

# GAG ME WITH A RULE OF ETHICS: BAPCPA'S GAG RULE AND THE DEBTOR ATTORNEY'S RIGHT TO FREE SPEECH

## INTRODUCTION

Both the congressional majority and President George W. Bush lauded the passing of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”)<sup>1</sup> as a giant step towards curbing bankruptcy fraud.<sup>2</sup> Motivated by the creditor lobby and an overriding sentiment that the bankruptcy system was being abused, Congress intended for the BAPCPA to not only regulate debtor fraud, but also the attorneys that assist consumer debtors.<sup>3</sup> The stated purpose of the BAPCPA was to “improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”<sup>4</sup>

However, instead of addressing the original sources of bankruptcy fraud,<sup>5</sup> Congress enacted provisions that potentially implicate attorneys’ rights to free speech under the First Amendment. The most troublesome restriction on attorneys is the Debt Relief Agency provision, § 526(a)(4) (hereinafter referred

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<sup>1</sup> Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005). All references hereinafter referring to the “Bankruptcy Code” or “Code” refer to bankruptcy law codified at 11 U.S.C.

<sup>2</sup> See NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS Ch. 5 (1997) (hereinafter “THE COMMISSION REPORT”). President George W. Bush stated at the BAPCPA signing ceremony, “The act of Congress I sign today will protect those who legitimately need help, stop those who try to commit fraud, and bring greater stability and fairness to our financial system.” Press Release, White House Press Office, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005) available at <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html>.

<sup>3</sup> See George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N.D. L. REV 297, 304 (2006).

<sup>4</sup> H.R. REP. NO. 109-31, at 1 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89.

<sup>5</sup> Attorneys were not originally found to be the source of abuse. The National Bankruptcy Review Commission issued the initial report on how the bankruptcy system could improve, and its findings did not include regulating attorneys. THE COMMISSION REPORT, *supra* note 2, at 81. Instead, the Commission made recommendations as to what it felt was the source of the abuse: false debtor claims and creditor misconduct. *Id.* It was the Minority Report issued by four dissenting Commission members that focused solely on debtors and their attorneys. *Id.* at ch. 5. See also Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 284–85 (2005).

to as the “Gag Rule”),<sup>6</sup> which forbids a debt relief agency from advising a client-debtor to incur additional debt “in contemplation of filing for bankruptcy.”<sup>7</sup> This content-based restriction implicates free speech, because it is entirely legal to incur additional debt, and, thus, to the extent that the term “debt relief agency” is interpreted to apply to attorneys, the provision forbids them from providing lawful advice to their client-debtors.<sup>8</sup> Moreover, in cases where incurring additional debt is the most prudent action for a debtor to take, the Gag Rule would potentially restrict attorneys from fulfilling their professional and ethical responsibility to provide competent advice.<sup>9</sup>

Attorneys should be concerned about the Gag Rule because it potentially disrupts the way that they advise their clients. Specifically, if applied to attorneys, the Gag Rule now forbids an attorney from advising a client to take actions that are not only legal, but also advantageous.<sup>10</sup> Prior to the BAPCPA, attorneys often advised their clients to refinance a mortgage or borrow money from a relative before filing for bankruptcy.<sup>11</sup> Under the Gag Rule, however, this advice is now not only illegal but may also subject attorneys to sanctions.<sup>12</sup> As one scholar noted, “[M]any consumer bankruptcy attorneys will ponder removing themselves from the consumer bankruptcy practice to avoid the debt relief agency provisions of the Code, potentially leaving debtors less informed about the bankruptcy process and more vulnerable to fraud.”<sup>13</sup>

As of March 2007, seven separate lawsuits had been brought against the U.S. Attorney General<sup>14</sup> and the U.S. Trustee’s office<sup>15</sup> (collectively, the

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<sup>6</sup> 11 U.S.C.A. §526(a)(4) (West 2007). Jean Braucher coined the term “Gag Rule” used throughout this Comment. Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 138–39 (2007).

<sup>7</sup> 11 U.S.C.A. § 526(a)(4).

<sup>8</sup> *Id.*

<sup>9</sup> Attorneys have an ethical responsibility to provide the most competent advice possible to their clients. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (1989). Furthermore, attorneys have an ethical duty to work with clients to create reasonable plans on how to pay for services. See *id.* R. 1.5.

<sup>10</sup> See *infra* Part II.B.

<sup>11</sup> See *infra* Part II.B.

<sup>12</sup> See *infra* Part II.A.

<sup>13</sup> Robert Wann Jr., Note, “Debt Relief Agencies”: Does the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Violate Attorneys’ First Amendment Rights?, 14 AM. BANKR. INST. L. REV. 273, 300 (2006).

<sup>14</sup> The U.S. Attorney General was named as the Defendant in the suits for his role in enforcing the sanctions imposed by the Gag Rule.

<sup>15</sup> The Office of the U.S. Trustee serves as a local branch of the Department of Justice. One of its primary roles is to monitor abuse of the bankruptcy system. The BAPCPA significantly broadened the scope and responsibility of the U.S. Trustee’s office. For a description of the role of the U.S. Trustee, see generally

“Government”) challenging the constitutionality of the Gag Rule under the First Amendment.<sup>16</sup> The plaintiffs in each case, primarily attorneys, claim that the Gag Rule is a content-based restriction subject to the most rigid constitutional analysis.<sup>17</sup> In response, the Government has argued that the provision should be considered an ethical rule,<sup>18</sup> which would arguably entail reduced scrutiny under the First Amendment.<sup>19</sup>

Since the passing of the BAPCPA, several scholars have analyzed whether the Gag Rule implicates attorney free speech under the First Amendment.<sup>20</sup> This Comment differs in that it focuses on the Gag Rule within the lexicon of legal ethics. More specifically, this Comment examines whether an ethical rule designation, regardless of context, warrants a less rigorous constitutional

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ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 135–36 (Aspen Publishers 2006).

<sup>16</sup> See *Geisenberger v. Gonzales*, 346 B.R. 678 (E.D. Pa. 2006); *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006); *Jackson v. McDow* (*In re Jackson*), No. 05-44941-B, 2006 U.S. Dist. LEXIS 68927 (D.S.C. Sept. 25, 2006); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758 (D. Minn. 2007); *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006); *In re Reyes*, 361 B.R. 276 (Bankr. S.D. Fla. 2007); *Zelotes v. Adams*, 363 B.R. 660 (D. Conn. 2007). Four courts have already held that the Gag Rule is unconstitutional. See *Hersh*, 347 B.R. at 28 (finding the Gag Rule in violation of both the balancing test and strict scrutiny); *Milavetz*, 355 B.R. at 769 (holding that the Gag Rule fails even a more lenient constitutional standard); *In re Reyes*, 361 B.R. at 281 (finding that the Gag Rule does not pass constitutional muster); *Zelotes*, 363 B.R. at 668 (placing an injunction on the enforcement of sanctions until the Gag Rule “is amended or modified”). *But see In re Jackson*, 2006 U.S. Dist. LEXIS 68927, at \*5 (holding that because plaintiff sought a declaratory judgment, there was no justiciable controversy for review); *Geisenberger*, 346 B.R. at 691 (dismissing case for lack of standing because the Government had not brought an action against the plaintiff, therefore, there was no as-applied challenge before the court); *Olsen*, 350 B.R. at 915 (holding that a challenge to the Gag Rule was legitimate and needed to be addressed, but “that time will only be appropriate with a fully-realized as-applied challenge”).

<sup>17</sup> *E.g.*, Memorandum of Law of Plaintiff at 3, *Milavetz*, 355 B.R. 758 (No. 05-CV-2626) (“The standard of review on lawful and truthful attorney advice to clients is strict scrutiny.”); Plaintiffs’ Response to Defendants’ Motion to Dismiss at 2, *Olsen*, 350 B.R. 906 (No. 05-6365-HO) (“[P]rofessional speech, such as that restricted by § 526(a)(4), is entitled to the highest level of constitutional protection.”).

<sup>18</sup> *E.g.*, Reply in Support of Motion to Dismiss at 1, *Milavetz*, 355 B.R. 758 (No. 05-CV-2626) (“[The Gag Rule] does not violate the First Amendment because it is an ethical rule that satisfies the balancing test applied to such rules.”); Motion to Dismiss at 10, *Olsen*, 350 B.R. 906 (No. 05-6365-HO) (“[B]ecause this provision is an ethical rule, there is no basis for subjecting it to “strict scrutiny review.”); Memorandum in Support of Federal Defendant’s Motion to Dismiss at 20, *Hersh*, 347 B.R. 19 (No. 3-05-CV-2330-N) (“[The Gag Rule] can be seen as a method for protecting the integrity and fairness of the bankruptcy system.”).

<sup>19</sup> See *infra* Part III.B.4. The Government bases its assertion on the less restrictive balancing test applied to an ethical rule in *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1066 (1991).

<sup>20</sup> See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571 (2005) (noting that the Gag Rule is the strongest basis for a constitutional challenge against the BAPCPA because it imposes a content-based restriction on attorney speech); see also Wann, Jr., *supra* note 13 (arguing that the courts should apply the doctrine of private speech to the Gag Rule and that the provision would ultimately fail strict scrutiny).

scrutiny than is typically applied to content-based restrictions. This Comment argues that the Gag Rule is not an ethical rule. Calling the provision an ethical rule would position Congress in the new, unprecedented role as a legislator of attorney ethics.<sup>21</sup> Secondly, even if the Government is successful in convincing the courts that the rule qualifies as an ethical rule, the Gag Rule would still be subject to and would fail strict scrutiny as an unconstitutional restriction on attorneys' First Amendment rights.

Part I of this Comment traces the history of the BAPCPA to provide context for the Gag Rule, as well as the broader concerns for bankruptcy practitioners. Part II describes the operation of the Gag Rule and its constitutional implications for attorney free speech. Part III determines whether the Gag Rule is an ethical rule for First Amendment purposes and reviews the Supreme Court's treatment of both content-based and ethical rule restrictions on an attorney's First Amendment right to free speech. Part IV analyzes the constitutionality of the Gag Rule under a strict scrutiny analysis. The Comment concludes that the Gag Rule is not an ethical rule, but is an unconstitutional infringement on attorney free speech.

## I. A BRIEF HISTORY OF THE BAPCPA AND THE DEBT RELIEF AGENCY PROVISIONS

During the eight years of hearings that preceded the passage of the BAPCPA, Congress heard testimony regarding rampant abuse of the bankruptcy system.<sup>22</sup> Judges, legislators, academics, and trustees described consumer fraud,<sup>23</sup> attorney misconduct,<sup>24</sup> and the emergence of so-called "bankruptcy mills."<sup>25</sup> These testimonials only compounded Congress's

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<sup>21</sup> See *infra* Part III.A.1.

<sup>22</sup> Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 501–62 (2005).

<sup>23</sup> Congress heard testimony that the bankruptcy system "has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse." H.R. REP. NO. 109-31, at 5 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 92.

<sup>24</sup> Attorney misconduct was described as twofold: attorneys "lur[ing] customers into bankruptcy unnecessarily" and failing to provide clients with appropriate information about filing. See 151 CONG. REC. S2472 (2005); *Bankruptcy Reform Act of 1998: Part 1, Hearing on H.R. 3150 before the H. Comm. on the Judiciary*, 105th Cong. 15 (1998) (hereinafter *Hearing on H.R. 3150*).

<sup>25</sup> Congress sought an amendment that would "crack down on 'so-called bankruptcy mills, where large volumes of cases are handled and where [bankruptcy] lawyers allegedly don't see their clients until a court hearing." Wann, Jr., *supra* note 13 at 274 (quoting Congressman Jerry Nadler). The BAPCPA would "allow [Congress] to clamp down on bankruptcy mills that make their money by advising abusers on how to game the system." See Jensen, *supra* note 22, at 567 (quoting President George W. Bush). Congressman James Moran

anxiety about the stark rise in the number of bankruptcy filings.<sup>26</sup> Consumer cases, in particular, remained the focus of the perceived abuse.<sup>27</sup> In 1997, officials estimated that consumers discharged more than \$44 billion of debt, which amounted to a loss of \$110 million every day.<sup>28</sup> Reimbursing these losses to creditors and to the economy taxed every U.S. household roughly \$400 per year.<sup>29</sup> Facts such as these persuaded Congress to pass the most comprehensive revision of U.S. bankruptcy law in more than twenty-five years.<sup>30</sup>

From the beginning, the bankruptcy bar uniformly criticized the “sweeping” BAPCPA provisions as acquiescence to creditors with potentially dangerous repercussions for both attorneys and their clients.<sup>31</sup> One of the bankruptcy bar’s main criticisms was that the BAPCPA would increase the liability of bankruptcy attorneys.<sup>32</sup> As one judge noted, “[i]t would seem it is with this lens that Congress viewed [consumer debtors and their attorneys]—as *moral equivalents to ‘shoplifters’*—in enacting the BAPCPA. In so doing, it

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stated that the most common complaint of people who file for bankruptcy is a lack of information and concern from their attorneys. *The Consumer Bankruptcy Reform Act: Seeking Fair and Practical Solutions to the Consumer Bankruptcy Crisis: Hearing on S.1301 Before the S. Comm. on the Judiciary*, 105th Cong. 29 (1998).

