

**SEP 29 2005**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP No.	AZ-04-1604-KMoS
		)		
7	WILLIAM H. TIMMER,	)	Bk. No.	04-01400
		)		
8	Debtor.	)		
		)		
9	_____	)		
		)		
10	KENNETH LEE ALLEN,	)		
		)		
11	Appellant	)		
		)		
12	v.	)	<b>MEMORANDUM*</b>	
		)		
13		)		
		)		
14	WILLIAM E. PIERCE, Trustee;	)		
	UNITED STATES TRUSTEE,	)		
		)		
15		)		
		)		
16	Appellees.	)		
		)		
	_____	)		

Submitted Without Oral Argument on  
September 22, 2005 at Phoenix, Arizona

Filed - September 29, 2005

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: KLEIN, MONTALI, SMITH, Bankruptcy Judges.

\_\_\_\_\_  
\*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 A bankruptcy petition preparer ("BPP") in Arizona appeals  
2 from an injunction enjoining him from acting as a document  
3 preparer until he obtains certification in accordance with the  
4 Rules of the Supreme Court of the State of Arizona. The  
5 bankruptcy court issued the injunction pursuant to Arizona  
6 Bankruptcy Court General Order No. 89 ("Arizona Bankruptcy  
7 General Order 89"), which provides that a BPP is required to be a  
8 certified legal document preparer, pursuant to the requirements  
9 of the Rules of the Supreme Court of the State of Arizona.  
10 Specifically, Arizona Bankruptcy General Order 89 adopts Rule 31  
11 of the Rules of the Supreme Court of Arizona ("Arizona Supreme  
12 Court Rule 31" ) and amendments thereto, governing the  
13 unauthorized practice of law, and provides for sanctions pursuant  
14 to 11 U.S.C. § 110 ("§ 110").

15 We AFFIRM.

16  
17 FACTS

18 On October 15, 2004, the bankruptcy court issued an Order To  
19 Show Cause ("OSC") because appellant Kenneth Allen ("Allen")  
20 filed a document in the bankruptcy case of William Timmer without  
21 a certification as required by Arizona Bankruptcy General Order  
22 89. The OSC ordered Allen to appear and show cause why he should  
23 not be held in civil contempt or otherwise sanctioned as provided  
24 in § 110 for failure to comply with Arizona Bankruptcy General  
25 Order 89 and for engaging in the unauthorized practice of law.  
26 The OSC further provided that "sanctions to be imposed may  
27 include ... entry of an injunction permanently enjoining the  
28

1 bankruptcy petition preparer from further acting as a bankruptcy  
2 petition preparer."

3 On October 28, 2005, Allen filed a "motion to dismiss" the  
4 OSC for lack of subject-matter jurisdiction. Allen argued that  
5 Rule 31 of the Arizona Supreme Court conflicts with § 110(a) and  
6 violates the Supremacy Clause of the United States Constitution.  
7 Allen also contended that Arizona Bankruptcy General Order 89  
8 interferes with his "right to contract" under Article 1, Section  
9 10 of the United States Constitution, his rights under the First  
10 and Fourteenth Amendments of the United States Constitution, as  
11 well as his rights under the Judiciary Act of 1789 §§ 34 and 35.

12 Additionally, the "motion to dismiss" referenced and  
13 attached Allen's declaration, as well the declaration of Robert  
14 Lauenders, both of which were filed in another bankruptcy case  
15 titled In re Michael Mulcahy, No. 04-01218, on September 17,  
16 2004. These declarations had been filed in response to an OSC,  
17 also issued for Allen's violation of Arizona Bankruptcy General  
18 Order 89. In Allen's declaration, he conceded that he prepared  
19 the petition for the debtor and failed to include a certification  
20 number. His response also included a recitation of the OSC which  
21 stated that he had failed to include a certification number and  
22 that he could be sanctioned for the unauthorized practice of law.  
23 He further explained that he did not violate Arizona Bankruptcy  
24 General Order 89 because he prepared the documents under Rule  
25 31(a)(4) of the Arizona Supreme Court as a "legal  
26 assistant/paralegal, authorized to do so by the Law Office of  
27  
28

