

REPORT OF PROFESSIONAL RESPONSIBILITIES COMMITTEE

By
Gerald K. Smith, Chair

I have taken a look at the more obvious provisions of the 2005 bankruptcy legislation that may involve liability issues, although perhaps not ethical issues. There are two helpful articles, one by Fellow Conferee Henry Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 AM. BANKR. L.J. 191 (Issue 2, Spring 2005) and the other by Professor Cooper and Ms. Vance, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law,* 79 AM. BANKR. L.J. 283 (Issue 2, Spring 2005).

1. Section 707(b)(4)(C).

The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has –

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion –

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

An abuse under paragraph (1) apparently refers to abuse under section 707(b)(1) which refers to “an abuse of the provisions of . . . [chapter 7].”

The problem with this provision is that it requires a reasonable investigation and a determination that the petition is well grounded in fact and warranted in addition to not being abusive. The issue is what must be done to satisfy the “reasonable investigation into [not of] the circumstances” requirement. Conferee Sommer concluded that

the certification, by its literal language, does not apply to schedules or statements . . . [and] it is not clear that [this provision] adds anything to current Rule 9011. One difference is the use of the phrase “reasonable investigation” rather than “reasonable inquiry.” . . . In view of the similarities to Rule 9011, it is unlikely that courts will draw a distinction between this certification and Rule 9011. They will, at most, use it as additional ammunition to sanction bad conduct that would have been punishable in any event.

Id. at 204-05.

Professor Cooper concludes her comments as to section 707(b)(4)(C) with the observation that “at its heart, this provision is little more than a fee shifting statute, but with a remarkable distinction – the fees are shifted not to the debtor, but to the attorney alone.” *Id.* at 288.

2. Section 707(b)(4)(D).

A new certification has been required of the attorney signing the petition for the debtor. Section 707(b)(4)(D) provides that “[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.” Exactly what is an inquiry and what type of inquiry is necessary, is left to future litigation. This creates a substantial risk for counsel for the debtor. However, Conferee Sommer is sanguine as to this provision. He concludes that:

Finally, a new subparagraph provides that the signature of attorney for the debtor on the petition also certifies that the attorney has no knowledge, after an inquiry, that the schedules are incorrect. This is a pretty low standard that any honest attorney should meet; a violation requires actual knowledge, not just a belief or suspicion, that the schedules are inaccurate. It requires an inquiry, which should be no greater than for other pleadings, perhaps less, since it does not use the word “reasonable.” Quite arguably, this more specific, and less stringent, standard for schedules overrides any other standard that now exists in the Rules. Moreover, another provision of the bill expresses a “sense of Congress” that Rule 9011 should be amended to provide that all papers (including schedules) submitted by debtors or attorneys for debtors be submitted only after reasonable inquiry to “verify” that information is well-grounded in fact and warranted by existing law or a good faith argument for extension, modification or reversal of existing law. This sense of Congress also adds to the arguments that the certifications under current Rule 9011 do not apply to the schedules. It seems unlikely that the Rules Committee will follow this suggestion, since it has only recently replaced very similar language in Rule 9011 in order to conform it to Federal Rule of Civil Procedure 11, and the Committee should be loathe to impose a different standard on debtors’ attorneys than on other attorneys. As a practical matter, as with the other new standards, courts are likely to look to the nuances of the differing language. They will simply continue to penalize those they believe to be engaged in seriously deficient conduct.

Id. at 206 [footnotes omitted].

3. Section 707(b)(4)(B).

Section 707(b)(4)(B) allows the court to assess a civil penalty against the debtor's attorney for a violation of Rule 9011. The language is as follows:

If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order –

- (i) the assessment of an appropriate civil penalty against the attorney for the debtor; and
- (ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

As Conferee Sommer points out, the court has this power under Rule 9011, and the amendment was not necessary. Conferee Sommer does point out that there is a difference since the penalty may be payable to others than the movant or the court. Professor Cooper again points out that there is also a distinction in that the sanction is only imposed on the attorney.

4. Debt Relief Agencies.

A person furnishing services to a person whose debts consist primarily of consumer debts and whose nonexempt assets are “worth” less than \$150,000, is subject to significant restrictions and is labeled a Debt Relief Agency. For those interested, I attach the discussion of Professor Cooper and Ms. Vance as Exhibit 1 and the discussion of Conferee Sommer as Exhibit 2. The statutory provisions relating to Debt Relief Agencies create problems and may prevent adequate representation of consumer debtors, but they are substantive provisions which were intended by Congress and there is little that can be done about them at this time.

