DEBATE 2: THE ETHICAL QUANDARY AND FINANCIAL DISINCENTIVES IMPOSED ON ATTORNEYS BY THE NEW ACT

Moderator: MS. FELICIA S. TURNER
Arguing for the changes: C. DAVID BUTLER
Arguing against the changes: FRANK J. PERCH, III

MS. TURNER[1]: Our topic is: The Ethical Quandary and Financial Disincentives Imposed on Attorneys by the New Act. We have chosen to break this issue down into three related subtopics. We're going to debate each topic for about thirty minutes. Let me first introduce David Butler, who will be arguing in favor of the changes to the law. He is of counsel with Shapiro Fussell and has over thirty years of experience in bankruptcy law. Prior to going of counsel with Shapiro Fussell, he was the U.S. Trustee for Region 21 from 1997 through 2004. And prior to that, he was a partner with Alston & Bird. He was one of the founding directors and twice president of the SBLI. He's a member of the American College of Bankruptcy and has also received the Atlanta Bar Bankruptcy Law Section's Pollard Award. He received his B.A. and J.D. from the University of Georgia.

Arguing against the changes to BAPCPA is Frank Perch. Frank is of counsel with Hunter Maclean in Savannah. Prior to this, he was the assistant U.S. Trustee for Delaware for two years. Before his time in Delaware, he worked at several different firms in Philadelphia in the fields of bankruptcy, insurance coverage, and commercial litigation. He's been a frequent speaker at the National Bankruptcy Training Institute in Columbia, South Carolina for the Department of Justice. He received his B.A. from Haverford College and his J.D., *cum laude*, from the University of Pennsylvania.

Our first issue is whether attorneys are debt relief agencies under BAPCPA. BAPCPA creates a new entity called a "debt relief agency." That definition, found in § 101(12A), says a debt relief agency is any person who provides any "bankruptcy assistance" to an "assisted person" in return for the payment of

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money or other valuable consideration, or who is a bankruptcy petition preparer. Section 101(12A) has certain exclusions for any person who is an officer, director, employer, or agent of a person who provides this assistance. Non-profit organizations exempt from taxation under § 501(c)(3) of the Internal Revenue Code are excluded as well as creditors of an assisted person; depository institutions; and authors, publishers, distributors, or sellers of works subject to copyright protection.

The definition of debt relief agency requires that one look at two other new definitions, which are in §§ 101(3) and 101(4A). Section 101(3) defines the term "assisted person" to mean any person whose debt consists primarily of consumer debt with the value of his non-exempt property being less than $150,000. The definition does not differentiate between encumbered and unencumbered assets—it's just nonexempt property. Section 101(4A) defines "bankruptcy assistance" to mean any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, or document preparation; attendance at a creditors' meeting; appearing in a case or proceeding on behalf of another; or providing legal representation with respect to a case or proceeding under the Code.

Those are the three new definitions—debt relief agency, assisted person, and bankruptcy assistance. If you are a debt relief agency, then you're subject to the new §§ 526, 527, and 528. I want to just give you a brief summary of each of those sections so you understand the potential impact this has on an attorney if an attorney is indeed a debt relief agency.

Section 526 sets forth certain restrictions on debt relief agencies. The debt relief agency cannot fail to perform the services they tell the assisted person they're going to perform. The debt relief agency cannot make any statement or advise an assisted person to make a statement in a filing that is untrue or misleading or that they should have known would be untrue or misleading. The debt relief agency cannot misrepresent the services they're going to provide or the benefits and the risks of filing for bankruptcy. The debt relief agency cannot advise the assisted person to incur more debt in contemplation of bankruptcy or to pay a bankruptcy attorney or petition preparer for services.

Section 526 has other provisions that void any contract not in compliance with these sections. It also says the debt relief agency will be liable for fees and actual damages if they're found to have been intentionally or negligently noncompliant with these sections. It gives the state, the district court, the

bankruptcy court, and the U.S. Trustee standing to raise these issues. It also says that §§ 526 through 528 do not excuse a debt relief agency from complying with state law, nor does it curtail state or federal courts from enforcing qualifications for the practice of law.

Section 527 sets forth the disclosures that a debt relief agency has to make to an assisted person. It requires that the debt relief agency give written notice of several things. They have to give the written notice that's set forth in § 342(b)(1). They also have to give written notice of all the different information the debtor is going to be required to provide in bankruptcy. This information must be truthful, and the debt relief agency must make a reasonable inquiry and may be subject to an audit under the new provisions of the law. Section 527(b) requires that the debt relief agency give the assisted person a specific, lengthy written statement. Section 527(c) also requires that the agency give the assisted person reasonably sufficient information on how to provide the information that § 521 requires. So, for example, the debt relief agency has to give the assisted person information about how to value assets at replacement value, how to calculate the current monthly income for the means test, how to create a list of creditors, and how to determine your exemptions.

