


# Weekly News & Comment

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## National vs. Local Rate

### What standard should be used to determine compensation?

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Dr. Quincy, a cosmetic surgeon from Beverly Hills, performs a surgery in a hospital in which Dr. Quincy does not typically perform surgeries. Doctors who regularly perform surgeries in the neighborhood of this new hospital generally charge less than Dr. Quincy. Does the patient pay Dr. Quincy's regular hourly rate even though doctors in the neighborhood typically charge considerably less? Presumably, yes. If our hypothetical patient is a sick company and our hypothetical surgeon is a bankruptcy attorney, the answer is less, though increasingly, clear.

In recent years, professional service firms with national reputations and extensive experience representing debtors and committees in relatively large Chapter 11 cases have captured a large market share. When a bankruptcy case is filed in a city where a local professional typically charges lower hourly rates than national firms charge, an issue arises whether such national firms may be compensated at their customary hourly rates. This is the "national rate vs. local rate" debate, but, as we discuss below, the debate may be nearing an end.

Compensation of professionals employed by a bankruptcy estate pursuant to Section 327 of the **Bankruptcy Code** is governed by Section 330. Section 330(a)(3)(E) prescribes that compensation is to be determined by considering all relevant factors, including "whether the compensation is reasonable, based on the customary compensation charged by comparably skilled practitioners in cases other than cases under [Title 11]." This language does not identify the relevant market for comparison. In practice, courts are divided into two camps.

An apparent minority of courts limit a firm's compensation to the rates typically charged in the particular locale where the case has been filed. This is the "Local Rate Rule." These courts typically support their decision by the fact that the higher priced professionals performed work that could have been performed by local professionals. See, e.g., *In re Southern Industrial Banking Corp.*, 41 B.R. 606, 612 (Bankr. E.D. Tenn. 1984) ("if a local professional with the required expertise could have been retained, a professional from another jurisdiction may be 'reasonably compensated' even though the allowed fee is based on a rate lower than his customary charge"); *In re Nova Real Estate Investment Trust*, 25 B.R. 252, 254 (Bankr. E.D. Va. 1982) (finding that because the services rendered could have been fulfilled in the locality, local rates should apply). Some of these courts also have held that the plain language of the Code supports their position. For example, the court in *In re Waldoff's Inc.*, in interpreting Section 330, stated that customary compensation charged by comparably skill practitioners does not reference the usual hourly billing rate of the applicant, but rather, it means the fee customarily charged outside bankruptcy in the local community by someone who possesses similar skill, experience, expertise, stature and reputation.

More courts seem to recognize that compensation should be based on the customary rates the retained firm typically charges. This is the "National Rate Rule," and it is supported by both legislative history and practical realities. See, e.g., *In re The Bennett Funding Group Inc.*, 213 B.R. 234, 250 (N.D.N.Y. 1997) ("it would be unduly burdensome and unfair to expect that [professionals from outside of the area] accept the appointment

to represent the estates at rates billed by the 'local' market, while still incurring the costs and overhead of their particular geographic market."); *In re Farley Inc.*, 156 B.R. 203, 213 (Bankr. N.D. Ill. 1993) ("[i]n 'national' cases, courts have generally held that debtors' attorneys may charge the rates prevailing where their offices are located"); *In re Temple Retirement Community Inc.*, 97 B.R. 333, 343 (Bankr. W.D. Tex. 1989) ("[w]hen the nature of a given case in fact justifies the retention of out-of-town counsel ... local rates should not operate as a limiting factor."); *In re Public Service Co. of New Hampshire*, 86 B.R. 7, 12 n.7 (Bankr. D. N.H. 1988) ("[i]f experienced attorneys can accomplish that task at high rates in one year, whereas less experienced attorneys at lower rates may take five years to do the job, the *total cost* to the estate in terms of *total dollars* will normally be lower in the first instance notwithstanding the higher hourly rates."); *In re Jensen-Farley Pictures Inc.*, 47 B.R. 577, 578-579 (Bankr. D. Utah 1985) (finding that it would be contrary to the intent of **Congress** to impose community based wage controls over professional fees); *In re Baldwin United Corp.*, 36 B.R. 401,

402 (Bankr. S.D. Ohio 1984) ("[t]o limit fees to the rates charged by Cincinnati bankruptcy lawyers, merely because these cases happened to be filed in Cincinnati, would be a position too capricious and parochial to withstand analysis under [section] 330."); *In re Atlas Automation Inc.*, 27 B.R. 820, 822 (Bankr. E.D. Mich. 1983) ("[t]he legislative history of the Code takes a strong stance in favor of encouraging the highest standard of professional practice in the bankruptcy courts ... more experienced practitioners should be encouraged to accept appointments in cases filed in less populous communities.").

Whether or not it is the majority rule, recent rulings or decisions suggest a strong trend toward the National Rate Rule (*see box on this page*). It is important to note that each of these cases were relatively large or complicated, and typically required the mobilization of vast resources on a very short timetable. Even some courts following the Local Rate Rule may have concluded that national rates were appropriate in such cases. Therefore, the two lines of cases are somewhat reconcilable. ■