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BANKRUPTCY FEE APPLICATIONS: COMPENSABLE SERVICE OR COST OF DOING BUSINESS?

INTRODUCTION

When submitting a fee application to a bankruptcy court, an attorney[1] must provide a detailed statement of services rendered, time expended and amounts requested.[2] A detailed statement is required because bankruptcy courts may award only reasonable compensation[3] and must therefore make a factual determination as to whether the fees requested are reasonable.[4]

The fee applicant bears the burden of proving entitlement to a requested fee;[5] the court, not the party at whose behest the services were performed, determines whether services rendered are compensable.[6] Thus, an attorney who does not intend to serve as a volunteer must satisfy this burden.[7]

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1. Section 330 also provides for the compensation of other professionals performing services in a bankruptcy case, such as accountants, auctioneers and "other professional persons." *See* 11 U.S.C. §§ 327, 330, 1103 (1988).

2. *See* Fed. R. Bankr. P. 2016(a). Rule 2016(a) is designed to enable the court to monitor compliance with the compensation provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1988), and Bankruptcy Rules. *See* 2 L. King, K. Klee, R. Levin, H. Miller, P. Murphy, Collier on Bankruptcy ¶ 330.03, at 330-6 to -7 (15th ed. 1990) [hereinafter 2 *Collier on Bankruptcy*].

3. *See* 11 U.S.C. §§ 330(a)(1), 503(b)(4) (1988); *In re* Erewhon, Inc., 21 Bankr. 79, 90 (Bankr. D. Mass. 1982).

4. The issues raised by section 330—whether "actual, necessary services" have been performed and whether amounts requested as compensation are "reasonable"—are factual and arise whenever the court reviews a fee application. *See In re* Pettibone Corp., 74 Bankr. 293, 299 (Bankr. N.D. Ill. 1987). Indeed, bankruptcy courts have "an affirmative duty to make an independent evaluation of reasonableness of all professional fees notwithstanding objections made by any party." *In re* Bilgutay, 108 Bankr. 333, 336 n.2 (Bankr. M.D. Fla. 1989) (citing *In re* Ross, 88 Bankr. 471, 474 (Bankr. M.D. Ga. 1988)); *In re* Wildman, 72 Bankr. 700, 705 (Bankr. N.D. Ill. 1987).

5. *See Pettibone*, 74 Bankr. at 299; *In re* Affinito & Son, Inc., 63 Bankr. 495, 497 (Bankr. W.D. Pa. 1986); *In re* Crutcher Transfer Line, Inc., 20 Bankr. 705, 710 (Bankr. W.D. Ky. 1982); *In re* Hamilton Hardware Co., 11 Bankr. 326, 329 (Bankr. E.D. Mich. 1981); *In re* Aldersgate Found., Inc., 10 Bankr. 910, 918 (Bankr. M.D. Fla. 1981).

6. With the benefit of hindsight, the court uses its "experience, observations and expertise" to determine the necessity of particular services. *See Pettibone*, 74 Bankr. at 308 (citing *In re* Liberal Market, Inc., 24 Bankr. 653 (Bankr. S.D. Ohio 1982)).

7. There is little dispute that lack of specificity in a fee application may jeopardize a fee award. *See In re* Fulton, 80 Bankr. 1009, 1011 (Bankr. D. Neb. 1988); *In re* Lock Shoppe, Inc., 67 Bankr. 74, 75 (Bankr. E.D. Pa. 1986); *Affinito & Son*, 63 Bankr. at 498; *In re* Anderson, 62 Bankr. 206, 207 (Bankr. D. Haw. 1986) (citing *In re* Horn & Hardart Baking Co., 30 Bankr. 938, 944 (Bankr. E.D. Pa. 1983)); *In re* Esar Ventures, 62 Bankr. 204, 205-06 (Bankr. D. Hawaii 1986); *In re* Cumberland Bolt & Screw, 44 Bankr. 915, 916-17 (M.D. Tenn. 1984); Cohen & Thiros v. Keen Enters., 44 Bankr. 570, 573-74 (N.D. Ind. 1984); *In re* Nation/Ruskin, Inc., 22 Bankr. 207, 209 (Bankr. E.D. Pa. 1982); *In re* Garland Corp., 8 Bankr. 826, 835 (Bankr. D. Mass. 1981); *see also* Butenas, *Establishing Attorney's Fees Under the New Bankruptcy Code*, 37 Bus. Law. 77, 83 (1981) (reprinted in 87 Com. L.J. 237 (1982)) (attorneys advised to be prepared to justify every hour because widespread failure of documentation will defeat application for fee award). Moreover, on its face, Bankruptcy Rule 2016(a) requires professionals applying for com-

Because preparing a fee application can be time-consuming, it is natural that an attorney ask himself, and then the court, whether the time spent doing so is compensable as an "actual, necessary service." This Note addresses whether time devoted to fee applications—in preparing, presenting and defending them—is properly compensable from the bankruptcy estate under section 330(a)(1) of the Bankruptcy Code.

There are several schools of thought on this issue.[8] Two federal appeals courts have held that time devoted to bankruptcy fee applications is compensable.[9] Federal district and bankruptcy courts in other circuits are divided. While some courts simply grant[10] or deny[11] such compensa-

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pensation to file a "detailed statement" of services rendered and time expended thereon. *See* Fed. R. Bankr. P. 2016(a). *But see* Continental Ill. Nat'l Bank & Trust Co. v. Charles N. Wooten, Ltd. (*In re* Evangeline Ref. Co.), 890 F.2d 1312, 1326 (5th Cir. 1989) (fee applications failing to reach an "ideal level of completeness" may suffice) (quoting Lawler v. Teofan (*In re* Lawler), 807 F.2d 1207, 1212 (5th Cir. 1987)); *In re* Best Pack Seafood, Inc., 21 Bankr. 852, 854 (Bankr. D. Me. 1982) ("Absence of detail regarding the service performed does not absolve the court from evaluating the service [sic] it may proceed utilizing the information submitted and its knowledge of the case.") (citing *In re* Hamilton Distribs., Inc., 440 F.2d 1178, 1180 (7th Cir. 1971); *In re* McAuley Textile Corp., 11 Bankr. 646, 648 (Bankr. D. Me. 1981); *In re* Leader Int'l Indus., 2 Bankr. Ct. Dec. (CRR) 588 (Bankr. E.D. Mich. 1976)).

8. *See Attorneys May Be Compensated for Time Spent in the Preparation, Presentation and Litigation of Fee Applications*, Att'y Fee Awards Rep./Bankr. Fee Section, No. 4, Aug. 1985, at 25, 27; *infra* notes 8-10, 60-65 and accompanying text; *see also* Note, *Preemption of State Law Notice Provisions Governing the Recovery of Attorneys' Fees by Section 506(b) of the Bankruptcy Code*, 1986 Duke L. J. 176, 193 n.98 (1986) (collecting cases and asserting there is no basis in law for denying compensation for fee application preparation).

9. *See In re* Nucorp Energy, Inc., 764 F.2d 655, 662 (9th Cir. 1985); *In re* Braswell Motor Freight Lines, Inc., 630 F.2d 348, 351 (5th Cir. 1980); Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088, 1093 (5th Cir. 1980) (per curiam).

10. *See, e.g.*, *In re* Pontiac Hotel Assocs., 92 Bankr. 715, 717 (E.D. Mich. 1988) (bankruptcy court erred in failing to award attorney compensation for time spent on fee application); Nunley v. Jessee, 92 Bankr. 152, 153-54 (W.D. Va. 1988) (attorney not precluded from recovery of cost of fee litigation on theory that nothing of value was contributed to debtor's estate); *In re* S.T.N. Enters., 70 Bankr. 823, 835 (Bankr. D. Vt. 1987) (preparation of fee application is compensable "[b]ecause of the meticulous record-keeping requirements imposed by the Court"); *In re* D.C. Sullivan & Co., 69 Bankr. 212, 217 (Bankr. D. Mass. 1986) (time spent on fee application is generally compensable but amount of time devoted in case was unreasonable); *In re* Baldwin-United Corp., 45 Bankr. 381, 382 (Bankr. S.D. Ohio 1984) (fee application preparation is compensable with expectation that time otherwise unnecessarily spent on case will be discounted).

11. *See, e.g.*, *In re* The Vogue, 92 Bankr. 717, 720-26 (Bankr. E.D. Mich. 1988) (attorneys for debtor in possession not entitled to compensation for fee application preparation); *In re* Holthoff, 55 Bankr. 36, 42 (Bankr. E.D. Ark. 1985) ("Time charged for letters, conferences, agreements and phone calls regarding retainers and fee applications is not compensable"); *In re* Wilson Foods Corp., 36 Bankr. 317, 323 (Bankr. W.D. Okla. 1984) (time spent preparing fee application is not compensable and is properly absorbed as cost of doing business); *In re* Hotel Assocs., 28 Bankr. 332, 333-34 (Bankr. E.D. Pa. 1983) (trustee's counsel not entitled to compensation for time spent preparing fee application); *In re* Liberal Market, Inc., 24 Bankr. 653, 661 (Bankr. S.D. Ohio 1982) (computation of fees is cost of doing business and is not chargeable to debtor's estate); *In re* Erewhon, Inc., 21 Bankr. 79, 89 (Bankr. D. Mass. 1982) (counsel for secured creditor not entitled to recover for time spent justifying request for an excessive fee).

tion, several opinions have advanced various compromise approaches,[12] indicating a general uneasiness towards awarding compensation, but nevertheless a compulsion to award something, albeit at reduced rates or only in special circumstances.

Part I of this Note provides background on the court-awarded compensation scheme in the Bankruptcy Code. It also discusses the legislative history and congressional purpose behind the change made by section 330 of the 1978 Bankruptcy Reform Act to the previous standard for professional compensation. Part II analyzes the text of the statute and critically discusses its application by the courts. More specifically, the current debate is criticized for failing to apply the plain language of the statute to the issue. The Note concludes that a proper application of section 330(a)(1) should, in most cases, preclude compensation for fee application efforts, or substantially restrict amounts actually awarded, even if fee application preparation is properly considered an "actual, necessary service." Furthermore, the Note contends that compensating attorneys for time devoted to obtaining their fees violates the traditional American rule of attorney fees, provides the wrong incentives to lawyers, and helps foster a negative public image of bankruptcy attorneys that could ultimately frustrate the congressional purpose behind the change in compensation standards made by the 1978 Bankruptcy Reform Act.

