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Cover Page Footnote
Referee in Bankruptcy, Eastern District of New York.

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FEES AND ALLOWANCES TO ATTORNEYS IN BANKRUPTCY AND CHAPTER XI PROCEEDINGS

*WILLIAM J. RUDIN**

THE Chief Justice of the United States has cautioned that "the high cost of administration in bankruptcy is a matter of continuing concern. Last year, more than twenty-six cents out of every dollar realized in bankruptcy proceedings was used up in administrative costs and represents an additional loss to creditors. Costs must be reduced if the judiciary is to continue to administer the bankruptcy system."[1] This reemphasis of the "economical spirit of the Act" highlights a significant area of conflict between the bench and the bar—the allowance of fees.[2]

A substantial portion of administration expenses is necessarily and properly required for attorneys' fees.[3] The problem is not so much who should be compensated, but, rather, *how much* should be received for the services rendered. The Bankruptcy Act does not establish any set schedule of fees,[4] but, to the contrary, is particularly vague in this area of allowances in bankruptcy and Chapter XI cases.[5] All that can be said

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1. Address by Chief Justice Earl Warren, Administration of the Federal Courts, 41st Annual Meeting of the American Law Institute, Week of May 17, 1964, in N.Y.L.J., May 27, 1964, p. 4, col. 2. The Chief Justice noted that one possible solution which has been advanced is to create an agency, such as the Alien Property Custodian, to aid in the administration of bankruptcy proceedings.

2. Charles Elihu Nadler, a noted authority on bankruptcy administration, has argued that it should not be the attorneys who feel the bite of the spirit of economy. He noted that the rationale behind this spirit of economy is that, if less is paid to the attorneys, more will be available for distribution to creditors. However, it was pointed out that what the courts fail to realize is that it is not the attorneys who are responsible for the poor financial condition of the bankrupt or debtor. If anyone at all is at fault, then that blame must fall upon the creditors (whose careless or negligent extensions of credit created the difficulty), and, therefore, they should rightfully bear the brunt of the costs in the administration. Finally, Nadler predicted that, if the courts persist in their parsimonious attitude, then the capable and respected attorneys will be forced to abandon bankruptcy practice altogether. Nadler, Fallacies in Judicial Attitudes Towards Legal Fees in Bankruptcy, 58 Com. L.J. 305, 307-08 (1953).

3. In 1964, attorneys' fees accounted for over 40% of the total costs and expenses of administration in bankruptcy proceedings. Administrative Office of the United States Court, Bankruptcy Costs Studies, Memorandum No. 1 (Supp. I, July 12, 1965). See generally Rudin, Allowances in Chapter XI Proceedings, Proceedings of Second Seminar for Referees in Bankruptcy 39 (1965); Snedecor, Fees and Allowances in Straight Bankruptcy, Proceedings of Second Seminar for Referees in Bankruptcy 27 (1965).

4. In re Charles Ray Glass, Inc., 47 F. Supp. 428 (S.D. Cal. 1942).

5. Although the act directs close judicial supervision of administration costs in bankruptcy

is that the quantum of compensation is placed within the sound discretion of the court,[6] which discretion must be exercised within the framework of the various provisions of the act and the General Orders. The perplexing problem facing the referee is the extent to which the ordinary measure of legal fees[7] should be disallowed in an attempt to abide by the spirit of economy. Economy should not foreclose just compensation;[8] fees must not be set so low as to discourage the active participation of able attorneys.[9] Yet, the court must be vigilant in avoiding the exercise of "vicarious generosity"[10] and bear in mind the interests of the creditors. It is within the ambit of these competing policies that the referee must make his decision.

I. STRAIGHT BANKRUPTCY

A. *Attorney for the Bankrupt and the Petitioning Creditors*

Section 64a of the Bankruptcy Act includes among the items of costs and expenses "one reasonable attorney's fee, for the professional services actually rendered . . . to the petitioning creditors . . . ."[11] The services rendered by the attorney to the petitioning creditors are usually limited in scope[12] and time, and, except when necessary to try issues raised by an answer to an involuntary petition, command modest compensation.[13]

proceedings by specifying safeguards and precautions, allowances are covered in greater detail only in Chapter X cases.

6. In re Lustron Corp., 196 F.2d 975 (7th Cir. 1952); Commerce Trust Co. v. Aylward, 145 F.2d 113 (8th Cir. 1944); In re Owl Drug Co., 16 F. Supp. 139 (D. Nev. 1936), aff'd sub nom. Cohn v. Edler, 90 F.2d 823 (9th Cir. 1937).

7. It is said that fees in bankruptcy cases cannot be as substantial as those received for similar services in private practice. In re Owl Drug Co., supra note 6, at 144.

8. "[T]he laborer is worthy of his hire." Luke 10:7.

