Petition Preparer
11 USC § 110
Excessive fees
Deceptive advertising
Unauthorized practice of law

U.S. Trustee v. Barry Taub, Adversary No. 01-6022-fra
In re Richard and Jessica Bercume, Case No. 600-66536-aer7

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A trial was held in the U.S. Trustee's action against petition preparer Taub for injunctive relief relating to fraudulent and unfair advertising practices and for disgorgement of excessive fees charged in four bankruptcy cases which were joined for purposes of the adversary proceeding.

Excessive Fees: The court declined to provide a standard or presumptive fee which all petition preparers would be subject to. Instead, it held that the proper method to determine what a petition preparer could charge under 11 U.S.C. § 110 is to use the "lodestar method," by which the court determines a reasonable hourly rate and applies that to a reasonable time for preparation. The court determined that $50 is a reasonable hourly fee in the Eugene Division. In three of the cases, the court determined that three hours was reasonable preparation time and in the fourth case that four hours was reasonable.

While the Bankruptcy Court in Oregon looks to the state for standards as to what constitutes the unauthorized practice of law, the court stated that the federal court has both the inherent and the statutory authority to regulate both those who practice before it as well as petition preparers. Based on that authority, the court determined that Taub had engaged in the unauthorized practice of law in one of the bankruptcy cases in which he exercised his independent judgment with respect to a legal matter. He would therefore be required to remit to the trustee the $299 he charged to prepare the petition in that case. Because there had been no guidance in this jurisdiction regarding appropriate fees, the court did not require Taub to remit the portion of the fees in the other three cases which were found to be excessive.

Unfair and Deceptive Advertising: Taub had been advertising his services at "$99 and up" and a week before trial had registered as a trade name "Bankruptcy $99," although very few people actually qualified for and paid $99 to have a bankruptcy petition filed. The court stated that similar standards should be applied as in unfair trade practices cases and held that the advertising was false and misleading. Taub was enjoined from advertising "99

and up” without giving further detail and from using the phone listing “Bankruptcy $99.”

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: UNITED STATES TRUSTEE, Plaintiff, v. BARRY L. TAUB, Defendant.	Adversary Proceeding No. 601-6022-fra
RICHARD BERCUME and JESSICA BERCUME, Debtors.	Bankruptcy Case No. 600-66536-aer7
JOEL GREENWALDT and KATHERINE GREENWALDT, Debtors.	Bankruptcy Case No. 600-67210-aer7
GREGORY VANORMAN and DIANA VANORMAN, Debtors.	Bankruptcy Case No. 600-67625-aer7
JAMES SIMMONS and TERESA SIMMONS, Debtors.	Bankruptcy Case No. 601-60088-aer7 MEMORANDUM OPINION

I. INTRODUCTION

The United States Trustee ("UST") commenced an adversary proceeding against Barry L. Taub alleging that Taub charged an excessive fee for preparing a bankruptcy petition and related forms. 11 U.S.C. § 110(h)(2). The complaint further challenges Taub's advertising practices as "fraudulent, unfair or deceptive." After the adversary proceeding was commenced, the parties agreed to join motions by the UST in three separate cases similarly seeking return of fees deemed by the UST to be excessive.

The matter was heard on August 1 through 3, 2001. The Court heard detailed evidence regarding the cases at hand, Taub's practices and those of other document preparers, and the practices and charges of paralegals employed by local attorneys.

The issues presented are:

1. Whether the amounts charged by Taub in these cases exceeded the value of the services. This determination requires consideration of what services may be lawfully performed, and how such services should be valued.

2. Whether advertising a very low, but seldom employed, flat fee for services is subject to being enjoined under Code § 110 as an unfair or deceptive practice.

I find that reasonable fees in the cases before me do not exceed $200. I further find that Taub's advertising practices should be enjoined. My reasons follow.