Section 528 addresses requirements other than disclosure requirements for debt relief agencies. The debt relief agency must enter into a contract with the assisted person within five days of giving any assistance. If a debt relief agency runs an advertisement, the ad has to say something like: "We are a debt relief agency and we help people file for bankruptcy."

On October 17th, the day these provisions became effective, Chief Judge Davis in Savannah issued an opinion shortly after 9:00 a.m. It was a sua sponte order declaring the lawyers in his district were not debt relief agencies. I certainly did not expect the opinion. I have appealed that decision as U.S. Trustee. The common question is: "Who's arguing the other side?" Two groups of intervenors sought to appear in the case. We did not object because we generally thought it would be better to have both sides argued. Briefs have been submitted to the district court and we're awaiting either a determination about oral argument or an actual ruling. So I, as moderator, am not allowed to comment on the substance of this. I'm going to leave that to Frank and David.

Frank is representing a group of intervenors in this appeal; he is the one who wrote the briefs. The only other thing I want to say before they get into this topic is we have decided not to address the case or controversy issue. The first issue in the appeal is whether Judge Davis had authority to issue the sua

sponte opinion on a substantive matter not within the context of a particular case. We felt what was more interesting from your standpoint and from an ethical standpoint is whether attorneys are debt relief agencies.

I'm going to start with Frank since he's arguing the con side, which is Judge Davis' side.

MR. PERCH: The only thing I would add is that I can't take sole credit for the briefing on our side of this issue because it was really a cooperative effort among a couple of people in my firm and several other lawyers in Savannah who are very interested in this issue. I want to make sure that I don't leave them out of the credit for this.

As Felicia indicated, what we're going to talk about here is whether these provisions of BAPCPA that create this entity called a "debt relief agency" should be interpreted to include bankruptcy lawyers representing consumer debtors. Judge Davis acknowledged in his opinion that conventional wisdom out there, including a number of articles published prior to the enactment or effective date of the statute, says the term "debt relief agency" is intended to apply to lawyers whether we like it or not.

But conventional wisdom, as we know, is not always right. When the court decides this issue, the standard by which they will decide it is not whether they agree or disagree with the conventional wisdom. Instead, what the court will need to do is to apply the principles of statutory construction. So I will spend a couple of minutes talking about how we apply the principles of statutory construction to the debt relief agency provisions of BAPCPA.

The first principle of statutory construction is to start with the plain language of the statute. We must assume Congress says what it means and means what is says. In looking at the plain meaning of the statute, we don't see the word "attorney" or "lawyer" anywhere in the definition of what a debt relief agency is. We know from the recent history of bankruptcy jurisprudence that Congress knows how to include attorneys in a provision of the Code and how not to. We know the Supreme Court says whether the word "attorney" is in the statute or not is very important. What I'm referring to in particular is the decision in *Lamie v. U.S. Trustee*[2] where the U.S. Supreme Court ruled when § 330(a)(1) was amended to remove the phrase "or the debtor's attorney" in the list of parties who could be compensated, then debtor's attorneys could not

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[2] Lamie v. U.S. Tr., 540 U.S. 526 (2004).

receive compensation for post-filing services even though the argument on the other side had a lot of circuit court decisions arguing to the contrary that, even if Congress removed the word "attorney," it was simply a scriveners error or some other form of omission—that somehow we all know debtor's attorneys in chapter 7 should get paid.

The Supreme Court's position was if the word "attorney" is not in the statute, it's not there for a reason. So if we want to follow the Supreme Court's interpretation of the Code, we have to conclude that if you want to include attorneys, you need to say "attorneys."

Now, I recognize the argument that, because a "debt relief agency" is someone who provides "bankruptcy assistance," bankruptcy assistance includes "providing legal representation," and, of course, what do lawyers do? They provide legal representation. Therefore, the suggestion is Congress must mean to include lawyers.

Judge Davis considered that in his opinion and said you need to look at the evils Congress was attempting to address. He referenced the fact that, in the bankruptcy field, we have had problems for years with non-lawyers attempting to do things akin to providing legal representation: either bankruptcy petition preparers, who are expressly included, or those that send chapter 13 clients unsolicited letters saying, "We can stop the foreclosure." These individuals, in various ways, provide quasi-legal advice and quasi-legal representation. In Judge Davis' opinion that's what the term "providing legal representation" was intended to cover.

