

PRACTICE OF LAW BOARD
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#03-25 ADVISORY OPINION
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NON-ATTORNEY BANKRUPTCY PETITION PREPARERS

Since its inception, the Practice of Law Board has received a number of complaints regarding non-attorney bankruptcy petition preparers. To assist the public, this advisory opinion will address the following issues:

ISSUES:

1. May a person, who is not licensed to practice law in any state, assist a debtor in preparing documents for filing with a federal bankruptcy court?
2. What is the scope of services that a non-lawyer bankruptcy petition preparer may provide to a debtor?
3. Where should complaints regarding a non-lawyer bankruptcy petition preparer be lodged?

BRIEF ANSWER: A non-lawyer may perform those services specifically authorized by 11 U.S.C. §110 without violating RCW 2.48.180. The service that a bankruptcy petition preparer may perform is essentially limited to acting as a typist for the debtor. Concerns regarding the scope of services being offered by a specific bankruptcy petition preparer should be brought to the attention of the United States Bankruptcy Court federal bankruptcy court.

ANALYSIS: The Bankruptcy Code recognizes the reality that pro se debtors often turn to non-lawyers for assistance in filing bankruptcy. Rather than prohibiting such assistance and, as a realistic matter, watching it flourish more dangerously underground, Congress chose to force it into the light by defining persons who provide such assistance and regulating their conduct in 11 U.S.C. §110. *In re Alexander*, 284 B.R. 626, 630 (Bankr. N.D. Ohio 2002); see also *Ferm v. United States Trustee (In re Crawford)*, 194 F.3d 954, 960 (9th Cir. 1999), cert. denied, 528 U.S. 1189 (2000) ("... 110 was enacted to remedy what was perceived to be widespread fraud and unauthorized practice of law in the BPP industry.").

Section 110 requires petition preparers to take certain actions and proscribes other conduct by petition preparers, while adding sanctions for non-compliance and mechanisms for court oversight.¹ The language of §110 actually says very little about what specific services a petition preparer can or cannot permissibly render to debtors. There is, however, oft-quoted language from the House Judiciary Committee's Report on the Bankruptcy Reform Act of 1994, which supports a narrow view of the scope of a bankruptcy petition preparer's authority. See 140 Cong. Rec. H. 10752, Sec. 308 (103d Cong., 2d Sess., Oct. 4, 1993) ("while it is permissible for a petition preparer to provide services solely limited to typing, far too many of them also attempt to provide legal advice and legal services to debtors").

Congress expressly provided that §110 was not to preempt state unauthorized practice of law statutes. See 11 U.S.C. §110(k) ("Nothing in this section shall be construed to permit activities that are otherwise prohibited by law, including rules and laws that prohibit the unauthorized practice of law."). "As a result of this provision, a document preparer may not use §110 as a 'safe harbor' if a rule or certain rules prohibit the unauthorized practice of law or the document preparer's activities are otherwise prohibited by law." *In re Gabrielson*, 217 B.R. 819, 826 (Bankr. D. Ariz. 1998).

A number of United States Bankruptcy Court opinions establish that the following services, when provided by a non-lawyer bankruptcy petition preparer, do not constitute the unauthorized practice of law:

- ◆ Typing or transcribing bankruptcy forms that the debtor has prepared alone without assistance. See, e.g., *In re Moore*, 283 B.R. 852, 858 (Bankr. E.D. N.C. 2002); *In re Bush*, 275 B.R. 69, 78 (Bankr. D. Idaho 2002); See, e.g., *Guittierez*, 248 B.R. 287, 297-98 (Bankr. W.D. Texas 2000).
- ◆ Selling forms and any printed material purporting to explain bankruptcy practice and procedure to the public. See, e.g., *In re Bachmann*, 113 B.R. 769, 774 (Bankr. S.D. Fla. 1990).
- ◆ Assisting the debtor with the physical filing of the petition. See, e.g., *In re Alexander*, 284 B.R. 626 (Bankr. N.D. Ohio 2002); but see *In re Shoup*, 290 B.R. 768 (Bankr. C.D. Calif. 2003) (bankruptcy preparer may not handle the client's filing fee in any fashion).

A number of United States Bankruptcy Court opinions establish that the following services, when provided by a non-lawyer bankruptcy petitioner preparer, constitute the unauthorized practice of law:

¹Section 110(a)(1) defines a "bankruptcy petition preparer" as "a person, other than an attorney, who prepares for compensation a document for filing." In turn a "document for filing" means "a petition or any other document prepared for filing by a debtor in a United States Bankruptcy Court . . . in connection with a case under this title." 11 U.S.C. ' 110(a)(2).

