Attorney Fees: Handling Bankruptcies without Getting There Yourself

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ATTORNEY FEES:
HANDLING BANKRUPTCIES WITHOUT
GETTING THERE YOURSELF

EDWIN F. FLOWERS*

By enacting the Bankruptcy Reform Act of 1978, Congress significantly increased the stature and influence of bankruptcy law in our legal system and in society. Consistent with this, Congress sought to improve the quality of legal services rendered to clients in bankruptcy cases by enhancing the recoverability of attorney fees for such services. In this article, the author treats the criteria a bankruptcy court will likely employ in deciding the reasonableness and recoverability of an attorney fee for services in cases under the Reform Act. The author attempts to show that an attorney who uses some forethought and attention to detail will find representation of a client in a bankruptcy case to be just as remunerative as representation of a client in any other context.**

An appearance in bankruptcy court for the general practitioner is frequently a miserable experience. When the attorney learns that his fee may be reduced by the judge acting sua sponte, it becomes an infuriating experience as well. The slightly smug creditor's attorney, who finds this perfectly fitting for those who represent debtor interests, finds it incredible that the judge also may have some control over the fee charged for bankruptcy service to his solvent client. Consider also the dismay of the two-person law firm which heard its work for a debtor lauded by the court, then saw its fee of $850,000 (which included a court-awarded $200,000 bonus) totally disallowed on appeal.¹

The likelihood of such an unhappy experience is diminished for those attorneys who understand a few rules peculiar to-bank-

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** Ed.

¹ Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.) 655 F.2d 463 (2d Cir.), cert. denied sub nom., Israel & Raley v. Futuronics Corp., 50 U.S.L.W. 3668, No. 81-1037 (Feb. 23, 1982).
ruptcy practice, and who remember that some rules applicable in the practice of law generally are no less applicable in bankruptcy. The new Bankruptcy Code\(^2\) rejects the notion that economy of administration should influence attorney fee allowances\(^3\) and instead dictates the award of fees "comparable" to nonbankruptcy work.\(^4\) Thus, attorneys with expertise in bankruptcy matters should no longer find it necessary to "leave the bankruptcy arena" in order to earn a higher income.\(^5\)

I. Rules Peculiar To Bankruptcy Practice

The Bankruptcy Code provides for judicial review of attorney fees paid by a bankruptcy debtor,\(^6\) those received for representing the bankruptcy trustee\(^7\) or an official creditors' committee,\(^8\) and, in some circumstances, fees charged by attorneys representing creditors.\(^9\) The rationale for intrusion into the attorney-client fee agreement is usually expressed as that of fulfilling one or the other of the two historic goals of bankruptcy: assuring the debtor a fresh start and assuring creditors an equitable distribution of the debtor's assets. To the extent that the debtor obligates himself for an attorney fee which must be paid in the future, his fresh financial start after bankruptcy is impaired. To the extent that a lawyer takes scarce cash from the estate for fees, a distribution to other creditors is reduced. The United States Supreme Court, some seventy-three years ago, justified the statutory regulation of counsel fees due to "the temptation of a failing debtor to deal too liberally with his prop-

\(^3\) Cf. Milbank, Tweed & Hope v. McCue, 111 F.2d 100 (4th Cir. 1940) (stating the view under the 1898 Act that economy of administration should be considered by the court).
\(^7\) 11 U.S.C. §§ 327(a), (b), (d), (e), (f), and 328(a) (Supp. III 1979).
\(^9\) 11 U.S.C. §§ 327(c), 328(c), 1103(b) (Supp. III 1979). (An attorney may not concurrently represent the trustee or creditors' committee and a creditor); See also 11 U.S.C. § 506(b) (Supp. III 1979) (relative to allowance of "any reasonable fees, costs, or charges" provided under a security agreement in determining the amount of an allowed secured claim); and 11 U.S.C. § 503(b)(4) (Supp. III 1979) (relative to allowance of reasonable compensation for the attorney filing a creditor's involuntary petition against a debtor).
property in employing counsel to protect him in view of financial reverses and probable failure."10

