

SIGNED.



Dated: March 12, 2009

James M. Marlara
JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

10	In re:	)	OPINION
		)	(All Cases are in Chapter 7)
11	ROBERT R. THUESON, II,)	
12	Debtor.	)	No. 4-08-bk-10121-JMM
13	ARCHIE GUERRERO and MARY L.)	
14	GUERRERO,	)	No. 4:08-bk-11130-EWH
	Debtors.)	
15	RICHARD J. IRBINSKAS and MARY P.)	
16	IRBINSKAS,	)	No. 4:08-bk-11365-EWH
	Debtors.)	
17	MIRIAM T. CASTRO,)	
	Debtor.	)	No. 4:08-bk-11454-EWH
18	LUIS J. LOPEZ, JR. and NATALIE I.)	
19	LOPEZ,	)	No. 4:08-bk-11703-EWH
	Debtors.)	
20	ANNETTE MAZON,	)	No. 4:08-bk-12181-EWH
21	Debtor.)	
22	CRAIG FALLENBERG,	)	No. 4:08-bk-12199-EWH
	Debtor.)	
23	LUCINDA M. FRIEND,	)	No. 4:08-bk-13583-JMM
24	Debtor.)	
25	STEVEN V. RICHTER,	)	No. 4:08-bk-10080-JMM
26	Debtor.)	
27	KARL PEIPELMAN,	)	No. 4:08-bk-11393-JMM
	Debtor.)	
28	MARTIN PALOMINO and ELIZABETH V.	)	No. 4:08-bk-09803-EWH
	PALOMINO,)	
	Debtors.)	

1	CHARLES E. WOLFSTELLER and	)	No. 4:08-bk-10244-EWH
2	DENISE D. WOLFSTELLER,)	
	Debtors.)	
3	YOLANDA V. CUARON,	)	No. 4:08-bk-11464-EWH
4	Debtor.)	
5	KEITH BOZDOG and CRYSTAL	)	No. 4:08-bk-12297-EWH
6	BLACKWELL,)	
	Debtors.)	
7	GRACIELA SALAS,	)	No. 4:08-bk-12326-EWH
8	Debtor.)	
9	MICAH C. JACOBS,	)	No. 4:08-bk-11939-EWH
10	Debtor.)	
11	JILL S. SWISS,	)	No. 4:08-bk-12945-JMM
12	Debtor.)	

12 On January 28, 29 and 30, 2009, evidentiary hearings were held in order to determine
13 the reasonable value of fees charged by a document preparer, Richard C. Hoyt & Associates. After
14 consideration of the evidence, the administrative files and the law, the court now rules.

15
16 **I. JURISDICTION**

17
18 This court has jurisdiction over these matters, which are "core" proceedings. 28
19 U.S.C. §§ 157(b)(2)(A) and 1334.

20
21 **II. ISSUES IN EACH CASE**

- 22
23 1. Does the bankruptcy court have sua sponte authority to review
24 document preparer fees?
25 2. What is the reasonable value of the document preparer's services?
26
27
28

1 **III. PROCEDURE**

2
3 Over three days, the court heard evidence concerning each of the 17 cases captioned
4 above.¹

5 Each case was commenced, sua sponte, by the court's orders to show cause requiring
6 the document preparer, Richard C. Hoyt & Associates ("DP," "RCH" or "Hoyt") to justify a \$400
7 fee for services rendered to each Debtor.

8 General evidence was adduced from five witnesses, which this court heard and
9 considered as applicable to all 17 cases. Exhibits A - G and I were admitted and deemed applicable
10 to all of the cases.

11 For each individual case, two of those five witnesses also testified as to the specifics
12 of those matters. The witnesses were Christopher Hoyt and Richard C. Hoyt. As to each individual
13 case, the court received a separate Exhibit J.

14 The court also took judicial notice of its entire court file in each case. *See In re E.R.*
15 *Fegert, Inc.*, 887 F.2d 955, 958 (9th Cir. 1989); *In re Blumer*, 95 B.R. 143, 146 (9th Cir. BAP 1988).

16 Finally, because the Consumer Price Index ("CPI") was raised by one of the general
17 witnesses, Donald Hartman, this court took judicial notice of the published CPI figures from the
18 United States Department of Labor from 1995 to the present. FED. R. EVID. 201.

19
20 **IV. FACTS APPLICABLE TO ALL CASES**

21
22 **1. James E. Mason**

23
24 James E. Mason is a computer expert in the way in which services are provided via
25 the Internet. He has been in the computer consulting business for 30 years. He described briefly
26

27
28 ¹ In all, the court noticed up 34 cases for hearing. Some were assigned to Judge Eileen W. Hollowell, and some to this judge. The judges then, between themselves, equalized the workload. Judge Hollowell heard 17 separate cases. This judge heard 17 cases.

1 how the Internet functions, and how information is shared through, among other things, certain
2 websites. He noted that there are numerous Internet providers of bankruptcy document preparation
3 services. The manner of providing bankruptcy information to consumers varies in degree of
4 "expertise," service and price. (See Ex. D, E.)

5 Mr. Mason also opined that if a business uses a computer in its office, there is an
6 overhead component associated therewith, for the hardware, software and training.

7 8 **2. Donald Hartman**

9
10 Donald Hartman is the DP's Certified Public Accountant. He handles tax and
11 accounting affairs for approximately 100 small businesses. One of his clients is the DP in this case,
12 "Richard C. Hoyt and Associates."

13 Although he opined that \$85 per hour was "reasonable" in order for the DP to be a
14 "profitable business," the court notes that this witness is not a qualified expert in the field of
15 bankruptcy law. He stated that he was not an attorney at law and therefore had never practiced law.
16 Nor did he testify that he had ever been certified as a document preparer. Therefore, his knowledge
17 as to what is a "reasonable" fee comes from a different perspective than what this court must decide.
18 In that regard, Mr. Hartman testified that he was unfamiliar with the factors which drive a court's
19 legal decision.

20 Mr. Hartman viewed the DP's business solely from a cost-benefit analysis. He tied
21 the rise in costs to the CPI, calling it a "fairly consistent gauge of inflation."

