

# **ABA: H.R. is a threat to lawyers**

## **Bill will discourage attorneys from representing debtors**

The American Bar Association warned Congress that parts of the bankruptcy reform bill it is considering. H.R. 975, will deny consumers access to legal representation, undermine the attorney-client relationship, and clog the courts with needless litigation. "These specific provisions pose a serious threat to the operation of the bankruptcy system and should be removed," says ABA President Alfred P. Carlton Jr.

In a letter submitted to the House Judicial Subcommittee on Commercial and Administrative Law, Carlton said that the current draft of H.R. 975 would "have a strong negative impact on individual debtors who are seeking a fresh start under the bankruptcy laws by subjecting their advocates to costly new regulations and liabilities beyond those faced by the lawyers in any other field of practice."

The ABA said it was most troubled by the three provisions that "would discourage many attorneys from agreeing to represent debtors at all, while significantly increasing the expenses of clients who are able to obtain legal representation." In addition, the new provisions would discourage lawyers volunteering for pro bono bankruptcy cases, the letter said.

The provisions criticized by the ABA are:

Section 102 - It requires attorneys to certify the accuracy of all facts in the debtor's Chapter 7 bankruptcy petition and schedules, and punishes debtor's lawyers instead of their clients for factual inaccuracies and errors.

These changes would seriously erode the confidential attorney-client relationship and "transform the attorney from an advocate to a detective and informer," Carlton said "that goes well beyond the standards imposed upon other attorneys." While Rule 9011 holds all bankruptcy lawyers to the same standards, the changes made to Section 102 would expose debtors' attorneys to liability to which their colleagues who represent creditors would not be exposed to.

Carlton added that these requirements will force many lawyers to refuse cases and significantly increase the cost of filing for bankruptcy,

denying debtors timely, effective and affordable representation just when they need it most. "Even when a debtor is fortunate enough to find an attorney who is willing to handle the bankruptcy case, the new potential liability created by Section 102 will have a severe chilling effect on the attorney's willingness to advocate a new position or theory on behalf of the client. Because the debtor's attorney could face substantial momentary sanctions if the attorney's efforts to maintain a Chapter 7 case are unsuccessful and the court finds that Rule 9011 was violated, the debtor's attorney will be reluctant to advance any but the most well-established legal theories and arguments."

Section 203 - It requires debtors' lawyers to certify that their clients are able to make payments on debts that they chose to reaffirm. If the debtor later proves unable to make payments on the reaffirmed debt, the debtor's attorney would be subject to sanctions. This provision will force debtors' lawyers to extensively audit their client's finances and make financial or household decisions for them. In cases where clients direct their lawyers to reaffirm debts that are later determined to be unaffordable, the requirement will create a conflict of interest between lawyer and client.

"Bankruptcy attorneys do not conduct extensive audits of their clients' finances, nor do they make financial or household budgeting decisions for their clients. Indeed, this is not the attorney's proper role and any attempt to force the attorney to assume these duties will substantially increase the cost of representing a debtor in a bankruptcy," Carlton said.

Like Section 102, Section 203 will discourage many attorneys from representing debtors and force attorneys who are willing to do so to charge higher fees to cover the substantial additional costs and risk. Of course, it remains to be seen whether bankruptcy judges will allow attorneys to charge substantially higher fees for doing the same work.

Carlton noted that creditors' attorneys are not subject to sanction under Rule 9011 when their clients make false disclosures or engage in illegal collection practices if the attorney acted in good faith and without knowledge of their client's actions.

Sections 227, 228 and 229 - The ABA "strongly opposes" these provisions, which require bankruptcy lawyers and many non-bankruptcy lawyers to identify and advertise themselves as debt relief agencies; which then subjects them to a host of other new regulations, including restrictions on the types of advice that they may

give their clients. These sections fail to differentiate between lawyers, who already are licensed and subject to ethical safeguards and sanctions through their state courts and bar associations, and nonlawyers such as bankruptcy petition preparers.

Requiring both attorneys and nonattorneys to advertise themselves as "debt relief agencies" will obscure these important distinctions while creating substantial confusion among the public, Carlton said. These provisions "impose unfair additional burdens and liability on debtors' attorneys that constitute an unjustified government invasion of the relationship between private attorneys and their clients."

The ABA also objects to the requirement that debtors' attorneys provide clients with preprinted, government-approved legal advice on bankruptcy law, and forcing attorneys to tell debtors in writing that they don't need to retain a lawyer to file for bankruptcy.

"Perhaps even more troubling, the bill would also prohibit the attorney from giving certain proper pre-bankruptcy planning advice to the client, including advice to pay certain lawful obligations or to incur certain debts. In fact, these provisions of the bill are worded so broadly that the attorney could be subject to liability merely for making an unsuccessful attempt to help the client restructure the debt to avoid bankruptcy. These provisions which dictate the types and content of legal advice that an attorney can and cannot render to his clients are particularly destructive of the attorney-client relationship," Carlton said.

Finally, Section 229 requires consumer debtors' attorneys to include "a conspicuous - and awkward - statement in all their advertising stating that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." Again, consumer debtors' attorneys are treated differently than creditors' attorneys, who are not required to include disclaimers in their advertising.

The ABA also questioned whether general practitioners and bankruptcy attorneys will practice mix of business and consumer cases will discontinue advertising their bankruptcy services, If they do advertise, they'll either include the disclaimer and misrepresent the true nature of their practice or exclude the disclaimer and risk running afoul Section 229.

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