A. Disclosure

To protect the allowance of his fee, an attorney in bankruptcy must make certain disclosures. The penalty for failure to meet these requirements is grim—possible disallowance of the entire fee.11 Fortunately, there is nothing tricky or complex about satisfying these conditions. The debtor's attorney, whether in a chapter 7 liquidation, a chapter 9 municipal adjustment, a chapter 11 reorganization, or a chapter 13 individual's adjustment, must "file with the court a statement of the compensation paid or agreed to be paid ... in contemplation of and in connection with the case ... and the source of such compensation."12 Every stationer's set of bankruptcy forms contains an appropriate page on which this disclosure may be made. It should accompany the petition, schedules and statement of affairs, but may be filed as late as the meeting of creditors.13 Costs advanced by the debtor or others for the filing fee should be distinguished from the attorney fee.14 Additionally, if an attorney is employed by one who must get court approval of such employment, (e.g., employment by the trustee, by the debtor in possession or by the creditors' committee) then he must disclose all "connections with the bankrupt, the creditors, or any other party in interest, and their respective attorneys and accountants."15 This disclosure is to assure that the appointed attorney is not disqualified and rendered ineligible to collect a fee. The Code provides, with exceptions discussed below, that "the court may deny allowance of compensation for services and reimbursement of expenses ... if, at any time ... such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed."16 As an aid to en-

10 In re Wood & Henderson, 210 U.S. 246, 253 (1908).
11 Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.), supra note 1.
14 References herein to an attorney's fee or expenses do not include the statutory filing fee charged by the clerk of the court pursuant to 28 U.S.C. § 1930(a) (Supp. III 1979).
forcement of the disclosure requirement, a trustee may be denied his own fees and expenses if he fails to make diligent inquiry into facts which would lead to disallowance of an attorney fee or if he employed an attorney known by him to be ineligible for appointment.\(^\text{17}\)

B. Prior Authorization

In the ordinary chapter 7 liquidation case, the debtor's attorney does not need pre-petition authorization from the court for his employment. Only the amount of the fee is subject to the control of the court. A different result obtains for post-filing employment of attorneys. For an attorney to be employed by a trustee, a creditors' committee, or debtor in possession,\(^\text{18}\) court approval must be obtained.\(^\text{19}\) Approval will be withheld if the nominated attorney holds or represents an interest adverse to the estate or is not a "disinterested person."\(^\text{20}\) Exceptions are made to allow appointment of the following persons who otherwise might be ineligible to serve: a creditor's former attorney,\(^\text{21}\) a debtor's attorney,\(^\text{22}\) a business debtor's "regularly employed attorneys,"\(^\text{23}\) and the trustee, who may serve as his own attorney.\(^\text{24}\)

C. Allowance

Attorney fees and expenses may be reduced or denied, as noted above, where the attorney is "not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional


\(^{18}\) A debtor in possession is a chapter 11 debtor where no trustee has been appointed. 11 U.S.C. § 1101(1) (Supp. III 1979).

\(^{19}\) 11 U.S.C. §§ 327(a), 1103(a), 1107(a) (Supp. III 1979). The latter section places a debtor in possession in the shoes of a trustee. H.R. REP. No. 95-595, 95th Cong., 2d Sess. 404, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6360. Inasmuch as § 327(a) requires a trustee to seek court approval for the employment of counsel, the same restriction applies to a debtor in possession.

\(^{20}\) 11 U.S.C. § 327(a) (Supp. III 1979). To spare any possible confusion as to the difference between a "distinterested" person and an uninterested one, the former is defined in 11 U.S.C. § 101(13) (Supp. III 1979).


