

**American Bankruptcy Institute
2005 Winter Leadership Conference
Ethics: Swearing Contest-Certifications of
Information and Other Ethical Quandaries of the
2005 Bankruptcy Reform Act**

Debt Relief Agencies, Assisted Persons, Disclosure, and
Advertisements under Sections 526, 527, and 528 of the
2005 Bankruptcy Reform Act: An Overview of Selected
Ethical Issues

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**I. Procedures, Notices, Contracts,
Retention of Documents and Audits**

I. Disclosure Notices and Service Contracts

A. 11 U.S.C. § 527 requires debtor's attorneys and debt relief agencies to tell their clients about the dangers of bankruptcy and to explain bankruptcy alternatives. These disclosures must be made no later than three days after bankruptcy assistance is first offered to the debtor. 11 U.S.C. § 527(b) provides:

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE
SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION
PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice."

B. 11 U.S.C. § 528 requires attorneys to have a written contract with their clients no later than five days after bankruptcy assistance is first provided and in every case the contract must be executed prior to the filing of the bankruptcy petition. 11 U.S.C. § 528(a) provides:

(a) A debt relief agency shall—

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

(2) provide the assisted person with a copy of the fully executed and completed contract;

(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for

bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

II. Production of Tax Returns and other Documents

- A. 11 U.S.C. § 521 has been amended to impose a number of new production requirements on debtors. § 521(a)(1)(B) provides that unless the court orders otherwise, individual debtors must file, together with their schedules:
1. A certificate of an attorney or petition preparer indicating that the debtor was given an informational notice required by amended § 342(b), or, in the case of a pro se debtor, a certificate of the debtor that the debtor has received and read the notice;
 2. Copies of all payment advices or other evidence of payment received within 60 days before the filing of the petition, by the debtor from any employer of the debtor;
 3. A statement of the amount of monthly net income, itemized to show how the amount is calculated; and
 4. A statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition.
- B. § 521(e)(2)(A) requires that each debtor, at least seven days prior to the 341 meeting, provide both to the trustee and to any creditor making a timely request a copy of the federal income tax return or transcript of the return for the period for which the return was most recently due and for which the debtor filed a return. This requirement may apply only to individual debtors in Chapter 7 and 13 cases, since § 521(e)(1) is limited in this way. A failure by the debtor to produce the return or transcript requires dismissal of the case unless the debtor demonstrates that the failure to produce the return or transcript was beyond the debtor's control.
- C. § 521(f)(1)-(3) provides that each individual debtor in a case under Chapter 7, 11, or 13, must also, on request of a party in interest or the judge, file with the court, at the same time filed with the IRS, copies of

any federal income tax return for a tax year ending while the case is pending and for a tax year that ended during the three years before the case was filed, as well as copies or any amendments filed to these returns.

- D. § 521(g)(2) provides that the filed returns or transcripts are to be available to any party in interest, with the debtor's privacy protected by regulations to be adopted by the Director of the Administrative Office.
- E. § 521(i) provides that if an individual debtor in a voluntary Chapter 7 or Chapter 13 case fails to file all of the information required under § 521(a)(1) within 45 days after filing the petition, the case must be dismissed on the 46th day, and that any party in interest may request a court order to that effect, which must be entered within 5 days of the request. The automatic dismissal may be delayed for up to 45 additional days on motion of the debtor made within the original 45 day period, and on motion of the trustee, filed prior to automatic dismissal, showing that the debtor attempted in good faith to file the debtor's payment advices and that the best interest of creditors would be served by administering the case.
- F. In order to comply with BAPCPA, debtors' attorneys should retain copies of the following documents:
 - signed copy of 342(b) notice;
 - section 527(a) supplement and 527(b) statement;
 - written contract as required by section 528(a);
 - proof that the debtor has attended prepetition credit counseling;
 - copies of previous tax returns;
 - in case of chapter 13 debtors, proof of tax return filings for past four years;
 - any record of property transfers for past two years;
 - records for secured transactions for past 910 days;
 - records of all bank accounts and IRA's;
 - copies of bank statements for past 90 days;
 - copies of all insurance policies;
 - copies of all causes of actions in which debtor is the plaintiff;
 - copies of any bills for past 90 days;
 - copy of debtor's credit report;
 - copies of orders creating domestic support obligations;
 - copies of all pending causes of action in which the debtor is a defendant;
 - copies of recent pay stubs and any other proof of income.

III. 11 U.S.C. § 521. Debtor's duties

(a) The debtor shall--

(1) file--

(A) a list of creditors; and

(B) unless the court orders otherwise--

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenditures;

(iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate--

(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;

(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and

(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate--

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);

(3) if a trustee is serving in the case or an auditor serving under section 586(f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case or an auditor serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;

(5) appear at the hearing required under section 524(d) of this title;

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either--

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee

(7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court--

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

(c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).