<sup>26</sup> From 1994 to 2004, the number of bankruptcy filings had nearly doubled to more than 1.6 million cases filed each year. H.R. REP. NO. 109-31, at 4 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 96.

<sup>27</sup> *Id.* Congress concluded that an “increase in consumer bankruptcy filings has adverse financial consequences for our nation’s economy.” *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See Steve Seidenberg, *Strange New World*, ABA JOURNAL, Dec. 21, 2006 at 49, available at <http://www.abajournal.com/magazine.strange.new.world>.

<sup>31</sup> See *In re Attorneys at Law and Debt Relief Agencies*, 353 B.R. 318, 320 (S.D. Ga. 2006) (“[The Code’s] sweeping language has not gone unnoticed by the academic and legal community. Scholars began scrutinizing the proposal in its infancy, and, by the time the BAPCPA became effective, an ever-growing chorus of disapproval could be heard.”). See also *In re Sosa*, 336 B.R. 113, 114–15 (Bankr. W.D. Tex. 2005) (“To call the act a “consumer protection” act is the grossest of misnomers. . . . Those responsible for the passing of [BAPCPA] did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had their own agenda. . . . It should be obvious to the reader at this point how truly concerned Congress is for the individual consumers of this country. Apparently, it is not the individual consumers of this country that make the donations to the members of Congress that allow them to be elected and re-elected and re-elected and re-elected.”).

<sup>32</sup> The new provisions force attorneys to submit over thirty forms in a typical case, to attest to the debtor’s ability to make future payments, and to certify the accuracy of the debtor’s assets and liabilities, under harsh penalty. See R. Larson Frisby, *Independence of the Legal Profession: Bankruptcy Attorney Liability*, Governmental Affairs Office of the American Bar Association, available at <http://www.abanet.org/poladv/priorities/bankruptcy.html>.

created a law that is sometimes self-executing, inflexible, and unforgiving.”<sup>33</sup> The American Bar Association (“ABA”) Journal reported that as a result of the harshness of the BAPCPA, many attorneys who once provided consumer bankruptcy advice had abandoned their practice.<sup>34</sup> For the attorneys who have maintained their consumer bankruptcy practice, confusion and the threat of sanctions have driven up the attorneys’ pricing structures, thus making it more difficult for already-strapped debtors to obtain good legal advice.<sup>35</sup>

Another criticism of the BAPCPA was that it was poorly drafted and that courts would face “interpretive challenges” to its ambiguous language.<sup>36</sup> Much of the new legislation remains confusing even to seasoned bankruptcy attorneys and judges.<sup>37</sup> According to the vice chair of the Consumer Bankruptcy Committee for the ABA, most of the difficulty exists in the consumer arena and, as a result, the predictability of a consumer bankruptcy proceeding under the BAPCPA is similar to “flipping a coin.”<sup>38</sup> Pleas for change came from the ABA, which drafted several amendments for congressional approval that would have removed any ambiguous language from the bill.<sup>39</sup> Additionally, in September 2005, Senator Jon Kyl prepared a draft bill entitled the “Bankruptcy Reform Technical Amendments Act of 2005” that contained ABA-supported language reversing the ambiguous consumer debtor provisions.<sup>40</sup> Although this bill circulated through both the Senate and House Judiciary Committees, it has not been formally introduced.<sup>41</sup>

Criticism of the BAPCPA’s harshness and ambiguity highlights the potential problems that attorneys may encounter with the Gag Rule.<sup>42</sup> If applied to attorneys, the Gag Rule would impose significant sanctions for even minor violations of the provision.<sup>43</sup> These sanctions reflect a belief in

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<sup>33</sup> *In re Ott*, 343 B.R. 264, 266 (Bankr. D. Colo. 2006).

<sup>34</sup> See Seidenberg, *supra* note 30, at 51.

<sup>35</sup> See *id.* at 50.

<sup>36</sup> See Singer, *supra* note 3, at 304 (“The case law construing the changes to the law over the last twelve months or so has underscored the interpretive difficulties encountered by courts and attorneys when dealing with many of the new provisions.”).

<sup>37</sup> See Seidenberg, *supra* note 30, at 51; see also *In re Reyes*, 361 B.R. 276, 279 (Bankr. S.D. Fla. 2007) (stating that “the experts who drafted BAPCPA are entitled to a failing grade in Legislative Drafting 101”).

<sup>38</sup> As evidence of this confusion, Congress has passed 300 pages of technical corrections since the enactment of the BAPCPA. See Seidenberg, *supra* note 30, at 51.

<sup>39</sup> See Frisby, *supra* note 32.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Additionally, at the time of writing this Comment, Congress has not scheduled any hearings or markups for a comprehensive reform of the ambiguous BAPCPA language. *Id.*

<sup>42</sup> See Wann, Jr., *supra* note 13, at 273.

<sup>43</sup> See *infra* Part II.A.

Congress that bankruptcy attorneys commonly seek to defraud the system by advising their clients to incur additional debt.<sup>44</sup> In light of this, even advice given in the best interest of the client will be met with harsh penalties.<sup>45</sup> Furthermore, attorneys are unsure whether, under the ambiguous language in the statute, they even qualify as debt relief agencies.<sup>46</sup> This matter is presently being adjudicated in district courts across the country.<sup>47</sup> Regardless of the outcome, it is for these reasons that authorities warned that the Gag Rule would “represent the beginning of a constitutional struggle between consumer bankruptcy attorneys and the federal government.”<sup>48</sup>

## II. THE GAG RULE

### A. Section 526(a)(4)—The Gag Rule

The BAPCPA’s most problematic provision for attorney free speech is the Gag Rule, contained in § 526(a)(4) of the Code.<sup>49</sup> This provision prohibits a debt relief agency from advising a client-debtor to incur additional debt in contemplation of filing for bankruptcy.<sup>50</sup> Specifically, the Gag Rule states:

A debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.<sup>51</sup>

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<sup>44</sup> THE COMMISSION REPORT, *supra* note 2, at 81 (citing The Minority Report which blamed debtor attorneys for threatening the bankruptcy system).

<sup>45</sup> See *infra* Part II.A.

<sup>46</sup> See *infra* Part II.A and note 53; see also Wann, Jr., *supra* note 13, at 273 (“No interpretive question has a more significant impact on consumer bankruptcy attorneys than whether they are ‘debt relief agencies.’”).

<sup>47</sup> For more information on the recent cases that debate this issue, see generally Wann, *supra* note 13. See also *infra* note 53.

<sup>48</sup> Wann, Jr., *supra* note 13, at 300.

<sup>49</sup> 11 U.S.C.A. § 526(a)(4) (West 2007).

<sup>50</sup> As explained in more detail in Part II.B, there are many instances when the incurrence of additional debt prior to a bankruptcy filing is a legal action.

<sup>51</sup> 11 U.S.C.A. § 526(a)(4) (West 2007).

Although the language defining the “debt relief agency” classification is somewhat ambiguous,<sup>52</sup> most commentators and courts have interpreted the classification to include attorneys.<sup>53</sup>

In passing the Gag Rule, Congress aimed to address two problems. First, Congress hoped to stop debt relief agencies from advising clients about how to discharge additional debt, which dilutes the amount that creditors will receive in a payout.<sup>54</sup> Second, Congress hoped to prevent manipulation of the bankruptcy means test, which determines whether a debtor qualifies for a chapter 7 filing.<sup>55</sup> By incurring additional debt, the debtor’s position looks “worse,” thereby making it likely that the debtor will pass the means test.<sup>56</sup>

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<sup>52</sup> See 11 U.S.C.A. § 101(12A) (West 2007). Section 101 of the Code defines a debt relief agency as “any person who provides any *bankruptcy assistance* to an *assisted person* in return for the payment of money or other valuable consideration.” *Id.* The Code defines “bankruptcy assistance” as “any goods or services . . . provided to an assisted person with the . . . purpose of providing information, advice counsel, document preparation . . . or . . . legal representation” regarding a bankruptcy proceeding. § 101(4A). An “assisted person” is defined as one who primarily owes consumer debts. § 101(3). However, the word “attorney” is never used in the Code’s definition of a debt relief agency.

<sup>53</sup> In order for the Gag Rule to implicate attorney free speech, attorneys must be classified as debt relief agencies under the Code. Although it is somewhat ambiguous, there is evidence that Congress intended for the debt relief agency classification to include attorneys. First, Congress did not specifically include the word “attorney” in the definition, but the word “attorney” was mentioned 164 times throughout the debate records. H.R. REP. NO. 109-31, at 4 (2005) (e.g. bankruptcy abuse was identified with “misconduct by *attorneys*.”; Congress sought to “strengthen professionalism standards for *attorneys*.”). Second, several courts interpreting the statute according to its plain meaning held that § 101 classified an attorney who provides a consumer debtor with legal representation in a bankruptcy matter as a debt relief agency. See *Olsen v. Gonzales*, 350 B.R. 906, 912 (D. Or. 2006) (“[I]t is the plain language of the Act that leads to the conclusion that attorneys are to be included in the definition of ‘debt relief agency.’”); see also *Hersh v. United States*, 347 B.R. 19, 22 (N.D. Tex. 2006) (citing that the omission of the word “attorney” from the list of exceptions indicated that “if Congress had wanted attorneys excluded from the term ‘debt relief agency’ . . . it surely would have taken this opportunity to exclude them from what otherwise they are so plainly within.”). But see *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 768 (D. Minn. 2007) (holding that the debt relief agency classification does not include attorneys based on the doctrine of constitutional avoidance, which states that the court “must opt for a construction which avoids grave constitutional questions.”) Lastly, the official position of the U.S. Trustee is that attorneys are debt relief agencies under the Code. See Reply Brief of United States Trustee at 12–15, *In re Attorneys at Law and Debt Relief Agencies*, 353 B.R. 318 (S.D. Ga. 2006) (No. 05-00400); see also Lisa Tracy & P. Matthew Sutko, *New Bankruptcy Law Helps Ensure Consumer Debtors Receive Competent Bankruptcy Services*, THE UNITED STATES ATTORNEYS’ BULLETIN, Aug. 2006, at 24, 24, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab5405.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5405.pdf). Based on these three grounds, it is likely that attorneys will be faced with the limitations on free speech imposed by the debt relief agency provisions, including the Gag Rule.

<sup>54</sup> *Hearing on H.R. 3150, supra* note 24.

<sup>55</sup> *Id.* One of the BAPCPA’s most striking additions to the Code was the means test, which determines whether a debtor qualifies for bankruptcy. 11 U.S.C.A. § 707(b)(2) (West 2007). The test measures a debtor’s ability to repay debts in the sixty months following the bankruptcy filing. If the debtor’s “current monthly income,” less allowable expenses, would permit the debtor to pay either (a) 25 percent of the non-priority

Under § 526(c), violators of the Gag Rule are subject to several sanctions.<sup>57</sup> Upon a finding of either an intentional or negligent violation, the provision allows the debtor to recover any reasonable attorney fees as well as any fees incurred from the bankruptcy.<sup>58</sup> The State may also bring an action to enjoin the debt relief agency from further violation, to recover actual damages, and to collect reasonable attorney fees.<sup>59</sup> Third, the court, either *sua sponte* or upon motion by the U.S. Trustee, may either enjoin violators from providing legal advice or impose “an appropriate civil penalty” against such persons.<sup>60</sup>

### *B. Issue Raised by the Gag Rule*

The Gag Rule prohibits an attorney, as a debt relief agency, from advising a client to “incur more debt” either in the contemplation of filing for bankruptcy or for the purpose of paying attorneys’ fees in connection with the bankruptcy filing.<sup>61</sup> This provision arguably restricts an attorney from providing lawful advice to a client. The failure to abide by the provision results in § 526(c) sanctions.

The example of a new car loan is illustrative. John the Debtor’s car is on its last leg. John needs a car to get to work, which is crucial for his ability to pay creditors in a chapter 13 reorganization plan. In short, John needs to buy a new car. Not only does John intend to pay back the entire new car loan, but he also plans to reaffirm the debt once he files for bankruptcy. His attorney, an expert in bankruptcy law, knows that if John waits until after filing to get a car loan, he may face extremely high interest rates or even the total inability to buy

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unsecured debt or \$6,000 (whichever is greater) or (b) \$10,000, then the case is presumed to be an abuse of chapter 7. *Id.*

<sup>56</sup> *Hearing on H.R. 3150, supra* note 24.