1 Robert J. Lauenders, P.C., 3100 N. Navajo Drive, Suite #B-3,  
2 Prescott, Valley, AZ 86314.”<sup>1</sup>

3 In connection with the OSC issued in the case of William  
4 Timmer, in which this appeal arises, the bankruptcy court entered  
5 an order on November 23, 2004, enjoining Allen from acting as a  
6 document preparer in the United States Bankruptcy Court for the  
7 District of Arizona:

8 unless and until he becomes a certified legal document  
9 preparer in accordance with the Rules of the Supreme  
10 Court of the State of Arizona, or is otherwise acting  
11 as a legal assistant/paralegal employed and properly  
supervised by an active member of the State Bar of  
Arizona who is the lawyer for the debtor/client and who  
appears in the bankruptcy case in that capacity.

12 The court ruled that Arizona Bankruptcy General Order 89 was  
13 applicable and unequivocal. The court explained that the  
14 Bankruptcy Court for the District of Arizona adopted Arizona  
15 Bankruptcy General Order 89, which states that Rule 31 sets forth  
16 the general rule that only an active member of the State Bar may  
17 practice law in the State of Arizona. The amendments to Rule 31  
18 create a limited exception for certified legal document  
19 preparers, provided the services are performed in compliance with  
20 the Arizona Code of Judicial Administration, Part 7, Chapter 2,  
21 Section 7-208, which includes the preparation of legal documents.  
22 The court concluded that Arizona Bankruptcy General Order 89  
23 commands that only certified BPPs are permitted to prepare  
24 documents.

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26 <sup>1</sup>Allen contends the court never addressed this declaration  
27 in connection with the OSC in the case of Michael Mulcahy, in  
28 which it was originally filed. In re Michael Mulcahy, Case No.  
04-01218.

1           Additionally, the court concluded from Allen's response, the  
2 affidavits attached thereto, and both Allen's and Mr. Launder's  
3 responses at the OSC hearing, that Allen prepared documents filed  
4 in the case and that he was not acting as an employee of an  
5 attorney when he prepared those specific documents.<sup>2</sup>  
6 Specifically, the court's finding that Allen was not acting as an  
7 employee of an attorney was based on the following facts:

8           1) Mr. Launder explained the employer-employee  
9 relationship with Mr. Allen as that of an independent  
10 contractor; 2) the Debtor was not a client of Mr.  
11 Launder's law firm; 3) Mr. Launder did not meet with  
12 Debtor; 4) the Debtor contacted Mr. Allen directly  
based on an advertisement placed by Mr. Allen in a  
Nevada newspaper; and 5) Mr. Launder did not review  
the documents prepared by Mr. Allen and apparently had  
no direct supervision.

13           Because Allen was not an employee of Mr. Launder and the  
14 exception stated in § 110(a)(1) did not apply, the court  
15 considered Allen a BPP as defined under § 110.

16           The court did not make any determinations as to whether  
17 Allen's actions constituted the unauthorized practice of law  
18 under Arizona Supreme Court Rule 31 and instead referred that  
19 matter to the State Bar of Arizona, in addition to enjoining  
20 Allen from preparing documents. This appeal ensued.

#### 22   JURISDICTION

23           The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334  
24 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

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27           <sup>2</sup>The court also found, based on testimony at the OSC  
28 hearing, that Allen paid Mr. Launder \$75.00, which was  
approximately one-half of the total fee collected by him.