That's not an unusual way of analyzing the issue. Judge Davis himself cited the Third Circuit case from 1988[3] referring to a state's compelling interest in regulating the practice of law. The court is not going to assume that Congress, by implication, is going to make that a matter of federal regulation. There was a recent decision in the D.C. Circuit just last fall, *ABA v. FTC*,[4] that had to do with a similar type of statutory structure involving regulations of consumer privacy that apply to a defined term of "financial institutions." Financial institutions were defined as "parties engaged in 'financial activities.'" Financial activities included a list of things that included stuff that lawyers can do—advising people on M&A transactions, for example. Nevertheless, the D.C. Circuit ruled you cannot reverse the definition process

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[3] *See* Arons v. N.J. State Bd. of Educ., 842 F.2d 58 (3d Cir. 1988).
[4] *See* Am. Bar Ass'n v. Fed. Trade Comm'n, 430 F.3d 457 (D.C. Cir. 2005).

and say because financial assistance includes things that lawyers can do, therefore, a lawyer is a financial institution.

I like to think of it this way: if you want to follow the reasoning that a debt relief agency must be a lawyer because of the "bankruptcy assistance" term, then I can explain to you how a desk is a chair. Because if I define the word "chair" as including things that somebody can sit on, well, in a pinch, I can sit on a desk.

And once again, what is the plain meaning of the statute? I suggest we think about to whom it is addressed. This is a term that is supposed to be part of a disclosure made to consumers. So let's think about what the term "debt relief agency" might mean to consumers. Is that term going to be suggestive of a lawyer? We don't usually call lawyers agencies. We don't call a criminal defense lawyer a "sentence reduction agency." Consumers are familiar with the term "employment agency." That's not an employment lawyer. Consumers are familiar with the term "real estate agency." That's not a real estate lawyer.

Another principle of statutory construction is a statute should not be construed in a way that would be absurd. It's absurd to suggest the statute should require lawyers to describe themselves by a term that not only wouldn't be interpreted by the ordinary consumer to refer to lawyers, but in fact is clearly misleading in a number of ways. It's the type of terminology that has been held by the State bars in both Texas and Ohio, prior to the enactment of BAPCPA, to be a misleading descriptor for a law firm. There's an advisory opinion out of the Texas Bar that's quoted in a Texas decision[5] using the term "debt relief clinic" as an example of a misleading trade name for a law firm. Further, the Rules of Professional Conduct specifically prohibit lawyers from practicing under misleading trade names.

The term debt relief agency is confusing. It could be a petition preparer, a credit counselor, or who knows what. To illustrate the confusion I want everyone this afternoon to go on the Internet and look up the site www.debtreliefagency.com and take a look at what you see. I know it is neither a law firm nor a petition preparer, but beyond it is not clear.

In conclusion, my practice is primarily oriented to representing creditors. However, occasionally I represent an individual. I have a lot of advertising

[5] Rodgers v. Comm'n for Lawyer Discipline, 151 S.W.3d 602, 613 (Tex. App. 2004).

and marketing materials for my firm at the office, and if I'm required to put on there that I'm a debt relief agency and I help individuals file for relief under the Code, then that is misleading because that's not what my firm does. I would suggest it's unreasonable to assume Congress intended for lawyers, in the name of consumer protection, to describe their practice in a way that's misleading and provides less than zero information to consumers.

MS. TURNER: Thanks, Frank. David, now tell us why the term "debt relief agency" does include attorneys?

MR. BUTLER: Thank you Felicia. Today, I don't feel like a debt relief agency. I don't want to be a debt relief agency; I don't think Frank does, and I don't think any of you do. But Congress has spoken and said that lawyers shall be debt relief agencies. My argument today is that each of you lawyers who are representing chapter 7 consumer debtors with assets not in excess of $150,000 need to re-imagine yourself as a debt relief agency.

First of all, we're waiting for a real case or controversy to arise. Until that time, it is instructive to note that while Judge Davis did construe the statute to exclude lawyers, his colleague to the North, Judge Hershner in the Middle District, has dismissed one motion by a lawyer who came to the rescue of a pro se debtor and had the debtor raise the issue. In dismissing that motion, Judge Hershner said the debtor's complaint about his lawyer's status did not present a case or controversy. Bankruptcy Judge Overstreet in Seattle has also dismissed a similar motion on the same grounds. The point is, while we lawyers wait to see how courts sort this issue out, we do not want to volunteer to be the first case or controversy and get hit by a sanctions motion brought by a U.S. Trustee.

Felicia Turner has indicated in her brief that Congress intended to cover lawyers when it spoke of debt relief agencies because § 101(4A) defines "bankruptcy assistance" to include providing legal representation. The words "advise" and "counsel" also appear in that statute. Moreover, § 526 says that no language shall be deemed to limit the ability or authority of state bars and the federal courts to qualify lawyers to practice in those venues. I must, therefore, agree with her position.