<sup>57</sup> 11 U.S.C.A. § 526(c) (West 2007).

<sup>58</sup> § 526(c)(2) (“Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys’ fees and costs if such agency is found, after notice and a hearing, to have . . . intentionally or negligently failed to comply with any provision of this section . . . or disregarded the material requirement of this title.”).

<sup>59</sup> § 526(c)(3) (“Whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State may bring an action to enjoin such violation; may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violating.”).

<sup>60</sup> § 526(c)(4) (“If the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may enjoin the violation of such section; or impose an appropriate civil penalty against such person.”).

<sup>61</sup> § 526(a)(4).

a new car.<sup>62</sup> However, if the attorney advises John to purchase the car prior to filing, the attorney arguably violates the Gag Rule.

Any advice that the attorney gives to John pertaining to payment of her services may also violate the Gag Rule.<sup>63</sup> Prior to the BAPCPA, she often told clients to borrow money from relatives in order to pay for her services.<sup>64</sup> However, she is no longer able to provide this advice under the Gag Rule. If John does not have the money, he may resort to using a petition preparer instead.<sup>65</sup> The attorney knows that bankruptcy filings are complicated and believes that good legal service is better than a bankruptcy petition preparer. In this scenario, either John receives inadequate bankruptcy advice or the attorney may reasonably worry that she may never get paid.<sup>66</sup>

As this example demonstrates, there are legitimate reasons for an attorney to advise a client-debtor to incur additional debt.<sup>67</sup> However, under the Gag Rule, an attorney faces disciplinary actions for providing such lawful advice.

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<sup>62</sup> A debtor inevitably suffers from a bad credit rating post-filing. This eventuality forces a debtor to consider options that may incur debt prior to filing. See Braucher, *supra* note 6, at 139.

<sup>63</sup> The Gag Rule also forbids an attorney to provide advice on how to “pay an attorney or . . . charge for services performed as part of preparing for or representing a debtor in a case.” § 526(a)(4).

<sup>64</sup> See Braucher, *supra* note 6, at 138 (arguing that the Gag Rule prevents attorneys from providing standard legal advice because they “often tell clients they can borrow for fees, for example from a relative”).

<sup>65</sup> A bankruptcy petition preparer is not a lawyer, but a scrivener who fills out the official bankruptcy forms for a fee. See Vance & Cooper, *supra* note 5, at 330. Courts have traditionally limited their range of activities. See *In re Gutierrez*, 248 B.R. 287, 295 (Bankr. W.D. Tex. 2000) (Restrictions on petition preparers are necessary because they are essentially “typing mills” that have the ability to “lull the unsuspecting public into thinking that they have the expertise to offer valuable legal (or at least quasi-legal) bankruptcy assistance.”); see also Gary Neustadter, 2005: *A Consumer Bankruptcy Odyssey*, 39 CREIGHTON L. REV. 225, 321 (2006) (“In addition to making Chapter 7 more complex and thus more difficult for consumer debtors to use without legal representation, this provision . . . also makes it more difficult for cash-strapped consumers debtors to timely obtain legal representation.”).

<sup>66</sup> For a more in-depth look into this problem, see Braucher, *supra* note 6, at 138–39.

<sup>67</sup> In holding the Gag Rule unconstitutional, the *Zelotes* court cited “various lawful, financially prudent actions” that would also be forbidden under the Gag Rule:

For example, it might be financially prudent for a debtor considering bankruptcy to (1) obtain a mortgage or refinance a mortgage at a lower rate in order to reduce payments, pay off various other debts or obtain a lower interest rate prior to entering bankruptcy, (2) take on secured debt, such as an automobile loan, that would survive bankruptcy while enabling the debtor to continue to get to work and make payments, (3) take out a loan to pay the filing fee in a bankruptcy case or to obtain the services of a bankruptcy attorney, (4) take out a loan to convert a non-exempt asset to an exempt asset, or (5) co-sign undischARGEABLE student loans.

*Zelotes v. Adams*, 363 B.R. 660, 665 (D. Conn. 2007).

The Gag Rule, therefore, “directly regulates the content of speech of lawyers to their clients, even when it is accurate, legal, and desirable.”<sup>68</sup>

### III. FIRST AMENDMENT ANALYSIS OF THE GAG RULE’S RESTRICTION ON ATTORNEY SPEECH

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>69</sup> This clause is commonly regarded as protecting “freedom of speech” and “freedom of expression” from government interference.<sup>70</sup> The type of speech that receives the most protection is the personal expression of ideas or a particular message.<sup>71</sup> It is well established that laws that restrict a particular message are considered “content-based” restrictions and are subject to the strictest scrutiny.<sup>72</sup> Strict scrutiny prevents the government from unfairly suppressing or regulating content-based speech, which lies at the heart of the First Amendment.<sup>73</sup>

Although the clause provides that Congress “shall make *no* law” abridging free speech, the Supreme Court has never adopted the view that the First Amendment shields all forms of speech from government regulation.<sup>74</sup> Particularly, speech that violates an ethical rule may receive less constitutional

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<sup>68</sup> Chemerinsky, *supra* note 20, at 579.

<sup>69</sup> U.S. CONST. amend. I.

<sup>70</sup> *E.g.*, *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding that the “government has no power to restrict expression because of its message, its ideas, its subject matter or its content”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a law that forced students to salute the flag as an unconstitutional infringement on the students’ freedom of expression).

<sup>71</sup> *See Turner Broad. Sys. v. FOC*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.”).

<sup>72</sup> *See id.* at 642. The standard for strict scrutiny is that the law must serve a compelling government interest and must be narrowly tailored to promote that interest. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). Furthermore, the government must use the least restrictive measure to further the compelling interest. *Id.*

<sup>73</sup> *Turner*, 512 U.S. at 641 (“Laws of this sort pose the inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”).

<sup>74</sup> *See Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (The Court “rejected the view that freedom of speech and association, . . . as protected by the First and Fourteenth Amendments, are absolutes.”) For example, the Supreme Court has traditionally upheld regulations prohibiting obscenity, libel, speech that would invoke a “clear and present danger,” and “fighting words.” *E.g.*, *Schenck v. United States*, 249 U.S. 47 (1919) (the Court held that the distribution of anti-war material posed a “clear and present danger” to the country and therefore was unprotected by the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that fighting words were unprotected by the First Amendment); *Roth v. United States*, 354 U.S. 476 (1957) (holding that obscenity is a category of unprotected speech).

protection.<sup>75</sup> The Government asserted this argument in the recent constitutional challenges to the Gag Rule.<sup>76</sup> The Government argued that the Gag Rule was an ethical rule and, as such, was entitled to reduced constitutional scrutiny.<sup>77</sup> Therefore, in order to analyze whether the Gag Rule implicates attorney free speech under the First Amendment, it is necessary to first determine whether or not the provision is an ethical rule. This functional test will dictate which Supreme Court cases to apply in a constitutional analysis of the Gag Rule. If the Gag Rule is not an ethical rule, then the provision is a content-based restriction on attorney free speech.<sup>78</sup> The Court typically applies the private professional speech doctrine to content-based restrictions to attorney speech.<sup>79</sup> Alternatively, if the Gag Rule is an ethical rule, then the Supreme Court case law governing ethical rules would apply.<sup>80</sup>

A. *The Gag Rule—Ethical Rule or Substantive Rule of Law?*

Determining whether the Gag Rule is an ethical rule requires an understanding of how ethical rules are traditionally adopted and enforced.<sup>81</sup> As a general principle, an ethical rule is a “moral principle [that] may be viewed either as the standard of conduct that individuals have constructed for themselves or as the body of obligations and duties that a particular society requires of its members.”<sup>82</sup> Legal ethical rules are created to govern attorney speech and activities.<sup>83</sup> In comparing traditional ethical rules to the Gag Rule, there are certain fundamentals that dictate which provisions qualify as an ethical rule, such as a commitment to federalism and the enforceability of sanctions.<sup>84</sup> Furthermore, the text of the rule is an indicator of whether the provision is intended by its authors to be an ethical rule.<sup>85</sup>

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<sup>75</sup> See *infra* Part III.B.4.

<sup>76</sup> See *supra* note 16.

<sup>77</sup> See *supra* note 16.

<sup>78</sup> When the speech in question is defined by its content, it is a content-based restriction. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811–12 (2000). In order to be content-neutral, the speech must be subject-matter neutral and viewpoint neutral. *Turner*, 512 U.S. at 643. Neither of those prongs is met, therefore the Gag Rule is a content-based restriction.

<sup>79</sup> See *infra* Part III.B.2.

<sup>80</sup> See *infra* Part III.B.4.

<sup>81</sup> See *infra* Part III.A.1.

<sup>82</sup> THE COLUMBIA ENCYCLOPEDIA (6th ed. 2000).

<sup>83</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §1 (2006).

<sup>84</sup> See *infra* Part III.A.2.

<sup>85</sup> See *infra* Part III.A.3.

### 1. *The Adoption and Enforcement of Ethics Rules*

The adoption of ethics codes typically occurs in three stages.<sup>86</sup> First, the ABA creates model codes.<sup>87</sup> The two most commonly used models today are the ABA Model Code of Professional Responsibility,<sup>88</sup> adopted by the ABA in 1969, and the newer version, the Model Rules of Professional Conduct,<sup>89</sup> adopted in 1983. Next, the supreme court of each state adopts the legal ethical code and gives it the effect of law.<sup>90</sup> As of 2007, forty-seven states had adopted an adapted version of the Model Rules of Professional Conduct.<sup>91</sup> Third, the state supreme courts are given disciplinary powers through legislation to enforce the legal ethical rules for the attorneys registered to practice in that state.<sup>92</sup> In most states, the state supreme courts govern the membership of the bar in that state, as well as the enforcement regulations of attorneys in that bar.<sup>93</sup>

In parallel with state courts, federal courts also possess the power to regulate the attorneys appearing before them.<sup>94</sup> Federal district courts typically adopt the legal ethical codes of the jurisdiction in which the court sits.<sup>95</sup> However, unlike state courts, there is no body of case law that gives federal

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<sup>86</sup> See Edward C. Brewer, III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the "Appearance of Impropriety" Disappear*, 39 IDAHO L. REV. 321, 321–22 (2003) (outlining the three-step process for the adoption of ethical rules).

<sup>87</sup> The first ABA model code was adopted in 1908. See CANON OF PROF'L ETHICS (1908).

<sup>88</sup> MODEL CODE OF PROF'L RESPONSIBILITY (1980).

<sup>89</sup> MODEL RULES OF PROF'L CONDUCT (1989). The later iterations of the ABA model codes incorporated Supreme Court cases interpreting attorney speech and the First Amendment. For example, the ABA based Model Rule 3.6, which sets out the guidelines for disclosing information to the press during a criminal proceeding, on the Supreme Court's holding in *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>90</sup> See Brewer, *supra* note 86.

<sup>91</sup> New York maintains a version of the older Model Code, while California and Maine have composed their own rules. American Bar Association, Center for Professional Responsibility, *available at* [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html).

<sup>92</sup> See Brewer, *supra* note 86. Even before the adoption of standardized legal codes, the state supreme courts have historically held the power to regulate attorneys practicing before the courts. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §1 (2006). Courts derived this power from the "historical role of courts . . . in regulating lawyers through admission and disbarment and the traditional practice of courts in England." *Id.* Today, state constitutions explicitly grant state judiciaries the regulatory power to enact legal codes. *Id.* Furthermore, the supreme courts in most states have "ruled as a matter of state constitutional law that their power to regulate lawyers is inherent in the judicial function." *Id.*

<sup>93</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §1 (2006) ("Admitting lawyers to practice, formulating and amending lawyer codes, and regulating the system of lawyer discipline are functions reserved in most states to the highest court of the state.").

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

courts an inherent power to regulate attorneys.<sup>96</sup> Moreover, the power of the federal courts to regulate attorneys does not extend into other jurisdictions or branches of government.<sup>97</sup>

When an attorney is admitted to the bar in a particular state, the attorney must abide by the legal ethical code adopted in that state and is subject to its sanctions.<sup>98</sup> The preamble to the Model Rules of Professional Conduct states that “a lawyer zealously asserts the client’s position under the rules of the adversary system”<sup>99</sup> and that an attorney has an “obligation to zealously protect and pursue a client’s legitimate interests.”<sup>100</sup> Stemming from this ethical standard, several rules in the Model Rules of Professional Conduct arguably restrict lawyer speech, implicating the First Amendment.<sup>101</sup>

## 2. *Comparison of the Gag Rule to ABA Ethics Rules*

In considering whether or not the Gag Rule is an ethical rule, this Comment identifies three defects that preclude the Gag Rule from being an ethical rule. The first section analyzes the traditional role of the states in promulgating and enforcing legal ethics codes. This section also compares the sanctions listed in § 526(c) with those typically administered by ethical rules. The second section examines the text of the provision to decipher Congress’s intent when enacting the Gag Rule.

