

Fordham Journal of Corporate & Financial Law

Volume 13, Number 3

2008

Article 3

Attorneys as Debt Relief Agencies: Constitutional Considerations

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NOTES

ATTORNEYS AS DEBT RELIEF AGENCIES: CONSTITUTIONAL CONSIDERATIONS

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INTRODUCTION

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005¹ (“BAPCPA”) was signed into law on April 20, 2005,² and became effective six months later.³ Congress’ stated rationale for BAPCPA “is 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.”⁴ However, critics have charged Congress, despite their decades-long effort,⁵ with impure motives, sloppy draftsmanship leading to inconsistencies and confusion,⁶ and “arrogant disregard for the facts about debt and debtors in bankruptcy.”⁷

The creation of a new group, “debt relief agencies,”⁸ and the corresponding provisions regulating their behavior, may be the most baffling.⁹ A debt relief agency is a person that provides bankruptcy assistance to an assisted person in exchange for consideration.¹⁰ These

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

2. *Id.*

3. UNITED STATES BANKRUPTCY CODE & RULES BOOKLET 5 (LegalPub.com, Inc. 2006).

4. H.R. REP. NO. 109-31(I), at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

5. See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 571 (2005).

6. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. J. 1, 1 (2005); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 AM. BANKR. L.J. 191, 191 (2005); Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 284 (2005).

7. Lundin, *supra* note 6, at 1.

8. 11 U.S.C. § 101(12A) (2007).

9. See *id.* §§ 526-528.

10. *Id.* § 101(12A). “Debt relief agency” means:

[A]ny person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include-- (A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer; (B) a nonprofit organization . . . ; (C) a creditor of such assisted person . . . ; (D) a depository institution . . . ; (E) an author, publisher, distributor, or seller of works subject to copyright protection . . .

Id. “Bankruptcy assistance” means:

requirements have sparked a two-part debate: whether attorneys fall within the definition of debt relief agencies,¹¹ and if so, whether an application of these regulations on lawyers as a class violates their First Amendment rights.¹²

Attorneys should not be included in the definition of debt relief agencies. A contrary ruling notwithstanding, the following provisions should be held unconstitutional: (1) § 526(a)(4), which prohibits debt relief agencies from advising assisted persons to incur more debt;¹³ (2) § 527, which requires attorneys to make specific statements to their clients;¹⁴ (3) § 528, which regulates debt relief agency advertisement;¹⁵ and (4) § 526(a)(1), which mandates attorneys to perform specific indicated services.¹⁶

[A]ny goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

Id. § 101(4A) (2007). "Assisted person" means "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$164,250." *Id.* § 101(3).

11. Compare *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 767-69 (D. Minn. 2006) (finding the debt relief agency provisions of BAPCPA inapplicable to attorneys), and *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005) (holding that attorneys are not debt relief agencies), with *Hersh v. United States*, 347 B.R. 19, 22-23 (N.D. Tex. 2006) (holding that attorneys are debt relief agencies), and *Olsen v. Gonzales*, 350 B.R. 906, 911-12 (D. Or. 2006) (stating that attorneys are debt relief agencies).

12. Each court that has found attorneys to be debt relief agencies has also held some or all of the challenged sections to be unconstitutional. See *Hersh*, 347 B.R. at 23-27 (holding that § 526(a)(4) violates the plaintiff's First Amendment rights, but that § 527 does not unconstitutionally compel speech); *Olsen*, 350 B.R. at 915-21 (determining that § 526(a)(4) was both under-inclusive and over-inclusive in violation of the First Amendment, but declining to find other challenged provisions unconstitutional); *Zelotes v. Martini*, 352 B.R. 17, 22-24 (D. Conn. 2006) (holding that § 526(a)(4) is facially unconstitutional), *aff'd sub nom. Zelotes v. Adams*, 363 B.R. 660 (D. Conn. 2007).

13. 11 U.S.C. § 526(a)(4) (2005).

14. *Id.* § 527.

15. *Id.* § 528.

16. *Id.* § 526(a)(1).

I. LEGAL BACKGROUND

A. Legislative History

BAPCPA arose from the lobbying efforts of a coalition of consumer lenders, who “convinced Congress that abuse was rampant in bankruptcy, that many debtors were using bankruptcy as a ‘first resort’ to avoid paying creditors, and that courts weren’t doing enough to police the bankruptcy system.”¹⁷ Congress rationalized that BAPCPA would restore integrity to the bankruptcy system and protect both creditors and debtors.¹⁸ Congress also singled out attorneys as a major abuser of the bankruptcy system,¹⁹ and purported that the amendments would curb such behavior.²⁰

Senator Orrin Hatch of Utah, one of the most ardent supporters of the “debtor’s bill of rights,” intentionally struck at attorneys when addressing the Senate in favor of section 256 of BAPCPA.²¹ “Some attorneys . . . leave out the part about the years of ruined credit that result, the inability to get a car loan or a house loan.”²² Senator Hatch noted that BAPCPA sought to end incomplete and sometimes incorrect information provided by attorneys to their clients.²³ Congress also highlighted attorney abuse, or “gaming” of the system, as a factor in support of bankruptcy reform.²⁴

17. Lundin, *supra* note 6, at 1 (citing H.R. REP. NO. 109-31(I), at 5-8 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 92-95).

18. H.R. REP. NO. 109-31(I), at 1 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 92-95).

19. Congress never presented any evidence in support of their accusations of these egregious abuses. “Without a shred of evidence, BAPCPA convicts debtors’ attorneys as conspirators in an ‘abusive’ bankruptcy system.” Lundin, *supra* note 6, at 69.

20. 151 CONG. REC. S2459-01 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) (“We all know about the abuses of the system. Well, that is about to change for the better. This bill is about fairness and accountability. . . . This bill contains a debtor’s bill of rights with new protections that prevent bad actors from preying on the uninformed.”). *Id.*

21. The section numbers of BAPCPA do not necessarily correspond to the section numbers of the Bankruptcy Code.

22. 151 CONG. REC. S2459-01 (daily ed. Mar. 10, 2005).

23. *See id.*

24. *See* H.R. REP. NO. 109-31(I), at 5 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 92-95.

[T]he present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse. . . . [The Justice Department] has ‘consistently identified’ such problems as ‘debtor misconduct and abuse, *misconduct by attorneys* and other professionals, problems associated with bankruptcy petition preparers, and instances where a debtor’s discharge should be challenged.’²⁵

The courts that have held that attorneys are debt relief agencies have relied on this evidence of legislative intent.²⁶

A failed proposal by Senator Feingold provides another relevant piece of legislative history. On March 9, 2005, Senator Feingold proposed, as part of amendment No. 93,²⁷ that the definition for debt relief agencies exclude attorneys.²⁸ However, the Senate did not pass, or even address, his proposal.²⁹ Although Congress turned down the opportunity to resolve the definition of attorneys as debt relief agencies, Congress did not reject BAPCPA, leaving the inclusion of attorneys an issue of contention.

Some legislative history suggests intent to exclude attorneys from the term “debt relief agency.” In certain parts, the Congressional Record includes both attorneys and debt relief agencies on the same list.³⁰ Additionally, the requirements for attorneys in the legislative history do not include the responsibilities mandated in 11 U.S.C. §§ 526-528 for debt relief agencies.³¹ Courts, especially those that heard challenges to the debt relief agency provisions as an issue of first impression in their

25. *Id.* (emphasis added).

26. *See* Hersh v. United States, 347 B.R. 19, 23 (N.D. Tex. 2006) (noting that Congress mentioned “attorneys” 164 times in the House Report on BAPCPA); Olsen v. Gonzales, 350 B.R. 906, 912 (D. Or. 2006) (weighing the legislative history to determine that attorneys are debt relief agencies).

27. 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, 281 n.37 (2006).

28. *See* 151 CONG. REC. S2306-02, 2316-17 (daily ed. Mar. 9, 2005) (statement of Sen. Feingold); *see also* Wann, *supra* note 27, at 281 n.37.(discussing Congress’ failure to adopt the Feingold amendment as support for the argument that attorneys are debt relief agencies).

