTS EITEL: Thank you.

DIRECTOR WHITE: Others with questions?

MS. DEANGELIS: Just one question. In your remarks, in your written remarks, you talk about greater transparency in fee applications would reduce concerns. When you talk about that, I mean, certainly the data-enabled forms will do that, but are you looking beyond that? I mean, is it broader and, if so,

what are you looking for?

PROFESSOR JACOBY: This is another one I don't necessarily have a detailed answer because I've tried to steer clear of making very specific comments on the Guidelines. I don't come with the same level of involvement with the system, in fact, for better or worse, I don't make any money on any chapter 11 cases as a fee examiner, as a lawyer, or otherwise. So -- and I don't, unlike some academics -- I don't engage in very specific study. I guess I would say that there is, again, going back to the question of when certain pieces are pulled out of individual fee applications and held up as an example of the kinds of problems, gives the sense that there's lots that's really hidden from view and that, if we only could get more of a peek at what they look like -- and we're talking about very large stacks of paper if we're looking at hard copy -- that there are lots more secrets that could be uncovered. Again, I'm going to the perception, not necessarily the reality, and one way to increase public confidence in the system is to know that more detailed information can be collected, can be aggregated,

available to many people who want to do research on these questions. And, again, I should disclose, I'm not planning to do empirical research on fees. That's not why I'm making this proposal. I'm sure others would use the data well, but that's not what I'm planning to do in any way. But -- so it's really at that more conceptual level that I'm making this suggestion, and it's not to the exclusion of other disclosures, other advances. Again, I think there's been a full discussion of that by those involved with the system, but really more as a first step.

Indeed, I might suggest that. I appreciate the opportunities the U.S. Trustee Program has given people to comment on this. To the extent this part was not controversial, it could have been implemented -- had they been pulled apart. Now we know. But they could have been implemented already, and already there would be more information. You know, I think that maybe what's needed here, in addition to the great legal expertise of a U.S. Trustee Program, is more non-lawyers who I think you probably already have, doing more statistical work that really could assist the

judges in their very difficult task.

MS. DEANGELIS: Thank you.

DIRECTOR WHITE: Other questions? All right, thank you very much, Professor. It was very valuable. I appreciate your time, and I also thank all of our speakers for participating in today's meeting. We appreciate everyone sharing their views and responding to our questions, and offering concrete suggestions for alternatives to some of the constructs we have in the Guidelines.

The task of evaluating how best to meaningfully review professional fees in bankruptcy, as shown by the meeting today, is not an easy one, but the task is vital to ensuring compliance with statutory standards and, as Professor Jacoby said, enhancing public confidence in the bankruptcy system. So learning more about the views of the various parties in interest as we did today will only assist the U.S. Trustee Program in producing a better product to benefit the whole system.

Now, with the conclusion of this public meeting, the U.S. Trustee Program will now undertake a

thorough review of the oral and written comments and suggestions received, and we will consider what further steps are required before we issue final Guidelines.

Now, in fact, based upon the comments that have been received, we have identified some areas that likely will be modified. So, for example, and again, this is by example and by no means an exhaustive list of the areas that we will revisit, but we will revisit the issue of dollar thresholds for what constitutes a larger case. We may exclude single asset real estate cases from those Guidelines. We will consider the use of efficiency counsel whereby smaller or specialized firms may be employed to do work that doesn't require the services of a larger or a more expensive law firm. And we will seek to streamline the prescribed forms without sacrificing the disclosure of the information that we believe is required to support the certifications. Although we will be expeditious, we will also be methodical in completing our work, and therefore it would be premature for us to provide a timetable for the issuance of final Guidelines.

Again, I appreciate the attendance of

everyone today and I'm deeply grateful, as well, to my colleagues here at the front table with me, both for their participation at the meeting and for their work on the Guidelines. So the meeting is now concluded and thanks again.

CERTIFICATE OF NOTARY PUBLIC

I, ERICK MCNAIR, the officer before whom the foregoing proceeding was taken, do hereby certify that the proceeding was recorded by me; that the proceeding was thereafter reduced to typewriting under my direction; that said transcript is a true and accurate record of the proceeding; that I am neither counsel for, related to, nor employed by any of the parties to the proceeding; and, further, that I have no financial interest in this proceeding.

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ERICK MCNAIR

Notary Public in and for the

District of Columbia

My Commission Expires: July 14, 2016

CERTIFICATE OF TRANSCRIPTION

I, KAREN CUTLER, hereby certify that I am not the Court Reporter who reported the following proceeding and that I have typed the transcript of this proceeding using the Court Reporter's notes and recordings. The foregoing/attached transcript is a true, correct, and complete transcription of said proceeding.

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JUNE 8, 2012 KAREN CUTLER

Transcriptionist

Exhibit A

Opening Statement of D.J. Baker, Latham & Watkins

As an initial matter, I would like to thank representatives of the Executive Office for United States Trustees for not only their time today but also for the thoughtful process that they have designed that has allowed for an open and constructive dialogue on a topic of great significance..