### a. *Ethical Rules, Federalism, & Separation of Powers*

The power to regulate attorney ethics has traditionally been held by the states.<sup>102</sup> Since the 1940s, state supreme courts have adopted the ABA canons as positive law, an enacted rule of court.<sup>103</sup> Furthermore, state courts have

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<sup>96</sup> *Id.* (“There is . . . no body of federal decisional law broadly asserting that federal courts have inherent power to regulate lawyers to the exclusion of the federal legislative and executive branches.”).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Bar associations are essentially a “self-regulated profession.” *Id.* (“Self-regulation provides protection of lawyers against political control of the state.”).

<sup>99</sup> MODEL RULES OF PROF’L CONDUCT Preamble [2] (1989).

<sup>100</sup> MODEL RULES OF PROF’L CONDUCT Preamble [9] (1989).

<sup>101</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 4.2 (1989) (governing communication with persons represented by counsel); MODEL RULES OF PROF’L CONDUCT R. 7.2 (1989) (governing attorney advertising); MODEL RULES OF PROF’L CONDUCT R. 7.3 (1989) (governing attorney solicitation of prospective clients).

<sup>102</sup> *See supra* Part III.A.1.

<sup>103</sup> RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY (Thomson West 2007).

consistently held that their state constitutional power to regulate lawyers is superior over and exclusive of other branches of government.<sup>104</sup>

Although the regulation of attorneys has typically existed within the power of the states, some federally mandated ethics rules do exist. For example, specialized ethics codes exist for attorneys who practice federal tax law<sup>105</sup> and maritime law.<sup>106</sup> Another example is the 2002 Sarbanes-Oxley Act, which gave the Securities and Exchange Commission (“SEC”) the ability to regulate attorney confidentiality.<sup>107</sup> This Act caused significant furor in the legal world, as it gave the power to regulate attorneys, traditionally held by state bar associations, to the federal government.<sup>108</sup> However, most states rectified conflicts by adopting similar confidentiality restrictions in their own state ethics codes.<sup>109</sup>

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<sup>104</sup> E.g., *Wash. State Bar Ass’n v. State*, 890 P.2d 1047 (Wash. 1995) (holding that state statutes in conflict with court rules violated separation of powers); *see also Squillace v. Kelley*, 990 P.2d 497 (Wyo. 1999) (reversing sanctions enforced against an attorney under state statutes that were significantly inconsistent with the court’s own sanction rules).

<sup>105</sup> 31 C.F.R. § 10.20 (2006) (regulating attorneys practicing before the Internal Revenue Service).

<sup>106</sup> 46 C.F.R. § 502.32 (2006) (regulating former Federal Maritime Commissioners).

<sup>107</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>108</sup> Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 984 n.34 (2003).

<sup>109</sup> *See* American Bar Association, Adopted by the House of Delegates (August 11–12, 2003), available at <http://www.abanet.org/leadership/2003/journal/119a.pdf> (amending Rule 1.6 of the Model Rules of Professional Conduct); *see also* William H. Volz & Vahe Tazian, *The Role of Attorneys Under Sarbanes-Oxley: The Qualified Legal Compliance Committee as Facilitator of Corporate Integrity*, 43 AM. BUS. L.J. 439, 447–48 (2006) (“Initially, the ABA expressed concern about this federal intrusion into legal ethics regulation. However, the ABA quickly moved to align its Model Rules of Professional Conduct with Sarbanes-Oxley’s [rules].”).

Another area of law has raised this issue. In 1994, the controversial Thornburgh-Reno rule established separate ethics rules for federal prosecutors. Federal prosecutors, for several years, had complained about the “no-contact” clause that existed in most state ethics codes. This rule prohibited attorneys from communicating with represented defendants in the absence of counsel. MODEL RULES OF PROF’L CONDUCT R. 4.2 (1989) (“[A] lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter. . . .”).

Prosecutors felt that the no-contact rule interfered with their ability to investigate crimes. In response to their complaints, the Attorney General issued a memorandum stating that the no-contact rule did not apply to federal prosecutors. Although the Department of Justice advocated for a completely separate ethics code for federal prosecutors, the memorandum was confined to excepting this single provision. Memorandum from Dick Thornburgh to All Justice Department Litigators (June 8, 1989); *see also* Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 57–60 (1998).

In a similar vein, some experts have called for a uniform bankruptcy code of ethics.<sup>110</sup> Like tax law, bankruptcy law is adjudicated in federal courts. Typically, the federal bankruptcy courts will apply the state ethics codes for the state in which the attorney is licensed to practice.<sup>111</sup> However, the state rules can vary.<sup>112</sup> Therefore, federal courts are forced to become experts in the ethical codes of several states, as well as to consistently apply those interpretations.<sup>113</sup> Critics also call for a bankruptcy code of ethics because the nationalization of legal practices forces bankruptcy attorneys to be “over-regulated.”<sup>114</sup> Most bankruptcy attorneys have a multi-jurisdictional practice, belong to multi-jurisdictional firms, or deal with out-of-state creditors.<sup>115</sup> Therefore, they must comply with the ethical rules of several states. Additionally, judges may be unsure which state’s laws apply when attorneys work in several states or with other attorneys from different states.<sup>116</sup> Not only are judges confused about which laws to apply, attorneys are confused about which laws to follow.<sup>117</sup> For all of these reasons, some experts have called for Congress to establish a separate specialized code for bankruptcy.<sup>118</sup> However, to date, no uniform federal code of bankruptcy ethics exists.<sup>119</sup>

Notwithstanding this lack of a specialized bankruptcy code of ethics, one section of the Code has traditionally been thought to provide ethical standards.<sup>120</sup> Section 327 provides guidance that many bankruptcy experts

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<sup>110</sup> See Rapoport, *supra* note 109, at 45–56; See generally Nancy B. Rapoport, *The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole*, 30 HOFSTRA L. REV. 977 (2002); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

<sup>111</sup> See Rapoport, *supra* note 110, at 983.

<sup>112</sup> See *supra* note 91.

<sup>113</sup> This practice is problematic for other reasons as well. For example, conflicts may occur when the attorney is licensed in several states, the federal court has adopted its own rule of ethics, or the court chooses the “Erie” method of analyzing substantive law. See Rapoport, *supra* note 109, at 50–51.

<sup>114</sup> See *id.* at 48. (citing the problem with multi-jurisdictional practice facing the broadening scope of bankruptcy law, “[T]hat push comes from a sense that the one-size-fits-all model of state ethics codes simply doesn’t fit the reality of modern legal practice”).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See *id.* at 48–49 (“The difficulty, of course, is that multiple sets of balkanized ethics codes might give attorneys *too* much leeway: somehow, attorneys could fall through the gaps in ethics regulation, and their subsequent unregulated behavior could cause untold disasters.”).

<sup>118</sup> See Rapoport, *supra* note 110, at 983 n.26 (“Because the promulgation of bankruptcy laws is reserved to Congress in the Constitution, the promulgation of rules related to lawyers practicing bankruptcy law can also be congressionally created.”).

<sup>119</sup> See generally Rapoport, *supra* note 109 (arguing for a specialized bankruptcy ethics code).

<sup>120</sup> 11 U.S.C. § 327 (2000).

liken to ethical rules.<sup>121</sup> However, courts have allowed state rules to trump § 327 when a conflict occurs.<sup>122</sup> Furthermore, courts have flatly rejected any issue of federal preemption by stating “the claim that the bankruptcy code insulated Respondent from his ethical duties is simply wrong.”<sup>123</sup> These cases demonstrate that courts are unwilling to allow federally mandated ethical rules, when they exist, to trump state codes of professional responsibility.<sup>124</sup>

In light of this, labeling the Gag Rule as an ethical rule raises two federalism issues. First, the assertion that the Gag Rule is an ethical rule discounts the traditional power of the states to regulate attorney ethics. The federal government has regulated attorneys only in a few specific situations.<sup>125</sup> Even in those situations, the provisions were either codified as specialized codes or adopted by the state courts.<sup>126</sup> In contrast, the government labeled the Gag Rule as an ethical rule “post hoc,” only when it faced a constitutional

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<sup>121</sup> Section 327 governs the employment of professional persons. *Id.*; see also Rapoport, *supra* note 109 at 67–68 (arguing that certain inroads into bankruptcy ethics have been achieved with § 327, which is similar to an ethics code in that it sets a ‘disinterestedness’ requirement for professionals, hired to represent the bankruptcy estate, but this provision has been “inconsistently applied, thanks to the overlay of state ethics codes”).

<sup>122</sup> For example, in *In re Breen*, the court held that the Arizona state ethics code governing conflicts of interest trumped § 327 of the Bankruptcy Code. *In re Breen*, 830 P.2d 462, 465 (Ariz. 1992). In that case, an attorney who had previously represented a creditor now represented the debtor in a chapter 11 bankruptcy petition without consent. *Id.* at 464. The attorney believed that § 327 exempted him from a conflict of interest violation despite the Arizona ethical rule barring this type of action. *Id.* The court held that “the bankruptcy code does not release an attorney from his or her duties under the Arizona ethical regulations.” *Id.*

<sup>123</sup> *Id.* at 465; *In re Greater Pottstown Cmty. Church of the Evangelical Congregational Church*, 80 B.R. 706, 711 (Bankr. E.D. Pa. 1987) (holding that § 327(c) does not trump the common ethical rule promulgated by the Supreme Court that apparent or actual conflicts of interest will not be tolerated). *But see* Ratterman v. Stapleton, 371 S.W.2d 939, 941 (Ky. 1963) (holding that state courts must share the power to regulate attorneys with other branches of government so long as this poses no threat to the continued validity of the judicial branch).

<sup>124</sup> The courts’ unwillingness to set aside state ethics codes can also be seen in their varying treatment of § 327(a), which allows a trustee to employ a professional person if that person is “disinterested” under the meaning of § 101(14) of the Code. In several cases, the courts have stated that the Rules of Professional Conduct should be used to interpret the term “disinterested,” as opposed to the definition in the Code. See *In re Capen Wholesale, Inc.*, 184 B.R. 547, 550–51 (N.D. Ill. 1995) (using the Rules of Professional Conduct for the Northern District of Illinois to determine whether the classification of “disinterested person” should be imputed to an entire law firm); *In re Nattchase Assocs. Ltd. Partnership*, No. 94-10356-A, 1994 Bankr. LEXIS 1319, at 4 (Bankr. E.D. Va. Aug 30, 1994) (“The American Bar Association’s Code of Professional Responsibility is applicable to the disqualification of attorneys in bankruptcy proceedings. These standards of ethics are guidelines for professional conduct and must be strictly applied so as to preserve the integrity of the judicial system.” (internal citations omitted)).

<sup>125</sup> 31 C.F.R. § 1020 (2006) (citing specialized codes for tax law); 46 C.F.R. § 502.32 (2006) (citing specialized codes for maritime law).

<sup>126</sup> See *supra* note 107.

challenge.<sup>127</sup> Furthermore, calling the Gag Rule an ethical rule does not resolve any of the issues raised by proponents of a specialized bankruptcy ethics code.<sup>128</sup> As one court held in a challenge to the Gag Rule, construing the provision as an ethical rule “would be a breathtakingly expansive interpretation of federal law to usurp state regulation of the practice of law via the ambiguous provisions of the Act, which in no clear fashion lay claim to the right to do any such thing.”<sup>129</sup>

Second, calling the Gag Rule an ethical rule would place it in direct conflict with state ethical codes governing attorney conduct. Under the preamble of the Model Rules of Professional Conduct, an attorney must zealously advocate for her client.<sup>130</sup> However, under the Gag Rule, an attorney is restricted from providing legal and advantageous advice to her client.<sup>131</sup> As seen with § 327 of the Code, courts typically hold that state ethical rules take precedence over statutory rules when a conflict exists.<sup>132</sup> Therefore, calling the Gag Rule an ethical rule raises serious federalism concerns.