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II. FACTS

Taub does business in Eugene, Oregon, as a legal document preparer. He prepares, for a fee, petitions and related forms for use by unrepresented parties in divorces and bankruptcy proceedings. His activities place him within the definition of "bankruptcy petition preparer" set out in Code § 110(a)(1).

Taub advertises his services in the Eugene area yellow pages with an ad under the heading "bankruptcy services." The text of the ad reads: "Bankruptcy as low as $99/18 years experience/Avoid high lawyer fees (court fees extra)/B. Taub paralegal [local phone number]." An ad regularly run in a weekly classified ad circular reads: " Divorce/Bankruptcy $99 and up/Avoid high lawyer fees!/18 years - satisfaction guaranteed/B. Taub Debt Clinic [local phone number]." Copies of the ads are set out in the appendix to this opinion. In addition, under the heading of "paralegals" Mr. Taub's business is listed under "Bankruptcy $99," along with his office's address and phone number. The name was registered as an assumed business name just a week prior to trial.

In a typical case a prospective customer calls Mr. Taub, who conducts a short interview to learn of the nature of the proposed bankruptcy filing. Based on that information he quotes a price. If the customer agrees, Taub sends by mail a form letter confirming the quoted price. The letter also provides instructions for filling out forms provided for use in listing assets and obligations. The letter advises the customer of what financial documents to bring in,

and includes a form, to be filled in by the customer, listing current expenditures. The customer is advised to call to make an appointment when he or she is ready to proceed.

At the appointed time, Taub meets with the customer and reviews the forms. The meeting begins with the execution of a "customer agreement," in which the customer acknowledges what services are desired, the agreed fee, and that Mr. Taub is not an attorney and is prohibited from giving legal advice. Taub proceeds to obtain information from the customer necessary to complete the petition and schedules. A memorandum prepared by Taub and submitted as Exhibit N, sets out that, with respect to each schedule Taub will "review with customer any missing information needed to be provided, customer questions and either answer or refer customer to attorney as appropriate."

After the necessary information is obtained, the meeting ends and Taub prepares the petition and schedules, using software marketed by a prominent legal publisher. The software itself contains a considerable amount of information, including addresses used by major creditors in consumer cases such as credit card issuers and large retailers.

Once the forms are completed there is a second interview to review and sign them. Taub has the customers sign a "termination document," in which the customer again acknowledges that no legal advice has been rendered.

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Taub's practices are generally consistent with those of other petition preparers who testified. Some abstain from interviewing customers, simply handing out blank forms and transcribing them, either through software or using blank forms. Taub testified that he believes the interview method is preferable, because it ensures that the information obtained and then placed in the schedules is more complete and accurate.

Respecting his charges, Taub testified that the amount he charges varies with the circumstances of each case. Factors justifying charges higher than the advertised $99 include whether the filing involves a husband and wife, the ownership of vehicles (or, presumably, other assets), and the number of creditors. Other petition preparers testified that the number of creditors is an important factor since including the names and addresses of creditors in the matrix and schedules is the most time consuming aspect of preparation. Another consideration was whether the petition was being filed on an "emergency" basis because of exigencies such as looming foreclosures. The $99 fee is, according to Mr. Taub's testimony, limited to single filers with "very simple" cases, which generally involve fewer than 10 creditors and low income.

Respecting the individual cases before the Court, the testimony and exhibits establish the following:

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VanOrman

After determining that a bankruptcy was necessary, Mr. VanOrman contacted two attorneys, each of whom required over $1,000 in fees.[1] Mr. VanOrman then saw one of Mr. Taub's ads, and particularly the reference to $99 and up. (As Mr. VanOrman put it: "All I saw was the $99.") He phoned Taub, who advised that the cost depended on the particular case. After inquiring into the number of creditors and vehicles, he quoted Mr. VanOrman a fee of $399, and said that the fee was higher than $99 because of the vehicles.

Mr. VanOrman agreed to the $399 fee which was paid to Taub at the parties' first meeting. Taub asked the customer to complete a blank Schedule C, setting out claimed exemptions, advising him to use "current values" for assets claimed to be exempt.

