

# DIFFERING PERCEPTIONS OF ATTORNEY FEES IN BANKRUPTCY CASES

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A man perceives a sheep's tail to be a leg. To reduce the sheep to the normal four-leg allotment, he cuts off one leg. How many legs does his sheep have? Three. Perceiving a tail to be a leg does not make a tail a leg.

Prescriptions for law reform must separate perception from reality. Perceptions, independent of reality, can help explain how the litigation system functions. Bargaining failure leading to trials can result from differing perceptions of a situation's underlying facts.<sup>1</sup> Even on agreed facts, failure to settle can result from different perceptions about the likely outcome of a case. Systematically biased, self-serving assessments of the merits probably contribute to the frequent inability to jointly predict case outcomes.<sup>2</sup> Exaggerated perceptions about the differences between judge and jury behavior influence the choice of trial mode between judge and jury.<sup>3</sup> Life and death decisions in capital cases can depend on perceptions, sometimes inaccurate, about the operation of the penal system.<sup>4</sup>

Perceptions, accurate or not, shape more than the settlement or non-settlement of individual cases. Perceptions of the legal system shape the system and its reform. Insurance and business groups successfully reshaped public perception about the functioning of the products liability system. They convinced both the public and the judiciary that a products liability crisis deepened even as products liability decisions took a strong pro-defendant turn.<sup>5</sup> Even among actors who seem to be similarly situated,

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1. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 212-13 (1992).

2. See Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 LAW & SOC. INQUIRY 375, 385-92 (1994); George Lowenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 140-41 & n.15 (1993).

3. See generally Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).

4. See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993).

5. See Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 791-94 (1992).

perceptions of the legal system can diverge. For example, appellate judges see a different system than trial judges.<sup>6</sup> Yet policymakers seeking to improve the system need accurate information about *the* state of the system. Different perspectives on the system can yield different policy prescriptions.

Perceptions of high attorney fees are at the heart of the concern about the bankruptcy system.<sup>7</sup> Chapter 11 cases are viewed as triggering a fee frenzy. In the public's mind, lawyers submit bills for large fees, are rarely rebuffed by the courts or other interested parties, and generate huge fees over the many years during which a Chapter 11 case might be pending. Newspapers heighten these perceptions by often reporting about high fees.<sup>8</sup>

Complaints about the costs of reorganizing businesses are not new. They have existed at least since modern businesses began reorganizing.<sup>9</sup> Because bankruptcy attorney fees continue to absorb so much attention, it is helpful to know how the system actually processes attorney fee requests. This article explores perceptions about bankruptcy fees from the perspective of two different groups of actors: bankruptcy lawyers and bankruptcy judges.

Bankruptcy judges and lawyers, not surprisingly, process information the way other human beings do. They see the world through a lens that inflates their performance. Their differing perceptions, based in part on egocentric biases, suggest that we have a less certain picture of the fee system's operation than one might hope.

The existence of real differences in the treatment of attorney fees complicates the matter. For while judges and lawyers seeing the same phenomena report them differently, real differences must also be taken into account. Probably the single most important influence on fee variation is geography. Attorney fees, bankruptcy and nonbankruptcy, vary across states and judicial districts. I show here the existence of strong interstate variation. Even accounting for interstate variation, however, differing perceptions profoundly affect one's assessment of the system.

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6. See Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989).

7. E.g., Symposium, *Paying the Piper: Rethinking Professional Compensation in Bankruptcy*, 1 AM. BANKR. INST. L. REV. 231 (1993).

8. See, e.g., John H. Kennedy, *Saying No to the Lawyers; Judges are Cutting Back Fees in One Bankruptcy Case After Another*, BOSTON GLOBE, Aug. 10, 1993, at 31; Michelle Singletary, *Bankruptcy Fees Said to Bleed Firms; System Assailed at Senate Hearing*, WASH. POST, Mar. 25, 1992, at F1; Claudia MacLachan, *Anger Rises Over Bankruptcy Fees; Congress and Courts Consider Ways to Control Costs*, NAT'L L.J., Mar. 9, 1992, at 1.

9. See Theodore Eisenberg, *Baseline Problems in Assessing Chapter 11*, 43 U. TORONTO L.J. 633, 644, 648; *The Costs of Bankruptcy: A Roundtable Discussion*, 1 AM. BANKR. INST. L. REV. 237 (1993) (remarks of Judge Pearson).

