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THE THIN RED LINE: AN ANALYSIS OF THE ROLE OF LEGAL ASSISTANTS IN THE CHAPTER 13 BANKRUPTCY PROCESS

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I. INTRODUCTION

Regulation of the unauthorized practice of law generally rests with the states.¹ All fifty states have enacted rules prohibiting non-lawyers from engaging in the “practice of law.” Restricting the practice of law to the efforts and expertise of licensed lawyers has been justified on various grounds, most commonly the protection of the public.²

Though seemingly clear and simple, the prohibition against non-lawyers engaging in the “practice of law” requires interesting and difficult judgment calls when applied to the pragmatic realities of real world law

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1. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 402 (1963) (“the State maintains control over the practice of law within its borders”).

2. Mathew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47, 51 (1995) (citations omitted).

Restrictions placed upon the laity are justified by two broad arguments. The first argument advanced is that regulation of law practice serves to maintain judicial integrity. Proponents of this theory assert that regulation is needed to preserve courtroom decorum and as an aid in disciplining miscreant attorneys. Secondly, and more importantly, unauthorized practice restrictions are necessary in order to prevent an unfettered market for legal services from harming consumers.

Id.

practices. Practicing lawyers must delegate various tasks and responsibilities to legal assistants.³ The degree to which such delegation is necessary largely depends on the particular lawyer's type of practice. Some practices by their very nature limit the scope of such delegation to ministerial tasks such as typing, dictation, and taking telephone messages. In other practices, the standardized and repetitive nature of the lawyer's work may allow, and in some cases require, the scope of such delegation to be much broader. Broad delegation of work to non-lawyers may include assigning tasks such as the initial interview of clients, preparation of basic court pleadings, and communicating basic information to both the courts and the clients. One such substantive area of practice is Chapter 13 bankruptcy.

While the extent of such delegation varies, lawyers representing Chapter 13 debtors almost invariably work within a system in which non-lawyers working for the lawyer handle substantial amounts of work, the performance of which requires discretion and judgment. A typical Chapter 13 debtor practice may employ between two and four legal assistants for each lawyer working in the practice. The fee that an attorney can charge a Chapter 13 debtor must be approved by the bankruptcy court. Generally, bankruptcy courts establish a standard, flat fee for Chapter 13 cases. For example, *In re Kindhart*⁴ affirmed the Bankruptcy Court for the Central District of Illinois' increase in the fee base presumed to be a reasonable Chapter 13 attorney's fee from \$800 to \$1,000. Accordingly, the economics of a practice dictate that attorneys for Chapter 13 debtors delegate duties to legal assistants as much as legally and practically possible. As one bankruptcy judge has explained in a law review article:

Often, bankruptcy lawyers who specialize in representing Chapter [13] debtors employ non-lawyers to do a variety of tasks. This makes economic sense since an attorney can only charge a relatively low fee for legal services and therefore needs a high volume of filings in order to maintain a lucrative practice. Since only the attorney can appear and represent the debtor at meetings [] and in court hearings, it is not economically viable for an attorney to stay in the office consulting with the debtors and preparing schedules, motions and

3. The term "legal assistant" is used in this Article to refer to non-attorneys working under the supervision of an attorney. Because the attorney versus non-attorney distinction is operative in determining whether one is engaged in the unauthorized practice of law, our use of the term "legal assistant" is meant to include paralegals, legal secretaries, and all other non-attorneys employed in a law firm.

4. 167 F.3d 1158 (7th Cir. 1999).

responses. Most high volume practitioners will therefore delegate this work to non-lawyers who presumably, work under the supervision of the lawyer.⁵

These legal assistants often have primary responsibility for various non-ministerial functions.

The delegation by a lawyer of substantial amounts of non-ministerial functions to legal assistants raises various unauthorized practice of law issues.⁶ This Article provides an overview of the Chapter 13 bankruptcy process and state law rules regarding the unauthorized practice of law. We then discuss these rules in the context of a typical Chapter 13 debtor practice.⁷

II. CLIENTS AND BANKRUPTCY—AN OVERVIEW OF THE CHAPTER 13 PROCESS

A. *The Basics of the Bankruptcy Process*

Bankruptcy law is a creature of uniquely federal origin. In Article I, Section 8, the Constitution of the United States of America vests Congress with the sole power to enact bankruptcy laws.⁸ The long history of bankruptcy law in the United States has as its most recent chapter the Bankruptcy Reform Act of 1978, which at the time of this Article continues to be the law.⁹ The number of bankruptcy cases filed in 1998

5. Honorable Geraldine Mund, *Paralegals: The Good, The Bad and The Ugly*, 2 AM. BANKR. INST. L. REV. 337, 338 (1994) (citations omitted).

6. Interestingly, a delegation by a lawyer to a non-lawyer is not necessarily restricted to an intra-firm transaction. Some courts have held that a literal reading of "Unauthorized Practice of Law" rules allows attorneys to delegate work to so-called independent paralegals. See *In re* Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962 (N.J. 1992).

7. For discussion purposes, we also provide an overview of cases dealing with so-called "independent" paralegals engaged in the unauthorized practice of law in bankruptcy. See IV A, *infra*. While a legal assistant working under the supervision of a licensed attorney arguably has more leeway in his or her activities, the "independent" paralegal cases provide an excellent overview of unauthorized practice of law issues in the context of the bankruptcy process.

8. See U.S. CONST. art. I, § 8.

9. Subsequent to the enactment of the Bankruptcy Reform Act of 1978, Congress adopted various amendments to both the substantive and procedural provisions of the Act. The most recent major substantive amendments were adopted in 1994,

reached an all-time high: 1,442,549 new bankruptcy cases were filed.¹⁰ Only 44,367 of these new cases were filed by businesses.¹¹

Most individuals file for bankruptcy relief under either Chapter 7 or Chapter 13.¹² In a Chapter 7 case, a bankruptcy trustee sells all of the debtor's nonexempt property and distributes the sale proceeds to creditors and this is all that prebankruptcy creditors receive. In a Chapter 13 case, the debtor retains her property. Chapter 13 creditors receive periodic payments, typically from the debtor's future earnings, pursuant to a court-approved plan of payment.

While currently most individual debtors use Chapter 7, Congress is considering changes in the bankruptcy laws designed to increase the use of Chapter 13. Moreover, the use of paralegals is much more problematic in Chapter 13. Accordingly, this Article will focus on Chapter 13 bankruptcy practices.

The bankruptcy process, Chapter 7 or 13, is initiated by the filing of a bankruptcy petition.¹³ The filing of a bankruptcy petition generally causes, by operation of law, the bankruptcy court to enter an "Order for Relief."¹⁴ A primary benefit of bankruptcy is the automatic stay, which is triggered by the filing of the bankruptcy petition.¹⁵ The automatic stay "freezes" all collection activity by creditors as of the filing of the petition.¹⁶ Creditors violating the automatic stay by continuing collection

and became effective Oct. 22, 1994. Congress is currently considering significant changes in bankruptcy law.

10. BNA Bankruptcy Law Daily, Mar. 10, 1999.

11. *Id.*

12. *Id.*

13. In simplified terms, a bankruptcy petition is a one page court pleading filed in a court of bankruptcy or with the clerk, by a debtor seeking the relief provided under the various chapters of the Bankruptcy Code. BLACK'S LAW DICTIONARY 793 (6th ed. 1991).

14. 11 U.S.C. § 301 (1993). The exceptions to this general rule are unimportant for purposes of this article. *See* 11 U.S.C. § 303 (involuntary cases).

15. 11 U.S.C. § 362 (1993).

16. In specific terms, the filing of the petition "operates as a stay, applicable to all entities, of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of

activities face stiff penalties, which may include attorney fees and punitive damages.¹⁷

Along with the bankruptcy petition, a debtor is required to file various schedules with the bankruptcy court.¹⁸ These schedules provide various information about the debtor and his or her financial affairs. The schedules include the following: (i) a schedule of assets; (ii) a schedule of liabilities, indicating the identity of each creditor and the nature and amount of each debt; (iii) a list of all real property owned; (iv) a list of all sources of income; (v) a detailed list of any judicial action to which the debtor has been a party; and (vi) a list of claimed exemptions.¹⁹ The bankruptcy petition and schedules must be signed by the debtor under oath. Providing false or misleading information on the petition or schedules is a federal crime punishable by fines and/or a prison sentence.²⁰

Shortly after the debtor files his petition and schedules, the bankruptcy court will set a hearing date for the section 341 meeting of creditors.²¹ The United States Trustee or his designee presides over the so-called "341 meeting."²² Although judicial in nature, the 341 meeting

the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor." 11 U.S.C. § 362(a)(1)-(7) (1993).