\(^{22}\) 11 U.S.C. § 327(e) (Supp. III 1979). The debtor's attorney may be employed by the trustee for a "specified special purpose" with some conditions attached. Id.


person is employed." Additionally, fees may be denied where
the attorney has violated the law, as in fee sharing. With two ex-
ceptions, the sharing of attorney fees is expressly forbidden by
the Bankruptcy Code. Members of the attorney's own firm may
share bankruptcy fees as they would other earnings of the firm,
and the attorneys for creditors who bring a successful involun-
tary petition against the debtor may share the fees allowed
under 11 U.S.C. § 503(b)(4). An undisclosed "fee-splitting agree-
ment" caused the loss of the well-earned $850,000 fee mentioned
above.

Since the court must act initially upon the appointment ap-
plication in which the required full disclosure of all the appli-
cant's relationships in the case must be made, forfeiture of fees
then is seldom encountered. More common is the case of a bus-
iness debtor's counsel failing to seek appointment by the court
in order to be compensated for services performed after filing.

While the debtor's counsel may file the petition for his client
without advance approval, the court may award compensation
only to those who hold no interest adverse to the estate and at-
torneys appointed under section 327 or 1103. Timely application
for appointment as counsel not only spares disallowance of a
fee, it can be utilized to lay the groundwork for an adequate
basis of compensation later. The Code provides that the employ-
ment of counsel for a trustee (including the debtor in possession)
or a creditors' committee may be "on any reasonable terms and
conditions . . . including on a retainer, or an hourly basis, or on a
contingent fee basis." This provides the attorney with an op-
portunity to know in advance whether his proposed employment
terms are acceptable to the court. Even though the terms of
counsel's employment may be approved by the court, the Code
specifically authorizes the court to "allow compensaton different
from the compensation provided under such terms and condi-
tions after the conclusion of such employment, if such terms and

\[\text{\textsuperscript{25}}\text{ 11 U.S.C. § 328(c) (Supp. III 1979).}\]
\[\text{\textsuperscript{26}}\text{ 11 U.S.C. § 504(a) (Supp. III 1979). Note that this section refers to
allowances made under section 503(b)(2), which incorporates "compensation and
reimbursement awarded under section 330." Id. See also CODE OF PROFESSIONAL
(regulating the division of attorney fees generally).}\]
\[\text{\textsuperscript{27}}\text{ 11 U.S.C. § 328(c) (Supp. III 1979).}\]
\[\text{\textsuperscript{28}}\text{ 11 U.S.C. § 330(a) (Supp. III 1979).}\]
\[\text{\textsuperscript{29}}\text{ 11 U.S.C. § 328(a) (Supp. III 1979).}\]
conditions prove to have been improvident in light of developments unanticipatable at the time of the fixing of such terms and conditions."

Thus, even though the court can change the previously approved terms of employment, the most favorable terms should be urged by counsel at the outset since once approved they can only be upset if proven "improvident" in light of unanticipatable developments. Moreover, this authority of the court to change the terms works two ways: the compensation can be increased as easily as it can be decreased. Usually, employment will be approved on an hourly basis, but the author has approved contingent fee contracts where: (1) they were executed prior to bankruptcy; (2) they were customary for the nature of the work being performed; and (3) they spared the estate expense without producing a recovery from the estate. Employment on a retainer would likely be approved only for a large corporate debtor with continuing legal problems.

1. Expenses

In addition to a fee for services, an attorney is entitled to be reimbursed for his "actual, necessary expenses." These of course must be itemized and should exclude those expenditures customarily regarded as office overhead. To the extent that a lawyer seeks to transfer to his expense claim those items normally considered by the bar as overhead, he invites reduction of his hourly rate. Excluded from overhead are expense items such as long distance telephone charges, copy fees and travel expenses. Typing or other clerical or secretarial services are not reimbursable as allowable expenses to an attorney.