22 Mr. Hartman noted that the DP, here, also provides other form preparation services
23 in the fields of wills, trusts, notary and divorce, as well as less complicated tax returns. However,
24 although Mr. Hartman testified that the DP's weekly overhead was approximately \$3,520 (Ex. I),
25 he did not produce any document, nor did he testify as to what the gross income was for this DP,
26 nor offer the DP's tax returns. Consequently, Mr. Hartman did not tie his opinion of an \$85 per hour
27 "reasonable" rate to the DP's actual income and expenses. Thus, this court has no way to know,
28

1 from the evidence presented, what the DP's other services bring to the bottom line of "Richard C.
2 Hoyt & Associates."

3 Finally, Mr. Hartman noted that the DP here is "in business for no other reason than
4 to make a profit."

5 6 **3. Allen D. Merrill**

7
8 Allen D. Merrill is also a document preparer. He, like the DP in this case, is certified.
9 He too testified that, as a document preparer, his "only purpose was to make a profit."

10 Mr. Merrill no longer offers document preparation services related to bankruptcy
11 proceedings, finding it unprofitable at the current accepted rate of \$200 per case. He noted that,
12 with the advent of the revised Bankruptcy Code in 2005 (The Bankruptcy Abuse Prevention and
13 Consumer Protection Act--BAPCPA), the number of forms, and therefore the cost, had increased.

14 Mr. Merrill agreed with Richard C. Hoyt's opinion that a routine bankruptcy case took
15 approximately 5.0 hours to process. (*See Ex. C.*)

16 Mr. Merrill charges \$125 per hour for his document preparation services, which
17 include wills, trusts and tax preparation, but not bankruptcy.

18 Although Mr. Merrill noted that he had no familiarity with any of the 17 cases which
19 this court is considering today, he nonetheless opined that, at an average 5.0 hours per case, \$85 per
20 hour and \$400 per case was "reasonable."

21 22 **4. Christopher Hoyt**

23
24 Christopher Hoyt is an independent contractor, who works full time for RCH. The
25 document preparation business is a family one: Richard C. Hoyt is the father, and Christopher and
26 David Hoyt are his sons. The DP pays them "commissions" (Ex. I), withholds no taxes for them and
27 offers them no company benefits, such as health insurance.

1 Christopher Hoyt's "primary function is to type documents," and input the information
2 received from the intake interview (conducted exclusively by Richard C. Hoyt) onto the bankruptcy
3 forms. These forms are part of a computer software package known as "E-Z Forms." Ninety
4 percent (90%) of Christopher Hoyt's document preparation work relates to bankruptcy cases,
5 although he sometimes helps out in the other document preparation fields handled by the DP firm,
6 including, divorce, child support, family law, wills, trusts, powers of attorney and taxes.

7 Christopher Hoyt, once the information is typed into its final form, passes it along to
8 his brother, David, who checks for accuracy and arranges a final interview with the customer-debtor.
9 Once the documents are approved, they are printed out so that the customer may file them with the
10 court.

11 Christopher Hoyt is a certified document preparer, as are the other individual
12 members, and as is the firm itself.

13 Before these court-ordered show cause orders were issued, no time sheets or summary
14 sheets were kept by the DP, but since these orders were issued, the firm's members have
15 reconstructed their time and effort as to each case. (*See* Ex. J in each case.) While, generally, each
16 case ranged in time, the average was about 5.0 hours, with "over and under" exceptions specific to
17 each case.

18 Christopher Hoyt has been preparing bankruptcy petitions, schedules and related
19 initial documents for eight years and, in general, it can be said that his work is well-done, accurate
20 and without problem for the court and its staff. As a document preparer, the court has no difficulty
21 with either his competence or his work product, and the DP's reputation is a good one.

22 Christopher Hoyt recognizes that he cannot give legal advice, and is prohibited by
23 statute from doing so. He resists the temptation when asked by customers. Mr. Hoyt noted that he
24 "just prepares forms. I don't represent them [the debtors]."

25 Christopher Hoyt types the information into a computer program, and some of the
26 information is also automatically transferred onto several other forms. To a large degree, the
27 computer saves time and produces a cleaner-looking work product. But it also has inefficiencies or
28

1 requires the application of human judgment. In the final analysis, Christopher Hoyt concluded that
2 whether he typed on a typewriter or a computer, it would take about the same time.

3 In 85% of the cases, Christopher Hoyt will be required to call a customer in order to
4 clear up a discrepancy in the collected information, and to obtain answers to perceived
5 inconsistencies.

6 Once the forms are completed and signed, two copies are given to the customer. One
7 is filed by the debtor at the courthouse, and the other is the debtor's copy. Once the debtor files the
8 original, Christopher Hoyt then "uploads" the same information electronically, using the court's
9 Electronic Case Filing (ECF) technology.

10 Christopher Hoyt's actual typing and information-clarifying activities, on average, take
11 about 3.0 hours. This includes typing, phone calls, follow-up and uploading the documents into
12 ECF.

13
14 **5. Richard C. Hoyt**

15
16 Richard C. Hoyt is the 100% shareholder of RCH. He is a certified document
17 preparer.

18 The business rents a five-office suite at 7229 N. Thornydale, and owns furniture,
19 computers, a copy machine and other business equipment. Weekly overhead is \$3,520 per week,
20 consisting of:

21

22	Commissions and Compensation	\$2,510
23	Rent	300
24	Utilities	65
25	Ongoing Education, Training and Certification	55
26	Phone and Cell	95
27	Advertising	310
28	Supplies	60

1	Travel	25
2	Copier Contract	30
3	Bank Fees and CC Fees	20
4	Software: BK, Tax, Trusts, Wills	25
5	Internet	<u>25</u>
6	Total	\$3,520

7
8 (Ex. I.)

9 Prior to July 15, 2008, RCH charged customers \$200 for their bankruptcy document
10 preparation services. Then, on July 15, 2008, RCH decided to raise its rates to \$400 per case.

