

# *Bankruptcy and the* Unauthorized Practice of Law

by Russell A. Brown

**Editor's Note:** This article is second in a year-long series pertaining to the unauthorized practice of law.

Except for the domestic relations area, the bankruptcy field has seen the largest influx of document preparers in Arizona. About 40 to 50 percent of Chapter 7 bankruptcy cases are filed *pro se*, with the majority of them prepared by document preparers. At one point in late 1996, document preparers did up to 40 percent of the Chapter 13 cases, but that number has declined to about five to 10 percent. The high number of *pro se* debtors in Chapter 13 cases was putting a strain on the system. As one would expect, *pro se* debtors want to receive legal advice from the document preparers but they do not want to pay the fee of a lawyer. Often, the *pro se* debtors are being penny wise but pound foolish. The law presumes that a *pro se* debtor or litigant knows the law and rules of procedure. Many debtors would not know what hit them until after the fact. I, along with other trustees and bankruptcy attorneys, have seen many cases where a debtor may have saved a few hundred dollars by using a document preparer, but ended up losing a home or other property. The debtor need not have lost property that a good bankruptcy lawyer could have saved by doing legitimate pre-bankruptcy planning.

Many bankruptcy document preparers are disbarred lawyers from Arizona or another state, have law degrees but cannot get licensed in Arizona, or are lawyers who move to Arizona but do not bother getting licensed. One preparer is a disbarred lawyer from another state who was convicted of bankruptcy fraud!

Due to the perceived abuses, Congress passed § 110 of the Bankruptcy Code on October 22, 1994, which imposes duties on preparers to make certain disclosures. Section 110 requires a bankruptcy document preparer (called a "bankruptcy petition preparer") to put his or her name, address and Social Security number on each document prepared and to give the debtor a copy of the document. Furthermore, the federal statute states that a preparer cannot execute a document on behalf of a debtor, collect or receive the filing fee, or use the word "legal" in any advertisement. The bankruptcy court can fine preparers up to \$500 for each violation, order return of excessive fees and enjoin preparers from preparing documents. The law allows a bankruptcy court to require a preparer to turn over any fee the court finds to be in excess of the value of the documents prepared. In Arizona, a fee of \$200 is the accepted amount a preparer may charge in most circumstances. Bankruptcy courts in other jurisdictions have set a lower fee amount for preparers.

Since the passage of § 110, the Arizona Bankruptcy Court has fined and enjoined preparers who continued to violate the law. The Court fined one preparer \$1 million in a single case for violating the Court's permanent injunction. See *In re Repp*, 218 B.R. 518 (Ariz. 1998). In another case, the Bankruptcy Court also ordered the same preparer to disgorge about \$200,000 in excessive fees in nearly 200 cases for violating the Court's order not to charge more than \$200 per case. The United States Attorney prosecuted the preparer in the District Court for criminal contempt of the Bankruptcy Court's order, but the District Court has rendered no decision yet.

Numerous preparers are eager to give legal advice. Perhaps this is because the debtor wants legal advice and many preparers have legal educations, or wish they did. As one would predict, the expectations of the debtors collide with the results they get from an unlicensed lawyer. The bankruptcy judges have been unwilling to allow preparers to delve into giving legal advice and to prepare pleadings. Judge Sarah Sharer Curley published a decision, *In re Gabrielson*, 217 B.R. 819 (Ariz. 1998), which delineates what activities would consist of the practice of law in the bankruptcy arena. The practice of law includes advising debtors about which chapter to file, determining how creditors should be listed in the schedules or plan, or advocating a position on behalf of the debtor to third parties. The Court used the Arizona Supreme Court's definition of the practice of law from the case, *State Bar v. Arizona Land Title & Trust Company*, 90 Ariz. 76, 366 P.2d 1 (1961). The decision made it clear that document preparers are to prepare documents at the direction of the customer, not practice law.

While the process has taken much litigation and several published opinions, the Bankruptcy Court has set out what bankruptcy document preparers may and may not do, and how much they can charge. Debtors still can get their documents

prepared by a non-lawyer but the preparer must remain a scrivener and comply with § 110.

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