New to the Code is compensation for the services of a "paraprofessional" person. Congress explained that the use of such persons can "reduce the cost of administering bankruptcy cases" and observed that "[i]n nonbankruptcy areas, attorneys are able to charge for a paraprofessional's time on an hourly

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20 Id.
basis, and not include it in overhead." 34 Unless new bankruptcy rules explain what a paraprofessional is, local practice will apparently distinguish a "paraprofessional" from a good legal secretary. It is likely that courts will require some showing that the person whose services are being represented as those of a paraprofessional person either has special training at a recognized paralegal school or has extensive legal experience and performs predominantly creative rather than clerical work. 35 "Creative work" has been described as "gathering raw data and fashioning it into an original document." 36

2. Interim Compensation

Under the former Bankruptcy Act it was not clear that an attorney representing the trustee, a creditors' committee, or a debtor in possession could be paid until the end of the case. Such doubts about the propriety of interim allowances have been removed by § 331 of the new Code. 37 A normal cycle, subject to adjustment by the court, is set at one fee allowance every 120 days. Notwithstanding the power to make interim allowances of attorney fees, courts will be reluctant to allow the payment of such fees in full where there may not be sufficient funds to similarly pay all other administrative priority expenses. 38 In such a case, partial interim allowances likely will be used.

3. Creditor's Counsel

Attorneys representing creditors in bankruptcy cases are not spared from statutory and judicial regulation. The creditor's attorney must give up his employment by a creditor to accept appointment as counsel for the trustee in a chapter 7 liquidation, a chapter 11 rehabilitation case, 39 or for the creditors' committee. 40 It should of course be noted that the disqualification in

representing the creditor continues only for the duration of the court-appointed service. In addition to the limitations placed on his employment, the fee of the creditor's attorney, to the extent that it is expected to be paid out of the value of secured property, is subject to a determination of reasonableness. Security agreements and deeds of trust frequently award attorney fees to the secured creditor in a liquidated amount expressed as a percentage of the indebtedness. While a creditor holding a secured claim is entitled to reasonable attorney fees if such are provided in the security instrument, and if the property is of sufficient value to pay them in addition to the debt, the creditor must be able to support the amount requested as reasonable. The same rules for the determination of reasonableness of fees charged by attorneys to debtors, trustees, debtors in possession, and committees are applicable to those being claimed by the creditor's attorney from the sale of a debtor's collateral.

II. APPLICATION TO BANKRUPTCY OF GENERAL RULES OF PRACTICE

A surprising number of lawyers seem to forget that bankruptcy practice constitutes legal representation in a judicial proceeding and, by so doing, cause themselves needless difficulty. Bankruptcy is the most frequently filed action in the federal courts, exceeding the total of all other civil and criminal matters combined. Attention by counsel to traditional constraints and responsibilities applicable generally in the practice of law will alleviate much of the anguish of bankruptcy practice and will strengthen and protect the attorney's claim for a reasonable fee.

A. Court Appearance

Filing a bankruptcy petition on behalf of a debtor and representing parties in an adversary proceeding or contested matter...
before the bankruptcy judge requires admission to practice before that court. The bankruptcy courts in the two West Virginia federal districts do not require separate admission before the bankruptcy court but recognize the practice privilege granted by the district court. Some bankruptcy courts in other jurisdictions do require admission by their court and most courts have restrictions on the appearance of visiting counsel. An attorney who desires the greatest judicial attention to the merits of the matters being presented should not risk having the court's scarce time occupied with a procedural squabble like qualification to practice before the court.

Not only must counsel be qualified to appear in court, he must also get there. As in any other judicial proceeding, counsel has a duty to appear at hearings and trials on behalf of his client and to continue in his representation until excused. Additionally, if counsel has appeared of record on any document filed with the court, including a petition initiating a bankruptcy case or a complaint filed as an adversary proceeding, leave of court must be secured by counsel for withdrawal from the case. An attorney cannot unilaterally "bail out" of a bankruptcy matter simply because it becomes unattractive and burdensome. He is not bound to render unexpected service at no added charge. However, he cannot make an unreasonable fee demand as a means of getting fired by his client, and thereby disrupt the court's docket.

An attorney in bankruptcy must also remember that his signature on any pleading, including the petition initiating a bankruptcy case, "constitutes a certification by him that he has read the paper; that to the best of his knowledge, information, and belief, there is good ground to support it and that it is not interposed for delay or other improper purpose."