Part I describes the data. Part II shows that both judges and lawyers view the fee system through a self-serving lens. Each group tends to overstate the merits of its professional performance compared to the other group's perception of that performance. Part III explores interstate differences as a source of differing perceptions. It finds that judge and lawyer perceptions of the same reality can be as important as the real variation across states. Even with respect to the hourly rate of compensation, judge-lawyer differences play a major role in explaining reported variation.

I should emphasize that my goal is not to answer the question whether fees in Chapter 11 cases are too high or too low. This question is more complicated than is commonly assumed and requires consideration of what the alternatives to our current system might be.<sup>10</sup> Nor do I wish to choose between lawyers and judges when their perceptions of the same phenomena differ. Some conferees were quite eager to know who (judges or lawyers) was right about the underlying reality. I merely highlight here the uncertainty in the information we have about fees and one of the sources of that uncertainty.

### I. THE DATA

The data analyzed here were gathered under the auspices of the American Bankruptcy Institute (ABI), a private organization interested in the development and operation of bankruptcy law. Since the organization is made up predominantly of lawyers who practice bankruptcy law, one of the ABI's central interests is fees in bankruptcy cases. In response to growing concern about the handling of professional fees in bankruptcy cases, the ABI commissioned a study of fees. It commissioned the Northwestern University Survey Laboratory (NUSL) to create and complete the survey work.<sup>11</sup> Working with experienced bankruptcy judges, United States Trustees, accountants, panel trustees, and attorneys, NUSL helped formulate the questionnaire.<sup>12</sup>

The study's designers made substantial efforts to assure a representative

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10. See, e.g., Eisenberg, *supra* note 9.

11. AM. BANKR. INST., AMERICAN BANKRUPTCY INSTITUTE NATIONAL REPORT ON PROFESSIONAL COMPENSATION IN BANKRUPTCY CASES at ix (G.R. Warner rep. 1991) [hereinafter ABI REPORT].

12. *Id.* Since, at the Conference, one of the commentators' more vigorous attacks was on the data, a word about the data is in order. The commentator suggested that the data were flawed because the survey instrument usually relied on predefined answers. Respondents often were not free to give open-ended responses. However useful open-ended responses may be, reliance on predefined categories is not a severe methodological flaw. Predefined responses are used in nearly all surveys, including the U.S. Census and research funded by the National Science Foundation.

and sizeable sample of bankruptcy judges and attorneys. The confidential responses include 205 lawyer responses and 150 judge responses. The ABI reports that the sampling error for judges was five percentage points and the sampling error for lawyers was seven percentage points.<sup>13</sup>

## II. EGOCENTRIC BIASES AND PERCEPTIONS OF THE LEGAL SYSTEM

Humans tend to exaggerate their abilities and the esteem in which others hold them.<sup>14</sup> Such egocentric biases are a potentially rich source of explanation of litigation behavior. Lowenstein and his co-authors point to egocentric biases as a partial explanation for why cases fail to settle.<sup>15</sup> If parties are systematically biased in a way that exaggerates the merits of their claim or defense, it is more difficult to reach settlements. Similarly, if parties are systematically and egocentrically biased in their perceptions about the legal system, it is difficult to agree on the state of that system.

Analyzing the presence of egocentric biases requires identifying perceptions that count as self-aggrandizing. With the data available from the ABI questionnaire defining the universe of possible inquiries, my assumptions about what counts as self-serving are as follows: (1) judges would like to see themselves as fair, efficient actors who are good case managers and who closely monitor the parties' compliance with the law; and (2) attorneys would like to see themselves as complying with requirements about fee applications and as not being greedy. The ABI data show, with respect to these characteristics, substantial egocentric biases on the part of lawyers and judges. Both lawyers and judges, relative to each other, report features of the fee system that reflect well on them.

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13. *Id.* at 10 n.19. More precisely, the ABI Report states that one can have 95% confidence that the true means for judge and lawyer responses fall within these margins of error. *Id.*

As George Triantis suggested at the Conference, the best way to find out about the reality of fees may not be to ask the judges and lawyers. One could instead rely on the written record of fees embodied in case files. Gathering such data requires reviewing many files in many courthouses. Understandably, the ABI did not engage in such an expensive project.

14. See Lowenstein et al., *supra* note 2, at 140-41 & n.15 (summarizing studies of egocentric bias); cf. Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 179, 188-89 (Daniel Kahneman et al. eds., 1982) (reporting that individuals tend to accept more responsibility for a joint product than other contributors attribute to them).

15. Lowenstein et al., *supra* note 2. See also LINDA BABCOCK ET AL., *FORMING BELIEFS ABOUT ADJUDICATED OUTCOMES: RISK ATTITUDES, UNCERTAINTY, AND RESERVATION VALUES* (1993) (reporting that only subjects assigned to roles for which they had extensive experience exhibited over-optimism about the likely outcome).