11 This decision was preceded by an effort to advise the U.S. Trustee of its intentions,
12 to which RCH received no response (Ex. A). In addition, Richard C. Hoyt consulted with legal
13 counsel as to the legal issues confronting such a business decision, and finally felt that various "test
14 cases" would be the best way to bring the issue before the courts. Richard C. Hoyt did not make this
15 decision without due deliberation, and in the end, felt it presented the best--and only--way to obtain
16 a decision on the issue of whether the \$200 accepted fee was still valid.

17 Richard C. Hoyt based this new rate of \$400 per case upon a need for profitability
18 (Ex. I), and simply divided his weekly overhead by 40 hours, arriving at the \$85 per hour rate.²

19 As the other witnesses stated, Richard C. Hoyt approached the situation presented here
20 from a business perspective, looking at the profitability of a fee of \$400 per case versus a fee of
21 \$200 per case.

22 Richard C. Hoyt testified that he was in business to make a profit, and that he could
23 no longer afford to do bankruptcy cases if he is limited to \$200 per case.

24 As for the document preparation process itself, Richard C. Hoyt conducts the initial
25 intake interview, explains the general process, does not offer any legal advice and walks the
26 customer through a questionnaire, from which the schedules, statement of financial affairs and other
27 initial filing documents are then typed up.

28

 ² Mathematically, the figure comes to \$88 per hour.

1 Richard C. Hoyt emphasized that neither he nor anyone in his office gives legal
2 advice, that they so advise the customers and that placards are posted which also bear that warning.
3 If a case is below the "median" for the applicable "Means Test," then the DP will accept those cases.
4 However, if the dollar amounts are above the median, then those cases are referred out to an
5 attorney.

6 Richard C. Hoyt did not present any tax returns from the business, nor offer any
7 information as to how much the other DP non-bankruptcy services contributed to the DP's bottom
8 line (such as wills, trust, divorce and tax return preparation).

9
10 **V. FACTS APPLICABLE TO SPECIFIC CASES**

11
12 Against this general backdrop, then, both Christopher and Richard C. Hoyt offered
13 additional testimony (and a corresponding Ex. J) as to the following specific matters. Each will be
14 discussed in turn.

15
16 **1. Robert R. Thueson, II, 4-08-bk-10121-JMM**

17
18 The Debtor filed a voluntary chapter 7 petition on August 7, 2008.

19 The Debtor was assisted in the preparation of his bankruptcy schedules and other
20 pertinent documents by the bankruptcy preparation service of Christopher Hoyt of RCH.

21 For these services, RCH charged and received \$400.

22 The documents which Christopher Hoyt (or members of his office staff) prepared
23 were:

- 24 (1) Petition (four page form).
25 (2) Statement of Social Security Number (one page form).
26 (3) Declaration of Evidence of Employer's Payments Within 60
27 Days (one page form).
28

- 1 (4) Individual Debtor Statement of Current Monthly Income and
- 2 Means Test Calculation Form B22A (eight page form, five of
- 3 which contained no typewritten information and were left blank)
- 4 (the "Means Test.")
- 5 (5) Summary of Schedules (one page form).
- 6 (6) Statistical Summary of Certain Liabilities and Related Data
- 7 (one page form).
- 8 (7) Schedules A through J (15 page form).
- 9 (8) Statement of Financial Affairs (five page form).
- 10 (9) Individual Debtor's Statement of Intention (one page form).
- 11 (10) Notice to Debtor by Non-Attorney Bankruptcy Petition Preparer
- 12 (two page form).
- 13 (11) Master Mailing List (two page form).
- 14 (12) Disclosure of Compensation of Bankruptcy Preparer (three page
- 15 form).

16 Each of these documents are official forms, with blanks or checkmark boxes for filling
17 in specific information.

18 The Debtor has one secured creditor, secured by a lien of \$8,439 on a vehicle (a 2005
19 Ford Focus) worth \$7,025.

20 The Debtor and his wife earn \$3,120.34 per month, and their expenses (for a family
21 of four), total \$3,181 per month (Schedules I and J).

22 The Debtor listed debts owing to 12 unsecured creditors totaling \$39,537.

23 The Debtor has no priority debts.

24 Of the 18 questions listed on the Statement of Financial Affairs, the Debtor checked
25 the "None" box on 14 questions, and answered four questions (Nos. 1, 2, 9 and 16).

26 The Debtor indicated that he would reaffirm the debt on one of his vehicles, and filled
27 in the description of the vehicle, and checked three places on that form.

28

1 Christopher Hoyt testified that he spent 2.0 hours on this Debtor's case, consisting of
2 organization and typing.

3 This court accepts electronic filing, and this case was so filed, after the Debtor paid
4 the filing fee and filed the original paperwork.

5 Christopher Hoyt filled in various informational fields, on a bankruptcy forms package
6 which is a software application for a computer.

7 Richard C. Hoyt testified that he spent a total of 1.0 hours with Mr. Thueson, and the
8 total time spent by all RCH members was 4 hours, 10 minutes (Ex. J).

9
10 **2. Archie and Mary L. Guerrero, 4:08-bk-11130-EWH**

11
12 Both Christopher Hoyt and Richard C. Hoyt testified that this case had factual
13 similarities to the Thueson case, above. For the work done on this case, the entire office spent a
14 total of 5 hours, 20 minutes (Ex. J).

15 This case was, according to Christopher Hoyt, "about average" and had "nothing
16 remarkable" to set it apart from other routine cases.

17 The Guerreros were charged \$400.

18
19 **3. Richard J. and Mary P. Irbinskas, 4:08-bk-11365-EWH**

20
21 Both Christopher Hoyt and Richard C. Hoyt testified that this case had factual
22 similarities to the Thueson case, above. For the work done on this case, the office spent a total of
23 4 hours, 55 minutes (Ex. J).

24 This case was, according to Christopher Hoyt, "about average" and had "nothing
25 remarkable" to set it apart from other routine cases.

26 The Irbinskas were charged \$400.

1 required some sorting out. For the work done on this case, the office spent a total of 4 hours, 35
2 minutes (Ex. J).

3 Ms. Cuaron was charged \$400.

4
5 **14. Keith Bozdog and Crystal Blackwell, 4:08-bk-12297-EWH**

6
7 This case had more than the usual number of phone inquiries, revolving around the
8 value of Wal-Mart stock, and whether a listed pool table and slot machine did or did not exist. For
9 the work done on this case, the office spent a total of 5 hours, 50 minutes (Ex. J).