5. Unauthorized Practice of Law.

Certain provisions of the Bankruptcy Code expressly permit the unauthorized practice of law. Since these matters are in federal court, it may be that the provisions preempt state law, but perhaps not. An express preemption would have helped.

In any event, Congress certainly had no problem with allowing credit counselors and petition preparers to provide, in the opinion of Professor Cooper and Ms. Vance, “consumer debtors information that is unquestionably legal advice, such as information about the advantages and disadvantages of filing under different chapters and instructions on valuing assets. In other words, Congress has carved out a range of activities that bankruptcy petition preparers may – indeed must – provide even though this constitutes the unauthorized practice of law.” *Id.* at 330.

There is another provision that arguably authorizes the unauthorized practice of law. And this provision clearly preempts state law to the contrary.

The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors. Notwithstanding any local court rule, provision of a State constitution, and otherwise applicable nonbankruptcy law, or any other requirement that representation at the meeting of creditors under subsection (a) be by an attorney, a creditor holding a consumer debt or any representative of the creditor (which may include an entity or an employee of an entity and may be a representative for more than 1 creditor) shall be permitted to appear at and participate in the meeting of creditors in a case under chapter 7 or 13, either alone or in conjunction with an attorney for the creditor. Nothing in this subsection shall be construed to require any creditor to be represented by an attorney at any meeting of creditors.

11 U.S.C. § 341(c).

Actually, I find this a welcome change, although it might have been more narrowly drafted so as to only allow employees of the particular creditor to make the inquiry.

6. *Merry-Go-Round Amendment.*

28 U.S.C. § 1334(e) has been amended to provide exclusive jurisdiction in the bankruptcy court over matters of disclosure. This change came about as a result of Ernst & Young requesting the amendment and now deceased Senator Thurman obliging. The amendment provides as follows:

The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –

(1) of all the property, wherever located, of the debtor as to the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.


The intent is to litigate disinterestedness and adverse interest, as well as disclosure issues, in the bankruptcy court so as to avoid the threat of a state court jury trial on an issue of a fraudulent nondisclosure like that alleged in *Merry-Go-Round*. There the trial would have taken place in the Maryland state court in Baltimore.

7. *Disinterested Person Definition.*

Section 101(14) was amended by deleting an investment banker for securities of the debtor, an attorney for an investment banker in connection with the offer of sale or issuance of a security of the debtor, and a relationship with an investment banker of the debtor.

Although the members of the Committee have received a copy of this Report, we have not had an opportunity to explore further issues or what action should be recommended to the Conference.

Respectfully submitted,



Gerald K. Smith, Chair

EXHIBIT 1

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Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law[©]

by

Catherine E. Vance
and
Corinne Cooper*

A scene from Oliver Stone's *Platoon*:

A Viet Cong bunker is discovered and must be searched. Two soldiers carefully enter, with weapons drawn. No enemy soldiers are present, so the soldiers look around and discover a small box. Wary of a booby trap, one soldier opens the lid very, very slowly. It's not rigged. Relieved, the soldier sorts through the box's contents. "These are important papers," he says to his buddy and as they prepare to leave the bunker, the soldier picks up the box to take it with him. Then it explodes.

Like the box, the misnamed Bankruptcy Abuse Prevention and Consumer Protection Act¹ is waiting to take you down.²

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¹Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. The Act is euphemistically titled, "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." Some opponents of the law refer to it as the Bankruptcy Act Reform Fiasco, or BARF. The editors of this publication have asked that we use "BAPCPA" to be consistent with the usage in other articles included in this issue. Each reference hereafter to a section of BAPCPA will include the provision to be codified. All references to the Code mean the Bankruptcy Code, which is codified at Title 11 of the

provision is far from clear, given that a violation of Rule 9011 already provides a basis for imposing sanctions. It's worth mentioning that this provision once *mandated* sanctions against the attorney; if there's any good news, it's the change to a discretionary standard.¹⁹

Sanctions may also be imposed when the trustee has successfully prosecuted a motion to dismiss the debtor's case based on "abuse," as defined in the remainder of BAPCPA Section 102.²⁰ Specifically, if the court finds that the bankruptcy filing constituted:

- abuse on the part of the debtor, and
- a violation of Rule 9011 on the part of the attorney

the court may order the attorney to reimburse the trustee all reasonable costs and fees associated with the motion to dismiss. At its heart, this provision is little more than a fee-shifting statute, but with a remarkable distinction—the fees are shifted not to the debtor, but to the attorney alone. This provision was also mandatory in earlier versions of BAPCPA.