1 ISSUES

- 2 1. Whether the bankruptcy court had jurisdiction.
- 3 2. Whether the bankruptcy court had the authority to adopt
- 4 Arizona Bankruptcy General Order 89.
- 5 3. Whether Arizona Supreme Court Rule 31, and by implication
- 6 Arizona Bankruptcy General Order 89, conflict with § 110?
- 7 4. Whether Arizona Bankruptcy General Order 89 violates
- 8 rights guaranteed under the First, Ninth, Tenth, and
- 9 Fourteenth Amendments and Article 1, § 10 of the United
- 10 States Constitution?
- 11

12 STANDARD OF REVIEW

13 We review the bankruptcy court's jurisdiction de

14 novo. See Ferm v. United States Tr. (In re Crowe), 243 B.R. 43,

15 47 (9th Cir. BAP 2000). Interpretations of the Bankruptcy Code

16 and other statutes and rules are issues of statutory

17 interpretation, which we review de novo. In re Bankruptcy

18 Petition Preparers Who Are Not Certified Pursuant to Requirements

19 of the Arizona Supreme Court ("In re BPP"), 307 B.R. 134, 139-40

20 (9th Cir. BAP 2004) (citing Steinberg v. Crossland Mortgage

21 Corp. (In re Park at Dash Point, L.P.), 985 F. 2d 1008, 1010 (9th

22 Cir. 1993)); Indus. Comm'n of Arizona v. Solot (In re Sierra Pac.

23 Broadcasters), 185 B.R. 575, 577 (9th Cir. BAP 1995). A

24 bankruptcy court's determination regarding discretionary

25 abstention is a matter fundamentally within the discretion of the

26 court to be reviewed for abuse of discretion. In re BPP, 307

27 B.R. at 140.

28

1 DISCUSSION

2  
3 I.

4 Appellant challenges the bankruptcy court's subject-matter  
5 jurisdiction, but does not articulate a specific jurisdictional  
6 defect. We are persuaded the bankruptcy court had subject-matter  
7 jurisdiction.

8 Specifically, 28 U.S.C. § 1334(b) confers original but not  
9 exclusive jurisdiction over all civil proceedings arising under  
10 title 11, or arising in or related to cases under title 11. All  
11 questions of the application of § 110, by definition, "arise  
12 under" Title 11.<sup>3</sup>

13 A § 110 injunction action is a core proceeding to be heard  
14 and determined by a bankruptcy judge. 28 U.S.C. § 157(b)(1);  
15 Demos v. Russell Brown (In re Graves), 279 B.R. 266, 271 (9th  
16 Cir. BAP 2002). Under 11 U.S.C. § 105(a), a bankruptcy judge may  
17 launch a § 110(j) injunction proceeding sua sponte. Id. at 273.  
18 Accordingly, the bankruptcy court had subject-matter  
19 jurisdiction.

20  
21 II.

22 Allen challenges the Arizona bankruptcy court's authority to  
23 adopt Arizona Bankruptcy General Order 89, as well as the court's  
24 method of adoption. He argues that in this instance only

25 \_\_\_\_\_  
26 <sup>3</sup>In connection with the OSC hearing, Allen argued that he  
27 prepared the documents as a legal assistant pursuant to Rule 31.  
28 The bankruptcy court determined Allen to be a BPP, as defined  
under § 110. Because the bankruptcy court's determination was  
not specifically questioned on appeal, we deem the issue waived.

1 Congress had the authority to adopt Arizona Bankruptcy General  
2 Order 89. The bankruptcy court concluded that its general order  
3 was applicable and unequivocal.