This rule is respect to those estates. For the same period, there were 185,622 civil actions commenced and 31,280 criminal prosecutions instituted in the U.S. District Courts. Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics, at 16, 18, 3, 8 (1982).


adapted from Rule 11 of the Federal Rules of Civil Procedure. Its importance is enlarged in bankruptcy where, on the attorney's signature alone, without judicial involvement and without a security bond being required, the attorney puts into effect one of the most pervasive injunctions known to the law: the automatic stay. The automatic stay is triggered by filing the bankruptcy petition. It is sweeping in scope, unlimited as to the amount of money involved, and of an unpredictable duration. Counsel should not be surprised to have his good faith challenged in the use of this big club.\(^{51}\)

B. Legal Services

The traditional role of a lawyer in gathering facts, advising the client of the legal import of those facts, and representing the client's legal interests growing out of such matters is no less involved in bankruptcy than in other contexts. Inasmuch as the fee of the debtor's attorney in bankruptcy is automatically reviewed by the court, he should be certain that these services are adequately rendered if he expects to collect or retain an adequate fee.

Data collection in bankruptcy matters is a particularly important first duty that the debtor's lawyer must perform. The omission of assets from the bankruptcy schedules can jeopardize the debtor's right to discharge.\(^{62}\) Failure to identify all creditors can cause the debt to be excepted from discharge\(^{53}\) or worse.\(^{54}\) Slipshod collection of data usually requires amendment of the bankruptcy schedules with attendant additional expense to the lawyer and delay of the case. Superficial information about the debtor's assets and liabilities will not enable the attorney to properly advise his client. To do so adequately requires a great deal of background data, e.g., are the assets encumbered and, if so, can the lien be avoided? Will the asset be surrendered to a creditor or must the debtor negotiate a reaffirmation of the indebtedness or redemption of the collateral? Are the principal liabilities excepted from discharge, e.g., taxes or family support obligations or are they vulnerable to a claim of nondischargeability for being fraudulently incurred?

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While the task of basic data collection can be performed by a properly trained secretary, paralegal, or legal assistant who understands the significance of the questions on the bankruptcy form, the attorney must determine the completeness, the significance, and whether clarification of that data is needed. With adequate information at hand, the attorney can advise the debtor of the consequences likely to result from applying both bankruptcy and nonbankruptcy law to his circumstances. Three crucial pieces of advice can then be given: whether the debtor should file bankruptcy, what kind of bankruptcy relief should be sought, and how to deal with creditors. Much of the trouble attorneys encounter in bankruptcy cases is attributable to shortcomings in these three areas. The lawyer who mistakenly brings a client into bankruptcy court by failing to consider alternatives to bankruptcy, who has selected the wrong kind of bankruptcy relief, or who has neglected to advise the debtor how to respond to his creditors, is simply rendering deficient legal services.

One need not be a bankruptcy specialist to avoid the most frequent and noticeable of these inadequacies. They can be avoided by remembering that the attorney is not obliged to file a bankruptcy petition simply because the client said that is what he wanted on the telephone; by weighing the consequences of bankruptcy filing with the client including an understanding about the adverse effect on future creditor relationships and the net relief which will be realized after reaffirmation of debts and facing debts which survive the discharge; by considering whether an extension of time to pay debts in full or paying a part of them is preferable by filing under Chapter 13 instead of under Chapter 7; and by associating more experienced counsel if the case is headed into Chapter 11 and debtor's counsel has never been there or if he finds himself befuddled by a Chapter 13 case.