10 Mr. Bozdog and Ms. Blackwell were charged \$400.

11
12 **15. Graciela Salas, 4:08-bk-12326-EWH**

13
14 The only unusual problem regarding this case had to do with the fact that the Debtor
15 owned no furniture. For the work done on this case, the office spent a total of 5 hours (Ex. J).

16 Ms. Salas was charged \$400.

17
18 **16. Micah C. Jacobs, 4:08-bk-11939-EWH**

19
20 Working with the Debtor to straighten out his vehicle ownership status required the
21 office to spend a total of 5 hours, 35 minutes on this case (Ex. J).

22 Mr. Jacobs was charged \$400.

1 **17. Jill S. Swiss, 4:08-bk-12945-JMM**

2
3 Confusion, by the Debtor, over her marital status, added some time-consuming work
4 to this relatively minor case (the Debtor only had nine creditors.) For the work done on this case,
5 the office spent a total of 4 hours, 35 minutes (Ex. J).

6 Ms. Swiss was charged \$400.

7
8 **VI. LEGAL ANALYSIS**

9
10 **A. THE COURT'S SUA SPONTE AUTHORITY TO REVIEW FEES**

11
12 **(1) Historical Perspective**

13
14 Section 110 was enacted as part of the Bankruptcy Reform Act of 1994, to govern,
15 for the first time, the activities of nonlawyer document preparers, who "had proliferated across the
16 country," and provide various sanctions for impermissible activity. As Congress explained:

17
18 Bankruptcy petition preparers not employed or supervised by any attorney
19 have proliferated across the country. While it is permissible for a petition
20 preparer to provide services solely limited to typing, far too many of them also
21 attempt to provide legal advice and legal services to debtors. These preparers
22 often lack the necessary legal training and ethics regulation to provide such
23 services in an adequate and appropriate manner. These services may take
24 unfair advantage of persons who are ignorant of their rights both inside and
25 outside the bankruptcy system.

26
27 H.R. Rep. 103-835, 103rd Cong., 2nd Sess. 56 (Oct. 4, 1994), *as reprinted in* 1994 U.S.C.C.A.N.
28 3340, 3365.

Given the predicament of debtors who are at the "end of their ropes," some judges
were skeptical that such nonlawyer document preparers would ever be "angels," rather than
"vultures." Hon. A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Legal Services: Angel or
Vulture?*, 2 AM. BANKR. INST. L. REV. 353, 357 (1994). And, in the years leading up to the 1994

1 amendment, courts took their role of scrutinizing the practice of petition preparers in accord with
2 the Bankruptcy Code quite seriously. As one court stated:

3
4 Congress in its wisdom, or perhaps as a result of life time experience, was also
5 aware that when death is about to occur, vultures circle the dying, waiting for
6 an opportunity to personally profit from the misfortune of another. Congress
7 enacted a number of safeguards to prevent the financially distressed from
8 being preyed upon by the vulture type in our society. Federal Rules of
9 Bankruptcy Procedure 2014 and 2016, and 11 U.S.C. §§ 327-330, were created
10 in an effort to make certain that help provided to afflicted victims of financial
11 distress is provided at a fair and reasonable rate. Gouging, overreaching or
12 taking advantage of the financially afflicted is to be avoided whenever
13 possible. The Court has taken judicial notice of the situation in California
14 where so-called typing services have taken outrageous advantage of clients and
15 creditors and have distorted the intent of the Bankruptcy Code for their own
16 personal profit, notwithstanding the fallout upon the debtors to whom they
17 provide services and the creditors that they sometimes abuse in the process.

18 *In re Calzadilla*, 151 B.R. 622, 625 (Bankr. S.D. Fla. 1993).

19 Congress does not write on a clean slate. For as long as bankruptcy law has existed--
20 e.g., the first federal bankruptcy act passed by Congress in 1800--bankruptcy law has been amended,
21 in part, in response to administrators and legal professionals picking off the last remaining flesh
22 from unsuspecting, desperate and vulnerable debtors.

23 For example, one reason for the repeal of the 1867 Act--the third national bankruptcy
24 act--was that the courts were allowing excessive fees to trustees and attorneys practicing in
25 bankruptcy. The bankruptcy estates were being "eaten up by a most vicious fee system." *In re*
26 *Wells*, 114 F.222, 224 (W.D. Mo. 1902); *see generally* David S. Kennedy & R. Spencer Clift, *An*
27 *Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of*
28 *Today's United States Bankruptcy Court and its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 174
(2000).

29 The fourth and most notable of the early "Bankruptcy Acts" was the Chandler Act of
30 1898. This Act delegated more functions and duties to "bankruptcy referees" who were subject to
31 the supervision of the district court. In 1938, the act was overhauled and referees were converted
32 into "judicial officers." The Act was officially rechristened the "Bankruptcy Act" in 1950. *See*
33 *Frank R. Kennedy, A Brief History of the Bankruptcy Reform Act*, 58 N.C. L. REV. 667 (1980). It
34 was not until 1973 that the Supreme Court renamed bankruptcy referees "United States bankruptcy

1 judges," pursuant to the Bankruptcy Rules under the Rules Enabling Act, 28 U.S.C. § 2075. *See* D.
2 Kennedy & R. S. Clift, *supra*, at 176-77.

3 Nonetheless, between 1973 and 1978, bankruptcy judges performed dual
4 administrative and judicial functions. This dual role was considered a deficiency of the Bankruptcy
5 Act, in light of the stunning growth in bankruptcies across the country, and the need to have judges
6 concentrate their efforts on the adjudication of controversies. *See Report of the Commission on the*
7 *Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess., Pt. I (1973).

