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Unauthorized Practice of Law: How Much Can Your Paralegal Do?

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A. Executive Summary

Ethical issues are always tricky, and sometimes more so in the practice of bankruptcy law. Certain aspects of bankruptcy law are unique, especially when it comes to non-lawyer assistance. Ethical issues may arise in situations when non-lawyers, such as paralegals or law clerks represent debtors, attend meetings, draft bankruptcy petitions, and negotiate reaffirmation agreements.

It is clear that non-lawyers may not engage in the unauthorized practice of law. However, what constitutes the "unauthorized practice of law" is less clear. On one end of the spectrum are clear "don'ts" for unsupervised paralegals, such as the giving of legal advice. On the other end, paralegals may engage in acts that are merely ministerial in nature, or clerical and preparatory work that is performed under attorney supervision, such as transcribing information provided by clients onto forms, and other routine office tasks. The activities that fall within the middle of this spectrum are not so clear cut and may constitute the "unauthorized practice of law."

One can rely on two general principles for guidance on what constitutes the unauthorized practice of law in bankruptcy. First, the unauthorized practice of law occurs when a non-attorney expressly holds himself or herself to others as being an attorney at law. This situation is not all that common, but often arises when a non-attorney creates situations in which others are allowed to mistakenly believe that he or she is either a lawyer

[1] This paper is intended to be read in conjunction with the accompanying live presentation and slides.

or has some expertise in the law. Second, the unauthorized practice of law occurs when a non-attorney provides bankruptcy-related services that inherently require a knowledge of the law greater than that which is held by an untrained person. Disclaimers that an individual is simply providing "scrivener" or "paralegal" services will not free one from liability under this principle. *See Matter of Bright*, 171 B.R. 799 (Bankr. E.D. Mich. 1994).

When utilizing paraprofessionals, it is important for lawyers to take steps necessary to protect themselves and their firms from disciplinary action and malpractice liability. If a lawyer fails to do so, that lawyer may be vulnerable to liability stemming from conduct of a subordinate that would be a violation of the Rules of Professional Conduct if:

> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rules of Professional Conduct 5.3.

Careful supervision of paraprofessionals is paramount. Attorneys may be inadequately supervising a paralegal if the attorney: does not know about the contents of the meeting between the paralegal and the client; relies solely on the paralegal, rather than meeting with the client; or fails to use independent judgment to determine which documents prepared by the paralegal should be communicated outside the law firm. *See Matter of Bright*, 171 B.R. 799 (Bankr. E.D.Mich. 1994). To avoid exceeding the ethical parameters of the legal field, Chief Justice William H. Rehnquist advised in his dissent in *Bates v. State Bar of Arizona*, to be uncompromisingly "unwilling to take even one step down the 'slippery slope'. . . ." *Bates v. State Bar of Arizona*, 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting). To that end, the balance of this paper will provide governing

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