I. ATTORNEY COMPENSATION UNDER THE BANKRUPTCY CODE—OPERATION, HISTORY & PURPOSE

A. *Court-Awarded Compensation for Bankruptcy Attorneys*

As an exception to the "American Rule" of attorneys' fees[13]—that a litigant bear his own costs, win or lose—a bankruptcy attorney's fees may be paid out of a bankruptcy estate pursuant to statutory authorization.[14] This exception is provided under section 330 of the Bankruptcy Code.[15] It authorizes the bankruptcy court to award "reasonable compensation" to certain professionals, based on five factors,[16] subject to

12. *See infra* notes 61-66 and accompanying text.

13. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (re-stating "American Rule" and holding exceptions are properly made only by statute); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (stating traditional American rule); Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. Marshall L. Rev. 331, 335 n.13 (1980) (discussing traditional American rule and its rationale).

14. *See* Lieb, *Sections 330, 331, 503(b), 506(b)—Attorney Compensation*, 1987 Ann. Surv. Bankr. L. 427, 427. The Bankruptcy Code is one of approximately 200 federal statutes carving out an exception to the "American Rule." *See id.*

15. *See* 11 U.S.C. § 330 (1988). However, because the trustee represents the bankruptcy estate, *see* 11 U.S.C. § 323(a), an award of fees from the estate for the trustee's counsel does not constitute "fee shifting" that would be contrary to the "American Rule" absent statutory authorization.

16. *See infra* notes 49-53 and accompanying text.

compliance with other sections of the Code.[17]

Before an attorney can qualify for compensation under the Code, however, the court must approve of his employment by the trustee, the debtor, or creditors' and equity security holders' committees.[18] In addition, notice[19] and a hearing[20] is required before compensation can be

17. *See* 11 U.S.C. § 330(a) (1988). The limiting sections are: section 326, placing a cap on the amount of compensation to be awarded a trustee, pegged to amounts ultimately distributed to creditors; section 328, permitting compensation agreements between parties and professional persons, subject to review and ultimate approval by the court; and section 329, requiring a debtor's attorney to file a statement with the court of compensation agreements made with the debtor within one year prior to the filing of the petition, subject to cancellation by the court if found to be unreasonable. Thus, the Code's compensation scheme clearly envisions a large degree of court involvement in the employment and compensation of bankruptcy professionals, as has traditionally been the case. *See id.* §§ 326, 328, 329.

18. *See* 11 U.S.C. § 327(a) (1988) (employment of professionals by bankruptcy trustee); *id.* § 1103 (employment of professionals by official creditors' and equity security holders' committees); Fed. R. Bankr. P. 2014 (requiring application for order of approval of employment under sections 327 and 1103); *see also* Butenas, *supra* note 7, at 81 ("An attorney has no right to compensation without prior court approval of . . . appointment as counsel to the trustee, to the creditors' committee in a reorganization, or to a debtor in possession in a reorganization.") (footnotes omitted).

Prior court approval, however, may not be an absolute prerequisite to receiving compensation from the estate; services that have not been pre-approved may be compensable on equitable grounds. *See* Windsor Communications Group v. Rogers (*In re* Windsor Communications Group), 68 Bankr. 1007, 1013, 1016 (E.D. Pa. 1986); *cf. In re* Grynberg, 6 Collier Bankr. Cas. 2d (MB) 541, 543 (Bankr. D. Colo. 1982) (despite absence of specific statutory authorization, reimbursement of expenses of committee members allowed under section 503(b)(3)(D) because of " 'substantial contribution' " to case). *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.04[2], at 330-18 to -21 n.11 (discussing split of authority on whether failure to obtain prior court approval of employment can be cured by *nunc pro tunc* order). *But see In re* Garland Corp., 8 Bankr. 826, 828 (Bankr. D. Mass. 1981) (prior court approval of services is "basic condition precedent to any fee application").

Further, section 503(b) may permit reasonable compensation for attorney services to an unofficial creditors' or equity security holders' committee "in making a substantial contribution" to a case under chapters 9 or 11. *See* 11 U.S.C. § 503(b)(3)(D), 503(b)(4) (1988). In practice, this section is understood as authorizing compensation for attorneys who have made "substantial contributions" to cases under chapters 9 or 11 (generally serving creditors)—as opposed to merely performing "actual, necessary services" under section 330—but who have worked without a court order of employment. *See* Lieb, *supra* note 13, at 427-28. *But see In re* Carolina Sales Corp., 45 Bankr. 750, 753 (Bankr. E.D.N.C. 1985) (section 503(b) does not provide alternative basis for compensation where professional's employment has not been pre-approved under section 327(a)).

The vagaries and conflicting interpretations of the Code's requirements of court-ordered employment and the requirements of the "substantial contribution" test under section 503(b), however, are beyond the scope of this Note. For more on the unsettled law of section 503(b) see Lieb, *Sections 329-331—Attorney Compensation*, 1986 Ann. Surv. Bankr. L. 329, 329-35.

19. The Bankruptcy Rules require twenty days notice by mail to parties in interest of hearings on fee applications. *See* Fed. R. Bankr. P. 2002(a)(7). The required notice "shall identify the applicant and the amounts requested." Fed. R. Bankr. P. 2002(c)(2).

The court may order that only committees, creditors and equity security holders, who formally request notice of fee applications by serving such request on the trustee or the debtor in possession and filing it with the clerk, receive notice. *See* Fed. R. Bankr. P. 2002(i).

awarded, thus allowing all interested parties an opportunity to object to the requested fee award.

B. *The Legislative History and Purpose of Section 330(a)*

Prior to the Bankruptcy Reform Act of 1978, which established the Bankruptcy Code,[21] the 1898 Bankruptcy Act and its various amendments comprised the operative bankruptcy law.[22] Under the 1898 Act, attorney compensation was governed by former Bankruptcy Rule 219,[23] which allowed awards of reasonable compensation, giving "due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors."[24]

Although three other factors in Rule 219 were to be considered in making an award of compensation, the fourth factor—"conservation of the estate"—most frequently resulted in severe limitations on an attorney's ultimate fee award.[25] This so-called "spirit of economy" eventually reached the dizzying point of arbitrary compensation awards based on

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20. *See* 11 U.S.C. §§ 330(a), 331, and 503(b) (1988).

A hearing will not be necessary if a party in interest does not timely request one. *See* 11 U.S.C. § 102(1)(B)(i) (1988). *See generally* 2 *Collier on Bankruptcy, supra* note 1, ¶ 330.03[2], at 330-10 to -11 & n.11 (discussing notice and hearing requirements). Proper notice, however, is always required. *See* 11 U.S.C. § 102(1)(B) (1988).

Some courts, however, have held that a full evidentiary hearing is required if requested by a fee applicant, and that a court's failure to hold one is an abuse of discretion. *See, e.g.*, American Benefit Life Ins. Co. v. Baddock (*In re* First Colonial Corp. of Am.), 544 F.2d 1291, 1300 (5th Cir.) (failure to require documentation of requested fee, failure to hold evidentiary hearing, and failure to justify fee award with "findings and reasons" constitutes abuse of discretion), *cert. denied*, 431 U.S. 904 (1977); *In re* Ralph Marcantoni & Sons, Inc., 62 Bankr. 245, 248 (D. Md. 1986) (opportunity to introduce testimony is "important component" of due process right to be heard at fee application hearing); *In re* Foster Iron Works, 3 Bankr. 715, 718 (S.D. Tex. 1980) (court erred by refusing to conduct requested evidentiary hearing on application for fees).

21. (Bankruptcy Reform) Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)).

22. *See generally* Klee, *Legislative History of the New Bankruptcy Code*, 28 De Paul L. Rev. 941, 941 n.1 (1979) (reprinted in 54 Am. Bankr. L.J. 275, 275 n.1 (1980)) (describing four earlier bankruptcy acts).

23. *See* 2 *Collier on Bankruptcy, supra* note 1, ¶330.02, at 330-3 to -4; Anderson & Miller, *New Rules for Compensation in Bankruptcy Proceedings*, 86 Com. L.J. 79, 80 (1981); Butenas, *supra* note 7, at 77.

24. Fed. R. Bankr. P. 219(c)(1), 11 U.S.C. app. (1976); *see also* 2 *Collier on Bankruptcy, supra* note 1, ¶ 330.02, at 330-3 to -5 (discussing compensation under Rule 219); Butenas, *supra* note 7, at 77-78 (same).

25. *See, e.g.*, Massachusetts Mutual Life Ins. Co. v. Brock, 405 F.2d 429, 432 (5th Cir. 1968) (reversing fee award because bankruptcy court failed to consider "the public interest . . . inherent in bankruptcy matters," even though time spent on case, complexity of case and results obtained had been duly considered), *cert. denied*, 395 U.S. 906 (1969); *see also* Anderson & Miller, *supra* note 23, at 81 (rule of conservation may have been developed to set aside any notion that bankruptcy was intended "for the relief of attorneys" rather than for the relief of debtors (quoting *In re* Orbit Liquor Store, 439 F.2d 1351, 1353 (5th Cir. 1971))); Butenas, *supra* note 7, at 77 ("Conservation of the estate became the predominant factor").

criteria such as a district court judge's salary.[26]

The doctrine of *Randolph v. Scruggs*,[27] which limited compensable services to those providing some benefit to the estate and its creditors, was an additional obstacle to compensation.[28] In addition, the absence of a provision for interim compensation also restricted compensation under the Act by often forcing attorneys to finance the cost of a bankruptcy case for years before receiving any compensation for their efforts.[29]

In response to these difficulties,[30] section 330 was included in the Bankruptcy Reform Act of 1978[31] as part of a broader restructuring of the bankruptcy laws. Section 330 significantly differed in one respect from the standard of compensation in Rule 219; it omitted reference to "conservation of the estate and the interests of creditors" and substituted "the cost of comparable services" in non-bankruptcy matters.[32] The

26. *See* York Int'l Building, Inc. v. Chaney (*In re* York Int'l Building, Inc.), 527 F.2d 1061, 1073 (9th Cir. 1975); *accord* Moshein v. Beverly Crest Convalescent Hosp. (*In re* Beverly Crest Convalescent Hosp.), 548 F.2d 817, 820-21 (9th Cir. 1977); Official Creditors' Comm. of Fox Markets, Inc. v. Ely, 337 F.2d 461, 465-66 (9th Cir. 1964), *cert. denied*, 380 U.S. 978 (1965); Anderson & Miller, *supra* note 23, at 81; Butenas, *supra* note 7, at 77-78.

27. 190 U.S. 533 (1903).

28. *See id.* at 539; *see also* Taylor v. Des Moines Sav. & Loan Ass'n (*In re* Urban Am. Dev. Co.), 564 F.2d 808, 810 (8th Cir. 1977) (per curiam) (benefit to estate relevant but not sole factor); U.S.A. Motel Corp. v. Danning (*In re* U.S.A. Motel Corp.), 521 F.2d 117, 119 (9th Cir. 1975) (debtor's attorney should not be compensated in unsuccessful reorganization as he would be in successful one).