Now, the *Lamie* case[6] addressed Congress' removal of the term "debtor's lawyer" from a predecessor bill. In that context you could see what Congress

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[6] *Lamie*, 540 U.S. at 526.

was doing. It was excising the words "debtor's attorney." In this case, however, the question is: Is there an ambiguity as to whether lawyers are intended to be included? And Felicia rightfully points out there is no ambiguity, Congress did intend to include lawyers, and there's some proof of it in the legislative history. Senator Feingold offered an amendment to exclude lawyers from the terms of the Act. That amendment was withdrawn, however, in the interest of legislative momentum.

Moreover, in the House, by a vote of 109-31, that body said the Bill's consumer protections include provisions strengthening professional standards for attorneys and others who assist consumer debtors with their bankruptcy cases. This statement by the House indicates lawyers were intended targets of the Congressional package, and I argue, that to the extent necessary, we may review the entire history of the statute to get a sense of what Congress intended.

In the meantime, is there anything that lawyers could be doing to avoid falling into a sanctions trap based upon the asserted new requirement? I don't think it's very harmful to put "debt relief agency" on your advertisements. I don't think you need to put it on your business card or on your stationery. Perhaps, however, you will decide to put it on your engagement letter the debtor will sign to hire you. You also might want to put a reference to it on your website to the extent you hold yourself out as representing chapter 7 consumer debtors with assets less than $150,000.

As to your role as a debtor's counselor intersecting with the client's need to incur additional debt, many caveats may be put forth. I have noticed in the sanctions decisions that judges don't just refer to Rule 11, Bankruptcy Rule 9011, and § 707(b). They also pick up the state canons of ethics in the district where the case is being tried. Georgia Rule of Professional Conduct 1.2 is straightforward, saying that a lawyer shall not counsel a client to engage in fraudulent conduct.[7] I believe this provision appears in the ethics code of virtually every state in the Union. As a lawyer, I cannot advise or recommend the incurring of debt that will not be repaid, but I can and should speak to the client and analyze what the repercussions of that potential course of action would be. In so doing, I will be in compliance with the Rule, § 707(b), and the Georgia canon.

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[7] GA. RULES OF PROF'L CONDUCT R. 1.2(d).

MR. PERCH: I don't really disagree with David on certain things. I understand from a practical standpoint why lawyers would feel they ought to comply with these provisions with respect to their advertising and client disclosure materials whether they agree or disagree with the position taken by Judge Davis in his order.

Judge Davis addressed that and said there was an importance to issuing his order. These are not provisions attorneys should feel they need to comply with solely out of an abundance of caution. Lawyers are entitled to have some clarity. The panelists here earlier this morning were talking about predictability. I guess this is a perfect example of lawyers who are entitled to have some clarity and predictability as to what is, in fact, expected of them.

Of course, whenever we talk about legislative history, I'm reminded of Winston Churchill's statement that one should observe neither laws nor sausages being made. We really have a question here of looking at the process of what ingredients we're going to put into that sausage. There was no vote on Senator Feingold's amendment. It was proposed along with a suitcase full of other amendments and withdrawn either the next day or the day after that. Therefore, there is no authority that would support drawing a conclusion as to the meaning of the statute because an amendment was put on the floor and then withdrawn before it was voted on. You can't say Congress rejected this. Congress never did anything. Senator Feingold threw it out there one day and pulled it back shortly thereafter.

Once again, I would suggest we run the conventional wisdom through the crucible of the principles of statutory interpretation. And also, while we're doing that, put our common sense hat on and say, "how can we really apply this to lawyers?"

MS. TURNER: Okay. Thank you. We'll move on to our second issue.

The second issue is whether BAPCPA requires more pre-bankruptcy investigation and inquiry by debtors' attorneys, and whether these changes are warranted. Before we turn to the panel, I will outline some of the changes BAPCPA made.

There's a new § 707(b)(4)(c) that says the signature of an attorney on a petition is a certification that the attorney has performed a reasonable inquiry into the circumstances that give rise to the petition. There is also a new § 707(b)(4)(d) which says the signature of an attorney on a petition is a

certification that the attorney has no knowledge, after an inquiry, that the information in the schedules filed of such petitioner is incorrect.

And then we still have Rule 9011, which remains the same. Rule 9011(a) is the signature requirement, which does not apply to schedules. Rule 9011(b), however, says by presenting to the court, whether by signing, filing, submitting, or advocating a petition, motion, or other paper, the attorney is certifying that, to the best of his or her knowledge formed after an inquiry reasonable under the circumstances, there's no improper purpose, that the position is warranted by existing law or non-frivolous argument for extension of the law, that the allegations have or will have evidentiary support after a reasonable opportunity for further investigation, and that the denials or factual contentions are warranted by the evidence.