4 Arizona Bankruptcy General Order 89, effective July 1, 2003,  
5 provides, in pertinent part:

6 11 U.S.C. Section 110(k) does not permit a bankruptcy  
7 petition preparer to engage in activities "that are  
8 otherwise prohibited by law, including the rules and  
9 laws that prohibit the unauthorized practice of law."  
10 The Supreme Court of the State of Arizona has enacted  
11 amendments to its Rule 31 governing the unauthorized  
12 practice of law which are effective commencing July 1,  
13 2003. Rule 31 sets forth the general rule that only an  
14 active member of the State Bar of Arizona may practice  
15 law in the State of Arizona. The amendments create a  
16 limited exception to that general rule for certified  
17 legal document preparers provided that the services  
18 performed are in compliance with the Arizona Code of  
19 Judicial Administration, Part 7, Chapter 2, Section 7-  
20 208, which include the preparation of legal documents  
21 documents. .... only bankruptcy petition preparers, as  
22 defined by 11 U.S.C. Section 110, who are certified  
23 legal document preparers pursuant to the Rules of the  
24 Supreme Court of Arizona are permitted to prepare  
25 documents for filing in the United States Bankruptcy  
26 Court for the District of Arizona.

17 Arizona Bankruptcy General Order 89 also requires BPPs to  
18 provide their certification number and a business phone number on  
19 any document which is filed with the court, and further provides  
20 that a BPP who is not certified may be subject to sanctions  
21 provided in § 110 and/or as provided by the law.

22 General orders are permissible to regulate practice when  
23 there is no controlling law embodied in federal law, the Federal  
24 Rules of Bankruptcy Procedure, Official Forms, and local rules of  
25 the district. Fed. R. Bankr. P. 9029(b). The violator of a  
26 general order must have had actual notice of the requirements of  
27 the general order before sanctions may be imposed. Id.

28 We previously addressed, in In re BPP, the validity of



1 Arizona Bankruptcy General Order 89. In re BPP, 307 B.R. at 142.  
2 We limited our review to the Rule 9029(b) standard of whether the  
3 general order was consistent with federal law, the Federal Rules  
4 of Bankruptcy Procedure, Official Forms, and local rules of the  
5 district.

6 As to the precise terms of the general order, our review was  
7 deferential: "We do not review independently a district court's  
8 determination of the scope and application of local rules and  
9 general orders because we give district courts broad discretion  
10 in interpreting, applying and determining the requirements of  
11 their own local rules and general orders." In re BPP, 307 B.R. at  
12 142 (quoting United States v. Gray, 876 F. 2d 1411, 1414 (9th  
13 Cir. 1989)).

14 Moreover, federal courts, including bankruptcy courts, have  
15 inherent power to regulate practice in cases before them. In re  
16 BPP, 307 B.R. at 307 (citing Gallo v. United States Dist. Ct. for  
17 the Dist. Of Arizona, 349 F.3d 1169, 1180-81 (9th Cir. 2003)).  
18 The bankruptcy court has the authority to deal with abuses in  
19 practice under its inherent power. Chambers v. NASCO, Inc., 501  
20 U.S. 32, 47 (1991). In this instance, the court had the  
21 authority to promulgate a general order designed to police the  
22 unauthorized practice of law in cases before it and to protect  
23 consumers from abuses by non-lawyers. In re BPP, 307 B.R. at  
24 143.

25 As to the adoption of Arizona Bankruptcy General Order 89,  
26 there is no specific required procedure to be followed. Instead,  
27 Rule 9029(b) restricts sanctions to those who have actual  
28 knowledge of the requirement. Fed. R. Bankr. P. 9029(b).

1 In this instance, Allen's response filed on September 14,  
2 2004, in connection with the bankruptcy case of Michael Mulcahy,  
3 establishes that he had actual notice of Arizona Bankruptcy  
4 General Order 89 and the requirements therein. Allen plainly had  
5 notice of the requirements again in the OSC issued in the instant  
6 case on October 15, 2004. The OSC listed a number of sanctions  
7 that could be imposed, including the potential entry of an  
8 injunction permanently enjoining him from further acting as a BPP  
9 and/or referral to the disciplinary process of the State Bar of  
10 Arizona and the rules of the Supreme Court of the State of  
11 Arizona. Because Allen had actual notice of the requirement and  
12 of the potential consequence, the bankruptcy court had the  
13 authority to enjoin Allen unless and until he became a certified  
14 document preparer.