B. REGULATING CONSUMER DEBTORS' ATTORNEYS AS "DEBT RELIEF AGENCIES"

BAPCPA redefines debtors' attorneys as "debt relief agencies" and dramatically regulates an attorney's practice, from advertising to representation, mandating what the attorney must do and what the attorney is forbidden from doing with no regard for the best interests of the client. To accomplish its mission, BAPCPA creates three important definitions:

- "Assisted Person" ["AP"] is any person whose debts consist primarily of consumer debts, and whose non-exempt assets are worth less than \$150,000.²¹
- "Bankruptcy Assistance" includes any goods or services

¹⁹This change was the result of intense lobbying by the American Bar Association. It's only one word, from "shall" to "may," but an important one.

²⁰See BAPCPA Section 102(a)(2)(C), amending Code § 707(b) by adding paragraph (4)(A). Code § 707(b) already permits dismissal of a consumer bankruptcy case that is a "substantial abuse." Section 102 of BAPCPA recasts abuse from a concept that looks at the debtor's conduct and purpose in filing for Chapter 7 relief into one premised on need, which is elaborately set forth in BAPCPA's means test.

²¹BAPCPA Section 226(a)(1), amending Code § 101 to add Subsection (3). It is beyond the purview of this article, but nonetheless interesting, to note in passing that the definition of "assisted person" appears to be a failed attempt to identify small consumer bankruptcies, thus limiting the reach of these provisions to lawyers who represent poorer debtors. In fact, substantial wealth can still be shielded through state exemptions (even with BAPCPA's homestead exemption cap) and asset protection trust statutes. Even with the changes to the unlimited homestead, some wealthy debtors (who have not moved or committed fraud, or whose assets are in an asset protection trust) will fall into the scope of the DRA provisions. Of course, some of those cases will fall outside of the provision if the debts are not primarily consumer debts (for example, if they consist of personal guaranties of business obligations), but some will undoubtedly remain. One can only assume that the attorney who represented Bowie Kuhn does not advertise.

sold or otherwise provided²² to an assisted person, such as legal advice or representation, document preparation or filing, or attendance at a creditors' meeting or the like, in connection with a case or proceeding under the Bankruptcy Code.²³

- "Debt Relief Agency" is any person who provides bankruptcy assistance to an AP in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under Section 110 of the Code.²⁴

Some folks are expressly (and inexplicably, in some cases) excluded from BAPCPA's definition of "debt relief agency." Trap #1 below discusses the counterintuitive and even dangerous results these definitions and their exceptions produce when determining who is and isn't a "debt relief agency."

For debtors' attorneys, these definitions bring into play a hideous array of new restrictions that apply in three main areas. The first is advertising. The second and third are flip sides of the communication coin: attorneys are prohibited from making some statements and forced to make others.

1. Attorney Advertising

Any attorney who fits the definition of a "debt relief agency" under BAPCPA must comply with its regulation of advertisements. If the attorney's advertisement is directed to the general public and

- includes a description of bankruptcy assistance,²⁵ or
- uses language that could lead a reasonable consumer to believe that debt counseling is being offered when in fact the services are directed to providing bankruptcy assistance, or
- offers assistance with credit defaults, mortgage foreclosures, or eviction, excessive debt, debt collection pressure, or an inability to pay any consumer debt,

then the attorney is required to disclose that the services relate to bankruptcy and to include this statement clearly and conspicuously in the advertisement:

²²That "otherwise provided" language is ripe to cause trouble. See Trap #1 *infra*.

²³See BAPCPA Section 226(a)(2), amending Code § 101 to add subsection (4A).

²⁴BAPCPA Section 226(a)(3), amending Code § 101 to add subsection (12A).

²⁵This includes assistance in connection with a Chapter 13 plan, whether or not Chapter 13 is specifically mentioned. BAPCPA Section 229(a) adding Code § 528(b)(1).

"We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."²⁶

This provision is not only offensive, it's confusing. It may seem simple on its face, but there is plenty more to say about it. It's discussed at length in Trap #2 below.

2. Required Disclosures

No fewer than five disclosures are required by the attorney to the client—"assisted person" in the new bankruptcy parlance—under BAPCPA.