### A. Judges as Case Managers and Fee Managers

Table 1 shows judges' and lawyers' responses to several questions in which biased self-perception could play a role. During the pendency of a substantial bankruptcy case, lawyers often move for an award of interim attorney fees. Judges would like to be regarded as highly efficient actors in the system. This should translate into judges' perceiving themselves as acting quickly on such fee applications. Table 1 shows that judges see themselves as efficient actors compared to lawyers' views of them.

**Table 1**  
**Egocentric Biases of Judges: Efficient Actors & Diligent Monitors**

QUESTION 3. Do courts in your district generally rule on <u>interim</u> fee applications . . .					
	<i>Lawyers</i>		<i>Judges</i>		Signif.
	N	%	N	%	
at the hearing	81	45.5	111	77.6	
within 30 days after the fee hearing	60	33.7	27	18.9	
31-60 days after the fee hearing	29	16.3	3	2.1	
61-120 days after the fee hearing	3	1.7	2	1.4	
> 120 days after the fee hearing	5	2.8	0	0	.000
QUESTION 4. Do courts in your district generally rule on <u>final</u> fee applications . . .					
	<i>Lawyers</i>		<i>Judges</i>		
	N	%	N	%	
at the hearing	77	42.5	102	71.3	
within 30 days after the fee hearing	64	35.4	36	25.2	
31-60 days after the fee hearing	28	15.5	5	3.5	
61-120 days after the fee hearing	9	5.0	0	0	
> 120 days after the fee hearing	3	1.7	0	0	.000
QUESTION 18. In what percentage of Chapter 11 cases, in which you have been involved, did the following entities make those objections?					
	<i>Lawyers</i>		<i>Judges</i>		
A. by Judges	21.1		29.1		.024
QUESTION 10.A. [W]ith respect to the fee application [of oversecured creditors], are oversecured creditors most frequently . . .					
	<i>Lawyers</i>		<i>Judges</i>		
	N	%	N	%	
required to provide as detailed a fee application as that required of attorneys employed by the estate	98	56.3	98	66.7	
required to provide a fee application with less detail than that required of attorneys employed by the estate	33	19.0	30	20.4	
not required to provide a detailed fee application	43	24.7	19	12.9	.022

Table 1, Question 3,<sup>16</sup> shows that while 78% of the judges report that they rule on interim fee applications at the fee hearing, only 46% of the lawyers report that the judges rule so quickly.<sup>17</sup> Nearly all judges (96%) report that they rule on requests for interim awards at the fee hearing or within thirty days after the hearing. Only 79% of the lawyers report that judges act so quickly. About 3% of the lawyers report rulings occurring more than 120 days after the fee hearing. No judges so report.

At the end of a case, lawyers move for a final fee award. Again, judges would like to think they act quickly. And, again, lawyers' and judges' perceptions about judicial behavior differ substantially. Table 1, Question 4, shows that, with respect to the final fee, 71% of the judges report that they rule at the hearing compared to 43% of the lawyers. Ninety-seven percent of the judges report that they rule on final fee requests at the hearing or within thirty days of the hearing. Only 78% of the lawyers report such prompt treatment. About 7% of the lawyers report rulings occurring more than sixty days after the fee hearing. No judges report such delayed awards. Judges, more than lawyers, view themselves as efficient processors of fee application requests.

Secondly, Table 1 shows that judges perceive themselves as more closely monitoring the system than lawyers believe. When fee objections are made, Table 1, Question 18, shows that judges report that they make the objections in 29% of the cases. Lawyers report that judges make the objections in 21% of the cases.

Aside from objecting to fees, judges can appear to be diligent monitors of the system by the level of detail they require in fee applications. Table 1, Question 10.A, shows that judges, much more than lawyers, report that they most frequently require oversecured creditors' lawyers to "provide as detailed a fee application as that required of attorneys employed by the

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16. References to "Question" numbers are to the question numbers in Northwestern University Survey Lab: American Bankruptcy Institute: Attorney Questionnaire (Jan. 10, 1991). The numbering on the Judge Questionnaire differs from that on the Attorney Questionnaire. Copies of both survey questionnaires can be found in ABI REPORT, *supra* note 11, at J-1 to J-20, L-1 to L-20.