After the initial meeting, Taub prepared the petition and schedules as requested. There was at least one discrepancy between the rough draft done by the VanOrmans and Taub's work product: a $500 per month credit card payment submitted by VanOrmans was excluded from the draft Schedule J. Taub explained that he left it off because the payments were not in fact being made by the time the VanOrmans decided to file their bankruptcy petition. Also at the final meeting a minor correction was made in the Statement of

[1] The debtors consistently testified that they were quoted $1,000 or more by local attorneys. Testimony from attorneys and their employees, as well as the Court's observation of cases over the years, suggests that the standard fee in this area may be closer to $600-$800. Whether the debtors' testimony here is inflated, or they happened to call expensive attorneys, is not clear. What *is* clear, of course, is that filing a bankruptcy with the assistance of an attorney is considerably more expensive than using a petition preparer.

Affairs. Taub also provided a Statement of Intent (Bankruptcy Form 521) and instructed the VanOrmans to complete the form and send copies to secured creditors.

According to the Debtor's testimony, the total meeting time was approximately 1.25 hours. Testimony established that a typical case requires anywhere from 30 to 90 minutes in input time. Taub testified that he did not maintain time records, but estimated that the total time devoted to the VanOrmans' case was four hours. The petition and schedules filed by the VanOrmans reveal no real property, two motor vehicles, $400 cash on hand, and six creditors.

Bercume

The Bercumes' bankruptcy was filed while they were in the process of divorcing. Mr. Bercume testified that Mrs. Bercume had advised him that a bankruptcy could be done for $99 using Mr. Taub's services. He also testified that he read Taub's letter of October 2 to Mrs. Bercume quoting a charge of $349.

The Bercumes' schedules reveal that they have a residence and three cars, $50 cash on hand, and 31 creditors.

Simmons

Mrs. Simmons testified that she and her husband needed to file a bankruptcy on an "emergency" basis because their home was scheduled to be sold at foreclosure the following day. She decided to contact Mr. Taub after receiving quotes of over $1,000 from one or more attorneys, and because she was attracted by the $99 fee

quoted in Mr. Taub's ad. During the initial phone contact Mr. Taub quoted a fee of $499.

Meetings between Taub and Mrs. Simmons took about an hour. Taub had to do some post-petition follow-up to ensure that the Simmons provided information necessary to file complete schedules after the "bare" emergency filing of the petition, matrix and Exhibit C. Taub's estimate of total time involved in the matter was six hours. The Simmons' schedules reveal a residence, two vehicles, $50 cash on hand, and 11 creditors.

Greenwaldt

The Greenwaldts contacted Taub after reading his advertisements. Taub quoted a fee of $300 (the actual charge was $299). He advised the Greenwaldts that he was charging a higher fee because their case was complicated by the fact that they were filing as a married couple, and that the filing involved a residence.

While they hoped they could get the job done for $99, the Greenwaldts chose not to argue, at least in part due to a strong desire get the process over with.

After the initial interview, Taub prepared a petition and schedules. The Greenwaldts questioned the treatment of a 401(k) retirement plan in the schedules. The Greenwaldts' draft documents revealed that the account held approximately $80,000, but was subject to a $39,000 loan using the account as collateral. The forms the Greenwaldts filled out showed what they believed to be the

net value, that is, $41,000, as the value of the fund. Taub's work product showed the $80,000 gross value on Schedule C.

The discrepancy was pointed out, but Taub gave no explanation. Greenwaldts asked him to change the entry but he refused. They eventually relented, assuming that he knew what he was doing.

At at least one meeting Mrs. Greenwaldt pressed Taub hard for explanations, and about resources where she could learn more about the bankruptcy process. Taub replied by insisting that he could not give legal advice.

The Greenwaldts' petition shows a residence, three vehicles, $25 cash on hand, and nine creditors.