Under the Code, courts have held "benefit to the estate" to be a factor in determining the reasonableness of a fee request. *See In re* Global Int'l Airways Corp., 18 Collier Bankr. Cas. 2d (MB) 310, 313 (Bankr. W.D. Mo. 1988); *In re* Moore, [1985-1986 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 70,965, at 88,447 (Bankr. W.D. Okla. 1986); *In re* Neibart Assocs. Press, Inc., 58 Bankr. 212, 215 (Bankr. E.D.N.Y. 1985); *In re* Spencer, 48 Bankr. 168, 171 (Bankr. E.D.N.C. 1985); *In re* Duque, 48 Bankr. 965, 975 (S.D. Fla. 1984); *In re* Zweig, 35 Bankr. 37, 37-38 (Bankr. N.D. Ga. 1983); *see also In re* Rhoten, 44 Bankr. 741, 743 (Bankr. M.D. Tenn. 1984) (accepted view is that only services of debtor's attorney that benefit estate, and not debtor personally, are compensable); *In re* Garnas, 40 Bankr. 140, 141-42 (Bankr. D. N.D. 1984) (given purpose of chapter 11, "value" to debtor is major factor). *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[d], at 330-40 to -48 (describing benefit-to-the-estate doctrine and its current status under the Code).

29. *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 331.01, at 331-1 to -5 (describing evolution of "judicially created law" of allowances of interim compensation).

Commentators, however, point out that under the Act, case law evolved to allow awards of interim compensation on equitable grounds. *See id.*; Anderson & Miller, *supra* note 23, at 82 (citing *In re* Imperial "400" Nat'l, Inc., 324 F. Supp. 582, 585 (D.N.J. 1971)). This type of adjustment was also made to the benefit-to-the-estate requirement, *see supra* note 27, by allowing compensation for certain chores that produced no tangible benefit to the estate, but which were nonetheless necessary to its administration. *See* Anderson & Miller, *supra* note 23, at 81.

30. *See generally* Anderson & Miller, *supra* note 23, at 80-85 (describing problems engendered by compensation provisions under the Act and legislative response).

31. (Bankruptcy Reform) Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). *See generally* Klee, *supra* note 21, at 942-60 (describing ten-year history of Code and providing useful nine-step approach to using legislative history to interpret its provisions).

32. *Compare* 11 U.S.C. § 330(a) (1988) *with* Fed. R. Bankr. P. 219, 11 U.S.C. app.

clearly stated purpose behind the change in the compensation standard was to encourage specialists to enter and continue practicing in the bankruptcy field instead of seeking higher fees in other areas of the law.[33]

While courts and commentators agree that this was the general purpose behind section 330(a), inconsistent House and Senate versions of section 330[34] have caused some confusion regarding the final disposition of the "spirit of economy."[35] Ultimately, Congress adopted the House version of section 330, and explicitly rejected inconsistent language in the Senate version[36] that indicated that some notion of economy was to remain in compensation determinations.[37]

(1976). *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[2][a], at 330-27 ("only significant departure from prior law . . . is the abandonment of the strict principle of economy").

33. *See* H.R. Rep. No. 595, 95th Cong., 2d Sess., ch. 3, at 329-30, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6286 [hereinafter *House Report No. 595*].

Courts uniformly agree that this is the purpose of section 330 and frequently quote the House Report verbatim. *See In re* Nucorp Energy, Inc., 764 F.2d 655, 658 (9th Cir. 1985); *In re* Casco Bay Lines, Inc., 25 Bankr. 747, 754 (Bankr. 1st Cir. 1982); *In re* The Vogue, 92 Bankr. 717, 722-23 n.7 (Bankr. E.D. Mich. 1988); *In re* Four Star Terminals, Inc., 42 Bankr. 419, 429 (Bankr. D. Alaska 1984).

Commentators concur. *See, e.g.*, Anderson & Miller, *supra* note 23, at 85 ("One might surmise that Congress understood and legislatively adopted the premise that 'you get what you pay for.' "); Butenas, *supra* note 7, at 78-79 ("The rationale for the change is . . . to encourage successful administration of estates by attracting bankruptcy specialists of high quality."); 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[2][a], at 330-28 to -29 ("spirit of economy has been abandoned under the Code in favor of the new policy that [bankruptcy attorneys] receive compensation on parity with that received by attorneys performing services in comparable situations.").

Congress made an insignificant "stylistic" change to section 330(a) by section 433 of the Bankruptcy Amendments and Federal Judgeship Act of 1984. *See In re* Four Star Terminals, Inc., 42 Bankr. 419, 428 n.4 (Bankr. D. Alaska 1984) (citing S. Rep. No. 65, 98th Cong. 1st Sess. 75, (1983)).

34. *Compare* 11 U.S.C. § 330(a)(1) (1988) ("and the cost of comparable services") *with* S. 2266 § 330(a)(1) ("and *considering* the cost of comparable services" (emphasis added)), *reprinted in* 9 Bankr. Serv. (L. Ed.) § 83:31 app. 311, 349 (1979). Although the language difference between the two versions is only subtle, the underlying substantive difference is highlighted by their conflicting reports. *Compare House Report No. 595*, *supra* note 33, at 6286 (section 330 overrules notions of economy) *and* 124 Cong. Rec. 32,394-395 (1978) (same) (remarks of Rep. Edwards) *and* 124 Cong. Rec. 33,994 (1978) (identical remarks of Sen. DeConcini) *with* S. Rep. No. 989, 95th Cong., 2d Sess., 40-41 (favoring retention of some notion of economy in compensation determinations), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5826-27 [hereinafter *Senate Report No. 989*].

35. *Compare In re* Nucorp Energy, 764 F.2d 655, 658 (9th Cir. 1985) (section 330 intended to overrule principles of economy) *with* Yermakov v. Fitzsimmons (*In re* Yermakov) 718 F.2d 1465, 1470 (9th Cir. 1983) (" 'economy in administration is the basic objective' " (quoting *Senate Report No. 989*, *supra* note 34, at 5826)).

36. *See* 124 Cong. Rec. 32,394-95 (1978) (remarks of Rep. Edwards); *id.* at 33,994 (identical remarks of Sen. DeConcini) ("Section 330(a) contains the standard of compensation adopted in H.R. 8200 as passed by the House rather than the contrary standard contained in the Senate amendment. . . . Notions of economy of the estate in fixing fees are outdated and have no place in [sic] bankruptcy code." (citations omitted)).

37. "An allowance [of fees] is the result of a balance struck between moderation in the interest of the estate and its security holders and the need to be 'generous enough to

The House may have gone too far, however, with its unequivocal rejection of economy. Courts have been unable to abandon comfortably all notions of economy when making compensation decisions,[38] and routinely disallow compensation for various reasons.[39] This is probably the result of the base restriction on compensation implicit in the language of section 330(a)—*i.e.*, it is axiomatic that section 330(a)'s requirement that services be actual and necessary forbids compensation awards from the estate for unnecessary services.[40] Thus, the language of section 330(a), and its implicit frugality, conflicts with statements made on its passage explicitly rejecting notions of economy. After all, it is not economical to pay for services that are neither "actual" nor "necessary" or to pay more than the actual value of those services.

The unequivocal rejection of economy found in the legislative history accompanying H.R. 8200 (the House version of section 330(a))[41] has thus proved too broad. Notwithstanding remarks on the passage of H.R. 8200 that expressly rejected the standard set forth in the report accompanying S. 2266,[42] the more moderate Senate version has proven to be more provident and common-sensical. This is apparent because even though bankruptcy courts routinely slash requested fees, thus evidencing far less than a total abandonment of principles of economy,[43] the Congressional goal of attracting attorneys to bankruptcy practice by making it more lucrative has been achieved.[44] This clear legislative purpose notwithstanding, inconsistent views in Congress regarding how it should be

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encourage' lawyers and others to render the necessary and exacting services that bankruptcy cases often require." *Senate Report No. 989*, *supra* note 34, at 5826 (citations omitted).

38. *See* Yermakov v. Fitzsimmons (*In re* Yermakov), 718 F.2d 1465, 1470 (9th Cir. 1983).

39. *See, e.g.*, *In re* Sumthin' Special, Inc., 2 Bankr. 743, 748 (N.D. Ill. 1980) (trustee's attorney cannot be compensated for unnecessary work); *In re* Wonder Corp. of Am., 72 Bankr. 580, 591 (Bankr. D. Conn. 1987) (court has duty to disallow compensation for services that are "not reasonably necessary . . . because of an attorney's excessive caution or overzealous advocacy."), *aff'd*, 82 Bankr. 186 (D. Conn. 1988); *In re* Brunel, 54 Bankr. 462, 466 (Bankr. D. Colo. 1985) (unnecessary services will be deducted from requested fee); *In re* Westwood Asphalt, 45 Bankr. 111, 111 (Bankr. E.D. Mich. 1984) (court must disallow compensation for duplicative services); *In re* G.A.C. Corp., 14 Bankr. 252, 255 (S.D. Fla. 1981) (debtor should not bear expense of unreasonable duplication of services); *In re* Sutherland, 14 Bankr. 55, 58 (Bankr. D. Vt. 1981) (disallowing attorney time billed that was "ill spent").

40. *See Yermakov*, 718 F.2d at 1470; *see also In re* Four Star Terminals, Inc., 42 Bankr. 419, 434 (Bankr. D. Alaska 1984) (funds needed by chapter 11 debtor to effect reorganization should not be taxed with undue expenses in form of attorney's fees).

41. *See supra* notes 33-36 and accompanying text.

42. *See supra* notes 34-35 and accompanying text.

43. *See supra* notes 37-39 and accompanying text.

44. Speaking of the changes in compensation standards made by the Code, one commentator has stated that

> [t]here is little danger of niggardly compensation in the Bankruptcy Code. Market rate, recognition of skill and even bonus for high success are well implanted in the statutory terms or legislative history. Fear of mutiny to more lucrative fields has not taken place. Quite to the contrary. Insolvency practice

achieved have left uncertain what the full effect of section 330(a)'s new standard of compensation should be.[45] Hence, to the extent that principles of economy have survived the reports accompanying H.R. 8200, and to the extent the congressional goals have been achieved, compelling arguments for compensating fee application work are weakened.

II. SECTION 330—AS WRITTEN AND AS APPLIED

A. *The Statutory Language*

Section 330, on its face, does not address the question of compensating attorneys for time devoted to fee applications.[46] Nevertheless, it supplies the standard by which bankruptcy attorneys are to be compensated, and therefore, should guide any analysis of the issue.