29. Wann, *supra* note 27, at 281 n.37.

30. *See* H.R. REP. NO. 109-31(I), at 34 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92-95). (“S[ection] 256 would impose private-sector mandates . . . on bankruptcy attorneys . . . [and] debt-relief agencies . . .”). *Id.*

31. *See id.* at 44.

jurisdictions, paid close attention to the legislative history of BAPCPA.³²

B. Scholarly Treatment Pre-Implementation

After passage but prior to implementation of BAPCPA, scholars, sparked by the ambiguous legislative history, addressed the inevitable problems that courts would face under the new law.³³ Scholarly articles published prior to BAPCPA implementation assumed that debtors' attorneys fall within the definition of "debt relief agencies."³⁴ Some of these articles also addressed the applicability of 11 U.S.C. §§ 526-528 to other attorneys (i.e., attorneys who do not or only rarely represent debtors), and argued that the statutory language applied to all attorneys involved in bankruptcy, not just debtor's attorneys.³⁵

Despite the failure to question whether attorneys are, in fact, debt relief agencies, most of the pre-implementation articles addressed the constitutional and practical issues posed by BAPCPA.³⁶ These issues varied from the regulation of advertising,³⁷ to the constitutionality of §

32. See *Hersh v. United States*, 347 B.R. 19, 22-23 (N.D. Tex. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 911-12 (D. Or. 2006); *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005) (discussing Congressional intent).

33. See Chemerinsky, *supra* note 5; Lundin, *supra* note 6; Sommer, *supra* note 6; Vance, *supra* note 6.

34. See Chemerinsky, *supra* note 5, at 572 (failing to question whether attorneys are debt relief agencies: "BAPCPA requires consumer bankruptcy lawyers to identify themselves in advertisements as 'debt relief agencies'"); Lundin, *supra* note 6, at 69 (denouncing the unjustified conviction of debtors' attorneys and discussing the de-professionalization of bankruptcy attorneys as debt relief agencies); Sommer, *supra* note 6, at 206 (assuming that the provisions applying to debt relief agencies would apply to bankruptcy attorneys); Vance, *supra* note 6, at 292 (assuming that debtors' attorneys are debt relief agencies).

35. See Chemerinsky, *supra* note 5, at 576 (explaining how §§ 526-528 could apply to attorneys representing creditors and landlords because the definition of "assisted person" is not limited to debtors or prospective debtors); Sommer, *supra* note 6, at 206 (stating that the "slipshod drafting" of BAPCPA means that the provisions applying to debt relief agencies "will apply to many attorneys who rarely, or never, represent consumer bankruptcy debtors"); Vance, *supra* note 6, at 293 (questioning whether BAPCPA will also regulate creditors' attorneys).

36. See generally Chemerinsky, *supra* note 5, at 572-89; Sommer, *supra* note 6, at 207-11; Wann, *supra* note 27, at 283-99 (forecasting constitutional issues which, while written post-implementation, had not yet been litigated).

37. See Chemerinsky, *supra* note 5, at 572-89 (evaluating the Supreme Court's perspective on attorney advertising and discussing whether BAPCPA's regulations on

526(a)(4) and § 528,³⁸ to the potential for First Amendment violations.³⁹ Attorneys, judges and other members of the bankruptcy world were undoubtedly on notice of the potential conflict over 11 U.S.C. §§ 526-528, prior to October 17, 2005, the effective date of BAPCPA.

C. Four Basic Cases Types⁴⁰

To date, four distinct types of rulings have emerged:⁴¹ (1) cases holding that the plaintiffs have no standing;⁴² (2) cases holding that

the content of advertising violate the constitution).

38. See Wann, *supra* note 27, at 283-99.

39. See Sommer, *supra* note 6, at 208 (indicating potential for violation of attorney's First Amendment rights).

40. The cases described in this section focus on whether or not attorneys are debt relief agencies and on the constitutionality of these newly added provisions. Other cases have also addressed debt relief agencies. One court, while determining a different issue, mentioned debt relief agencies, assuming without discussion that attorneys are included in the definition. See *In re Mendoza*, 347 B.R. 34, 38 n.6 (Bankr. W.D. Tex. 2006) (assuming that a debtor's attorney is almost always a debt relief agency). Other courts applied §§ 526-528, but did not specifically discuss the applicability of the provisions to attorneys. See *In re Bernales*, 345 B.R. 206 (Bankr. C.D. Cal. 2006); *Martini v. We The People Forms & Serv. Ctr. USA, Inc. (In re Barcelo)*, 313 B.R. 135 (Bankr. E.D.N.Y. 2004). Another court assumed for the purposes of resolving a different issue that attorneys are debt relief agencies, but recognized a split in authority, reserving the right to readdress the dispute in a controlling decision. See *In re Chapter 13 Fee Applications*, No. 06-00305, 2006 Bankr. LEXIS 2710, at *17 n.7 (Bankr. S.D. Tex. Oct. 3, 2006).

41. To date, courts have decided only eleven cases addressing the topic of debt relief agencies with regard to attorneys. See *Geisenberger v. Gonzales*, 346 B.R. 678 (E.D. Pa. 2006); *In re Gutierrez*, 356 B.R. 496 (N.D. Cal. 2006); *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006); *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758 (D. Minn. 2006); *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006); *Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2006), *aff'd sub nom. Zelotes v. Adams*, 363 B.R. 660 (D. Conn. 2007); *In re Reyes*, 361 B.R. 276 (Bankr. S.D. Fla. 2007); *In re Robinson*, 368 B.R. 492 (Bankr. E.D. Va. 2007); *In re Francis I. McCartney*, 336 B.R. 588 (Bankr. M.D. Ga. 2006); *In re Norman*, No. 06-70859-A, 2006 Bankr. LEXIS 2925 (Bankr. E.D. Va. Oct. 24, 2006); *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005).

42. See *Geisenberger*, 346 B.R. at 683; *In re Francis I. McCartney*, 336 B.R. at 591-92. *But see* *Jackson v. McDow (In re Jackson)*, No. 05-44941-B, 2006 U.S. Dist. LEXIS 68927, at *3 (D.S.C. Sept. 25, 2006) (holding that a debtor has standing to challenge whether the debt relief agency provisions apply to attorneys, so long as that challenge is brought as an adversary proceeding and not as a motion in a main proceeding).

attorneys are not debt relief agencies;⁴³ (3) cases holding that attorneys are debt relief agencies, but that some or all of the provisions pertaining to debt relief agencies are unconstitutional as applied to attorneys;⁴⁴ and (4) cases applying the debt relief agency provisions to attorneys, without formal discussion on the applicability of the provisions.⁴⁵

The courts in *Geisenberger v. Gonzales* and *In re Francis I. McCartney* both held that they lack jurisdiction to decide whether attorneys are debt relief agencies.⁴⁶ Both courts discussed the constitutional prohibition against delivery of advisory opinions,⁴⁷ and determined that the motions by the plaintiffs amounted to little more than requests for such proscribed opinions; therefore, they could not hear the cases.⁴⁸ The *In re McCartney* court noted that “no party has threatened to enforce against [plaintiff] the debt relief agency provisions of BAPCPA.”⁴⁹ Without the enforcement, or the threat of enforcement, a court could not hear a case or controversy as required under Article III of the Constitution, and therefore could not determine whether attorneys are debt relief agencies.⁵⁰

The courts in three cases determined that debtors’ attorneys are not debt relief agencies.⁵¹ These opinions forwarded four arguments as to why courts should construe the statute in this way:⁵² (1) plain language

43. See *Milavetz*, 355 B.R. at 767-68; *In re Reyes*, 361 B.R. at 279-80; *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 71.

44. *Hersh*, 347 B.R. at 23-27; *Olsen*, 350 B.R. at 915-21; *Zelotes*, 352 B.R. at 22-25.

45. See *In re Gutierrez*, 356 B.R. 496; *In re Robinson*, 368 B.R. at 500 n.7 (briefly mentioning binding authority holding that attorneys are debt relief agencies and that the relevant provisions to that case were not unconstitutional); *In re Norman*, No. 06-70859-A, 2006 Bankr. LEXIS 2925, at *11-*15, *21-*22 (Bankr. E.D. Va. Oct. 24, 2006) (discussing debt relief agencies and their requirements with regard to attorneys, but assuming without discussion that attorneys are debt relief agencies and the provisions are constitutional).

46. See *Geisenberger*, 346 B.R. at 683; *In re McCartney*, 336 B.R. at 591-92.

47. See *Geisenberger*, 346 B.R. at 683; *In re McCartney*, 336 B.R. at 591.

48. See *Geisenberger*, 346 B.R. at 683; *In re McCartney*, 336 B.R. at 591.

49. 336 B.R. at 592.