9. Cf. In re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931).

10. In re Gilbert, 276 U.S. 294, 296 (1928); see Realty Associates Sec. Corp. v. O'Connor, 295 U.S. 295 (1935). It has also been suggested that referees should avoid vicarious parsimony. In the Matter of The Dole Co., 244 F. Supp. 751, 753 (N.D. Me. 1965).

11. Bankruptcy Act 64a, 52 Stat. 874 (1938), as amended, 11 U.S.C. § 104(a)(1) (1964). Section 64 gives priority to the costs of administration, while § 62a(1) authorizes the allowance of these costs and expenses of administration. 60 Stat. 329 (1946), 11 U.S.C. § 102(a)(1) (1964). For a discussion of the fees allowed to the attorney for the petitioning creditors, see Snedecor, supra note 3, at 32-33.

12. These services are usually confined to preparing the involuntary petition and procuring the adjudication of the bankrupt. E.g., Calhoun v. Stratton, 61 F.2d 302 (6th Cir. 1932); In re Consolidated Factors Corp., 59 F.2d 193 (2d Cir. 1932). In cases where the trustee or receiver is not immediately appointed, the attorney's services may be expanded to include examinations of the bankrupt and the witnesses. See Herzog, Fees and Allowances in Bankruptcy, 36 Conn. B.J. 374, 387-88 (1962). These services could properly be considered to aid in the administration of the estate.

13. In the Southern District of New York, the fees of the attorneys for the petitioning creditors generally run between $125 and $250. Herzog, supra note 12, at 388.

These services terminate with the entry of the order of adjudication.[14]

Section 64 also provides for allowances to the attorney for the bankrupt. Even though the services are performed for the bankrupt, the attorney will be compensated only for those legal services of a professional nature which aid in the administration of the estate.[15] Thus, he will be compensated for services which were reasonably necessary and rendered in aiding the bankrupt in preparing his schedules of assets and liabilities and such other statutory duties which he may perform,[16] such as attendance at the first meeting of creditors. Pursuant to section 60d of the act,[17] any payment by the debtor directly to his attorney, for services rendered prior to the filing of the petition, can be re-examined by the court on the petition of the trustee, any creditor of the bankrupt, or the court on its own motion. The payment will be valid only to the extent of a reasonable amount as determined by the referee, and any excess will be returned to the estate.[18]

The fact that the attorney voluntarily aids the receiver or trustee in his duties does not entitle the attorney to any additional compensation;[19] nor will he receive an allowance for the unsuccessful attempt to resist an involuntary petition.[20] Likewise, services rendered in aiding the debtor in obtaining his discharge[21] or in defending him against charges of fraud are not compensable since they do not aid in the administration of the estate.[22]

The weight of authority is to the effect that prior fruitless efforts to effect an arrangement under Chapter XI of the act, a composition or

14. Calhoun v. Stratton, 61 F.2d 302, 303 (6th Cir. 1932); Morse & Tyson v. Irving-Pitt Mfg. Co., 18 F.2d 692, 695 (8th Cir. 1927); cf. In re Eureka Upholstering Co., 48 F.2d 95 (2d Cir. 1931).

15. In re Herald-Post, Inc., 21 F. Supp. 231 (W.D. Ky. 1937). General Order 42, 11 U.S.C. App. (1964), provides: "No allowance of compensation shall be made to any attorney for a receiver, trustee or debtor in possession except for professional services."

The concept that the services must be beneficial to or aid in the administration of the estate was set forth by the Supreme Court in 1903 in the landmark case of Randolph v. Scruggs, 190 U.S. 533, 538-39 (1903).

16. In re Geiser Mfg. Co., 23 F. Supp. 482, 484 (M.D. Pa. 1938); In re Higgin Mfg. Co., 19 F. Supp. 120, 122 (E.D. Ky. 1937). But see Herzog, supra note 12, at 389.

17. Bankruptcy Act § 60d, 77 Stat. 14 (1963), 11 U.S.C. § 96(d) (1964).

18. Ibid. See Quinn v. Union Nat'l Bank, 32 F.2d 762, 765 (8th Cir. 1929).

19. In re Eureka Upholstering Co., 48 F.2d 95 (2d Cir. 1931).

20. In re Evenod Perfumer, Inc., 67 F.2d 878 (2d Cir. 1933), cert. denied, 291 U.S. 671 (1934).

21. Lewis v. Fitzgerald, 295 F.2d 877 (10th Cir. 1961), cert. denied, 369 U.S. 828 (1962); In re Owl Drug Co., 16 F. Supp. 139 (D. Nev. 1936), aff'd sub nom. Cohn v. Edler, 90 F.2d 823 (9th Cir. 1937).

