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CONNECTICUT BAR ASSOCIATION

AMERICAN BAR ASSOCIATION

GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association opposes the provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act, P.L. 109-8, that impose restrictions upon the bankruptcy-related legal advice lawyers can provide to individual clients and that require lawyers who provide such advice to identify and advertise themselves as "debt relief agencies," as well as other similar future federal legislative or regulatory proposals, on the grounds that such provisions violate core First Amendment principles, undermine the confidential attorney-client relationship, and interfere and conflict with traditional state judicial regulation of the legal profession.

REPORT

I. INTRODUCTION

In April 2005, after more than eight years of debate, Congress enacted sweeping bankruptcy reform legislation, the Bankruptcy Abuse Prevention and Consumer Protection Act, P.L. 109-8 ("BAPCPA"), containing numerous significant changes to the federal bankruptcy laws.[1] Unfortunately, certain key provisions of BAPCPA requiring certain lawyers to identify and advertise themselves as "debt relief agencies" have had a strong negative impact on all lawyers who offer bankruptcy-related advice to individuals, not just those lawyers who specialize in representing debtors in bankruptcy. In addition to the serious and direct impact these provisions have had on the constitutional rights of lawyers who provide bankruptcy-related advice to both consumers and creditors, these provisions undermine both the fundamental tenets of the attorney-client relationship and traditional state judicial regulation of the bankruptcy legal profession.

On June 8, 2009, the U.S. Supreme Court granted review in *Milavetz, Gallop & Milavetz, P.A. v. United States*, No. 08-1119 & 1225. The case presents several key questions, including whether the "debt relief agency" provisions in BAPCPA violate lawyers' First Amendment rights to free speech or violate lawyers' or clients' Fifth Amendment rights to due process. In deciding the case, the Supreme Court will resolve a split between the Eighth and Fifth Circuits on these key issues. Although the ABA has existing policy generally opposing the "debt relief agency" provisions in legislation that was ultimately enacted as BAPCPA[2], the resolution would grant the ABA additional specific policy in support of an application to the Board of Governors for an ABA amicus brief to be filed

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[1] Although the ABA has expressed support for certain narrow provisions in BAPCPA that allow direct appeals of final bankruptcy orders to the courts of appeals and permit bankruptcy lawyers to pay referral fees to nonprofit lawyer referral services, the ABA strongly opposes three provisions in the law that require debtor bankruptcy lawyers to: (1) certify the accuracy of the debtor's schedules, under penalty of harsh court sanctions; (2) certify the debtor's ability to make future payments under reaffirmation agreements; and (3) identify and advertise themselves as "debt relief agencies" subject to new intrusive regulations. *See* ABA's May 1, 2007 letter to the House Judiciary Subcommittee on Commercial and Administrative Law, available on the ABA's website at http://www.abanet.org/poladv/letters/bankruptcy/2007may01_BAPCPAh_1.pdf

[2] *See* ABA Resolution 10C, adopted by the ABA House of Delegates at the 2001 Annual Meeting, opposing the "enhanced attorney liability provisions in S. 420/H.R. 333," legislation that was ultimately enacted as BAPCPA in 2005; *see also* ABA Fact Sheet titled "ABA Seeks Repeal of Harmful Provisions in BAPCPA," available at http://www.abanet.org/poladv/priorities/bankruptcy/brattyliabilityfactsheet_july2009_.pdf The ABA Board of Governors designated repeal of the attorney liability provisions in BAPCPA as an ABA Legislative and Governmental Priority several years ago (as part of the "Independence of the Legal Profession" priority) and the issue remains an ABA priority for 2009. *See* ABA priorities webpage at: http://www.abanet.org/poladv/priorities/

in the *Milavetz* case, which would address the constitutionality of the "debt relief agency" provisions in the statute. It would also support the ABA's continuing legislative efforts seeking repeal of these statutory provisions.