17. 11 U.S.C. § 362(h) (1993). This section provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys fees, and, in appropriate circumstances, may recover punitive damages." *Id.* See *In re Crysen*, 902 F.2d 1098 (2d Cir. 1990).

18. FED. R. BANKR. P. 1007(a)(1).

19. 11 U.S.C. § 522(d) (1993). An exemption is a claim by the debtor that, under applicable law, certain assets held by the debtor are exempt from the property of the bankruptcy estate which otherwise could be used to pay creditors. Under the Bankruptcy Code, a debtor may elect to claim exemptions as provided by the Code, or may alternatively claim his or her exemptions as provided by state substantive law. *Id.* Under the bankruptcy exemptions, a debtor may exempt \$16,150 in value of his or her residence, \$2,575 in value of a motor vehicle, \$8,625 in aggregate value of household furnishings and goods, \$1,075 in jewelry, as well as other exemptions in tools of the trade, life insurance, etc. See *id.*

20. See 18 U.S.C. § 1621 (setting forth penalties for perjury).

21. 11 U.S.C. § 341 (1998).

22. Section 341(a) provides as follows: "Within a reasonable time after the order

itself is not an adjudicative proceeding, as the bankruptcy judge does not (and indeed, may not) attend.²³

The 341 meeting is a very important meeting for creditors of the debtor.²⁴ The 341 hearing provides an opportunity for creditors of the debtor to question the debtor under oath. The scope of this examination is broad, and may include questions relating to any collateral retained by the debtor which he or she proposes to pay for through a reorganization plan or otherwise. Creditors may also ask about related issues, such as whether collateral is insured, the physical location of collateral, and the sources of income debtor has available to fund the bankruptcy.

B. Special Features of Chapter 13 Practice

Several attributes of Chapter 13 bankruptcy are defining. First, along with the bankruptcy petition, a debtor is required to file a Chapter 13 reorganization plan.²⁵ This reorganization plan is a proposal by the debtor to pay his or her creditors over a term of anywhere from 36 to 60 months.²⁶ A Chapter 13 debtor is statutorily required to pay all "disposable income" to her creditors for the term of the plan.²⁷ With the exception of long-term debts,²⁸ a debtor typically pays on all of her debts

for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors." 11 U.S.C. § 341(a) (1998). Similarly, Federal Rule of Bankruptcy Procedure 2003(a) provides that "the United States Trustee shall call a meeting of creditors." FED. R. BANKR. P. 2003(a).

23. 11 U.S.C. § 341(c) (1998). See, e.g., *In re Dynamite Food Enter.*, 8 B.R. 839 (Bankr. E.D.N.Y. 1981).

24. As a practical matter the 341 meeting presents a rare opportunity for a creditor or his attorney to conduct business with the debtor and his attorney. This is especially important in a chapter 7 case, as the 341 hearing allows a creditor to obtain the signatures of the debtor, debtor's attorney, and trustee on a so-called "reaffirmation agreement," which agreement is necessary for a debtor to retain possession of encumbered property.

25. 11 U.S.C. § 1321 (1993 & Supp. 1998).

26. The Bankruptcy Code provides that a Chapter 13 reorganization "plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." 11 U.S.C. § 1322(d) (1993 & Supp. 1998). The five-year maximum time period begins from the date that payments are to begin under the plan, rather than upon confirmation of the plan. *In re Cobb*, 122 B.R. 22 (Bankr. E.D. Pa. 1990).

27. 11 U.S.C. § 1325(b).

28. A long-term debt for purposes of Chapter 13 is a debt whose terms exceed

through the reorganization plan. The Chapter 13 trustee then distributes payments to creditors pursuant to a priority scheme established by both the reorganization plan and the Bankruptcy Code.²⁹

Another defining characteristic of Chapter 13 bankruptcy is the relative ease with which a debtor may dismiss his or her bankruptcy case. Unlike chapter 7, the filing of a Chapter 13 petition does not require a court hearing and approval to be dismissed.³⁰ A Chapter 13 debtor having "second thoughts" may, as a general rule, achieve dismissal of her case by the unilateral action of filing a notice of dismissal with the bankruptcy court.³¹ Once a debtor files chapter 7 bankruptcy, the "court may dismiss [such] case . . . only after notice and a hearing and only for cause."³² A Chapter 13 debtor may, however, request and obtain dis-

the duration of the Chapter 13 reorganization plan. For instance, under a 36-month reorganization plan, any debt whose term is in excess of 36 months may be considered a long-term debt. Typical long-term debts include real estate mortgages and mobile home contracts.

29. Predictably, the Bankruptcy Code requires that the initial disbursements by the Chapter 13 trustee be used to satisfy the bankruptcy filing fee and court costs. Following satisfaction of these fees, general creditors of the debtor stand behind the debtor's attorney, the taxing authorities, and various other entities in the payment scheme established by the Bankruptcy code. *See* 11 U.S.C. §§ 503, 507 (1993).

30. In a chapter 7 case, the court may dismiss such case only after notice and a hearing and only for cause. 11 U.S.C. § 707 (1993). "Cause" is defined to include unreasonable delay by the debtor that is prejudicial to creditors, non-payment of fees, as well as failure to timely file bankruptcy schedules. *Id.* By contrast, dismissal of a Chapter 13 case requires no finding of cause: "On request of the [Chapter 13] debtor at any time, . . . the court shall dismiss a case under this chapter." 11 U.S.C. § 1307(b) (1993). Some courts hold that the presence of the word "shall" in this Section confers an absolute right upon the debtor to dismiss his or her Chapter 13 case at any time, notwithstanding any other pending motion by other parties in interest. *In re Rebeor*, 89 B.R. 314 (Bankr. N.D.N.Y. 1988).

31. Three basic exceptions exist to this rule. First, a hearing may be required if the Chapter 13 case resulted from the conversion of a case under another chapter. 11 U.S.C. § 1307(b) (1993). Second, a creditor may file an objection to debtor's dismissal of the Chapter 13 case. Finally, the court may *sua sponte* refuse to dismiss the case or dismiss the case with an order enjoining the debtor from filing another bankruptcy petition for a certain amount of time. A common basis for a creditor or the court to resist a debtor's attempt to dismiss his or her Chapter 13 bankruptcy is the concept of "bad faith." Courts in the various jurisdictions have established that serial filings by a Chapter 13 debtor may serve as the basis to either prevent a debtor from unilaterally dismissing a Chapter 13 petition, or allow dismissal with a proviso that the debtor be enjoined from filing another bankruptcy petition.

32. 11 U.S.C. § 707(a) (1993).

missal of his or her bankruptcy without a court hearing and without establishing cause.³³

Once a Chapter 13 petition has been filed, the bankruptcy court sets dates for two important hearings: (i) the section 341 meeting of creditors, and (ii) a hearing on confirmation of the Chapter 13 reorganization plan. The hearing on confirmation of the debtor's Chapter 13 plan is typically held within a few months after the petition is filed. Once a plan summary is filed with the court and a copy served on all creditors, the creditors have an opportunity to file an objection to the plan in an attempt to prevent confirmation of that plan. The Bankruptcy Code provides various bases for preventing confirmation of a plan. The two primary bases for objecting to a Chapter 13 plan include feasibility and valuation issues. The feasibility standard requires that under the terms of a proposed Chapter 13 plan, "the debtor will be able to make all payments under the plan and to comply with the plan."³⁴ As for valuation, a plan must propose to pay any secured creditor no less than the "value" of its collateral during the proposed term of the plan.³⁵

III. AN OVERVIEW OF THE "UNAUTHORIZED PRACTICE OF LAW" ISSUES

Enforcing rules prohibiting the "practice of law" by non-lawyers necessarily requires courts and state bar organizations to define the "practice of law". Nebulous by its very nature, the "practice of law" concept provides those charged with responsibility for enforcing such rules a challenging task. "It is not possible to define with precision what activities constitute 'practicing law.' Such an endeavor is 'more likely to invite criticism than to achieve clarity.'"³⁶ Regulation of the unauthorized practice of law is almost categorically left up to the states.³⁷

Although all states are uniform in their prohibition of non-lawyers practicing law, each state's definition of the "unauthorized practice of

33. 11 U.S.C. § 1307(b) (1993). The only express exception to this right of a Chapter 13 debtor involves Chapter 13 cases which were converted from another bankruptcy chapter. *Id.*

34. 11 U.S.C. § 1325(a)(6) (1993).

35. 11 U.S.C. § 1325(a)(5) (1993).

