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CONSUMER BANKRUPTCY

Attorney Advertising Under the New Bankruptcy Laws

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which went into effect on October 17, 2005, was the most comprehensive reform of the Bankruptcy Code in 25 years. BAPCPA makes important changes in lawyer responsibility and accountability. The new law contains various provisions which mandate that attorneys must now provide consumers with certain disclosures and must also place disclosures in their advertising. Many provisions of BAPCPA are poorly drafted, confusing and inconsistent, and the sections covering this area are no exception.

Legislative Background. The credit card industry lobbyists who essentially drafted BAPCPA had the ulterior motive of trying to scare away consumers from filing for bankruptcy. In trying to achieve this objective, they decided to put a label on those entities offering bankruptcy services and then came up with some unusual requirements that entities of this group had to adhere to. Accordingly, BAPCPA



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designates anyone who offers bankruptcy services as a "Debt Relief Agency," and such entities have rigorous disclosure requirements, among other obligations.

Debt Relief Agencies. The official definitions are contained in Code

section 101. A "Debt Relief Agency" is any person who provides "bankruptcy assistance" to an "assisted person" (any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000) in return for the payment of money or other valuable consideration. Bankruptcy Assistance is defined as expressly or impliedly providing information, advice, counsel, document preparation, or filing, or attendance at a creditor's meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to such a case.

Debt Relief Agencies Have Many Obligations. Debt relief agencies are required to enter into written contracts with "assisted persons" and provide numerous written disclosures to "assisted persons." In addition, they must adhere to various advertising requirements regarding any services that contemplate bankruptcy. See Code section 526.

Pro-Bono Services are Excluded. Non-profit organizations are excluded from being treated as Debt Relief

Agencies. In addition, authors and publishers of books whose works are entitled to copyright protection are excluded.

Bankruptcy Attorneys in this District Are (So Far) Debt Relief Agencies. Very simply by definition, if you are a person, and you provide bankruptcy assistance to an assisted person for money, then, congratulations, you are a Debt Relief Agency.

Debt Relief Agency Advertisements. Code section 528 states that any attorney who fits the definition of a Debt Relief Agency and who advertises to the general public and

- includes a description of bankruptcy assistance, 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 foreclosure, 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 the following statement clearly and conspicuously in the advertisement: **"We are a Debt Relief Agency. We help people file for bankruptcy relief."** A substantially similar statement can be used as well, but basically, these are the magic words.

Attorneys Are Now Branded With a Scarlet Letter. One academic commented that this requirement reminds us of the "The Scarlet Letter." According to Congress, sinful bankruptcy attorneys must be branded in order to warn society of their wicked ways.

Some Lucky Bankruptcy Attorneys Are Not Debt Relief Agencies. Judge W. Davis, Jr., a Georgia bankruptcy judge, issued a *sua sponte* ruling on October 17, 2005, the very day that BAPCPA went into effect,

determining that attorneys are not "Debt Relief Agencies" as that term is used in BAPCPA. In re Attorneys at Law and Debt Relief Agencies, ___ B.R. ___, 2005 WL 2626199 (Bankr. S.D. Ga. 2005). His order held that attorneys in Georgia are not covered by the provisions of the Code regulating Debt Relief Agencies and are excused from compliance with any of the requirements or provisions governing Debt Relief Agencies, so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise.

While acknowledging that the language of the relevant code sections could be interpreted otherwise (as well as the substantial legal commentaries concluding attorneys fell within the definition), Judge Davis held that §§ 101(12A) defining "Debt Relief Agency" did not include the word "attorney" or "lawyer" but included the term "bankruptcy petition preparer" which expressly excluded attorneys and their staffs. The term "attorney" is separately defined in §§101(4), which makes no reference to Debt Relief Agencies or to subsection (12A). "Because the definition of "Debt Relief Agency" omits express reference to attorneys and includes a term which excludes attorneys, it is difficult to imagine that Congress meant otherwise."

Judge Davis concluded that the inclusion of the term "legal representation" in the definition of "bankruptcy assistance" was a reference to non-lawyers' unauthorized practice of law and was Congress's effort to empower the Bankruptcy Courts with authority to protect consumers coming before the court who may have been harmed by such practices.

Booby Traps for Non-Compliance. In addition to responding to the wrath of the United States Trustee's Office, the Code also provides that your own client can seek a refund of legal fees (as well as actual damages, attorney's fees and costs) based solely on a non-complying advertisement. To make matters more complicated, since the violation occurs before the filing of the petition, it becomes an asset of the bankruptcy estate, and the trustee is then obligated to administer and collect it.

Conclusion: Comply With this Silly Requirement. Regardless of the type of advertising that you may do, include the Scarlet Letter language and make sure your ad makes it clear that your services relate to bankruptcy. Obviously, we can expect a fair amount of litigation on this issue in the years to come. What is an advertisement? A business card? A Martindale-Hubbell listing? What is "clear and conspicuous"? What about First Amendment rights and free speech? In any event, for now, if you want to avoid trouble, play it safe and say: **"We are a Debt Relief Agency. We help people file for bankruptcy relief."**

Editor's Note (revised 2008): Craig D. Robins, Esq., a regular columnist, is a bankruptcy attorney who has represented thousands of consumer and business clients during the past twenty years. He has offices in Medford, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: CraigRobinsLaw.com.