Analytically, section 330(a) sets up a two-stage test for determining whether and in what amount to compensate bankruptcy attorneys and other professionals for services rendered.[47] Before compensation can be awarded, the court must first be satisfied that actual and necessary services have been performed.[48] If the applicant meets this burden, the court

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enjoys a prestige marked by contrast to that of a few years ago. Firms which disdained the work now eagerly seek the business.

Aaron, *The Bankruptcy Bench*, 89 Com. L.J. 47, 47 (1984). Indeed, the Honorable Harold Lavien, United States Bankruptcy Judge for the District of Massachusetts, has remarked quite candidly that

> [u]ntil very recently bankruptcy, like sex, was looked upon as a necessary part of life, but not anything that respectable citizenry would publicly acknowledge participating in. In the last decade, even the most bluenosed firms have not only established bankruptcy departments, they have eagerly embraced the practice which our exploding . . . credit economy has caused to become the fastest growing area of the law.

Lavien, *Fees as Seen from the Bankruptcy Bench*, 89 Com. L.J. 136, 136 (1984).

45. *See* DeNatale, *The Creditors' Committee Under the Bankruptcy Code—A Primer*, 55 Am. Bankr. L.J. 43, 61 (1981); *see also* Yermakov v. Fitzsimmons (*In re* Yermakov), 718 F.2d 1465, 1470-71 (9th Cir. 1983) (because economy in administration is still a basic objective under the Code, contingent fee limited to actual, necessary services); *In re* Pettibone Corp., 74 Bankr. 293, 306 (Bankr. N.D. Ill. 1987) ("Though economy of estate is no longer a standard, it does not follow that the legal engine may always operate at full throttle."); *In re* Shades of Beauty, Inc., 56 Bankr. 946, 951 (Bankr. E.D.N.Y. 1986) (services must still be actual and necessary), *aff'd*, 95 Bankr. 17 (E.D.N.Y. 1988). *But see* Butenas, *supra* note 7, at 78 n.7 (DeNatale's "equivocal reading of congressional intent" is "incorrect in view of significant language differences" between House and Senate versions of section 330(a) and "principles of legislative research" propounded by Klee).

46. *See* 11 U.S.C. § 330 (1988).

47. This is not explicitly spelled out in the statute, but it is undeniably clear that this is what section 330(a)'s language embodies: "the court may award . . . reasonable compensation for actual, necessary services . . . , based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services [in non-bankruptcy cases]." 11 U.S.C. § 330(a)(1) (1988).

48. *See id.* At least two courts have explicitly identified this as the first step in a compensation determination. *See In re* Nucorp Energy, Inc., 764 F.2d 655, 658 (9th Cir. 1985); *In re* Four Star Terminals, Inc., 42 Bankr. 419, 430 (Bankr. D. Alaska 1984); *see also In re* Pettibone Corp., 74 Bankr. 293, 299 (Bankr. N.D. Ill. 1987) (whether services

may then award reasonable compensation based on five factors:[49] 1) the *nature* of the services rendered,[50] 2) the *extent* of those services,[51] 3) their *value*,[52] 4) the *time* spent performing those services[53] and 5) the *cost of*

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are actual, necessary and reasonable are factual issues that arise on presentation of every fee application).

49. *See* 11 U.S.C. § 330(a)(1) (1988).

50. For the purpose of a fee determination, the "nature" of an attorney's services is evaluated by the novelty and difficulty of the issues presented and the formidability of adversaries encountered. *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[2][c], at 330-38 to -39 (describing components of "the nature of services rendered" element of reasonable compensation under section 330(a)); Butenas, *supra* note 7, at 79 (grouping fee awards criteria around three main factors—quantity, quality and result).

This factor might justify an award of compensation for fee application related efforts where an attorney faces clamorous or unyielding opposition to his application. But could it lead to the applicant and the opposing party both claiming entitlement to compensation for opposing and defending the same fee application on the ground that they were providing "services" to the estate?

51. Courts and commentators do not offer any useful explanation of what the "extent" of an attorney's services is supposed to denote. It probably refers to elements, such as an attorney's ability, the skills required, and time demands of the case, that could properly be included in the time, value and nature components of reasonableness under section 330(a). *See generally* Butenas, *supra* note 7, at 83-84 (discussing broad "quality factor"). Its appearance should thus be considered superfluous.

52. The value of an attorney's services appears to be determined by assessing actual contributions or benefits to the estate realized by the attorney's efforts, and should be considered the single most important factor in calculating a fee award. *See In re* Jessee, 77 Bankr. 59, 60 (Bankr. W.D. Va. 1987); Butenas, *supra* note 7, at 84. "The main aim of bankruptcy, apart from a fresh start for the debtor, is 'a ratable distribution of the maximum realizable cash to creditors.'" Butenas, *supra* note 7, at 84 (quoting Lavien, *A Public Relations Problem with Regard to Fees and a Suggested Remedy*, 81 Com. L.J. 504, 509 (1976)).

The majority rule regarding compensation for services performed by a *debtor's* attorney requires that these services confer some benefit on the estate as a prerequisite to any award of fees. *See In re* Reed, 890 F.2d 104, 105 (8th Cir. 1989); *In re* Holden, 101 Bankr. 573, 574-75 (Bankr. N.D. Iowa 1989); *Jessee*, 77 Bankr. at 61; *In re* Chapel Gate Apartments, Ltd., 64 Bankr. 569, 576 (Bankr. N.D. Tex. 1986); *In re* Spencer, 48 Bankr. 168, 171 (Bankr. E.D.N.C. 1985). Why the majority rule does not apply to compensating officers, however, is not readily (if at all) apparent.

In this light, when an attorney confers great benefits on the estate, courts have awarded premium fees. *See In re* White Motor Credit Corp., 50 Bankr. 885, 890 (Bankr. N.D. Ohio 1985); *In re* Penn-Dixie Indus., 18 Bankr. 834, 836-37 (Bankr. S.D.N.Y. 1982); *In re* Garland Corp., 8 Bankr. 826, 835 (Bankr. D. Mass. 1981).

It would thus appear that bankruptcy is sometimes practiced on a contingent basis. This is certainly true when services are rendered before it is determined whether sufficient funds in the estate exist to make a complete fee award. *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[2][d], at 330-42 to -48 n.28 (discussing contingent nature of bankruptcy practice and risk factor fee enhancements). Because bankruptcy attorneys, however, enjoy first priority under the Code, *see* 11 U.S.C. §§ 507(a), 503(b)(2), the risk of non-payment of earned fees is significantly diminished.

Regardless of the importance of value, however, courts nevertheless consider the time spent on a case to be a factor of major importance in making a section 330(a) fee award. *See infra* note 53.

53. The time spent on a case is commonly viewed as an essential starting point for any analysis of the reasonableness of a fee request. *See* Blake v. Doyle (*In re* Doyle-Lunstra Sales Corp.), 19 Bankr. 1003, 1005 (D.S.D. 1982); *In re* Garland Corp., 8 Bankr. 826, 829 (Bankr. D. Mass. 1981); *see also In re* Hamilton Hardware Co., 11 Bankr. 326, 330

comparable services in non-bankruptcy cases.[54]

The threshold inquiry in making an award of fees from the bankruptcy

(Bankr. E.D. Mich. 1981) (every determination of reasonable fee must begin with consideration of total hours worked; such an approach will account for all relevant factors and will lead to a reasonable result); Anderson & Miller, *supra* note 23, at 87 (time is factor most frequently considered in calculating fee awards). *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[b], at 330-30 to -37 (discussing time factor).

Furthermore, Bankruptcy Rule 2016 explicitly requires that time spent on a case be included in a fee application. *See* Fed. R. Bankr. P. 2016(a). Indeed, it is deemed so important to a fee determination that failure to substantiate the number of hours devoted to particular tasks may prove fatal to a fee award. *See In re* Best Pack Seafood, 21 Bankr. 852, 854 (Bankr. D. Me. 1982); *In re* G.W.C. Fin. & Ins. Servs., 8 Bankr. 122, 127 (Bankr. C.D. Cal. 1981). *But cf. In re* Doctors, Inc., 4 Bankr. 346, 348 (Bankr. E.D. Pa. 1980) (bankruptcy trustee awarded compensation based on estimate of time expended on case). *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[b], at 330-30 to -38 (discussing time factor).

Time spent on a case is critical to the "lodestar" calculation that has become prevalent in determining reasonable fee awards in bankruptcy and non-bankruptcy cases. The "lodestar" is the product of the reasonable number of hours spent on a case multiplied by a reasonable hourly rate, and may be adjusted up or down when warranted by other factors. *See* Pennsylvania v. Delaware Valley Citizens' Council I, 478 U.S. 546, 564-65 (1986); Blum v. Stenson, 465 U.S. 886, 888-89 (1984); Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); Norman v. Housing Auth., 836 F.2d 1292, 1302 (11th Cir. 1988); *In re* Casco Bay Lines, 25 Bankr. 747, 756 (Bankr. 1st Cir. 1982); Furtado v. Bishop, 635 F.2d 915, 920 (1st Cir. 1980); *In re* Bilgutay, 108 Bankr. 333, 339-40 (Bankr. M.D. Fla. 1989); *In re* United States Lines, 103 Bankr. 427, 433 (Bankr. S.D.N.Y. 1989); *In re* Jensen-Farley Pictures, 47 Bankr. 557, 586 (Bankr. D. Utah 1985); *In re* Erewhon, Inc., 21 Bankr. 79, 81-82 (Bankr. D. Mass. 1982); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 243 (1985).

Courts, however, should not weigh the time factor too heavily, or else bankruptcy attorneys may become "hourly employees" rather than real professionals. *See In re Jensen-Farley Pictures*, 47 Bankr. at 586 n.40 (citing *In re* Gloria Mfg. Corp., 20 Bankr. 603, 605 (Bankr. E.D. Va. 1982)). Moreover, focusing too closely on time spent on a case may result in failure to recognize and reward efficiency and skill. *See* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[b], at 330-32 to -35.