The first notice must provide descriptions of the relief available under the different chapters of the Bankruptcy Code, and must also include language designed to scare the debtor about criminal liability and Attorney General investigations.²⁷

The second notice, which we discuss more in Trap #5 below, sets out specific "advice" the attorney must give, some of which is actually inconsistent with the law. As in the first notice, the debtor's potential criminal liability must be mentioned.²⁸

Third, the attorney must provide the client with a written contract, which every lawyer should do anyway.²⁹

Fourth, BAPCPA also mandates a disclosure statement that is very much like those required under federal consumer protection statutes.³⁰

Finally, the attorney must provide "reasonably sufficient information" that, like the second notice, is inconsistent with what the law actually requires. Here, the attorney is also required to advise the client how to perform tasks—such as valuation of assets—that have perplexed attorneys and courts alike for some time.³¹

If the attorney fails to provide any of these five "disclosures," or makes prohibited statements (discussed below), statutory penalties include both the ability of the client to avoid the contract—but enforce it against the attorney—and the power of state Attorneys General to take action against attorneys.³²

²⁶BAPCPA Section 229(a) adding Code § 528, subsections (a)(3)-(4) and (b). See Trap #2 *infra* for a discussion of this provision.

²⁷See BAPCPA Section 228(a) adding Code § 527(a)(1) and BAPCPA Section 315(b) adding Code § 521(a)(1)(B)(iii). The content of the notice is governed by Code § 342(b) as amended by BAPCPA Section 104.

²⁸See BAPCPA Section 228(a) adding Code § 527(a)(2), which, under subparagraph (D), requires the following disclosure: "information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction."

²⁹BAPCPA Section 229(a) adding Code § 528(a)(1) and (2).

³⁰See BAPCPA Section 228(a) adding Code § 527(b).

³¹See BAPCPA Section 228(a) adding Code § 527(c). See Trap #5 *infra*.

³²See BAPCPA Section 227(a) adding Code § 526(b) and (c).

3. Prohibited Statements

The flip side of the required statements is BAPCPA's prohibition on what an attorney can say or do. In some respects, these prohibitions are unnecessary reiterations of ethics and disciplinary rules. For example, BAPCPA says an attorney can't advise a debtor to make false statements in the bankruptcy papers,³³ which an attorney isn't allowed to do under any circumstances.

But some prohibitions are also foolhardy—and dangerous. They reach “prospective assisted persons” in addition to actual clients, preclude what could be the best legal advice for a particular client, and create thresholds for liability that are frightfully low. The attorney can't even tell the client, whose financial distress has become so dire that he sought out the attorney's help, that it's okay to borrow the money needed to pay the legal expenses of the bankruptcy.³⁴

C. REQUIRING ATTORNEYS TO CERTIFY THE DEBTOR'S ABILITY TO PAY IN A REAFFIRMATION AGREEMENT

Among the substantial changes BAPCPA makes to reaffirmation agreements is a bizarre requirement for debtors' attorneys. In addition to the certification that has long been required in every reaffirmation agreement, if the agreement triggers the statutory presumption of hardship,³⁵ the attorney has to go further, and give assurance that the client can perform the promise to pay the debt.³⁶ BAPCPA provides:

If a presumption of undue hardship has been established with respect to [a reaffirmation] agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.³⁷

Obviously, this creates a serious problem for the attorney.³⁸ If the client wants to reaffirm a debt, that is the client's decision, even if doing so flies in the face of the attorney's sound legal advice. After all, attorneys can't *force* their clients to do anything. But BAPCPA disregards this reality and goes a step further by requiring the attorney to certify that the debtor—who has a

³³BAPCPA Section 227(a) adding Code § 526(a)(1).

³⁴See BAPCPA Section 227(a) adding Code § 526(a)(2). See Trap #4 *infra*.

³⁵See BAPCPA Section 203(a), amending Code § 524 by adding subsection (k)(6)(A).

³⁶BAPCPA Section 203(a), amending Code § 524 by adding subsection (k)(5). This assurance does not apply to a reaffirmation agreement entered into with a credit union. See *id*.

³⁷BAPCPA Section 203(a)(2), amending Code § 524 by adding subsection (k)(5)(B).

³⁸This is a policy problem and a source of potential liability, but not precisely a trap because there's nothing hidden in the language of the statute. However, it does require the attorney—in the same document—to certify that the reaffirmation does *not* impose an undue hardship on the debtor, and to acknowledge that there is a presumption of undue hardship under the statute.

demonstrated *inability* to pay a reaffirmed debt—is somehow able to pay it. And the penalty for being wrong could be severe: liability to the creditor for what the debtor owes.