36. *In re Stone*, 166 B.R. 269, 274 (Bankr. W.D. Pa. 1994) (quoting *Shortz v. Farrell*, 193 A. 20, 21 (Pa. 1937)).

37. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

law" is somewhat unique.³⁸ While appearing in court on behalf of a client clearly constitutes the "practice of law" in every state, shades of gray exist in two other forms of service: rendering advice, and preparing legal documents.

A. Alabama

1. *Statutes.*—Each state has its own statutes regulating the practice of law within its borders. Since most states' regulations are substantially similar, a view of Alabama's regulations is illustrative of what to expect, with minor variations, throughout the United States.

Alabama Code Section 34-3-1 (1975) makes it a crime for any person to practice or assume to act, or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer. Alabama Code Section 34-3-6 states that only persons who are regularly licensed to practice law may do so. Paragraph (b) of this section specifically defines the practice of law:

§ 34-3-6. *Who may practice as attorneys.*

(a) Only such persons as are regularly licensed have authority to practice law.

(b) For the purposes of this chapter, the practice of law is defined as follows: Whoever,

(1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or . . .

(2) For a consideration . . . advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights.

The Alabama Supreme Court has not taken a rigid approach in applying this section, but has sought to determine on a case-by-case basis which specific acts wrongfully intrude into that area of practice which should be reserved exclusively for lawyers.³⁹ The legislature intended by section 34-3-6 to insure that laymen would not serve others in a representative capacity in areas requiring the skill and judgment of a licensed

38. See Debra L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 45 (1981).

39. *State ex rel. Porter v. Dun & Bradstreet, Inc.*, 352 F. Supp. 1226 (N.D. Ala. 1972), *aff'd*, 472 F.2d 1049 (5th Cir. 1973).

attorney.⁴⁰

As for an attorney, the enforcement mechanism comes by way of ethical rules, rather than criminal statutes. Alabama's Rules of Professional Conduct, which are based on the ABA Model Rules of Professional Conduct, are illustrative of the rules of most states having adopted the Model Rules. Rule 5.5 of the Alabama Rules of Professional Conduct specifically prohibits a lawyer from allowing or assisting a non-lawyer.

2. *Case Law.*—While the Alabama Supreme Court has not rendered decisions on allegations of unauthorized practice of law in the bankruptcy arena, there are decisions concerning (1) insurance adjusters, (2) a collection agency, (3) a non-lawyer advertising to obtain uncontested divorces, and (4) a non-lawyer rendering title opinions.

a. Independent (Non-Lawyer) Insurance Adjusters

The independent insurance adjuster may not engage in the business of giving advice to his employer, nor pose as an attorney in dealing with the insured or beneficiary of the insurance.⁴¹ An independent lay insurance adjuster may not advise or recommend that insurance companies have subrogation or contribution claims against other insurance companies or individuals, as such action involves the giving of legal advice and constitutes the practice of law.⁴² An independent lay insurance adjuster may not express his own opinion to a claimant as to the rights of the claimant under the Workmen's Compensation Act, as this would require a construction of the law on the subject and would constitute the practice of law.⁴³ The adjuster may not advise a claimant that he cannot legally enter suit against the insurance company which he represents to recover for the loss of earnings suffered by claimant's wife while caring for claimant after he is injured. Such action constitutes the practice of law in that counsel or advice is given as to legal rights of the claimant.⁴⁴

After a default, dispute or controversy has arisen, the independent lay adjuster must step aside, for then the law declares that the further

40. State ex rel. Porter v. Alabama Association of Credit Executives, 338 So. 2d 812 (Ala. 1976).

41. Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 731 (Ala. 1940).

42. Wilkey v. State, 14 So. 2d 536, 547 (Ala. 1943).

43. *Id.*

44. *Id.* at 548.

adjustment or litigation must be handled by a regularly licensed lawyer.⁴⁵ The lawyer must come into an adjustment as soon as a controversy or dispute arises or a default occurs. Any sort of controversy or dispute is the statutory line of demarcation.⁴⁶

The court ruled that adjusters could handle claims adjustments/settlements in dispute so long as the dispute is over the amount of the claim and not liability.⁴⁷ Adjusters may also execute releases provided by the insurance company or their counsel even though the adjuster selects from the forms furnished them the proper form applicable to the settled claim. They may not, however, prepare contracts or agreements for the settlement of claims made against the insurance companies employing them.⁴⁸

b. Collection Agencies

A collection agency in making a peaceful collection of a claim or in making a friendly adjustment of a bill without resort to a court of law does not engage in the unauthorized practice of law. But, to determine whether a lawsuit may properly be commenced, and therefore whether it is justifiable to threaten to commence it, requires special knowledge of the legal elements constituting a cause of action. To make a business of acting for or advising others in these matters involves the practice of law.⁴⁹

45. *Id.* at 546.

46. *Id.*

47. *Wilkey*, 14 So. 2d at 547.

The evidence shows that on one or more occasions the appellants, in accordance with instructions received from the insurance company notified the claimant of the amount which the company agreed to pay on the settlement of the claim and after the refusal by the claimant to accept this sum, notified the company of the claimant's refusal and thereafter negotiated a settlement with claimant at an increased figure. As we construe the evidence, there was no dispute or controversy relative to liability, nor had the situation reached the point where negotiations were no longer possible. This conduct on the part of appellants did not constitute the practice of law within the meaning of the statute.

48. *Id.*

49. *Alabama Ass'n of Credit Executives*, 338 So. 2d at 814.

c. Non-Lawyer Obtaining Uncontested Divorces

*McGiffert v. State*⁵⁰ found that an advertisement was an intrusion into the profession of the practice of law: "This is the only possible interpretation which could be placed on the advertisement in question, it seems to us."⁵¹ For one to represent to the public that, for \$100.00 plus court costs, one guaranteed to obtain a divorce if uncontested without attorney's fees, seems clearly in violation of Alabama Code Section 34-3-1.⁵² It is clear that only a licensed lawyer may obtain an uncontested divorce for another person without violating the statute.⁵³

d. Non-Lawyer Rendering Title Opinions

A non-lawyer rendering a title opinion regarding real property amounts to the unauthorized practice of law. An expression of opinion as to title, if not based upon an independent opinion of an attorney duly authorized to practice law in this state constitutes the unauthorized practice of law. The rule allowing only duly authorized practicing lawyers to give opinions as to title relates to the public interest and is based on the fact that issuing such opinions requires legal expertise that could hardly be relegated to the perfunctory or the routine. If a non-lawyer title insurance agent attempts to give advice concerning the effect or manner of taking title to real estate, he or she engages in an activity prohibited by the statute governing the practice of law.⁵⁴

B. Other States

1. ABA Model Rules of Professional Conduct.—Rule 5.5(b) of the ABA Model Rules of Professional Conduct provides that "[a] lawyer shall not: (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

Most states have adopted the Model Rules, perhaps changing a few words here and there. Generally speaking, the prohibition of lawyers assisting persons in the unlawful practice of law is consistent throughout

50. 366 So. 2d 680 (Ala. 1978).

51. *Id.* at 682.

52. *Id.* at 683.

53. *Id.*

54. Mississippi Valley Title Ins. v. Hooper, 707 So. 2d 209, 215 (Ala. 1997).

the United States, as illustrated by an examination of the rules of Colorado, Florida and Virginia.

2. State Disciplinary Rules.—States have enacted various disciplinary rules proscribing or limiting the use of legal assistants by a lawyer. The rules in Colorado are illustrative of these provisions. The Colorado Bar Association has promulgated a set of ethical requirements for the attorney who hires paralegals:

1. A lawyer shall ascertain the paralegal's abilities, limitations and training, and must limit the paralegal's duties and responsibilities to those that can be competently performed in view of those abilities, limitations and training;
2. A lawyer shall educate and train [paralegals] with respect to the ethical standards which apply to the lawyer;
3. A lawyer is responsible for monitoring and supervising the conduct of [paralegals] to prevent the violation of the ethical standards which apply to the lawyer, and the lawyer is responsible for assuring that [paralegals] do not do anything which the lawyer could not do;
4. A lawyer shall continuously monitor and supervise the work of [paralegals] in order to assure that the services rendered by the [paralegals] are performed competently and in a professional manner;
5. A lawyer is responsible for assuring that the [paralegal] does not engage in the unauthorized practice of law;
6. A lawyer shall assume responsibility for the improper conduct of [paralegals] and must take appropriate action to prevent recurrence of improper behavior or activities;
7. [Paralegals] who deal directly with lawyers' clients must be identified to those clients as non-lawyers, and the lawyer is responsible for obtaining the understanding of the clients with respect to the role of and the limitations which apply to those assistants.⁵⁵

The Michigan, Missouri, and New York Bar Associations have adopted similar requirements.