The Gag Rule also implicates separation of powers concerns in that the power to sanction attorneys typically resides with the courts, not Congress. When the state supreme courts adopt the ABA Canons as positive law, they also receive the power from the state legislators to enforce court sanctions upon violating attorneys.<sup>133</sup> These sanctions include suspension from practice, disbarment, disqualification, legal malpractice, and censure.<sup>134</sup> In terms of enforcement, many of these ethical sanctions apply only where inattention, incompetence, or neglect is accompanied by willfulness, deceit, or gross negligence.<sup>135</sup>

If the Gag Rule were called an ethical rule, it would mean that Congress would enforce bankruptcy attorney sanctions, a function typically reserved for the courts. Traditionally, the courts only apply sanctions where a violation is

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<sup>127</sup> See *supra* Introduction.

<sup>128</sup> Presumably providing another instance—similar to § 327—where state and federal ethical guidelines would be in conflict would exacerbate the problem.

<sup>129</sup> *In re Debt Relief Agency Attorneys*, 332 B.R. 66, 71 (Bankr. S.D. Ga. 2005).

<sup>130</sup> MODEL RULES OF PROF'L CONDUCT Preamble [9] (1989); see *supra* Part III.A.

<sup>131</sup> See *supra* Part II.B.

<sup>132</sup> See *In re Capen Wholesale, Inc.*, 184 B.R. 547, 550–51 (N.D. Ill. 1995); *In re Natchase Assocs. P'ship*, No. 94-10356-A, 1994 Bankr. LEXIS 1319 (Bankr. E.D. Va. Aug. 30, 1994).

<sup>133</sup> See ROTUNDA & DZIENKOWSKI, *supra* note 103, at 5.

<sup>134</sup> *Id.* See also MODEL RULES OF LAWYER DISCIPLINARY ENFORCEMENT (1978).

<sup>135</sup> 7 AM. JUR. 2D *Attorneys at Law* § 67 (1997).

combined with some type of requisite intent.<sup>136</sup> In contrast, calling the Gag Rule an ethical rule would give Congress the unprecedented power to enforce sanctions that violate the provision without any such intent requirement. The Gag Rule would make Congress, not the courts, the overseer of bankruptcy attorney legal ethics.

Furthermore, even if Congress possessed the power to sanction attorneys for ethical violations, the Gag Rule does not carry the type of sanctions typically imposed by an ethical rule. Section 526(c) lists three types of sanctions for violation of the Gag Rule: a) action to enjoin the violation; b) imposition of civil penalties; and c) monetary fines such as reasonable costs, attorneys' fees, and actual damages.<sup>137</sup> These sanctions differ from ethical sanctions in two important ways. First, these sanctions impose fines and civil penalties typically unavailable to the courts. Second, the list is under-inclusive in that it does not include archetypal legal ethical rule sanctions, such as disbarment or suspension of practice. Therefore, the Gag Rule exceeds the courts' enforcement powers by providing for civil penalties and financial sanctions unavailable to the courts.

*b. Ethical Rules & The Gag Rule Text*

The text of the Gag Rule suggests that Congress did not intend for it to function as an ethical rule. The plain language of the provision goes “well beyond [the] rules of ethics and standards of reasonable care.”<sup>138</sup> The section is titled “Restrictions on Debt Relief Agencies” and does not suggest an ethical restriction different from any other section within the Bankruptcy Code. In short, the language of the Gag Rule is identical to other provisions in the Code that the Government does not claim to be ethical rules. Moreover, nowhere in the section does Congress refer to ethical standards or guidelines. Instead, § 526 includes commanding language that a debt relief agency “shall not advise” and “shall not make any statement.”<sup>139</sup> These commands are essentially bright line rules for activity—atypical in an ethical rule.<sup>140</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> 11 U.S.C.A. § 526(c) (West 2007).

<sup>138</sup> See Neustadter, *supra* note 65, at 315.

<sup>139</sup> Compare 11 U.S.C.A. § 526 (West 2007), with MODEL RULES OF PROF'L CONDUCT Preamble (2003) (referring to “responsibilities,” “quality of service,” and “reasonable” behavior).

<sup>140</sup> In *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758 (D. Minn. 2006), the court not only held that the Gag Rule was not an ethical rule and therefore subject to strict scrutiny, but it also called into question the entire premise. See *id.* at 764 (“The ‘ethical rule’ of which the government speaks appears to exist only in its pleadings.”). Furthermore, the court warned that the Government may not manipulate the

Ethical rules typically uphold public policy by prohibiting illegal actions.<sup>141</sup> The Gag Rule was intended to protect the integrity of the legal system by providing two layers of protection.<sup>142</sup> The provision protects debtors from bad attorney advice that could result in the denial of relief.<sup>143</sup> In addition, it protects creditors from harms that may occur when a debtor circumvents the means test by incurring additional secured or unsecured debt.<sup>144</sup>

Certainly, there is an interest in preserving the “integrity and fairness” of the bankruptcy system.<sup>145</sup> However, in order to qualify as an ethical rule, the provision must prohibit attorney actions that are in bad faith, harmful to a client, or illegal.<sup>146</sup> The Gag Rule cannot be an ethical rule unless the action that the attorney is forbidden from advising—incurring “more debt in contemplation” of filing for bankruptcy—is illegal. It is not. A debtor may incur additional debt prior to filing for bankruptcy,<sup>147</sup> but may not know about this option because their attorney is forbidden from providing this advice. In summary, the Gag Rule forbids an attorney from providing *legal* and *advantageous* advice to a client.<sup>148</sup> No ethical policy is upheld by its restrictive language or its sanctions. Therefore, the Gag Rule is merely an arbitrary restriction on attorney advice.<sup>149</sup>

For argument’s sake, even if the incurrence of additional debt was illegal, current ABA-sponsored ethical rules forbid an attorney from providing illegal

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scrutiny analysis by “mere labels.” *Id.* The Gag Rule cannot be considered an ethical rule if it “discloses no quasi-religious or ethical principle.” *Id.* Furthermore, the court held, “[i]f this is the government’s view of legal ethics, it is a form of ethics unfamiliar to the court.” *Id.*

<sup>141</sup> See ROTUNDA & DZIENKOWSKI, *supra* note 103, at 5.

<sup>142</sup> Reply Memorandum in Support of Motion to Dismiss at 10, *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006) (No. 05-6365-HO).

<sup>143</sup> Reply in Support of Motion to Dismiss at 6, *Milavetz*, 355 B.R. 758 (No. 05-CV-2626).

<sup>144</sup> *Milavetz*, 355 B.R. at 764 (“The advice the Section forecloses may be potentially advantageous to creditors, but this does not make it equivalent to ethics either in logic or in law.”).

<sup>145</sup> The dual interests of integrity and fairness served as the purported basis for BAPCPA. See H.R. REP. NO. 109-31, at 1 (2005).

<sup>146</sup> See ROTUNDA & DZIENKOWSKI, *supra* note 103, at 5.

<sup>147</sup> 11 U.S.C. § 707(b) (2000) (in regulating the means test, there is no time restriction on when the debt was incurred prior to filing for bankruptcy).

<sup>148</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.2 (2003); see also *Milavetz*, 355 B.R. at 764 (“[T]his statute does not restrict false statements—arguably implicating some ‘ethical’ precept—it forbids truthful and possibly efficacious advice.”).

<sup>149</sup> See, e.g., Memorandum of Law at 5, *Milavetz*, 355 B.R. 758 (No. 05-CV-2626) (“The paradigm adopted by the Government makes a critically misleading assumption—it assumes that somewhere in the body of substantive state or federal law there actually exists an independent rule which prohibits the conduct included within the statute.”).

or unlawful advice.<sup>150</sup> These restrictions make any additional restriction in the Gag Rule superfluous. If Congress had concluded that the current state ethical models were not doing enough to curb the surfeit of bankruptcy attorney abuses, one would think that it would have explicitly listed the ethical duties of an attorney under the Bankruptcy Code or, better yet, created an independent bankruptcy ethics model. However, nothing in the text or in the sanctions suggests ethical standards or guidelines.

Traditionally, state courts have created, adopted, and enforced ethical rules.<sup>151</sup> To suggest that Congress intended for the Gag Rule to be an ethical rule also suggests that it is assuming a new role as legislator of bankruptcy ethics. This new function for Congress would implicate both federalism and separation of powers issues. Moreover, nothing in the text of the Gag Rule suggests that Congress intended for it to be an ethical rule. Taken together, these factors indicate that the Gag Rule is not an ethical rule.

### *B. First Amendment Analysis—Attorney Speech and Ethical Rules*

The Supreme Court does not apply the same level of scrutiny to all types of speech, including ethical rules governing attorney speech. Therefore, in order to determine what level of scrutiny would apply to the Gag Rule, this section analyzes the Supreme Court case law concerning ethical restrictions on attorney speech. Although the Supreme Court has not directly addressed this type of speech,<sup>152</sup> it has provided helpful guidelines for other types of attorney speech. A narrowing of these categories of speech will suggest how restrictions such as the Gag Rule would be treated under the First Amendment.<sup>153</sup>

#### *1. Attorney Free Speech—The Commercial Speech Doctrine*

The Supreme Court has labeled the broadest category of speech governing attorneys as commercial speech. Commercial speech is defined as a communication that proposes a commercial action or is an advertisement that

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<sup>150</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003).

<sup>151</sup> See *supra* Part III.A.1.

<sup>152</sup> See *infra* Part III.B.3.

<sup>153</sup> See *generally infra* Part III.B.

references specific products or services.<sup>154</sup> Under this definition, attorney advertising and attorney solicitation qualify as commercial speech.<sup>155</sup>

The Supreme Court has consistently held that although the First Amendment protects free speech,<sup>156</sup> it merits only limited protection.<sup>157</sup> The Court applies a less rigorous constitutional standard to commercial speech than that reserved for content-based restrictions.<sup>158</sup> Under this standard, only non-deceptive, non-illegal advertising is protected.<sup>159</sup> Furthermore, the government may only restrict this type of speech if the restriction is justified by “substantial” governmental interests, the restriction directly advances that interest, and the regulation is the least-restrictive method needed to achieve that interest.<sup>160</sup> Even under this less-restrictive balancing test, the Supreme Court has been consistent in affording protection to truthful, non-deceptive commercial speech.<sup>161</sup>

The Gag Rule potentially restricts the type of attorney speech that proposes a commercial transaction. Therefore, under the commercial speech doctrine, courts would apply a less-restrictive scrutiny to the Gag Rule. Because the advice restricted by the Gag Rule is not deceptive or illegal, the Court would most likely find that the provision fails even this more lenient test. However,

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<sup>154</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

<sup>155</sup> *See Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985) (governing attorney advertising); *see also Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (governing attorney solicitation).

<sup>156</sup> *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (establishing that commercial speech was protected by the First Amendment).

<sup>157</sup> *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980); *Zauderer*, 471 U.S. at 626 (holding that truthful attorney advertisements are protected by the First Amendment); *id.* at 637 (“[W]hat has come to be known as ‘commercial speech’ is entitled to protection of the First Amendment, albeit to the protection somewhat less extensive than that afforded ‘noncommercial speech.’”); *id.* at 638 (“The . . . Government [is] free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”). *See also Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that states cannot prohibit attorneys from advertising under the First Amendment).

<sup>158</sup> *See Bates*, 433 U.S. at 383 (applying a “substantial state interest” test to a government restriction on attorneys’ non-misleading advertising); *see also Cent. Hudson*, 447 U.S. at 566 (applying a four-part framework to misleading advertisements).

<sup>159</sup> *See Cent. Hudson*, 447 U.S. at 566.

<sup>160</sup> *Id.*

<sup>161</sup> *See Va. State Bd.*, 425 U.S. at 748 (declaring a law unconstitutional that prohibited truthful advertisements by pharmacists); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (holding a state law unconstitutional that restricted advertisement of contraceptives because “preventing offense or embarrassment was never a sufficient justification for banning speech”); *Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding a state law prohibiting the use of trade names in optometry advertisements based on the high risk of confusion and deception to the public).

the commercial speech category is too broad for an adequate comparison to commercial speech case law. For example, the commercial speech doctrine covers activities that are inapplicable to the Gag Rule, such as attorney advertising. In light of this, a narrowing of the commercial speech doctrine is necessary to predict the level of scrutiny warranted by the Gag Rule.