50. See U.S. CONST. art. III; *In re McCartney*, 336 B.R. at 591 (quoting *Preiser v. Newkirk*, 422 U.S. 395 (1975)).

51. See *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 768-69 (D. Minn. 2006); *In re Reyes*, 361 B.R. 276, 279-80 (Bankr. S.D. Fla. 2007); *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66, 71 (Bankr. S.D. Ga. 2005).

52. See *infra* Part III.B.

interpretation;⁵³ (2) legislative intent;⁵⁴ (3) the doctrine of absurd result;⁵⁵ and (4) the doctrine of constitutional avoidance.⁵⁶ The *In re Reyes* court adopted the opinion of Judge Rosenbaum from *Milavetz, Gallop & Milavetz P.A. v. United States*, holding that attorneys are not debt relief agencies.⁵⁷ However, even if attorneys generally are debt relief agencies, attorneys who represent debtors in connection with pro bono work are not debt relief agencies.⁵⁸ Additionally, the *In re Reyes* and *Milavetz* courts each held that §§ 526(a)(4), 528(a)(4) and (b)(2) are unconstitutional.⁵⁹

The courts in *Hersh v. United States*, *Olsen v. Gonzales*, and *Zelotes v. Martini* also held that attorneys are debt relief agencies, but that many of the provisions applying to debt relief agencies are unconstitutional.⁶⁰ All three courts held that § 526(a)(4) is unconstitutional as applied to attorneys.⁶¹ *Olsen* and *Hersh* both addressed the constitutionality of § 527, holding that the section, even as applied to attorneys, does not unconstitutionally compel speech.⁶² The *Olsen* court went one step further in its constitutional evaluation, discussing the viability of §§ 526(a)(1) and 528,⁶³ but ultimately

53. See *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 69.

54. See *Milavetz*, 355 B.R. at 768; *In re Reyes*, 361 B.R. at 279 (adopting the opinion of Judge Rosenbaum in *Milavetz*); *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 69.

55. See *Milavetz*, 355 B.R. at 768; *In re Reyes*, 361 B.R. at 279 (adopting the opinion of Judge Rosenbaum in *Milavetz*); *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 69-70.

56. See *Milavetz*, 355 B.R. at 768; *infra* Part II.A.1.

57. See *In re Reyes*, 361 B.R. at 279.

58. See *id.* at 280-81; *infra* Part III.B. (discussing how the debt relief agency provisions affect non-debtor attorneys).

59. *Milavetz*, 355 B.R. at 763-67 (holding that if attorneys are debt relief agencies, §§ 526(a)(4), 528(a)(4) and (b)(2) violate their First Amendment right to free speech); *In re Reyes*, 361 B.R. at 279 (adopting the decision of *Milavetz* with regard to the constitutional challenges).

60. See *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006); *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006); *Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2006), *aff'd sub nom.*, *Zelotes v. Adams*, 363 B.R. 660 (D. Conn. 2006).

61. See *Hersh*, 347 B.R. at 23-25 (holding that § 526(a)(4) is not sufficiently narrow); *Olsen*, 350 B.R. at 916 (determining that “the regulation is both under-inclusive and over inclusive”); *Zelotes*, 352 B.R. at 21-25 (holding that § 526(a)(4) is overbroad).

62. See *Hersh*, 347 B.R. 25-27; *Olsen*, 350 B.R. at 917-19.

63. See 350 B.R. at 916-17, 919-21.

determining that neither section violated the attorneys' First Amendment rights.⁶⁴

In re Gutierrez,⁶⁵ *In re Robinson*,⁶⁶ and *In re Norman*⁶⁷ vary from the other three types of cases because they were not brought by attorneys seeking clarification about the statute, but rather were motions on other issues, the resolution of which required analysis of the debt relief agency provisions.⁶⁸ These cases did not address whether attorneys are debt relief agencies, or the corresponding constitutional implications.⁶⁹ Rather, they merely applied the law to the factual situations presented.⁷⁰ These cases, in particular *In re Gutierrez*, affect arguments that attorneys may make about standing.⁷¹ Because a court has held an attorney liable under the debt relief agency provisions, one can argue that the threat of enforcement is not merely speculative.

64. *See id.*

65. 356 B.R. 496 (N.D. Cal. 2006).

66. 368 B.R. 492 (Bankr. E.D. Va. 2007).

67. No. 06-70859-A, 2006 Bankr. LEXIS 2925 (Bankr. E.D. Va. Oct. 24, 2006).

68. *See In re Gutierrez*, 356 B.R. at 496 (debtor asserting claims against his former attorney, alleging violations of the debt relief agency provisions); *In re Robinson*, 368 B.R. at 500 (determining whether supplemental compensation for the debtor's attorney should be approved); *In re Norman*, 2006 Bankr. LEXIS 2925, at *11-*16 (determining whether the Chapter 13 Trustee was entitled to attorney-client documents under the debt relief agency provisions).

69. *See In re Gutierrez*, 356 B.R. at 496; *In re Robinson*, 368 B.R. at 500; *In re Norman*, 2006 Bankr. LEXIS 2925, at *11-*16.

70. *See In re Gutierrez*, 356 B.R. at 496; *In re Robinson*, 368 B.R. at 500; *In re Norman*, 2006 Bankr. LEXIS 2925, at *11-*16.

71. 356 B.R. at 469 (holding the debtor's attorney liable under the debt relief agency provisions and sanctioned him). This Note does not delve into the issue of standing, but several cases challenging the debt relief agency provisions have speculated on standing. *Compare* *Geisenberger v. Gonzales*, 346 B.R. 678, 683 (E.D. Pa. 2006) (refusing to hear the plaintiff attorney's claims because he lacked standing), and *In re Matter of Francis I. McCartney*, 336 B.R. 588, 591 (Bankr. M.D. Ga. 2006) (holding that the plaintiffs lacked standing and finding the court lacked jurisdiction), with *Olsen v. Gonzales*, 350 B.R. 906, 913-15 (D. Or. 2006) (continuing the proceedings after holding that the plaintiffs had standing), and *Zelotes v. Martini*, 352 B.R. 17, 20-22 (D. Conn. 2006) (confirming that plaintiffs possessed standing).

II. CONFLICT

A. Are Attorneys Debt Relief Agencies?

Because the limited number of courts that have addressed whether attorneys are debt relief agencies disagree, the issue is unresolved. Section 101(12A) defines debt relief agencies,⁷² but its vagueness has led attorneys to question whether debtors' attorneys are debt relief agencies.⁷³ Although such challenges have been raised primarily with regard to debtors' attorneys,⁷⁴ the question whether attorneys who either do not represent debtors, or represent them pro bono, are also debt relief agencies, remains.⁷⁵

I. Debtors' Attorneys

Two courts have held that attorneys are not debt relief agencies, relying on the plain language of the statute.⁷⁶ Section 101(12A) of the Bankruptcy Code "makes no direct reference to either 'attorney' or 'lawyer,'"⁷⁷ and "as a matter of plain language, 'attorney' and 'debt relief agency' are not synonymous nor do they in common understanding include each other."⁷⁸ Similarly, this definition of debt relief agency makes specific reference to bankruptcy petition preparers, a group that specifically excludes attorneys,⁷⁹ and omits precise reference to attorneys.⁸⁰ "Attorney' is separately defined in § 101(4),

72. See definitions cited *supra* note 10.

73. See *Hersh v. United States*, 347 B.R. 19, 21 (N.D. Tex. 2006); *Olsen*, 350 B.R. at 910; *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 758 (D. Minn. 2006); *Zelotes*, 352 B.R. at 19; *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66, 67 (Bankr. S.D. Ga. 2005).

74. See *Hersh*, 347 B.R. at 21; *Olsen*, 350 B.R. at 910; *Milavetz*, 355 B.R. at 758; *Zelotes*, 352 B.R. at 19; *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 67.

75. See *Olsen*, 350 B.R. at 910 (beyond noting that one of the petitioners was not a bankruptcy attorney, the court did not otherwise distinguish the plaintiffs from one another); *In re Reyes*, 361 B.R. 276, 280-81 (Bankr. S.D. Fla. 2007).

76. See *Milavetz*, 335 B.R. at 768; *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 69.

77. *Milavetz*, 335 B.R. at 768.

78. *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 69.

79. 11 U.S.C. § 110(a)(1) ("'[B]ankruptcy petition preparer' means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney . . .").