22. In re Owl Drug Co., supra note 21, at 145.

debt extension, are not compensable as an administrative claim.[23] However, *In the Matter of Knickerbocker Leather & Novelty Co.*[24] appears to be a rejection of that principle. There, the attorney for the bankrupt petitioned for the fixing of fees for services rendered in attempting to obtain approval and confirmation of a plan of reorganization under Chapter XI. The referee considered only those services rendered in connection with the filing of the petition, refusing to consider the other services performed and set forth in the application. These services included efforts to obtain financing which was essential for the approval and confirmation of the plan.[25]

The district court, in modifying the referee's order, noted that "the Referee did not hold, as petitioner seems to argue, that petitioner could not ever be compensated for his services to the then debtor between February 8th and May 15th, 1956. He merely held that allowance for such services must await an application therefor . . . ."[26] The court of appeals, in its per curiam affirmance, stated that "the order, of course, did not purport to preclude an application for an allowance as an expense of the administration of the estate."[27]

This conclusion appears to be in conflict with the earlier decisions,[28] as well as with the test in the Bankruptcy Act. Whether or not particular services are compensable is governed by the act,[29] and there is no provision in the bankruptcy sections which specifically authorizes the allowance of fees for unsuccessful attempts to have a plan of arrangement confirmed. Similarly, it is provided that, in fixing allowances under Chapter XI, "the court shall give consideration only to the services which contributed to the arrangement confirmed or to the refusal of confirmation of an arrangement, or which were beneficial in the administration of the estate, and the proper costs and expenses incidental thereto . . . ."[30] Congressional intent to deny compensation to the attorney in an unsuccessful Chapter XI proceeding becomes even clearer in light of the amendments to Chapters X[31] and XII[32] made by the Chandler Act

23. In re Kinnane Co.'s Estate, 242 Fed. 769 (6th Cir. 1917); In re Geiser Mfg. Co., 23 F. Supp. 482 (M.D. Pa. 1938); In re Higgin Mfg. Co., 19 F. Supp. 120 (E.D. Ky. 1937).

24. 158 F. Supp. 236 (S.D.N.Y. 1958), aff'd per curiam sub nom. Haar v. Oseland, 265 F.2d 218 (2d Cir. 1959).

25. 158 F. Supp. at 237.

26. Ibid.

27. 265 F.2d at 219.

28. See cases cited note 23 supra.

29. Lane v. Haytian Corp. of America, 117 F.2d 216, 219 (2d Cir.), cert. denied, 313 U.S. 580 (1941); In re Realty Associates Sec. Corp., 69 F.2d 41, 43 (2d Cir.), cert. denied, 292 U.S. 628 (1934).

30. Bankruptcy Act § 337(2), 72 Stat. 821 (1958), 11 U.S.C. § 737(2) (1964).

31. Bankruptcy Act § 246, 52 Stat. 901 (1938), 11 U.S.C. § 646 (1964).

32. Bankruptcy Act § 495, 52 Stat. 926 (1938), 11 U.S.C. § 895 (1964).

of 1938. By virtue of these amendments, the court is empowered to "allow reasonable compensation for services rendered"[33] in abortive Chapter X and XII proceedings. The absence of similar provisions in the straight bankruptcy sections and in Chapter XI of the act seems, therefore, to preclude the allowance of any such compensation, and thus requires a holding contrary to the result indicated by the dictum in the *Knickerbocker* case.

B. *Attorney for the Receiver and Trustee*

Although the attorneys for the receiver[34] or trustee have the greatest responsibility in preserving, increasing, and administering the estate, there is no specific statutory authorization for compensating them. Their compensation is considered, therefore, to be part of the "costs and expenses of administration" as provided in section 64a(1).[35] The attorney will receive compensation only for services which are of a professional nature, and not for ministerial or clerical tasks.[36] Since only the court can fix the fee after appropriate notice to creditors,[37] retainers to the attorney for the trustee or contingent fee contracts are not permitted in straight bankruptcy cases.[38]

Interim allowances may be granted in a proper case,[39] even though there are no express provisions relating thereto. Generally, such allowances will be awarded only in cases where large estates are involved which require an extended period of time for liquidation and settlement. The application for the allowance usually covers services which already have been rendered, but may include, in certain cases, charges for reasonably anticipated services.[40]

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33. Bankruptcy Act §§ 246, 495, 52 Stat. 901, 926 (1938), 11 U.S.C. §§ 646, 895 (1964).

34. Since the duties of receivers have been increased by the Chandler Act of 1938, their need for legal services, therefore, has correspondingly increased. See General Order 40, 11 U.S.C. App. (1964); 3 Collier, Bankruptcy ¶ 62.12[3], at 1475-76 (14th ed. 1964) [hereinafter cited as Collier].