II. HARMFUL EFFECTS OF BAPCPA'S "DEBT RELIEF AGENCY" PROVISIONS

Under BAPCPA, any lawyer or law firm providing information or advice to, or representation of, an "assisted person" with respect to a bankruptcy case or proceeding is deemed a "debt relief agency" that: (1) is barred from advising the client "to incur more debt in contemplation" of a bankruptcy filing, even where such debt is legal and appropriate; (2) must provide a disclosure statement to every potential bankruptcy client explaining the duties of a debtor in bankruptcy, and maintain a copy of the statement for two years; (3) loses all fees charged in the case and is subject to additional penalties, if found negligent in failing to perform any agreed-upon service; and (4) is required to include a conspicuous notice in any advertising stating "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code," or a substantially similar statement. Defined as anyone "whose debts consist primarily of consumer debts," an "assisted person" is not limited to the debtor in the bankruptcy case; the person could be a creditor. Similarly, the lawyer need not be a bankruptcy specialist, nor be giving bankruptcy advice, so long as the advice is "with respect to" a bankruptcy case or proceeding.

In light of the broad definitions given to the terms "debt relief agency," "bankruptcy assistance," and "assisted persons" by the courts that have interpreted BAPCPA since its enactment in 2005, these provisions have had a broad, adverse impact on representation of individual debtors and creditors.

First, by mandating that a lawyer may not advise his client "to incur more debt in contemplation" of a bankruptcy filing, the "debt relief agency" provisions of BAPCPA infringes upon and undermines the confidential attorney-client relationship[3]. Because there are a number of situations where incurring such debt may be both appropriate and beneficial,[4] these provisions in BAPCPA prevent lawyers from fulfilling their duties to

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[3] The relevant provision in BAPCPA mandating that an attorney may not advise his client "to incur more debt in contemplation" of a bankruptcy filing is codified at 11 U.S.C. § 526(a)(4).

[4] "For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time. There would be no fraud in doing so if the client intended to pay such debt notwithstanding the filing of a contemplated bankruptcy case." Erwin Chemerinksy, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 75 AM. BANKR. L.J. 571, 578 (2005), quoted in *Milavetz*, 541F.3d at 794 n. 9.

clients by advising them of their full range of options. Enforcement of this "gag rule" provision necessarily entails inquiry into the precise advice given by the lawyer to the individual client, and thus represents an inappropriate intrusion into the attorney-client privilege, a fundamental legal principle strongly supported by the ABA.[5] In addition, requiring lawyers to disclose such communications would directly violate Model Rule of Professional Conduct 1.6, or the equivalent binding rule adopted by the state in which the lawyer is licensed, which prohibits the lawyer from revealing confidential information relating to the representation of the client except in certain narrow circumstances.

Second, this content-based prohibition on speech violates the lawyer's First Amendment rights to free speech. Because incurring debt may be beneficial and entirely proper in certain circumstances, such a prohibition is not narrowly tailored to prevent a crime or fraud. As noted above, the United States Supreme Court recently granted certiorari in the case of *Milavetz, Gallop & Milavetz, P.A. v. United States* and will be considering the constitutionality of these provisions.

Third, other "debt relief agency" provisions in BAPCPA[6] are likely to compel factually incorrect statements in a significant number of lawyer advertisements, creating public confusion as to who provides bankruptcy assistance and who does not. A lawyer representing a creditor who technically meets the definition of an "assisted person" under BAPCPA would be required to add the mandatory disclosure language, even though the lawyer may not in fact represent consumer debtors. Similarly, a real estate lawyer who provides bankruptcy-related advice in a real estate transaction by a prospective consumer debtor may have to add the disclosure language, even though the lawyer does not provide general bankruptcy representation. Such mandatory disclosure statements in advertising by lawyers who do not represent consumer debtors as bankruptcy counsel would be false and misleading. These "debt relief agency" disclosure requirements[7] may also discourage lawyer advertising entirely, effectively narrowing the range of available representation.

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[5] *See, e.g.*, ABA Resolution 111, adopted by the ABA House of Delegates in August 2005, expressing the ABA's strong support for the preservation of the attorney-client privilege and opposition to governmental policies, practices, and procedures that have the effect of eroding the privilege. Resolution 111, the related background Report, and many other useful materials on the privilege prepared by the ABA Task Force on Attorney-Client Privilege are available on the Task Force's website at http://www.abanet.org/buslaw/attorneyclient/

[6] *See* 11 U.S.C. §§ 101(12A), 101(4A), 101(3), and 528(a) and (b).

[7] *See* 11 U.S.C. § 528.