Similarly, Florida's Code of Professional Responsibility, in Disciplinary Rule 3-104, regulates the lawyer's use of non-lawyer personnel, holding lawyers to a standard very similar to that of Colorado. Rule 3-104 provides that:

- (A) A lawyer or law firm may employ non-lawyer personnel to

55. *In re* Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962, 973 (N.J. 1992).

perform delegated functions under the direct supervision of a licensed attorney, but shall not permit such non-lawyer personnel to (i) counsel clients about legal matters, (ii) judicial process, or (iii) otherwise engage in the unauthorized practice of law.

(B) A lawyer or law firm that employs non-lawyer personnel shall not permit any representation that such non-lawyer is a member of the Florida Bar.

(C) A lawyer or law firm that employs non-lawyer personnel shall exercise a high standard of care to assure compliance by the non-lawyer personnel with the applicable provisions of the Code of Professional Responsibility. The initial and the continuing relationship with the client must be the responsibility of the employing attorney.

(D) The delegated work of non-lawyer personnel shall be such that it will assist only the employing attorney and will be merged into the lawyer's completed product. The lawyer shall examine and be responsible for all work delegated to non-lawyer personnel.

(E) The lawyer or law firm that employs non-lawyer personnel shall not permit such non-lawyer to communicate with clients or the public, including lawyers outside his firm, without first disclosing his non-lawyer status.⁵⁶

The Virginia Code of Professional Responsibility Disciplinary Rule is substantially identical to Florida's. In fact, it shares the same rule number.⁵⁷ Many of the states' ethics codes are practically identical because they are based on the ABA Model Rules.

3. Illustrative Cases.—The following cases will show how various jurisdictions apply their versions of the Model Rules to alleged instances of lawyers assisting non-lawyers in the unauthorized practice of law.

a. Employment of/Association With Disbarred/Suspended Lawyers

Whether a lawyer may employ, as a clerk or legal assistant, an attorney who has been disbarred or suspended has not been clearly answered. On this issue, some jurisdictions are clearly more lenient than others.

56. FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY DR 3-104 (quoted in *In re Petition to Amend Code of Professional Responsibility*, 327 So. 2d 15, 16-17 (Fla. 1976)).

57. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 3-104 (1997).

The Oregon State Bar has stated that “[t]he composition and typing of legal documents, including contracts, by one not authorized to practice law, such as by a secretary, ‘paralegal’ assistant, law clerk or a disbarred lawyer for approval and signature by an attorney does not of itself constitute the practice of law . . . [unless he] is actually acting as the attorney for a client and is only using an attorney admitted to practice law as a ‘front’ to cover his own unauthorized practice of law.”⁵⁸

The Philadelphia Bar Association ruled that “a suspended attorney may be hired by a law firm in light of the fact that he will subsequently be accorded an opportunity to indicate that he has been rehabilitated and that he has kept up with the law.”⁵⁹ Other jurisdictions have taken a much firmer position against lawyers employing suspended and/or disbarred attorneys.⁶⁰

b. The Suspended Lawyer’s Office Staff

Lawyers who have been suspended from the practice of law may not allow their non-lawyer staff to continue to actively operate their law office and conduct business on behalf of clients during the period of suspension.⁶¹ This is because the conducting of the business management of a law practice, in conjunction with that practice, constitutes the practice of law.⁶²

58. Oregon State Bar v. Lenske, 584 P.2d 759, 763 (1978).

59. See Philadelphia Bar Ass’n Professional Guidance Comm., Op. 75-24, at 26 (1975).

60. *In re Kuta*, 427 N.E.2d 136, 140 (Ill. 1981).

In Illinois, a disbarred or suspended attorney should not serve as a law clerk or a paralegal during his disbarment or suspension. The line of demarcation between the work that a paralegal or a law clerk may do and those functions that can only be performed by an attorney is not always clear and distinct. The opportunity for a disbarred or suspended attorney who is serving as a paralegal or a law clerk to violate that line of demarcation is too great and too inviting.

New Jersey holds a similar position. “No attorney shall, in connection with his law practice, employ, permit or authorize to perform services for him, or share or use office space with another who has been disbarred, transferred to ‘disability inactive’ status, or is under suspension from the practice of law, or whose resignation from the Bar has been accepted by the Supreme Court.” RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, R. 1:21-8 (1984) (Prohibited Association).

61. *In re Thonert*, 693 N.E.2d 559 (Ind. 1998).

62. *Id.* at 563.

c. Assisting the Independent Paralegal

Many clinics which are operated by independent paralegals exist to serve the needs of customers who wish to file simple Chapter 7 bankruptcies and uncontested divorces. Can a lawyer be disciplined for giving legal advice to one of these paralegals? A bankruptcy court in Michigan held that he can if he knows that the information will be passed along to the paralegal's customer.⁶³

d. Law Students

A lawyer cannot delegate his professional responsibility to a law student employed in his office. He may avail himself of the assistance of the student in many of the fields of the lawyer's work, but the student is not permitted, until he is admitted to the Bar, to perform the professional functions of a lawyer, such as conducting court trials, giving professional advice to clients or drawing legal documents for them. The student in all his work must act as agent for the lawyer employing him, who must supervise his work and be responsible for his good conduct.⁶⁴

e. Adequate Supervision Required

The legal profession has a long history of utilizing the services of knowledgeable secretaries and law clerks. But the view has always been that a legal assistant's work is of a preparatory nature, such as research, investigation of details, the gathering of data and other necessary information, and such other work as will assist the employing attorney in carrying the matter to a completed product, either by his personal examination and approval thereof or by additional effort on his part. The work must be such, however, as loses its separate identity and becomes either the product, or else merged in the product, of the attorney himself.⁶⁵

While the level of supervision may vary, depending on the type of work involved and the competence of the legal assistant, it must always be present.⁶⁶ Under the supervision of a licensed attorney, a legal assis-

63. *In re Bright*, 171 B.R. 799 (E.D. Mich. 1994).

64. ABA Comm. on Professional Ethics, Op. 85 (1932).

65. *Ferris v. Snively*, 19 P.2d 942, 945-46 (1933).

66. A.G. Greene & K. Williams-Fortin, *Expanding the Role of the Legal Assistant-Why Do It?*, LEVERAGING WITH LEGAL ASSISTANTS 6, 8 (ABA Sec. of Law

tant, for example, may, under certain circumstances, obtain facts from the client, communicate information to the client, interview witnesses, perform limited research to assist the lawyer with the legal analysis, obtain documents, obtain photographs, prepare summaries, prepare chronologies, prepare itemization of claims, prepare drafts of pleadings, prepare drafts of interrogatories and of production of document requests, prepare drafts of responses to discovery requests, prepare outlines for the lawyer to use in deposing a witness, index deposition transcripts, and prepare summaries of the evidence.⁶⁷

4. *The Penalties.*—Nationwide, there are three predominant forms of punishment for attorneys found guilty of assisting in the unauthorized practice of law: (1) censure or reprimand, (2) suspension, and (3) disbarment.

a. Censure/Reprimand

The censure or reprimand of attorneys was ordered by the courts under the circumstances of the following cases upon proof that the attorneys in question had aided or assisted non-lawyers in the unauthorized practice of law.

An attorney was censured who, due to his inadequate supervision of his assistant, a law school graduate who failed the Bar examination several times, was unaware that the assistant had begun holding himself out as an attorney, representing clients and embezzling client funds.⁶⁸ Another lawyer was censured for helping non-lawyers in selling “living trust” document packages to customers.⁶⁹

b. Suspension

The suspension of attorneys from practice for a finite period was ordered by the courts under the circumstances of the following cases upon proof that the attorneys had aided or assisted non-lawyers in the unauthorized practice of law.

An attorney was suspended for three months where after employing

Prac. Mgmt., A.G. Greene ed., 1993).

67. *Id.* at 20.

68. *In re Bonanno*, 617 N.Y.S.2d 584 (N.Y. App. Div. 1994).