35. Bankruptcy Act § 64a(1), 76 Stat. 571 (1962), 11 U.S.C. § 104(a)(1) (1964).

36. Connelly v. Hancock, Dorr, Ryan & Shove, 195 F.2d 864 (2d Cir. 1952); In re Union Dredging Co., 225 Fed. 188 (D. Del. 1915); In re Eureka Upholstering Co., 48 F.2d 95 (2d Cir. 1931) (dictum). Often, there is great difficulty in drawing the line between compensable professional services and non-compensable clerical services. See In re S.R. Stern Labs., Inc., Bank. No. 92726 (S.D.N.Y. June 17, 1959).

37. Bankruptcy Act § 58, 52 Stat. 867 (1938), as amended, 11 U.S.C. § 94 (1964).

38. Watkins v. Sedberry, 261 U.S. 571, 574-75 (1923).

39. Connelly v. Hancock, Dorr, Ryan & Shove, 195 F.2d 864, 868-69 (2d Cir. 1952); In re Paramount-Publix Corp., 10 F. Supp. 504, 510-11 (S.D.N.Y. 1934). It should be noted that any interim allowances paid are subject to reconsideration by the court. See 3 Collier ¶ 62.12[7], at 1506 n.94.

40. In re Paramount-Publix Corp., 10 F. Supp. 504, 510-11 (S.D.N.Y. 1934).

II. Chapter XI Proceedings

It has been noted that Chapter XI makes only oblique reference to the subject of allowances. Therefore, it is necessary to review the entire act and the General Orders to find guidance on the subject.[41]

The act requires the court to fix a time within which the debtor shall deposit the money necessary to pay the costs and expenses of the proceeding and the expenses incurred by the creditors' committee, including fees and expenses of its attorneys, accountants, and agents.[42] Further, the court is authorized to fix the amount of compensation to be paid to the distributor.[43] The act also grants priority to the "costs and expenses of administration,"[44] which, of course, include allowances for services rendered by the attorneys. Moreover, the General Orders contemplate the allowance of fees to attorneys for the receiver and/or the debtor in possession.[45]

A. *Attorney for the Debtor and the Debtor in Possession*

Normally, only one attorney is chosen to represent the debtor in both of his capacities, *i.e.*, as the debtor and as the debtor in possession. That no distinction should be made as to what capacity he has served in is evidenced by the fact that the attorney files only one application for allowances, which lists all of the services rendered in both capacities.[46]

The attorney for the debtor and the debtor in possession occupies a position analogous to that of the attorney for the bankrupt and the attorney for the trustee in a straight bankruptcy proceeding: It is upon him that the bulk of the work falls. His duties include, for example, preparation of the petition and schedules, achieving confirmation of the plan of arrangement, and advising his client in both the Chapter XI proceedings and in the operation of the corporation's business activities. The fee of the attorney for the debtor and the debtor in possession is, therefore, often substantial, since it is he who will usually be responsible for the ultimate success of the proceeding.[47] Generally, the same criteria utilized in straight bankruptcy cases should also be used in Chapter XI cases in determining the amount of the allowance.[48]

There are no longer any grounds for disputing that the compensation of the attorney for the debtor is to be determined by the court.[49] Any

41. Herzog, Bankruptcy Law—Modern Trends, 37 Ref. J. 110 (1963).
42. Bankruptcy Act § 337(2), 72 Stat. 821 (1958), 11 U.S.C. § 737(2) (1964).
43. Bankruptcy Act § 337(1), 52 Stat. 908 (1938), 11 U.S.C. § 737(1) (1964).
44. Bankruptcy Act § 64a(1), 76 Stat. 571 (1962), 11 U.S.C. § 104(a)(1) (1964).
45. General Orders 42, 44, 11 U.S.C. App. (1964).
46. Herzog, supra note 41, at 112.
47. Ibid.
48. See notes 84-88 infra and accompanying text.
49. In re Preston, 89 F. Supp. 866 (S.D.N.Y. 1950). In Preston, the attorney had

fee paid by the debtor directly to his attorney is reviewable by the court since section 60d has been made applicable to Chapter XI proceedings by section 302.[50]

B. *Attorney for the Creditors' Committee*

The policy of the Bankruptcy Act dictates that compensation be denied unless expressly provided for in the act.[51] Since no provision is made for the payment of fees to counsel for the creditors' committee in a straight bankruptcy proceeding, compensation generally will be denied.[52] However, there is express authority in the act for allowances to attorneys for creditors' committees in Chapter XI proceedings. Section 337 requires a deposit of money to pay the "necessary expenses (including fees and expenses of attorneys, accountants and agents) . . . incurred after [the attorney's] . . . appointment by a committee appointed pursuant to section 338 of this Act . . . ."[53]

This section was strictly construed in the case of *Lane v. Haytian Corp. of America*,[54] where allowances were denied to an *unofficial* creditors' committee and its attorney in a Chapter XI proceeding. The court noted that the provisions of the act allow compensation only to an official committee of creditors and that the compensable duties of this committee are limited to examining the plan proposed by the debtor and advising the general creditors whether the plan should be accepted or rejected.[55] Services rendered by the committee before their official appointment aimed at aiding the debtor in formulating or achieving acceptance of the plan are not compensable since the committee and its attorney are representatives only of the creditors and not of the debtor.[56]