17. The significance column in Table 1 indicates that, across all the responses to Question 3 in Table 1, the judge-lawyer difference is significant at the 0.000 level ( $p=0.000$ ). The p-values (sometimes called significance levels) reported in the tables represent the likelihood of observing by chance a difference between judges and lawyers as large as the observed difference. Table 1 and the subsequent tables report the appropriate significance levels for judge-lawyer comparisons. The reported p-values were computed using a t-test for continuous variables. See STEVEN F. ARNOLD, MATHEMATICAL STATISTICS 366-78 (1990). For ordinal data, p-values were computed using the Mann-Whitney two-sample statistic. See H.B. Mann & D.R. Whitney, *On a Test of Whether One of Two Random Variables is Stochastically Larger than the Other*, 18 ANNALS OF MATHEMATICAL STAT. 50 (1947).

estate.” The percentage of lawyers reporting that no detailed application is required was twice as high as the percentage of judges so reporting.

*B. Judges as Dispensers of Fair Treatment*

Judges perceive themselves as fair, as well as efficient and diligent. They, more than lawyers, see themselves as providing fair compensation and as treating lawyers before them similarly. Table 2 provides judge and lawyer response rates to questions bearing on these issues.

I assume that reimbursement for services based on the actual value furnished is in keeping with a judge's self-image as a fair monitor who must simultaneously protect the estate. With respect to the rate of compensation allowed to attorneys for oversecured creditors, Question 10.B in Table 2 shows that 37% of the judges report that they most frequently allow reimbursement at the “value of the services to the secured creditor,” even if that value differs from the rate agreed on between the secured creditor and its attorneys. Only 15% of the lawyers report that judges reimburse at such rates. The attorneys view the compensation paid to secured creditors' attorneys as being closer to the rates agreed on between the secured party and its attorneys. Forty-six percent of the lawyers, compared to 16% of the judges, report this to be the standard. Thus, judges view themselves as fine-tuning compensation more than lawyers report this activity occurring.

**Table 2**  
**Egocentric Biases of Judges: Fairness**

QUESTION 10. Section 506 of the Bankruptcy Code allows oversecured creditors to be reimbursed for reasonable attorney fees. In cases you have been involved in and where the creditor has sufficient security to cover the entire debt plus the requested fees, which of the following is most frequently done?

B. . . . with respect to the rate of compensation, are the oversecured creditors most frequently . . .

	<i>Lawyers</i>		<i>Judges</i>		Signif.
	N	%	N	%	
reimbursed at the rate agreed to between the secured creditor and its attorneys, even if that rate exceeds the rate generally allowed to attorneys employed by the estate,	79	45.9	23	15.8	
reimbursed at the rate generally allowed to attorneys employed by the estate, even if that rate is different from the rate agreed to between the secured creditor and its attorneys, or	44	25.6	55	37.7	
reimbursed at the value of the services to the secured creditor, even if that is different from the rate agreed to between the secured creditor and its attorneys,	26	15.1	54	37.0	
reimbursed depending on the other assets in the case	6	3.5	1	0.7	
reimbursed on some other basis	17	9.9	13	8.9	.000

QUESTION 42. In instances where attorneys perform services for the estate, which initially appeared to be reasonable, but which result in no significant benefit, is compensation generally allowed for the services at . . .

	<i>Lawyers</i>		<i>Judges</i>		
	N	%	N	%	
regular hourly rates	108	56.3	102	69.9	
reduced rates	57	29.7	39	26.7	
not compensated	27	14.1	5	2.4	.003

QUESTION 19. In Chapter 11 cases in which you have been involved, are members of official creditors committees awarded reimbursement of their actual and necessary expenses incurred in connection with serving on such committees . . .

	<i>Lawyers</i>		<i>Judges</i>		
	N	%	N	%	
always	31	18.5	56	39.4	
frequently	51	30.4	33	23.2	
sometimes	40	23.8	16	11.3	
infrequently	22	13.1	23	16.2	
never	24	14.3	14	9.9	.002



Question 42, Table 2, asks about instances in which attorneys perform services for the estate, which initially appear to be reasonable, but which result in no significant benefit to the estate. The question sounds a bit loaded. Who could deny fees for reasonable services? A fair judge ought to allow compensation for such services. And in such cases, judges, much more than lawyers, report that compensation is allowed at regularly hourly rates. Attorneys perceive themselves as being compensated at a lower rate than judges do when, after the fact, their services are determined not to have benefitted the estate. And a higher percentage of attorneys than judges (14% versus 2%) report that attorneys are not compensated for such services.