III. DISCUSSION

A. Preparer's Fees

The Bankruptcy Code regulates the fees charged to debtors by bankruptcy petition preparers by requiring that the preparers file a declaration disclosing any fee received, and that the Court disallow and require turnover to the trustee of any fee "found to be in excess of the value of the services rendered for the documents prepared." 11 U.S.C. § 110(h)(2).

The Code gives courts no guidance as to how the services of a bankruptcy petition preparer should be evaluated. The UST suggests three methods: the local market for such services, case law from other jurisdictions, and a "lodestar" approach in which the Court

determines a reasonable hourly fee, multiplied by a reasonable time to complete the petition and schedules.

Local practices and the open market: Evidence presented by the UST establishes that nine entities are responsible for over 90% of the cases filed using petition preparers. Excluding Taub, their fees range from $139 to $195, and average $149. Mr. Taub's average is $270, and the average including Taub is $178.

The $150 average is hardly surprising in light of the fact that the UST regularly advises petition preparers who charge more than $150 that it will take them Court, as it has Mr. Taub, if they persist in doing so. Several preparers operating in the Eugene Division were so advised, and virtually all but Mr. Taub agreed to reduce their fees. Taub argues that the evidence of average fees charged cannot be relied on as an indicator of a fair market value, given the UST's intervention in the market. The argument is well taken. The Court cannot rely on market data if a majority of the participants of the market have unwillingly reduced their fees to the goal set by the UST.[2]

One preparer testified that she felt that preparers should be permitted to charge "whatever the market would bear." Some support for that notion can be drawn from the Code's reference to "value" of the services. In a free market economy it is ordinarily presumed

[2] This is not meant as criticism of the UST. The Code charges the UST with a duty to monitor fees and seek refunds where they are excessive. While the UST's determination of its trigger point is not binding on the Court, there is no reason to believe that his decision to object to fees in excess of $150 was arbitrary or unreasonable.

that the value of a service is whatever the customer in an arm's length transaction is willing to pay for it. Refunds under Code §110 would, therefore, be ordered only when some defect in performance diminished the value to something less than the price.

The problem with this approach is its assumption that transactions with debtors are really at arm's length. To the contrary, Congress has determined that debtors are particularly vulnerable to sharp practices, and has closely regulated debtor's dealings with attorneys and other professionals. 11 U.S.C. § 327-330. The purpose of the regulation is to protect debtors from overreaching, In re Zepecki, 258 B.R. 719 (8th Cir. BAP 2001), and prevent inappropriate diminution of the estate, In re Bachman, 113 B.R. 769 (Bankr. S.D. Fla. 1990). The same reasoning applies to petition preparers. In re Agyekum, 225 B.R. 695 (9th Cir. BAP 1998).

Other precedent: Case law from other jurisdictions tends to fall into one of two categories. One type denies fees altogether because of some failure or misconduct on the part of the preparer, or to set fairly low ceilings. See, e.g., In re Farness, 244 B.R. 464 (Bankr. D. Id. 2000) (entire fee disgorged where preparer was engaged in unauthorized practice of law); In re Bradshaw, 233 B.R. 315 (Bankr. D. N.J. 1999) (no fees permitted where services were useless in light of repeated dismissals). Another type sets fairly low maximum fees, on the theory that nothing more is done (or may be done) than providing a transcription service. In re Guttierez, 248 B.R. 287 (Bankr. W.D. Tx. 2000) (reasonable fee for transcription

service only cannot exceed $50); In re Hartman, 208 B.R. 768 (Bankr. D. Mass. 1997) (preparer's fee limited to $50); In re Moran, 256 B.R. 842 (Bankr. D. N.H. 2001)(en banc) ($30 per hour is a reasonable rate, and most petitions can be prepared in five hours or less: "Accordingly, the Court holds that, in general, petition preparers should be able to provide their petition preparation services in a routine individual or joint consumer bankruptcy case for $150 or less").