Finally, the "debt relief agency" provisions in BAPCPA interfere with the traditional state-based judicial regulation of the legal profession that the ABA has long supported.[8] As applied to lawyers, these provisions purport to regulate the lawyer's conduct by:

- Prohibiting certain kinds of legal advice, even if the advice is appropriate and beneficial to the client;
- Attempting to regulate the discussions and agreements between lawyer and client about what services would be provided, including the voiding of any retention agreement if the lawyer fails to comply with the statutory requirements; and
- Imposing federal statutory liability for damages for any misrepresentation or material omission made by the lawyer with respect to the advice being given.

Furthermore, by making these provisions enforceable by the United States Trustee or state law enforcement agencies, the "debt relief agency" provisions improperly invade confidential attorney-client communications without the client's consent, or by coerced client consent. All of these provisions conflict with or flatly violate state rules of professional conduct that currently bind all lawyers. Piecemeal imposition of federal regulation on the practice of law will serve both to undermine state judicial authority and impose inconsistent requirements upon counsel.

Most courts considering the issue have held that the statutory definition of "debt relief agencies" is broad enough to apply to lawyers. Many lawyers have stopped providing advice or representing individuals in bankruptcy matters entirely rather than render legal advice under these restrictions and risk incurring the undue regulatory interference created by the statute, especially given the obligation to display the awkward and misleading notice that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code" or a substantially similar statement.

The "debt relief agency" provisions in BAPCPA have thus had a serious negative impact on the availability of legal counsel in bankruptcy-related matters. More importantly, it would set a troubling precedent if Congress is permitted to mandate different degrees of

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[8] The ABA has consistently taken the position that primary regulation and oversight of the legal profession should continue to be vested in the highest state court in which the lawyer is licensed. In February 1972, the ABA House of Delegates adopted a resolution stating that "discipline of the legal profession is the responsibility of the judicial branch of government and the American Bar Association is opposed to the adoption of disciplinary rules by the legislative branch of government". *See* Resolution of the Special Committee on National Coordination of Disciplinary Enforcement, adopted at the ABA Midwinter Meeting in 1972. The ABA reiterated and expanded this position in February 1992 by endorsing certain key lawyer disciplinary principles, including the position that "regulation of the legal profession should remain under the authority of the judicial branch of government." *See* ABA Resolution 119, adopted in February 1992.

professional responsibility, accountability, and liability simply because of the content of the advice, the area of practice, or the types of clients that the lawyer represents.

III. CONCLUSION

The "debt relief agency" provisions of BAPCPA have had a significant adverse effect on lawyers, debtors, courts, and the bankruptcy system as a whole. In addition to violating the core constitutional rights of both lawyers and their clients, the provisions have seriously undermined the confidential attorney-client relationship and interfered with the traditional and longstanding state judicial regulation of the legal profession. The Supreme Court's decision to review the Eighth Circuit's opinion in the *Milavetz* case presents the ABA with a unique opportunity to address these important issues directly. Therefore, the ABA should adopt the proposed resolution as ABA policy, to strengthen the ABA's voice as it addresses these important issues and, if necessary, opposes similar future legislative or regulatory proposals governing lawyers.

Respectfully submitted,

Francis J. Brady, President
Connecticut Bar Association

Robert A. Zupkus, Chair
General Practice, Solo and Small Firm Division

August 2009

GENERAL INFORMATION FORM

Submitting Entity: Connecticut Bar Association
General Practice, Solo and Small Firm Division

Submitted By: Francis J. Brady, President, Connecticut Bar Association
Robert A. Zupkus, Chair, General Practice, Solo and Small Firm Division

1. Summary of Recommendation(s).

The proposed resolution opposes the provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act, P.L. 109-8, that impose restrictions upon the bankruptcy-related legal advice lawyers can provide to individual clients and that require lawyers to identify and advertise themselves as "debt relief agencies" if they offer such advice, and other similar future federal legislative or regulatory proposals, on the grounds that such provisions violate core First Amendment principles, undermine the confidential attorney-client relationship, and interfere and conflict with traditional state judicial regulation of the legal profession.