8 Many, at the close of the 1970's, believed that the bankruptcy system should be
9 relegated to an administrative agency and not a judicial function, but that view was criticized by
10 bankruptcy judges and practitioners. F. Kennedy, *supra*, at 671 & n.23. The proponents of a
11 stronger judiciary emphasized judicial experience within the bankruptcy system. *Id.*

12 In the end, the judicial view won out with the enactment of the Bankruptcy Reform
13 Act of 1978, which expanded the jurisdiction and role of the bankruptcy judge, as an Article I judge,
14 selected on merit, and created the new office of the United States Trustee to relieve the judge of
15 performing certain administrative functions. *Id.* at 675-680; *see generally Tiers of Federal Judges--*
16 *Article III and Statutory Federal Judges, Their Numbers, Selection, and Tenure*, 95 GEO. L. J. 1009,
17 1012 (2007).

18 Although one of the United States Trustee's functions was review of fee requests, it
19 did not, or could not, always fulfill its duties in this regard, and the bankruptcy court, which had
20 always had nonadjudicative duties unique to the bankruptcy process, was required to act in its
21 supervisory role in order to prevent abuse in bankruptcy cases. One such abuse was that caused by
22 "certain professionals seeking to gouge the estate for excessive fees." Hon. Stephen A. Stripp, *An*
23 *Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 Seton Hall L. Rev.
24 1329, 1338 (1993).

25 Indeed, the new Bankruptcy Code imposed a reasonableness standard, enforceable by
26 the bankruptcy court, on attorneys' fees in a variety of circumstances where fees would be paid by
27 the estate. For example, the standard is applied to the claims of secured creditors, whether the claim
28 arose prepetition or postpetition, § 506(b), estate professionals applying for compensation, §§ 329

1 and 330(a), and other professionals seeking compensation as an administrative expense,
2 §§ 503(b)(4) and 503(b)(5).

3 It is well established law that bankruptcy courts have authority to review fee
4 applications sua sponte under §§ 329 and 330. Section 329 is implemented by Bankruptcy Rule
5 2017, which provides that the court, on its own initiative, may hear and determine whether an
6 attorney fee is excessive. Fed. R. Bankr. P. 2017. See *In re Rheuban*, 121 B.R. 368, 379 (Bankr.
7 C.D. Cal. 1990) (discussing former § 60(d), the predecessor to § 329, which was “administrative in
8 character”); *In re Zepecki*, 258 B.R. 719, 725 (8th Cir. BAP 2001), *aff'd*, 277 F.3d 1041 (8th Cir.
9 2002) (Rule 2017 gives a court the power to review compensation paid by a debtor; the bankruptcy
10 court’s power under section 329 coupled with Bankruptcy Rule 2017 allowed the court to act sua
11 sponte.).

12 Section 330(a)(1) provides that the court may award "reasonable" attorney fees, and
13 § 330(a)(2) provides that the court may, on its own motion, award compensation that is less than the
14 amount requested. See, e.g., *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir. 1994);
15 *In re Eliapo*, 298 B.R. 392, 405 (9th Cir. BAP 2003), *aff'd in part, rev'd in part and remanded on*
16 *other grounds*, 468 F.3d 592 (9th Cir. 2006); *In re Auto Parts Club, Inc.*, 211 B.R. 29, 33 (9th Cir.
17 BAP 1997).³

18 19 **(2) The Document Preparer and § 110**

20
21 Enter the document preparer. As stated above, Congress saw fit to bring this new
22 player "into the fold" by enacting § 110, in 1994. Section 110 governs what document preparers
23 may or may not do. It is a consumer protection statute passed to "control the proliferation of
24

25
26 ³ In the early 1990's some courts, in the Eastern District of Pennsylvania, questioned
27 whether the bankruptcy court had sua sponte authority to review fee requests under § 330. That
28 matter was put to rest, in the affirmative, by the Third Circuit, in *Busy Beaver*, 19 F.3d at 841.
Today, "the overwhelming number of bankruptcy courts that have addressed the question have
held that bankruptcy courts have not only the power but also the obligation to scrutinize fee
petitions sua sponte." A. Hirsch & D. Sheehy, *Awarding Attorneys' Fees and Managing Fee
Litigation*, at 101 (Fed. Jud. Ctr., 2d ed. 2005).

1 bankruptcy typing mills." In re Gutierrez, 248 B.R. 287, 292 (Bankr. W.D. Tex. 2000) (citation
2 omitted). First and foremost, petition preparers merely prepare documents for filing, and shall
3 neither execute any document on behalf of the debtor nor give legal advice. 11 U.S.C. §§ 110(a)
4 and 110(e)(1) & (2).

5 Since 2003, in Arizona, document preparers have been required to become certified,
6 and to comply with continuing education requirements. *See* ARIZ. SUP. CT. RULE 31; ARIZ. CODE
7 OF JUD. ADMIN. §§ 7-201, 7-208. In addition, the local bankruptcy rules for the district of Arizona
8 require a legal document preparer to have state certification. *See* L.B.R. 2090-2(a).

9 Pertinent to this decision are the following provisions of § 110, which govern the
10 document preparer's fees. Section 110(h) reads in pertinent part:

11 (1) The Supreme Court may promulgate rules under section 2075 of
12 title 28, or the Judicial Conference of the United States may prescribe
13 guidelines, for setting a maximum allowable fee chargeable by a
14 bankruptcy petition preparer. A bankruptcy petition preparer shall
notify the debtor of any such maximum amount before preparing any
document for filing for a debtor or accepting any fee from the debtor.

15 (2) A declaration under penalty of perjury by the bankruptcy petition
16 preparer shall be filed together with the petition, disclosing any fee
17 received from or on behalf of the debtor within 12 months immediately
prior to the filing of the case, and any unpaid fee charged to the debtor.

18 . . .

19 (3)(A) The court shall disallow and order the immediate turnover to the
20 bankruptcy trustee any fee referred to in paragraph (2) found to
be in excess of the value of any services—

21 (i) rendered by the bankruptcy petition preparer
22 during the 12-month period immediately
preceding the date of the filing of the petition; or

23 (ii) found to be in violation of any rule or guideline
24 promulgated or prescribed under paragraph (1).

25

26 (4) The debtor, the trustee, a creditor, the United States trustee (or the
27 bankruptcy administrator, if any) or the court, on the initiative of the
court, may file a motion for an order under paragraph (2).

28 11 U.S.C. § 110(h)(1)-(4).