Finally, the debtor's lawyer should not overlook the representational needs of his client. As in any other judicial proceeding, when the client must be in court his lawyer should be there with him. While the meeting of creditors or discharge hearing may seem routine to the lawyer, they are not routine for the debtor. The debtor who has engaged counsel should not be left to fend for himself. Additionally, the attorney should represent the debtor in negotiations with creditors. This includes not only being a protective buffer to tell creditors "bad news" and the restraints the law places on them, but also includes the affir-
mative duty to make contact to initiate reaffirmation of a debt. Reaffirmation should be pursued where the debtor is delinquent and desires to retain the secured property. Contacting the creditor may save the expense of defending a complaint to lift the automatic stay and spares the debtor loss of the right to have a reaffirmation agreement approved.55

C. Reasonable Fee

After quality services are rendered and all the pitfalls peculiar to bankruptcy are avoided, the attorney need only be prepared to justify the reasonableness of his fee as he would for his other professional services. The Bankruptcy Code expresses the factors which the court must use for the determination of a reasonable attorney fee in terms which are familiar to the subject.56 The Code provides:

[T]he court may award ... to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney—

(1) reasonable compensation for actual necessary services rendered ... based on time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title. ...57

These factors are superimposed on the agreement under which the services were rendered and the court compares the results. As discussed above, the court "may allow compensation different from the compensation provided ... [under the agreement if it proves] to have been improvident in light of developments unanticipatable at the time of the fixing of such terms and conditions."58

Usually in a liquidation case the consumer debtor and his attorney will have agreed upon a fixed sum with an understanding about extra services. In a business case the debtor's attorney has probably received an advance on fees and has quoted an hourly rate. In these two instances the determination of a reasonable fee is done by the court de novo.

55 A reaffirmation agreement to be approved by the court must be executed before the discharge is entered. 11 U.S.C. § 524(c)(1) (Supp. III 1979).
Where court appointment is required, hourly rates may have been specified in the court's order. In this case, the court has approved the agreement in advance of services and the sole determination is whether the terms of that agreement were improvident. The fee can of course be adjusted for the results achieved if they were either good or bad beyond anticipation.

Though every attorney's fee is subject to review, bankruptcy courts must take administrative shortcuts in order to avoid the kind of choked dockets common to all courts. The United States Bankruptcy Court for the Southern District of West Virginia does not require detailed justification of fees charged to consumer debtors if there has been no objection raised to the fee, if all required services have been rendered to the debtors, and if the fee does not exceed a specified amount. Those amounts currently are $400.00 for a chapter 7 liquidation with one petitioner and $450.00 for joint petitioners. For a chapter 13 case the amount is $500.00 for a single or joint petition. These are neither suggested nor customary fees but are simply guideline amounts which the court, drawing upon experience with a vast number of cases, has found to be a reasonable allowance in the majority of cases. When the court finds that the fee exceeds the reasonable value of the services, it may order the excessive portion of the fee cancelled or paid to the debtor, the trustee or whoever made the payment. Where a reasonable fee must be determined by the court, whether from the court's waiver limits or to test the agreement made by the parties, the Code factors are invoked.

1. Time

Time is the universally recognized factor in determining a reasonable attorney fee. The attorney should express the time consumed by the case in more detail than simply a gross number of hours. To add credibility to his claim and aid in the valuation of his time, an itemized daily log of specific services rendered, the substance of each service and the amount of time spent on each item should be filed. The entry should not only describe the nature of the service, such as telephone call, conference with John Doe, or research, but should indicate some substance of that effort: "Call to Atty. Jones offering compromise of Westinghouse $50,000 claim for $25,000."

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Time should be recorded using fractions of an hour. Entries expressed in segments of even hours appear estimated, not measured, and detract from the credibility of the record. Moreover, by recording too generous a chunk of time for a simple task, the attorney devalues the level of his expertise. Expression of hourly segments in tenths of an hour, that is 0.2 = 12 minutes, is more precise and is easier to calculate than is expression in fractions. If fractions are used, it is suggested that rounding off should be to no larger segment than the nearest quarter hour. Some firms now use computer-generated records which reflect commendable attention to the responsibility for accurate and contemporaneous documentation. A court will likely accept such records without retyping if they are readable and understandable.