III. LET'S TACKLE THE TRAPS.

TRAP #1: POOF! YOU'RE A "DEBT RELIEF AGENCY" (BUT AMERIDEBT ISN'T)

The first question is: Who is a "debt relief agency"? That simple question produces some surprising results. The answer lies in three definitions provided in Code § 101:

- "Assisted person" means any person whose debts consist primarily of consumer debts and the value of whose non-exempt property is less than \$150,000.³⁹
- "Bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.⁴⁰
- "Debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110 . . .⁴¹

What's missing from all these definitions? Any reference to a bankruptcy *debtor*! Common sense would suggest that these provisions apply only to attorneys and others who assist consumers who are in debt and looking at bankruptcy as an option to get out. Everyone who has followed this law knows these provisions were intended to apply to debtors' counsel, and to petition preparers. But the language of the statute contains no such limitation. The plain language defies common sense—and common understanding—but unfortunately, in a battle like this, plain language usually prevails.

1. *Who's Out?*

The statute provides some guidance. The definition of "debt relief agency" [DRA] specifically excludes:

³⁹BAPCPA Section 226(a), amending Code § 101(3).

⁴⁰BAPCPA Section 226(a)(2) adding Code § 101(4A).

⁴¹BAPCPA Section 226(a)(3) adding Code § 101(12A).

EXHIBIT 2

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Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"

by

Henry J. Sommer*

From its Orwellian title, an example of deceptive advertising if ever there was one, to the last of its 512 pages, the bankruptcy bill recently passed by Congress presents numerous challenges to attorneys who represent consumer debtors. How such terrible legislation came to be passed by Congress is a story of money, political mean-spiritedness, and intellectual dishonesty, but that is a story for another article.¹ This Article will address some of the major issues that will confront practitioners representing consumer debtors under the new Bankruptcy Code provisions and the likely impact of those provisions. There is no doubt that bankruptcy relief will be more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law. At the same time, other debtors, often the higher income individuals the bill was ostensibly aimed at, will find themselves better off than before because of generous new exemptions for retirement and education savings accounts and a means test which can be turned to the debtor's advantage, in both Chapters 7 and 13, by the careful planning that only higher income debtors can afford.

One of the chief problems that will be confronted is atrocious drafting, especially in many of the consumer provisions of the bill. In contrast to the 1978 legislation,² which was crafted with extensive assistance from many of the finest minds in the bankruptcy world, many of the consumer provisions of

*Supervising Attorney, Consumer Bankruptcy Assistance Project, Philadelphia, PA; Editor in Chief, Collier on Bankruptcy. Copyright 2005. All Rights Reserved. I am grateful for the comments of the following people who reviewed a draft of this article: Eric Frank, Keith Lundin, John Rao, and Alan Resnick. All errors, of course, are my own.

¹See Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?* 27 HOFSTRA L. REV. 33 (1998) for some earlier views on this subject.

²Bankruptcy Reform Act of 1978, Pub. L. No. 95-598.

Finally, a new subparagraph provides that the signature of attorney for the debtor on the petition also certifies that the attorney has no knowledge, after an inquiry, that the schedules are incorrect.⁸² This is a pretty low standard that any honest attorney should meet; a violation requires actual knowledge, not just a belief or suspicion, that the schedules are inaccurate. It requires an inquiry, which should be no greater than for other pleadings, perhaps less, since it does not use the word "reasonable." Quite arguably, this more specific, and less stringent, standard for schedules overrides any other standard that now exists in the Rules. Moreover, another provision of the bill expresses a "sense of Congress" that Rule 9011 should be amended to provide that all papers (including schedules) submitted by debtors or attorneys for debtors be submitted only after reasonable inquiry to "verify" that information is well-grounded in fact and warranted by existing law or a good faith argument for extension, modification or reversal of existing law.⁸³ This sense of Congress also adds to the arguments that the certifications under current Rule 9011 do not apply to the schedules. It seems unlikely that the Rules Committee will follow this suggestion, since it has only recently replaced very similar language in Rule 9011 in order to conform it to Federal Rule of Civil Procedure 11,⁸⁴ and the Committee should be loathe to impose a different standard on debtors' attorneys than on other attorneys. As a practical matter, as with the other new standards, courts are unlikely to look to the nuances of the differing language. They will simply continue to penalize those they believe to be engaged in seriously deficient conduct.