15 The bankruptcy court correctly concluded that Arizona  
16 Bankruptcy General Order 89 was applicable.

17  
18 III.

19 Allen next contends that Arizona Supreme Court Rule 31, and  
20 by implication Arizona Bankruptcy General Order 89, conflicts  
21 with § 110. To the extent Allen's argument to the bankruptcy  
22 court challenged the validity of Arizona Supreme Court Rule 31,  
23 we construe the bankruptcy court's silence on the matter as  
24 discretionary abstention under 28 U.S.C. § 1334(c)(1). In re  
25 BPP, 307 B.R. at 141. As Arizona courts unquestionably have  
26 jurisdiction to determine the validity of Arizona rules, the  
27 bankruptcy court properly abstained. Id.

28 In In re BPP, we determined that Arizona Supreme Court Rule

1 31, and by implication, Arizona Bankruptcy General Order 89, does  
2 not conflict with § 110. In re BPP, 307 B.R. at 142-43. The  
3 salient question was “whether the bankruptcy court may validly  
4 order that BPPs, all of whom are subject to § 110, also comply  
5 with state certification requirements established to regulate the  
6 unauthorized practice of law.” Id. We answered the question in  
7 the affirmative, and held that there was no conflict between the  
8 Arizona Rule adopted by Arizona Bankruptcy General Order 89 and  
9 the Code. Id. at 143.

10 Specifically, § 110 defines a BPP, establishes certain  
11 duties and requirements and creates BPP liability for misconduct.  
12 But § 110 does not, nor does any other portion of the Bankruptcy  
13 Code, impose minimum qualifications, or adopt certification  
14 standards for BPPs or a mechanism for establishing such  
15 standards. Id. Because Arizona Supreme Court Rule 31 adopts  
16 certification requirements that are not addressed by the  
17 Bankruptcy Code, there is no conflict.

18 Moreover, the Bankruptcy Code leaves room for state-law  
19 regulation of BPPs. Thus, § 110(k) provides: “Nothing in this  
20 section shall be construed to permit activities that are  
21 otherwise prohibited by law, including rules and law that  
22 prohibit the unauthorized practice of law.” In re BPP, 307 B.R.  
23 at 137. State law governs the unauthorized practice of law. Id.  
24 We agree with the bankruptcy court for the District of Arizona:

25 As a result of [§ 110(k)], a document preparer may not  
26 use § 110 as a “safe harbor” if a rule or certain rules  
27 prohibit the unauthorized practice of law or the  
28 document preparer’s activities are otherwise prohibited  
by law. In Arizona, Supreme Court Rule 31(a)(3) limits  
who may practice law.

1 In re Gabrielson, 217 B.R. 819, 826 (Bankr. D. Ariz. 1998).

2 Because the Bankruptcy Code contains no certification  
3 provision and leaves to state law the governance of unauthorized  
4 practice of law, there is no conflict between Arizona Supreme  
5 Court Rule 31 adopted by Arizona Bankruptcy General Order 89 and  
6 the Bankruptcy Code. In re BPP, 307 B.R. at 142-43.

7 Likewise, Allen's contention that Arizona Supreme Court Rule  
8 31 violates the Supremacy Clause fails because state law is pre-  
9 empted only to the extent that it actually conflicts with federal  
10 law. English v. Gen. Elec. Co., 496 U.S. 72, 78-79. Here, there  
11 is no actual conflict. It is possible for one to comply with  
12 both state and federal requirements. Id. Moreover, because  
13 there is no preemption, even if Arizona Bankruptcy General Order  
14 89 had not been adopted, BPPs would still have to comply with the  
15 Bankruptcy Code and with Arizona law.

16  
17 IV

18 A. First Amendment

19 Allen contends that the court has violated his First  
20 Amendment rights by enforcing Arizona Supreme Court Rule 31 vis-  
21 à-vis Arizona Bankruptcy General Order 89.