I am told by some people involved in the process it is not on the table to change Rule 9011 at this point. So we're going to let David address whether these changes are warranted.

MR. BUTLER: An expert treatment of these changes with respect to potential attorney liability under § 707(b) is found in the American Bar Association's Paper for Attorney Discipline dated September 20th, 2005.[8] In that paper, the language of the statute is taken apart and the history of Rule 9011 is traced along with its amendments. The conclusion of the studied effort is that there is enough to guide us as lawyers and to motivate us to be extremely careful as we consult and advise chapter 7 debtors contemplating bankruptcy. My argument is that the removal of a word or two by Congress tracking the language of the rule is not that much of a material enhancement of the lawyer's duties.

Section 707(b)(4) requires that lawyers certify they have performed a reasonable investigation of the circumstances giving rise to the bankruptcy case and that the case, or a matter sought in the case, is legally warranted and well grounded in fact. I don't think that imposes a significantly different requirement from Rule 9011. And dropping the adjective "reasonable" before "inquiry" does not permit the lawyer to make a bare inquiry and be willfully blind to something that smells foul. This is the dreadful problem we see arising in criminal cases where the lawyer shuffles papers which mask over a fraudulent activity while turning a blind eye to what's going on. There the courts may well say, "You've facilitated that underlying transaction. As a

[8] Catherine E. Vance & Jimmy F. Dahu, *Attorney Liability Under § 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 2005 A.B.A. BUS. L. SEC. 1.

licensed attorney, do not tell me you did not know your client's intention and purpose."

I do not believe § 707(b)(4) should be read to require an exhaustive legal audit and verification of the debtor's filing information. That is to say, it does not require that a lawyer act as an accountant and audit, test, and verify everything that's put under his nose. The bottom line on the rule is that counsel's conduct will be examined in light of what a knowledgeable and intelligent lawyer would have done under those circumstances at the time. So the challenge will be for the lawyers in debtor clinics to not rest totally reliant upon their legal assistant's preparation over there in the clinic's intake section. With the new and existing computer research capabilities, it will not be difficult to spot a potentially fad faith filing or claim. And lawyers will be keen to heavily document the files of clients whose cases might raise those questions.

Additionally, I think lawyers should continue to expect to be held to what they should have known, but only at the time that they should have known it. Remember, lawyers have experience. They have training, they're intelligent, and they're able to discern if there's a lack of cohesion in the story that they're getting from their client.

Now, the offending language in § 707 says that the lawyer must certify she has determined that the petition is well-grounded in fact. The Task Force says the change is going to result in more litigation and an attendant rise in awareness of debtor's counsel. The language in § 707(b) is different, but it is not all that different from the prior decisions reached under Rule 9011. It does not require the lawyer to run about auditing each statement and each fact put forth by the debtor. But it certainly raises awareness because we know from the sanctions decisions that the judge is required to impose sanctions when a case is made for a lawyer's willful indifference to a client's abuse. She does not have to award sanctions, but she must make a finding, and the process may turn out to be more mechanical than one would think.

Dropping the adjective "reasonable" before "inquiry" doesn't represent any Congressional intent to permit the lawyer to make the bare inquiry I talked about. The bottom line is we lawyers are going to have the advantage of guidance from the sanctions cases replete with their analyses of the factors which constitute bad faith as well as what the elements of sanctionable conduct are. Without trying to put anybody too much at ease, I contend lawyers should keep doing what they have been doing and take extra precautions when they

are undertaking representation of chapter 7 debtors with assets less than $150,000 and peculiar debt to asset ratios.

MS. TURNER: Thank you, David. So, Frank, why are all the lawyers so scared of this? Why is it so horrible?

MR. PERCH: Let me start out by saying I would very much like for David to be right. But whenever somebody says, "Don't worry about it," my first reaction is to worry about it. That is essentially the conclusion of the American Bar Association task force—don't worry about it. We are operating under this statute without the guidance of a lot of court decisions and hardly any appellate decisions. I agree with what David said earlier, nobody really likes to be the first test case. So the question, therefore, is: what do you do as a practitioner to make sure you're on the right side of the line? Every consumer practitioner I've spoken with believes this statute requires them to do something more. I've sat down with a few of them and said: "Well, how do you deal with it?" And many of them are really at a loss. I think they're at a loss because what we're trying to discern here, through some very dark glasses, is how these statutes are going to be interpreted.