1 Section 110(h)(1) was added by the Bankruptcy Abuse Prevention and Consumer
2 Protection Act of 2005 ("BAPCPA"). To date, there have been no maximum fee rules or guidelines
3 promulgated by either the Supreme Court or the Judicial Conference.

4 Actions arising under § 110 are core matters within the meaning of 28 U.S.C.
5 § 157(b)(2)(A) (administration of the estate), over which the bankruptcy court has jurisdiction
6 pursuant to 28 U.S.C. § 1334. *See In re Graves*, 279 B.R. 266, 271 (9th Cir. BAP 2002).

7 Hoyt asserts the court lacks sua sponte authority to determine the reasonableness of
8 its fees because § 110(h) only allows the court, on its own initiative, to order a document preparer
9 to disclose the amount of fees collected but does not authorize sua sponte review of the
10 reasonableness of the disclosed fees.

11 Hoyt's reading of § 110(h) conflicts with a harmonious construction of § 110(h)(2)-
12 (4). Statutory provisions are to be read in harmony in the context of the whole statute. *In re*
13 *Hougland*, 886 F.2d 1182, 1184 (9th Cir. 1989). All parts of a statute are to be read as a whole, and
14 in harmony with one another, and not in conflict. *In re Chiu*, 266 B.R. 743, 750 (9th Cir. BAP
15 2001), *aff'd*, 304 F.3d 905 (9th Cir. 2002); *In re Labib-Kiyarash*, 271 B.R. 189, 195 (9th Cir. BAP
16 2001). When read as a whole, § 110(h) gives the court sua sponte authority to order fee disclosures
17 and to review the reasonableness of the disclosed fees. Otherwise, § 110(h)(3)(A) becomes a
18 toothless provision. *See also In re Bernales*, 345 B.R. 206, 227 (Bankr. C.D. Cal. 2006) (issuing
19 a sua sponte order to show cause regarding fee disgorgement and ultimately requiring disgorgement
20 under § 110(h)(3)); 2 COLLIER ON BANKRUPTCY ¶ 110.09, at 110-18 (15th ed. rev. 2008) ("Section
21 110(h)(3) and (4) authorizes the court, on its own motion . . . to disallow any excessive fees paid to
22 a bankruptcy petition preparer and to order the preparer to turn over the excess to the bankruptcy
23 trustee.")

24 Such construction, of course, is consistent with the long and historic practice of the
25 court's ability to prevent fee-gouging excesses in bankruptcy cases. For such fee reviews to apply
26 to everyone else in the bankruptcy system, but to exempt bankruptcy petition preparers, is an
27 argument which fails to appreciate the uniqueness of this legal tradition.

1 (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)); *see also In re Dyer*, 322 F.3d 1178, 1196
2 (9th Cir. 2003).

3 As discussed above, §§ 110 and 329 give the court power to review document preparer
4 fees sua sponte. As one legal scholar has written, excessive fees fall into the category of "abuse of
5 process" in § 105(a) "because they offend creditors and other parties in interest who feel helpless
6 to stop the offense, thereby engendering extensive public resentment against the bankruptcy court
7 and process." Hon. S. Stripp, *supra*, at 1367. Therefore, the court is authorized to use its § 105(a)
8 authority to implement §§ 110 and 329.

10 (4) Due Process

11
12 Finally, Hoyt asserts that the court's sua sponte review of fees violated his procedural
13 due process rights to have the matter decided by an impartial decision maker, and that the court was
14 basically acting in an adversarial role.

15 An order to show cause is the "usual step preliminary to the initiation of a summary
16 proceeding." *Hall v. Goggin*, 148 F.2d 774 (9th Cir. 1945). While a court is not prohibited from
17 adjudicating a proceeding raised sua sponte, the court must provide fair notice and an opportunity
18 for a hearing. The Ninth Circuit has held, in the context of a § 330(a)(1) fee award, that if the
19 bankruptcy court materially reduces the fee requested, Bankruptcy Rule 2017(b) requires that court
20 to first provide notice and a hearing. *In re Eliapo*, 468 F.3d 592, 602 (9th Cir. 2006).

21 The Ninth Circuit "emphasize[d] that the notice-and-hearing definition in
22 § 102(1) is flexible and sensitive to context" but that "the essential point is that the court should give
23 counsel a *meaningful* opportunity to be heard." *Id.* (*citing Busy Beaver*, 19 F.3d at 846 n.16). As
24 the *Eliapo* court further explained, all that is required is that the applicant be given a reasonable
25 opportunity to present legal argument and/or evidence to clarify or supplement a fee application.
26 *Id.*

27 In this proceeding, Hoyt was given fair notice and an opportunity to present legal
28 argument and evidence. The order to show cause noticed Hoyt of the alleged violations of § 110.

1 After the initial status hearing on the order to show cause, the court issued a Procedural Order to
2 Show Cause setting the procedures and deadlines to be used at the hearings. The court then
3 conducted evidentiary hearings in which Hoyt had the opportunity to present legal arguments, expert
4 testimony, witnesses, and documentary evidence. These hearings occurred over three separate days,
5 with a fourth day for argument.

6 Hoyt maintains, nonetheless, that an impartial decision maker is a requirement of due
7 process, citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Hoyt contends that the court was not
8 impartial, because it had already arrived at an adverse legal position by issuing an order to show
9 cause regarding the reasonableness of the DP fees.

10 *Goldberg* is not on point. There, the Supreme Court reviewed a welfare recipient's
11 final eligibility determination following termination of benefits. The Court held that due process
12 required the opportunity for a pre-termination evidentiary hearing, which had not been given. *Id.*
13 at 264. In discussing the requirement for an impartial decision maker, it stated: "[w]e agree with
14 the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare
15 official from acting as a decision maker. He should not, however, have participated in making the
16 determination under review." *Id.*

17 In this proceeding, unlike the situation in *Goldberg*, no final determination was made
18 by the court prior to hearing evidence on the issue. In fact, the court's final decision is in accordance
19 with *Goldberg* as it "rest[s] solely on the legal rules and evidence adduced at the hearing." *Id.*

20 Moreover, concerning judicial bias, the Supreme Court has stated:

21 First, judicial rulings alone almost never constitute a valid basis for a
22 bias or partiality motion. . . . Second, opinions formed by the judge on
23 the basis of facts introduced or events occurring in the course of the
24 current proceedings, or of prior proceedings, do not constitute a basis
for a bias or partiality motion unless they display a deep-seated
favoritism or antagonism that would make fair judgment impossible.

