

without the need for a formal application. The order provided that for additional services not adequately compensated by the no-look fee, the attorney could not accept cash or other payment directly from the debtor, but could apply for additional fees to be added to the administrative expense fees to be paid through the plan. The order also provided that where the attorney was satisfied to do the case within the no-look fee, it was not necessary for such attorney to keep contemporaneous time & billing records.

1.2 THE COMPENSATION ENVIRONMENT

Attorney's fees in bankruptcy are highly regulated. It is crucial that any attorney representing the debtor in a consumer bankruptcy case be familiar with the bankruptcy regulations regarding compensation of bankruptcy professionals.

Failure to properly observe the many rules bearing on compensation issues often results in court orders to refund (i.e. disgorge) all or a portion of the fees to the debtor or the bankruptcy estate, even if the debtor has not complained and may not even want to take the money back. Virtually unheard of in state court proceedings, the notion of refund of fees, colorfully called *disgorgement* in bankruptcy jargon, is an epidemic in the bankruptcy courts. And, closely related to disgorgement is denial or reduction of compensation.

Reasons for this problem are many, but prominent among them is that many bankruptcy judges and trustees have never represented consumer debtors to any great extent, and many have never had to meet a payroll.¹

Like most other areas of law practice, bankruptcy lawyering is both a business and a profession. This split personality, and the need to be sensitive to the economics of such a practice, have been recognized by some courts.

For example, the Court in *In re Castorena*,² quoting an earlier case,³ observed:

In an economic context the practice of law for a livelihood is a profit oriented business. With the changing approaches to the practice of law the business aspects associated with the profession have come to the forefront and have taken on a new importance.

The legal profession is paying more attention to the bottom line. Part is due to competition, part to consumer demand for efficiency and affordable fees, and part to a recognition that an attorney's time is limited and if the bottom line is to be improved, ways have to be found to provide more services in a limited amount of time.

These factors have led to an increased use of support staff, trained and experienced paralegals and secretaries, to handle routine matters not involving legal judgments or advice, and an increased use of computers to generate routine forms and documents.

Some in the profession are willing to practice law by specializing, limit the services they offer, charge a lower fee, and rely on their support staff and volume to maintain or improve the bottom line.

But having said that, the *Castorena* court further observed:

There must be a sensitivity to the need of debtors' attorneys to find time-effective and cost-effective ways to deliver professional services, and a sensitivity to the changing marketplace. But at the same time, attorneys are professionals. Individuals place their financial lives, and more, in their attorney's hands. Attorneys have ethical obligations to their clients regardless of the economic pressures which might exist. The balance cannot be tipped toward the interest in collecting fees to the detriment of the client's right to thorough and competent representation.

1.3 PUBLIC POLICY & COMPENSATION

¹ [Findings of the American Bankruptcy Institute National Report On Professional Compensation in Bankruptcy Cases](#) (1991) (LRP Publications).

² *In re Castorena*, 270 B.R. 504 (Bkrcty.Idaho 2001).

³ *In re Bancroft*, 204 B.R. 548 (Bkrcty.C.D.Ill. 1997).

Public policy in the bankruptcy field provides that bankruptcy attorneys should be compensated at a rate comparable to non-bankruptcy attorneys doing comparable non-bankruptcy work. Thus, the consumer bankruptcy attorney is entitled to charge at the same hourly rates, and for the same kinds of services, as non-bankruptcy lawyers.⁴ Bankruptcy lawyers may be reimbursed for the same kinds of out-of-pocket expenses as non-bankruptcy lawyers, including filing fees, photocopy charges, long-distance phone costs, and costs of legal research. In addition, time expended by paralegals employed by the firm may be billed in the same manner and rates as in other fields of practice. This policy is well documented in bankruptcy literature. The House comments, which prevailed in the adoption of the final amendments of the Code and for purposes of legislative intent, declared that the intent of the adoption of § 330⁵ was to over-rule those cases which had stood for the doctrine of “economy of the estate,”⁶ and stated, *inter alia*;

If that case⁷ were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. Bankruptcy fees that are lower than fees in other areas of the legal profession may operate properly when the attorneys appearing in bankruptcy cases do so intermittently, because a low fee in a small segment of a practice can be absorbed by other work. Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.⁸

Attorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However, bankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as services of other than in a case under title 11. ... Notions of economy of the estate in fixing fees are outdated and have no place in a bankruptcy code.⁹

Although the notion of “economy of the estate” still casts its shadow even today in case law,¹⁰ the general shift in policy away from it has been well recognized in the bankruptcy literature.¹¹

The legislative history specifically indicates that the movement away from an economy based standard as intended to provide for compensation of bankruptcy attorneys at the same rate as non-bankruptcy attorneys and to ensure that parties involved in bankruptcy would be able to secure qualified counsel.¹²

Another authority has made a similar observation:

The aim of the new Code is to compensate attorneys at a reasonable rate based on, among other factors, the cost of comparable services in a case other than under the Bankruptcy Code. This

⁴ See King, *Attorneys' Fees in Consumer Bankruptcy Cases: The Failure of Public Policy in Actual Practice and Suggestions For Reform*, Norton's Annual Survey of Bankruptcy Law (1996).