## 2. *Attorney Free Speech—The Professional Speech Doctrine*

A subset of the commercial speech doctrine is the professional speech doctrine. “Professional speech” is the private speech between a professional and a client.<sup>162</sup> It is more defined than commercial speech in that it covers speech “offering specific knowledge and expertise to an audience that deliberately seeks access to such information.”<sup>163</sup> In this way, there is a heightened element of reliability with professional speech that does not exist with advertisements or solicitations.<sup>164</sup>

The government may only enact complementary regulations of professional speech.<sup>165</sup> In other words, the government may ensure that professional standards exist, but may not abrogate the professional’s role or determine “the bodies of knowledge that may be accessed or the individual judgments that may be rendered in a [particular] case.”<sup>166</sup> The Supreme Court has only usurped this traditional viewpoint once.<sup>167</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>168</sup> the Court upheld a Pennsylvania state law requiring physicians to provide women certain information prior to an abortion.<sup>169</sup> However, the majority opinion confined its decision to the practice of medicine and left open the question of whether all professional

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<sup>162</sup> Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 772 (1999).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 773.

<sup>166</sup> *Id.*

<sup>167</sup> In another case, *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court held that it was constitutional for the government to selectively fund programs that did not provide abortion services. This case is somewhat inapposite to the Gag Rule in that it involved government funding and the restrictions were not considered viewpoint-based. *Id.*

<sup>168</sup> 505 U.S. 833 (1992).

<sup>169</sup> *See id.* at 841.

advice, such as between an attorney and a client, could be regulated under the First Amendment.<sup>170</sup>

The Supreme Court has never spoken directly to the protection of professional speech concerning attorneys and their clients.<sup>171</sup> However, dicta in two cases are instructive. In *Florida Bar v. Went For It, Inc.*, the Court applied intermediate scrutiny to uphold a Florida restriction on attorney advertising.<sup>172</sup> In the course of its discussion, the Court stated that “[s]peech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer.”<sup>173</sup> However, the Court did not identify those circumstances.<sup>174</sup> Nevertheless, this case suggests that advice constituting legal representation, such as between a bankruptcy attorney and a client, deserves strict scrutiny.

In *Board of Trustees of the State University of New York v. Fox*, the Court questioned a public university’s regulation that prohibited the use of dormitories for certain non-commercial activities, such as providing legal advice for a fee.<sup>175</sup> The Court noted that legal advice, although it is “speech for profit,” is not the same as commercial speech and deserves a higher standard of protection.<sup>176</sup> Accordingly, albeit in dicta, the Supreme Court has indicated a more robust protection of attorney professional speech over that of attorney commercial speech.<sup>177</sup>

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<sup>170</sup> See *id.* at 884 (“To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine . . . [w]e see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.”).

<sup>171</sup> See Halberstam, *supra* note 162, at 772 (“Despite the century-old recognition of the regulation of professions, we still have, for example, no paradigm for the First Amendment rights of attorneys . . . when they communicate with their clients.”); see also Michael W. McTigue, Jr., Case Comment, *Court Got Your Tongue? Limitations on Attorney Speech in the Name of Federalism: Gentile v. State Bar*, 72 B.U.L. REV. 657, 659 (1992) (noting that the Supreme Court had only “tangentially” addressed attorney free speech).

<sup>172</sup> *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634–35 (1995) (holding that the standard for intermediate scrutiny was that the statute (1) fits the compelling interest reasonably but not perfectly; (2) represents a scope that is in proportion to the interest served; and (3) employs a means narrowly tailored to achieve the desired objective).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Bd. of Tr. Of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485–86 (1989).

<sup>176</sup> *Id.* For other cases that applied strict scrutiny to restrictions of professional speech, see *N.A.A.C.P. v. Button*, 371 U.S. 415, 439–44 (1963) (declaring law that forbid attorneys from educating people on their civil rights unconstitutional under strict scrutiny), and *Sable Comm’n of Cal., Inc. v. Sable*, 492 U.S. 115, 126 (1988) (holding that a law banning adult access to a “dial-a-porn” service did not survive strict scrutiny).

<sup>177</sup> See *Fla. Bar*, 515 U.S. at 634; *Fox*, 492 U.S. at 482.

*Board of Trustees* supports the argument that although attorney advice is a form of commercial speech, it should be given the more precise label of professional speech.<sup>178</sup> The traditional doctrine on professional speech holds that the government may not prohibit or compel the content of an attorney's speech to a client.<sup>179</sup> Furthermore, *Florida Bar* suggests that the Supreme Court would apply strict scrutiny to restrictions of professional speech.<sup>180</sup> Based on this, the Gag Rule restricts professional speech that would receive more scrutiny than would normally be applied to commercial speech restrictions.

*Casey* is an anomaly in that it provides only limited protection to professional speech,<sup>181</sup> although it may only apply to the practice of medicine. For this reason, however, the professional speech category is still too broad to make definitive comparisons with the Gag Rule. Therefore, the analysis must once again narrow the speech category to arrive at Supreme Court case law most analogous to the Gag Rule.

### 3. Attorney Free Speech—Gag Orders

A further subset of the professional speech category is attorney gag orders. Although the Supreme Court has upheld attorney gag orders within the litigation setting,<sup>182</sup> it has not addressed the constitutionality of gag orders on attorneys outside of this setting.<sup>183</sup> Two federal courts recently faced this issue, highlighting the tension created by a gag order on an attorney's ability to advocate for a client. In *Doe v. Gonzales*,<sup>184</sup> the District Court of Connecticut granted an injunction against a gag order imposed by the Federal Bureau of Investigation ("FBI") against an attorney.<sup>185</sup> That gag order, codified in 18 U.S.C. § 2709, restricts anyone contacted for information by the FBI from disclosing the terms of the request to other parties.<sup>186</sup> The court held that the provision was a content-based restriction and subject to strict scrutiny.<sup>187</sup>

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<sup>178</sup> *Fox*, 492 U.S. at 482.

<sup>179</sup> *Id.* at 476.

<sup>180</sup> *See Fla. Bar*, 515 U.S. at 634.

<sup>181</sup> *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 883, 884 (1992).

<sup>182</sup> In contrast, gag orders on the press are rarely ever held to be constitutional. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

<sup>183</sup> Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 876 (1998).

<sup>184</sup> *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005).

<sup>185</sup> *Id.* at 82.

<sup>186</sup> 18 U.S.C.A. § 2709 (West 2007).

<sup>187</sup> *Doe*, 386 F. Supp. 2d at 69.

However, in *United States v. Scarfo*<sup>188</sup> the Court of Appeals for the Third Circuit applied a lenient balancing test to the constitutionality of a gag rule on a defendant's former attorney.<sup>189</sup> The court noted that although the attorney was no longer a trial participant, he "still retained the raiment and appearance of one."<sup>190</sup> Therefore, the appropriate standard was whether the attorney's statements posed a "risk of prejudice" to the trial.<sup>191</sup> Despite applying this lower standard, the court held that the importance of the protection of the First Amendment outweighed any alleged impairment to the trial.<sup>192</sup>

Although the Supreme Court has not specified the level of scrutiny applied to restrictions on attorney professional speech and gag orders, these cases do provide three principles that are applicable to the BAPCPA Gag Rule. First, the court consistently applies strict scrutiny to content-based restrictions.<sup>193</sup> Second, private professional speech is given higher protection than that given to commercial speech.<sup>194</sup> Third, the Court has applied strict scrutiny to gag rules except within the litigation setting.<sup>195</sup> As a content-based restriction on professional speech, outside of the litigation setting, the Gag Rule most likely would be subject to strict scrutiny analysis.

#### 4. *Attorney Free Speech—Ethical Rules*

As with the case law governing professional speech, the Supreme Court has not been consistent with respect to ethical rules that restrict expression. The Court administers heightened protection depending on the type of speech at issue.<sup>196</sup> In doing so, the Court has focused on one question crucial to its analysis: whether the attorney in the particular case functions as an "officer of

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<sup>188</sup> 263 F.3d 80 (2001).

<sup>189</sup> *Id.* at 90–93.

<sup>190</sup> *Id.* at 93 (“[The attorney] was not merely a lawyer with a passing interest in the case.”).

<sup>191</sup> *Id.* at 95.

<sup>192</sup> *Id.* (“[W]e can see no valid reason to interdict a lawyer’s First Amendment right of speech, even of one disqualified in the case.”).

<sup>193</sup> *See supra* Part III and accompanying notes.

<sup>194</sup> *See supra* Part III.B.2 and accompanying notes.

<sup>195</sup> *See supra* Part III.B.3.

<sup>196</sup> *See Scarfo*, 263 F.3d at 92 (“The Supreme Court and Court of Appeals have announced varying standards to review [ethical rules] depending on who . . . is being gagged.”).

the court.”<sup>197</sup> This officer of the court designation plays an important role in determining which level of scrutiny to apply.<sup>198</sup>

In cases where the attorney was not acting as an officer of the court, the Supreme Court has applied heightened scrutiny to the ethical rule in question.<sup>199</sup> Two cases in particular demonstrate the Court’s hesitancy to permit regulations that restrict private attorney speech when the attorney is not acting in the capacity of an officer of the court. In *United Mine Workers v. Illinois*,<sup>200</sup> the Court held that freedom of speech gave a union the right to hire an attorney to assert workmen’s compensation claims.<sup>201</sup> The attorney was hired to advise members on potential claims and to advocate on behalf of the union.<sup>202</sup> Although this arrangement violated two Canons of Professional Ethics of the Illinois State Bar Association,<sup>203</sup> the Court held that an infringement on an attorney’s ability to advocate for clients “is not needed to protect the State’s interest in high standards of legal ethics.”<sup>204</sup> Similarly, in *Legal Services Corp. v. Velazquez*,<sup>205</sup> the Supreme Court struck down a congressional rule that prohibited nonprofit attorneys from challenging existing welfare laws.<sup>206</sup> The Court held that any restriction on what attorneys are allowed to advocate “distorts the legal system”<sup>207</sup> and “threatens severe impairment of the judicial function.”<sup>208</sup>

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<sup>197</sup> See *In re Sawyer*, 360 U.S. 622, 666, 668 (1959) (“[A] lawyer actively participating in a trial . . . is not merely a person and not even merely a lawyer . . . [h]e is an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.”).

<sup>198</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1081-82 (1991) (O’Connor J., concurring) (noting that lawyers in pending cases are officers of the court and the government may regulate their speech more readily).

<sup>199</sup> See *infra* notes 241–43.

<sup>200</sup> *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217 (1967).

<sup>201</sup> *Id.* at 225.

<sup>202</sup> *Id.* at 218.

<sup>203</sup> CANONS OF ETHICS OF THE ILLINOIS STATE BAR ASSOCIATION 35, 47; see also *United Mine Workers*, 389 U.S. at 222.

<sup>204</sup> *United Mine Workers*, 389 U.S. at 222 (The Court will not permit legislation that violates the First Amendment, even if that legislation was “enacted for the purpose of dealing with some evil within the State’s legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.”).

<sup>205</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504(a)(16), 110 Stat. 1321 (1996).

<sup>206</sup> *Velazquez*, 531 U.S. at 549. In dicta, the *Velazquez* court explicitly rejected the officer of the court designation. *Id.* at 542. Although the attorneys in this case were potentially representing clients in litigation, the Court stated that an attorney was “not the government’s speaker,” but instead an attorney speaks on behalf of the client. *Id.*

<sup>207</sup> *Id.* at 544.

<sup>208</sup> *Id.* at 546.

In contrast, the Supreme Court has applied a less searching standard of review to ethical rules restricting the speech of attorneys acting as “officers of the court.”<sup>209</sup> The seminal case in this area is *Gentile v. State Bar of Nevada*,<sup>210</sup> which applied a lesser standard of scrutiny to a state ethical rule barring attorney political speech.<sup>211</sup> In *Gentile*, the Supreme Court faced the question of whether attorneys were officers of the court and, if so, whether states could regulate their speech under a less stringent standard of review.<sup>212</sup> The attorney in *Gentile* violated a Nevada ethical rule that prohibited lawyers from making extrajudicial statements to the press that had a “substantial likelihood of materially prejudicing” the legal proceeding.<sup>213</sup> The attorney challenged this ethical rule on the basis that it required only a “substantial likelihood of material prejudice” standard for the state to regulate content-based speech.<sup>214</sup>

Chief Justice Rehnquist, writing for a 5-4 majority, held that attorneys were officers of the court, and therefore “were subject to ethical restrictions on speech to which an ordinary citizen would not be.”<sup>215</sup> The Court framed the role of attorneys as “key participants in the criminal justice system” with “special access to information through discovery and client communications.”<sup>216</sup> In other words, attorneys in pending litigation play a special role as officers of the court, and therefore are subject to regulation of both their speech and their conduct.<sup>217</sup> Following from this, the Court held that all attorney speech relating to pending litigation “may be regulated under a less demanding standard” than that reserved for the press or other individuals.<sup>218</sup>

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<sup>209</sup> See *infra* note 214.

<sup>210</sup> 501 U.S. 1030, 1034 (1991).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 1051–52.

<sup>213</sup> *Id.* at 1033.