Judges and lawyers report different experiences with respect to reimbursement of expenses for members of official creditors' committees. Table 2, Question 19, shows that judges, more than lawyers, report always allowing reimbursement of official creditors' committee expenses. Thirty-nine percent of judges report always reimbursing members' expenses, but only 19% of lawyers so report.<sup>18</sup>

### *C. Lawyers' Behavior As Viewed by Lawyers and Judges*

Lawyers, like judges, exhibit egocentric biases in their responses. Table 3 shows responses to questions in which lawyers and judges evaluate lawyer activity.

It reflects well on attorneys to comply with guidelines. Lawyers and judges, in results not reported in Table 3, gave comparable responses to the question whether a U.S. Trustee had established local guidelines for attorney fees.<sup>19</sup> And they responded similarly when asked whether judges followed the guidelines.<sup>20</sup> They significantly disagreed, however, about the extent to which attorneys comply with the guidelines. Table 3, Question 41, shows that attorneys, much more than judges, viewed themselves as in compliance with fee guidelines. Over 60% of the lawyers report that they always comply with fee guidelines. Judges report that only 18% of attorneys always comply.

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18. Notice of standards is a component of fairness. Two questions asked whether guidelines for attorney fees are written. One question asked whether there were written guidelines for fees in no-asset consumer Chapter 7 cases. Question 46. Another asked about such guidelines in Chapter 13 cases. Question 48. Surprisingly, lawyers reported the existence of written guidelines more often than judges did.

19. Question 39 (p=.931).

20. Question 40 (p=.838).

**Table 3**  
**Egocentric Biases of Lawyers**

QUESTION 41. Do you follow [guidelines for fee applications]?					
	<i>Lawyers</i>		<i>Judges</i>		Signif.
	N	%	N	%	
always	59	60.2	13	18.3	
frequently	23	23.5	47	66.2	
sometimes	12	12.2	10	14.1	
never	4	4.1	1	1.4	.000

  

QUESTION 30. In cases in which you have been involved, how often have professionals requested compensation in excess of normal hourly rates?					
	<i>Lawyers</i>		<i>Judges</i>		Signif.
	N	%	N	%	
always	1	0.5	2	1.3	
frequently	6	3.1	3	2.0	
sometimes	29	15.0	16	10.7	
infrequently	95	49.2	112	75.2	
never	62	32.1	16	10.7	.009

  

QUESTION 33. In cases in which you have been involved, and in which there has been a <u>delay in payment</u> of fees, how often has there been a request made for an upward adjustment to compensate to reflect such a delay?					
	<i>Lawyers</i>		<i>Judges</i>		Signif.
	N	%	N	%	
always (continued)	1	0.6	0	0.0	
frequently	4	2.3	7	4.9	
sometimes	18	10.2	18	12.6	
infrequently	37	21.0	65	45.5	
never	116	65.9	53	37.1	.000

Lawyers also view themselves as less aggressive in seeking fees than judges view them. Table 3, Question 30, shows that judges, more than attorneys, report attorneys requesting compensation in excess of normal hourly rates. The big difference is between the "infrequently" and "never" responses. Thirty-two percent of lawyers say they never seek an upward adjustment. Only 11% of the judges responded "never." When there is a delay in payment of fees, attorneys report seeking an upward adjustment to compensate for the delay less frequently than judges report such conduct by attorneys. Table 3, Question 33, shows that about two-thirds of the lawyers responded that they never seek an upward adjustment for delay. Only about one-third of the judges report lawyers being so passive.

In summary, compared to how lawyers report about judges, judges report themselves as quick actors who base fees on value rendered and reasonable-

ness. Compared to how judges report about lawyers, lawyers report themselves as complying with fee guidelines and rarely seeking higher than normal fees or upward fee adjustments. Both sets of results suggest that egocentric biases shape perception.

### III. INTERSTATE VARIATION, PERCEPTION, AND FEE LEVELS

The ABI data do not allow for complete investigation of the sources of varying perceptions of judges and lawyers. They do, however, allow for consideration of one important factor, interstate variation. Prior empirical work suggests that venue effects are important in bankruptcy. For example, LoPucki and Whitford emphasized the importance of venue in Chapter 11 cases and found substantial variation.<sup>21</sup>

The ABI data include the state of each responding judge and lawyer. Using regression techniques,<sup>22</sup> one can account simultaneously for differences between judge and lawyer responses, and for differences across states. This allows us to explore whether the differing perceptions reported in Tables 1, 2, and 3 are artifacts of one or a few states or constitute a truly national effect.