Some ten years after the *Lane* case, section 337(2) was amended to allow for payment of attorney's fees incurred "before or after the filing

petitioned for $2,500 as fees for services rendered in formulating and gaining acceptance of the plan of arrangement. The referee disallowed a substantial part of the claim. On the appeal, the attorney contended that the referee was without power to pass upon the fee since § 337(2) makes no reference to the attorney for the debtor. Id. at 867-68. Section 337(2) authorizes the referee to set only the fee of the attorney for the creditors' committee. The court dismissed this contention and found that § 64a, which authorizes the court to pass upon the fees paid by the debtor to his attorney, has been incorporated into Chapter XI proceedings by § 302 of the act. Id. at 868-69.

50. Bankruptcy Act § 302, 52 Stat. 905 (1938), 11 U.S.C. § 702 (1964).

51. Lane v. Haytian Corp. of America, 117 F.2d 216, 219 (2d Cir.), cert. denied, 313 U.S. 580 (1941); In re Realty Associates Sec. Corp., 69 F.2d 41, 43 (2d Cir.), cert. denied, 292 U.S. 628 (1934); Nisonoff v. Irving Trust Co., 68 F.2d 32, 34 (2d Cir. 1933).

52. In re Realty Associates Sec. Corp., supra note 51, at 42.

53. Bankruptcy Act § 337(2), 72 Stat. 821 (1958), 11 U.S.C. § 737(2) (1964).

54. 117 F.2d 216 (2d Cir.), cert. denied, 313 U.S. 580 (1941).

55. 117 F.2d at 221.

56. Ibid.

of the petition . . . by a committee designated in writings, filed with the court and signed and acknowledged by a majority in amount of unsecured creditors . . . ."[57] In fixing the allowance, the court is directed to give consideration only "to the services which contributed to the arrangement confirmed or to the refusal of confirmation of an arrangement, or which were beneficial in the administration of the estate, and the proper costs and expenses incidental thereto . . . ."[58]

Under the extremely broad amendatory language of this section, services which in any manner tend towards the confirmation of the arrangement are now compensable, thus overruling *Lane v. Haytian Corp. of America*[59] in this respect. The duties of the creditors' committee have been greatly expanded, and now may properly include, for example, scrutinizing and supervising the operations of the debtor in possession, approving or disapproving orders submitted to the court for signature, advising the court with regard to the limitation of purchases, the handling of moneys, and the hiring and firing of employees.[60]

It seems clear from the text of the act that, if the arrangement aborts, counsel for the committee receives no compensation unless it was through his efforts that the confirmation was denied. This result follows both from the quoted portion of section 337(2) set forth above and from section 64a(3).[61] The latter section provides that, where "confirmation of an arrangement . . . has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more [of the] creditors . . . the reasonable costs and expenses [incurred by these] . . . creditors in obtaining such refusal, revocation, or setting aside . . ." should be paid.[62]

The phrase which appears in section 337(2), "or which were beneficial in the administration of the estate,"[63] can only mean those services which result in the enhancement of the assets of the estate in one form or

57. Bankruptcy Act § 337(2), 66 Stat. 432 (1952), 11 U.S.C. § 737(2) (1964), amending 52 Stat. 908 (1938).

58. Ibid.

59. 117 F.2d 216 (2d Cir.), cert. denied, 313 U.S. 580 (1941). Of course, compensation will not be allowed for services which were not of a legal nature. Nor can the 1952 amendment be read to imply that the attorney for the creditors' committee can now assume the duties of the attorney for the debtor in possession. It is still the latter's primary duty to prepare the plan of arrangement, and, if the attorney for the creditors' committee voluntarily assumes this responsibility, he will not receive any allowance. The Lane case has not been overruled in this respect.

60. See Rudin, Allowances in Chapter XI Proceedings, Proceedings of Second Seminar for Referees in Bankruptcy 39, 45 (1965).