More confusing, if not simply absurd, are the provisions setting out requirements for "debt relief agencies."⁸⁵ These provisions, due to slipshod drafting, will apply to many attorneys who rarely, or never, represent consumer bankruptcy debtors. Under new definitions in § 101, an "assisted person" is any person whose debts are primarily consumer debts and whose nonexempt property is worth less than \$150,000.⁸⁶ This description encompasses the vast majority of the population, because there is no requirement that an assisted person be a bankruptcy debtor. "Bankruptcy assistance" is then defined as goods or services sold or otherwise provided to an "assisted person" with the purpose of providing advice, document preparation, or representation in a bankruptcy case or proceeding, regardless of the chapter.⁸⁷ Again, the advice or representation need not be in connection with a case in

⁸²11 U.S.C. § 707(b)(4)(D) (2005).

⁸³BAPCPA, Pub. L. No. 109-8, § 319, 119 Stat. 231 (2005).

⁸⁴See FED. R. BANKR. P. 9011 advisory committee's note.

⁸⁵See 11 U.S.C. § 528 (2005).

⁸⁶11 U.S.C. § 101(3) (2005).

⁸⁷11 U.S.C. § 101(4)(A) (2005).

which the assisted person is a debtor, nor need it be in connection with a consumer bankruptcy case.

A "debt relief agency" is then defined as any person who provides bankruptcy assistance to an assisted person in return for compensation or who is a bankruptcy petition preparer as defined in § 110.⁸⁸ This clearly includes attorneys who represent individual landlords or other mom and pop businesses that owe primarily consumer debts, as well as those who represent consumer creditors, or nondebtor spouses who are creditors in title 11 cases, including Chapter 11 cases. Because "person" is defined to include partnerships and corporations,⁸⁹ presumably the entire law firm is a debt relief agency. There is no time limit in the statute, so quite possibly representing one assisted person could make a firm a debt relief agency forever. On the other hand, since the definition is in the present tense, a more sensible reading might be that a firm is a debt relief agency only if it is currently providing bankruptcy assistance to an assisted person in return for compensation.⁹⁰ Under this interpretation, it could be difficult for a large firm which occasionally provides such services to keep track of whether it is a debt relief agency at any particular point in time. Some may cease representing any individuals in title 11 cases for compensation⁹¹ to avoid the risk of becoming debt relief agencies.

The definition of "debt relief agency" excludes officers, employees, directors or agents of debt relief agencies or petition preparers, so an attorney employed by a firm or by the attorney's own professional corporation (of which he is an officer) or by any entity providing services is not a debt relief agency, though the employer is.⁹² This will seemingly allow thinly capitalized petition preparers and their officers, and perhaps thinly capitalized professional corporations or other entities employing attorneys, to escape any liability under the provisions. Nonprofit organizations, which could include not only legitimate nonprofits but also operations masquerading as nonprofits like some of the new credit counseling agencies, are also excluded from the definition.

The restrictions placed on debt relief agencies, for the most part, prohibit practices that are already considered improper, such as failing to perform ser-

⁸⁸11 U.S.C. §§ 101(12A) & 110(a)(1) (2005).

⁸⁹11 U.S.C. § 101(41) (2005).

⁹⁰It may also be argued, based on the present tense language, that a person is a debt relief agency only in those particular cases in which bankruptcy assistance is provided to an assisted person for compensation. This would excuse an entity that is a debt relief agency due to representation in other cases from complying with the debt relief agency provisions (many of which, such as the fee disclosures, have no relevance) in pro bono cases. However, this may be a risky strategy until the definition has been clarified by case law or other interpretation.

⁹¹Pro bono representation would not render a firm a debt relief agency because it is not "in return for the payment of money or other valuable consideration."

⁹²See 11 U.S.C. § 101(12A)(A) (2005).

vices as promised, and making untrue or misleading statements or advising clients to make statements that the agency should know are untrue or misleading.⁹³ Although the latter restriction, by itself, might look like a strict liability provision for any untrue or misleading statements, the remedy sections under which it is enforced speak of negligence or intentional misconduct,⁹⁴ for which remedies exist under current law. Courts are unlikely to hold attorneys responsible for untruths they could not, with reasonable care, have discovered.