Further, the attorney or paraprofessional person rendering each item of service should be identified and the total time spent by each person should be applied against the claimed rate at the foot of the bill. The court can then examine the entries comprising that time to determine whether a person with an appropriate skill and payment level has rendered the service. For example, services that could be performed by a paraprofessional person cannot be compensated at the rate of the most highly skilled attorney working on the case. Accordingly, for the highest hourly rates to be awarded by the court, counsel will have to demonstrate that associates or paraprofessionals were used for tasks for which that level of skill was adequate. Conversely, the lawyer who must do everything on a case cannot expect to receive an optimum hourly rate for everything he does.\(^6^1\)

2. Nature

The Code next instructs a consideration of the nature of the services in determining reasonable compensation for an attorney. This refers to the nature of the bankruptcy case, the

\(^6^1\) See Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088 (5th Cir. 1980). The Fifth Circuit is the source of other help on fee matters. See the following additional decisions under the former Bankruptcy Act, the standards of which will likely be perpetuated in that Circuit under the new Code: Neville v. Eufaula Bank & Trust Co. (In re U.S. Golf Corp.), 639 F.2d 1197 (5th Cir. 1981); American Benefit Life Ins. Co. v. Baddock (In re First Colonial Corp. of America), 544 F.2d 1291 (5th Cir.), cert. denied, 421 U.S. 904 (1977). These cases noted twelve factors for fee determinations first announced in the oft-cited civil rights case of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).
kind of services required and the subject matter involved. Some services by nature are more arduous and require greater skill. These merit higher compensation. Representing a chapter 11 debtor, for example, ordinarily requires the highest level of bankruptcy and business knowledge and accordingly should command a greater fee than would a chapter 13 case. A chapter 13 adjustment, however, is usually more complex than a chapter 7 liquidation and, by its nature, deserves a fee higher than that allowed for an ordinary liquidation. The more complex the factual and legal problems, the higher attorneys deserved to be recompensed.

Some kinds of particular legal services command higher fees than others. Litigating and briefing novel and complex legal questions will usually be recognized as warranting a higher fee than office consultations and routine negotiations. Unopposed efforts do not merit the same remuneration as those efforts which are skillfully and vigorously contested. That is not to say that preparation and advocacy so overwhelming as to melt opposition and achieve a settlement by office conferences should go unrecognized.

Certain subject matter demands more knowledge, experience and skill than does general legal practice. The “avoiding powers,” “adequate protection,” and “cramdown” of creditor and equity security holder interests represent subjects unique to bankruptcy practice; the few who understand these subjects and the fewer who astutely use them deserve commensurately greater reward. Areas of nonbankruptcy expertise also command special consideration by the court. Tax matters, lien priorities, mineral interest, inter- and intra-corporate relationships and liabilities are a few of the subject areas that commonly call for greater expertise, and thus, higher fees. By summarizing services according to their nature, an attorney can aid the court in valuing those services at rates which reflect the premium the market place usually accords them. Correspondingly, creditors, whose recovery is usually diminished by a fee allowance, are assured that a premium price was paid only for premium work.

3. Extent

The third factor to be considered in determining reasonable compensation according to the mandate of section 330(a) is the extent of the services. This compels a review of the depth of
time and talent required to properly represent the client’s interests. Special consideration is merited when the bankruptcy engagement precludes other employment by the attorney. If the urgency of the bankruptcy matters means that counsel must forgo other business, or if other remunerative employment in the case is lost because it would constitute a conflict of interest, a new dimension of compensability is added which the court will frequently recognize.

Other current employment may not be the only loss suffered by the attorney in a bankruptcy matter. Faithful and vigorous representation of the client’s interest may engender ill will for the attorney and result in the loss of future clients. The "undesirability" of the case or of counsel’s position in it is noteworthy in determining a reasonable fee.