61. Bankruptcy Act § 64a(3), 52 Stat. 874 (1938), as amended, 11 U.S.C. § 104(a)(3) (1964).

62. Ibid.

63. Bankruptcy Act § 337(2), 72 Stat. 821 (1958), 11 U.S.C. § 737(2) (1964).

another. Examples of this would be the institution of proceedings to invalidate liens, the setting aside of fraudulent transfers, and the recovery of preferentially transferred property. In no other way can the creditor render services which are "beneficial in the administration of the estate."[64]

III. The Thrust of Section 60d

The 1963 amendment to section 60d[65] has thrust the referee squarely and actively into the process of fee allowances. Under the new section, the referee can now, on the petition of either the trustee or any creditor, or *on his own motion*, review the fees paid to attorneys in both bankruptcy and Chapter XI proceedings. The purpose of the amendment was to provide adequate protection for the creditors and the bankrupt or debtor from excessive attorney's fees, inasmuch as lawyers are often hesitant to challenge the reasonableness of their colleagues' fees.[66]

The duty which devolves upon the referee cannot and should not be avoided even if the debtor and creditors are in agreement.[67] In a straight

64. Herzog, supra note 41, at 114. The case of Technical Color & Chem. Works, Inc. v. Two Guys from Massapequa, Inc., 327 F.2d 737 (2d Cir. 1964), is an extraordinary example of services rendered by a creditor's attorney which were beneficial to the estate. The debtor's plan of arrangement had been approved by the creditors. Upon submission of the plan to the court, the creditor's attorney objected to the confirmation on the grounds that it was not in the best interests of the creditors. It was alleged that many of the claims against the estate were without merit and that the debtor had made several fraudulent conveyances and preferences. If all the allegations were true, the net result would have been that the creditors would receive over 60% of the face value of their claims upon liquidation, rather than the proposed 33%. The court of appeals held that the lower court should have held a full hearing on the petition, and, if the allegations were found to be true, the court should then refuse confirmation.

65. "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

"If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt." Bankruptcy Act § 60d, 77 Stat. 14 (1963), 11 U.S.C. § 96(d) (1964), amending 52 Stat. 870 (1938).

66. S. Rep. No. 144, 88th Cong., 1st Sess. 2 (1963). In the House Report to the amendment, it was noted that it often "matters very little to a bankrupt whether his attorney's fee is large or small since it will be paid out of assets which in any event will normally be completely consumed in distribution." H.R. Rep. No. 99, 88th Cong., 1st Sess. 1 (1963).

67. In the Matter of Seed Marketing Ass'n, 228 F. Supp. 812, 813, 823 (D. Neb. 1964); In re Goodman, 17 F. Supp. 337, 338 (W.D.N.Y. 1936); see In the Matter of The Dole Co., 244 F. Supp. 751 (N.D. Me. 1965).

bankruptcy proceeding, the amount awarded as counsel fees diminishes to that extent the amount available for distribution to creditors. In a Chapter XI proceeding, any reduction in the amount requested reverts to the debtor. Even if the debtor is content to let his attorney's request for allowance stand and the creditors raise no objection, the court must keep the fees reasonable in conformity with the policy of economy required by the act, and thus improve the debtor's financial condition and expedite his eventual rehabilitation.

Only fees paid by the bankrupt to his attorney in contemplation of bankruptcy are summarily reviewable by the court under section 60d.[68] On a motion to examine, there are two distinct questions presented to the court. The first, pertaining to jurisdiction, is whether the payment was made in contemplation of bankruptcy;[69] and the second is whether the payment was reasonable.[70] To establish "contemplation of bankruptcy," the court must determine what the bankrupt's state of mind was at the time of the payment.[71] The thought of liquidation must be the "impelling cause of the payment."[72] "Contemplation" is, therefore, broadly defined as having the possibility of liquidation in mind as distinguished from the narrower definition of having the actual intent to file a petition.[73] Thus, in the leading case of *Conrad, Rubin & Lesser v. Pender*,[74] the Supreme Court held that payments made by the bankrupt to his attorneys for conducting negotiations with creditors for extensions of time, and thereby attempting to avoid bankruptcy, were subject to review under section 60d, since "negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment."[75]

Although the referee may review any fees paid by the debtor, if the attorney receives his fee from a third party, the court is without authority to examine the reasonableness of the fee,[76] unless it appears that the debtor has obligated himself to repay the amount to the third person

68. Conrad, Rubin & Lesser v. Pender, 289 U.S. 472 (1933); In re Wood & Henderson, 210 U.S. 246 (1908).

69. Conrad, Rubin & Lesser v. Pender, 289 U.S. 472 (1933); see 3 Collier ¶ 60.69. It is the contemplation of the bankrupt, not his attorney, which is requisite. Tripp v. Mitschrich, 211 Fed. 424 (8th Cir. 1914).

70. For the criteria used in determining reasonableness, see pp. 397-400 infra.

71. Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 477 (1933).

72. Id. at 479.

73. Id. at 478-79.

74. 289 U.S. 472 (1933).