54. The "cost of comparable services" was the significant change instituted by the Bankruptcy Reform Act. *See supra* notes 31-32 and accompanying text. Its intended effect was to do away with the notions of strict economy that governed fee awards under the Act, and thus, to encourage qualified attorneys to practice bankruptcy by offering them compensation comparable to what they would receive in other fields of practice. *See* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[e], at 330-49 to -53. By its plain language, section 330(a)(1) directs bankruptcy courts to base fee decisions on, among other factors, what an attorney would receive in a non-bankruptcy case for services performed in a bankruptcy case. *See* 11 U.S.C. § 330(a)(1) (1988). It does not define, however, what constitutes a compensable "actual, necessary service." *See id.*

Thus, weighing this or any other provision too heavily may violate fundamental canons of statutory construction. *See, e.g.*, Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (statutes should be interpreted so as not to render one part inoperative); Colautti v. Franklin, 439 U.S. 379, 392 (1979) (same); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) (effect should be given to every clause and part of statute if possible); *Ex parte* Public Nat'l Bank of New York, 278 U.S. 101, 104 (1928) (same). This Note argues, therefore, that an almost mechanical application of section 330(a)(1) and explicit consideration of all the factors contained therein is warranted.

The cost of comparable services is but one factor to consider in determining what is a reasonable amount of compensation. *See In re* City Planners & Developers, Inc., 5 Bankr. 217, 219 (Bankr. D.P.R. 1980). The inquiry should also consider the billing prac-

estate, therefore, is whether efforts towards preparing, presenting and even defending a fee application are "actual, necessary services" rendered by the attorney to the estate.[55] If that question can be answered affirmatively, then whether the amount requested is reasonable, in light of the five factors listed,[56] should be considered.

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tices of the legal community. *See In re* Perros, 14 Bankr. 515, 518 (Bankr. E.D.N.Y. 1981).

For a discussion of the case law regarding what is the appropriate community for a billing rate comparison, that is, which market rate to apply, see 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[2][e], at 330-51 to -55 n.34.

55. Section 330(a) does not explicitly state that "services" be rendered to the estate, but it is the estate, after all, that is paying for them.

It is not feasible to list all the services for which a trustee or professional person may receive compensation from the bankruptcy estate. *See generally* 2 *Collier on Bankruptcy*, *supra* note 1, ¶ 330.05[1], at 330-25 ("*services* are normally directed either towards protecting and increasing the available assets or towards decreasing the debtor's indebtedness") (emphasis added).

As propounded by the authors of *Collier on Bankruptcy*, the leading test for the compensability of professional "services" is whether "the officer employing the professional person is, by the Code, either directed or permitted to act, and [whether] compliance with the duties or exercise of the privileges of such officer require professional advice or assistance." *Id.*

56. Despite the five reasonably intelligible and unambiguous factors in section 330(a)(1), some bankruptcy courts have curiously decided to rely on twelve similar factors set forth in *Johnson v. Georgia Highway Express, Inc.*, a civil rights case. Those factors are: 1) time and labor required, 2) novelty and difficulty of questions presented, 3) requisite skill, 4) preclusion of other employment by acceptance of the case, 5) customary fees, 6) whether fee is fixed or contingent, 7) time limitations imposed by client or other circumstances, 8) amount involved and results obtained, 9) experience, reputation and ability of attorneys, 10) undesirability of the case, 11) nature and length of professional relationship with the client and 12) awards in similar cases. *See* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). The Fifth Circuit later deemed the twelve factors propounded in *Johnson* to be useful in fixing reasonable compensation in bankruptcy cases under the Act. *See* Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088, 1091 (5th Cir. 1980); American Benefit Life Ins. Co. v. Baddock (*In re* First Colonial Corp. of Am.), 544 F.2d 1291, 1299 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977). They have also seen wide use under the Code. *See In re* Humbert, 21 Bankr. 489, 492-93 (Bankr. N.D. Ohio 1982), *aff'd*, 39 Bankr. 643 (N.D. Ohio 1984); *In re* Doyle-Lunstra Sales Corp., 19 Bankr. 1003, 1005 (D.S.D. 1982); *In re* International Coins & Currency, Inc., 22 Bankr. 127, 129 (Bankr. D. Vt. 1982); *In re* Warrior Drilling & Eng'g Co., 9 Bankr. 841, 848-50 (Bankr. N.D. Ala. 1981); *In re* Underground Utils. Constr. Co., 13 Bankr. 735, 737 (Bankr. S.D. Fla. 1981); *In re* James Calvin Belk Constr. Co., 11 Bankr. 56, 58-60 (Bankr. N.D. Miss. 1981); *In re* Garland Corp., 8 Bankr. 826, 831 (Bankr. D. Mass. 1981); *In re* Jones, 13 Bankr. 192, 194 (Bankr. E.D. Va. 1981); *see also* Lieb, *supra* note 14, at 428 ("The strength of Johnson as the seminal authority is now unquestioned").

Using the twelve *Johnson* factors may be justified under the "cost of comparable services" provision, as indicative of customary billing standards, because they closely track fee guidelines in the American Bar Association's Code of Professional Responsibility. *See* Model Code of Professional Responsibility DR 2-106 (1989); *see also* Butenas, *supra* note 7, at 79-81 (discussing similarities between section 330(a)(1), *Johnson* factors and ABA fee guidelines).

However, the almost wholesale reception of the *Johnson* factors into the law of compensation of bankruptcy attorneys is, at the very least, disturbing. *Johnson* was a 1974 civil rights case decided before the revision of compensation provisions in the Bankruptcy Code. Although the five factors listed in section 330(a)(1) are nowhere deemed exclusive,

Judicial treatment of the issue, however, has not been conducted along these simple lines. Instead of explicitly and simply deciding whether fee application work is a compensable "actual, necessary service," the courts have put the cart before the horse by exploring whether fee application work is compensated in other types of cases, and thus have based their decisions on imprecise analogies of questionable utility.[57]

B. *Judicial Treatment of the Issue*

The two federal courts of appeal that have addressed the issue have held that attorney time devoted to bankruptcy fee applications *is* compensable.[58] The bankruptcy and district courts, however, remain divided. Several have held, without imposing any significant qualifications, that time devoted to fee applications is compensable.[59] Others have simply denied such requests for compensation.[60]

In addition, various compromise rules have emerged: allowing compensation for fee application work if the debtor is solvent and all the creditors' claims are satisfied in full;[61] allowing compensation for such work, but at a reduced rate;[62] or allowing compensation under various

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the statute is unambiguous. The fact that all twelve factors were neither incorporated by section 330(a)(1) nor mentioned in the legislative history of section 330, yet were cited in the House and Senate Reports accompanying 42 U.S.C. § 1988, should not be passed over lightly. That bankruptcy courts have seen fit to complicate their task by considering twelve factors where Congress deemed only five to be necessary is cause for consternation.

Indeed, the utility of the *Johnson* factors has not gone unquestioned. *See In re* Casco Bay Lines, 25 Bankr. 747, 754 (Bankr. 1st Cir. 1982) (citing Copeland v. Marshall, 641 F.2d 880, 890 (D.C. Cir. 1980)); *cf.* City of Detroit v. Grinnel Corp., 495 F.2d 448, 470 (2d Cir. 1974) (citing similar list of factors and concluding that such a "conceptual amalgam is so extensive and ponderous that it is probably not employed in any precise way by those courts espousing adherence to it").

For a detailed analysis of the construction and procedural application of the *Johnson* factors in the context of fee awards under 42 U.S.C. § 1988, see Comment, *supra* note 13, at 346-400.

57. *See, e.g., In re* Nucorp Energy, 764 F.2d 655, 662 (9th Cir. 1985) (finding fee-shifting cases most analogous to bankruptcy); *In re* The Vogue, 92 Bankr. 717, 723 (Bankr. E.D. Mich. 1988) (suggesting more useful comparison is to private commercial practice); *In re* National Paragon Corp., 74 Bankr. 858, 862 (Bankr. E.D. Pa. 1987) (bankruptcy is more analogous to common fund cases), *rev'd on other grounds*, 87 Bankr. 11 (E.D. Pa. 1988).

This approach fails to apply the plain language of section 330(a)(1): the *cost* of comparable services is one of five factors to be considered in fixing a reasonable amount of compensation. What services are compensated in other cases, however, does not define what is a compensable service in bankruptcy.

58. *See supra* note 9.

59. *See supra* note 10 and accompanying text.

60. *See supra* note 11 and accompanying text.

61. *See In re* J.A. & L.C. Brown Co., 75 Bankr. 539, 540 (E.D. Pa. 1987); *In re* Bible Deliverance Evangelistic Church, 39 Bankr. 768, 774 (Bankr. E.D. Pa. 1984).

62. *See, e.g., In re* C & J Oil Co., 81 Bankr. 398, 405 (Bankr. W.D. Va. 1987) (75 percent hourly rate); *In re* Neibart Assoc. Press, 58 Bankr. 212, 215 (Bankr. E.D.N.Y. 1985) (at rate lower than that for "demanding legal services").

exigent circumstances.[63] Most recently, a federal district court decided that the appropriate measure of compensation for fee application work is the difference between any amount the lawyer ordinarily charges his non-bankruptcy clients and the cost of preparing and presenting bankruptcy fee applications.[64]

At least one bankruptcy decision has limited the number of hours spent in fee application preparation, holding that such work should not exceed three percent of the total hours submitted.[65] "Bending over backwards to be fair" in a later case, the same court decided to raise the ceiling to ten percent of the total hours.[66]

1. *In re Nucorp Energy*

In re Nucorp Energy[67] is illustrative of the problems courts have in applying the language of section 330(a)(1)[68] to the nettlesome question of compensating attorneys for fee application preparation. It receives special attention here because it is so widely cited and because it draws specious analogies, under the guise of the "cost of comparable services" factor, that have become the accepted terms in the current controversy. Because of the dubious nature of such comparisons to other cases, this Note argues for an approach that focuses on all of section 330(a)(1)'s language rather than on only one of its five factors.

The bankruptcy court in *Nucorp Energy* authorized the employment of the fee applicants as counsel for the debtors in possession.[69] From the commencement of the case until a chapter 11 trustee was appointed, the fee applicants performed 6,500 hours of service for the debtors in possession.[70] Interim fee applications were submitted on a bi-monthly basis,

63. *See, e.g., In re* Wiedau's, Inc., 78 Bankr. 904, 909 (Bankr. S.D. Ill. 1987) (time spent preparing fee applications is cost of doing business and not compensable absent "unusual circumstances"); *In re* Alan I.W. Frank Corp., 71 Bankr. 585, 586 (Bankr. E.D. Pa. 1987) (time spent preparing fee applications is not compensable absent "extraordinary circumstances") (citing *In re* Shaffer-Gordon Assocs., 68 Bankr. 344 (Bankr. E.D. Pa. 1986)); *In re* Beck-Rumbaugh Assocs., 68 Bankr. 882, 889 (Bankr. E.D. Pa. 1987) (excessive time spent on applications compensable because "vociferous" opposition constituted "extraordinary" circumstance), *aff'd*, 84 Bankr. 369 (E.D. Pa. 1988); *In re* WHET, Inc., 61 Bankr. 709, 712 (Bankr. D. Mass. 1986) (only extra work required beyond what private client would expect in preparation of fee application is compensable); *In re* Four Star Terminals, 42 Bankr. 419, 436 (Bankr. D. Alaska 1984) (dicta) (time spent defending fee application is compensable if objections are frivolous).