25 *Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

26 Therefore, the court concludes that Hoyt's due process rights have been satisfied as required
27 by *Eliapo*.

1 **B. REASONABLENESS OF THE FEES**

2
3 The sole remaining issue in each of these cases is what constitutes a fair and
4 reasonable price for the work performed by a certified document preparer. As noted above, the
5 exercise of this power has strong historical roots, and sound reasoning.

6 Section 329 utilizes the same reasonableness test as § 330. *In re Basham*, 208 B.R.
7 926, 931 (9th Cir. BAP 1997), *aff'd*, 152 F.3d 924 (9th Cir. 1998). "The customary method for
8 assessing an attorney's fee application in bankruptcy is the 'lodestar,' under which 'the number of
9 hours reasonably expended' is multiplied by 'a reasonable hourly rate' for the person providing the
10 services." *Eliapo*, 468 F.3d at 598 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) and
11 *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc.*, 924 F.2d 955, 960 (9th Cir.1991)).
12 "However, the lodestar method is not mandatory." *Id.*

13 In addition, a court may utilize its own knowledge of, and experience with, market
14 rates and fees charged in comparable cases as a guide. *See In re Doser*, 281 B.R. 292, 301 (Bankr.
15 D. Idaho 2002), *aff'd*, 412 F.3d 1056 (9th Cir. 2005) (judge's experience with petition preparer fees
16 in the district); *In re Rauch*, 110 B.R. 467, 477 (Bankr. E.D. Cal. 1990); *In re McMullen*, 273 B.R.
17 558, 562 (Bankr. C.D. Ill. 2001).

18 As noted above, a document preparer may not give legal advice nor represent a client-
19 customer in court or before any other agency, and is limited to the task of "preparing bankruptcy
20 documents" for filing with the court. This preparation involves discussion with debtors, gathering
21 information from them to place into the standard, pre-printed bankruptcy forms and typing or
22 otherwise inputting that gathered information into the necessary forms.

23 As this court noted in the *In re Kassa* case, written almost thirteen years ago, these
24 tasks are "something that a trained legal secretary can do, no more and no less." *In re Kassa*, 198
25 B.R. 790 , 791 (Bankr. D. Ariz. 1996), *aff'd*, 232 B.R. 822 (9th Cir. BAP 1999). The court, in 1996,
26 then observed that a legal secretary earned approximately \$16.82 per hour and applied a 12-hour
27 standard to the assigned tasks. From that calculation, the court arrived at the present \$200 fee still
28 used in the District to this day.

1 What, then, has changed since 1996? First, as the accountant, Mr. Hartman, testified,
2 inflation has crept up steadily. Mr. Hartman noted that the best, and most accepted, gauge of that
3 inflation rate is the CPI, used by the United States Department of Labor, and published widely. So
4 widely, in fact, that this court can take judicial notice of its reports. FED. R. EVID. 201.

5 Second, the typewriters or personal computers used in 1996 have improved to the
6 point where the input of information has been simplified, and information's internal organization
7 within the documents themselves is easier. In total time, however, the evidence suggests that it still
8 takes about the same time as it always did.

9 Third, the passage of the current BAPCPA additions to the Bankruptcy Code have
10 added extra paperwork and necessary documents. But the testimony in this case did not reflect that
11 an inordinate amount of extra work was needed for those new tasks to be accomplished, or the forms
12 completed.

13 Fourth, this court has had nagging concerns about *Kassa* since publishing it in 1996,
14 which it could not express until now, given this new challenge to the *Kassa* reasoning, and the
15 evidence presented. In *Kassa*, the court noted that it took about 12 hours to gather information and
16 put it into the schedules. In retrospect, this figure seemed too high, and now the evidence in these
17 cases has confirmed those long-held suspicions. The evidence in these cases supports a finding that
18 an average, routine case only takes about five hours to prepare, from initial meeting to final
19 document production.

20 Thus, the court must consider the CPI, and bring it forward from 1996, to arrive at a
21 current hourly rate for a legal secretary. Thus, the calculation is:

<u>Year</u>	<u>Legal Secretary Hourly Rate</u>	<u>Inflation</u>	<u>Rate for Following Year</u>
1996	\$16.32	3.0	\$16.80
1997	16.80	2.3	17.18
1998	17.18	1.6	17.45
1999	17.45	2.2	17.83
2000	17.83	3.4	18.43
2001	18.43	2.8	18.94

1	2002	18.94	1.6	19.24
2	2003	19.24	2.3	19.68
3	2004	19.68	2.7	20.21
4	2005	20.21	3.4	20.89
5	2006	20.89	3.2	21.55
6	2007	21.55	2.8	22.15
7	2008	22.15	3.8	22.99

8 U.S. Department of Labor, Urban Consumer Price Index, ftp://ftp.bls.gov/pub/special.requests/
9 cpi/cpi.ai.txt.⁴

10 A consistent theme of the DP's presentation of evidence in the cases at bar here dealt
11 with the issue of whether the preparation of bankruptcy documents is "profitable" at \$200 per case.
12 For the court, "profitability" is an immaterial factor. What the court is charged with is a
13 determination of the reasonable value of the service provided. When one determines that the best
14 measure of that service is most closely akin to that of a legal secretary, the hourly rate suggests only
15 \$23 per hour, not \$85. "Profitability" is a business issue, not a legal one. If a business decides that
16 \$23 per hour is unsatisfactory, then it can also decide whether or not to continue to offer that service.
17 The bankruptcy courts are not charged with the legal responsibility, under § 110, of ensuring that
18 document preparation offices make a profit. The focus of the statute is directed to protection of the
19 consumer, not the well-being of the document preparation service.

21 **VII. APPLICATION OF LAW TO THE FACTS**

23 The court can now apply the reasonable hourly rate of \$23.00 per hour to each of the
24 cases heard by the court. Any excess fee must be disgorged to the case trustee.