69. *People v. Laden*, 893 P.2d 771 (Colo. 1995).

a disbarred attorney as a law clerk in his office, the attorney became aware that the employee was actually practicing law, and the lawyer, knowing of his employee's actions, continued to employ him in the same capacity with the same responsibility, and persistently left him in a position from which he could hold himself out as a lawyer.⁷⁰ Another Illinois attorney was suspended from the practice of law for two years for continuing a workers' compensation case-sharing relationship with another attorney after the other attorney had been disbarred, even though the disbarred attorney's functions allegedly resembled tasks undertaken by a paralegal or clerical aide.⁷¹

Similarly, a New York attorney was suspended for six months for employing a disbarred attorney and permitting him to perform the duties of a law clerk on numerous occasions.⁷² When an attorney has been disbarred, the court noted, he has been pronounced unfit for further professional activities.⁷³

A Nevada lawyer was suspended for thirty days when the court found that the attorney had violated the state rule prohibiting a member of the Bar from directly or indirectly aiding or abetting an unlicensed person to practice law or to receive compensation therefrom, where the attorney, without ever having seen or consulted with or advised the plaintiff, signed and filed, as the plaintiff's lawyer, a complaint which had been prepared by a person not licensed to practice law in the state.⁷⁴ Noting that the person who drew the complaint was licensed to practice law in several other states and frequently held himself out as a Nevada lawyer, as well as a business and tax consultant, the court pointed out that the person aided by the respondent attorney was not in fact licensed in Nevada, and that the attorney, who rented office space from this person, knew of his actual status.⁷⁵

70. *In re Schelly*, 446 N.E.2d 236 (Ill. 1983).

71. *In re Discipio*, 645 N.E.2d 906 (Ill. 1994).

72. *In re Sutherland*, 300 N.Y.S. 667 (N.Y. App. Div. 1937).

73. *Id.*

74. *In re Parks*, 184 P.2d 355 (Nev. 1947).

75. *Id.*

c. Disbarment

The disbarment of the attorneys from practice was ordered by the courts under the circumstances of the following cases upon proof that the attorneys in question had aided or assisted non-lawyers in the unauthorized practice of law.

In a proceeding to disbar or discipline an attorney who, *inter alia*, knowing another attorney had been disbarred from the practice of law in the state, had associated such disbarred attorney with himself in the practice of law in his office, and caused him to act in the capacity of an attorney at law in various matters in which the defendant was an attorney, the court held that such conduct could not be approved and warranted disbarment of the respondent attorney.⁷⁶ The proprietor of a legal clinic was disciplined by the court for, *inter alia*, allowing law students working in his office to practice law without adequate supervision, in violation of the state's disciplinary rule prohibiting the aiding of a non-lawyer in the unauthorized practice of law.⁷⁷ The court declared that the statutory authority for delegation of a lawyer's duties to clerks, secretaries, and other lay persons made that delegation conditional upon the lawyer maintaining a direct relationship with his client, supervising the delegated work, and retaining complete responsibility for the work product.⁷⁸ An Oregon attorney was disbarred for not establishing precise contours for his paralegal as to what constituted practice of law, and then sending the paralegal to meet with clients alone, and failing to supervise the paralegal properly. As a result, the paralegal examined wills and interpreted them for the clients.⁷⁹

C. Summary

As the American Bar Association has noted:

A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scribes, non-lawyer draftsmen or non-lawyer researchers. In fact, she may employ non-lawyers to do any task for her except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal

76. *In re Lacy*, 112 S.W.2d 594 (Mo. 1937).

77. *In re Sekerez*, 458 N.E.2d 229 (Ind. 1984).

78. *Id.* at 239.

79. *In re Complaint as to the Conduct of Morin*, 878 P.2d 393 (Or. 1994).

proceedings that are part of the judicial process, so long as she is the one who takes the work and vouches for it to the client and becomes responsible for it to the client.⁸⁰

A lawyer may delegate various tasks to paralegals, clerks, secretaries and other non-lawyers. He or she may not, however, delegate to any such person the lawyer's role of appearing in court in behalf of a client or of giving legal advice to a client. He or she must supervise closely any such person to whom he or she delegates other tasks, including the preparation of a draft of a legal document or the conduct of legal research. The lawyer must not under any circumstance delegate to such person the exercise of the lawyer's professional judgment in behalf of the client or even allow it to be influenced by the non-lawyer's assistance.⁸¹

IV. BANKRUPTCY CONSIDERATIONS AFFECTING UNAUTHORIZED PRACTICE QUESTIONS

While state substantive law provides the rules and an enforcement scheme for enforcing the prohibition as to unauthorized practice of law, the bankruptcy process itself provides certain procedural safeguards which assist in preventing the unauthorized practice of law. In addition to procedural safeguards, it is important to note that, although state law provides the substantive rules regarding the unauthorized practice of law, a federal court may well be the forum in which any such claim is determined. It is generally accepted that "[f]ederal courts, including bankruptcy courts, have inherent authority to regulate practice in cases pending before them."⁸²

A. The Limited Relevance of Section 110

At first blush, a non-lawyer desiring to assist a debtor in filing the necessary papers to begin a Chapter 13 bankruptcy may find § 110 of the

80. ABA Comm. on Professional Ethics, Op. 316 (1967).

81. See ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT: 21:8203 (1984); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6 (1988).

82. *In re Stacy*, 193 B.R. 31, 38 (Bankr. D. Ore. 1996) (citing *State Unauthorized Practice of Law v. Paul Mason*, 159 B.R. 773, 776 (Bankr. N.D. Tex. 1993); *In re Evans*, 153 B.R. 960, 966 (Bankr. E.D. Pa. 1993)).

Bankruptcy Code comforting. Section 110 deals with "bankruptcy petition preparer[s]," a term defined as "a person, other than an attorney or an employee of an attorney, who prepares for compensation a document for filing" in bankruptcy.⁸³ Section 110 seems to validate the participation of a non-lawyer in the preparation and filing of bankruptcy documents, as this Section provides specific rules controlling such activity. For instance, each bankruptcy document prepared or filed by a non-lawyer must be signed by the non-lawyer, and include an identifying number that identifies each individual who assisted in the preparation of the document.⁸⁴ The debtor must be furnished a copy of each such document.⁸⁵ In addition, the non-lawyer is prohibited by § 110 from employing any advertisement that contains the word "legal" or "any similar term."⁸⁶ Lastly, each non-lawyer covered by § 110 who assisted in preparing or filing bankruptcy documents on behalf of a debtor must file with the court a declaration under penalty of perjury disclosing any fee she received from or on behalf of the debtor within twelve months preceding the filing of the case.⁸⁷

Despite its apparent approval and disapproval of certain activities by non-lawyers in the preparation and filing of bankruptcy documents, by its express terms § 110 does not expand or otherwise affect state law rules on the unauthorized practice of law.⁸⁸ This fact is firmly established by the final provision of § 110: "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."⁸⁹ While this particular provision has not been the subject of much judicial comment, the few cases interpreting this provision hold that the section means what it says. For example, *In re Wallace*⁹⁰ recently held that § 110 bars a pe-

83. 11 U.S.C. § 110(a)(1). A "document for filing" is defined to include "a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a [bankruptcy] case." 11 U.S.C. § 110(a)(2).

84. 11 U.S.C. § 110(c).

85. 11 U.S.C. § 110(d).

86. 11 U.S.C. § 110(f).

87. 11 U.S.C. § 110(h).

88. Although § 110 does not *affect* state substantive law on the unauthorized practice of law, this provision may in part be responsible for prompting states to consider requiring a license to be purchased and maintained by non-lawyers engaged in the preparation of bankruptcy pleadings. See Mund, *supra* note 5, at n.50.

89. 11 U.S.C. § 110(k).

90. 227 B.R. 826 (Bankr. S.D. Ind. 1998).

petition preparer from receiving a check made out to the clerk of the bankruptcy to prevent a petition preparer from having control over even the timing of a bankruptcy filing.

B. Rule 9011—Representations to the Court

In its own way, Rule 9011 operates to prevent a lawyer from delegating legal matters to his bankruptcy legal assistants. As bankruptcy's version of "Rule 11," Rule 9011 requires an attorney representing a debtor in Chapter 13 to sign every petition, pleading, written motion, and virtually all other papers which are filed with the court.⁹¹ A lawyer's signature on a court document constitutes a representation by that lawyer to the court.⁹² Rule 9011(b) provides the parameter of this representation:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney . . . is certifying that to the best of [his or her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

. . .

(2) the claims, defenses, and other legal contentions therein are warranted by existing law . . .

. . .