Once again, I would like for David to be right, but there are reasons to be concerned. The task force report dated September of 2005 was written without the benefit of the first wave of court decisions interpreting and applying BAPCPA. If you look at the first wave of court decisions defining and interpreting BAPCPA in the consumer area, most of them are about issues that arise at the beginning of a case, such as the credit counseling waiver issues, the automatic stay, and multiple filings. I think the bulk of those decisions take a strict, rigid approach towards the Act. Some judges taking a strict and rigid approach toward the Act acknowledge in their opinions they are taking such an approach only because they are required by statute to do so.

That returns us to two questions: Can we safely assume that removal of the word "reasonable" before "inquiry" has no meaning? Can we assume in a broader sense this entire exercise of Congress is somehow surplusage? Once again, that conflicts with the normal way we see judges interpret those kinds of issues. If Rule 9011 took care of all the problems, well, Rule 9011 is still here. This must be doing something more. And the struggle, therefore, is to come up with what that "more" is.

If you say Congress' intent was to codify Rule 9011 case law, what do you mean? Rule 9011 case law is not unitary. There are shades and nuances

among the circuits as to how Rule 9011 issues are addressed. So which circuit's Rule 9011 case law was intended to be codified? Is this, to go back to Neal and Ezra's discussion, another attempt to limit judicial discretion, to try and cement in place one particular interpretation of Rule 9011? Are we sure we know which interpretation it is?

It's very clear there are new requirements here. The requirement of the attorney certifying the accuracy of the schedules is new. Also, what does the new requirement of the attorney attesting to an adequate investigation of the circumstances that gave rise to the petition mean? If the debtor had health problems, do I need to review her medical records? Do I need to call her doctor? If I need to certify that the schedules are correct, as of what date? As of the date the debtor came to my office? As of the date of the petition? As of the date of the § 341 meeting? How do I do that? Do I have to visit the debtor's home and take pictures? Do I have to open the closet doors and the medicine cabinet? We know what a reasonable lawyer will do. But from the standpoint of a consumer lawyer, does that make you feel comfortable? Does that make it easier for you to go to sleep at night?

This is further complicated if indeed we are going to treat attorneys as debt relief agencies, because if attorneys are debt relief agencies the debt relief agency must enter into written contract with the client within five days. And how do those five days give the attorney enough time to conduct this type of investigation and determine whether they want to take the case, and in fact, enter into a contract with the client? The question may seem simple, but it raises some additional questions.

What do you do with a client who comes into your office who has a difficult case? This can be someone who has a prior filing and you've got to deal with what kind of automatic stay you can get. What about a consumer who is just straddling the line of the Means Test, particularly if the Means Test analysis is based on things that are not simple and direct like self-employment income? Or where the client comes to you at 4:30 p.m. on the first Monday of the month? And guess what happens on the first Tuesday of the month? Foreclosures. Now the lawyer has to scramble to get this client's petition filed and get them to some form of credit counseling before 10:00 in the morning. Lawyers now have to dot all those "i" and cross all those "t"s. Take a look at the case law and see what happens if they miss any of those hurdles. In the meantime, you have to conduct a reasonable investigation and, when you are

signing your name to the petition, feel comfortable that you can make that kind of a certification.

This is a topic that is creating more questions than answers. And I wish I had more answers to offer. I'll end where I began, which is that I would like to say David is right. I'm not sure that I can.

MR. BUTLER: Frank makes a very good point, however, I do not think we have any limitation on judicial discretion here. Judges are people of discretion. Their job is to interpret the statute and analyze the facts. Their experience will carry us through to an unsurprising result.

Again, perhaps I can correct a misperception. I don't think, as consumer lawyers representing chapter 7 debtors, that by signing the petition we certify the truthfulness and correctness of the debtor's schedule. What we certify is that after inquiry into the schedules we have no knowledge that they are untruthful. Turning a blind eye will not work. Normally, it will not work to say to the judge, "My paralegal handled this and I had very little time." We must admit, notwithstanding all the ambiguity and the bad English in the statute, the U.S. Trustee will continue to pursue petition preparers and attorneys because there's a message in here from Congress that she should do so.

I think you're going to see the U.S. Trustees and their assistants taking a closer look at attorney misconduct. So I think lawyers need to look at their engagement forms and rewrite them in view of what the statute is saying. But I do believe the lawyer controls the commencement of the running of the five day period because the trigger is pulled only when I start giving advice. So at the end of five days from that, I better have an engagement letter in my file with the required disclosures as to terms, payments, when the representation starts and ends, etc. But, as the lawyer, I do control the start of the five day period.

So frequently, I will spend an hour or two with a client just gathering information without giving any advice. Bankruptcy lawyers do this anyway as a matter of course. They put together a lot of information pretty quickly and can then draw some empirical conclusions right away. If the situation is rattling at them, they know it may be a rattlesnake, and I submit they can tell better than anybody else. I think we know when we start giving advice from the legal malpractice cases, and we can be careful not to do that until we're ready to assess all the information.