Reasonable rate and time: The best approach is to consider the evidence at hand and ascertain a reasonable hourly rate for the preparer's services, and the amount of time reasonably necessary to complete the assigned task. This is the approach taken by the Moran court.

Divining an appropriate hourly rate is difficult. By alluding to the "value" of services, as opposed to "costs," the Code directs the inquiry not toward the preparer's overhead or costs, but to what the services are worth to the debtor. In other words, the value of the service is what it can be sold for in an arm's length transaction. The best evidence available to the Court in this case is what other providers, including law firms, receive for the services of non-lawyer personnel performing services substantially similar to those carried out by petition preparers. Several paralegals working for area law firms testified that their services were billed out at $60-$65 per hour. Presumably this figure includes the costs to the law firm of the paralegal's time, plus

overhead and a reasonable profit. An important distinction is that the paralegal employed by an attorney is subject to that attorney's supervision, which provides an extra measure of service and protection to the debtor. Bearing that in mind, I find that a reasonable hourly charge for a petition preparer's services in the counties within the Eugene Division of this Court is $50 per hour.

Equally difficult is the determination of the amount of time that should be spent in each case. This requires at the outset a consideration of exactly what a petition preparer is permitted to do.

A petition preparer may be compensated only for activities lawfully undertaken. In re Guttierez, 248 B.R. 287 (Bankr. W.D. Tx. 2000); In re Farness, 244 B.R. 464 (Bankr. D. Id. 2000). These cases, and others like them, denied compensation to preparers who have performed incompetently, or whose activities have violated applicable law prohibiting the unauthorized practice of law.

The regulation of bankruptcy petition preparers is a matter of federal law. See 11 U.S.C. § 110, 18 U.S.C. § 156. Code §110(j)(2)(B) authorizes bankruptcy courts to permanently enjoin individuals from acting as bankruptcy petition preparers -- the equivalent of disbarment. While Code § 110(k) provides that "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," the applicable rules are a matter of federal jurisdiction.

Federal courts have the inherent authority to regulate the conduct of persons practicing before them. *See* In re Poole, 222 F.3d 618 (9th Cir. 2000) and cases cited therein. It stands to reason that the same authority over attorneys practicing in federal courts extends to petition preparers who prepare documents for filing in federal proceedings. While, as will be seen, federal courts look to state law to give definition to the concept of "practicing law," case and statutory law are well settled on the proposition that practice before federal courts, either as attorneys or as bankruptcy petition preparers, is ultimately to be controlled by the federal courts.

"Traditionally, when dealing with cases involving the unauthorized practice of law, the U.S. Bankruptcy Courts have looked to state law for guidance." In re Samuels, 176 B.R. 616, 620 (Bankr. M.D. Fl. 1994) (cited by In re Stacy, 193 B.R. 31(Bankr. D. Or. 1996)); In re Backman, 113 B.R. 769 (Bankr. S.D. Fl. 1990); In re Anderson, 79 B.R. 482 (Bankr. S.D. Ca. 1987). While supremacy clause considerations preclude states from regulating the practice of law before federal tribunals, see Sperry v. Florida, 373 U.S. 379 (1963), the federal tribunal may look to state law in prescribing qualifications. In re Bright, 171 B.R. 799 (Bankr. E.D. Mich. 1994).

The Bankruptcy Court in Oregon looks to Oregon law to define what constitutes the unauthorized practice of law. U.S. Trustee v. Tank (In re Stacy), 193 B.R. 31 (Bankr. D. Or. 1996). The Oregon

Legislature has not provided a statutory definition of the practice of law. Oregon's courts have declined to craft a bright-line definition, preferring to let the law develop on a case by case basis. However, two leading cases provide standards to apply to the matter at hand.