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.⁹³

Penalties for violation of Rule 9011 include payment of court fees, attorney fees incurred by a moving party,⁹⁴ as well as "other expenses in-

91. FED. BANKR. R. P. 9011(a). Interestingly, by its very terms Rule 9011 "except[s] a list, schedule, or statement, or amendments thereto" from the requirement that an attorney must sign all pleadings and court documents. *Id.*

92. FED. BANKR. R. P. 9011(b).

93. *Id.*

94. FED. BANKR. R. P. 9011(c).

curred as a direct result of the violation."⁹⁵

In the context of a Chapter 13 debtor case, two primary court pleadings are directly affected by Rule 9011. These pleadings are the bankruptcy petition and Chapter 13 plan. Although the former is a rather simple form, by signing a petition a lawyer represents to the court that his client is eligible to be a Chapter 13 debtor. The Bankruptcy Code provides that the only persons entitled to file a Chapter 13 bankruptcy petition are individuals with regular income that owe less than \$269,250.00 in unsecured debt, and less than \$807,750.00 in secured debt.⁹⁶ Even individuals who meet the regular income and level of debt requirements may not be eligible to file a Chapter 13 petition (or any other bankruptcy petition for that matter) if (i) he or she was previously involved in a bankruptcy which was dismissed for willful failure to abide by orders of the court or for failure to appear in prosecution of the bankruptcy case, or (ii) if he or she voluntarily dismissed a prior case within 180 days following the filing of a motion for relief by a creditor.⁹⁷ Because Rule 9011 imposes upon the lawyer a duty to have a factual and legal basis for filing a Chapter 13 petition, a powerful disincentive exists for a lawyer to sign bankruptcy petitions that he or she has not been personally involved in preparing.

As for the Chapter 13 plan, the lawyer signing this document makes similar representations to the court. The Bankruptcy Code places strict requirements on the terms of all proposed Chapter 13 reorganization plans.

C. Section 329 and Court Examination of Attorney Fees

The tandem provisions of § 329 and Rule 2017 provide a powerful structural safeguard against an attorney rendering services for a bankruptcy debtor getting compensated for work he or she has not performed. Section 329 unambiguously requires full disclosure by any attorney representing a debtor.

Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for

95. FED. BANKR. R. P. 9011(c)(2).

96. 11 U.S.C. § 109(e).

97. 11 U.S.C. § 110(g).

compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.⁹⁸

The legislative history to § 329 reveals Congress's concern over transactions between the debtor and his attorney: "[p]ayments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny."⁹⁹ The courts have held that failure to disclose a fee arrangement will result in an attorney's fee being categorically denied.¹⁰⁰

While § 329 establishes the substantive requirement that all attorneys who represent the debtor disclose their fee arrangement, Rules 2016 and 2017 provide the procedural requirements for disclosing such arrangements. With regard to the attorney for the debtor, these requirements are quite specific:

Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity.¹⁰¹

Each attorney for the debtor has a continuing duty to supplement the Rule 2016 statement upon receiving any payment.¹⁰²

While Rule 2016 requires all attorneys representing debtors to file statements of compensation, Rule 2017 provides a procedural mechanism by which any fees paid may be reviewed. This Rule, which vests standing to "any party in interest," allows the court to receive and hear a motion challenging the propriety of payments by the debtor to his or her attorney. The court will, upon such motion, determine if any such fee is

98. 11 U.S.C. § 329.

99. H.R. REP. NO. 95-595 (1977).

100. *In re Downs*, 103 F.3d 472 (6th Cir. 1996).

101. FED. R. BANKR. P. 2016(b).

102. Rule 2016 requires that "[a] supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed."

“excessive.”

In terms of monitoring the unauthorized practice of law, it is clear that upon motion from a party in interest to review a fee or fee application, the court may discover acts which constitute the unauthorized practice of law. Such findings may result in, among other punishments, the disgorgement of fees paid.¹⁰³

V. PARTICIPATION BY LEGAL ASSISTANTS IN THE CHAPTER 13 PROCESS—UNAUTHORIZED PRACTICE OF LAW?

An analysis of the role of legal assistants in the Chapter 13 bankruptcy process begins with an inspection of how this process actually works. In a typical Chapter 13 debtor practice, how do clients contact a law firm? Once a law firm is contacted, what process is utilized in determining whether the client should file bankruptcy?

In addition to fundamental issues such as whether to file bankruptcy, many “housekeeping” matters must be initially addressed and determined by a law firm representing a prospective debtor. For instance, a debtor must make decisions regarding what exemptions to claim in his bankruptcy schedules. This decision requires the characterization of his or her assets and liabilities along functional lines.¹⁰⁴ The content of a Chapter 13 reorganization plan also requires important threshold decisions to be made, such as whether to pay a creditor through the plan or directly, how to treat valuation issues, and for what period of time payments should be made.¹⁰⁵

A typical prospective Chapter 13 debtor will either contact a law firm by telephone or merely show up at the law firm unannounced.¹⁰⁶ Once contact is established, the law firm normally schedules an initial consultation with the potential client. The potential client is instructed to come to the law firm with various documents, including copies of bills,

103. *Matter of Bright*, 171 B.R. 799 (Bankr. E.D. Mich. 1994) (court found that paralegal engaged in unauthorized practice of law and ordered paralegal to disgorge fees paid by debtors).

104. *See supra* note 15.

105. *See supra* notes 22-24.

106. Our sources for establishing “typicality” include real life experiences of the authors, as well as informal conversations with debtors’ attorneys who handle large-volume practices. In this vein, we wish to express particular gratitude to the law firm of Burns & Wilson, LLC, in Tuscaloosa, Alabama, for their invaluable input into how the Chapter 13 debtor process “really works.”

pay stubs, and other personal and financial information. The potential client will then meet with either a legal assistant or an attorney for the purposes of providing information regarding the client's financial state and any pressing matters such as a threatened repossession of an automobile or foreclosure of a home.

Many debtor practices have established a standard intake questionnaire, which requires the potential client to provide basic information such as employment status, home and work addresses and telephone numbers, social security numbers, and details regarding amounts of assets and liabilities. At some point, if the decision to file bankruptcy is made, someone in the law firm, typically a legal assistant, will input data from the intake questionnaire into computer programs which produce court-approved bankruptcy forms for the various bankruptcy schedules. A follow-up appointment is then made for the client to meet with the attorney to review the proposed bankruptcy schedules and petition and have the attorney answer any questions that the client may have. It is at this follow-up appointment that the client signs the bankruptcy petition and schedules. Following the lawyer signing the same, the petition and schedules are filed with the court, beginning the bankruptcy process.

The extent to which legal assistants are utilized in the foregoing process depends entirely upon the practices and policies of the particular law firm. In some cases, legal assistants merely enter basic information on the law firm's computer system, and have no contact with or discussions with the client. At the other pole, legal assistants may handle everything from the initial client interview, preparing all schedules and petitions, and even signing the attorney's name.¹⁰⁷ Each situation presents differing degrees of opportunity for an attorney to lapse into the forbidden land of aiding and abetting the unauthorized practice of law by a non-lawyer.

107. See *In re Martin*, 97 B.R. 1013 (Bankr. N.D. Ga. 1989). In this case, a creditor filed a motion for sanctions against the debtor's counsel for asserting various grounds. During the course of a hearing, the fact surfaced that debtor's attorney had allowed someone in his office to sign his name to the bankruptcy petition. *Id.* at 1019. The court held the attorney fully responsible for this act.

A. *Unauthorized Practice of Law by
"Independent" Paralegals*

In analyzing unauthorized practice of law concepts as they apply in the bankruptcy process, a useful discussion begins with a review of the plight of "independent" paralegals, i.e., paralegals who are not employed by lawyers. Bankruptcy court decisions have specified actions which, if performed by an "independent" paralegal, constitute the unauthorized practice of law in a bankruptcy case. For example, a paralegal who advised a debtor as to her legal rights regarding secured collateral, the difference between a Chapter 13 filing and a Chapter 7 filing, and who selected the debtor's exemptions was held to be engaged in the unauthorized practice of law.¹⁰⁸ In addition, advising a debtor whether or not to file a Statement of Intention and directing a client to refer to a list of exemptions from which to select assets also has been held to constitute the unauthorized practice of law when performed by a paralegal.¹⁰⁹

Bankruptcy courts have identified the following activities, when conducted by independent paralegals, as constituting the unauthorized practice of law:

- A. Soliciting information from clients which is reformulated and typed into the bankruptcy petition;¹¹⁰
- B. Advising debtors to file a Chapter 13 petition and composing an insufficient Chapter 13 plan;¹¹¹
- C. Drafting and preparing legal documents, including bankruptcy petitions, statements, and schedules;¹¹²
- D. Defining terms in bankruptcy schedules such as "creditors holding secured claims," "real property," and "executory contracts";¹¹³

108. *In re Anderson*, 79 B.R. 482, 484-86 (Bankr. S.D. Cal. 1987).