MS. TURNER: Okay. We'll move on to the third topic. The final topic is whether, and to what extent, debtors' attorneys can advise potential debtors to incur more debt in contemplation of bankruptcy or to convert non-exempt assets into exempt assets.

The first half of this issue assumes attorneys are debt relief agencies. As already stated, § 526(a)(4) provides that a debt relief agency shall not advise an assisted person to incur more debt in contemplation of filing bankruptcy or to pay the attorney's fee.

The second half of the question about converting non-exempt assets into exempt assets is an old issue. We've had that issue for a long, long time. However, there is a new twist in the new law, and that is § 522(o). It provides that the value of an interest in a homestead is reduced to the extent such value is attributable to any portion of any property the debtor disposed of during the ten years prior to bankruptcy with the intent to hinder, delay, or defraud a creditor, and that the debtor could not otherwise have exempted or to the extent the debtor couldn't otherwise have exempted.

MR. PERCH: To some extent this builds upon the issue raised by the debt relief agency litigation over whether and to what extent Congress can, in the Code, create federal rules for lawyers' conduct that may conflict with what state bars permit and require, and in addition, whether Congress can constitutionally regulate the privileged communication between lawyers and their clients outside conduct that would constitute fraud, crime, or some variation on perjury.

Further, to what extent are statutes so vague in terms of the standards that they impose upon lawyers that they do not provide adequate due process? The difficulty presented here is that these provisions go beyond what we all would agree is non-controversial. No one has any problem with the rule that lawyers should not advise their clients to lie, cheat, or steal. But the new statute, as written, also bars lawyers from talking with their clients about things that are legal and non-fraudulent.

"Loading up" is when a consumer incurs unsecured debt—credit card debt, for example—on the eve of bankruptcy with the intent to discharge that debt in bankruptcy. We all agree counseling a client to load up is improper. But the way the statute is worded, it also would preclude advising the client to incur debt that the client knows they are going to repay and fully intends to repay. It prevents advising a client to incur secured and non-dischargeable debt.

Let's say a client walks into your office and they've got a daughter that is about to start college. You are thinking about making sure that, while they take care of their other financial problems, they can finance their daughter's college education. You know they're going to have greater difficulty getting loans for their daughter's education if they just filed chapter 13 a couple of weeks ago. So you suggest, "This would be a good time to take out the maximum parent loan so you can be sure that your daughter's tuition is paid. Of course, Mr. and Mrs. Smith, you'll need to pay that debt back. It's not dischargeable. You're not going to get out of that in bankruptcy." That's something they can do legally and it's not fraudulent.

There are a lot of things that are debt in a technical sense that are potentially covered by this. If your client is about to sign a new lease for an apartment, that's incurring a debt. Let's say your client operates a business. It's not out of the realm of possibility that this could be someone who meets the definition of "assisted person." So you have an assisted person who is a business proprietor. Can you counsel your client to continue receiving inventory from vendors or from suppliers on the same terms? If you cannot advise your clients as before on how to keep their business running, what do you do? There's even a problem created under the Model Rules of Professional Conduct. Lawyers have a duty to provide competent and complete advice.

A lot of clients are coming to a bankruptcy lawyer for advice about their financial problems. Bankruptcy is one of the options they're considering; it's not the only option. If you can't talk about strategic use of debt, you're prevented from telling your client about all of the available options to deal with his problem.

You have a statute that puts a gag order on lawyers providing competent advice to their clients to do things that are legal and non-fraudulent. It's almost like a don't ask, don't tell rule because even if the client initiates the conversation I can't talk about strategic use of debt. The client's next question is, "Who can advise me on whether or not I should take out that loan?" I don't know who to send them to because anybody who gives that advice becomes a debt relief agency and is thus prohibited from giving advice on strategic use of debt. So I do not understand how I can competently advise my client and do what every good lawyer should do, which is talk about all of the legal and non-fraudulent options available to resolve the client's problem under the current statute.

Now, just a quick minute on the issue of converting non-exempt assets to exempts assets. This is not a new issue other than the ten year reach back for transfers to create homestead equity. Pre-BAPCPA law does not create a per se rule that converting non-exempt assets into exempt assets is fraudulent. The exemption doesn't create a per se rule either—it merely reduces the amount of the exemption. What that means for clients is if they want to keep their house, and they have equity which exceeds the exemption, they'll need to somehow put that equity back into the case.

Are you violating the law if your response to that dilemma is to suggest the following? Assume a client has equity in their house they cannot exempt. What if the client takes out a home equity loan secured by the house? The client is going to pay it back. What if the client takes out a home equity loan to reduce the equity to a level that basically does not include the fraudulent transfer? Let's say the client's going to use the proceeds from that home equity loan to payoff non-dischargeable debt. Well, does this mean that we can't advise our client to do that? Does this mean that we have to tell our client, I can't tell you how to save your home?