80. See *Milavetz*, 335 B.R. at 768; *In re Attorneys at Law & Debt Relief Agencies*,

which makes no reference to debt relief agencies or to subsection (12(A)).”⁸¹

Both courts also declined to read the statute in a way that would lead to an “absurd result.”⁸² If the definition of “debt relief agency” includes attorneys, attorneys must tell assisted persons (their clients or potential clients) that they have the right to hire an attorney or to represent themselves, and that only an attorney can render legal advice.⁸³ “The interpretation of a statute that is logical or sensible is preferred over interpretation that is illogical or absurd.”⁸⁴

The court in *Milavetz* also relied on the doctrine of statutory construction that strives to read a statute to avoid a finding of unconstitutionality.⁸⁵ The doctrine of constitutional avoidance “counsels that, in construing a statute for ambiguity, the Court must opt for a construction which avoids grave constitutional questions.”⁸⁶ The court concluded that clear ambiguity exists in the statute and constitutional avoidance requires that §§ 526-528 do not apply to attorneys.⁸⁷ Because the court opined that the various provisions of BAPCPA governing debt relief agencies would be unconstitutional if applied to attorneys, it favored a construction of the statute that viewed the debt relief agency provisions as inapplicable to attorneys, thus avoiding a conclusion that §§ 526-528 are unconstitutional.⁸⁸

The *In re Attorneys at Law and Debt Relief Agencies* court rationalized that because the definition of bankruptcy assistance,⁸⁹ a vital element of the definition of debt relief agencies,⁹⁰ includes the provision “legal representation,” Congress intended to exclude attorneys

332 B.R. at 69.

81. *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 69.

82. *See Milavetz*, 335 B.R. at 768; *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 69-70.

83. *See* 11 U.S.C. § 527(b); *Milavetz*, 335 B.R. at 768; *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 69-70.

84. *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. at 70 (citing *United States v. Katz*, 271 U.S. 354, 357 (1926)).

85. *Milavetz*, 335 B.R. at 768.

86. *Id.* (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)).

87. *See id.*

88. *See id.* at 768.

89. *See* 11 U.S.C. § 101(4A).

90. *See id.* § 101(12A).

from the definition of debt relief agencies.⁹¹ The court reasoned that Congress intended to create a federal statute to prevent the unauthorized practice of law, not to regulate attorneys.⁹² The court also stated that Congress made clear in § 526(d)(2) “that there is no effort to curtail the states’ role in enforcing ‘qualifications for the practice of law.’”⁹³ Because regulation of attorneys has traditionally been a matter of state law, application of the new provisions to attorneys would overstep previously established boundaries.⁹⁴ Additionally, the court briefly mentioned that this potential infringement on the states’ right to regulate the practice of law would violate the Tenth Amendment.⁹⁵

Despite the plain language reading, most courts find that debtors’ attorneys are debt relief agencies.⁹⁶ To the extent they articulate their reasoning, courts generally find that attorneys fit within the definition of debt relief agencies because only attorneys are authorized to provide legal advice, and “providing legal advice” is part of the definition of bankruptcy assistance.⁹⁷ Additionally, these courts reason that if

91. See *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005).

[T]he organized bar varies from state to state, is restricted by limited availability of resources, and often cannot occur in a time-sensitive period as to protect the consumer, [and] that the inclusion of the term ‘legal representation’ . . . was Congress’s effort to empower the Bankruptcy Courts presiding over a case with authority to protect consumers who [were] before the Court

Id.

92. See *id.*

93. *Id.* at 70 (citing 11 U.S.C. § 526(d)(2)).

94. See *id.*

95. See *id.* at 71 (theorizing that if the debt relief agency provisions applied to attorneys, then the federal government might be violating the Tenth Amendment by infringing on the states’ right to control the practice of law); Chemerinsky, *supra* note 5, at 582-83.

96. The reasoning is less detailed than the analysis provided by the two courts that found that debtor’s attorneys are not debt relief agencies, perhaps because scholars and other participants in the legislative process have assumed for some time that the legislation should (or could) be so construed. See *supra* note 34 and accompanying text. In fact, the court in *Zelotes v. Martini* did not discuss whether or not attorneys fit within the definition because the plaintiff, an attorney, claimed that he was a debt relief agency. The court held that because the defendants did not raise the issue in their papers, it would assume that the plaintiff met the definition. 352 B.R. 17, 19 n.1 (D. Conn. 2006), *aff’d sub nom.*, *Zelotes v. Adams*, 363 B.R. 660 (D. Conn. 2007).

97. See 11 U.S.C. § 101(4A); *Hersh v. United States*, 347 B.R. 19, 22-23 (N.D. Tex. 2006) (holding that attorneys also supply many of the other enumerated functions included in the definition of “bankruptcy assistance”); *Olsen v. Gonzales*, 350 B.R. 906,

Congress had intended to exclude attorneys from the definition of debt relief agencies, it would have done so explicitly.⁹⁸ Congress never considered Senator Feingold's amendment to BAPCPA, which would have created this exclusion.⁹⁹ These courts view repeated references in legislative history that BAPCPA should protect consumer debtors from their attorneys¹⁰⁰ as evidence that Congress anticipated the restrictions pertaining to debt relief agencies to apply to attorneys.¹⁰¹

2. Other Attorneys

Several scholars discussed the possibility that attorneys of other parties in bankruptcy, such as creditors and landlords, could also fall within the definition of debt relief agency.¹⁰² These scholars argued that the definition of "assisted person," set out in § 101(4A), is not limited to debtors in a bankruptcy.¹⁰³ Therefore, an individual creditor or landlord, or a defendant in an adversary proceeding, could be considered an "assisted person" and their attorney a debt relief agency.¹⁰⁴ Additionally, § 527(b) requires debt relief agencies to provide disclosures to represented debtors.¹⁰⁵ This provision, however, only requires debt relief agencies to provide disclosures "to the extent applicable."¹⁰⁶ Consequently, Congress may have added this discretion-granting phrase to protect attorneys from other parties to a bankruptcy.

911-12 (D. Or. 2006).

98. See *Hersh*, 347 B.R. at 23; *Olsen*, 350 B.R. at 912.

99. *Olsen*, 350 B.R. at 912; see *supra* notes 27-29 and accompanying text.

100. See *supra* notes 19-25 and accompanying text.

101. See *Hersh*, 347 B.R. at 23 (noting that Congress mentioned "attorneys" 164 times in the House Report on BAPCPA); *Olsen*, 350 B.R. at 912 (discussing the legislative history).

102. See Chemerinsky, *supra* note 5, at 576; Sommer, *supra* note 6, at 204 (mentioning that "those mostly likely to innocently violate the provisions will be attorneys who do not regularly represent consumer debtors"); Vance, *supra* note 6, at 295-96.

103. See Chemerinsky, *supra* note 5, at 576; Sommer, *supra* note 6, at 204, Vance, *supra* note 6, at 295-96. Anyone whose debts consist primarily of consumer debts can be an assisted person. The bankruptcy assistance provided need not be related to that person's own debts. See 11 U.S.C. § 101(4A).

104. See Chemerinsky, *supra* note 5, at 576; Vance, *supra* note 6, at 294-96 (listing specific instances where a non-debtor could become an assisted person, rendering their attorney a debt relief agency).

105. 11 U.S.C. § 527(b).

106. *Id.*; see also *infra* Part II.C.2.

No court has ruled on whether the debt relief agency provisions apply to attorneys other than debtors' attorneys. The court in *Hersh* noted, however, that while the attorney in that case fell within the definition of debt relief agency, that "does not necessarily mean it applies to all attorneys."¹⁰⁷ McBride, one of the plaintiffs in *Olsen*, was not a debtors' attorney.¹⁰⁸ However, the court did not treat McBride differently from the other plaintiffs who were debtor attorneys, stating its belief that if attorneys are debt relief agencies, the definition includes all attorneys, not just debtor's attorneys.¹⁰⁹

Some scholars conclude that legislative intent would not render non-debtor's attorneys debt relief agencies.¹¹⁰ Because Congress intended for BAPCPA to protect consumers from their attorneys, at least in part,¹¹¹ it would not follow that Congress meant to extend the provisions to attorneys for other parties in bankruptcy. One court addressed whether pro bono attorneys are debt relief agencies.¹¹² The court held that because, by definition, a "debt relief agency" must provide "bankruptcy assistance . . . in return for the payment of money or other valuable consideration,"¹¹³ pro bono attorneys are not debt relief agencies.¹¹⁴ The court acknowledged that pro bono attorneys do receive a benefit from the representation—credit toward fulfilling the state pro bono requirement.¹¹⁵ Nonetheless, this benefit was not enough to constitute the necessary exchange of valuable consideration between the debtor and the attorney to fall within the definition of a debt relief agency.¹¹⁶ However, the government could argue as erroneous the adoption of a standard of valuable consideration mandating monetary exchange between the debtor and attorney. Rather, the receipt of valuable consideration should only require that the attorney receive

107. *Hersh v. United States*, 347 B.R. 19, 22 n.4 (N.D. Tex. 2006).