⁵ [11 U.S.C. § 330](#), Compensation of officers, Pub.L. 95-598, Nov. 6, 1978.

⁶ “Economy of the estate” ... the notion that debtors' attorneys should not be paid for all of their work in order to preserve the assets of the estate. Where the fees requested were deemed out of proportion to the size of the estate, the requested compensation was not fully allowed.

⁷ Referring to *In re Beverly Crest Convalescent Hospital*, 548 F.2d 817 (9th Cir. 1977).

⁸ Notes of Committee on the Judiciary, [House Report No. 95-595](#).

⁹ House Report 95-595, *supra*.; *In re Manoa Fin. Co.* 853 F.2d 687 (9th Cir. 1988).

¹⁰ *In re Lasica*, _ B.R. _ (N.D.Ill. 2003)

¹¹ Charles Jordan Tabb, *The History of The Bankruptcy Laws in The United States*, 3 Am.Bankr.Inst.L.Rev. 5, 35 (Spring, 1995).

¹² Hon. Roger M. Whelan, *Professional Compensation Reform: New Ideas or Old Failings?* 1 Am.Bankr.Inst.L.Rev. 407, 414 (1993).

change of policy serves to attract bankruptcy specialists of high quality who would otherwise choose another field in order to avoid the 'bankruptcy haircut' prevalent under the old Bankruptcy Act.¹³

Under the Code, the legislative history reflects a significant shift in policy. Attorneys and other professionals serving in a bankruptcy case are to be compensated at the same rate that would be used to compensate them for performing comparable services in nonbankruptcy cases.¹⁴

Following the publication of these statements of Congressional intent published case law took on a more generous tone regarding compensation of professionals, resulting in the basic concept that bankruptcy attorneys were entitled to charge and be paid in conformity with existing market practices and the prevailing market rates.

Bankruptcy courts must consider whether the fee awards are commensurate with fees for professional services in nonbankruptcy cases, thus providing sufficient economic incentive to practice in the bankruptcy courts.¹⁵

Congress intended to provide adequate compensation, on a par with that available in other areas of practice, to attract competent counsel to the bankruptcy specialty.¹⁶

[I]t is clear that in adopting § 330 Congress intended to retreat from doctrines which strictly limited fee awards under § 241 to less than attorneys might have received for services of the same professional quality in non-bankruptcy cases.¹⁷

And the court in *In re Busy Beaver Bldg. Centers*¹⁸ observed "Congress determined, it appears, that on average the gain to the estate of employing able, experienced, expert counsel would outweigh the expense to the estate of doing so, and that unless the estate paid competitive sums it could not retain such counsel on a regular basis."

Addressing the burden on attorneys of being forced to wait for compensation to be paid, one opinion observed:

We disagree, however, that sections 330 and 331 absolutely prohibit the transfer of funds to professionals prior to compliance with those sections.... [T]he trustee ignores the problem, arising especially in large cases, that when counsel must wait an extended period for payment, counsel is essentially compelled to finance the reorganization. This result is improper and may discourage qualified practitioners from participating in bankruptcy cases; a result that is clearly contrary to Congressional intent¹⁹.

Notwithstanding clear public policy in favor of debtors' attorneys being adequately compensated, the empirical evidence indicates that this has not happened, although there appears to be some improvement in recent years.²⁰ The regulations and other built-in impediments to getting paid are so great that in fact debtor attorneys are paid near the bottom of

¹³ [Comment, Attorneys Fees in Bankruptcy, 19 Gonz. L. Rev. 333, 334 \(1983/84\)](#)

¹⁴ 2 Collier On Bankruptcy § 330.02 (15th. ed.).

¹⁵ *In re McCombs*, 751 F.2d 286 (8th Cir. 1984).

¹⁶ *In re Commercial Consortium of California*, 135 B.R. 120, 126 (Bkrcty.C.D.Cal. 1991)

¹⁷ *In re Manoa Fin. Co.* 853 F.2d 687, 690 (9th Cir. 1988); *In re Nucorp Energy, Inc.* 764 F.2d 655 (9th Cir. 1985).

¹⁸ *In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 850 (3rd Cir. 1994), quoted with approval in *In re Raytech Corp.*, 206 B.R. 646 (Bkrcty.D.CT 1997).