The issues being discussed today are at the core of an effective and efficient bankruptcy process, and the questions raised by EOUST are timely and important. Publication by the EOUST of the Proposed Guidelines has stimulated thoughtful and extensive comment and input. Taken together, the submissions made by an impressive number of bar groups, law firms, law school professors and individual practitioners provide an extremely thorough and constructive commentary on important chapter 11 fee issues.

As part of this process, my firm has participated with over 100 other law firms in three written submissions with respect to the Proposed Guidelines.

- On January 31, 2012, 119 Law Firms submitted Comments regarding the "*Proposed Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. §330 by Attorneys in Larger Chapter 11 Cases*" issued by the Executive Office for United States Trustees for public comment on November 4, 2011. Subsequently, several additional law firms joined the Comments.

- Thereafter, those law firms that signed the Comments worked to develop a set of Proposed Revised Fee Guidelines that address the concerns raised by the Comments. To that end on April 16, 2012, 118 Law Firms submitted the Proposed Revised Guidelines and Commentary.

- Finally, on May 18, 2012, 118 Law Firms submitted a short amendment to the Proposed Revised Guidelines and Commentary that had been submitted on April 16, 2012.

I would like to thank the skilled practitioners at the many and diverse law firms (large and small and from nearly every state in the country) that worked together to prepare those submissions. Their collective experience and judgment were instrumental in, and greatly contributed to, an end product that I am proud to join them in supporting. To have so many busy professionals come together and work so collaboratively has been a testament to the true character of the bankruptcy bar.

As you can understand, I am not in a position today to speak on behalf of any firm other than my own, and I hope that my comments today are received in that context. To the extent there are questions or requests for further detail, we would be pleased to continue to work with the group of over 100 law firms with which we have been involved, in order to promptly respond in writing to any inquiries by the EOUST. Moreover, I am sure that a small sub-group of such firms would be pleased to meet with the EOUST, should that be helpful, to discuss issues that have been raised with respect to the Guidelines.

Although we believe that our written submissions provide a thorough overview of our thoughts with respect to the November 2011 Proposed Guidelines, I would like to make a few brief observations.

First, when considering how to control total fees in a chapter 11, it is tempting to focus on the rates charged by individual attorneys at firms that represent either debtors or committees. As research has increasingly shown, however, total fees in chapter 11 cases are driven primarily by the size of the case and the amount of controversy in the case. Despite efforts by Congress to shorten the duration of chapter 11 cases through the 2005 amendments to Section 1121 and thereby reduce the accompanying fees, it is still true that, the greater the degree of controversy, the longer the debtor will be in chapter 11, and the longer in chapter 11, the higher the fees.

Second, debtors generally are unable to control the amount of controversy that occurs in a case, because controversy is more and more being driven by inter-creditor disputes. In a growing number of cases, sophisticated players in the distressed debt market are accumulating debt and then making economically rational decisions about how to maximize their own recoveries. Since bankruptcy is almost always a zero-sum game, maximizing the recovery of one group of creditors almost always diminishes the recovery of a different group. As experience has shown, however, very sophisticated and experienced distressed debt investors are regularly concluding that litigation will often enhance their recoveries. That litigation inexorably drives up total fees in the case.

Third, one of the increasing trends in chapter 11 cases is for secured lenders to place limits on the professional fees for a debtor and committee that they are willing to see funded out of their collateral. Such limits often result in a sale or merger on an expedited basis.

There are contrary trends as well. When the Bankruptcy Code was enacted, its drafters explained that, while the Code encouraged the parties to reach consensus about how a case should be resolved, it also allowed for litigation if the parties could not resolve the issues in dispute. They explicitly made the point that the parties to a case, subject to the supervision of the court, had the option of a relatively quick consensual resolution or a longer litigated resolution, with attendant increases in costs. Where secured lenders are not able to put meaningful limits on chapter 11 fees, it seems to be increasingly the case that inter-creditor disputes over allocations of value are becoming more heavily litigated, with a consequent increase in case duration and costs.

Section 330, along with adoption of the expanded reorganization provisions of chapter 11 of the Bankruptcy Code, attracted some of the best and most creative legal minds to the practice and also gave rise to expanded domestic and new international services in the United States reorganizing major U.S. and global corporations. The experience of the past three decades since Congress changed the standard by which professionals are to be paid in bankruptcy cases has confirmed the validity of that change in compensation policy.

We respectfully suggest that any guidelines promulgated by the Executive Office for United States Trustees should necessarily conform to the policy choices made by Congress in § 330. In this regard, our written papers detail specific suggestions with respect to the Proposed Guidelines that were originally issued last fall.

We believe that the Revised Proposed Fee Guidelines submitted on April 16, 2012 by 118 Law Firms, as subsequently amended on May 18, 2012, address these concerns while also responding to concerns expressed by the Executive Office for United States Trustees. We also believe that the April 16, 2012 Revised Proposed Fee Guidelines accomplish a goal shared by both the United States Trustee Program and a diverse cross-section of law firms that practice in this area - a transparent and cost-effective restructuring and reorganization process.

Again, I would like to express my sincere gratitude to the many law firms and professionals with whom my colleagues and I have had an opportunity to work, and, most importantly, to the Executive Office for United States Trustees for its time and careful consideration of these very important issues.