Section 526 also prohibits debt relief agencies from misrepresenting the services to be provided or the benefits or risks of bankruptcy, or advising an assisted person to incur more debt in contemplation of filing a bankruptcy case or in order to pay bankruptcy fees to an attorney or petition preparer.⁹⁵ Again, most of these actions are improper under current law, although it may be perfectly proper to advise a debtor to incur a debt the debtor plans to pay. Indeed, the restriction on such lawful and proper advice could infringe on the First Amendment rights of attorneys and their clients.⁹⁶ In order to avoid an unconstitutional reading of the statute, courts should interpret it narrowly, as prohibiting only advice that debtors incur debts they intend to discharge in bankruptcy.

Section 527 sets forth a series of "disclosures" required to be made by debt relief agencies to all assisted persons being provided bankruptcy assistance (which would include creditors). First, the assisted person must be given the written notice required under § 342(b)(1), despite the fact that that section requires the notice to be given by the clerk of the court. Confusingly, § 527 only mentions a portion of the notice required under § 342, omitting the portion required by § 342(b)(2).⁹⁷

To the extent not covered by the § 342(b)(1) notice, and within three days of when the agency first offers to provide bankruptcy assistance services to an assisted person (including a creditor or landlord) a clear and conspicuous notice containing various other pieces of information or misinformation must also be provided.⁹⁸ For example, the notice is to inform the debtor that replacement value of each asset as defined in § 506 must be stated where requested in the "documents filed to commence the case" after reasonable inquiry to establish that value.⁹⁹ However, the document filed to commence the case is the petition, which requires no property valuation. Even if the

⁹³11 U.S.C. § 526(a)(1), (2) (2005).

⁹⁴11 U.S.C. § 526(c) (2005).

⁹⁵11 U.S.C. § 526(a) (2005).

⁹⁶U.S. CONST. amend. I. See *New York State Bar Assn. v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

⁹⁷Compare 11 U.S.C. § 527 (2005) with § 342(b)(2) (2005).

⁹⁸11 U.S.C. § 527(a)(2) (2005).

⁹⁹11 U.S.C. § 527(a)(2)(B) (2005).

provision is read to mean the schedules, those documents do not "request" replacement value and it is not relevant to at least some purposes of schedules. Therefore, the required statement may be somewhat misleading, but few debtors will understand the disclosure anyway.

A debt relief agency must also provide the assisted person a statement about "bankruptcy assistance services."¹⁰⁰ This statement must be provided at the time of notice under § 527(a)(1), but no time requirement is set in § 527(a)(1), which refers to the clerk's notice under § 342(b)(1).¹⁰¹ The clerk is required to give its notice before commencement of the case, so if a creditor who is an assisted person first consults an attorney after the commencement of the case it may be impossible for the attorney to give timely notice to the creditor. This could lead attorneys to refuse to represent individual creditors because they cannot comply with the provision. The required statement, which must be given verbatim, or in substantially similar language, to the extent applicable, includes information that may be incorrect. It states, "You will have to pay a filing fee to the bankruptcy court," which is not always true because the fee may be waived by the court, or no fee may be charged for a particular proceeding.¹⁰² It also states, "The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need."¹⁰³ But in fact, the statement gives no information that would help someone to evaluate how much service is needed. Finally, it proceeds to "inform" the assisted person that "you can get help in some localities from a bankruptcy petition preparer who is not an attorney,"¹⁰⁴ a statement that implies petition preparers are competent to help bankruptcy debtors and may promote the unauthorized practice of law by petition preparers.

Although much of the statement would be inapplicable to a creditor or landlord, some of it probably is applicable (for example, that a case may involve litigation and that the assisted person may choose to appear pro se). In any event, to avoid the issue of whether any substitute is "substantially similar" or "applicable," many attorneys probably will choose to give the statement verbatim and, for debtors and creditors who read it, it will be basically useless.¹⁰⁵

Debt relief agencies, but not attorneys who prepare the bankruptcy petition, schedules and statements for debtors, are required to provide clear and conspicuous written notice to an assisted person giving "reasonably sufficient

¹⁰⁰11 U.S.C. § 528(b) (2005).

¹⁰¹11 U.S.C. § 527(a)(1) (2005).

¹⁰²11 U.S.C. § 527(b) (2005); see also 28 U.S.C. § 1930(f) (2005) for new fee waiver provisions.

¹⁰³11 U.S.C. § 527(b) (2005).