- ◆ Suggesting or making the exemption choice for a debtor. See, e.g., *In re Buck*, 290 B.R. 758, 760 (Bankr. C.D. Calif. 2003); *In re Pillot*, 286 B.R. 157 (C.D. Calif. 2002); *In re Bush*, 275 B.R. 69 (Bankr. D. Idaho 2002); *In re Ellingson*, 230 B.R. 426, 433-34 (Bankr. D. Mont. 1999).
- ◆ Determining where property and debts would be scheduled. See, e.g., *In re Bush*, 275 B.R. 69, (Bankr. D. Idaho 2002); *In re Farness*, 244 B.R. 464, 471 (Bankr. D. Idaho 2000).
- ◆ Using bankruptcy software to convert a client's raw information into usable form. See, e.g., *In re Bush*, 275 B.R. 69, 77 (Bankr. D. Idaho 2002); *In re Farness*, 244 B.R. 464, 471 (Bankr. D. Idaho 2000).
- ◆ Providing documents to the debtor that explain bankruptcy or that explain how to complete the required information that the preparer is then to transfer to the official forms. See, e.g., *In re Moore*, 283 B.R. 852, 863 (Bankr. E.D. N.C. 2002) (unauthorized documents included a "Customer Information Workbook", "Bankruptcy Overview", "Step by Step Guide to the Bankruptcy Workbook", and "Tips on Filing a Chapter 7 Bankruptcy"); *In re Moffett*, 263 B.R. 805, 814 (Bankr. W.D. Ky. 2001) (prohibited documents include a list of exemption statutes).
- ◆ Directing clients to a particular legal publication or specific pages so that they can attempt to find legal answers on their own. See, e.g., *In re Doser*, 281 B.R. 292, 307 (Bankr. D. Idaho 2002); *In re Landry*, 268 B.R. 301 (Bankr. M.D. Fla. 2001).
- ◆ Providing clients with a questionnaire that deviates in any way from the official forms. See, e.g., *In re Doser*, 281 B.R. 292, 309 (Bankr. D. Idaho 2002); *In re Moffett*, 263 B.R. 805, 815 (Bankr. W.D. Ky. 2001).
- ◆ Answering questions about post-filing aspects of the bankruptcy process. See, e.g., *In re Bush*, 275 B.R. 69 (Bankr. D. Idaho 2002).
- ◆ Improving upon a prospective debtor's answers or correcting any errors or omissions. See, e.g., *In re Bush*, 275 B.R. 69, 79 (Bankr. D. Idaho 2002); *In re Livers*, 179 B.R. 837, 841 (Bankr. W.D. Ky. 1995).
- ◆ Preparing post-filing motions, such as motions to dismiss the bankruptcy petition, objections to claims, or responses to the Trustee's Recommendation. See, e.g., *In re Boettcher*, 262 B.R. 94, 95 (Bankr. N.D. Calif. 2001); *In re Gabrielson*, 217 B.R. 819, 827 (Bankr. D. Ariz. 1998); *In re Lyvers*, 179 B.R. 837, 842 (Bankr. W.D. Ky. 1995).
- ◆ Advertising as a paralegal or use the title paralegal in any dealings with clients. See, e.g., *In re Moffett*, 263 B.R. 805, 813 (Bankr. W.D. Ky. 2001); *In re Moore*, 232 B.R. 1, 11 (Bankr. D. Maine 1999).

- ◆ Advising client as to which form of bankruptcy to file. See, e.g., *In re Gabrielson*, 217 B.R. 819, 826 (Bankr. D. Ariz. 1998); *In re Skobinsky*, 167 B.R. 45, 50 (Bankr. E.D. Pa. 1994); *In re Anderson*, 79 B.R. 482, 485 (Bankr. S.D. Cal. 1987).
- ◆ Advising clients as to the timing of an anticipated bankruptcy filing. See, e.g., *In re Herren*, 138 B.R. 989, 995 (Bankr. D. Wyo. 1992).
- ◆ Advising clients to dispose of assets prior to filing. See, e.g., *In re Moore*, 232 B.R. 1 (Bankr. D. Maine 1999).
- ◆ Advising clients regarding the tax consequences of bankruptcy. See, e.g., *In re Guittierez*, 248 B.R. 287, 294 n. 15 (Bankr. W.D. Texas 2000).
- ◆ Advising clients regarding whether a loan taken by a debtor from a 401(k) plan or other retirement account constitutes a "claim" under the code. See, e.g., *Taub v. Weber*, 2004 U.S. App. Lexis 8807, ___ F. 3d ___ (9th Cir. March 5, 2004).
- ◆ Advising clients regarding whether they may redeem property. See, e.g., *In re Guittierez*, 248 B.R. 287, 294 n. 15 (Bankr. W.D. Texas 2000).
- ◆ Advising clients regarding whether they should reaffirm any debts. See, e.g., *In re Guittierez*, 248 B.R. 287, 294 n. 15 (Bankr. W.D. Texas 2000).
- ◆ Advising clients regarding the effect of a bankruptcy filing upon a foreclosure and whether the clients may keep their homes. See, e.g., *In re Guittierez*, 248 B.R. 287, 294 n. 15 (Bankr. W.D. Texas 2000).

Any concerns that a nonlawyer bankruptcy petition preparer is engaging in conduct which exceeds that authorized by 11 U.S.C. §110, should be brought to the attention of the United States Trustee. The Trustee may bring the issue before the court. A bankruptcy court may impose sanctions and may issue an injunction against a bankruptcy petition preparer in response to conduct found to violate 11 U.S.C. §110. The bankruptcy court may also, in an appropriate case, certify the matter to the district court for a determination of damages. See generally, *In re Doser*, 281 B.R. 292, 312-13 (D. Idaho 2002); *Interpreting 11 U.S.C. §110 Which Governs Conduct of Non-Lawyer Bankruptcy Petition Preparers and Delineating the Relationship, Powers, and Functions of the Bankruptcy Court and the District Court Under the Statute*, 198 B.R. 604 (C.D. Calif. 1996); 11 U.S.C. §110(i)(1). If the sanctions available to the bankruptcy court prove ineffective, a referral may be made to the Practice of Law Board or to the appropriate county prosecutor.

CONCLUSION: Congress's adoption of 11 U.S.C. §110 was not meant to create a new profession. See, e.g., *In re Guittierez*, 248 B.R. 287, 297 (Bankr. W.D. Texas 2000). Bankruptcy petition preparers must limit their services to the transcription of

dictated or handwritten notes prepared by the debtor prior to the debtor having sought out the petition preparer's service. Any concerns that a bankruptcy petition preparer has provided services beyond those authorized by 11 U.S.C. §110 should first be brought to the attention of the United States Bankruptcy Court.