108. *Olsen v. Gonzales*, 350 B.R. 906, 910-11 (D. Or. 2006).

109. *See id.* at 919 ("[I]t does not appear that McBride is correct that he is required to give an untrue statement or not advertise his services regarding advising clients in areas of bankruptcy. . . . [S]ection 528 also permits a substantially similar statement . . .").

110. *See Vance*, *supra* note 6, at 293.

111. *See supra* notes 19-25 and accompanying text.

112. *See In re Reyes*, 361 B.R. 276 (Bankr. S.D. Fla. 2007).

113. 11 U.S.C. § 101(12A).

114. *See In re Reyes*, 361 B.R. at 280-81.

115. *See id.*

116. *See id.*

consideration for services rendered, which can include credit toward a pro bono requirement.

B. Constitutional Considerations

The conclusion that attorneys are debt relief agencies raises a host of constitutional issues, specifically First Amendment issues.

1. Section 526(a)(4)

Section 526(a)(4) of the bankruptcy code raises the most uncertainty, which provides that

[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.¹¹⁷

Plaintiffs argue that compliance with this section prevents otherwise correct, lawful, and proper speech, violating their First Amendment right to free speech.¹¹⁸

a. Applicable First Amendment Standard

In any First Amendment challenge to a statute, the court must first determine which standard or level of scrutiny to apply, i.e., how valuable is the speech or the speaker's right to make the speech, balanced against the government interest forwarded by the statute.¹¹⁹ Challengers of § 526(a)(4) have based their claims on First Amendment principles.¹²⁰ The courts have grappled with the difficult threshold issue of the applicable standard to apply to the evaluation of § 526(a)(4).¹²¹

117. 11 U.S.C. § 526(a)(4).

118. See *Hersh v. United States*, 347 B.R. 19, 21-22 (N.D. Tex. 2006); *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 762 (D. Minn. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 910 (D. Or. 2006); *Zelotes v. Martini*, 352 B.R. 17, 20 (D. Conn. 2006).

119. See *Hersh*, 347 B.R. at 23 (discussing two issues—the applicable standard and constitutionality—the parties raised regarding § 526(a)(4)).

120. See *id.* at 23-24.

121. See *id.*; *Milavetz*, 355 B.R. at 763-66; *Olsen*, 350 B.R. at 915-16; *Zelotes*, 352

The outcome of this threshold issue directly affects whether a court will invalidate the statute with regard to attorneys.

Defendants in constitutional challenges to § 526(a)(4) advocate for the lenient standard articulated by the Supreme Court in *Gentile v. State Bar of Nevada*.¹²² The disputed provision must serve “the State’s legitimate interest in regulating the activity in question” and “impose only narrow and necessary limitations on lawyers’ speech.”¹²³ This test arose out of the Supreme Court’s belief that the government has a “special responsibility for maintaining standards among members of the licensed professions,”¹²⁴ specifically a responsibility to impose ethical restrictions.¹²⁵ Therefore, this standard applies where the challenged provision is an ethical rule.¹²⁶ According to the court in *Gentile*, an ethical rule is designed to protect “the integrity and fairness” of the judicial system.¹²⁷ The defendants in *Olsen* and *Hersh* argued that § 526(a)(4) should be construed as an ethical rule, because it is “a tool for protecting the integrity and fairness of the bankruptcy system.”¹²⁸ If a court determines that § 526(a)(4) constitutes an ethical rule, the more lenient *Gentile* standard will apply, making invalidation of the statute on First Amendment grounds more likely.¹²⁹

However, a content-based restriction merits a higher standard of review. The court in *Milavetz* rejected that the *Gentile* standard in favor of strict scrutiny.¹³⁰ Under strict scrutiny, restrictions can only survive if they are narrowly tailored to achieve a compelling state interest.¹³¹ The

B.R. at 22.

122. 501 U.S. 1030 (1991); *see also* Brief in Support of Motion to Dismiss at 12-13, *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006) (No. 05-6365-HO) [hereinafter *Olsen Brief*]; Reply Brief in Support of Federal Defendant’s Motion to Dismiss at 2, *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006) (No. 3-05-CV-2330-N) [hereinafter *Hersh Reply Brief*].

123. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

124. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978).

125. *See Gentile*, 501 U.S. at 1073.

126. *Id.*

127. *Id.* at 1075.

128. *Olsen Brief*, *supra* note 122, at 14; *see also Hersh Reply Brief*, *supra* note 122, at 2.

129. *See U.S. v. Scarfo*, 263 F.3d 80 (3d Cir. 2001); *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999).

130. *See Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 764 (D. Minn. 2006).

131. *See United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).

Milavetz court held that strict scrutiny should apply because § 526(a)(4) is a content-based regulation of attorney speech; it prevents attorneys from giving specific information to their clients.¹³² Strict scrutiny applies to content-based restrictions on speech because “[g]overnment action that stifles speech on account of its message . . . favored by the Government, contravenes th[e] essential [First Amendment] right[s]’ of private citizens.”¹³³ In rejecting the *Gentile* standard,¹³⁴ the court held that § 526(a)(4) is not an ethical rule.¹³⁵ The court found that nothing in the section “alludes to ethics.”¹³⁶ “The government ‘cannot foreclose the exercise of constitutional rights by mere labels.’”¹³⁷ This holding increases the likelihood that the statute, as applied to lawyers, will be invalidated on First Amendment grounds.

Other courts that have addressed the constitutionality of § 526(a)(4) held that it is irrelevant which standard applies because the provision fails even under the more lenient *Gentile* standard.¹³⁸

b. Constitutionality

In determining the constitutionality of § 526(a)(4), courts first look to the government’s interests under the statute.¹³⁹ The rationale behind BAPCPA is well established: improve bankruptcy law by protecting creditors and debtors and preventing abuse of the system.¹⁴⁰ Congress was concerned that attorneys were advising their clients to incur significant debt in the time preceding filing because the debt would be dischargeable, to the disadvantage of both creditors, whose distributions in bankruptcy would be diminished, and debtors, whose cases could be

132. See *Milavetz*, 355 B.R. at 764.

133. *Id.* (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994)).

134. See *supra* notes 125-27 and accompanying text.

135. See *Milavetz*, 355 B.R. at 764.

136. *Id.*

137. *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)).

138. See *Hersh v. United States*, 347 B.R. 19, 23-24 (N.D. Tex. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 915-16 (D. Or. 2006); *Zelotes v. Martini*, 352 B.R. 17, 22 (D. Conn. 2006), *aff’d sub nom.*, *Zelotes v. Adams*, 363 B.R. 660 (D. Conn. 2007); *infra* Part III.C.1.b.

139. Under the *Gentile* test, the state must have a “legitimate interest.” *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991). Under the strict scrutiny standard, the government must have a “compelling interest.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).

140. See *supra* notes 19-25 and accompanying text.

dismissed because of bad faith filing.¹⁴¹ Section 526(a)(4), which targets loopholes and removes the incentives “that allow and sometimes even encourage opportunistic personal filings and abuse,”¹⁴² advances BAPCPA’s rationale.