Oregon State Bar v. Security Escrows, Inc., 233 Or. 80, 377 P.2d 334 (1962), involved an action by the State Bar to enjoin an escrow company from preparing conveyances and other instruments related to real property transactions. Noting that "the *exercise of discretion* concerning the property rights of another should be entrusted only to those learned in the law" [emphasis in original], the Court held that

> for the purposes of this case. . .the practice of law includes the drafting or selection of documents and the giving of advice in regard thereto anytime an informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served. The knowledge of the customer's needs obviously cannot be had by one who has no knowledge of the relevant. One must know what questions to ask. Accordingly any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties, will bring the activity within the practice of the profession.

233 Or. at 89, 337 P.2d at 339. The Court went on to say that "the line is drawn at the point where there is any discretion exercised by the escrow agent in the selection or preparation for another of an instrument, with or without costs."

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On the other hand, filling in blanks in forms preselected by the customer does not constitute the practice of law. The Court elaborated on this point, noting that

> One of the facts of modern life is that most routine conveyancing, as a practical matter, has been allowed to drift away from lawyers and into the hands of stationers, notaries and others. This phenomenon may be the result of a default by the legal profession. It may also be the result of a diffusion of superficial knowledge in such matters. Whatever the cause, it is now too late to rise [sic] the cry of "unauthorized practice of law" each time a lay conveyancer fills in the names, dates and description on the simple form of a warranty deed by which one husband and wife combination ordinarily conveys a city lot to another husband and wife as tenants by the entirety. Granting that the drafting of such a conveyance historically was within the practice of law, we hold that the filling in of forms as directed
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> by customers under modern business conditions is not the practice of law.

233 Or. at 91-92, 377 P.2d at 340 (Footnotes omitted).

In Oregon State Bar v. Gilchrist, 272 Or. 552, 538 P.2d 913 (1975), the Court was confronted with the then relatively new phenomenon of sales of so-called "divorce kits" containing sample forms and instructions for use in initiating divorce proceedings.

> [I]n the advertising and selling of their divorce kits the defendants are not engaged in the practice of law and may not be enjoined from engaging in that part of their business. We further conclude, however, that all personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems does constitute the practice of law and must be and is strictly enjoined.

272 Or. at 563-564, 538 P.2d at 919.

Read together, Security Escrows and Gilchrist demonstrate that nonlawyers such as bankruptcy petition preparers may assist customers in filling out petitions and schedules, so long as the preparer exercises no independent discretion, and does not influence the debtor in his or her choices regarding the forms. Petition preparers may meet with customers for the purpose of eliciting the information required by the forms, and in order to ensure that the preparer is accurately setting out what the customer requires. The preparer may also ensure that the forms are completely filled out.[3]

Gilchrist does not prohibit such consultations between the preparer and customer. Read in light of Security Escrows and cases such as Oregon State Bar v. Fowler, 278 Or. 169, 563 P.2d 674 (1977), Gilchrist prohibits the preparer's involvement in the selection of forms and decisions about their use, and any determination as a matter of "informed discretion" as to what information is to be put in them. It does not prevent the preparer from, for example, asking the customer what property he owns and putting the answers in the schedules, since the question appears in the schedules.

Applying these principles to the cases presented, it appears that Taub, while generally organizing his handling of these cases in a lawful manner, did cross the line by exercising discretion on at

[3] Bankruptcy petitioners are, of necessity, not engaged in the selection of forms in Chapter 7 bankruptcies. The forms are standardized, and all are mandatory.

least one occasion. He exercised discretion when he determined that the appropriate way to schedule the Greenwaldts' pension was by stating its gross value. It does not matter that Taub's approach was the correct one: the law clearly dictates that the customer is the only person entitled to discretionary action, whether the discretion is more or less informed than the petition preparer's.[4]

In his defense Taub asserts that he was required to make these changes by 18 U.S.C. § 156(b).[5] He argues that this provision creates an independent standard for bankruptcy petition preparers which must in all cases be complied with. Allowing information known to him to be incorrect to remain on a petition he prepares would constitute a knowing attempt to disregard the requirements of the Code, thus subjecting him to liability in the event the case is dismissed.