MS. TURNER: Okay. Thank you. David, what is your opinion on this issue?

MR. BUTLER: I just had a picture flash before me. It was a cartoon of a consumer debtor lawyer standing up before a bankruptcy judge saying, "Yes, I told my client to draft my retainer fee on his Visa card, but § 526(a)(4) is unconstitutional." We're not going to go there. We are going to maintain the standard of care for that standard of conduct contemplated by the rules and ethical decisions. We're going to be wise lawyers and good counselors with an eye on our role as counselor to the client and an eye on our role as officer of the Court. And we are not going to be gagged by a misinterpretation of the statute.

Bankruptcy judges will continue to construe statutes to give effect to a rational constitutional meaning, especially where wrongful acts are concerned. They are not going to limit the speech of lawyers to clients. There is a body of law that Congress was aware of when it passed the statute, that the judges remain aware of. And words have legal terms of art. We all know about debtors who prior to bankruptcy have "loaded up." We have seen the cases where the client charges debt with no intention of repaying it. That is typical of the basic problem we're looking at here. Every statute has a class of proscribed activities. I would submit to you that the words "in contemplation"

raise the red flag as to those debts the client and the lawyer know will not be repaid, but will instead be discharged in the bankruptcy case.

Frank's excellent example of a debtor borrowing out the value of his residence above his allowable exemption to pay off a non-dischargeable debt really frames the issue well. The lawyer may wish to avoid counseling a client to incur that kind of debt in contemplation of bankruptcy by saying, "You know, I have seen situations before where debtors have borrowed money and paid off a non-dischargeable debt. The repercussions of that are that the person who receives the money may have to return it as a preference and so forth. . . ." So I am not counseling my client to incur debt in contemplation of bankruptcy. I am only analyzing the facts, which presents the client with choices. And I am documenting what I said. I find that in every regulatory statute there are victims that need to be protected. The lawyer crosses that line when he goes from analyzing and discussing consequences into really taking the initiative and even constructing the means to accomplish the fraudulent transfer.

I remember, to my horror, researching another topic while I was a young lawyer. I went to the bankruptcy criminal statute and looked at the annotations. I was stunned by the number of indictments against lawyers where those lawyers had been found complicit in counseling a client to commit a fraudulent transfer, even coming up with the idea. When the heat gets on, through a disgruntled creditor and the U.S. Attorney, what happens? The debtor flips on his lawyer and points the finger at the lawyer as the idea man. The lawyer is a much bigger fish for a U.S. Attorney to fry. I contend that the same dynamic tension is at work here with the statute and rule as regards the need for a heightened awareness of what we are ethically prohibited from doing as lawyers.

It's my view that, as long as you adhere to the Georgia Code of Professional Conduct, you'll be safe. I don't think we should say the statute is vague either. Here, the statute is directed at the one who counsels the client and provides the means to effect the incurrence of debt that will not be repaid or will result in some irregular diminution of the bankruptcy estate to the detriment of other creditors by the commission of some illegal act. So rest easy, but with a heightened awareness that the judges are going to look as hard at these things just as they have always looked at them.

MS. TURNER: Thank you, David. Frank, you've got the last word on this issue.

MR. PERCH: I think David just said do not worry about it. I've said what my response to that tends to be. I think the two most difficult situations created by this are, first of all, the situation where bankruptcy is not the only option being discussed. If you have a client who doesn't want to file bankruptcy, and the client wants to take a last shot at doing something to avoid bankruptcy, but in the conversation you map out what will happen if the strategy fails, does that constitute a discussion "in contemplation of bankruptcy?"

Second, the statute does not address the situation where it makes sense to incur debt and where it's not fraudulent. I talked about a couple of them. Another one is the situation where a client comes to you and has a car that is on its last legs. It starts about one out of every three times you turn the key. And therefore, obviously, it's not a valuable asset to the estate. The debtor has a twenty-mile commute to work. They need to keep working in order to earn money and therefore pay on their chapter 13 plan. So you might suggest to that client, "You should go out and replace that car now because you can go out and buy a six-year-old used car and get a reasonable interest rate on your loan." The creditor is not going to put the client into some higher rate after the client files assuming the creditor agreed to make the loan.

So you have a situation where it's going to cost the client more money to replace the car postpetition. Where is that money going to come out of? It's going to come out of the disposable income that would otherwise be available to the unsecured creditors under that chapter 13 plan. It's going to cost the client money; it's going to cost the creditors money if the statute says I can't tell the client to go out and replace that clunker car before he files. Does that make any sense at all?