None of the courts addressed whether this was a compelling¹⁴³ or legitimate interest,¹⁴⁴ rather, they addressed whether Congress narrowly drew the statute to serve that interest.¹⁴⁵ Section 526(a)(4) prevents attorneys from advising their clients to incur any debt, including legitimate debt, in contemplation of bankruptcy.¹⁴⁶ However, Congress failed to consider that incurring additional debt may not be a sign of “gaming” the system, but rather an appropriate reaction to the debtor’s financial distress.¹⁴⁷ The prohibition could prevent a number of lawful and beneficial actions, including: (1) refinancing at a lower rate in order to lower payments and possibly delay or prevent bankruptcy; (2) incurring secured debt in order to establish credit after filing for bankruptcy; (3) taking out a loan to cover the expenses of bankruptcy, such as attorneys’ fees and filing fees; and (4) refinancing secured debt in order to pay off unsecured debt.¹⁴⁸ A statute prohibiting attorneys from advising clients to take actions that could improve the possibility of a successful bankruptcy is not narrowly drawn to serve the government’s interest.¹⁴⁹ Therefore, § 526(a)(4) is facially

141. See *Milavetz*, 355 B.R. at 765; *Zelotes*, 352 B.R. at 23 (citing *Bankruptcy Reform Act of 1998: Part I: Hearing on H.R. 3150 Before the H. Comm. on the Judiciary*, 105th Cong. 25 (1998)).

142. *Zelotes*, 352 B.R. at 23 (quoting H.R. Rep. No. 109-31(I), at 1 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92).

143. Under the strict scrutiny test, the government must have a compelling interest to restrict speech. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).

144. Under the *Gentile* test, the government must have a legitimate interest to restrict the speech of an attorney. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

145. Both tests require that the statute be narrowly drawn to serve the government interest. See *supra* notes 125, 133 and accompanying text.

146. 11 U.S.C. § 526(a)(4) (2006).

147. See *Hersh v. United States*, 347 B.R. 19, 24-25 (N.D. Tex. 2006); *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 765 (D. Minn. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 916 (D. Or. 2006); *Zelotes*, 352 B.R. at 24.

148. See *Zelotes*, 352 B.R. at 24 (citing *Hersh*, 347 B.R. at 24; *Olsen*, 350 B.R. at 916-17).

149. See *Conant v. Walters*, 309 F.3d 629, 638-39 (9th Cir. 2002) (holding that government could not justify a policy that threatened to punish a physician for

unconstitutional, irrespective of which standard is applied, because it chills the speech, or the advisement ability, of attorneys.¹⁵⁰

2. Section 527

Section 527 requires attorneys to make specific statements to their clients.¹⁵¹ Attorneys challenging this section have argued that it violates

recommending to a patient the medical use of marijuana on the ground that such a recommendation might encourage illegal conduct by the patient); *Hersh*, 347 B.R. at 25 (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)) (even under intermediate scrutiny, “[s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive”); *Olsen*, 350 B.R. at 916-17; *Zelotes*, 352 B.R. at 25.

150. See *Hersh*, 347 B.R. at 25; *Milavetz*, 355 B.R. at 765-66; *Olsen*, 350 B.R. at 916 (advocating that because the definition of debt relief agencies does not include non-profits, debtors can still be advised on ways to “game” the system, rendering the section under-inclusive as well as over-inclusive); *Zelotes*, 352 B.R. at 25; *Olsen Brief*, *supra* note 122, at 16 (arguing that § 526(a)(4) is narrowly drawn because (1) it allows for attorneys to discuss the standards for determining when debt is abusive, and (2) it is merely a prohibition against advising clients from incurring more debt with an abusive intention).

151. 11 U.S.C. § 527(b) (2006). Section 527 requires a debt relief agency providing bankruptcy assistance to an assisted person to provide each assisted person the following notice in writing:

IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE
SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once

a professional's First Amendment right not to speak.¹⁵² In other cases addressing the right of a professional not to speak, courts have applied a strict scrutiny standard.¹⁵³

Two courts have addressed constitutional challenges to § 527,¹⁵⁴ and both held that § 527 passes constitutional muster under the strict scrutiny standard.¹⁵⁵ Section 527 ensures that a client is informed of basic information before initiating a bankruptcy proceeding.¹⁵⁶ Because consumer debtors are at an informational disadvantage, as compared to creditors, attorneys, and corporate debtors, a compelling government interest exists.¹⁵⁷

The courts also held that the burden imposed by § 527 is reasonable.¹⁵⁸ Because nothing in § 527 prevents the attorney from

your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.

Id.

152. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that First Amendment rights include both the right to speak and the right to refrain from speech); *Hersh*, 347 B.R. at 26 (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988)).

153. See *Planned Parenthood v. Casey*, 505 U.S. 833, 882-83 (1992); *Riley*, 487 U.S. at 795-96 (this standard requires that the statute in question must (1) further a substantial government interest and (2) provide no "substantial obstacle" and not be an "undue burden").

154. See *Hersh*, 347 B.R. at 25-27; *Olsen*, 350 B.R. at 917-19.

155. See *Hersh*, 347 B.R. at 27; *Olsen*, 350 B.R. at 918-19.

156. See *Hersh*, 347 B.R. at 27.

157. See *id.*

158. See *id.*

giving the debtor further explanation than that provided in the statute, the attorney would not be forced to provide false or misleading information.¹⁵⁹ Additionally, the provision allows attorneys to alter the statement, so long as the content is “substantially similar.”¹⁶⁰ A third factor making the burden “reasonable” is that the disclosures only need to be provided “to the extent applicable.”¹⁶¹ These flexibilities leave “the bankruptcy attorney with sufficient control of the distribution of the messages of the statement to avoid any undue burden.”¹⁶²

The plaintiff in *Hersh* argued that § 527 creates an undue burden on attorneys because it requires them to make false or potentially misleading statements.¹⁶³ This includes statements that clients “will have to pay a filing fee to the bankruptcy court,” even though such fees can be deferred under Federal Rule of Bankruptcy Procedure 1006(b), and that the trustee is a “court official,” when the trustee is not employed by the court, but rather is selected by the Executive Branch.¹⁶⁴ Plaintiff contended that because such disclosures are objectively incomplete or misleading or false, compelling attorneys to dispense this information is an obvious violation of their constitutional rights.¹⁶⁵ Under *Casey*, mandating speech is unconstitutional if it requires the professional to make false or misleading statements.¹⁶⁶ Therefore, plaintiff argued, because § 527 requires attorneys to make eleven false or misleading statements, it violates the First Amendment right to refrain from speech.¹⁶⁷ No court has accepted these arguments.¹⁶⁸

159. *See id.*

160. *See id.* (citing 11 U.S.C. § 527(b) (2006)).

161. *See id.* (citing 11 U.S.C. § 527(b) (2006)).

162. *Id.* (citing *Fargo Women’s Health Org. v. Schafer*, 18 F.3d 526, 532-34 (8th Cir. 1994)) (upholding a provision requiring doctors to provide information, where they may comment on or dissociate themselves from that information).

163. *See Hersh Reply Brief, supra* note 122, at 15-17.

164. *See id.* The plaintiff listed nine other false or misleading statements that a debt relief agency would be required to make if it complied with § 527. *See id.*

165. *See id.*

166. *See id.* (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 883 (1992)).

167. *See id.*

168. *See e.g., Hersh v. United States*, 347 B.R. 19, 27 (N.D. Tex. 2006) (rejecting the plaintiff’s arguments).

3. Section 528

Section 528 regulates debt relief agency advertisements by requiring them to include the phrase: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”¹⁶⁹

Two courts heard challenges to this section, and their holdings conflict.¹⁷⁰ Both initially evaluated which of three standards of constitutional evaluation should apply.¹⁷¹ All three standards require the evaluating court to first determine whether the First Amendment right to commercial speech protects the expression,¹⁷² and then assess the nature of that commercial speech.¹⁷³ If the speech is found to be deceptive, it need only withstand a rational basis review.¹⁷⁴ If the speech is not deceptive, the restriction must directly advance a substantial government interest.¹⁷⁵ The courts in *Milavetz* and *Olsen* determined that intermediate scrutiny is the proper standard to apply to § 528¹⁷⁶ because the statute imposes requirements on both the false and deceptive advertisement of which Congress complains and on truthful advertisements.¹⁷⁷ The intermediate scrutiny standard requires that the regulation (1) directly advance (2) a substantial government interest that is (3) “narrowly drawn.”¹⁷⁸

The court in *Milavetz* held that § 528 violates attorneys’ First Amendment rights because the statute fails the first and third prongs of

169. 11 U.S.C. §§ 528(a)(4), (b)(2) (2006).

170. See *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 766 (D. Minn. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 919 (D. Or. 2006).