22 Section 110, as well as Arizona Bankruptcy General Order 89,  
23 is aimed at conduct. Scott v. United States Tr. (In re Doser),  
24 412 F. 3d 1056, 1063 (9th Cir. 2004). A bankruptcy court's order  
25 enjoining a BPP from preparing bankruptcy petitions does not  
26 violate the First Amendment. Ferm v. United States Tr. (In re  
27 Crowe), 243 B.R. 43, 50 (9th Cir. BAP 1999), aff'd 246 F.3d 673  
28 (9th Cir. 2000); see United States v. O'Brien, 391 U.S. 367, 376-

1 77 (1968). Even assuming § 110 and Arizona Bankruptcy General  
2 Order 89 regulate speech, they do not infringe First Amendment  
3 rights. In re Doser, 412 F. 3d at 1063.

4 Likewise, Allen's contention that the court abused its  
5 discretion for overbreadth by not adhering and/or adopting other  
6 state laws with the same subject lacks merit.

7  
8 B. Ninth and Tenth Amendments

9 Allen raises for the first time on appeal the argument that  
10 Arizona Bankruptcy General Order 89 abridges the Ninth and Tenth  
11 Amendments of the Constitution. Because this argument was not  
12 raised at the bankruptcy court, we decline to address the  
13 argument on appeal. Leibowitz v. County of Orange (In re  
14 Leibowitz), 230 B.R. 392, 399 (9th Cir. BAP 1999), Concrete  
15 Equip. Co. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R.  
16 513, 520 (9th Cir. BAP 1996); McCoy v. Bank of Am. (In re McCoy),  
17 111 B.R. 276, 281-82 (9th Cir. BAP 1990).

18  
19 C. Equal Protection

20 Although Allen frames his issue statement to refer to the  
21 trustee, clerks of the court, real estate brokers, and  
22 secretaries, his equal protection argument centers around only  
23 one of the exemptions to Arizona Supreme Court Rule 31 as  
24 violative of equal protection under the Fourteenth Amendment.

25 Arizona Supreme Court Rule 31(b) provides that except as  
26 provided in subsection (d): "no person shall practice law in this  
27 state or represent in any way that he or she may practice law in  
28 this state unless the person is an active member of the state

1 bar." Accordingly, subsection (d) lays out the exceptions to  
2 this general rule.

3 Allen focuses on exemption number 22, which states:

4 "Nothing in these rules shall prohibit an officer or employee of  
5 a governmental entity from performing the duties of his or her  
6 office or carrying out the regular course of business of the  
7 governmental entity."

8 Allen contends that this exemption allows a trustee, clerk,  
9 secretary, etc., to be exempted from the general rule. The crux  
10 of Allen's argument is that Arizona Supreme Court Rule 31 and its  
11 exemptions therein impermissibly discriminate between him and  
12 those persons who are exempted from the general rule.

13 To the extent that Allen's challenge requires us to consider  
14 the validity of Arizona Supreme Court Rule 31 as a matter of  
15 Arizona law, we decline. In re BPP, 307 B.R. at 141. We also  
16 construe Allen's argument to be an equal protection challenge to  
17 Arizona Bankruptcy General Order 89.

18 The Due Process Clause of the Fifth Amendment, which applies  
19 to the federal government, incorporates the Fourteenth  
20 Amendment's guarantee of equal protection. Ferm v. United States  
21 Tr. (In re Crawford) 194 F. 3d 954, 960-61 (9th Cir. 1999),  
22 (citing Bolling v. Sharpe, 347 U.S. 497). A general order not  
23 affecting fundamental rights will pass scrutiny if it bears "a  
24 rational relationship to a legitimate state interest." Gallo v.  
25 U.S. Dist. Court, 349 F.3d 1169, 1179 (9th Cir. 2003). Requiring  
26 the certification of BPPs is rationally related to the legitimate  
27 governmental interest in protecting consumers from abuses by non-  
28 lawyers. In BPP, 307 B.R. at 143.