(d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a

proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

(e)

(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.

(2)

(A) The debtor shall provide--

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall

make available to such creditor a copy of the plan--

(A) at a reasonable cost; and

(B) not later than 5 days after such request is filed.

(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court--

(1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;

(2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;

(3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and

(4) in a case under chapter 13--

(A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan;

a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.

(g)

(1) A statement referred to in subsection (f)(4) shall disclose--

(A) the amount and sources of the income of the debtor;

(B) the identity of any person responsible with the debtor for the support of any dependent of the debtor; and

(C) the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.

(2) The tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(h) If requested by the United States trustee or by the trustee, the debtor shall provide--

(1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or

(2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.

(i)

(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

(j)

(1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.

(2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate

IV. Audits

- A. The Bankruptcy Abuse Prevention and Consumer Protection Act sets out a duty, imposed on the Attorney General (in districts served by United States trustees) and on the Judicial Conference of the United States (in districts served by bankruptcy administrators) to conduct audits;
 - 1. of all information provided by the debtors in at least 0.4% of individual Chapter 7 and 13 cases, randomly selected; and
 - 2. of any schedules of income and expenses which reflect greater than average variances from the statistical norm of the district in which the schedules were filed.
- B. The audits are to determine accuracy, veracity, and completeness of petitions, schedules, and other information that the debtor is required to provide under §§ 521 and 1322 of the code.
- C. The audits are to be conducted by certified or licensed public accountants in accordance with generally accepted auditing standards, or under regulations adopted by the Attorney General (and the Judicial Conference in areas served by bankruptcy administrators).

- D. Provision is made for aggregate reports of the results of the audit and for criminal referrals in the event of material misstatements.
- E. A new § 727(d)(4) creates as a ground for revocation of discharge the failure by the debtor to cooperate with the auditor or to explain satisfactorily a material misstatement in an audit.
- F. The Attorney General and the Judicial Conference are given two years from the enactment of the BAPCPA to develop bankruptcy auditing standards. However, the auditing provisions themselves become effective 18 months after enactment, thus requiring earlier development of bankruptcy auditing standards to avoid the need to conduct the required audits under generally accepted auditing standards.

II. Duties to Supervise Paralegals

I. Guidelines for the Utilization of Paralegal Services

- A. Paralegals can be delegated any task normally performed by a lawyer, as long as the lawyer supervises the work, except those proscribed by law. *See* the ABA Model Guidelines for Utilization of Paralegal Services.
- B. Paralegals can review and organize client files, conduct factual and legal research, prepare documents for legal transactions, draft pleadings and discovery notices, interview clients and witnesses, and assist at closings and trials.
- C. Paralegals must avoid the unauthorized practice of law. Generally, paralegals may not represent clients in court, take depositions, or sign pleadings.
- D. Paralegals may not establish the attorney's relationship with the client or set fees to be charged, and may not give legal advice to a client. *See*, Guideline 3 of the ABA Model Guidelines for Utilization of Paralegal Services.

II. The American Bar Association Standing Committee on Paralegals has established the ABA Model Guidelines for Utilization of Paralegal Services. They provide:

Guideline 1: A lawyer is responsible for all of the professional actions of a

paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the jurisdiction in which the lawyer practices.

To conform to Guideline 1, a lawyer must give appropriate instruction to paralegals supervised by the lawyer about the rules governing the lawyer's professional conduct, and require paralegals to act in accordance with those rules. Additionally, the lawyer must directly supervise paralegals employed by the lawyer to ensure that, in every circumstance, the paralegal is acting in a manner consistent with the lawyer's ethical and professional obligations.

Guideline 2: Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a paralegal any task normally performed by the lawyer except those tasks proscribed to a non-lawyer by statute, court rule, administrative rule or regulation, controlling authority, the applicable rule of professional conduct of the jurisdiction in which the lawyer practices, or these guidelines.

Once the lawyer has determined that a particular task can be delegated, consistent with the professional rules, utilization guidelines, and case law of the relevant jurisdiction, the key to Guideline 2 is proper supervision. A lawyer should start the supervision process by ensuring that the paralegal has sufficient education, background and experience to handle the task being assigned. The lawyer should provide adequate instruction when assigning projects and should also monitor the progress of the project. Finally, it is the lawyer's obligation to review the completed project to ensure that the work product is appropriate for the assigned task

Guideline 3: A lawyer may not delegate to a paralegal:

- (a) Responsibility for establishing an attorney-client relationship.
- (b) Responsibility for establishing the amount of a fee to be charged for a legal service
- (c) Responsibility for a legal opinion rendered to a client.

