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AMERICAN BAR ASSOCIATION

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

March 11, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

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

Dear Chairman Sensenbrenner and Ranking Member Conyers:

As your committee 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]. The ABA has prepared some proposed amendments that would eliminate these provisions and replace them with alternative language that would be more effective in reducing bankruptcy fraud and abuse. The text of the ABA's proposed amendments are available online at http://www.abanet.org/poladv/bankruptcyreform.html. It is our understanding that these and other possible amendments may be discussed and considered during your committee's markup scheduled for March 16, 2005.

The ABA believes that the attorney liability provisions in S. 256, discussed in greater detail below, would be a disaster for the nation's bankruptcy system. The provisions holding the debtors' attorneys *personally liable* for the accuracy of their clients' schedules would force the attorney to hire private investigators and appraisers to verify this information, adding thousands of dollars to the cost of representing a debtor in bankruptcy. Any attorney who fails to take these costly steps—including *pro bono* attorneys—would be subject to harsh sanctions and civil penalties that malpractice policies are unlikely to cover. Unless these and other related provisions are removed, bankruptcy representation will become unaffordable for most debtors and essential *pro bono* bankruptcy services will be greatly diminished, resulting in thousands of *pro se* debtors clogging up the courts.

Certification of Bankruptcy Schedules and Related Attorney Sanctions

The ABA strongly opposes the provisions in S. 256 that would require the debtor's attorney to certify the accuracy of all factual allegations in the debtor's schedules and would subject the attorney to harsh court sanctions if any factual inaccuracies resulted in the dismissal of the debtor's Chapter 7 bankruptcy petition or in its conversion to a Chapter 13. During House-Senate conference committee negotiations in 2002 on the predecessor to S. 256, H.R. 333, the provision requiring the court to impose sanctions against attorneys for inaccurate bankruptcy schedules was replaced with a discretionary standard. Although that change was a significant improvement, the current language contained in S. 256 will still have severe negative effects on the bankruptcy system.

Under current law, the debtors themselves are legally responsible for the accuracy of the schedules they file with the bankruptcy court, and debtors are required to sign and certify these schedules under penalty of perjury. If the debtor files false schedules, the debtor is subject to strict sanctions and criminal penalties, including stiff fines and up to five years in prison. In addition, existing Bankruptcy Rule 9011 requires both debtor and creditor bankruptcy attorneys, like all other attorneys appearing in federal courts, to certify that pleadings and other items that they prepare are supported by the facts before they are filed with the court. This rule, which is identical in form and substance to Federal Rule of Civil Procedure 11, applies to all pleadings and motions filed with the bankruptcy court. By its own terms, however, Rule 9011 does not apply to the bankruptcy schedules listing the debtor's financial information. Because those schedules are prepared almost entirely with information supplied directly by the debtor, Rule 9011 allows bankruptcy attorneys to rely in good faith upon the accuracy of this information provided by the client. Therefore, the debtor alone has been held responsible for the truthfulness and accuracy of the schedules.

Section 102 of S. 256 would change existing law by creating a new and higher standard for debtor bankruptcy attorneys that goes well beyond the standards imposed upon other attorneys. By creating new subsections 4(A) – (D) to 11 U.S.C. § 707(b), Section 102 of the bill would hold the debtor's attorney—instead of the debtor—financially responsible for any factual errors contained in the debtor's bankruptcy schedules. Therefore, if even innocent errors in the schedules result in the dismissal of the petition or in its conversion to a Chapter 13 proceeding, the debtor's attorney could be held financially responsible unless it is proven that the attorney conducted a time-consuming and costly investigation of these factual allegations before the filing.

In addition, while current Rule 9011 holds all bankruptcy attorneys to the same standards, Section 102 of S. 256 unfairly discriminates between debtor and creditor attorneys. Section 102 provides that if the debtor's schedules are found to violate Rule 9011 and the debtor is denied a discharge under the means test outlined in S. 256, the debtor's attorney would be subject to harsh court sanctions and could be held personally liable for the attorneys' fees of the trustee or bankruptcy administrator who contested the discharge, as well as civil penalties. Because most malpractice carriers are expected to exclude this new liability from coverage under their policies, the debtor attorney's exposure will be even greater. 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 new standards outlined in Section 102 of the bill also would fundamentally alter the attorney-client relationship in bankruptcy cases. It would transform the attorney from an advocate to a detective and informer. The legislation would create an unwaivable conflict of interest because the attorney would be unable to accept information provided by the client at face value without risking liability if the information later proved to be inaccurate. Further, the debtor's attorney would be required to independently verify all of the client's factual representations. Indeed, the attorney would be forced to hire private investigators and appraisers to confirm the existence and value of all of the assets listed on the client's schedules.