#### A. Regional Variation and Differing Perceptions

For this part of the analysis, I limited the sample to those states with ten or more respondents.<sup>23</sup> This left 13 states, 113 lawyer responses, and 81 judge responses. These 194 respondents comprise 55% of the original sample. Since we are primarily interested in whether one or a few states are the source of differing perceptions, I present only a portion of the

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21. Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11. I realize that the state is not the ideal unit of analysis for measuring geographic variation. There can be important differences, for example, between the Southern District of New York and other districts in New York State. But the most distinctive districts, at least in terms of high fees, probably also tend to be those with the most cases. Since the ABI randomly sampled judges and lawyers, the high fee districts should dominate their state's results. The results tend to confirm this assumption.

22. For the dependent variables for which responses are ordinal, ordered logit was used. See 3 STATA CORP., REFERENCE MANUAL, Stata Release 3.1, at 42-50 (1993). For continuous dependent variables, ordinary least squares regression was used. In each case, a dummy variable was coded "1" for lawyer responses and "0" for judge responses. In addition, dummy variables for each state were included. The results reported in Table 4 are the significance levels of the judge-lawyer dummy variable and of the state dummy variables as a group.

23. The included states are California, Georgia, Illinois, Indiana, Michigan, Missouri, North Carolina, New York, Ohio, Pennsylvania, Tennessee, Texas, and Wisconsin. In disaggregating the data at the state level, the reduction in sample size means that we have less precise estimates of each variable.

statistical results. In particular, I present only a summary of the judge-lawyer effect and combined interstate effects and do not report the individual state effects. Table 4 shows the significance level of the judge-lawyer effect for each of the questions presented in Tables 1, 2, and 3 as well as the aggregate interstate effect.<sup>24</sup>

Table 4 suggests that the effects reported in Part II are predominantly national effects. Controlling for individual states, all judge-lawyer differences remain significant at the 0.09 level or beyond. And all but two are significant well beyond that level. Thus, the results as a whole are unlikely to have been observed by chance. The significance of geographical area, as measured by the state effect, is substantially less than that of the judge-lawyer effect. Indeed, for many questions, one cannot reject the hypothesis that interstate effects as strong as those observed would be observed by chance. I conclude that controlling for geographic location does not eliminate the presence of egocentric biases in perceptions about bankruptcy fees. This is what one would expect if, as seems likely, these biases are part of human nature. They transcend state borders.<sup>25</sup>

Table 4  
Judge-Lawyer Effects Controlling for State

<i>Question number</i>	<i>Significance</i>	
	Judge-Lawyer Effect	Interstate Effect
Question 3 (Table 1) (interim fee delay)	.000	.001
Question 4 (Table 1) (final fee delay)	.000	.000
Question 18 (Table 1) (% objection by judges)	.012	.000
Question 10.A (Table 1) (fee detail-oversec.)	.007	.249
Question 10.B (Table 2) (fee rate-oversec.)	.001	.472
Question 42 (Table 2) (no benefit fee)	.089	.079
Question 19 (Table 2) (committee expenses)	.029	.301
Question 41 (Table 3) (follow guidelines)	.000	.728
Question 30 (Table 3) (excess of hourly)	.093	.083
Question 33 (Table 3) (upward for delay)	.000	.244

24. The interstate significance level is the significance level associated with the hypothesis that the individual state dummy variable coefficients all equal zero.

25. Conferees expressed concerns that some quirk in the data may be the source of the judge-lawyer effect. In particular, it was suggested that a high lawyer estimate in one state might combine with a low judge estimate in another state. If one analyzed only judge-lawyer differences, without controlling for the fact that the respondents are from different states, one might find a spurious judge-lawyer effect. I was not clear enough about the derivation of Table 4. The significance levels in Table 4 are the product of multivariate regression analyses in which the states were included as dummy variables. If the judge-lawyer effect were merely an artifact of interstate differences, controlling for the states' identity would substantially reduce, and perhaps eliminate, the effect.

### *B. Interstate Variation in Fee Levels*

With respect to fee levels, perceptions may differ, but one also expects substantial interstate variation. One expects interstate fee variation to be more prominent than the interstate variation shown for the factors in Table 4. Fee awards in Wyoming, for example, differ from fee awards in California. This difference is not unique to bankruptcy fees. Legal fees in major metropolitan areas tend to be higher than fees outside those areas.<sup>26</sup> This section first explores interstate variation in bankruptcy fee awards. It then seeks to explain the variation in fee levels as a function of judge-lawyer perceptions, interstate differences, and other factors.