<sup>214</sup> *Id.* at 1037. Traditionally, states could only restrict the press or other individuals from disclosing information about pending litigation if it posed a “clear and present danger” to the adjudication proceeding. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). In one of the most famous decisions governing free speech doctrine, Justice Holmes stated that the “question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.” *Id.* (emphasis added). For example, the “most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Id.* Under this test, a state must demonstrate a “serious and imminent danger” before it can regulate otherwise protected speech, making regulation of speech extremely difficult under this standard. See *McTigue, Jr.*, *supra* note 171, at 659.

<sup>215</sup> *Gentile*, 501 U.S. at 1071.

<sup>216</sup> *Id.* at 1074.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

Under the *Gentile* test, “[w]hen a state regulation [of an officer of the court] implicates First Amendment rights, the Court must balance those interests against the State’s legitimate interest in regulating the activity in question.”<sup>219</sup> The *Gentile* test provides the state with additional leeway to regulate attorney speech through ethical rules.<sup>220</sup>

Justice Kennedy dissented, arguing that the case involved political speech, which the Court has traditionally held “at the very center” of First Amendment protection.<sup>221</sup> Justice Kennedy also challenged the majority’s failure to separate the attorney’s First Amendment rights from his state ethical obligations.<sup>222</sup> “At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law.”<sup>223</sup> In the end, Justice Kennedy ultimately prevailed, but for different reasons. In a separate opinion, a 5-4 majority of the Court held that the provision, although surviving the lesser standard of scrutiny, was void for vagueness.<sup>224</sup>

*Gentile* only partially answers the question whether attorneys are considered officers of the court and, as such, are subject to lesser First Amendment protection.<sup>225</sup> Neither *Gentile* nor subsequent cases considered the transactional side of legal practice. In its reasoning, the Court implicitly

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<sup>219</sup> *Id.* at 1075.

<sup>220</sup> See *McTigue, Jr.*, *supra* note 171, at 664 (noting that the standard allows states to regulate “extrajudicial comments that, irrespective of actual or imminent prejudice, they know or should know are substantially likely materially to prejudice an adjudicative proceeding” and therefore provides a less stringent standard).

<sup>221</sup> *Gentile*, 501 U.S. at 1034. (Kennedy J., dissenting). “The instant case is a poor vehicle for defining with precision the outer limits under the Constitution of a court’s ability to regulate an attorney’s statements about ongoing adjudicative proceedings.” *Id.* at 1057.

<sup>222</sup> *Id.* at 1054–58; see also *McTigue, Jr.*, *supra* note 171, at 667.

<sup>223</sup> *Gentile*, 501 U.S. at 1054 (Kennedy J., dissenting) (“We have not in recent years accepted our colleagues’ apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms.”).

<sup>224</sup> *Id.* at 1048–49 (“Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide ‘fair notice to those to whom it is directed.’” (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972))).

<sup>225</sup> *Id.* at 1034; see also *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In *Sheppard*, the Supreme Court overturned a murder conviction based on the “carnival atmosphere at trial.” *Id.* at 358. The Court admonished the judge in that case for not taking control of the case. *Id.* at 363. “Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.” *Id.*

restricted its holding to attorneys representing clients in pending litigation.<sup>226</sup> *Gentile* expressed “no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made.”<sup>227</sup> Furthermore, the Court left it open whether all ethical rules governing lawyers demand a less stringent standard of First Amendment protection.

Other cases provide some guidance. The Court had already established that attorney advertising called for intermediate scrutiny.<sup>228</sup> The court has also applied a less stringent standard of review to restrictions of two other types of attorney activity. In *Seattle Times Co. v. Rhinehart*,<sup>229</sup> the Supreme Court held that lesser protection also extends to punishing an attorney for publishing discovery documents in violation of a state civil procedure rule.<sup>230</sup> “The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.”<sup>231</sup> “In addition, heightened First Amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals. . . .”<sup>232</sup> Accordingly, a protective order against publishing discovered documents did not offend the First Amendment if the court based the order on good cause, it was limited to pretrial discovery, and it did not restrict the flow of information from other sources.<sup>233</sup>

Secondly, the Supreme Court has upheld restrictions on attorney speech within the courtroom, where “‘free speech’ . . . is extremely circumscribed.”<sup>234</sup> Likewise, other courts have consistently held that attorney speech within the courtroom may not exceed the rulings of the court beyond the point necessary to preserve an appeals claim.<sup>235</sup> In *Mezibov v. Allen*,<sup>236</sup> the Court of Appeals

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<sup>226</sup> *Gentile*, 501 U.S. at 1074 (“Lawyers representing clients in pending cases are key participants in the criminal justice system. . . .”); *id.* at 1076 (“The regulation of attorneys’ speech is limited . . . until after the trial.”). *Id.* at 1081 (O’Connor J., concurring) (“I agree that the State may regulate speech by lawyers representing clients in pending cases. . . .”).

<sup>227</sup> *Id.* at 1072 n.5 (Kennedy J., dissenting).

<sup>228</sup> *See supra* Part III.B.1.

<sup>229</sup> 467 U.S. 20 (1984).

<sup>230</sup> *Id.* at 36.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 36 n.23.

<sup>233</sup> *Id.* at 37 (laying the foundation for *Gentile*’s balancing test).

<sup>234</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (citing *Sacher v. United States*, 343 U.S. 1, 8 (1952)).

<sup>235</sup> *Id.*

<sup>236</sup> 411 F.3d 712 (6th Cir. 2005).

for the Sixth Circuit stated that an attorney's First Amendment rights within the courtroom are "tightly cabined by various procedural and evidentiary rules, along with the heavy hand of judicial discretion."<sup>237</sup> In *Mezibov*, the attorney claimed that his inability to present certain evidence to the judge infringed on his First Amendment rights.<sup>238</sup> Furthermore, the type of "speech" used by attorneys in the courtroom should not be confused with the right to "free speech" under the First Amendment.<sup>239</sup>

Based on these precedents, it is evident that the question of whether strict scrutiny applies to an ethical rule turns on whether the attorney functions as an officer of the court. The Supreme Court has applied heightened scrutiny even to ethical rules if the rule restricts private professional speech between attorneys and their clients.<sup>240</sup> Typically, the role of the attorney in these cases was not as an officer of the court, but instead as a speaker on behalf of the client.<sup>241</sup> Conversely, the Court has applied a more lenient balancing test when the attorney acts as an officer of the court.<sup>242</sup> Applying this relaxed scrutiny, the Court has upheld restrictions on attorneys with respect to speaking to the media about pending litigation,<sup>243</sup> disclosing discovery documents,<sup>244</sup> or speaking in the courtroom.<sup>245</sup>

The officer of the court distinction demonstrates that the Supreme Court applies strict scrutiny to the First Amendment rights of attorneys within the ambit of private professional speech. The core of the First Amendment is that the government may not restrict speech based on a particular message.<sup>246</sup> This axiom is true even for attorneys restricted by ethical rules. In refusing to extend the *Gentile* holding outside of a litigation setting, the Court has validated the importance of protecting an attorney's ability to analyze all legal issues and to present them to her client and to the court.<sup>247</sup> An attorney has an ethical duty to advocate zealously for her client, and the Supreme Court will

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<sup>237</sup> *Id.* at 717.

<sup>238</sup> *Id.* at 715–16.

<sup>239</sup> *Id.* at 719.

<sup>240</sup> *See* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 225 (1967).

<sup>241</sup> *See Velazquez*, 531 U.S. at 537.

<sup>242</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

<sup>243</sup> *Id.*

<sup>244</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).

<sup>245</sup> *Sacher v. United States*, 343 U.S. 1, 8 (1952).

<sup>246</sup> *See generally* *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002).

<sup>247</sup> *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

only limit her speech when there is a threat to fair adjudication,<sup>248</sup> a risk of false attorney advertising,<sup>249</sup> or a need to eliminate a “carnival atmosphere at trial.”<sup>250</sup> Furthermore, the Supreme Court applies the most rigorous scrutiny to ethical restrictions on attorney-client speech because otherwise, these restrictions “threaten” severe impairment of the judicial function.<sup>251</sup>

Among the Supreme Court cases governing ethical rules, the most analogous to the Gag Rule is *Velazquez*, where the Court applied strict scrutiny to a restriction on private counsel.<sup>252</sup> In this case, Congress distributed grant money to attorneys providing legal aid to indigent clients. However, one of the restrictions on this grant money was that the attorney could not represent clients to challenge the constitutionality of welfare laws.<sup>253</sup> The Court held that this restriction was invalid because it sought to restrict viewpoint-based speech in violation of the First Amendment.<sup>254</sup>

Four key factors in *Velazquez* provide a roadmap for a constitutional challenge to the Gag Rule. The first is that attorney advice to a client is private speech and that any rule infringing on that speech restricts private expression.<sup>255</sup> “[A]dvice from the attorney to the client and advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept.”<sup>256</sup> In *Gentile*, the Court went to great lengths to argue that attorneys played a crucial role in the judicial process and therefore were officers of the court. However, in *Velazquez*, the Court distinguished the role of an attorney from that of the government. “Here the program presumes that private, nongovernmental speech is necessary and a substantial restriction is placed upon that speech.”<sup>257</sup> One reason for this inconsistency is that attorney actions within the courtroom are very different from providing private counsel to a client.<sup>258</sup> The attorney acting in the

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<sup>248</sup> See *Gentile*, 501 U.S. at 1038.

<sup>249</sup> See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995).

<sup>250</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

<sup>251</sup> See *Velazquez*, 531 U.S. at 546.

<sup>252</sup> *Id.* at 536.

<sup>253</sup> *Id.* at 538–39. This restriction applied even in cases where the attorney had already accepted employment and constitutional issues arose during the course of the employment. In these instances, the attorney was required to withdraw. *Id.* at 539.

<sup>254</sup> *Id.* at 549.

<sup>255</sup> *Id.* at 542 (“[T]he LSC program was designed to facilitate private speech, not to promote a governmental message.”).

<sup>256</sup> *Id.* at 542–43.

<sup>257</sup> *Id.* at 544.

<sup>258</sup> *Id.*

courtroom is part of an overall judiciary process and must abide by certain restrictions to maintain the integrity of the adjudication process.<sup>259</sup> The attorney providing private counsel, however, is responsible for “advising their clients and in presenting arguments and analyses,” and as such entitled to heightened First Amendment protection.<sup>260</sup>

The Supreme Court also emphasized in *Velazquez* that an “attorney speaks on the behalf of the client.”<sup>261</sup> The Court held that the government was trying to use private attorneys to speak its messages or to advocate for its position, however “[t]he lawyer is not the government’s speaker.”<sup>262</sup> This type of control distorts the legal process, a notion that was seemingly lost in *Gentile*.<sup>263</sup> On facts similar to those in *Velazquez*, Congress is using the Gag Rule to force attorneys to defend the interests of the creditor lobby, even if those interests are contrary to those of the client.<sup>264</sup> Incurring more debt prior to bankruptcy may create wariness in the existing creditors, but it may also provide the debtor with favorable rates or more flexible options.<sup>265</sup> In essence, Congress is forcing attorneys to speak on behalf of the creditors over their own clients. As one district court stated in a recent constitutional challenge to the Gag Rule: “The lawyer has no duty to assist creditors—who are scarcely without their own resources, and may indeed have contributed to the potential-bankrupt’s straits by making credit easy to obtain. The attorney’s only duty is to the client, and to the law.”<sup>266</sup>

The third key finding in *Velazquez* stems from the suggestion that as one who speaks for a client, the attorney must also possess the ability to provide the best advice.<sup>267</sup> Any restriction on zealous advocacy is “inconsistent with the proposition that attorneys should present all the reasonable and well-

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* (“Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys. . . .”).

<sup>261</sup> *Id.* at 542.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* The *Gentile* court abandoned the idea that an attorney speaks on behalf of the client and instead focused solely on the role of the attorney as an officer of the court. *See also* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”); *see also* *Mezibov v. Allen*, 411 F.3d 712, 719 (6th Cir. 2005) (rejecting the idea that an attorney has an independent right to First Amendment protection of free speech as distinguished from the client’s right, “absent that client, the attorney is completely silenced”).

<sup>264</sup> The less debt a debtor has accumulated, the more money that is available to creditors.

<sup>265</sup> *See supra* Part II.B.

<sup>266</sup> *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 765 (D. Minn. 2006).