Fundamental to the lawyer-client relationship is the lawyer's agreement to undertake representation and the related fee arrangement. The Model Rules and most states require lawyers to make fee arrangements with their clients and to clearly communicate with their clients concerning the scope of the representation and the basis for the fees for which the client will be responsible.

- Guideline 4: A lawyer is responsible for taking reasonable measures to ensure that clients, courts and other lawyers are aware that a paralegal, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.

Since, in most instances, a paralegal is not licensed as a lawyer, it is important that those with whom the paralegal communicates are aware of that fact. Most guidelines or ethics opinions concerning the disclosure of the status of paralegals include a proviso that the paralegal's status as a non-lawyer be clear and that the title used to identify the paralegal not be deceptive. To fulfill these objectives, the titles assigned to paralegals must be indicative of their status as non-lawyers and not imply that they are lawyers.

- Guideline 5: A lawyer may identify paralegals by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.

Under Guideline 4, above, a lawyer who employs a paralegal has an obligation to ensure that the status of the paralegal as a non-lawyer is fully disclosed. The primary purpose of this disclosure is to avoid confusion that might lead someone to believe that the paralegal is a lawyer. The identification suggested by this guideline is consistent with that objective while also affording the paralegal recognition as an important member of the legal services team.

- Guideline 6: A lawyer is responsible for taking reasonable measures to ensure that all client confidences are preserved by a paralegal.

A fundamental principle in the client-lawyer relationship is that the lawyer must not reveal information relating to the representation. Model Rule 1.6. A client must feel free to discuss whatever he/she wishes with his/her lawyer, and a

lawyer must be equally free to obtain information beyond that volunteered by his/her client. The ethical obligation of a lawyer to hold inviolate the confidences and secrets of the client facilitates the full development of the facts essential to proper representation of the client and encourages laypersons to seek early legal assistance. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office. This obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved.

- Guideline 7: A lawyer should take reasonable measures to prevent conflicts of interest resulting from a paralegal's other employment or interests.

Model Rule 5.3 requires lawyers with direct supervisory authority over a paralegal and partners/lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the conduct of the paralegals they employ is compatible with their own professional obligations, including the obligation to prevent conflicts of interest. Therefore, paralegals should be instructed to inform the supervising lawyer and the management of the firm of any interest that could result in a conflict of interest or even give the appearance of a conflict.

- Guideline 8: A lawyer may include a charge for the work performed by a paralegal in setting a charge and/or billing for legal services.

A number of court decisions have addressed or otherwise set forth the criteria to be used in evaluating whether paralegal services should be compensated. Some requirements include that the services performed must be legal in nature rather than clerical, the fee statement must specify in detail the qualifications of the person performing the service to demonstrate that the paralegal is qualified by education, training or work to perform the assigned work, and evidence that the work performed by the paralegal would have had to be performed by the attorney at a higher rate. Because considerations and criteria vary from one jurisdiction to another, it is important for the practitioner to determine the criteria required by the jurisdiction in which the practitioner

intends to file a fee application seeking compensation for paralegal services.

Guideline 9: A lawyer may not split legal fees with a paralegal nor pay a paralegal for the referral of legal business. A lawyer may compensate a paralegal based on the quantity and quality of the paralegal's work and the value of that work to a law practice, but the paralegal's compensation may not be contingent, by advance agreement, upon the outcome of a particular case or class of cases.

Guideline 10: A lawyer who employs a paralegal should facilitate the paralegal's participation in appropriate continuing education and pro bono public activities.

III. Ethical Responsibilities

- A. Lawyers are ultimately responsible for the work product of paralegals.
- B. Lawyers are responsible for the ethical conduct of the paralegals whom they employ. Any transgressions by the paralegals may subject the lawyer to professional discipline. See Rule 5.3 of the Model Rules of Professional Conduct.
- C. Screening of a paralegal who has a conflict with a client's interest was endorsed by the ABA in Informal Opinion 88-1521
- D. Prior to BAPCPA, 11 U.S.C. § 110(a) defined a "bankruptcy petition preparer" as a person other than an attorney or an employee of an attorney, who prepares for compensation a document for filing. After October 17, 2005, the language of § 110(a) is changed to define a "bankruptcy petition preparer" as a person other than an attorney for the debtor **or an employee of such attorney under the direct supervision of such attorney**. This change in the language places added responsibility on the attorney to directly supervise any employee who prepares filings whereas prior to the amendments, such supervision was not required. See 11 U.S.C. § 110(a).