64. *See In re* McLean Indus., No. 89 Civ. 7935, slip op. at 6 (S.D.N.Y. Apr. 11, 1990).

65. *See In re* Wildman, 72 Bankr. 700, 711 (Bankr. N.D. Ill. 1987).

66. *See In re* Churchfield Management & Inv. Corp., 98 Bankr. 838, 867 (Bankr. N.D. Ill. 1989).

67. 764 F.2d 655 (9th Cir. 1985). *Nucorp Energy* was a reorganization filed under chapter 11 of the Bankruptcy Code on July 27, 1982, by the debtor company and twenty-seven of its affiliates. *See id.* at 656. The debtors employed approximately 2,000 persons and had assets and liabilities in the hundreds of millions of dollars. *See id.*

68. *See supra* notes 46-57 and accompanying text.

69. *See Nucorp Energy*, 764 F.2d at 657.

70. *See id.*

and the full amounts requested on each application were awarded.[71] At all stages of the case the fee applications were unopposed.[72] The final fee application contained a request for $18,750 as compensation for time devoted to preparing and presenting the prior fee requests; the bankruptcy court summarily denied it on vague policy grounds.[73]

In denying a motion for rehearing, the bankruptcy judge elaborated that fee application preparation did not benefit the estate and was therefore undeserving of compensation.[74] The district court affirmed that decision without opinion.[75]

On appeal, the Ninth Circuit reversed and remanded the case to the district court, directing it to award the fee applicants "reasonable compensation for all 'actual, necessary services' rendered in connection with the preparation and presentation of the fee application."[76]

Reviewing the decisions below on the fee applicants' contention that the bankruptcy court had erroneously applied section 330,[77] the Ninth Circuit observed that attorneys are statutorily obliged to submit detailed fee applications to the bankruptcy court accounting for all services rendered to the bankruptcy estate.[78] Taking due notice of the reason for that requirement—to enable courts to evaluate independently the necessity of services for which compensation is sought as well as the reasonableness of the fees requested—the Ninth Circuit concluded that fee applications are necessary and that therefore their preparation and presentation is a necessary service.[79] Because attorneys must prepare fee applications in order to receive compensation, denying compensation would "be fundamentally inequitable [and would] ignore the direct mandate of section 330(a) that reasonable compensation be provided for all 'actual, necessary' services rendered by bankruptcy counsel."[80]

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71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.* at 663.
77. The standard of review of fee determinations is "abuse of discretion" or "erroneous application of law." *See* Southwestern Media v. Rau, 708 F.2d 419, 422 (9th Cir. 1983).
78. *See In re* Nucorp Energy, Inc., 764 F.2d 655, 658 (9th Cir. 1985); *see also supra* notes 1-3 and accompanying text (discussing statutory obligation to submit fee applications).
79. *See Nucorp Energy*, 764 F.2d at 658.
80. *See id.* at 659; *accord In re* Braswell Motor Freight Lines, Inc., 630 F.2d 348, 351 (5th Cir. 1980) (remanding for award of reasonable compensation for fee application preparation); Rose Pass Mines v. Howard, 615 F.2d 1088, 1093 (5th Cir. 1980) (per curiam) ("We have long *required* an attorney to file a detailed account of the legal services he provided the bankrupt in order to recover any compensation at all for his services. It would be unduly penurious to require such an accounting without granting reasonable compensation." (emphasis in original) (citations omitted)). *But see In re* The Vogue, 92 Bankr. 717, 721-22 (Bankr. E.D. Mich. 1988):

> The assertion that it is "fundamentally inequitable" not to allow bankruptcy attorneys to bill their application preparation time, even if true, is beside the

After stating the reasoning behind its conclusion that fee application preparation is an "actual, necessary service" within the meaning of section 330(a), the Ninth Circuit, by a mechanical application of the statute, should have remanded the case for calculation of reasonable compensation for that service, using the five factors listed in section 330(a)(1).[81] Instead, the court launched into questionable dictum about the compensability of fee application efforts in non-bankruptcy cases, under the supposed authority of the fifth factor listed in section 330(a)(1)—"the *cost* of comparable services" in non-bankruptcy cases.[82]

Essentially, the Ninth Circuit found three broad non-bankruptcy categories analogous to bankrutpcy fee cases: "statutory fee," or "fee shifting" cases, "common fund" cases and private practice.[83] Because

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point. Congress directed that the standard for allowing compensation be "the cost of comparable services. . . ." Notions of "fairness" are outside the scope of our inquiry. . . . [T]he Supreme Court has recently reminded us [that] "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."

Id. (quoting Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988)).

Further, the plain language of section 330(a) does not support the interpretation that it is a "direct mandate" to award reasonable compensation for all actual and necessary services performed in the case. The statute is merely permissive, stating that "the court *may* award" reasonable compensation. *See* 11 U.S.C. § 330(a) (1988) (emphasis added).

81. *See supra* notes 46-53 and accompanying text.

82. *See In re* Nucorp Energy, Inc., 764 F.2d 655, 659-62 (9th Cir. 1985). At least one court has recognized *Nucorp*'s exploration of compensation of fee application efforts in other types of cases as "dicta." *See In re* Jessee, 77 Bankr. 59, 61 (Bankr. W.D. Va. 1987).

Although not explicitly required by the statute, analogizing to and distinguishing from non-bankruptcy cases has become the preferred method of approaching the issue of fee application work compensability. This is apparently the result of reading too much into the "cost of comparable services" factor in section 330, based on the legislative purpose behind its inclusion in the statute. The courts' efforts would probably be better directed towards ascertaining whether those congressional goals have been met, before considering how similar legislative goals are implemented in other types of cases.

83. *See Nucorp Energy*, 764 F.2d at 659-61.

In both "statutory fee" and "common fund" cases, attorneys' fees are awarded by the court as in bankruptcy. Statutory fee cases involve "fee shifting"—reallocating the cost of litigation among the parties—and thus constitute permitted statutory exceptions to the traditional American rule of attorneys' fees. *See supra* note 13 and accompanying text. The typical example is a civil rights plaintiff's recovery of attorneys' fees from the defendant. *See generally* Comment, *supra* note 13, at 332-41 (discussing genesis of statutory fee and common fund theories).

In contrast, common fund cases do not involve a shifting of fees from prevailing to losing party, but rather an equitable sharing of costs among all beneficiaries of the litigation. The theory is that if one party has successfully litigated a claim producing a fund available to a class of beneficiaries, the party taking the initiative by prosecuting the claim should not be taxed with all its costs, while the other class members reap the benefits without contributing to the litigation costs. Attorneys' fees are therefore awarded out of the "common fund" so that the cost of the litigation is borne by all who benefit thereby. *See generally id.* at 333 n.6 (discussing "common fund" theory).

The common fund doctrine was later expanded to become the "common benefit doctrine" in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), to cover situations where a benefit was conferred on a class but not by creation of a "common fund." *See* Comment, *supra* note 13, at 333 n.6. The "private attorney general" doctrine of fee shifting arose as

statutory fee shifting and common fund cases are two broad areas in which fees are court-awarded, the Ninth Circuit confined its comparison to those areas.[84] It then decided that fee awards in bankruptcy cases are more analogous to fee awards in fee shifting cases than in common fund cases.[85] The court reached this conclusion by comparing the policy bases behind attorney fee awards in bankruptcy, common fund and statutory fee shifting cases.[86] While the policy basis for attorney fee awards under the common fund doctrine is similar to an action in *quantum meruit*, the court found that the policy justifications for attorney fee awards in bankruptcy and statutory fee shifting are virtually identical: encouraging qualified counsel to practice bankruptcy and encouraging attorneys to represent indigent plaintiffs with meritorious civil rights claims.[87] The Ninth Circuit commenced this policy comparison, however, after noting, but ultimately ignoring, probably the most significant and fundamental difference between fee shifting and bankruptcy cases—the source from which attorney fees are paid.[88]

In fee shifting cases, attorneys' fees are shouldered by the losing de-

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an extension of the *Mills* reasoning applied in the context of civil rights litigation, until it was abolished by the Supreme Court in 1975. *See id.* at 333-35.

For an account of the evolution of statutory fee shifting and common fund doctrine, see generally *id.* at 332-39.

84. *See Nucorp Energy*, 764 F.2d at 659.

85. *See id.* at 659-62.

86. *See id.* at 662. For a discussion of the theories behind common fund doctrine and statutory fee shifting, see Comment, *supra* note 13, at 353-54.

87. *See In re* Nucorp Energy, Inc., 764 F.2d 655, 662 (1985). Although the court chose fee shifting in civil rights cases as the appropriate frame of reference, there are many statutes, apart from civil rights acts, that provide for awards of attorneys' fees. *See, e.g.*, 2 U.S.C. § 1962k (1988) (Ethics in Government Act of 1978); 7 U.S.C. § 18(f), (g) (1988) (Commodity Futures Trading Commission Act of 1974); 12 U.S.C. § 1975 (1988) (Bank Holding Company Act); 15 U.S.C. § 1117 (1988) (Trademark Act); 15 U.S.C. § 1640(a) (1988) (Truth in Lending Act); 15 U.S.C. § 2102 (1988) (Hobby Protection Act); 33 U.S.C. § 1910(d) (1988) (Act to Prevent Pollution from Ships); 42 U.S.C. § 2184 (1988) (Atomic Energy Act of 1954). For a list of well over one hundred statutes providing for fee awards, see the inside cover of almost any edition of the Att'y Fee Awards Rep./Bankr. Fee Section.

Nevertheless, the policies behind fee shifting in civil rights cases and bankruptcy fee awards may not be as closely analogous as the court suggested. Statutory fee shifting permits a prevailing plaintiff to "sock the loser" with his attorneys' fees in order to encourage the filing of civil rights lawsuits and to deter future wrongdoing. *See In re* The Vogue, 92 Bankr. 717, 722 (Bankr. E.D. Mich. 1988).