¹⁹ *In re Heritage Mall Associates*, 184 B.R. 128, 134 (Bankr.Or., 1995)

²⁰ The fee survey completed by NACBA in 2003 demonstrates a modest liberalization in some jurisdictions of fee guidelines for consumer bankruptcy cases.

all legal specialties.²¹ And, there is still a large after-glow of the previous, discredited notion of economy of the estate, which stood for the proposition that lawyers should expect to be paid less than they are entitled to for their services in bankruptcy in order to preserve as much as possible for the creditors; see, for example, the ruling in *In re Allied Computer Repair, Inc.*,²² where the judge advanced the preposterous idea that “[a]ttorneys must be disabused of the erroneous notion that they are entitled to compensation as long as the time recorded was actually expended.” This statement is flatly contrary to explicit Congressional intent that bankruptcy lawyers are entitled to be paid commensurate with their non-bankruptcy colleagues doing comparable non-bankruptcy work, and the attitude behind such remarks only contributes to the lowering of professional standards in the debtors' bar.²³

1.4 FIXED OR HOURLY FEE?

a. Generally

Collier Bankruptcy Compensation Guide, at ¶ 2.02[1], states, “the flat fee arrangement creates the least problem for the debtor's counsel, subject only to the restriction that the fee not be excessive.” However, the author of this book believes this advice should be qualified, and that in some cases hourly billing is preferable in both chapter 7 and chapter 13 cases.

b. Argument against flat fees

A case may be made that a fixed fee in a bankruptcy case is not a wise thing to do. While it is true that there is a fifty percent chance the case will be routine ... the other fifty percent won't be. No matter how routine or simple the case may appear when you sign up the client, you simply must assume there are sharks swimming just below the surface. And they will rise to the surface as soon as you file the case.

Examples ... the client who comes in to wipe out general unsecured debt, only he forgets to tell you about the tax claims. Or, he tells you all about the federal tax claims, but forgets to tell you about the state tax claims. He forgets to tell you that he transferred all his assets to a family trust (spelled, “scam”); forgets to tell you that he is expecting a huge inheritance (why? Because he didn't know what you meant **when** you asked him if he was a beneficiary of a pending probate. In fact, his probate gland is quite healthy, thank you!); he forgets to tell you he used the credit cards to buy his girl-friend a vacation in France the month before you file; forgets to tell you that he gets an income from a trust (because he thought income only referred to a job); forgets to tell you his home is in foreclosure, etc. etc.

All clients will swear that they thought the fee was a fixed fee, and that you are obligated to solve every one of their financial and legal problems for the next ten years.

Collecting compensation in Chapter 13 cases is a real challenge, for a variety of reasons. Chapter 13 cases may be seen as miniature chapter 11 reorganizations. Thus, clients for whom Chapter 13 is the most desirable remedy often have the same kinds of problems as businesses in chapter 11. This is more so following the Bankruptcy Reform Act of 1994, which made more small business eligible for chapter 13 by raising the debt ceiling on eligibility under Bankruptcy Code § 109(e).

²¹ See, King, *Attorneys' Compensation in Consumer Bankruptcy Cases; The Failure of Public Policy in Actual Practice and Suggestions For Reform*, (Norton Annual Survey of Bankruptcy Law, 1996)

²² *In re Allied Computer Repair, Inc.* 202 B.R. 877 (Bkrcty.W.D.Ky. 1996).

²³ See the author's article appearing in the journal of the National Association of Chapter 13 Trustees (The NACTT Quarterly), entitled [Inadequate Compensation of Debtors' Attorneys Is Impairing the Chapter 13 System](#), reproduced in the Appendix. See, also, the author's extensive article in Norton, Annual Survey of Bankruptcy Law, 1996-97 Edition, entitled *Compensation of Debtors' Attorneys in Consumer Bankruptcy - The Failure of Public Policy in Actual Practice And Suggestions For Reform*.

Thus, Chapter 13 cases can quickly become very problematical and time-consuming. The notion that Chapter 13 work can be handled on a routine basis is a myth. In many cases the attorney finds he has become embroiled in a wide variety of possible problems, including serial relief from stay motions, motions for use of [cash collateral](#), disputes over the debt limits of 109(e), objections to confirmation based on bad faith or lack of feasibility, client failure to provide documentation required by the trustee for confirmation, hearings to determine the value of collateral, motions to amend the plan, applications for supplemental fees, objections to claims, filing claims on behalf of secured creditors, and on and on. But many of these same issues may arise in Chapter 7, as well.

In both chapter 7 and chapter 13 cases, the best advice might be to opt for fixed fees. But thought should be put into the pros and cons of each strategy.

In any event, don't let yourself get cornered in the trap of limiting yourself to a modest fixed fee to represent the client for the rest of his or her natural life; take a few prudent steps to assure that you have the right to collect additional fees for additional work, and to protect yourself as much as possible against an arbitrary fee reduction by the court.

c. Argument for flat fees

See §§ 4.1(b)(3), 4.2 & 4.3, 5.1(d)(1).