27 ⁴ At \$23.00 per hour, a legal secretary would gross approximately \$47,840 per year.
28 Some make slightly more, some less. But as an average, this figure, and its method of calculation, is not unreasonable.

	<u>Debtor(s)</u>	<u>Case Nos.</u>	<u>Doc Prep Hours</u>	<u>Reasonable Fee Allowed</u>	<u>Paid</u>	<u>To be Disgorged & Paid to Trustee</u>	<u>Trustee</u>
1							
2							
3	Robert R. Thueson, II	4-08-bk-10121-JMM	4 hrs 10 min	\$95.83	\$400	\$304.17	Mills
4	Archie Guerrero and Mary L. Guerrero	4-08-bk-11130-EWH	5 hrs 20 min	122.66	400	277.34	Kartchner
5							
6	Richard J. Irbinskas and Mary P. Irbinskas	4-08-bk-11365-EWH	4 hrs 55 min	113.08	400	286.92	Kartchner
7	Miriam T. Castro	4-08-bk-11454-EWH	5 hrs 25 min	124.58	400	275.42	Mills
8	Luis J. Lopez, Jr. and Natalie I. Lopez	4-08-bk-11703-EWH	4 hrs 55 min	113.08	400	286.92	Maxwell
9							
10	Annette Mazon	4-08-bk-12181-EWH	4 hrs 50 min	111.16	400	288.84	Lang
11	Craig Fallenberg	4-08-bk-12199-EWH	5 hrs 35 min	128.41	400	271.59	Maxwell
12	Lucinda M. Friend	4-08-bk-13583-JMM	4 hrs 45 min	109.24	400	290.76	Lang
13	Steven V. Richter	4-08-bk-10080-JMM	5 hrs 20 min	122.66	400	277.34	Lang
14	Karl Peipelman	4-08-bk-11393-JMM	5 hrs 50 min	134.16	400	265.84	Kartchner
15	Martin Palomino and Elizabeth V. Palomino	4-08-bk-09803-EWH	6 hrs 35 min	151.42	400	248.58	Maxwell
16							
17	Charles E. Wolfsteller and Denise D. Wolfsteller	4-08-bk-10244-EWH	9 hrs 40 min	222.33	400	177.67	Mills
18							
19	Yolanda V. Cuaron	4-08-bk-11464-EWH	4 hrs 35 min	105.41	400	294.59	Mills
20	Keith Bozdog and Crystal Blackwell	4-08-bk-12297-EWH	5 hrs 50 min	134.16	400	265.84	Kartchner
21	Graciela Salas	4-08-bk-12326-EWH	5 hrs 0 min	115	400	285	Kartchner
22	Micah C. Jacobs	4-08-bk-11939-EWH	5 hrs 35 min	128.41	400	271.59	Lang
23	Jill S. Swiss	4-08-bk-12945-JMM	4 hrs 35 min	105.41	400	294.59	Lang
24							

25 The court is cognizant of the fact that \$200 per case has been the reasonable standard
26 for a "no challenge" or "no look" document preparation fee in this District for 14 years. However,
27 as the Ninth Circuit held in *Eliapo*, once a fee issue is brought up, the starting place is not from the
28

1 "no look" amount forward, but is instead the value of services provided from the inception of the
2 engagement. *Eliapo*, 468 F.3d at 599-601.

3 By this ruling today, the court does not intend to challenge the long-established fee
4 charged per case, except in cases where a document preparer desires a higher fee. In those
5 instances, this court will scrutinize value from start to finish, as the Ninth Circuit observed was to
6 be the procedure followed once a "no look" was turned into a "look."

7 Here, the "look" shows the reasonable fee, in most cases, to be below the \$200
8 typically charged. That excess must therefore be disgorged in each applicable instance.

9
10 **RULING**

11
12 RCH shall, in each of the foregoing cases, turn over the foregoing sums to be
13 disgorged, to the Trustee of each such case.

14 In addition, this court will issue a permanent and continuing injunction preventing
15 Richard C. Hoyt & Associates, Richard C. Hoyt, individually, Christopher Hoyt, individually, and
16 David Hoyt, individually, from charging more than \$200 per bankruptcy case, unless application
17 is made to the court and a higher fee is proven to be reasonable.⁵ Such injunction shall apply from
18 the date of this Opinion forward.

19 The Clerk will now set for hearing, on orders to show cause, why fees charged by
20 Hoyt in other cases at \$400, which were not part of these hearings, should not be disgorged in whole
21 or in part, for exceeding the \$200 amount accepted in this District. As in the 17 cases decided today,
22 each of those cases will require a separate evidentiary hearing.

23
24
25
26
27

⁵ Section 110(j) allows the court to enjoin a document preparer from violating § 110.
28 The court's Procedural Order to Show Cause notified Hoyt that the court would also be
proceeding under § 110(j). *See Graves*, 279 B.R. at 274 (court may move sua sponte under
§ 110(j) if it gives adequate notice).

1 A separate order will issue. FED. R. BANKR. P. 9021. The Clerk shall file a copy of
2 this Opinion and the Order in each individual case. Any appeal must be taken within ten days. FED.
3 R. BANKR. P. 8002.

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5 DATED AND SIGNED ABOVE.
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1 COPIES served as indicated below on
2 the date signed above:

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10 Keith Bozdog and Crystal Blackwell	U.S. Mail
11 Miriam T Castro	U.S. Mail
12 Yolanda V Cuaron	U.S. Mail
13 Craig Fallenberg	U.S. Mail
14 Lucinda M Friend	U.S. Mail
15 Archie Guerrero and Mary L Guerrero	U.S. Mail
16 Richard J Irbinskas and Mary P Irbinskas	U.S. Mail
17 Micah C Jacobs	U.S. Mail
18 Luis J. Lopez, Jr. and Natalie I. Lopez	U.S. Mail
19 Annette Mazon	U.S. Mail
20 Martin Palomino and Elizabeth V Palomino	U.S. Mail
21 Karl Peipelman	U.S. Mail
22 Steven V. Richter	U.S. Mail
23 Graciela Salas	U.S. Mail
24 Jill S Swiss	U.S. Mail
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27 By /s/ M.B. Thompson
28 Judicial Assistant