75. Id. at 479.

76. In re Star Brand Prods. & Pickle Co., 96 F. Supp. 406 (S.D.N.Y. 1951); In re A.L. Ratner, Inc., 95 F. Supp. 137 (S.D.N.Y. 1951).

after confirmation of the plan in Chapter XI.[77] This situation has been criticized as presenting a threat that unreasonable and unconscionable fees may be coerced from the debtor in return for the approval of the arrangement.[78] In a proceeding under Chapter X of the act, the court is expressly given the right to determine the reasonableness of fees paid by third parties.[79] A bill, recently introduced into the House of Representatives by Congressman Celler, would amend Chapter XI to have it conform with Chapter X in this respect.[80] The determination of the referee in fixing the compensation, if free from errors of law, ought not to be disturbed, unless it is clearly unsupported by the evidence.[81] Moreover, the two-year limitation imposed by the act within which the receiver or trustee must institute proceedings on behalf of the estate does not bind the referee in the exercise of his powers under section 60d.[82]

IV. Quantum of Compensation

As in any case involving fees, the best that the court can hope to do is to come within the *area* of reasonableness, not so high as to be overgenerous and unconscionable and not so low as to fail to recognize the importance of the role played by the . . . attorney.[83]

Different courts have enunciated and emphasized different standards that should be used in attempting to reach this area of reasonableness. Few questions in bankruptcy administration have been as persistently litigated as those relating to fees; the reported cases are manifold. In one of the most widely cited decisions on the subject, *In re Owl Drug Co.*,[84] the court, in an exhaustive opinion, enumerated several criteria which are now traditionally used in determining the reasonableness of fees. These factors are: (1) the time consumed; (2) the intricacy of the legal problems involved; (3) the relative size of the estate and the amount available for distribution; (4) the quality of the opposition encountered; (5) the results achieved (salvage theory); and (6) the ethics of the profession.[85] The court then noted that any determination is, of course, subject to the economical spirit of the act:

77. Lane v. Haytian Corp. of America, 117 F.2d 216 (2d Cir.), cert. denied, 313 U.S. 580 (1941).

78. Herzog, supra note 41, at 113.

79. Bankruptcy Act § 221(4), 52 Stat. 897 (1938), 11 U.S.C. § 621(4) (1964).

80. H.R. 5645, 89th Cong., 1st Sess. (1965).

81. E.g., Roth v. Reich, 164 F.2d 305, 311 (2d Cir. 1947); Matter of Valentine, 139 F. Supp. 576, 577 (D. Md. 1956).

82. Levin & Weintraub v. Rosenberg, 330 F.2d 98 (2d Cir. 1964).

83. Herzog, supra note 41, at 111.

84. 16 F. Supp. 139 (D. Nev. 1936), aff'd sub nom. Cohn v. Edler, 90 F.2d 823 (9th Cir. 1937).

85. 16 F. Supp. at 142. For the ethical considerations, see ABA, Canons of Professional

We must, nevertheless, bear in mind the fact that, in view of the policy of economy of the Bankruptcy Act, allowances for such fees cannot and should not approximate what attorneys might or would receive, under similar circumstances, for services to private persons.[86]

Probably the most significant factor to be used in determining the amount of the allowance is the referee's own knowledge and experience with respect to the value of the services.[87] Consideration should be given to the entire spectrum of economic facts, including cost of living, comparative value of similar services in private practice, etc.[88]

As we have already seen,[89] the services rendered by the attorney for the bankrupt and the attorney for the petitioning creditors are limited in scope, and, therefore, compensation will generally be limited.[90] However, the above criteria should be used in determining the fees of the other attorneys, upon whom the burden of administration falls.

Recent cases fixing allowances, especially in the Second Circuit, have laid great, if not undue, stress upon the time element. Chief Judge Lumbard, writing for the court in *In the Matter of Hudson & M.R.R.*,[91] issued this stern warning to the Bar:

We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent. Lawyers are well aware that, especially where services of the nature here involved are spread over a period of time and ultimate payment is virtually assured, they are valued principally on the basis of the time required. There is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so.[92]

One year later, the Second Circuit strongly reiterated its position in *In the Matter of the Wal-Feld Co.*[93] The attorneys had requested compensation of 25,000 dollars, based on 1,150 hours of work. The court, in affirming the order below which had awarded the attorneys 11,000 dollars,[94] noted that, since daily time sheets had not been kept, the attorneys could not receive the full amount requested.[95] The attorneys had

Ethics, Canon 12; Feibelman, The Allowance and Reasonableness of Attorneys' Fees in Bankruptcy, 15 Bus. Law. 889, 894-95 (1960).

86. 16 F. Supp. at 144. (Emphasis omitted.)

87. Roth v. Reich, 164 F.2d 305, 311 (2d Cir. 1947).

88. Referee Herzog warns that, if the courts allow fees to fall so low as to make bankruptcy practice unprofitable, and the practice falls into the hands of the unscrupulous, the creditors will pay doubly for this "tarnished administration" of bankruptcy administration. Herzog, Fees and Allowances in Bankruptcy, 36 Conn. B.J. 374, 377-78 (1962).

89. See notes 12-14 supra and accompanying text.

90. See note 13 supra.

91. 339 F.2d 114 (2d Cir. 1964).