2. Approval by Submitting Entity.

The recommendation was approved by the General Practice, Solo and Small Firm Division Council on _____ and by the Connecticut Bar Association on July 27, 2009.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

Yes. In 2001, the House of Delegates adopted a recommendation (01A10C) generally opposing the "debt relief agency" provisions and other related provisions in S. 420/H.R. 333, legislation that was ultimately enacted as BAPCPA in 2005.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Although the ABA has existing policy (referenced in #3 above) generally opposing the "debt relief agency" provisions that were enacted as part of BAPCPA, the proposed recommendation would grant the ABA additional specific policy that would support an application to the Board of Governors for an ABA amicus brief to be filed in the case of *Milavetz, Gallop & Milavetz, P.A. v. United*

States, No. 08-1119 & 1225, which is currently pending in the U.S. Supreme Court, and in support of the ABA's ongoing efforts to obtain legislative repeal of these statutory provisions. The current recommendation is entirely consistent with the earlier recommendation, 01A10C.

In addition, the proposed recommendation is consistent with and reinforces certain related ABA policies, including policies that: (a) strongly support the preservation of the attorney-client privilege as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel (05A111); (b) oppose legislation that would authorize the federal government to preempt state regulation of the legal profession by imposing restrictions on attorney advertising (8/83); (c) state that discipline of the legal profession is the responsibility of the judicial branch of government and the ABA is opposed to adoption of disciplinary rules by the legislative branch (2/72); and (d) state that regulation of the legal profession should remain under the authority of the judicial branch of government (2/92).

5. What urgency exists which requires action at this meeting of the House?

A case considering these issues, *Milavetz v. United States*, has been granted certiorari by the U.S. Supreme Court and additional specific policy is needed for the ABA to file an amicus brief on the issues. The deadline for filing the brief is currently September 1, 2009.

6. Status of Legislation. (If applicable.)

Various bills proposing the repeal of certain provisions of BAPCPA have been introduced in Congress. In addition, the ABA has prepared draft legislation that would amend the "debt relief agency" provisions in BAPCPA to exclude lawyers and would also repeal several other attorney liability provisions in the statute opposed by the ABA. The ABA continues to seek prospective House and/or Senate sponsors to introduce the ABA draft bill and is also urging House and Senate Judiciary Committee leaders to include the ABA draft language in any other legislation amending BAPCPA that may be considered during the 111th Congress.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

Support will be sought from, among others, the Litigation and Business Law Sections.

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

[TBD]

EXECUTIVE SUMMARY

1. Summary of the Recommendation

The American Bar Association opposes the provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act, P.L. 109-8, (BAPCPA) that impose restrictions upon the bankruptcy-related legal advice lawyers can provide to individual clients and that require lawyers to identify and advertise themselves as "debt relief agencies" if they offer such advice. The ABA also opposes other similar future federal legislative or regulatory proposals. The Association opposes these provisions on the grounds that they violate core First Amendment principles, undermine the confidential attorney-client relationship, and interfere and conflict with traditional state judicial regulation of the legal profession.

2. Summary of the Issue that the Resolution Addresses

The recommendation addresses the issues the U.S. Supreme Court will soon consider in the case of *Milavetz, Gallop & Milavetz, P.A. v. United States*, No. 08-1119 & 1225, including whether the "debt relief agency" provisions in BAPCPA violate lawyers' First Amendment rights to free speech. The recommendation also addresses the adverse effects the provisions have on the confidential attorney-client relationship, traditional state judicial regulation of the bar, and lawyers, debtors, courts and the system in general.

3. Please Explain How the Proposed Policy Position will Address the Issue

Although the ABA has existing policy generally opposing the "debt relief agency" provisions in legislation that was ultimately enacted as BAPCPA, the recommendation will provide additional specific policy in support of an application to the Board of Governors for an ABA amicus brief to be filed in the *Milavetz* case challenging the constitutionality of the "debt relief agency" provisions in the statute. In particular, the recommendation will allow the ABA to take the position in the proposed brief that the provisions in question: (1) violates the core First Amendment free speech rights of both lawyers and their clients; (2) seriously undermine the confidential attorney-client relationship; (3) interfere and conflict with the traditional and longstanding state judicial regulation of the legal profession; and (4) have had a profound adverse effect on lawyers, debtors, courts, and the bankruptcy system as a whole. The recommendation also will support the ABA's ongoing legislative efforts to achieve the repeal of these statutory provisions, and would enable the ABA, if necessary, to oppose similar future legislative or regulatory proposals governing lawyers providing bankruptcy-related advice.

4. Summary of Minority Views

No minority views to the recommendation within the ABA have been identified.