171. See *Milavetz*, 355 B.R. at 766; *Olsen*, 350 B.R. at 919-20.

172. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

173. See *Milavetz*, 355 B.R. at 766.

174. See *id.* (citing *Zauderer v. Office of Disciplinary Counsel of the S.Ct. of Ohio*, 471 U.S. 626, 651-52 (1985)).

175. See *id.* (citing *Cent. Hudson*, 447 U.S. at 566 (1980)).

176. See *id.*; *Olsen v. Gonzales*, 350 B.R. 906, 920 (D. Or. 2006) (determining that rational basis review applied, but nevertheless proceeded to analyze the case under intermediate scrutiny, concluding that even this greater standard was satisfied by the facts).

177. See *Milavetz*, 355 B.R. at 766; *Olsen*, 350 B.R. at 919-20 (holding that the *Zauderer* decision is on point with the case at issue).

178. See *Milavetz*, 355 B.R. at 766 (citing *Cent. Hudson*, 447 U.S. at 566; *Zauderer*, 471 U.S. at 641); *Olsen*, 350 B.R. at 919 (citing *Cent. Hudson*, 447 U.S. at 566; *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989)).

the intermediate scrutiny standard.¹⁷⁹ The government interest concerns preventing debt relief agencies from misleading “the lay community into thinking debts can be erased without payment or filing for bankruptcy.”¹⁸⁰ However, because the statute is likely to create more confusion, not less, the government’s interest is not advanced.¹⁸¹ The public does not know what a debt relief agency is, and is more likely to be confused by advertisements for this Congressionally-invented group (which has no real existence outside of the legislative imagination) than it would by advertisements for bankruptcy attorneys.¹⁸² Additionally, the statute forces all professionals that are debt relief agencies to advertise in the same way, regardless of whether they are qualified to practice law or only assist in the petition preparation process,¹⁸³ thus compounding confusion.¹⁸⁴

The *Milavetz* court, in addition to holding that § 528 does not directly advance the government’s interest, also held that this section is not “narrowly drawn.”¹⁸⁵ “A narrowly drawn regulation designed to prevent deception ‘may be no broader than reasonably necessary to prevent the ‘perceived evil.’”¹⁸⁶ The court concluded that Congress constructed § 528 far too broadly because it regulates “absolutely truthful advertisements,” which is unnecessary to satisfy the government interest.¹⁸⁷

Conversely, the court in *Olsen* held that § 528 withstands constitutional scrutiny.¹⁸⁸ It concluded that because the required language is neither illegal nor misleading, it advances the government interest of preventing fraudulent advertising by debt relief agencies.¹⁸⁹ The first two prongs of intermediate scrutiny are thus satisfied.¹⁹⁰ The *Olsen* court found that Congress did narrowly draw the statute because, while it does require attorneys to advertise as debt relief agencies, it

179. See *Milavetz*, 355 B.R. at 767.

180. *Id.* at 766.

181. See *id.* at 767.

182. See *id.*

183. See *id.*

184. See *id.*

185. See *id.*

186. *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

187. See *id.*

188. See *Olsen v. Gonzales*, 350 B.R. 906, 919-20 (D. Or. 2006).

189. See *id.* at 920 (citing 151 CONG. REC. H2063-01, 2066 (daily ed. Apr. 14, 2005)).

190. See *id.*

does not limit them from also identifying themselves as bankruptcy attorneys.¹⁹¹ The forced inclusion of debt relief agencies simply provides more information.¹⁹² The court also addressed whether non-debtor attorneys will be obligated to include this potentially misleading statement in advertisements, despite the fact that the debt relief agency designation arises only because of service provided to “assisted persons.”¹⁹³ The court held that because § 528 allows professionals to make “substantially similar” statements and does not limit them from providing additional information in their advertisements, it is still narrowly drawn.¹⁹⁴ As a result, the *Olsen* court found that the third prong of intermediate scrutiny was satisfied, and therefore upheld the constitutionality of § 528.¹⁹⁵

4. Section 526(a)(1)

Section 526(a)(1) provides that “[a] debt relief agency shall not fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title”¹⁹⁶ In *Olsen*, the plaintiffs argued that attorneys might be reluctant to tell clients or potential clients some details regarding the ramifications of representation, thus unconstitutionally chilling speech.¹⁹⁷ The plaintiffs discussed several examples where an attorney might promise services, but later ethical or practical considerations would prevent performance.¹⁹⁸ These concerns echo those voiced by scholars, who had previously addressed the potential chilling effect of the debt relief agency provisions, and who

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. 11 U.S.C. § 526(a)(1) (2007).

197. Olsen Brief, *supra* note 122, at 8-10.

198. *See id.* (examples cited include an attorney representing a married couple, making representations to both of them and then, due to their divorce, becoming unable to fulfill those obligations to one or both of them per the ethics rules; an attorney unable to fulfill his obligations because he feels as though his life is threatened by his client; and the situation of a debtor changing dramatically during the course of a bankruptcy case).

described hypothetical situations in which an attorney's adherence to professional responsibilities would induce violation of the statute.¹⁹⁹

The *Olsen* court, unpersuaded,²⁰⁰ interpreted the statute consistently with the statutory construction doctrine of constitutional avoidance, and in a way that did not raise a question of constitutionality. *Olsen* held that courts "should interpret this section to not require attorneys to perform ill-advised or unethical services."²⁰¹ It concluded that when an interpretation that does not violate the constitution is available, an as-applied challenge should fail.²⁰² The court found that "speech is not chilled by the provision,"²⁰³ because in the worst case, attorneys would be required to couch their promises in conditional terms, not abstain from communication entirely.²⁰⁴

III. RESOLUTION

A. Attorneys Are *Not* Debt Relief Agencies

I. Debtor's Attorneys

Notwithstanding the pre-implementation treatment of this issue by scholars,²⁰⁵ debtors' attorneys are not debt relief agencies. If courts interpret the definition of debt relief agencies to exclude attorneys, many, if not all, of the constitutional issues would disappear.²⁰⁶ This result complies with the requirement that courts choose the statutory construction that creates the fewest constitutional issues.²⁰⁷

The plain language of the statutory provisions at issue compels such a result.²⁰⁸ Despite Congressional denunciations of bankruptcy

199. See Vance, *supra* note 6, at 306-09 (discussing how the vagueness of the provision creates an obligation to clients that otherwise would not exist under either ethical rules or applicable law).

200. See *Olsen*, 350 B.R. at 916-17.

201. *Id.* at 917.

202. See *id.*

203. *Id.*

204. See *id.*

205. See *supra* note 34 and accompanying text.

206. See Milavetz, Gallop & Milavetz P.A. v. United States, 355 B.R. 758, 768 (D. Minn. 2006); *supra* notes 87-89 and accompanying text.

207. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

208. See 11 U.S.C. §§ 526-528 (2007).

attorneys in the legislative history, the definition of a debt relief agency does not expressly include attorneys.²⁰⁹ Congress easily could have added attorneys to this definition, but did not. Moreover, the legislative history reveals instances where attorneys and debt relief agencies are recognized as separate entities on the same list.²¹⁰ The history also contains a separate list of attorney responsibilities, indicating that attorneys have responsibilities different from those of debt relief agencies.²¹¹

Lastly, the failure to incorporate Senator Feingold's amendment,²¹² which would have excluded attorneys from the definition of debt relief agency, is not persuasive evidence of Congressional intent to include attorneys. First, Congress never specifically rejected this amendment.²¹³ Second, its failure to read the issue is better construed as an indication that Congress did not view the amendment as necessary, because attorneys are not included within the definition of debt relief agency, rather than that Congress affirmatively understood the term to include attorneys and declined the opportunity to carve out an exemption for attorneys.

2. Other Attorneys

If debtors' attorneys are not debt relief agencies, then attorneys for non-debtor "assisted persons" and pro bono attorneys are not debt relief agencies, either.²¹⁴ Even if debtors' attorneys are debt relief agencies, attorneys for other "assisted persons" should not be included within the scope of these provisions. Since the most powerful argument in favor of debtors' attorneys as debt relief agencies is the legislative history accusing attorneys of "gaming,"²¹⁵ it is difficult to translate this argument to attorneys who do not represent debtors and, therefore, cannot mislead debtors or aid them in "gaming" the system.

209. *See id.* § 101(12A).

210. *See* H.R. REP. NO. 109-31(I), at 17, 44 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 103, 116 ("S. 256 would impose private-sector mandates on bankruptcy attorneys, creditors, preparers of bankruptcy petitions, debt-relief agencies, consumer reporting agencies, and credit and charge-card companies.").