As above, the ABI data allow comparison of fee award levels across states. For present purposes, I focus on the hourly fee paid to partners in law firms. Attorneys were asked for the upper and lower range of hourly rates charged by partners in their firm for representing Chapter 11 debtors or official committees.<sup>27</sup> Judges were asked a similar question about fee awards granted by them during the last year.<sup>28</sup> I averaged the upper and lower range responses for each respondent to arrive at what I will call the average hourly partner rate.

The average hourly rate differs substantially across states. Since many states have few respondents, I limit my presentation here to states with ten or more respondents.<sup>29</sup> Table 5 shows that the average award within these states differs and does so beyond chance expectation. For both judge respondents and lawyer respondents, geographic location substantially influences their estimate of partners' hourly rates. Lawyers in New York report hourly rates of \$237 compared to a low of \$119 in Ohio. Judges in California report average hourly partner rates of \$249 compared to a low of \$120 in North Carolina. These 100% differences in rates suggest the importance of a local perspective in considering fees.

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26. *See supra* note 21.

27. Question 67.

28. Judge Questionnaire, Question 27.

29. *See supra* note 23.

**Table 5**  
**Interstate Variation in Partners' Hourly Rates**

	AVERAGE HOURLY COMPENSATION FOR PARTNERS IN CHAPTER 11 CASES					
	<i>Lawyers</i>			<i>Judges</i>		
	N	\$	Std.dev.	N	\$	Std.dev.
California	13	216	56	13	249	36
Georgia	6	149	56	4	166	47
Illinois	7	162	67	5	195	49
Indiana	8	127	32	4	131	15
Michigan	6	166	13	5	171	27
Missouri	7	129	30	4	141	24
North Carolina	6	136	16	4	120	4
New York	10	247	70	9	213	62
Ohio	5	119	20	8	163	48
Pennsylvania	10	176	52	6	155	24
Tennessee	5	146	6	4	158	21
Texas	17	179	44	9	189	22
Wisconsin	5	135	38	5	131	17
F-test significance		.0000			.0000	

### C. *Exploring Fee Level Variation*

To further explore the differences in partner hourly rates, regression analysis is again useful. I employ a model using data available in the ABI study. In constructing such a model, what might be thought of as the state's background influence on legal fee rates is important. That is the influence (presumably through local economic factors) on rates that a state might have independent of the area of law being studied. I use a dummy variable for each state (not just states with ten or more cases) to account for interstate fee variation.<sup>30</sup> Thus, the partner hourly rate is modeled in part as a function of the state in which the attorney practices or the judge sits.

In addition, the nature of the firm's bankruptcy practice could influence fees. One expects Chapter 11 work to be more lucrative than either Chapter 7 or Chapter 13 work. Accordingly, I include a variable that accounts for the percentage of bankruptcy practice or administration consisting of Chapter 7 work<sup>31</sup> and the percentage of bankruptcy practice or administration consisting of Chapter 13 work.<sup>32</sup> Thus, the higher the

30. To conserve space, I do not report each state's effect on hourly rates.

31. Question 75.A; Judge Questionnaire, Question 73.A.

32. Question 75.D; Judge Questionnaire, Question 73.D.

percentage of Chapter 7 or Chapter 13 work, the lower one expects the average hourly rate to be.

Working for a financially strapped, closely scrutinized debtor may be less lucrative than working for a creditor or an official committee. I therefore include a variable that measures the percentage of the respondent's bankruptcy practice that consists of being an attorney for the debtor.<sup>33</sup> Also, closely monitored fees, as measured by frequency of objections to fees, may influence hourly rates. I therefore include a variable that measures the percentage of cases in which the respondent reports objections having been made to Chapter 11 fee applications.<sup>34</sup> Finally, because it is available and interesting, I include a variable accounting for the respondent's gender.<sup>35</sup>

Table 6 presents the results. First, holding constant the state and other factors, substantial variation again emerges between judge and lawyer perceptions. Lawyers report hourly rates significantly lower than judges report.<sup>36</sup> Self-interest may again be at work here. Lawyers may wish to believe they receive modest fees. Judges may like to think of themselves as generous, though judges are subject to pressure to preserve the estate. Together, these effects could lead lawyers to report lower average fees than judges.