IV. Rule 5.3 of the Model Rules of Professional Conduct handles the responsibilities regarding non-lawyer assistants such as paralegals. It provides:

With respect to a non-lawyer employed or retained by or associated with a

lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer 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.

III. Sanctions and Consequences

I. Sanctions imposed on debtor's counsel

- A. 11 U.S.C. § 707(b) is amended to add several new duties and liabilities on debtor's counsel.
 - Subparagraph (4)(A) allows the court to award costs and fees to a trustee who successfully pursues a § 707(b) motion, payable by debtor's counsel, if it finds that the Chapter 7 filing violated Fed. R. Bankr. P. 9011. This section reads as follows:
 - (4)(A) The court, on its own initiative or on the motion of a party in interest in accordance with the procedures described in Rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney to reimburse the trustee for all reasonable costs in prosecuting a motion filed under § 707(b), including reasonable attorneys' fees, if—

- (i) a trustee files a motion for dismissal or conversion under this subsection; and
 - (ii) the court—
 - (I) grants such motion; and
 - (II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.
- Subparagraph (4)(B) specifies that if the court finds any violation of Rule 9011 by the debtor’s attorney, it may award a civil penalty against the attorney, payable to the trustee, U.S. trustee, or bankruptcy administrator. Pursuant to § 103(b) of the Code, this provision would apply only in Chapter 7 cases. This section reads as follows:
 - (4)(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—
 - (i) the assessment of an appropriate civil penalty against the attorney for the debtor; and
 - (ii) the payment of such civil penalty to the trustee, the United States trustee (or bankruptcy administrator, if any).
- Subparagraphs (4)(C) and (D) set out a statutory parallel to Fed. R. Civ. P. 11, providing that the signature of a debtor’s attorney constitutes a certification that the attorney has “performed a reasonable investigation” and determined that the signed documents is well grounded in fact, that any Chapter 7 petition is not an abuse under § 707(b), and that “the attorney has no knowledge after an

inquiry that the information in the schedules filed with the petition is incorrect.” This statutory restatement of Rule 11 includes no provision for sanctions in the event that its signature certification is incorrect. The sections read as follows:

(4)(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

- (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
- (ii) determined that the petition, pleading, or written motion—
 - (I) is well grounded in fact; and
 - (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(4)(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

- B. Under the new § 526, debtors counsel are subject to loss of fees, damages, injunctive remedies, and imposition of costs for any failure to meet new disclosure and record-keeping requirements imposed on “debt relief agencies” in new §§ 527 and 528. “Debt relief agency” is defined in § 101 (12A) as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration.” “Assisted person” is defined in new § 101(3) as “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000.” Accordingly, bankruptcy lawyers who represent only nonpaying debtors

or owners of businesses and other relatively wealthy individuals would not be covered. Among the new provisions are an obligation to include specified statements in advertisements (§ 528) and an obligation to retain for two years a copy of each of several notices required to be given to any “assisted person” (§ 527).

II. Sanctions imposed on creditors and creditors’ attorneys.

A. When a creditor files a § 707(b) motion to dismiss and loses, the court can award the debtor’s cost, including reasonable attorneys’ fees, incurred in opposing the motion. Under § 707(b)(5), sanctions under this section require that the court find that either:

- The position of the party that filed the motion violated Rule 9011; or
- The attorney (if any) who filed the motion failed to comply with § 707(b)(4)(C)(i) and (ii) and the motion was made solely to coerce the debtor into waiving a right guaranteed under title 11.

B. A small business creditor with an aggregate claim of less than \$1,000 cannot be sanctioned under § 707(b)(5)(A)(ii)(I)

C. 11 U.S.C. § 502(k) is intended to encourage non-bankruptcy workouts. This section reads as follows:

(k)(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if–

(A) The claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budgeting and credit counseling agency described in § 111;

(B) the offer of the debtor under subparagraph (A)–

- (i) was made at least 60 days before the date of the filing of the petition; and
 - (ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and
- (C) no part of the debt under the alternative repayment schedule is nondischargeable.
- (2) The debtor shall have the burden of proving by clear and convincing evidence, that–
 - (A) the creditor unreasonably refused to consider the debtor’s proposal; and
 - (B) the proposed alternative repayment schedule was made prior to expiration of the 60 day period specified in paragraph (1)(B)(i).

III. Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) Signing of papers.

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the court.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

- (1) it is not being presented for any improper purpose, such as to

harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new 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.

(c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its

partners, associates, and employees.

(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations.

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery.

Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(e) Verification.

Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is

required by these rules, an unsworn declaration as provided in 28 U.S.C. §1746 satisfies the requirement of verification.

(f) Copies of signed or verified papers.

When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.