The argument overlooks the fact that the preparer is not compelled to produce the documents. If a customer directs the preparer to include information the preparer knows to be inaccurate, or insists on excluding information the preparer knows should not be

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[4] Taub also unilaterally changed the VanOrmans' Schedule J to reflect the fact that they had discontinued their $500 per month credit card payments. Giving him the benefit of the doubt, I conclude that this was merely the correction of a factual mistake brought to Taub's attention during the interview process, rather than Taub's exercise of discretion with respect to a legal matter.

[5] 18 U.S.C. § 156(b): "Offense. – If a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a bankruptcy petition preparer in any manner to disregard the requirements of Title 11, United States Code, or the Federal Rules of Bankruptcy Procedure, the bankruptcy petition preparer shall be fined under this Title, imprisoned not more than one year, or both."

excluded, the preparer's duty is to point out the error or omission, without explanation, advise the customer to seek legal advice, and to decline to proceed further. Any fee unearned at that point should be returned.

In light of these criteria, bankruptcy petition preparers may charge for the time spent interviewing clients for the purpose of ascertaining the information to be placed into the forms, and the time spent in preparing the forms themselves. The testimony presented by people who prepare forms on a regular basis, both as in-house paralegals and as petition preparers, supports a finding that the time spent in the Burcume, Greenwaldt and VanOrman matters was three hours. Given the exigencies of the emergency filing and difficulties in communication (which I do not attribute to the preparer) the time attributable to the Simmons case is four hours. In each case I find the time spent to be reasonable.

In most cases, it is virtually impossible to separate discussions, interviews or preparation which violate rules against the unauthorized practice, from those that do not. Where unauthorized practice occurs, it should be presumed, subject to rebuttal by the preparer, that the entire transaction is tainted and that the entire fee should be refunded. *See* In re Guttierez, 248 B.R. 287 (Bankr. W.D. Tx. 2000); In re Farness, 244 B.R. 464 (Bankr. D. Id. 2000).

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Accordingly, no fees should be awarded in the Greenwaldt case. Fees in Burcume and VanOrman should be limited to $150, and in the Simmons case to $200.[6]

The Court has the equitable power to forego an order that fees be disgorged if, all things considered, disgorgement would be inequitable. Since there has been no guidance in this jurisdiction regarding the appropriate fees to be charged, the Court will not order disgorgement of fees in the Bercume, VanOrman and Simmons cases. However, since clearly defined rules regarding the unauthorized practice of law were violated in the Greenwaldt matter, those fees must be disgorged.

The UST asks that Taub be enjoined from charging and collecting excessive fees in the future, pursuant to 11 U.S.C. §110(j)(2)(A). This section provides for such relief if it is found to be necessary to prevent the recurrence of proscribed conduct. The record does not support a finding that Taub will

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[6]The UST urges the Court to set "guidelines" for use by the UST and bankruptcy petition preparers. Congress has not authorized the Courts or the UST to set specific limits, and it is the duty of the Court not to legislate a fee schedule, but to decide the merits of the case before it. Accordingly, I decline to pronounce a standard fee for all cases. *See* Consolidated Memorandum Regarding Bankruptcy Petition Preparers, 1997 WL 615657 (Bankr. D. Me. 1997).

It is true that courts may recognize presumptive fees, for example, by setting a "no questions asked" amount and strictly scrutinizing charges higher than that amount. *See, e.g.,* In re Agyekum, 225 B.R. 695 (9th Cir. BAP 1998), In re Agnew, 144 F.3d 1013 (7th Cir.1998) (Attorneys fees), Moran, 256 B.R. 842 (Bankr. D. N.H. 2000)(en banc). This approach is similar to that used in setting attorneys fees in Chapter 13 cases in this District. The rationale is that courts may indulge in such presumptions in order to avoid being overrun by demands for hearings in hundreds of cases involving fees. However, I believe that such presumptions should be prescribed, if at all, by way of local rule or general order. This ensures a common standard for the District.

continue to charge excessive fees in the future. Accordingly, injunctive relief will not be ordered.