In section 330, however, "[t]here simply was no public policy directive to positively 'encourage' or to 'promote' the filing of bankruptcy cases or to deter anybody from anything." *Id.* at 723. Nonetheless, it is worth noting that the basic objective of section 330 is to encourage attorneys to enter bankruptcy practice, and that bankruptcy practice can be markedly different from the "zero-sum" type of litigation at the root of typical fee shifting cases. Thus, more importantly, an award of attorneys' fees for civil rights plaintiffs is "entirely contingent upon prevailing on the merits; this concept is alien to § 330." *Id.*

88. The court simply stated that "[t]he source of attorneys' fees in bankruptcy cases is not parallel to the source of fees in other statutory fee cases. . . . [I]t is not parallel to that in the common fund cases either." *Nucorp Energy*, 764 F.2d at 662.

fendant in addition to his liability for the judgment. In common fund cases, fees are paid from the judgment recovered from the losing defendant by the successful litigant and his attorneys, and are thus shared by all who benefit from the fund created thereby. There is no additional liability imposed on the defendant for attorneys' fees. In bankruptcy, attorneys' fees are paid from the bankruptcy estate. Thus, in bankruptcy and common fund cases attorneys' fees are not paid by an adversary; in fee shifting cases they are. The source of attorneys' fees is therefore more similar in bankruptcy and common fund than in bankruptcy and fee shifting. Hence, aside from arguably similar policy objectives the only characteristic shared by bankruptcy and fee shifting, but not by common fund, is that the authorization for court-awarded attorneys' fees is statutory. Moreover, statutory fee shifting does not require as much judicial supervision in setting the fee as do common fund and bankruptcy cases, where, it has been said, fee applications are without "natural enemies."[89]

In *Nucorp Energy*, however, the Ninth Circuit chose to follow the fee shifting cases, because of their similar policy objectives, stating that efforts devoted to fee applications are "uniformly" held to be compensable by the federal courts, and that they should therefore be compensable in bankruptcy.[90] Compensating for fee-related efforts, the court noted, prevents the dilution of fee awards by uncompensated hours devoted to preparing and defending fee applications.[91] Justifying one's fee, therefore, should not be absorbed as a cost of doing business. *Nucorp* attempted to justify this policy-based comparison, without even considering whether the similar policy had been effected, by stating that the source of fees in bankruptcy are not parallel to those in fee shifting or common fund cases.[92]

2. The Trouble with Analogies

Nucorp did articulate some compelling similarities between bankruptcy fees and fee shifting: both are statutory at root, and both serve similar policies.[93] If section 330(a)(1), however, is interpreted as requiring a comparison to other cases in which fees are awarded by the court, it is virtually impossible to escape the stark similarity between the effect of a bankruptcy fee award and that of fees awarded from a common fund: both reduce the total amount ultimately available to distributees.[94] But if

89. *See In re* Gianulias, 98 Bankr. 27, 28 n.1 (Bankr. E.D. Cal. 1989); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 251 (1985).

90. *See Nucorp Energy*, 764 F.2d at 659-60.

This may not be true. *See generally* Comment, *supra* note 13, at 353-57 (discussing split of authority on this issue under 42 U.S.C. § 1988 as of 1980).

91. *See In re* Nucorp Energy, Inc., 764 F.2d 655, 661 (9th Cir. 1985).

92. *See id.* at 662.

93. *See supra* notes 85-86, 90 and accompanying text.

94. Bankruptcy cases are most akin to common fund cases. *See In re* The Vogue, 92 Bankr. 717, 723 (Bankr. E.D. Mich. 1988); *In re* National Paragon Corp., 74 Bankr. 858, 862 (Bankr. E.D. Pa. 1987), *rev'd on other grounds*, 87 Bankr. 11 (E.D. Pa. 1988).

the policy behind the court's authority to make a fee award is the appropriate point of comparison, then an additional similarity between common fund and bankruptcy can be noted—the policy of preventing unjust enrichment. This policy is relevant in bankruptcy because not everyone who benefits from the creation and distribution of a bankruptcy estate employs their own counsel to represent them in that process. This could certainly be the justification for a court-awarded fee in bankruptcy cases absent the statutory authorization in the Code. Given these similarities between bankruptcy and common fund cases, the rationale for denying compensation for fee application work in the latter (lack of benefit to the fund by the attorney's effort to establish his fee)[95] should also apply to the former, since it jibes with a fundamental goal of bankruptcy law—maximizing return to creditors—and has been expressed as a requirement for compensation.[96] Thus, applying a statute that suggests a comparison to the "*cost* of comparable services" in non-bankruptcy cases, as a measure of an appropriate fee in a bankruptcy case, degenerates into an analysis of the policies behind fee awards in various cases.

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95. *See Nucorp Energy*, 764 F.2d at 661 (citing City of Detroit v. Grinnel Corp., 560 F.2d 1093, 1102 (2d Cir. 1977)). *See generally* Comment, *supra* note 13, at 353-54 (discussing "equitable fund doctrine" and reasoning behind disallowing fee application compensation under 42 U.S.C. § 1988 based on "equitable fund" principles).

96. Compensation for fee application work has been disallowed precisely because no benefit to the estate was recognized in the attorney's efforts to justify his fee. *See In re* Jessee, 77 Bankr. 59, 61 (Bankr. W.D. Va. 1987). The *Jessee* court took a broad view of the issue and recognized that

> allowance of the additional fee application [solely for the defense of a previous application] could have a detrimental effect upon the Debtor's ability to carry out her confirmed Chapter 11 plan. Further, the allowance and payment of the fees would benefit no creditor, would not benefit the Debtor, and would inure only to the benefit of the . . . attorney for the Debtor in Possession.

Id.

For other cases requiring benefit to the estate as a prerequisite to a compensation award, see *supra* note 52 (discussing "value" element of section 330(a)(1) and majority rule requiring benefit to the estate for award of compensation for services of debtor's attorney).

The conclusion that no benefit at all flows to the estate by an attorney's efforts to prepare a fee application, however, fails to consider the purpose of fee applications. Although attorneys are free to act as volunteers if they wish, there is absolutely no reason to expect that they will. Congress' concern was with the smooth functioning of the bankruptcy process, and to that end, they sought to attract able counsel to practice in the field. To that end, Congress recognized that compensation is necessary to gain and maintain their participation. Carefully prepared fee applications benefit the estate by enabling the bankruptcy judge to review the requested compensation to ensure the estate does not pay too much in legal fees. "Detailed billing information is of importance to all parties, as well as to the court." *In re Nucorp Energy*, 764 F.2d at 659.

To the extent that it cannot be considered part of the "value" element of section 330(a)(1), however, benefit to the estate is not a measure of an amount of reasonable compensation for actual, necessary services; and it is not an explicit element of "service." Although the "benefit" to the estate from a bankruptcy fee application, albeit real, is undeniably remote, it does not appear that it should therefore be excluded from the realm of "actual, necessary services." The term "service" connotes some benefit, but direct benefit is not a requirement on the face of the statute.

Furthermore, deciding what area of non-bankruptcy practice is the appropriate point of comparison is problematic: is it in other cases where fees are awarded by the court, or where fees are paid by the client? Choosing the area of court-awarded fees presumes that the congressional purpose behind section 330(a) was not to attract competent counsel from all areas of the law to bankruptcy practice, but only those who look to the courts for payment of their fees. Should the bankruptcy courts then compete with the rest of the judiciary to attract the most qualified of those attorneys?

On the other hand, in what other field is a "service" comparable to preparing a fee application for court-awarded fees performed? It should be noted that virtually every attorney performing services with the expectation of receiving compensation, whether by court approval or from a private client, must justify his requested fee. Typical commercial clients, as well as assertive individuals, will demand and receive billing information from their counsel.[97] If such expectations of attorneys and their clients are the norm, the next inquiry should be whether there is "something inherently different in practice before a bankruptcy court which makes the process of obtaining one's fees materially more onerous than in practice outside of bankruptcy court."[98]

That fee applications require detail is written into the Bankruptcy Rules and is otherwise well-established.[99] Requirements, however, may vary from court to court and from case to case, perhaps explaining why courts differ on whether those requirements are significantly more burdensome in bankruptcy than non-bankruptcy cases.[100] Generally, however, the requirements are not Draconian and the task of meeting them is not herculean.[101]

In this light, at least one bankruptcy court, noting that a private client

97. *See In re* The Vogue, 92 Bankr. 717, 723 (Bankr. E.D. Mich. 1988); *In re* Pettibone Corp., 74 Bankr. 293, 304 (Bankr. N.D. Ill. 1987). *But see* Lerman, *Lying to Clients*, 138 U. Pa. L. Rev. 659, 720 (1990) ("Most clients do not ask for detailed explanations of their bills; if a bill appears reasonable clients usually pay without question, even though they are unhappy that legal fees are so high.")

Two factual questions asked by the *The Vogue* court are: 1) "Do attorneys normally bill their clients for the time spent in preparing their bill?"; and 2) "Do attorneys normally bill their clients for the time spent meeting with a client to explain, discuss, negotiate or haggle over (the practical equivalent of appearing in court on a fee application) their bill?" *The Vogue*, 92 Bankr. at 720. To both questions the fee applicant conceded that they do not. *See id. But cf.* Lerman, *supra*, at 715 n.235 (citing example of apparently accepted practice of charging for paralegal time spent preparing bills).

98. *In re The Vogue*, 92 Bankr. at 720.

99. *See supra* notes 1-2, 6 and accompanying text.

100. *Compare In re* Nucorp Energy, 764 F.2d 655, 659 (9th Cir. 1985) (bankruptcy fee process requires "far more" than ordinary client) *with The Vogue*, 92 Bankr. at 723 (ordinary clients do not require "much less" billing information).

101. *See, e.g., In re* Jensen-Farley Pictures, 47 Bankr. 557, 582 (Bankr. D. Utah 1985) (although record keeping requirement is important it " 'should not be imposed in a draconian manner.' " (quoting Action on Smoking and Health v. C.A.B., 724 F.2d 211, 220 (D.C. Cir. 1984))); *see also In re* Pettibone Corp., 74 Bankr. 293, 302 (Bankr. N.D. Ill. 1987) (adequately explaining how time was spent is "not an overly burdensome task" for

presented with a substantial fee would expect substantial detail in the bill, decided to compensate the fee applicant only for fee work over and beyond what a private client would expect.[102] Striking an advisory tone, the court stated that "if contemporaneous time records are kept, the assembling of that information is not a major undertaking."[103] The very fact, however, that no consensus has been reached on what does occur in other cases,[104] reveals the uselessness of the precise analogies the courts have tried to draw in giving effect to the "cost of comparable services" element of section 333(a)(1).

III. COMPENSATION FOR FEE-RELATED EFFORTS SHOULD BE RESTRICTED

Notwithstanding the time spent by bankruptcy attorneys preparing, presenting, and defending fee applications, there are good reasons for denying or restricting compensation for such efforts.

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fee applicants); *In re* Hotel Assocs., 15 Bankr. 487, 488 (Bankr. E.D. Pa. 1981) ("The Court does not require a fee application the size of a boring victorian novel.").