Requiring the debtor's attorney to verify all of the client's representations would significantly raise the cost to the debtor of filing for bankruptcy. As a result of the new obligations and liability imposed on attorneys by Section 102, many bankruptcy lawyers will no longer agree to accept debtors' cases because they will not be willing to become their client's insurer. In addition, those bankruptcy lawyers who continue to represent debtors will be forced to charge substantially higher fees (which most debtors will be unable to afford). Therefore, the practical effect of these provisions will be to deny many debtors timely, effective, and affordable representation just when they need it most. For all of these reasons, the ABA believes that new subsections 4(A) – (D) contained in Section 102 are counterproductive and should be removed from the bill.

Certification of Reaffirmation Agreements

The ABA also opposes those provisions in Section 203(a) of the bill that would require attorneys to certify the debtor's ability to make payments under a reaffirmation agreement.

Under current law, a debtor is not required to accept the discharge of all outstanding debt. Instead, the debtor may choose to reaffirm certain debts—thus retaining liability for these debts—provided that the decision is voluntary and will not create undue hardship for the debtor. Before such reaffirmation agreements can proceed under current law, however, the debtor's attorney must certify that the reaffirmation is voluntary and will not impose an undue hardship on the debtor or the debtor's dependents.

Section 203(a) would change these procedures by again imposing new burdens on the debtor's attorney. Unlike the current law, which simply requires the debtor's attorney to certify in writing that the reaffirmation agreement is voluntary and would not cause the debtor undue hardship, the new provisions require the attorney to certify that "the debtor is able to make the [reaffirmation] payment," in cases where there is a presumption of undue hardship under the debtor's budget (i.e., if the debtor's monthly income is less than monthly expenses, including the reaffirmation payments).

Bankruptcy attorneys are not accountants and are neither trained nor equipped to 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 bankruptcy. Therefore, this certification requirement, like the certification requirement in Section 102, will discourage many attorneys from representing debtors, while forcing the remaining debtors' attorneys to charge higher fees to cover the substantial additional costs and risk.

The new certification requirement contained in Section 203(a) also will create strong conflicts of interest between the debtor and the attorney in those instances when the debtor wants to reaffirm a debt and instructs the attorney to certify the debtor's ability to make payments. If the attorney follows the client's directive, the attorney may become subject to sanctions under Rule 9011—or to a lawsuit by the creditor—if the debtor later proves unable to pay the reaffirmed debt. This new mandate is particularly unfair because creditor's attorneys are not subject to sanctions under Rule 9011 for their clients' false disclosures or illegal collection practices even if they acted in bad faith for vexatious purposes. For all of these reasons, the ABA believes that the provisions in Section 203(a) requiring debtors' attorneys to certify their clients' ability to make reaffirmation payments are inappropriate and should be deleted from the bill.

"Debt Relief Agency" Provisions

The ABA also strongly opposes those provisions in Sections 227-229 of the bill that would require bankruptcy attorneys to identify and advertise themselves as "debt relief agencies" and then comply with a host of new intrusive and burdensome regulations. These provisions would confuse the public, seriously interfere with the attorney-client relationship, and impose unfair additional burdens and liability on debtors' attorneys that constitute an unjustified government invasion of the relationship between private attorneys and their clients.

Under these provisions, any "person"—including both bankruptcy attorneys and non-attorney "bankruptcy petition preparers"—who assists individual debtors with their bankruptcies in return for compensation is deemed to be a "debt relief agency." Unfortunately, the provisions fail to take into account any of the important differences between attorneys and non-attorneys providing bankruptcy services. Under current law, only attorneys are permitted to give legal advice, file pleadings, or represent debtors in bankruptcy hearings. In addition, unlike non-attorney bankruptcy petition preparers, only attorneys are licensed by the state in which they practice, bound by canons of ethics, and subject to discipline by the courts in which they practice. More importantly, only those communications between the debtor and his or her attorney are protected by the attorney-client privilege. Requiring both attorneys and non-attorney bankruptcy petition preparers to advertise themselves as "debt relief agencies" would obscure these important distinctions while creating substantial confusion among the public.