<sup>267</sup> MODEL RULES OF PROF’L CONDUCT PREAMBLE [9] (1989).

grounded arguments necessary for proper resolution of the case.”<sup>268</sup> By restricting the legal advice that an attorney may provide to a client, the law raises “doubt whether . . . the truncated representation had resulted in complete analysis of the case” or if it reflected the “adequacy and fairness” of the representation.<sup>269</sup> For obvious reasons, the Gag Rule flies in the face of this holding, in that it restricts the legal advice available to clients. As a result, a debtor may be left wondering about the quality of the representation or the additional options left unexplored.<sup>270</sup>

In its fourth key finding, the *Velazquez* Court held that Congress may not restrict attorney speech if it leaves the client with no reasonable alternative to receive vital legal information.<sup>271</sup> By confining the type of counsel an attorney can provide, such rules leave “no alternative channel for expression of the advocacy Congress seeks to restrict.”<sup>272</sup> Similarly, if a debtor cannot receive advice to incur additional debt from an attorney, under penalty of law, then where else will the debtor get this information? Like the clients in *Velazquez*, most consumer debtors have significant financial challenges that circumscribe the availability of financial or legal advice.<sup>273</sup> Furthermore, as experts, bankruptcy attorneys are in the best position to provide legal information regarding the filing of bankruptcy.

These four principles underlying the *Velazquez* decision demonstrate that strict scrutiny should apply to a constitutional challenge of the Gag Rule.<sup>274</sup> The Gag Rule restricts an attorney from providing legal and advantageous professional advice outside of the courtroom setting. As such, the *Gentile* standard would not apply because the attorney in a bankruptcy filing would not

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<sup>268</sup> *Velazquez*, 531 U.S. at 545 (“By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”).

<sup>269</sup> *Id.* at 534, 546 (“The courts and the public would come to question the adequacy and fairness of professional representation when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the state, avoided all reference to questions of statutory validity and constitutional authority.”).

<sup>270</sup> *Zelotes v. Martini*, 352 B.R. 17, 25 (D. Conn. 2006) (“Section 526 chills the attorney’s very exercise of the advice and counsel function that is the defining feature of our profession.”).

<sup>271</sup> *Velazquez*, 531 U.S. at 546.

<sup>272</sup> *Id.* at 546–47.

<sup>273</sup> An argument could be made that nonprofit organizations, which are exempted from the Debt Relief Agency definition, would potentially be able to provide this advice. However, differing advice would add to the already rampant confusion created by BAPCPA.

<sup>274</sup> *Geisenberger v. Gonzales*, 346 B.R. 678, 683 n.6 (E.D. Pa. 2006) (“On its face . . . this provision is a content-based restriction on speech because it prohibits attorneys from communicating a particular message and, doctrinally, would be reviewed with heightened scrutiny.”).

qualify as an officer of the court, the key determination in that case.<sup>275</sup> Furthermore, the Supreme Court typically applies strict scrutiny to ethical rules outside of the litigation setting and therefore would apply that same standard to the Gag Rule, regardless of any ethical rule classification.

#### IV. STRICT SCRUTINY OF THE BAPCPA GAG RULE

In a legal challenge to the Gag Rule, the courts would analyze its constitutionality with the highest level of scrutiny. The Gag Rule is not an ethical rule and therefore does not deserve the reduced level of scrutiny sometimes applied to ethical rules. Second, even if the court were to find that the Gag Rule is an ethical rule, the lesser standard does not necessarily apply. The Supreme Court has applied strict scrutiny to ethical rules similar to the Gag Rule, ones that prohibit attorney speech outside of the litigation setting.

When the government restricts speech based on its content, the law is presumptively invalid and the government bears the burden to rebut this presumption under strict scrutiny.<sup>276</sup> The first prong of strict scrutiny is that the law must serve a compelling government interest.<sup>277</sup> A compelling interest is “more than a mere desire to avoid the discomfort and unpleasantness” of a differing viewpoint.<sup>278</sup> Instead, the government must demonstrate that the “harms it recites are real and that its restriction will in fact alleviate them to a material degree.”<sup>279</sup> Important or legitimate state interests are not enough to satisfy the first prong of strict scrutiny.<sup>280</sup>

The stated purpose of the BAPCPA was to protect the integrity and fairness of the bankruptcy system.<sup>281</sup> The Gag Rule, specifically, was intended to shield the unsophisticated debtor from unknowingly filing a fraudulent bankruptcy claim.<sup>282</sup> The Gag Rule was also intended to protect creditors from those who might seek to “game” the means test.<sup>283</sup>

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<sup>275</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

<sup>276</sup> *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000).

<sup>277</sup> *Id.* at 813 (“To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.”).

<sup>278</sup> *Id.* at 817 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

<sup>279</sup> *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).

<sup>280</sup> *See Zablocki v. Redhail*, 434 U.S. 374, 378 (1978).

<sup>281</sup> H.R. REP. NO. 109-031, at 1 (2005).

<sup>282</sup> *See Motion to Dismiss at 15, Olsen v. Gonzalez*, 350 B.R. 906 (D. Or. 2006) (No. 05-6365-HO). The government claimed that the Gag Rule protects debtors from “attorneys who would lead them to undertake abusive practices which could result in the debtor being injured.” *Id.* For example, a court could deem the

If the courts assume a compelling interest, the Gag Rule would fail the second prong of strict scrutiny, because the law is not narrowly tailored to promote that compelling governmental interest.<sup>284</sup> To be narrowly drawn, the law must “be defined with an exactitude well beyond that of other routine legislation.”<sup>285</sup> The government must also use a less restrictive measure if one exists.<sup>286</sup> This “precision principle”<sup>287</sup> ensures that any laws restricting speech “burden no more speech than necessary to [accomplish the government’s objective].”<sup>288</sup> Therefore, to pass the second prong, the law may not be over-inclusive or overbroad.<sup>289</sup>

The Gag Rule is a sweeping provision that prohibits an attorney from advising a client to “incur more debt” in contemplation of filing for bankruptcy.<sup>290</sup> The Gag Rule is over-inclusive because it not only prevents attorneys from providing advice to a client that is illegal, but also advice that would otherwise be legal.<sup>291</sup> In short, the act of incurring additional debt is not illegal, but advising a client to take such action is now wholly illegitimate by

debts non-dischargeable or an “impermissible abuse[s] of the bankruptcy system,” resulting in the dismissal of the bankruptcy petition. *Id.*

<sup>283</sup> *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers of Bankruptcy Accountability Act of 1998: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 25 (1998) (statement of Hon. Randall J. Newsome, U.S. Bankruptcy Judge, Northern District of California) (“Perverse as it may seem, I can envision debtor’s counsel advising their clients to buy the most expensive car that someone will sell them, and sign on to the biggest payment they can afford . . . as a way of increasing their deductions. . . .”). However, these stated interests come from the government’s pleadings in the recent constitutional challenges, and are not as clear from the legislative record. See Motion to Dismiss at 10, *Olsen*, 350 B.R. 906; Reply in Support of Motion to Dismiss at 6, *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758 (D. Minn. 2007) (No. 05-CV-2626); Memorandum in Support of Federal Defendant’s Motion to Dismiss at 20, *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006) (No. 3-05-CV-2330-N). In fact, the legislative history of BAPCPA shows that creditors were identified as a major source of abuse. See THE COMMISSION REPORT, *supra* note 2, at 81 (“Some creditors have found ways to take advantage of the system . . . Abusive post-bankruptcy debt collection . . . led the Commission to recommend banning the reaffirmation of unsecured debt.”). The majority of the National Bankruptcy Review Commission did not even cite attorney misconduct as one of the sources of bankruptcy fraud in issuing its report to Congress. See *supra* note 5. Therefore, it is unclear to what extent attorney misconduct is the primary reason for the alleged consumer bankruptcy abuses. *Id.*

<sup>284</sup> *Playboy*, 529 U.S. at 813.

<sup>285</sup> 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 4:24 (2007).

<sup>286</sup> *Id.*

<sup>287</sup> *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 765 (1994) (quoting *N.A.A.C.P. v. Clairborne Hardware Co.* 458 U.S. 886, 916 (1982)).

<sup>288</sup> *Id.*

<sup>289</sup> *Carroll v. President and Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968) (The law “issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.”).

<sup>290</sup> 11 U.S.C.A. § 526(a)(4) (West 2007).

<sup>291</sup> See *supra* Part II.B.

the Gag Rule.<sup>292</sup> Moreover, the restriction extends beyond preventing abuse to actually prohibiting prudent actions.<sup>293</sup> In both instances, the statute infringes on an attorney's ability to zealously advocate for a client.<sup>294</sup> Therefore, due to the over-inclusiveness of the provision, the Gag Rule is not narrowly drawn and fails the second prong of strict scrutiny.

Going one step further, if the court considered the constitutionality of the Gag Rule under a lesser standard, the provision would not even pass a lesser standard of review.<sup>295</sup> Both standards of review share the requirement that "any restrictions on speech be narrow."<sup>296</sup> However, in each case, the provision is not narrowly tailored to satisfy even a lesser standard of review, and therefore it also would not survive strict scrutiny.<sup>297</sup>

## CONCLUSION

One year after the BAPCPA went into effect, the Senate held a hearing to evaluate the success of its first year.<sup>298</sup> Several representatives from the credit card industry, academia, and the U.S. Trustee's office testified.<sup>299</sup> The Senate heard testimony heralding "so far, so good"<sup>300</sup> and that "the reforms have been workable and show promising signs for positive results in the future."<sup>301</sup> Only one mention was made of the constitutional challenges to the Gag Rule, and

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<sup>292</sup> See *Zelotes v. Martini*, 352 B.R. 17, 25 (D. Conn. 2006).

<sup>293</sup> *Id.* ("[The Gag Rule prohibits] lawyers from advising their client to take [various] lawful, [financially] prudent actions" prior to filing for bankruptcy.).

<sup>294</sup> In the recent constitutional challenges to the Gag Rule, several courts struck down the constitutionality of the Gag Rule based on similar strict scrutiny analysis. In *Zelotes* the District Court of Connecticut stated:

Rather than changing the bankruptcy system by closing the loopholes, eliminating the incentives for opportunistic action or enacting penalties for those who take on such debt prior to filing for bankruptcy, Congress enacted [the Gag Rule], a prophylactic rule which prohibits attorneys from advising their clients to take on any additional debt in contemplation of bankruptcy, even when doing so would be lawful.

*Id.* at 24.

<sup>295</sup> See *Hersh v. United States* 347 B.R. 19, 24 (N.D. Tex. 2006) (holding that the provision failed even the less stringent balancing test in *Gentile* due to its over-inclusive restriction on attorney speech); *Zelotes*, 352 B.R. at 22 ("Because [the Gag Rule] is found to violate the First Amendment under either standard, it will be analyzed under the more lenient standard.").

<sup>296</sup> See *Hersh*, 347 B.R. at 24.

<sup>297</sup> See *id.*, see also *Zelotes*, 352 B.R. at 24.

<sup>298</sup> *Oversight on the Implementation of the Bankruptcy Abuse Prevention Act: Hearing Before the Subcomm. on the Administrative Oversight and the Courts of the Comm. on the Judiciary*, 109th Cong. (2006).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 94 (Testimony of Steve Bartlett).

<sup>301</sup> *Id.* at 209 (Testimony of Clifford J. White III).

the plaintiffs were described as attorneys who believe they “have a right under the Constitution to deceive the public or hide information from clients or advise consumers to commit fraud.”<sup>302</sup>

These hearings are a strong indication that Congress is not likely to repeal the Gag Rule any time soon. Because BAPCPA took over eight years to pass, many legislators have either moved on to other issues or refuse to “reopen the political battles.”<sup>303</sup> Most experts agree that the provisions will not be revisited for at least a few more years.<sup>304</sup> Therefore, if legislators are not likely to amend either BAPCPA’s ambiguous language or its unconstitutional Gag Rule, these issues must be addressed in the courts.

This Comment has laid out the threat posed by the Gag Rule to a consumer bankruptcy attorney’s First Amendment rights. Furthermore, the Comment provides a roadmap for future constitutional challenges to the Gag Rule. Despite the Government’s assertion, the Gag Rule is not an ethical rule and is subject to strict scrutiny. Hopefully, the Comment will provide the courts and consumer bankruptcy attorneys seeking to protect their First Amendment rights with both guidance and a framework for future constitutional challenges to the Gag Rule.

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<sup>302</sup> *Id.* at 104 (Testimony of Steve Bartlett).

<sup>303</sup> *See* Seidenberg, *supra* note 30, at 54.

<sup>304</sup> *Id.*

\* J.D. Candidate, Emory University School of Law (2008). Many thanks to Professor Julie Seaman and the *Emory Bankruptcy Developments Journal* for their hard work in publishing this Comment. I would also like to thank my friends at Emory for their unmatched humor, which has kept me above water. Lastly, I would like to thank Adam for supporting me (literally) these past few years. This is dedicated to my father.