The extent of services is also measured by the skill of counsel. While worthy of reward by the court, the skill of counsel is not always apparent. On occasion it may be readily perceived by the court. Sometimes the court can derive the extent of services from time records, but most often counsel will have to explain it to the court in an unabashed manner. The court of course can distinguish skillful advocacy from lesser efforts by observation of courtroom performance or by the quality of briefs. Moreover, skill can be inferred from time records which permit the comparison of the fee applicant’s time for given tasks with the amount of time commonly recorded by others. A court recognizes, however, that the ultimate in skill may never be displayed in a case tried before it or in briefs filed to persuade it. The greatest skill may have eliminated the need for either a trial or briefs. This is what counsel must convey to the court by the narrative portion of a fee application. Counsel ought to realize that reliance merely on the file of the case and on the court’s total familiarity with it is an unsteady foundation on which to base counsel’s economic fortunes. Counsel should call to the attention of the court that which is documented in the file as well as what is unseen by the judge. It is not unseemly to aid the court by reciting demands the case placed on counsel and the skill he used in meeting them.\(^2\)

\(^2\) *In re Warrior Drilling & Eng’g Co., Inc.*, 9 Bankr. 841 (Bankr. N.D. Ala. 1981), contains an excellent discussion about the extent of counsel’s services in a chapter 11 reorganization.
4. Value

As the fourth factor in determining a reasonable fee, "value" evokes consideration of the results achieved by counsel as well as the personal qualifications counsel brings to the case. The expertise, reputation, and ability of the attorney add value to the result simply from the expectation that those personal qualities will produce the best result possible. One who has considerable experience with matters of the type the case concerns, who has a local, regional, or national reputation for expertise in bankruptcy matters, or whose ability has been recognized by his peers, should be granted the standing he has earned unless his efforts are noticeably and uncharacteristically deficient. Ordinarily, such a qualified person will achieve more in less time than a general practitioner and, though a high hourly rate may be charged, the client will realize more than with many more hours of lesser skilled service.

It is easier to estimate the value of results than the quality of the attorney. With some reflection and attention to the matter, counsel may be able to describe the increased recovery achieved through his services or the diminished liability those efforts produced. The adequate fee application recites this in narrative form. Similarly, counsel should name any significant bankruptcy cases in which he has participated, any published works he has written, any speaking engagements related to the services rendered, and any peer recognition such as bar responsibility, professional association, or bankruptcy commission membership. Attorneys who have not achieved these honors should nevertheless provide the court an opportunity to reward the abilities brought to the case by revealing their investment in continuing legal education through seminars they have attended.

5. Cost of Comparable Non-Bankruptcy Services

The Bankruptcy Code injects a new element into fee determinations. The court is directed to award compensation for bankruptcy services at the same level as earned in comparable non-bankruptcy legal services. Any obligation of the court to achieve economy of administration at the expense of attorneys is discarded. It does not mean, however, that poor quality services will

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be highly compensated. The provision dictates comparability, not superiority. The attorney who walks into court unfamiliar with the file or his client's circumstances is providing little more than escort services. Comparability does not require that the lawyer's companionship at a hearing or the clerical accommodation of his office should be rewarded as legal services. Nor does comparability mean that counsel competent in other fields of the law will receive their highest hourly rate when they venture into bankruptcy court. If they render poor or mediocre bankruptcy services, they should be compensated accordingly, for in the last instance the court should achieve comparability with similar quality bankruptcy services. The Bankruptcy Code does not instruct the court to make bankruptcy practice remunerative for all who undertake it.

III. SUMMARY

The nearly century-old regulation of attorney fees is continued under the new Bankruptcy Code. Eliminated, however, is any duty of the court to achieve economy of administration and conservation of the estate by reducing attorney fees. This change in the law will produce no bonanza for attorneys who fail to render adequate legal services or who ignore the general principles of practice applicable to their nonbankruptcy work. Nor will it offset violation of specific rules applicable to fee allowances in bankruptcy cases. The statutory mandate to allow fees at levels earned for comparable nonbankruptcy work, however, should mean that courts in the future, considering the complexities and the demands of bankruptcy practice, will be as generous in fee allowances as is the market for similar legal services.

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