The "debt relief agency" provisions in the bill would also interfere with the attorney-client relationship in a variety of ways. Because the definition is worded so broadly, it may be construed to apply not just to bankruptcy attorneys, but also to family attorneys, tax attorneys, criminal and civil defense attorneys, and general practitioners who, in the course of representing their clients, are compelled to advise them to consider filing bankruptcy to protect their rights. This will jeopardize the attorney's ability to properly advise his or her client regarding their legal rights.

Any attorney who assists a client with bankruptcy will be subject to a long list of new regulations under the bill. In particular, attorneys will be required to provide lengthy written disclosure statements to potential and existing bankruptcy clients that explain the bankruptcy system and that provide general, government-approved legal advice. In addition, attorneys will also be required to advise the debtor in writing that the debtor need not be represented by a lawyer in the bankruptcy or in related litigation, which in many cases is bad advice.

By requiring that the debtor's attorney provide the debtor with preprinted, government-approved legal advice on bankruptcy law, and by forcing the attorney to state in writing that the debtor need not even retain a lawyer, the bill would usurp the attorney's role as the proper legal representative of the debtor. 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 client, are particularly destructive of the attorney-client relationship.

Sections 227-229 also require attorneys to provide the debtor with a written contract, and if the contract fails to comply with each of the detailed requirements outlined in the bill, it would be void and unenforceable. Furthermore, if the debtor's attorney failed to follow any of the many technical requirements of the legislation, the attorney would forfeit the entire fee and could be sued in state or federal court by the debtor, the trustee, or state law enforcement officials for actual damages, civil penalties, attorneys' fees, and costs. Although existing law and ethical rules require all attorneys to provide quality legal representation to their clients, Sections 227-229 go well beyond existing law and would subject just one type of attorney—debtors' bankruptcy attorneys—to a far stricter standard than attorneys in any other field of practice.

In addition, Section 229 also seeks to micromanage the bankruptcy attorney's advertising by requiring the attorney to include a conspicuous—and awkward—statement in all its advertising stating that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." No such requirements will apply to creditors' attorneys under the bill. These advertising regulations could conflict with the well-established advertising rules that have already been established by many state supreme courts and state bars and will confuse the public. In addition, requiring attorneys to label themselves as "debt relief agencies" will discourage general practitioners and bankruptcy professionals who have a consumer and business, debtor and creditor practice, from advertising the availability of bankruptcy services, thus limiting consumer bankruptcy representation to attorneys with narrower practices. For all of these reasons, the ABA believes that attorneys should be exempted from the coverage of the "debt relief agency" provisions contained in Sections 227-229.

These three attorney liability provisions outlined above, taken together, would be a disaster for the nation's bankruptcy system. These provisions would discourage many attorneys from agreeing to represent debtors at all and would make bankruptcy representation unaffordable for countless numbers of Americans. In addition, these provisions would strongly discourage attorneys from providing essential *pro bono* bankruptcy services to the poor. With fewer attorneys available to represent debtors, many more debtors will be forced to file their bankruptcies *pro se*, without first obtaining adequate advice regarding the necessity or advisability of filing for bankruptcy. Therefore, these attorney liability provisions ultimately will have an adverse effect on debtors, creditors, and the bankruptcy system as a whole.

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. The proposed amendments would also amend the definition of "debt relief agency" to exclude attorneys (who are already licensed and heavily regulated by their state supreme courts and state bars) while leaving these new regulations in the bill in place for the non-attorney bankruptcy petition preparers (who are now largely unregulated). If adopted, these reforms would reduce bankruptcy fraud and abuse without unfairly harming honest debtors or the overall bankruptcy system. Therefore, we urge you to add these amendments to S. 256.

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,

Robert D. Evans

Robert D. Evans

cc: All members of the House Judiciary Committee