

GOVERNMENTAL AFFAIRS
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

DIRECTOR

Robert D. Evans

(202) 662-1765

rdevans@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

Denise A. Cardman

(202) 662-1761

cardmand@staff.abanet.org

Kevin J. Driscoll

(202) 662-1766

driscollk@staff.abanet.org

Lillian B. Gaskin

(202) 662-1768

gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

R. Larson Frisby

(202) 662-1098

frisbyr@staff.abanet.org

Kristi Gaines

(202) 662-1763

gainesk@staff.abanet.org

Kenneth J. Goldsmith

(202) 662-1789

goldsmithk@staff.abanet.org

Ellen McBarnette

(202) 662-1767

mcbarnee@staff.abanet.org

E. Bruce Nicholson

(202) 662-1769

nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS

OPERATIONS/LEGISLATIVE COUNSEL

Julie M. Strandlie

(202) 662-1764

strandlj@staff.abanet.org

INTELLECTUAL PROPERTY

LAW CONSULTANT

Hayden Gregory

(202) 662-1772

gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL

Rita C. Aguilar

(202) 662-1780

aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT

Julie Pasatiempo

(202) 662-1776

jpasatiempo@staff.abanet.org

STAFF DIRECTOR FOR

INFORMATION SERVICES

Sharon Greene

(202) 662-1014

greenes@staff.abanet.org

EDITOR WASHINGTON LETTER

Rhonda J. McMillion

(202) 662-1017

mcmillionr@staff.abanet.org

March 1, 2005

Re: Bankruptcy Attorney Liability Provisions in S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"

Dear Senator:

As the Senate begins its consideration of S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," the American Bar Association (ABA) respectfully urges you to support amendments to delete several provisions from the bill that we believe unfairly increase the liability and administrative burdens of bankruptcy attorneys under the Bankruptcy Code.

Although the ABA has not taken a position on S. 256 in its entirety, the ABA and many state and local bars throughout the country strongly oppose those provisions in the bill that would require debtor bankruptcy attorneys to: (1) certify the accuracy of the debtor's bankruptcy schedules, under penalty of harsh court sanctions [*see* Section 102]; (2) certify the ability of the debtor to make future payments under a reaffirmation agreement [*see* Section 203(a)]; and (3) identify and advertise themselves as "debt relief agencies" subject to a host of new intrusive regulations that would interfere with the confidential attorney-client relationship [*see* Sections 227-229]. For the ABA's detailed analysis of the problems with these three provisions, please see our February 8, 2005 letter to the Senate Judiciary Committee which is available online at <http://www.abanet.org/poladv/priorities/brattyliabilitylettertosenjudcommelectronicfebruary2005.pdf>.

In our view, these bankruptcy attorney liability provisions would be a disaster for the nation's bankruptcy system for many reasons:

• **These provisions will make legal representation unaffordable for many debtors.** By holding a debtor's attorney personally liable for the accuracy of the clients' schedules, Section 102 would force the attorney to hire private investigators and appraisers to independently verify the existence and value of all the client's assets—and the extent of the client's debts—thereby adding up to several thousand dollars to the cost of representing a debtor in bankruptcy. Most individual debtors will not be able to afford these new expenses, resulting in many thousands of *pro se* debtors clogging up the court system.

•**These provisions will discourage many attorneys from agreeing to represent debtors in bankruptcy at all.** Section 102 will create a harsh new liability standard for debtors' attorneys who do not conduct a lengthy investigation and appraisal of the client's assets. If these costly steps are not taken and the Chapter 7 petition is dismissed or converted to a Chapter 13, the court could then impose harsh sanctions and civil penalties on the attorney personally. Because most malpractice carriers are expected to exclude this new liability from coverage under their policies, the attorney's exposure will be even greater. These provisions in Section 102, combined with the reaffirmation agreement certification language contained in Section 203(a) and the "debt relief agency" liability and regulations in Sections 227-229, will drive many debtors' bankruptcy attorneys from the practice altogether, leaving many thousands of debtors without any legal representation at all.

•**These provisions will greatly reduce *pro bono* representation for the poorest Americans.** Although the "debt relief agency" provisions in Sections 227-229 only apply to attorneys who receive payment for their services, the new certification requirements of Sections 102 and 203(a) apply to *all* debtor bankruptcy attorneys, whether or not they charge a fee. As a result, these provisions will strongly discourage attorneys and law firms from providing essential *pro bono* bankruptcy services to the very debtors who need them most.

•**These provisions unfairly establish a separate legal standard for one particular type of attorney.** While current Bankruptcy Rule 9011 holds all bankruptcy attorneys to the same standards, Section 102 of S. 256 unfairly discriminates between debtor and creditor attorneys by requiring the debtor attorney to personally certify the accuracy of the underlying factual information supplied by the client and by holding the attorney *personally liable* if even innocent errors are discovered later. In contrast, attorneys representing creditors would not be required to certify the accuracy of their clients' factual information and would not be made subject to any comparable new sanctions under the bill.

The unfairness—and unworkability—of imposing different legal standards on different types of lawyers was perhaps best expressed in the February 28, 2005 correspondence from Michael Reed, President of the Pennsylvania Bar Association (and a prominent business bankruptcy attorney), to Senate Judiciary Committee Chairman Arlen Specter, in which he wrote:

“It is as unfair and inappropriate to require an attorney to certify the accuracy of a client's bankruptcy filings as it would be to require an attorney representing a corporation to certify the accuracy of all of the company's statements in its public filings. Indeed, the situation is worse since private bankruptcy counsel often have had limited prior experience with the debtor whereas a company's regular outside corporate counsel often will have had a long relationship with the company.”

To avoid these problems, the ABA has crafted proposed amendments that would replace the current attorney liability provisions in S. 256 with tough new *non-dischargeable* sanctions against debtors who lie on their bankruptcy schedules and new language urging the bankruptcy courts to more vigorously enforce existing Rule 9011 of the Federal Bankruptcy Rules when misconduct by any party is shown. These reforms will reduce bankruptcy fraud and abuse without unfairly harming

March 1, 2005

Page 3

honest debtors or the overall bankruptcy system. The text of these proposed amendments is available at <http://www.abanet.org/poladv/priorities/brattyliabilityabaamendmentstosfeb82005.pdf>, and we urge you to support these or similar amendments as S. 256 is considered by the full Senate.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA's positions on these issues, your staff may contact our legislative counsel for bankruptcy law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans