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ETHICS: SWEARING CONTEST—
CERTIFICATIONS OF INFORMATION AND OTHER
ETHICAL QUANDARIES OF THE NEW LAW

The Honorable Thomas F. Waldron
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INTRODUCTION

This material is a brief introduction to some selected areas where existing law governing professional conduct [the Model Code, Rules or other ABA recommendations, as modified in specific jurisdictions] are appropriately considered in connection with provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the Act).

Without attempting to overcomplicate the issues, it should be recalled that the Act is an addition to, not a substitute of, the existing Bankruptcy Code. It is like an odd sidecar attached to an otherwise fully operational vehicle. For that reason, any analysis of the Act's provisions always requires recognition of the applicable remaining provisions of the Bankruptcy Code.

Additionally, since the debt relief agency provisions focus on attorney-client relationship issues, an appropriate analysis also implicates the body of state and federal law governing the ethical responsibilities of attorneys in connection with these issues.

DISCLAIMER

Moreover, in the unique circumstances of new legislation, some, or all, of which may be presented for judicial determination, a disclaimer concerning this material is appropriate. This material is presented as part of an early education effort and is limited to brief, initial considerations of selected issues involving the Act and is not, and should not be taken as, an indication of any final determination the author would make in the context of any specific bankruptcy case or proceeding. In all circumstances, the final text of the Act and other applicable law should be examined.

COMPETENCY

This material is not intended to cause concern among capable attorneys who are interested in continuing to represent clients or perform trustee work under the Act. It should, however, be a cause for concern to attorneys who have developed practices prohibited under applicable standards governing professional conduct or have previously been the subject of sanctions or other hearings concerning practices which fail to meet the requirements for competent practice. It should be recalled that there is existing case law demonstrating the severity of consequences for incompetent practice.

See Model Code of Professional Responsibility: Competency, 1.3; Diligence, 1.4; Communication, 1.5; Fees, 1.16 Declining or Terminating Representation; 1.18 Duties to Prospective Client; 3.1 Meritorious claims and Contentions; See also Model Code, Canon 6 (A lawyer should Represent A Client Competently), Model Code, Canon 3 (A Lawyer Should Assist In Preventing The Unauthorized Practice Of Law), Model Code, Canon 5 (A Lawyer Should Exercise Independent Professional Judgment On Behalf of A Client), Model Code, Canon 7 (A Lawyer Should Represent A Client Zealously Within The Bounds Of The law).

There are new, enhanced, potentially serious consequences for such prohibited practices under the Act. [§ 526(c) (attorney's contract for services void, attorney liable for return of fees, actual damages, attorney fees, subject to civil action by state authority, injunction or penalty; § 707(b)(4) (reasonable costs and attorney fees may be awarded against the attorney for the debtor)]

The standing Chapter 13 Trustee filed an adversary proceeding seeking reduction and disgorgement of excessive fees in 155 Chapter 13 cases in which Frank E. Mann acted as attorney. Mann's practice appeared to be based on the premise that if the trustee did not object to what had been filed, the filing must have complied with bankruptcy law. Mann's filings contained values he assigned to assets without information concerning the specific assets. He also assigned, without further supervision, essential legal work to assistants who were not lawyers. Mann used contract attorneys, who often never met the clients, to attend 341 meetings. The Bankruptcy Judge found no award of fees appropriate in 155 cases and suspended Mann from practicing before her pending additional review by an admissions and grievance committee. *O'Connell v. Mann (In re Davila*), 210 B.R. 727 (Bankr. S.D. Tex. 1996).

Three clients filed complaints with the Columbus Bar Association due to their attorney mishandling their bankruptcy cases and his failure to communicate with them. In one case, the mishandling of a case led to a 109(g) dismissal. The Columbus Bar Association filed a complaint and the attorney defaulted. The Board of Commissioners on Grievances and Discipline recommended indefinite suspension of the attorney and the matter was reviewed by Supreme Court of Ohio, which noted:

From March 1988 through October 1999, respondent filed seventeen bankruptcy cases, including the Mullis, Opatich, and Johnson cases. In eight of those cases, the clients signed the petitions substantially earlier than the dates on which respondent filed the cases. In one case, the date of the signature had been "whited over" and a photocopy of the paper filed instead of an original as to make the date of actual signing unclear. In eleven cases, respondent did not file the schedules of debts and statement of financial affairs as required by the bankruptcy rules; in four of those cases, respondent filed the schedules and statement over one hundred days after the petition dates; in three of those cases, respondent never filed them. In five of the cases, respondent did not file in a timely manner other necessary documents. Though directed in July 1999 by the bankruptcy clerk to redo the Patricia Burba petition because his signature was omitted, respondent had not complied as of May 2000. Four of the cases were dismissed because respondent failed to file appropriate documents or failed to attend the required first meeting of creditors.

The board member concluded that respondent's conduct in these cases demonstrated a pattern and practice of carelessness, inattention to detail, procrastination, and failure to communicate with clients and court officials and indicated that he was not competent to practice bankruptcy law. The board member concluded that respondent's conduct violated DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), 1-102(A)(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice), 1-102(A)(6) (a lawyer shall not engage in conduct adversely reflecting on the lawyer's ability to practice law), 6-101(A)(1) (a lawyer shall not handle a legal matter that he is not competent to handle), 6-101(A)(3) (a lawyer shall not neglect an entrusted legal matter), 7-101(A)(1) (a lawyer shall not fail to seek the lawful objectives of a client), and 7-101(A)(3) (a lawyer shall not prejudice or damage his client).

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We have reviewed the record and adopt the findings and conclusions of the board. As we noted in *Dayton Bar Assn. v. Andrews* (1997), 79 Ohio St.3d 109, 112, 679 N.E.2d 1093, 1095, "'the counseling of a client in financial matters * * * is a serious matter that deserves the attention of a qualified attorney.' If the attorney cannot or will not give this matter his necessary attention, or is not qualified to handle the matter he undertakes, he violates our Disciplinary Rules." Id., quoting *Columbus Bar Assn. v. Wolosin* (1999), 84 Ohio St.3d 401, 704 N.E.2d 566, and *Disciplinary Counsel v. Dahling* (2000), 90 Ohio St.3d 246, 737 N.E.2d 25, where the orders we issued disbarring attorney were based on large part on their neglect of bankruptcy cases. In this matter, we agree with the recommendation of the board. Respondent is indefinitely suspended from the practice of law in Ohio. Full and complete restitution to respondent's former clients for payments made and services not rendered is a prerequisite to the filing of any application for reinstatement. Costs are taxed to respondent. (emphasis added)

Columbus Bar Ass'n v. Foster, 92 Ohio St.3d 411, 412-13, 750 N.E.2d 1112, 1113-14 (2001).

See also *In re TCW/CAMIL Holding L.L.C.*, __ B.R. __, 2005 WL 2036203 (D. Del. Aug. 24, 2005) in which the Court discussed applicable New York law and noted:

Legal malpractice is a specific form of negligence. *Schweizer v. Mulvehill,* 93 F.Supp.2d 376, 393 (S.D.N.Y.2000). A claim of legal malpractice consists of four elements: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual damage resulting from the professional's negligence.[FN9] *Id.; Freschi v. Grand Coal Venture,* 564 F.Supp. 414, 415 (S.D.N.Y.1983); *Tinter v. Rapaport,* 253 A.D.2d 588, 677 N.Y.S.2d 325, 326 (N.Y.App.Div.1998); *Mendoza v. Schlossman,* 87 A.D.2d 606, 448 N.Y.S.2d 45, 46 (N.Y.App.Div.1982).

To prevail on a claim of legal malpractice, a plaintiff must establish the failure of an attorney to exercise the degree of skill commonly exercised by an ordinary member of the legal community proximately resulting in damages to the client. *Schweizer,* 93 F.Supp.2d at 393; *Plentino Realty v. Gitomer,* 216 A.D.2d 87, 628 N.Y.S.2d 75, 76 (N.Y.App.Div.1995); *Saveca v. Reilly,* 111 A.D.2d 493, 488 N.Y.S.2d 876, 877 (N.Y.App.Div.1985).

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Attorneys may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, neglect to prosecute or defend an action, or failure to conduct adequate legal research. *Hatfield,* 109 F.Supp.2d at 180; *Shopsin v. Siben & Siben,* 268 A.D.2d 578, 702 N.Y.S.2d 610, 612 (N.Y.App.Div.2000).

Failure to properly investigate, evaluate, and advise a client can also establish an attorney's failure to exercise the degree of skill commonly exercised by an ordinary member of the legal community. *Hart v. Carro, Spanbock, Kaster & Cuiffo,* 211 A.D.2d 617, 620 N.Y.S.2d 847, 849 (N.Y.App.Div.1995).

Negligent or willful withholding of information material to the client's decision to pursue a course of action is also a breach of the duty of due care. *Schweizer v. Mulvehill,* 93 F.Supp.2d 376, 397 (S.D.N.Y.2000).

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Canon 6 of the Code relates to an attorney's duty to be competent in representing a client. (D.I. 77 at 18); *see also* N.Y.Code of Prof'l Responsibility Canon 6 (2002). Canon 6 forbids a lawyer to neglect a legal matter or give legal advice or services without research and preparation that is adequate for the circumstances. (D.I. 77 at 18-19); *see also* N.Y.Code of Prof'l Responsibility Canon 6 (2002).

Canon 7 of the Code relates to an attorney's duty to zealously represent a client. (D.I. 77 at 19); *see also* N.Y.Code of Prof'l Responsibility Canon 7 (2002). Canon 7 requires a lawyer to advance and protect the rights and interests of the client, and do nothing to harm the client in the course of the representation. (D.I. 77 at 19); *see also* N.Y.Code of Prof'l Responsibility Canon 7 (2002).

See Debra T. Landis, Annotation, Negligence, Inattention Or Professional Incompetence Of Attorney In Handling Client's Affairs In Bankruptcy Matters As Grounds For Disciplinary Action – Modern Cases, 70 A.L.R. 4TH (1989 and supp. 2000).

NEW DEFINITIONS, NEW DISCLOSURES, NEW DUTIES, NEW CONSEQUENCES

Although the limitations of this material do not permit a more complete development of these issues, it is clear that the traditional obligation of a consumer bankruptcy attorney to act as a advocate for a client has been diminished, not by the state or federal entity exercising authority over the attorneys who are members of its bar, but by the confusingly worded provisions of 11 U.S.C. §§ 526, 527 & 528.

This material attempts to highlight several of these extraordinary changes in the following categories: new definitions (§ 101), new required disclosures (§ 527), new duties (§§ 526 & 528) and new consequences [§§ 526(c) and (d) & 707(b)(4)].

NEW DEFINITIONS §101:

- **NOT AN ATTORNEY / NOW A DEBT RELIEF AGENCY [DRA] §101(12A)**
- **NOT A CLIENT, NOR A BANKRUPT, NOR A DEBTOR / NOW AN ASSISTED PERSON [AP] § 101(3) OR A PROSPECTIVE ASSISTED PERSON [PAP - not a defined term, but see ABA Model Rule of Professional Conduct 1.18 – Duties to Prospective Client (a) "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to matter is a prospective client."]**
- **NOT LEGAL SERVICES / NOW BANKRUPTCY ASSISTANCE [BA] §101(4A)**

NEW REQUIRED DISCLOSURES § 527:

NOT LATER THAN 3 BUSINESS DAYS AFTER THE FIRST DATE A DRA OFFERED BA TO AN AP, THE DRA MUST PROVIDE THE AP WITH CERTAIN CLEAR AND CONSPICUOUS NOTICES AND INFORMATION.

NEW REQUIRED DUTIES §§ 526, 528:

NOT LATER THAN 5 BUSINESS DAYS AFTER THE FIRST DATE THE DRA PROVIDES ANY BA TO AN AP, BUT PRIOR TO THE AP'S PETITION BEING FILED, EXECUTE A WRITTEN CONTRACT CONTAINING CERTAIN CLEAR AND CONSPICUOUS EXPLANATIONS AND PROVIDE IT TO THE AP.

- **CLEARLY AND CONSPICUOUSLY PROVIDE CERTAIN INFORMATION IN ANY ADVERTISEMENT OF BA.**
- **BE TRUTHFUL AND DO WHAT THE DRA SAID WOULD BE DONE, EXERCISE REASONABLE CARE IN STATEMENTS AND ADVICE TO APS AND PAPS, ADVISE APS AND PAPS THEY CANNOT INCUR DEBT THEY PLAN TO DISCHARGE IN THEIR BANKRUPTCY FILING.**
- **RETAIN COPIES OF CERTAIN NOTICES AND INFORMATION PROVIDED TO AN AP.**

NEW CONSEQUENCES:

THERE ARE NEW, ENHANCED, POTENTIALLY SERIOUS ADVERSE CONSEQUENCES FOR SUCH PROHIBITED PRACTICES UNDER THE ACT. § 526(c) [ATTORNEY'S CONTRACT FOR SERVICES VOID, ATTORNEY LIABLE FOR RETURN OF FEES, ACTUAL DAMAGES, ATTORNEY FEES, SUBJECT TO CIVIL ACTION BY STATE AUTHORITY, ALSO PRACTICE CAN BE ENJOINED AND SUBJECT TO OTHER PENALTY; § 707(b)(4) (REASONABLE COSTS AND ATTORNEY FEES MAY BE AWARDED AGAINST THE ATTORNEY FOR THE DEBTOR)]. See generally, Catherine E. Vance, *Attorneys and the Bankruptcy Reform Act of 2001: Understanding the Imposition Of Sanctions Against Debtors' Counsel*, 106 Comm. L.J. 241 (Fall 2001) and a related article – Catherine Vance and Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under The New Bankruptcy Law*, 79 Am. Bankr. L.J. 283 (Spring 2005).

The next section of this material attempts to demonstrate the interface of provisions of the new Act, the prior Code, ethical obligations arising under the Model Rules of Professional Conduct (or the Model Code) and circumstances frequently encountered by consumer bankruptcy attorneys.

DRA ATTORNEYS – TEMPORARY, CONTRACT & APPEARANCE

There are attorneys, variously designated as temporary, contract or appearance attorneys, who regularly participate in bankruptcy proceedings; however, their participation presents specific ethical and legal concerns, which implicate both substantive and procedural issues of bankruptcy and state law. Such an attorney, although appearing as counsel for a client, particularly a consumer debtor in a chapter 7 or 13 case, in general, has no prior relationship, and will have no subsequent relationship, with the debtor. In fact, frequently these attorneys are entirely unknown to the debtor, and also to the court, in the sense that the record of the case does not contain any document evidencing the attorney's retention or appearance in the bankruptcy proceeding. This is in stark contrast to the familiar appearance and retention of co-counsel or local counsel for a debtor in a chapter 11 case, with all the customary applications, disclosures and related orders. [This material does not attempt to address the more complicated issues presented by such temporary attorneys' participation, often during a single docket, as counsel for both debtors and creditors, some of whom have adverse interests.] See generally *Simple Solution = Big Problem*, Judge Pappas, 46-Oct Advocate (Idaho) 31 (2003); Neil M. Berman, *"Judge, This Is Not My Case"* – Ethical Pitfalls Concerning Contract and Appearance Attorneys*,* 2004 No. 5 Norton Bankr. L. Adviser 3 (May 2004).

An extended analysis of these issues is found in *In re Wright*, 290 B.R. 145, 155-56 (Bankr. C.D. Cal. 2003), in which the Court stated:

> **This Court finds that full disclosure to the court is an absolute requirement of the bankruptcy process. Further, even with full disclosure to the court, the applicant must meet the requirements of the State Bar of California as to consent of the client to use of a temporary attorney when that attorney is performing a significant aspect of the work. This disclosure and consent must occur prior to the work being done. For the client to first find out about this when s/he meets the contract attorney in court does not fulfill the requirement of consent--though it would be allowed if the contract attorney was hired due to an unforeseen emergency or timely efforts to communicate with the client were fruitless.**
>
> **If the applicant is seeking fees or costs for work done by a contract attorney, the application must reveal the use of the contract attorney and demonstrate that the client agreed to the use and billing rate of contract attorneys if the firm contemplated their use at the time that the firm was employed. Whether or not the client has given general consent to the use of contract attorneys, the attorney of record for the debtor must also show that he/she/it advised the debtor who would be appearing on the debtor's behalf or demonstrate why the debtor was not advised in advance of the role and identity of the appearance attorney. [FN13] No sum over the amount paid to the contract attorney will be allowed unless specifically requested in the fee application along with disclosure of its basis. A basis may be that the contract attorney provided the client with an exclusive amount of time equal to that shown on the billing statement and that the hourly rate charged is what would be charged by an attorney with equivalent experience for equivalent work. Or it might consist of unbilled support by other attorneys in the firm. Or a surcharge may be requested as a fee enhancement, if it is supported by evidence upon which the enhancement is based.**
>
> > **FN13. The Court will soon be issuing a "Rights and Responsibilities Agreement Between Chapter 13 Debtors and Their Attorneys" in which the attorney agrees--among other things--to do as follows: (4) "Advise the Debtor who, if not the attorney, will appear on the Debtor's behalf at the 341(a) meeting or any court hearing." (5) "If the attorney will be using an appearance attorney to attend the 341(a) meeting or any court hearing, explain to the Debtor in advance, if possible, the role and identity of the appearance attorney. In any event, the attorney is responsible to prepare adequately the appearance attorney in a timely fashion and to furnish the appearance attorney with all necessary documents, hearing notes, and other necessary information in sufficient time to allow for review of such information and proper representation of the Debtor."**
>
> **If the firm seeks to receive an amount in excess of that which it actually paid the contract attorney, in determining the exclusive time which the contract attorney spent on its client, the firm will use the following process: If the appearance attorney who is paid a flat fee per matter and appears on multiple cases can segregate the time spent on a single matter, the law firm which hires him/her can bill for that amount of time (as exclusive to its client). But if the appearance attorney cannot segregate the discrete time spent on that client, the maximum amount of time to be attributed to the client is the total time spent (including travel and excluding any time which can be calculated on other specific cases) divided by the number of appearances made.**

See also: California Formal Opinion 1994-138: Issue: Must an Attorney Comply with the Fee-Splitting Requirements of Rule 2-200 of the California Rules of Professional Conduct When the Attorney Hires an Outside Lawyer and When the Attorney Discloses a Rate to a Client but Pays the Outside Lawyer Less Than the Amount Disclosed; CA Formal Opinion 1996-147: Issue: How Must an Attorney Bill for Work on Two or More Matters at the Same Time? What are the Ethical Considerations Involved? ; ABA Formal Opinion 88-356: Temporary Lawyers; ABA Formal Opinion 93-379: Billing for Professional Fees, Disbursements and Other Expenses; ABA Formal Opinion 00-420: Surcharge to Client for use of a Contract Lawyer.

It should be noted that to the extent the initial attorney was a debt relief agency [§ 101(12A)], the temporary, contract or appearance attorney would also be a debt relief agency (§§ 526, 527, 528). It is easy to see that, under the Act, the above activities would sustain a finding the attorneys violated various provisions of the Model Rules (or Code) of Professional Conduct. Under the Act, these activities would also provide a basis to void any contracts with any involved APs, require the return of all fees, assess any resulting actual damages and attorney fees and enter an injunction prohibiting such practices

DRA ATTORNEYS - LIMITED REPRESENTATION

Although this issue, which often involves state law determinations concerning limited representation or "unbundling" of legal services, is more complex than this material will address, it is significant to note that such state court determinations may be only a factor, and not a determining factor, in a court decision concerning consumer debtor representation.

In *In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001), the bankruptcy court addressed issues presented by an attorney who provided limited representation to chapter 7 debtors in self-described simple no-asset cases for $250 per case. Counsel would prepare and file the petition, schedules and related documents, but without agreeing to provide any post-petition services. First, the court rejected counsel's argument that the disclosure of Bankruptcy Rule 2016(b) was not mandatory. The court also found "there is no excuse" for failure of counsel who prepares bankruptcy filings to sign the petition. However, due to the failure of the court's order to provide adequate notice, the court excluded Bankruptcy Rule 9011 sanctions from its decision.

In reviewing the reasonableness of the $250 fee, the court found the descriptions of the itemized work was inadequate, counsel charged professional fees for noncompensable clerical services, and an unjustified rate for the use of "interns." Further, although the record was incomplete for a determination, the court was concerned whether debtors were being "represented" by interns. The court also questioned charges for attending certain 341 meetings, even though counsel considered the debtors *pro se*.

In reviewing the value of the services provided, the court found complete disgorgement would be warranted, but instead limited counsel to $125 per case. Finally, the court firmly rejected counsel's notion of limited representation:

> **In order to make an informed decision, the client must understand what might be faced in the bankruptcy, and the risks associated with representing himself in handling those contingencies. Many lawyers find themselves surprised by what can arise in an otherwise "simple" bankruptcy case. The reported decisions of this and other bankruptcy courts make it clear that, even in garden variety consumer chapter 7 cases, counsel for debtors and those who might be characterized as their adversaries (creditors, or occasionally the trustee) sometimes have distinctly polar views of what is permissible and what is not. The ability to adequately explain the lay of the bankruptcy landscape, including all its variations, contingencies and permutations, in order to obtain a truly informed consent is suspect.**
>
> **To send a debtor into a bankruptcy *pro se*, on the theory that he has had "enough" advice and counseling in the document preparation stage to safely represent himself, is except in the extraordinary case so fundamentally unfair as to amount to misrepresentation. Even Counsel appears to know, at some level, that this is so. Virtually all his Itemizations show post-petition conferences with debtors and, in a few, with creditors. In most of these cases, Counsel filed corrected or amended pleadings. He sent interns to "attend" eight first meetings and he purportedly attended the other 11 first meetings personally to "observe." If debtors were adequately advised, and if it was safe to allow debtors to represent themselves under the suggested approach, why was there a need for any of these services?**
>
> **To be sure, some of the attorney's obligations can be at least partially fulfilled in the pre-petition stage of representation. But it requires a leap to believe that, after the filing occurs, no problems will arise and no further help be required. It is a leap that one familiar with the gamut of chapter 7 cases would not easily make.**
>
> **An attorney, in accepting an engagement to represent a debtor in a bankruptcy case, will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required. Compliance with I.R.P.C. 1.1, 1.2 and 1.4 is mandatory, and must be proved.**
>
> **What are these core obligations? The first, and most obvious, is the obligation to appear as debtor's counsel of record and to represent the debtor. The attempt of Counsel to validate a standard or routine process of sending clients into bankruptcy court "unrepresented" as pro se debtors is unacceptable and rejected.**
>
> **Furthermore, for clarity, when accepting an engagement to represent a debtor in relation to a bankruptcy proceeding, an attorney must be prepared to assist that debtor through the normal, ordinary and fundamental aspects of the process. These include the proper filing of all required schedules, statements and disclosures; preparation and filing of necessary amendments to the same; attendance at the § 341 meeting; turnover of assets to the trustee, and cooperation with the trustee; compliance with the tax turnover and other orders of the Court; performance of the duties imposed by § 521(1), (3) and (4); counseling in regard to § 521(2) and the reaffirmation, redemption, surrender or retention of consumer goods securing obligations to creditors, and assisting the debtor in accomplishing**

> **those aims; and responding to issues that arise in the basic milieu of the bankruptcy case, such as violations of stay and stay relief requests, objections to exemptions and avoidance of liens impairing exemptions, and the like.**
>
> **It is difficult to describe every such service, much less predict each variation from the norm, which might arise in a given case. Indeed, this is a large part of the reason why truly informed consent limiting future services would be so difficult to establish. The summary above is, therefore, not intended to be and cannot be read to be exclusive. Rather, it is illustrative of key issues which arise with sufficient regularity and which are common to all consumer bankruptcies so as to be part and parcel of the engagement. What else might be found to fall within or without must await specific facts and specific cases. But the closer to the heart of the matter--the debtors' desire to obtain bankruptcy relief and the process necessary to do so--the less likely exclusion is appropriate.**

Id. at 529-30.

In *In re Kewriga*, 2002 WL 484942 (Bankr. D. Mass. March 28, 2002), the bankruptcy court addressed whether, under 11 U.S.C. § 504, an debtor attorney can hire a attorney, who is not a member of the law firm, without court approval, in order to do research and writing.

11 U.S.C. § 504 states that:

(a) Except as provided in subsection (b) of this section, a person receiving compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title may not share or agree to share—

> (1) any such compensation or reimbursement with another person; or
>
> (2) any compensation or reimbursement received by another person under such sections.

(b) (1) A member, partner, or regular associate in a professional association, corporation, or partnership may share compensation or reimbursement received under section 503(b)(2) or 503(b)(4) of this title with another member, partner, or regular associate in such association, corporation, or partnership, and may share in compensation or reimbursement received under such sections by another member, partner, or regular associate in such association, corporation, or partnership.

(2) An attorney for a creditor that files a petition under section 303 of this title may share compensation and reimbursement received with any other attorney contributing to the services rendered or expenses incurred by such creditor's attorney.

The court found that this fee arrangement did not fit any of the exceptions of 11 U.S.C. § 504. Accordingly, the research attorney should have been approved per 11 U.S.C. § 327(a).

See also the district court's [Judge Robert E. Coyle] unreported decision (*Morgan King v. Linda Ekstrom Stanley, et. al.,* No. CV-95-5487-REC (E.D. Cal. Jan. 26, 1996), which affirmed the bankruptcy court's [Judge Michael S. McManus] unreported decision, *In re Taylor*, No. 93-94008 (Bankr. E.D. Cal. Apr. 24, 1995) and determined:

> **Morgan D. King appeals from an order of the bankruptcy court regarding the disgorgement of attorney fees. Morgan D. King, attorney at law, hired one Barbara Bangs as a contract attorney to work on the Tyler bankruptcy matter. King paid Bangs $50.00 per hour and billed the estate $125 per hour. Bangs handled the matter on her own, with virtually no supervision or input from King. Furthermore, the arrangement between King and Bangs was not disclosed to the clients, Gary and Christine Taylor, or to the bankruptcy court. The bankruptcy court found that Bangs was a non-regular associate of King's firm and that the arrangement constituted fee sharing and trafficking and adjusted the legal fees paid by the estate. Upon reviewing the oral and written record this court affirms the decision of the bankruptcy court in is entirety.**

It should be noted that a limited representation attorney could certainly be determined to be a debt relief agency (§§ 101(12A), 526, 527, 528). It is easy to see that, under the Act, the above activities would sustain a finding the attorneys violated various provisions of the Model Rules (or Code) of Professional Conduct. Under the Act, these activities would also provide a basis to void any contracts with any involved APs, require the return of all fees, assess any resulting actual damages and attorney fees and enter an injunction prohibiting such practices.

DRA ATTORNEYS - GHOSTWRITING

As a result of the new provisions §§ 526, 527 and 528 of the Act, surreptitious assistance could result in serious consequences.

The Court in *In re Mungo*, 305 B.R. 762, 767-69 (Bankr. D.S.C. 2003), noted:

> **The act of ghost-writing is not a new phenomenon--it is a problem that has occurred in other courts and has been deemed an unethical practice. Inasmuch as this Court and courts within this District have yet to specifically and directly address the issue, this Court finds it necessary to issue this Order to provide notice to the bar that anonymous drafting or ghost-writing of pleadings for pro se individuals without signing such pleadings is prohibited and may result in sanctions and possibly suspension or disbarment from practice before this Court.**
>
> *** * * * ***
>
> **Ghost-writing is best described as when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar. *See Barnett v. LeMaster,* No. 00-2455, 2001 WL 433413 at *3 (10th Cir.2001); *Ellis v. Maine,* 448 F.2d 1325, 1328 (1st Cir.1971); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.,* 968 F.Supp. 1075, 1078 (E.D.Va.1997); *Wesley v. Don Stein Buick,* 987 F.Supp. 884, 885 (D.Kan.1997); *U.S. v. Eleven Vehicles,* 966 F.Supp. 361, 367 (E.D.Pa.1997).**

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> **Additionally, *Fed.R.Civ.P. 11* requires an attorney to sign all documents submitted to the court and to personally represent that there are grounds to support the assertions made in each filing in the course of that attorney's representation of a client. Ghost-writing frustrates the application of these rules by shielding the attorney who drafted pleadings for pro se litigants in a cloak of anonymity. An obvious result of the anonymity afforded ghost-writing attorneys is that they cannot be policed pursuant to the applicable ethical, professional, and substantive rules enforced by the Court and members of the bar since no other party to the existing litigation is aware of the ghost- writing attorney's existence. *See Barnett,* 2001 WL 433413 at *3; *Duran,* 238 F.3d at 1272; *Ellis,* 448 F.2d at 1328; *Laremont-Lopez,* 968 F.Supp. at 1078-79. The Court finds this result particularly disturbing; and thus, considers this factor a strong policy ground for prohibiting attorneys from ghost-writing pleadings and motions for pro se litigants. Therefore, to counter this danger, the Court will, in its discretion, require pro se litigants to disclose the identity of any attorneys who have ghost written pleadings and motions for them. Furthermore, upon finding that an attorney has ghost written pleadings for a pro se litigant, this Court will require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive rules and standards regulating other attorneys, who properly sign pleadings, are applicable to the ghost-writing attorney.**

See also *In re Cash Media Sys., Inc*., 326 B.R. 655 (Bankr. S.D Tex. 2005) and ABA Rules 1.1; 1.5; 1.16; 3.1; 3.3; 3.4; 5.5; 8.4.

It should be noted that a ghostwriting attorney certainly could be determined to be a debt relief agency (§§ 101(12A), 526, 527, 528). It is easy to see that, under the Act, the above activities would sustain a finding the attorneys violated various provisions of the Model Rules (or Code) of Professional Conduct. Under the Act, these activities would also provide a basis to void any contracts with any involved APs, require the return of all fees, assess any resulting actual damages and attorney fees and enter an injunction prohibiting such practices.

FEDERAL RULE OF BANKRUPTCY PROCEDURE 9011 AND § 526

Again, the limitations of this presentation do not allow for the extended development of this issue; however, the central point is that there is nothing in the text of §§ 526, 527 or 528, which requires the application of different standards than the standards of Federal Rule of Bankruptcy Procedure 9011 in determining any issues involving an attorney determined to be a debt relief agency.

Lower courts have been repeatedly instructed by the United States Supreme Court and other reviewing courts to begin a statutory analysis with the text of the statute and apply its plain meaning and, in the absence of a specific definition from Congress, examine a dictionary for the meaning of the words used in the statute. See *Rousey v. Jacoway*, __ U.S. ___, 125 S.Ct. 1561, 1566 (2005); Lee Dembart and Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Jurisprudenc*e, 1979-2004, 78 Amer. Bankr. L.J. 373 (Fall 2004); Norman J. Singer, *Sutherland Statutes and Statutory Construction*, Sutherland § 48A:11 (updated March 2005) and Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 Wisc. L. Rev. 205 (2000).

The following is a brief attempt to apply the above principles to the text of 11 U.S.C. §526:

§ 526 – Restrictions on debt relief agencies

(a) A debt relief agency *[see above]* **shall not—**

(1) fail to perform any service that such agency informed an assisted person *[see above]* **or prospective** *[not a defined term, but see ABA Model Rule of Professional Conduct 1.18 – Duties to Prospective Client (a) "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to matter is a prospective client."]* **assisted person** *[see above]* **it would provide in connection with a case or proceeding under this title;**

(2) make any statement, or counsel or advise any assisted person *[see above]* **or prospective assisted person** *[see above]* **to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading,** *[no change, already prohibited by Title 18, Bankruptcy Rule 9011 and the Model Rules of Professional Conduct]* **or that upon the exercise of reasonable care,** *[See Webster – reasonable care n: due care; due care n: the care that an ordinary reasonable and prudent person exercises under all circumstances for his own protection. This appears to reflect the standards of Rule 9011 (see 9011(b) "after an inquiry reasonable under the circumstances") and appears to be consistent with Section 319 of the Act]:*

SEC. 319. SENSE OF CONGRESS REGARDING EXPANSION OF RULE 9011 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE It is the sense of Congress that rule 9011 of the Federal Rules of Bankruptcy Procedure (11 U.S.C. App.) should be modified to include a requirement that

all documents (including schedules), signed and unsigned, submitted to the court or to a trustee by debtors who represent themselves and debtors who are represented by attorneys be submitted only after the debtors or the debtors' attorneys have made to verify that the information contained in such documents is— (1) well grounded in fact; and (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *[It may be noted that, although Congress can vote to reject any proposed Federal Rule of Bankruptcy Procedure, it cannot create such Rules, which,, under existing law, are part of the Supreme Court's authority. See generally, Kenneth N. Klee, The Future of the Bankruptcy Rules, 70 Am. Bankr. L.J. 277 (Summer 1996).]*

reasonable *[see Webster reasonable adj : 1 a : being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous < a ~ conviction> <a ~ theory> b : being or remaining within the bounds of reason : not extreme : not excessive <a ~ request> <a ~ hope of succeeding> < spend a ~ amount of time in relaxation>: <is of a ~ size> c : MODERATE: AS (1) : not demanding too much <a ~ boss> (2) : not expensive <fresh vegetables are now ~> (3) : that allows a fair profit <sold the material at a ~rate> 2 a : having the faculty of reason : RATIONAL <a ~ being> b : possessing good sound judgment : well balanced : SENSIBLE <can rely on the judgment of a ~ man>]*

inquiry *[see Webster inquiry 1 : the act or an instance of seeking truth, information, or knowledge about something : examination into facts or principles : RESEARCH, INVESTIGATION <complete freedom of ~> <the scientific method of ~ - C.W. Eliot> < that most modern of inquiries, the study of the cosmic rays - K.K. Darrow> <an ~ into the nature of truth>; specif : a formal or official investigation of a matter of public interest by a body (as a legislative committee) with power to compel testimony <witnesses convicted of contempt of congressional inquiries- Current Biog.> 2 : the act or an instance of asking for information : a request for information : QUERY, QUESTION <upon ~, I learned that he was out> < the information desk receives many inquiries> <would not answer my ~> – This appears to reflect the standards of Rule 9011 (see 9011(b) "after an inquiry reasonable under the circumstances") and appears to be consistent with Section 319 of the Act.]*

should have been known by such agency *[see above]* **to be untrue or misleading;**

(3) misrepresent to any assisted person *[see above]* **or prospective assisted person** *[see above]* ,**directly or indirectly, affirmatively or by material omission, with respect to—**

(A) the services that such agency will provide to such person ***[****no change, already required by Rules of Professional Conduct****]*** **; or**

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title *[no change, already required by Rules of Professional Conduct****]*** **; or**

(1) **advise an assisted person** *[see above]* **or prospective assisted person** *[see above]* **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 *[This section is particularly troubling. It has no time reference in connection with "more debt in contemplation of such person filing a case under this title." More debt than the assisted person had at the time of the initial interview? At a subsequent interview? At the time of filing? More debt, but not "in contemplation of filing," but rather, for medical necessities? health insurance premiums? The plain meaning of this section could appear to bar an attorney from rendering advice to an assisted person to pay for the required pre-filing credit briefing (§ 109(h)), or advise an assisted person to arrange a refinancing to pay all debts to attempt to totally avoid bankruptcy, or to complete such a refinancing to pay all debts as the proposed plan in a chapter 13 case or obtain, or reinstate, if not maintain, required insurance covering personal property subject to a lease or a purchase money security agreement in chapter 13 cases (§1326(a)(4)). All such results (and other similar meanings of "more debt") would appear to be "demonstrably at odds with the intent of the drafters." See generally Bankruptcy Abuse Prevention And Consumer Protection Act Of 2005, House Report NO. 109-31(I) April 8, 2005 available on Westlaw at 2005 WL 832198 and at http://thomas.loc.gov/cgi- bin/cpquery/T?&report=hr031p1&dbname=cp109&. It is, however, not clear that there is any legislative history to consult, or, an appropriate basis upon which to consult what may be offered as legislative history. See generally, Norman J. Singer, Sutherland Statutes and Statutory Construction, Southerland § 48A:11 (updated March 2005) and Charles Tiefer, The Reconceptualization of Legislative History in the Supreme Court, 200 Wisc. L. Rev. 205 (2000)] An appropriate reading of this section would appear to acknowledge that this section is a Congressionally stated prohibition against "loading up", which is an attempt by a debtor to incur debt, in the period prior to filing bankruptcy, with a "contemplation" to discharge such debt as a part of the filed bankruptcy*.

(b) Any waiver by any assisted person *[see above]* **of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency** *[see above]*. *[The plain meaning of this provision appears to prohibit any waiver by an assisted person, who retains all rights against a debt relief agency.]*

(c)(1) Any contract for bankruptcy assistance *[see above]* **between a debt relief agency** *[see above]* **and an assisted person** *[see above]* **that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.** *[The plain meaning of this provision appears to void (Webster - void adj 7a : of no legal force or effect and so incapable of confirmation or ratification) any contract for bankruptcy assistance and then, in what would appear to be superfluous text, prohibit enforcement of the void contract, but then, contradictorily, permit enforcement by such assisted person. Although a more appropriate legal phrase may have been to designate any such contract as "voidable at the option of the assisted person", the more significant phrase in this section would appear to be "material requirements". The use of this phrase recognizes there may be any number of*

instances where there would be failures to comply with the provisions of 526, 527 and/or 5228; however, these failures to comply would not be in connection with the "material" requirements" of these provisions.]

(2) Any debt relief agency *[see above]* **shall be liable to an assisted person** *[see above]* **in the amount of any fees or charges in connection with providing bankruptcy assistance** *[see above]* **to such person that such debt relief agency** *[see above]* **has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing** *[see above]* ,**to have—**

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 *[Although these are new Act sections, this provision does not appear to require the consideration of any new standards, beyond the existing basis for causes of action for legal malpractice, failure to comply with the Model Rules of Professional Conduct or failure to comply with Rule 9011]* **with respect to a case or proceeding under this title for such assisted person** *[see above]*;

(B) provided bankruptcy assistance *[see above]* **to an assisted person** *[see above]* **in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521** *[As a convenience, but without any analysis, the text of § 521 is reproduced]* ;**or**

§ 521. Debtor's duties

(a) The debtor shall—

~~**(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;**~~

(1) file —

(A) a list of creditors,; and
(B) unless the court orders otherwise,—
(i) a schedule of assets and liabilities,;
(ii) a schedule of current income and current expenditures, and;
(iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate—
(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or
(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;
(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;
(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and
(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within ~~forty-five days after the filing of a notice of intent under this section~~ 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such ~~forty-five~~ 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);

(3) if a trustee is serving in the case or an auditor serving under section 586(f) of title 28,24 cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case or an auditor serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title, and

(5) appear at the hearing required under section 524(d) of this title; ~~and~~

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722. If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee; and

(7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

(c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).

(d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.

(2)(A) The debtor shall provide—

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan—

(A) at a reasonable cost; and

(B) not later than 5 days after such request is filed.

(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—

(1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;

(2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was

subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;

(3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and

(4) in a case under chapter 13—

(A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan;

a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.

(g)(1) A statement referred to in subsection (f)(4) shall disclose—

(A) the amount and sources of the income of the debtor;

(B) the identity of any person responsible with the debtor for the support of any dependent of the debtor; and

(C) the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.

(2) The tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(h) If requested by the United States trustee or by the trustee, the debtor shall provide—

(1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or

(2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.

(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and

after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

(j)(1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.

(2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate.

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency. *[Although these are new Act sections, this provision does not appear to introduce any new standards, beyond the existing basis for causes of action for legal malpractice or failure to comply with the Model Rules of Professional Conduct or failure to comply with Rule 9011 .]*

(3) In addition to such other remedies as are provided under State law, 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—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons *[see above]* **arising from such violation, including any liability under paragraph (2); and**

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court. *[This section appears to be limited to certain identified State persons or entities, granted standing to pursue, in addition to any state law causes of action, federal claims. The term court is not defined and may be a reference to a state court, since the next section § 526(a)(4) appears to reference concurrent jurisdiction.]*

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3). *[This section appears to be limited to certain identified State persons or entities, granted standing to pursue, in addition to any state law causes of action, federal claims in a state court, or, at the filer's option, a united states district court. This appears to be somewhat inconsistent with 28 U.S.C. § 1334(e)(2), at least as to "claims or causes of action which involve construction of section 327," which appear to be subject to "exclusive jurisdiction" in a federal district court]*

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, 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—

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

[Although limited to only this section (§ 526), this provision appears to merely codify existing case law, in which many courts have enjoined attorney's practices, imposed civil penalties and, in some instances, suspended or disbarred attorneys. See In re Clark, 223 F.3d 859 (8th Cir. 2000); In re Dragoo, 186 F.3d 614 (5th Cir. 1999); In re Maurice, 69 F.3d 830 (7th Cir. 1995), In re Maurice, 73 F.3d 124 (7th Cir. 1995).

(d) No provision of this section, section 527, or section 528 shall—

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability—

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

[The plain meaning of this section appears to reaffirm state and federal authority to determine and enforce qualification to practice law, preempt state laws governing professional conduct (ABA Model Code, Rules or other provisions, as modified and adopted by a state) and protect attorneys subject to this section from client or state claims that the attorney failed to comply with otherwise applicable provisions of state or federal authority governing professional conduct, which would be inconsistent with §§ 526, 527 and 528, such as advice which an attorney might otherwise be obligated to provide to an assisted person. (see above discussion of § 526(a)(4))]

CONSUMER PRACTICE CONSIDERATIONS

The initial determination, which must be made as quickly as possible, in a consumer bankruptcy case, is whether an attorney is a debt relief agency. If the attorney is a debt relief agency in the case, then the DRA must comply with the new requirements of §§ 526, 527 and 528. This material could never begin to cover the detailed adjustments which must be initially made, and continually updated, in an attorney's office to assure compliance with these sections.

Although some general suggestions can be made, consumer representation, which often involves a relatively few attorneys representing a relatively large number of debtors presents specific challenges, which require careful monitoring by other attorneys. While the terms "reasonable inquiry", "reasonably diligent inquiry", and "reasonably sufficient information" are all undefined in the Act, these terms will, to a great extent, develop meaning in a specific court as attorneys develop their own practices under the Act. For example, if almost every DRA obtains a credit report on every AP, and conducts an internet asset search, a real estate and UCC search, and a national and local PACER search, it would be easy for a court to conclude that such information is REQUIRED as part of a "reasonable inquiry", "reasonably diligent inquiry" to obtain "reasonably sufficient information."

The following are merely, some, but not all, of the items which may develop in a particular court as components of "reasonable inquiry", "reasonably diligent inquiry" to obtain "reasonably sufficient information."

- **CHECK FOR PROTECTION OF MINOR CHILD INFORMATION? [§ 112]**
- **REVIEW THE CERTIFICATE FROM THE CREDIT COUNSELING AGENCY? [§ 109(h)]**
- **REVIEW THE DEBTOR NOTICE, DISCLOSURE STATEMENT, AND CONTRACT RECORDS FOR ANY AUDIT [28 U.S.C. § 586(f)]**
- **REVIEW THE CREDITOR COMMUNICATIONS AND NOTICE ISSUES [§ 342]**
- **REVIEW ALL THE REQUIRED § 521 DOCUMENTS AND ACTIONS [THERE IS A LENGTHY LIST OF REQUIRED DOCUMENTS, WHICH MUST BE TIMELY FILED, AND ACTIONS, WHICH MUST BE TIMELY TAKEN, AND, IN THE ABSENCE OF AN ORDER, GRANTING ADDITIONAL TIME OR EXCUSING COMPLIANCE, FAILURE TO TIMELY COMPLETE THESE FILINGS OR TAKE THESE ACTIONS OFTEN RESULTS IN DISMISSAL OR CONVERSION. ADDITIONALLY, SUCH FAILURES EXPOSE COUNSEL FOR AN ASSISTED PERSON TO LIABILITY. §526(C)(2)(B).]**
- **REVIEW ANY REQUIRED "FIRST DAY" CONSUMER ORDERS**
- **CONDUCT A CONSUMER CONFLICT CHECK**

- **CONSIDER SEPARATE FILINGS, UNDER SEPARATE CHAPTERS FOR RELATED CONSUMER DEBTORS AND OBTAIN ANY CONSUMER INFORMED CONSENTS AND/OR WAIVERS**

- **EXAMINE THE APPROPRIATE STATE OR FEDERAL EXEMPTIONS [§522(b)]**

- **CONDUCT A LOCAL SEARCH FOR ANY PRIOR FILINGS AND DISMISSAL ORDERS? [§§ 109(g) and (h), 362(d),(e),(g),(h) & (k), 727(a)(8) & (11), 1328(f) & (g)]**

- **CONDUCT A NATIONAL PACER SEARCH FOR ANY PRIOR FILINGS AND DISMISSAL ORDERS? [§ 109(g) and (h), 362(d),(e),(g),(h), & (k), 727(a)(8) & (11), 1328(f) & (g)**

- **OBTAIN AN INTERNET ASSET SEARCH**

- **OBTAIN A REPORT FROM A CREDIT AGENCY**

- **OBTAIN A LOCAL LAND RECORD SEARCH**

- **OBTAIN A LOCAL U.C.C. SEARCH**

- **OBTAIN AVAILABLE IRS RECORDS, ASSESSMENTS AND JUDGMENTS**

APPENDIX

Articles:

Neil M. Berman, *"Judge, This Is Not My Case"* – Ethical Pitfalls Concerning Contract and Appearance Attorneys, 2004 No. 5 Norton Bankr. L. Adviser 3 (May 2004)

Lee Dembart and Bruce A/ Markell, *Alive at 25? A Short Review of the Supreme Court's Jurisprudenc*e, 1979-2004, 78 Amer. Bankr. L.J. 373 (Fall 2004)

Kenneth N. Klee, *The Future of the Bankruptcy Rules*, 70 Am. Bankr. L.J. 277 (Summer 1996)

Debra T. Landis, Annotation, *Negligence, Inattention Or Professional Incompetence Of Attorney In Handling Client's Affairs In Bankruptcy Matters As Grounds For Disciplinary Action – Modern Cases*, 70 A.L.R. 4TH (1989 and supp. 2000)

***Simple Solution = Big Problem*, Judge Pappas, 46-Oct Advocate (Idaho) 31 (2003)**

Norman J. Singer, *Sutherland Statutes and Statutory Construction*, Sutherland § 48A:11 (updated March 2005)

Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 Wisc. L. Rev. 205 (2000)

Catherine E. Vance, *Attorneys and the Bankruptcy Reform Act of 2001: Understanding the Imposition Of Sanctions Against Debtors' Counsel*, 106 Comm. L.J. 241 (Fall 2001)

Catherine Vance and Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under The New Bankruptcy Law*, 79 Am. Bankr. L.J. 283 (Spring 2005)

Cases:

U.S. Supreme Court:

***Rousey v. Jacoway*, __ U.S. __, 125 S.Ct. 1561 (2005)**

1st Circuit:

***In re Kewriga*, 2002 WL 484942 (Bankr. D. Mass. March 28, 2002)**

***In re Van Dyke*, 296 B.R. 591 (Bankr. D. Mass. 2003)**

3rd Circuit:

***In re TCW/CAMIL Holding L.L.C.*, __ B.R. __, 2005 WL 2036203 (D. Del. Aug. 24, 2005)**

4th Circuit:

***In re Mungo*, 305 B.R. 762 (Bankr. D.S.C. 2003)**

5th Circuit:

***In re Cash Media Sys., Inc*., 326 B.R. 655 (Bankr. S.D Tex. 2005)**

***In re Dragoo*, 186 F.3d 614 (5th Cir. 1999*)**

***O'Connell v. Mann (In re Davila*), 210 B.R. 727 (Bankr. S.D. Tex. 1996)**

6th Circuit:

***Columbus Bar Ass'n v. Foster*, 92 Ohio St.3d 411, 750 N.E.2d 1112 (2001)**

7th Circuit:

***In re Maurice,* 69 F.3d 830 (7th Cir. 1995)**
***In re Maurice*, 73 F.3d 124 (7th Cir. 1995)**

8th Circuit:

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9th Circuit:
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11th Circuit:

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