109. *In re McCarthy*, 149 B.R. 162, 165-67 (Bankr. S.D. Cal. 1992).

110. *In re Bachman*, 113 B.R. 769, 774 (Bankr. S.D. Fla. 1990).

111. *Id.*

112. *Id.* at 773.

113. *In re Herren*, 138 B.R. 989, 994-95 (Bankr. D. Wyo. 1992).

E. Determining whether property should be claimed as exempt, whether the client had any co-debtors, or whether the client was a party to executory contracts and/or unexpired leases;¹¹⁴

F. Directing a client to refer to a comprehensive set of state exemptions from which the client is to select assets;¹¹⁵ and

G. Advising clients to list all debt and the option of voluntary repayment.¹¹⁶

As one court indicated, the rights of a non-lawyer must be balanced against the public policy of protecting the public from being advised and represented in legal matters by unqualified persons.¹¹⁷

What services can an independent paralegal legitimately perform for the pro se debtor? Typing is the only activity paralegals can perform with absolute immunity.¹¹⁸ When performing this service, paralegals can type forms "provided they only copy the written information" furnished by clients and "[u]nder no circumstance . . . engage in personal legal assistance in conjunction with typing service business activities, including the correction of errors and omissions."¹¹⁹ For instance, the Florida Supreme Court and Florida bankruptcy courts have made it clear that persons wanting to provide services in the bankruptcy area are limited to typing or transcribing written information provided to them by a consumer onto pre-prepared forms.¹²⁰ Bankruptcy courts even regulate the fee charged by the paralegal. The fee must be commensurate with the fee charged by a typing service.¹²¹

By 1986 it had become clear to the courts that there was a problem of abuse in the bankruptcy system.¹²² Despite efforts to halt abuse of the system, the issue again arose in the 1990 case of *In re Bachmann*.¹²³ In *Bachmann*, Christopher and Charlene Bachmann filed a Chapter 13 case pro se on November 15, 1980. On December 20, 1988, they came

114. *In re Harris*, 152 B.R. 440, 441, 445 (Bankr. W.D. Pa. 1993).

115. *Herren*, 138 B.R. at 992, 995.

116. *Id.* at 995.

117. *In re Bachmann*, 113 B.R. 769, 773 (Bankr. S.D. Fla. 1990).

118. *Id.* at 774.

119. *Id.*

120. *In re Samuels*, 176 B.R. 616, 621-22 (Bankr. M.D. Fla. 1994).

121. *McCarthy*, 149 B.R. at 167.

122. *See In re Hildago*, 96 B.R. 389 (Bankr. S.D. Fla. 1988).

123. 113 B.R. 769 (Bankr. S.D. Fla. 1990).

before the Chapter 13 Trustee at the section 341 meeting and were advised that their plan was improperly prepared and could not be recommended for confirmation for a number of reasons.¹²⁴ The debtors informed the trustee that they knew nothing about Chapter 13 nor did they understand how to prepare or file a plan.¹²⁵ They further advised the trustee that a typing service advised them to file a Chapter 13 petition and prepared the plan for them.¹²⁶ At this point, under existing law, their case could have been dismissed.¹²⁷ Debtors would have lost their home, certain other benefits of the bankruptcy system, as well as the money they paid to the typing service. Fortunately for the Bachmanns, the Chapter 13 Trustee, Robert Roth, operates under the “Rachmones Doctrine”—“rachmones” means compassion or pity in Yiddish. He helped the thankful Bachmanns draft a Chapter 13 plan which the Court confirmed.¹²⁸ In addition, Mr. Roth brought this alarming matter to the Court’s attention.

An evidentiary hearing ensued from the Court’s *sua sponte* Order to Show Cause why both the individual owner of the typing service and the service itself, Capital Business Services, Inc., should not be held in contempt of court for the unauthorized practice of law.¹²⁹ Ironically, the owner, who had rendered legal advice to others, retained a member of the Bar for his own defense. This defense was buttressed by two additional Washington D.C. attorneys who were members of the Public Citizen Litigation Group, a Washington based public interest organization. Little factual dispute existed. Based in part on the owner’s own testimony, the court found that he, doing business as Capital, engaged in the unauthorized practice of law.¹³⁰ The Court enjoined these defendants from such future unauthorized practice.¹³¹ No appeal resulted. Upon a motion of the U.S. Trustee, the Court also reviewed the fees charged by Capital. Under Federal Rule of Bankruptcy Procedure 2017, the court determined that a portion of the fees charged should be disgorged.¹³²

More importantly, the *Bachmann* Court delineated what a “Typing

124. *Id.*

125. *Id.*

126. *Id.*

127. *See* 11 U.S.C. § 1307 (1988).

128. 113 B.R. at 771.

129. *Id.*

130. *Id.* at 772-73.

131. *Id.* at 776.

132. *Id.* at 775.

Service” may and may not do. The *Bachmann* rules provide that non-lawyer bankruptcy providers:

1. May type bankruptcy forms, provided they only copy written information furnished to them;
2. May sell bankruptcy forms;
3. May sell to the public, printed material purporting to explain bankruptcy practice and procedure;
4. May advertise the providing of secretarial services, notary and typing services;
5. May not advise customers as to the various remedies and procedures available to them in the bankruptcy system;
6. May not make inquiries nor answer questions as to the completion of particular bankruptcy forms or schedules;
7. May not advise how best to fill out the bankruptcy forms or the bankruptcy schedules;
8. May not engage in personal legal assistance in bankruptcy matters, including the correction of errors or omissions in bankruptcy forms or schedules created by a debtor;
9. May not use the word “paralegal” on business cards or advertising;
10. May not advertise in misleading fashion which leads the public to believe the service is offering legal services, legal advice or legal assistance;
11. May not charge for services connected with a bankruptcy filing without complying with 11 U.S.C. 329.¹³³

In 1978 the Florida Supreme Court stated: “In determining whether a particular act constitutes the practice of law, our primary goal is the protection of the public.”¹³⁴ In February of 1998, the Florida Supreme Court, in response to a petition filed by the Florida Bar against the operator of a legal form preparation service, sustained allegations that he had engaged in the unlicensed practice of law.¹³⁵ The court enjoined Catarcio individually, his agents and employees, and etc., from engaging in the following activities:

1. [A]dvising customers of their rights, duties and responsibilities under Florida or federal law,
2. [M]aking inquiries and answering questions as to the particular bankruptcy forms that might be necessary, how best to fill out

133. See *Bachmann*, 113 B.R. at 774.

134. *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1192 (Fla. 1978).

135. *Florida Bar v. Catarcio*, 709 So. 2d 96 (Fla. 1998).

the forms, the information necessary to complete the forms, and where to properly file such forms,

3. [G]iving advice and making decisions on behalf of others that require legal skill and a knowledge of the law greater than that possessed by the average citizen,

4. [A]dvising about or explaining legal remedies and possible courses of action that affect the procedural or substantive legal rights, duties and privileges of persons,

5. [C]ounseling customers as to the advisability of filing for protection under United States bankruptcy laws,

6. [A]llowing members of the public to rely on Catarcio to properly prepare legal forms or legal documents affecting individuals' legal rights,

7. [U]sing the phrase "Free Consultation" in advertising his legal form preparation service, and from advertising any legal form preparation services beyond the business activities of providing secretarial and notary services, and selling legal forms and general printed information, and

8. [U]sing the designation "J.D." following his name in the context of print advertisements, business cards, or other offerings of his legal form preparation services, or in any other manner which could mislead the public into believing Catarcio can assist the public in legal matters.¹³⁶

In highly technical and specialized areas of law such as bankruptcy, there are good reasons to regulate persons who provide assistance to debtors. There is no civil malpractice remedy against a non-lawyer who makes a substantive error while providing legal assistance.¹³⁷ Similarly, non-lawyers are not subject to prohibitions against mishandling client funds, charging exorbitant fees or engaging in misleading advertising.

B. Unauthorized Practice of Law by Supervised Legal Assistants

In addition to analyzing unauthorized practice of law rules as they apply to "independent" paralegals, courts have had the occasion to analyze these rules in the context of supervised legal assistants. As discussed above, a typical debtor attorney's practice may maintain a ratio of three or four non-attorney employees for each attorney on staff. Because the

136. *Catarcio*, 709 So. 2d at 100-01.

137. *In re Webster*, 120 B.R. 111, 114 (Bankr. E.D. Wis. 1990).

repetitive nature of bankruptcy filings lends itself to broad delegation of duties to non-attorneys, it is not surprising that bankruptcy courts from time to time face the issue of whether these non-attorneys are engaged in the unauthorized practice of law. The court analyzed this very subject in *In re Pinkins*.¹³⁸

The court in *Pinkins* began its analysis by reviewing in detail the standardized process used by the subject law firm in handling client contact.