In fact, even fee applications that do not fully satisfy the courts' penchant for detail have been deemed sufficient. *See* Continental Ill. Nat'l Bank & Trust Co. v. Charles N. Wooten, Ltd. (*In re* Evangeline Refining Co.), 890 F.2d 1312, 1326 (5th Cir. 1989); *see also* 2 *Collier on Bankruptcy*, *supra* note 1, at 330-33 to -34 n.17 (discussing standard fee application requirements).

Basically, the operative standard is whether the application provides sufficient information for the court to independently evaluate whether the fees requested are actual, necessary and reasonable. *See Evangeline Ref. Co.*, 890 F.2d at 1326. For an illustration of the level of detail generally expected by a court in a fee application, see *Pettibone*, 74 Bankr. at 301-02.

In New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2d Cir. 1983), the Second Circuit set forth the requirement that applications for court-awarded compensation must be documented with contemporaneous time records specifying, "for each attorney, the date, the hours expended, and the nature of the work done." *Id.* at 1148. As observed in *In re* Cena's Fine Furniture, 109 Bankr. 575, 582 (E.D.N.Y. 1990), this requirement is mirrored in the Local Bankruptcy Rules for the Eastern District of New York. *See also In re* Bilgutay, 108 Bankr. 333, 341-43 (Bankr. M.D. Fla. 1989) (appendix of (non-mandatory) "Guidelines for Fee Applications").

102. *See In re* WHET, Inc., 61 Bankr. 709, 712 (Bankr. D. Mass. 1986).

103. *Id.* Keeping contemporaneous time records, however, may not be too common a practice among most lawyers. *See, e.g.*, Lerman, *supra* note 97, at 716 ("Failure to keep precise records of work time was perhaps the most prevalent deceptive billing practice among [lawyers interviewed by the author]."). Nevertheless, that many, or even a majority, of lawyers fail to accurately account for their time should not excuse those who are called on to do so. It is really the least that should be expected of professionals who generally charge by *the hour*.

104. *See supra* notes 93-98 and accompanying text.

An understanding of what does occur in other cases, however, should be reached. If fee documentation is generally considered part of the overhead included in an attorney's hourly rate, an attorney recovering for preparing a fee application recovers twice for the same work. Such a result is clearly unreasonable and should be prevented. Therefore, if an attorney's hourly rate is to be used in calculating a fee award in a bankruptcy case, it is important to know what items are included in that hourly rate. *Cf.* Butenas, *supra* note 7, at 86 (advising that to defend his hourly rate an attorney should understand how it is constructed in terms of what items are and are not considered overhead, and stating that costs customarily passed on to clients should be reimbursable in a bankruptcy case).

First, as a general proposition, allowing compensation for fee application work is contrary to the traditional American rule of attorneys' fees.[105] Because submitting a fee application is the way an attorney attempts to meet his burden of proof regarding entitlement to a fee, and because in seeking a fee the attorney is acting adversely to the bankruptcy estate, compensating efforts to meet that burden constitute an unauthorized shifting of fee liability. Section 330(a) authorizes payment of fees to professionals employed by parties sharing an interest in conserving or increasing the size of the bankruptcy estate. Thus, no real fee shifting is contemplated by the statute. When an attorney, however, is compensated for asserting interests against the estate, real fee shifting does occur.

Second, allowing such compensation creates the wrong incentives for lawyers. It is easy to see how such a rule of compensation can be abused by attorneys attempting to "hedge" fee requests that may be subject to disallowance or discounting by the court upon review. Knowing that time spent preparing, presenting and defending a fee application is compensable, an attorney might not shy away from including questionable items on the application because he would have nothing to lose by doing so.[106] Accordingly, less scrupulous attorneys[107] might simply choose to pad fee requests in order to stir up opposition, thus increasing the number of compensable hours devoted to preparing and defending an application. Of course, such abuse could be checked by denying compensation for a losing effort at defending a "padded" fee request.[108]

Third, the notion that a professional person can be compensated for

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105. *See supra* note 13 and accompanying text.

106. At least two courts have made this same observation. *See In re* Four Star Terminals, Inc., 42 Bankr. 419, 437 (Bankr. D. Alaska 1984); *In re* Erewhon, 21 Bankr. 79, 89 (Bankr. D. Mass. 1982). *But see In re* Pettibone Corp., 74 Bankr. 293, 304 (Bankr. N.D. Ill. 1987) (compensation should be allowed because otherwise "professionals would have little incentive to engage in a comprehensive review of the time expended and the value thereof").

This view, however, is hardly persuasive. That an attorney's entire fee request may be denied, or substantially reduced, for failing to meet his burden of proof should provide a much greater incentive to submit satisfactory applications than the few dollars to be earned from the time spent preparing one. This "stick" rather than "carrot" approach would surely encourage better record keeping by attorneys, thus reducing the number of hours ultimately spent preparing an application. Further, the idea that attorneys should be paid for efforts towards establishing entitlement to a fee, in order to encourage the making of that effort in the first place, is totally divorced from common sense.

107. In a recent case, an attorney serving as trustee in a number of cases was accused of fraudulent billing. Examining only nine fee applications filed by the attorney, who was working on over 250 cases simultaneously, the court discovered that on at least six days he personally billed over twenty-four hours per day. *See* Continental Ill. Nat'l Bank & Trust Co. v. Wooten (*In re* Evangeline Refining Co.), 890 F.2d 1312, 1318 (5th Cir. 1989).

108. *Cf. Evangeline Refining Co.*, 890 F.2d at 1323-24 (fraudulent fee applications are punished by denying all compensation); Comment, *supra* note 13, at 356 (courts can employ equitable powers to punish and deter ill motivated fee litigation). Rule 11 sanctions may also be appropriate.

time spent preparing and even arguing over a bill for services shocks the conscience of ordinary persons. That such charges may be taxed against the bankruptcy estate of a debtor who has sought the protection of the bankruptcy laws because he has had trouble paying his debts in the first place only makes the proposition more frightening. Compensating bankruptcy attorneys for time devoted to fee applications, therefore, could create a public image problem for the bankruptcy bar and ultimately frustrate the congressional goal of attracting competent and upstanding attorneys to practice in the field.

Even apart from these concerns, however, bankruptcy courts should conclude that the text of section 330 itself functions to significantly limit awards of compensation for fee application work. Because any benefit to the estate from an attorney's fee application is, at best, only remote, the "value" element of section 330(a)(1) should be viewed as the most formidable statutory barrier to compensation.

Absent further instruction from Congress, however, a *per se* rule of denying compensation for fee application work should not be adopted. Section 330(a)(1) contains other elements, such as "time," that must also be considered. If an attorney is required to spend excessive time pursuing an application because of peculiar demands of the court, some compensation will be warranted.

It is important to recognize the tension between quality and quantity built into section 330.[109] On one hand, the factors of the "nature" and "value" of services require that compensation be awarded for services based on their subjective worth (suggesting that each service be evaluated independently); on the other hand, the factors of "time" and the "cost of comparable services" (to the extent that non-bankruptcy work is billed for by the hour) require awards based on the objective factor of time spent on a case. Computations based on the number of hours expended on a case, such as "lodestar," are therefore clearly inappropriate because they fail to account for the variety of "services" performed during that time and their subjective nature and value. Likewise, compensation decisions based only on worth are also wrong.

By the language of section 330(a) itself, neither value nor time should serve as the sole benchmarks for compensation decisions. The tension, discussed above, between the section's five factors, suggests some balance be struck. As a rule of thumb, therefore, if necessary services with little or no value to the estate take a great deal of time to perform, some compensation should be awarded, but tempered in amount by the lack of value to the estate. A similar balance should be struck in the case of services of great value to the estate that take very little time to perform.

Weighing all of the factors, it is clear that fee application work generally should not command compensation parallel to that for "real" serv-

109. *See generally* Butenas, *supra* note 7, at 83-85 (dividing section 330(a) into "qualtiy," "quantity" and "result" factors).

ices to the bankruptcy estate. Time devoted by an attorney to his fee application is time spent pursuing his own pecuniary interests, and at root should be considered as properly absorbed as a cost of doing business.

No precise and easy formula can be devised, however, and different results may obtain in exceptional cases. By the terms of the statute, though, all of the factors must be considered; reasonableness is the only key. Ninety years ago, a court warned that

> the dignity and honor of the profession are not conserved, or its influence for good promoted, by excessive allowance for service. That would lend countenance to the suggestion sometimes heard that the commercial spirit of the age has invaded even the legal profession, to the impairment of its dignity, the blunting of its sense of honor; that a profession instituted for the maintenance of justice has become degenerate, and that its main calling now is a vulgar scramble for the "almighty dollar." We cannot bend our judgment to lend sanction to a foul aspersion.[110]

Indeed, as public scorn for attorneys in general is reaching new heights,[111] these words of moderation should not be forgotten.

CONCLUSION

Preparing, presenting, and defending bankruptcy fee applications does take time. Courts, however, need to make clear whether such efforts constitute "actual, necessary services" within the meaning of section 330(a). While any benefit to the estate from such efforts is undeniably remote, if not actually adverse, a bankruptcy attorney cannot get paid without presenting a fee application. Therefore, if bankruptcy courts conclude that fee-related efforts are necessary services, they should apply the language of section 330(a)(1), being careful to weigh each of its five factors when fixing an award of compensation. Compensation should be awarded by the courts for fee application work only in special circum-

110. *In re* Curtis, 100 F. 784, 795 (7th Cir.), *cert. denied*, 179 U.S. 683 (1900) (*quoted in In re* Consolidated Distribs., 298 F. 859, 863 (2d Cir. 1924); *In re* Kentucky Elec. Power Corp., 11 F. Supp. 528, 531 (W.D. Ky. 1935); *In re* Hamilton Hardware Co., 11 Bankr. 326, 333 (Bankr. E.D. Mich. 1981)).

111. Marlin Fitzwater, the White House press secretary, commenting on a speech by the President, remarked, "[l]awyers certainly deserve all the criticism they can get. . . . Everyone ought to take every opportunity to blast lawyers." *Fitzwater v. Lawyers*, N.Y. Times, Feb. 24, 1990, at A11, col. 1. Asked whether he was expressing the President's or his own feelings, Fitzwater responded, "[t]hose are universally held feelings by everyone who has ever dealt with the legal establishment." *Id.*; *see also* S. Stein, A Feast for Lawyers xvii (1989) (bankruptcy is "an area of legal practice that has contributed perhaps more than its share to the precipitous decline of the reputation of a once great profession").

stances, and only after the reasons for doing so are carefully explained in the terms provided by the statute.

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