211. *See id.* at 116.

212. *See supra* notes 27-29 and accompanying text.

213. *See* Wann, *supra* note 27, at 281 n.37.

214. The arguments about constitutional avoidance and plain language discussed above apply to all attorneys.

215. *See supra* notes 102-03 and accompanying text.

On the other hand, if debtor's attorneys are debt relief agencies, debtor's attorneys working on a pro bono basis are also debt relief attorneys.²¹⁶ The *In re Reyes* court held that pro bono attorneys are not debt relief agencies because they do not receive valuable consideration from the debtor in exchange for their services.²¹⁷ The definition of debt relief agencies does not require that the debtor give valuable consideration, only that consideration is received in exchange for the services.²¹⁸ Debtors' attorneys, or any other debt relief agency, could simply receive payment directly from family members of the debtor, or from a bank where the debtor has taken a loan to cover bankruptcy expenses, to avoid all liability under §§ 526-528. This loophole would render the debt relief agency provisions completely ineffective. Therefore, pro bono attorneys that represent debtors must be debt relief agencies if debtors' attorneys are included in the definition.

*B. If Attorneys are Debt Relief Agencies, §§ 526-528 are
Unconstitutional*

A holding that attorneys are debt relief agencies triggers the second half of the debt relief agency debate, whether §§ 526-528 violate the constitutional rights of attorneys.

1. Section 526(a)(4) Violates Attorneys' First Amendment Rights

a. Strict Scrutiny—The Applicable Standard

Determining which First Amendment standard to apply to a statutory restriction on speech first requires a threshold determination of the type of restriction.²¹⁹ If the restriction is content-based, then the strict scrutiny standard applies.²²⁰ If the restriction constitutes an ethical rule, the evaluating court should apply the *Gentile* standard.²²¹ Section

216. From a public policy standpoint, such a holding would not be desirable since it discourages attorneys from engaging in pro bono work aimed at assisting consumer debtors as they are already experiencing financial difficulties.

217. See 361 B.R. 276, 280-81 (Bankr. S.D. Fla. 2007); *supra* notes 114-18 and accompanying text.

218. 11 U.S.C. § 101(12A) (2007).

219. See *supra* notes 123-40 and accompanying text.

220. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

221. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

526(a)(4) prevents attorneys from giving specific information to their clients.²²² Therefore, it is a content-based restriction and strict scrutiny should apply.²²³ It is more likely that a court will find that the statute violated attorneys' constitutional rights under a strict scrutiny standard than under the *Gentile* standard.

b. Section 526(a)(4) Violates Attorneys' First Amendment Rights
Regardless of the Applicable Standard

Section 526(a)(4) fails constitutional scrutiny regardless of the standard applied, whether under the *Gentile* test or the strict scrutiny standard. Both tests require that the statute be "narrowly drawn" in order to serve the government interest,²²⁴ and § 526(a)(4) is not narrowly drawn. While it may serve the purposes set out by Congress,²²⁵ it would also prevent attorneys from providing lawful, appropriate advice to their clients. There are several examples of proper incursion of additional debt prior to filing for bankruptcy, even in anticipation of filing for bankruptcy.²²⁶ Offering such advice would not be unlawful, unethical, or even encourage debtors to "game" the system. Instead, it would aid all parties in a bankruptcy.²²⁷ Unfortunately, attorneys could not advise debtors accordingly if forced to comply with § 526(a)(4). A statute prohibiting attorneys from advising clients to take actions that could improve the possibility of a successful bankruptcy is not narrowly drawn. Therefore, it violates attorneys' constitutional rights.

222. See *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 764 (D. Minn. 2006).

223. See *id.*; *supra* notes 132, 134-35 and accompanying text.

224. See *supra* notes 125, 133 and accompanying text.

225. Among Congress' stated purposes for BAPCPA was to curb the practice of debtors "gaming" the system, and to prevent their attorneys from helping them do so. See S. Res. 256, 109th Cong., 151 CONG. REC. S2459 (2005) (enacted); *supra* notes 19-25 and accompanying text.

226. See *Olsen v. Gonzales*, 350 B.R. 906, 916-917 (D. Or. 2006); *Zelotes v. Martini*, 352 B.R. 17, 24 (D. Conn. 2006), *aff'd sub nom. Zelotes v. Adams*, 363 B.R. 660 (D. Conn. 2007) (citing *Hersh v. United States*, 347 B.R. 19, 24 (N.D. Tex. 2006)).

227. See *supra* notes 150-52 and accompanying text (discussing the positive effects of violation of this section).

2. Section 527 Violates Attorneys' First Amendment Rights

Section 527 violates attorneys' First Amendment right to remain silent.²²⁸ While the government has a compelling interest in ensuring that an attorney inform the debtor of basic information before initiating a bankruptcy proceeding, the statute unduly burdens attorneys.²²⁹ Under *Casey*, a statute unconstitutionally violates speech if it requires a professional to make false or misleading statements.²³⁰ Section 527 proscribes eleven mandatory statements that are false or misleading.²³¹ Thus, § 527 violates attorneys' constitutional rights.

3. Section 528 Violates Attorneys' First Amendment Rights,
Notwithstanding Application of the Intermediate Scrutiny Standard

Milavetz and *Olsen* both addressed the constitutionality of § 528 and held intermediate scrutiny as the appropriate standard of review.²³² Intermediate scrutiny requires that the statute directly advance a substantial government interest and to be drawn narrowly.²³³ Despite the use of this more lenient standard, § 528 is not constitutionally valid. Section 528 might confuse those reading debt relief agency advertisements, such that non-attorneys might be perceived as attorneys, and actual attorneys become de-professionalized.²³⁴ This confusion frustrates the government's goal to protect against consumer deception. As a result, the statute fails the first prong of the intermediate scrutiny standard.

228. The First Amendment right to free speech includes both the right to speak and the right not to speak. *See* *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977).

229. A statute is only constitutionally valid if it furthers a substantial government interest and provides no substantial obstacle or undue burden. *See* *Planned Parenthood v. Casey*, 505 U.S. 833, 882-83 (1992).

230. *See id.* at 883.

231. *See* *Olsen Brief*, *supra* note 122.

232. *See* *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 766 (D. Minn. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 919 (D. Or. 2006).

233. *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

234. *See* *Lundin*, *supra* note 6, at 69 (arguing that the debt relief agency provisions de-professionalize bankruptcy attorneys).

Further, § 528 is not narrowly drawn, as required by the third prong of the intermediate scrutiny standard.²³⁵ The regulation applies to all advertisements, even truthful ones. Regulation of truthful advertisements, when such regulation does not achieve the government interest, violates attorneys' First Amendment right to free speech.

4. Section 526(a)(1) Unconstitutionally Chills Attorney Speech

Ethical and other considerations frequently arise, rendering attorneys unable to perform services for their clients. Mandating attorneys to perform services absent exceptions will prevent attorneys from discussing the scope of their representation prior to the commencement of representation. Had Congress included a phrase excusing attorneys when an ethical or other conflict arises, § 526(a)(1) would be valid. However, because in the event of a conflict, the plain language of the text leaves attorneys with no option other than to violate BAPCPA and face sanctions, or violate ethical rules and face disciplinary action, attorneys will be reluctant to have open communication with their clients about the scope of the representation. Not only does this violate the attorneys' First Amendment right to free speech, it also contradicts the rationale for BAPCPA—debtor protection.²³⁶

Olsen's stipulation that courts "should interpret this section to not require attorneys to perform ill-advised or unethical services"²³⁷ provides guidance for future courts, but does nothing to calm the fears of attorneys. Section 526(a)(1) violates attorneys' First Amendment rights because they cannot speak with clients in the legal and ethical way that, absent this provision, they otherwise could.

IV. CONCLUSION

Any attorney that wishes to make a statement in violation of § 526(a)(1) or (4), refrain from any statement in violation of § 527, or advertise in a manner that violates § 528, has standing to raise a constitutional challenge to the debt relief agency provisions of BAPCPA. A court hearing that challenge should find that attorneys do not fall within the definition of debt relief agencies. If the court does

235. See *Cent. Hudson*, 447 U.S. at 566.

236. See *supra* notes 19-20 and accompanying text.

237. 350 B.R. 906, 917 (D. Or. 2006).

find that attorneys are debt relief agencies, it next must find that §§ 526(a)(1), (4), 527, and 528 violate attorneys' First Amendment right to free speech.