[The law firm's] standard practice in handling initial consultations with clients was that the client met with a legal assistant, who discussed with the client the available chapters and assisted the client in deciding which, if any, chapter proceedings the client should file. If the client had a question and requested an answer from an attorney, the legal assistant would personally ask the attorney and relate the answer back to the client. The client would not meet with an attorney. The assistant gave a questionnaire to the client to fill out and return. The assistant then reviewed the questionnaire and prepared the papers to be filed. The client then returned to sign the papers, again meeting with a legal assistant, rather than an attorney. In most instances, unless the client had specifically requested to meet with an attorney, the client's first contact with the attorney was at the [section 341] meeting of creditors.¹³⁹

The court then noted that "[t]he formidable task of constructing a definition of the practice of law has largely been left to the judiciary."¹⁴⁰

Citing Michigan law prohibiting a non-lawyer from practicing law, the court then turned its focus to whether the process employed by the law firm violated these rules. The *Pinkins* court found "that the legal assistants of [the law firm] perform many services that constitute the unauthorized practice of law."¹⁴¹ The first three facts cited by the *Pinkins* court in support of its conclusion that legal assistants in this law firm were engaged in the unauthorized practice of law centered on the rendering of advice. First, the court noted that the legal assistants explained to prospective clients the differences between Chapter 7 and Chapter 13 bankruptcies.¹⁴² The court concluded that explaining these

138. 213 B.R. 818 (Bankr. E.D. Mich. 1997).

139. *Id.* at 819-20.

140. *Id.* at 820 (quoting *State Bar v. Cramer*, 249 N.W.2d 1 (1976)).

141. *Id.* at 821.

142. *In re Pinkins*, 213 B.R. at 821.

differences necessarily entails "defining and explaining concepts and legal terms of art."¹⁴³ Additionally, the court noted that the legal assistants successfully persuaded approximately one-third of prospective clients to avoid filing bankruptcy by taking some other course of action. The court found that steering clients away from bankruptcy required a legal determination by the assistant that the legal process of bankruptcy is not the best choice for a particular individual. Finally, the court held that the act by the legal assistant in helping a client determine whether to file Chapter 7 or Chapter 13 constituted the unauthorized practice of law. The court found that although this decision was "reviewed" by an attorney, the legal assistant was engaged in the unauthorized practice of law nonetheless.¹⁴⁴

Significantly, the court in *Pinkins* also frowned upon the "relay" system established by the subject law firm. The court articulated its reasons for being uncomfortable with the system under which a legal assistant would relay questions from the client to an attorney, and then return to the client with an answer.

[I]f the legal assistant is not comfortable answering a specific question, or if the client is not comfortable with the advice given by the legal assistant, the legal assistant asks the attorney what the advice should be and relates that information back to the client. The primary concern with this practice is that the legal assistant uses his or her own judgment to decide which questions to refer to an attorney and which questions to attempt to answer themselves. There is also a chance that the assistant will not properly phrase the question to the attorney or will not communicate the advice properly to the client. Moreover, and most importantly, the client is entitled to the professional judgment of the attorney.¹⁴⁵

In holding that the legal assistants were engaged in the unauthorized practice of law, the court in *Pinkins* summarily rejected the argument by the law firm that "the legal assistants employed by the [law firm] are very well trained, and that the legal services, although not provided by an attorney, are of the highest quality."¹⁴⁶ The court noted that "[t]his argument misses the point. Legal assistants are not authorized to practice law."¹⁴⁷

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

In a factually similar case, the federal district court in California upheld a bankruptcy court's imposition of sanctions against a law firm for aiding and abetting the unauthorized practice of the law in *In re Hessinger & Associates*.¹⁴⁸ In this case, the court found that the law firm's extensive use of legal assistants violated the individual attorney's obligations to provide competent representation to their clients.¹⁴⁹ In upholding the bankruptcy court's finding that the law firm's legal assistants engaged in the unauthorized practice of law, the district court found several facts as determinative. First, the court noted that the firm had seven offices which engaged primarily in representing bankruptcy debtors, but had only six attorneys to staff these offices.¹⁵⁰ The court was also persuaded by the testimony of two formal legal assistants who testified that it was "routine practice" for the accused law firm to allow the legal assistants to handle completion of bankruptcy schedules and petitions.¹⁵¹ Following a review of these practices, the court noted that the legal assistants employed by this firm had little or no attorney supervision.¹⁵² In fact, several legal assistants had a non-attorney as their supervisor.¹⁵³

This failure of supervision [] created a situation in which paralegals were making final decisions on how important legal aspects of individual bankruptcy filings, such as the claiming of exemptions, should be handled; and this constituted the unauthorized practice of law by those paralegals.¹⁵⁴

The court found that this failure to supervise established that the attorneys in the law firm intentionally, recklessly or repeatedly failed to perform legal services competently.

Seizing a rare opportunity to comment on the subject, the court also provided a searing response to the fundamental theme in the accused law firm's defense.

As a final point on this issue, the court notes that a persistent theme

148. 192 B.R. 211 (Bankr. N.D. Cal. 1996).

149. Applying California law, the court found that the attorney's use of legal assistants violated Rule 3-110(A) of the California Rules of Professional Conduct, which prohibits attorneys from intentionally, recklessly or repeatedly failing to perform legal services competently. *Id.* at 220.

150. *Id.* at 221.

151. *Id.*

152. *Id.* at 222-23.

153. *In re Hessinger*, 192 B.R. at 222-23.

154. *Id.* at 223.

in [the law firm's] position on the role of paralegals in its practice is the argument that "everybody does it;" that is, all large consumer bankruptcy firms rely on paralegals to perform a large amount of the work required for filing a bankruptcy petition, and in all such firms the paralegals do so with only minimal attorney supervision. This may well be true; it may also be true that, given sufficient training, paralegals are fully capable of competently handling most aspects of a consumer bankruptcy case. The court, however, is not in a position to decline to enforce the Rules of Professional Conduct merely because application of those rules results in attorneys being required to perform work which could be performed less expensively and more efficiently by non-lawyers. Nor is the court in a position to condone an unethical practice merely because most consumer bankruptcy firms are engaging in it.¹⁵⁵

VI. CONCLUSION

In sum, the reported decisions dealing with unauthorized practice issues in Chapter 13 bankruptcy cases seem to mirror the non-bankruptcy cases. The reported opinions reflect the state law rules and decisions.¹⁵⁶

As Congress considers changes in the role of Chapter 13, we believe that Congress and/or the courts should consider changes in the role of paralegals in Chapter 13. A recent study by Professor Jean Braucher of the University of Arizona Law School was highly critical of lawyers' counseling consumer debtors regarding bankruptcy choices.¹⁵⁷ It can be questioned whether a law degree is necessary to counsel the individual debtor with typical problems as to her bankruptcy alternatives — whether the choice is dictated by legal issues or economic/social considerations. And it can be questioned whether a young lawyer can do a better job preparing a basic Chapter 13 plan than an experienced paralegal.

These specific questions take us back to the basic question about unauthorized practice: what is the reason for concern about unauthorized practice? In a recent article surveying the role of paralegals in Florida

155. *Id.* at 223.

156. We acknowledge that the reported decisions may not reflect all of the bankruptcy proceedings questioning the role of paralegals in which the court does not publish an opinion or even issue an opinion.

157. Jean Braucher, *Counseling Consumer Debtors to make Their own Informed Choices- A Question of Professional Responsibility*, 5 AM. BANK. INST. L. REV. 165 (1997).

bankruptcy cases, Judge Cristol, the Chief Bankruptcy Judge for the Southern District of Florida, reminded us that "the reason to prevent unauthorized practice is to prevent harm to the public."¹⁵⁸

We think it can legitimately be questioned whether the present state law rules on the role of paralegals are necessary in bankruptcy to prevent harm to the public. It can be argued that the combination of the Chapter 13 trustee and the bankruptcy judge can protect the consumer with atypical problems from the paralegal who is in over his head just as they now protect such consumers from the lawyer who is in over her head. We join Judge Cristol and Judge Mund who authored a similar article on California bankruptcies¹⁵⁹ in urging Congress and the courts to consider changes in the role of paralegals in Chapter 13 bankruptcy cases.

158. Hon. A. Jay Cristol, *The Nonlawyer Provider of Legal Services: Angel or Vulture?*, 2 AM. BANKR. INST. L. REV. 353, 367 (1994).

159. See Mund, *supra* note 5.