**Table 6**  
**Dependent Variable = Log of Average Partner Hourly Rate**

<i>Variable</i>	<i>Coefficient</i>	<i>t</i>	<i>Significance</i>
Lawyer-Judge (1=lawyer, 0=judge)	-.080	-3.31	.001
Percent of practice = Chapter 7	-.002	-3.67	.000
Percent of practice = Chapter 13	-.003	-5.33	.000
Gender of respondent (1=female, 0=male)	.067	2.17	.031
Percent of practice = representing debtors	-.001	-2.07	.039
Percent observed rate of objections to fees	.001	1.89	.060
constant	5.191	140.02	.000
state variables (not reported separately)			.000
N = 289		(Huber standard errors used)	
Adjusted R square = .61			

33. Question 74.D; Judge Questionnaire, Question 72.D.

34. Question 17; Judge Questionnaire, Question 18.

35. Question 79; Judge Questionnaire, Question 76.

36. Similarly, in Chapter 13 cases, judges report a mean maximum fee for routine Chapter 13 cases of \$995. Lawyers report \$845. Question 49; Judge Questionnaire, Question 57.

Second, the states' background influence on rates is important. The state variables do help capture differences across states. As a group, the state dummy variables (not reported individually) are highly significant. Holding other factors constant, California practitioners, for example, receive higher fees than Ohio practitioners. This confirms the results in Table 5.

Third, even controlling for the background variation in practice rates across states,<sup>37</sup> variability within the practice of bankruptcy emerges. The more a lawyer's practice consists of Chapter 7 work or Chapter 13 work (in contrast to Chapter 11 work), the lower the hourly partner rate. The more a lawyer does work for debtors (in contrast to other actors in the bankruptcy system) the lower the fee.

Fourth, the more the lawyer or judge reports objections to fees, the higher the hourly rate. A simple explanation might be that higher rates attract more objections.<sup>38</sup>

Fifth, female respondents report higher fees than male respondents. This may be because females in fact receive more, or because they perceive that fees are higher than males perceive them to be.

Overall, the model provides a reasonable, though not complete, framework for understanding reported fee levels. It is highly statistically significant and explains about 60% of the variation in fee level across respondents. Interstate differences and other factors matter, but different perceptions of the same reality continue to play a prominent role.

#### IV. CONCLUSION

Empirical work has dispelled several false impressions about the bankruptcy system. LoPucki, Whitford, and others have shed important light on the frequency and level of violations of absolute priority in Chapter 11.<sup>39</sup> Gilson and others find that managers of firms in Chapter 11 have a less easy time of it than is commonly believed.<sup>40</sup> Eisenberg and

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37. There are, of course, shortcomings to the control used here.

38. Or perhaps, conversely, more objections induce higher rates.

39. See Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990); Allan C. Eberhart et al., *Security Pricing and Deviations from the Absolute Priority Rule in Bankruptcy Proceedings*, 45 J. FIN. 1457 (1990); Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority Claims*, 27 J. FIN. ECON. 285 (1990).

40. See Stuart C. Gilson, *Management Turnover and Financial Stress*, 25 J. FIN. ECON. 241, 246-48 (1989) (observing a "52% annual turnover rate among senior managers for a large sample of financially distressed firms . . . compared with a rate of only 19% for a control sample of highly unprofitable, non-financially distressed firms"); Lynn M. LoPucki & William C. Whitford, *Corporate*



Tagashira find reorganizations, at least in Japan, to be surprisingly beneficial to creditors, even in the face of high failure rates.<sup>41</sup> Sullivan, Warren, and Westbrook report several surprising findings about consumer bankruptcy.<sup>42</sup>

The findings reported here suggest an important caution for interpretation of empirical findings. For at least some studies, the findings will depend on who is asked about the system. Lawyers see a fee system that operates differently than the one that judges see. Bankruptcy reform that hopes to improve the system must sort through the real and perceived problems with the system. We do not want to end up with three-legged sheep.

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*Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PENN. L. REV. 669, 726 (1993) (reporting "at least one change in CEO in 91% of the total number of cases in the period starting eighteen months before filing and ending six months after confirmation [compared to a] 'normal' CEO turnover rate of 10% annually for large, publicly held firms").

41. See Theodore Eisenberg & Shoichi Tagashira, *Should We Abolish Chapter 11? The Evidence from Japan*, 23 J. LEGAL STUD. 111 (1994).

42. See TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989). In light of the many surprising empirical findings about the bankruptcy system, one comment made at the Conference merits discussion. It was suggested that this study is of little value because the person making the comment believed the results to be obvious. Since the obviousness point is often made about empirical work, it is worth noting the importance of obvious findings. Because so many empirical findings about the bankruptcy system do not comport with widely shared intuitive impressions, studies that do agree with intuition serve a useful function. Some intuitions turn out to be correct and some do not. Without empirical testing, one cannot distinguish between sound and false intuition. I also suspect that something of a hindsight bias is at work. That judges and lawyers would report noticeably different views of matters so mechanical as the timing of fee awards was beyond my intuition.