92. Id. at 115.

93. 345 F.2d 676 (2d Cir. 1965).

94. This constituted approximately $10 per hour.

95. Id. at 677.

sought to support their petition for allowance by the fact that, of the 83,000 dollars received by the estate, 59,000 dollars came from three settlements negotiated by them. The court found, however, that this success in enriching the estate did not excuse the firm from keeping detailed time records, and that a request for an allowance cannot be supported by a bare allegation of the total number of hours worked.[96] One commentator has noted that the success in the *Wal-Feld* case "brought only a pat on the back, which may give satisfaction but contributes nothing to the overhead of maintaining the modern law office."[97]

Any elevation of the time factor leads to unrealistic results and difficulties of administration. Is an experienced, expert, quick-thinking bankruptcy lawyer to be penalized because it takes him less time than a beginner, or an equally competent but slower-moving colleague? To stress the time factor is to

> disregard that much of the attorney's work is cerebral; that a brilliant idea which may flash into an attorney's mind may be worth more than a thousand hours of routine services which require no particular acumen; that some minds work swifter than others; that the work performed may be ordinary or extraordinary, even spectacular; that the work could be performed cheaper, if not better, by a clerk or junior.[98]

A narrow, mechanistic application of the time test would require the referee to analyze and to evaluate the time properly spent on the case—a truly Herculean task. In addition, the temptation to exaggerate on a time-clock approach is almost overwhelming. "A five-minute telephone call becomes a fifteen-minute conference, and a thirty-minute informal discussion becomes a two-hour conference."[99] The time factor which is considered, therefore, must be limited to the time that *should be* required to deal with the case rather than the time actually spent.[100]

Accomplishments and benefits to the estate, rather than the time factor, should be the determining elements in fixing allowances, and numerous courts have effected this by placing primary reliance on this "salvage theory." As results and achievements determine compensation in the business world, so also should the fees be measured by the extent of success.[101]

The rationale behind this salvage theory was well stated by the court in the early case of *In re Osofsky*:[102]

> In bankruptcy cases, however, there seems . . . to be another element which has

96. Ibid.

97. Herzog, Fees and Allowances—The Time-Clock Approach, in N.Y.L.J., Oct. 25, 1965, p. 4, col. 1. (Footnote omitted.)

98. Id. at 4, col. 1.

99. Ibid.

100. In re Jacellen Realty Corp., Bankr. L. Rep. ¶ 54,378 (S.D.N.Y. 1943).

101. In re Hoffman, 173 Fed. 234 (E.D. Wis. 1909).

102. 50 F.2d 925 (S.D.N.Y. 1931).

to be considered. That is the fact that in bankruptcy very often futile quests for assets have to be made. Many times, however much ingenuity and time attorneys may expend, they may not be able to get anything for the estate by their efforts. It is then a question, as in salvage at sea, of no cure, no pay.

When the efforts of attorneys cause a material increase in the bankruptcy estate, or, as here, create it, they should be well rewarded; otherwise there will not be any incentive to attorneys to put forth their best efforts in cases which appear unpromising.[103]

There can be little quarrel with such a formulation as applied to a case such as *Osofsky*, where virtually the entire estate was created by the attorneys' efforts in instituting and settling suits to set aside fraudulent transfers. In *Osofsky*, the court allowed the attorneys approximately one-third of the amounts recovered. However, if an estate has been created by ordinary liquidation, and the attorneys' services to the estate were of a routine nature, a much smaller fee would be indicated.

Thus, as a matter of policy, it seems to be unwise to elevate the time factor over the element of success as measured by the benefit to the estate. The facts of life require that attorneys in insolvency proceedings be adequately compensated where the funds of the estate were created by their efforts, and their efforts alone. The thrust of the *Wal-Feld* case and the *Hudson & M.R.R.* case can be harmonized, if at all, with the earlier decisions which emphasized this salvage theory, only on the basis that these two courts considered the enrichment of the estate to be the result of services rendered which were of a routine and ordinary nature.

V. Conclusion

"The granting of allowances in bankruptcy involves a complex amalgamation of consideration[s] which can be only imperfectly sketched out."[104] In approaching this task and in promoting the public policy of encouraging attorneys to use their best efforts on behalf of the estate, the element of benefit to the estate should be given primacy. The other factors should, of course, be considered in arriving at a result. Very often, however, a proper consideration of the case under the salvage theory will implicitly reflect, to a great extent, many of these other factors. Which factor should receive prime consideration will, of course, depend upon the facts of the particular case.

It is relatively easy for the courts to formulate the governing rules and criteria—the difficulty is encountered in applying these rules. It is submitted that the surest route to the "area of reasonableness" in allowances is the methodical and painstaking application of these multiple factors.

103. Id. at 927.

104. Herzog, supra note 97, at 4, col. 2. (Footnote omitted.)