B. Advertising Practices

It is clear from the testimony that Taub's customers were attracted by his "$99 and up" advertisement. It is equally clear that:

(1) very few people will qualify for the bottom rate; and

(2) the prevailing charges for most likely customers is three times greater.

Taub's approach is very much like a "bait and switch." He entices customers with a rate that few are likely to qualify for, and then sells them a service for several times as much money. The fact that the customers go along with this, whether out of impatience, urgency, or other reason is immaterial. Nor does it matter that the ads say (in smaller print) "$99 and up."

Taub argues that the UST must establish each of the elements of common law fraud, citing to Turtle Rock Meadows Homeowners Assoc. v. Slyman (In re Slyman), 234 F.3d 1081 (9th cir. 2000). Slyman involves a complaint to deny discharge under 11 U.S.C. § 523(a)(2), and is inapposite. The standards applicable under Code §110 are more akin to those established in unfair trade practice cases. In determining whether or not advertising is false or misleading, the Court must regard not fine spun distinctions and arguments made to excuse the advertisement, but the effect which it might reasonably

be expected to have on the general public. P. Lorilard Co. v. Federal Trade Commission, 186 F.2d 52 (4th Cir. 1950). As one court stated respecting trademarks[7]: "The law is not made for the protection of experts, but for the public – that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." Florence Manufacturing Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2nd Cir. 1910).

Further guidance may be had by resort to Oregon's Unfair Trade Practices Act, ORS 646.605 to 646.656. In Saunders v. Francis, 277 Or. 593, 561 P.2d 1003 (1977), the Court held that a complaint which alleged that defendants advertised an automobile for sale with an intent not to sell it as advertised (that is, not at the advertised price) stated a claim under ORS 646.608(i), which prohibits advertisement of goods or services "with intent not to provide them as advertised."

Taub prepared petitions in 266 cases between January 1, 2000 and June 1, 2001. Of these, only three carried a charge of $99. One was for $149; the next "step" was $199. It is unfair to advertise a service for $99, or even "$99 and up," if barely 1% of the customers qualify for it.

[7] Recall that Taub has registered "Bankruptcy $99" as an assumed business name.

The effect of Taub's advertisement is to entice customers who cannot qualify for the advertised price. The advertisements are deceptive for purposes of 11 U.S.C. § 110, unless their reference to $99 is put in context by providing information about who qualifies for that rate, or what other rates are charged for more typical cases.

The Court will not attempt to write Taub's advertising for him by setting out in detail what is permitted and what is not. It suffices that the particular advertising now in place, and the phone directory entry of "Bankruptcy $99" are deceptive practices prohibited by the Bankruptcy Code, which should be enjoined.

C. Certification of Violation

Code § 110(i)(1) requires that the Court, if it finds that a bankruptcy petition preparer has violated any part of § 110, or committed any fraudulent, unfair or deceptive act, should certify the facts to the District Court. In light of the Court's findings regarding excessive fees and advertising practices, the Court's judgment in this case shall include such a certification.[8]

IV. CONCLUSION

1. Mr. Taub shall be ordered to remit to the estate the $299 charged in the Greenwaldt case. No disgorgement is required with respect to the Bercume, VanOrman and Simmons cases.

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[8] The Complaint sought other relief, including a permanent injunction from acting as a petition preparer. These claims were excluded from the pretrial order, and presumably withdrawn.

2. Mr. Taub shall be permanently enjoined from advertising his services for "$99 and up," without further detail, and from using the phone listing "Bankruptcy $99."

3. This Court's findings regarding Taub's advertising practices shall be certified to the District Court.

This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law. Counsel for the UST shall prepare a judgment consistent with the foregoing.

FRANK R. ALLEY, III
Bankruptcy Judge