¹⁰⁴*Id.*

¹⁰⁵*Id.*

information” on how to provide required information.¹⁰⁶ This notice must explain such unsettled questions of law as how to determine replacement value of assets and current monthly income, how to do means test calculations, how to determine disposable income in Chapter 13, how to list creditors, determine the amount owed and the proper address for the creditor, and how to determine what property is exempt and value exempt property at replacement value as defined in § 506,¹⁰⁷ which has nothing to do with valuing property for exemption purposes. Since all of these subjects constitute legal advice about very complicated issues, no petition preparer can give such advice, and the provision is essentially applicable to no one. Alternatively, it will encourage petition preparers to engage in the unauthorized practice of law.

Under new § 528(a)(1), a debt relief agency must execute a written contract with an assisted person within five days after the first date the agency provides bankruptcy assistance to the assisted person, and prior to filing the petition. This may be impossible because the assisted person may not wish to sign a contract. In such cases, the tendering of a contract should satisfy the debt relief agency’s obligation. Obviously, there is no way to force the assisted person to sign. Alternatively, the debt relief agency, even before providing a free consultation, could execute a contract that states the services that would be provided if the debtor chooses to pursue a case and the fees for such services in flexible terms, but gives the debtor the option to pursue a case or not, with little or no fee for services if the debtor chooses not to proceed. Attorneys may have to be careful to avoid giving advice in an initial telephone call, which is probably good practice in any event. Probably, telephone tape recordings and other general information provided to the public would not be considered bankruptcy assistance, especially in light of the other provisions regulating advertising that seem to include statements to the public,¹⁰⁸ because it is not provided “in a case or proceeding on behalf of another.”¹⁰⁹ Again, the requirements for a written contract apply to all attorneys who are debt relief agencies with respect to all assisted persons, even if the assisted person is a creditor or landlord.

Finally, there are new advertising requirements in § 528. Advertising is defined to include “general media, seminars, mailings, telephonic or electronic messages” but only if directed to the general public.¹¹⁰ It may be that mailings to particular individuals facing foreclosure would not be included, since they are not mailings to the general public. All advertising of bankruptcy assis-

¹⁰⁶11 U.S.C. § 527(c) (2005).

¹⁰⁷11 U.S.C. § 527(c) (2005); *see also* 11 U.S.C. § 506 (2005).

¹⁰⁸*See* 11 U.S.C. § 528(a)(3) (2005).

¹⁰⁹11 U.S.C. § 101(4A) (2005).

¹¹⁰11 U.S.C. § 528(a)(3) (2005).

tance services or of the benefits of bankruptcy must contain the statement: "We are a debt relief agency. We help people file for relief under the Bankruptcy Code," or a substantially similar statement.¹¹¹ This advertising blurs the distinction between attorneys and petition preparers, which will cause more people to fall prey to petition preparers.

Since this advertising requirement applies to any advertisement offering assistance with respect to credit defaults, mortgage foreclosures, or evictions, it clearly applies to attorneys who may never help people file for relief under the Bankruptcy Code, for example those attorneys offering services to creditors and landlords, thus engaging them in untruthful false advertising, not to mention advertising that will deter desired clients from coming to them.

It is unclear how much leeway is given by the right to use "substantially similar" language.¹¹² May an attorney omit the phrase "debt relief agency" if the attorney makes clear that bankruptcy services are offered? This should be allowed, since the supposed purpose of the requirement is to prevent attorneys from "luring" clients by not mentioning that the service they offer is bankruptcy. May attorneys for creditors and landlords omit the language stating they help people file bankruptcy petitions if, in fact, that is not true? Absent such leeway, the provision may well be unconstitutional, requiring certain speech that may not even be truthful.

In any case, consumer bankruptcy attorneys will learn to cope with these provisions, adding to the mounds of paper they give to their clients. The main impact, especially when combined with the many additional paperwork provisions elsewhere in the bill, will probably be to drive general practitioners out of bankruptcy practice, which could create additional access problems in small towns and rural areas. J

III. NEW DOCUMENT PRODUCTION AND NOTICE REQUIREMENTS

A. DOCUMENTS TO BE FILED WITH THE COURT

The biggest increases in fees and expenses for consumer debtors will result from the numerous new document production requirements that will be imposed upon those debtors. For those who are subject to the means test, as discussed above, not only will there be a requirement to complete a detailed and complicated means test calculation, but also various expenses must be documented in order to be allowed. In addition, there will be a number of new documents required of all debtors.

If the debtor is an individual with primarily consumer debts, an attorney must file a certificate that the § 342(b) notice was delivered by the attorney

¹¹¹11 U.S.C. § 528(a)(4) (2005).

¹¹²*Id.*