No. 08-1119

IN THE
Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., *et al.*,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, the American Bar Association (ABA), as *amicus curiae*, respectfully submits this brief in support of Petitioner's challenge to the constitutionality of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (2005), as applied to lawyers.[1] The ABA requests that, in determining whether the BAPCPA withstands constitutional scrutiny, the Court consider the substantial negative—and unnecessary—impact of the BAPCPA on state regulation of the legal profession and on the important protections embodied in the attorney-client privilege.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court pursuant to Rule 37.3.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council participated in the adoption of or endorsement of the positions in this

Throughout its existence, the ABA has asserted, consistent with this Court's holdings, that primary regulation and oversight of the legal profession should remain vested in the highest state court in which attorneys are licensed. *E.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 569 n.18 (1984) ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public." (citation omitted)).

For example, in 1972, the ABA adopted policy affirming 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." *ABA 1972 Report with Recommendation #54* (Policy adopted Feb. 1972).[3] In 1992, the ABA reiterated this position, affirming that "[r]egulation of the legal profession should remain under the authority of the judicial branch of government." *ABA 1992 Report with Recommendation #119* (Policy adopted Feb. 1992).[4] The ABA has not wavered from this position.

Throughout its existence, the ABA has also consistently recognized that an attorney's ability to engage

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brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] Available from the ABA. A recommendation becomes policy of the ABA if adopted by the ABA's House of Delegates (HOD). With more than 500 delegates, the HOD is composed of delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, and ABA members. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Sept. 1, 2009).

[4] Available from the ABA.

openly and candidly with clients, free from governmental interference, is essential to the "full and frank communication between attorneys and their clients" and serves to "promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). In support of the privilege, the ABA continues to develop standards governing the preservation of client confidences,[5] and has participated before this Court and other courts as *amicus* in numerous cases involving the privilege and the related work-product doctrine.[6]

Guided by the twin principles of state regulation of the legal profession and preservation of the attorney-client privilege, the ABA's House of Delegates adopted a policy in 2001, opposing "the enhanced attorney liability provisions in S. 420/H.R. 333," the legislative precursor to what is now the BAPCPA. *ABA 2001 Report with Recommendation #10C* (Policy adopted Aug.

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[5] In 1908, the ABA adopted its *Canons of Professional Ethics*. In 1928, the ABA added Canon 37, which stated, "It is the duty of a lawyer to preserve his client's confidences," and that this duty "outlasts the lawyer's employment." The ABA's *Model Code of Professional Responsibility*, adopted in 1969, similarly provided that "[a] lawyer shall not knowingly ... reveal a confidence or secret of a client." Disciplinary Rule 4-101(B)(1). The ABA's current *Model Rules of Professional Conduct*, adopted in 1983 and periodically amended, address the duty to preserve client confidences in Model Rules 1.6 ("Confidentiality of Information") and 1.9 ("Duties to Former Clients").

[6] The ABA's *amicus* briefs on attorney-client privilege include those filed in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981); *Swidler & Berlin* v. *United States*, 524 U.S. 399 (1998); and, most recently, *Mohawk Industries, Inc.* v. *Carpenter* (No. 08-678).

2001).[7] In so doing, the ABA noted that the legislation's "debt relief agency" provisions would not only subject attorneys to "a host of new regulations" but, in conjunction with other provisions, make filing for bankruptcy "dramatically riskier for lawyers, and more expensive for clients, as well as for the operation of the bankruptcy courts." *Id.*

In August 2009, shortly after this Court granted certiorari in the instant matter, the ABA's House of Delegates affirmed the ABA's opposition to application of the BAPCPA to attorneys. This ABA policy opposes, *inter alia*, restrictions on the legal advice attorneys can provide to clients and requirements that attorneys who provide such advice must advertise themselves as "debt relief agencies," "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." *ABA 2009 Report with Recommendation #10B* (Policy adopted Aug. 2009).[8]

The ABA submits this *amicus* brief because it believes that the BAPCPA, if applied to attorneys, will improperly and unnecessarily interfere with regulation by state judicial systems of the legal profession and

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[7] Available from the ABA.

[8] Available at http://www.abanet.org/leadership/2009/annual/daily_journal/Ten_B.pdf; *see also* ABA Governmental Affairs Office, *Legislative and Governmental Priorities*, *available at* https://www.abanet.org/poladv/priorities/ (last visited Sept. 1, 2009) (designating as a 2009 ABA priority the repeal of the bankruptcy law provisions "that impose new liability and regulations on bankruptcy debtor attorneys").

with the ability of attorneys to advise clients in financial distress—an occurrence made all the more common in light of our Nation's current economic crisis.

SUMMARY OF ARGUMENT

If this Court concludes that attorneys fall within the statutory definition of "debt relief agency," and therefore must consider whether the application of the BAPCPA to attorneys can withstand constitutional scrutiny, the ABA requests that the Court include in its consideration the substantial negative and unnecessary impact of the BAPCPA on the ability of the state judicial systems to regulate the legal profession and on the important protections embodied in the attorney-client privilege.

Although the licensing and regulation of attorneys has been reserved to the States, the BAPCPA is an express attempt to regulate attorneys in ways that are in direct conflict with existing state laws and ethical rules, and with the attorney's role of advisor and advocate. Inclusion of attorneys within the BAPCPA would place attorneys in the untenable position of being statutorily prohibited from using their legal skills and judgment in determining many aspects of their representation of clients. Moreover, significant public policy considerations would be implicated, since attorneys would be subject to the imposition of contradictory—and not simply additional—rules and liabilities.

Further, application of the BAPCPA to attorneys would significantly undermine the attorney-client privilege, first, by directly limiting the communications between attorney and client, and second, by expressly making those communications discoverable. That is, application of the BAPCPA to attorneys would create

new exceptions to the attorney-client privilege that are based on a balancing of the desire for privileged information against the public policies served by the privilege, a basis that was rejected by this Court in *Swidler & Berlin* v. *United States*, 524 U.S. 399 (1998).

Because application of the BAPCPA to attorneys would create direct conflicts with state laws and ethical rules regulating the practice of law, and moreover, would create new exceptions to the attorney-client privilege that are contrary to the goals of encouraging full and frank communication and of protecting the client's interests, the ABA submits that attorneys should not be included within the BAPCPA's definition of "debt relief agencies."

ARGUMENT

The Bankruptcy Abuse Prevention And Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (2005), was enacted in part to curb what Congress perceived to be serious and systemic abuses of the bankruptcy system. As Congress explained, the purpose of the BAPCPA was "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 109-31, at 2 (2005).

To this end, the BAPCPA was designed to regulate the conduct of a new category of legal entities termed "debt relief agencies." As defined in the statute, a "debt relief agency" is "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable considera-

tion."[9] 11 U.S.C. § 101(12A). The BAPCPA imposes a series of restrictions and liabilities on any "debt relief agency." *See* 11 U.S.C. §§ 526-528.

If this Court concludes that attorneys fall within the statutory definition of "debt relief agency"—which has been the subject of debate in the lower courts[10]—and therefore must consider whether application of the BAPCPA to attorneys can withstand constitutional scrutiny, the ABA requests that the Court include consideration of the substantial negative—and unnecessary—impact of the BAPCPA on the ability of the state judicial systems to regulate the legal profession and on

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[9] An "assisted person," in turn, is defined as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250." 11 U.S.C. § 101(3). Additionally, "bankruptcy assistance" means "any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title." 11 U.S.C. § 101(4A).

[10] *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 541 F.3d 785, 792 (8th Cir. 2008) (holding that attorneys who "provide 'bankruptcy assistance' to 'assisted persons' are 'debt relief agencies' as that term is defined by the Code"); *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743, 752 (5th Cir. 2008) (same), *petition for cert. filed*, No. 08-1174. *But see In re Reyes*, 361 B.R. 276, 280 (Bankr. S.D. Fla. 2007) (attorneys, generally, are not debt relief agencies), *aff'd in part, rev'd in part*, No. 07-20689, 2007 WL 6082567 (S.D. Fla. Dec. 19, 2007); *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005) (attorneys are not "debt relief agencies" so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise).

the important protections embodied in the attorney-client privilege.[11]

I. APPLICATION OF THE BAPCPA TO ATTORNEYS RESULTS IN SUBSTANTIAL NEGATIVE IMPACT ON THE REGULATION OF THE LEGAL PROFESSION BY THE STATE JUDICIAL SYSTEMS

Throughout this country's history, the licensing and regulation of attorneys has been reserved to, and performed by, the State judicial systems. As this Court has stated, "States have a compelling interest in the practice of professions within their boundaries, and … as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Florida Bar* v. *Went For It, Inc.* 515 U.S. 618, 625 (1995) (internal quotation marks omitted; alteration in original). To this end, "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975) (citing cases); *see also Hoover* v. *Ronwin*, 466 U.S. 558,

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[11] The ABA notes that it supported a draft "technical corrections" bankruptcy bill that, had it been enacted, would have resolved both the constitutional question and the fundamental problems identified in this *amicus* brief by excluding attorneys from the BAPCPA's definition of "debt relief agency." Letter from Denise A. Cardman, Acting Director of the ABA Governmental Affairs Office, to the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives (May 1, 2007), *available at* http://www.abanet.org/poladv/letters/bankruptcy/2007may01_BAPCPAh_l.pdf.

569 n.18 (1984) ("regulation of the bar is a sovereign function" of the State's highest court).

Nevertheless, and assuming *arguendo* that attorneys fall within the BAPCPA's statutory definition of "debt relief agency," the BAPCPA is an express attempt to regulate attorneys in ways that are in direct conflict with the existing laws and ethical rules that have been promulgated by the States for the regulation of attorneys practicing within their jurisdictions.

For example, under § 526(a)(4), a debt relief agency may not "advise an assisted person … to incur more debt in contemplation of such person filing a case under this title." As lower courts have recognized, there are scenarios in which an assisted person's reasons for incurring additional debt when contemplating bankruptcy are not only lawful, but otherwise beneficial, both to the assisted person and the creditors.[12] Indeed, incurring such debt may provide the means ultimately

[12] *See Hersh*, 553 F.3d at 754 n.10 (observing it may be advisable for an assisted person, prior to filing for bankruptcy, to secure "a home equity based line of credit … because the terms of the credit may not be available at all" after or "to finance a new vehicle while his credit ratings are intact … so that he will be able to commute to work to pay off his debts"); *Milavetz, Gallop & Milavetz, P.A.*, 541 F.3d at 793-794 (same); *Connecticut Bar Ass'n* v. *United States*, 394 B.R. 274, 282-283 (D. Conn. 2008) (stating it might be "financially prudent for a debtor considering bankruptcy" to, among other things, "take out a loan to pay the filing fee in a bankruptcy case or to obtain the services of a bankruptcy attorney"; "take out a loan to convert a non-exempt asset to an exempt asset"; or "co-sign undischargeable student loans" (internal citation omitted)).

to stave off the need to file for bankruptcy or otherwise be in the assisted person's best interest.[13]

Under § 526(a)(4), however, the attorney is flatly prohibited from advising a client who is an assisted person to incur additional debt, regardless of the attorney's considered professional judgment as to the potential personal or financial risk or benefit to the client. Notably, Congress has not made it illegal for debtors *independently* to incur more debt in contemplation of bankruptcy. Rather, it is when debtors do so on advice of counsel that liability attaches—to the attorney.

Not only does this result turn the attorney's traditional "advice and counsel" role on its head, it is directly contrary to state laws and ethical rules that already regulate precisely the conduct at which the BAPCPA, ostensibly, is aimed.[14] For example, *ABA Model Rule of Professional Conduct* 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith

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[13] *See Milavetz, Gallop & Milavetz, P.A.*, 541 F.3d at 793 ("[U]nder § 526(a)(4)'s plain language an attorney is prohibited from providing this beneficial advice [to incur more debt]—even if the advice could help the assisted person avoid filing for bankruptcy altogether.").

[14] The ABA's *Model Rules of Professional Conduct* are the basis for the lawyer ethics codes in every state except California. California's rules are currently under review, in response to developments in the field and to the Report and Recommendation of the ABA's Ethics 2000 Commission.

> effort to determine the validity, scope, meaning or application of the law.

That is, Model Rule 1.2(d) already prohibits an attorney from counseling a client to commit a fraud on the bankruptcy court. However, as Model Rule 1.2(d) also illustrates, the BAPCPA's § 526(a)(4) prohibits attorneys from providing counsel as to a "proposed course of conduct" that, under the *Model Rules*, they are permitted to provide.[15]

The tension between the BAPCPA's § 526(a)(4) and the *Model Rules* is further illustrated by Model Rule 1.4(b), under which the lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." As stated in the Comment to Model Rule 1.4(b), "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Under the BAPCPA's § 526(a)(4), as discussed above, an attorney is flatly prohibited from advising a client who is an assisted person to incur additional debt, regardless of whether this might be in the client's best interests.

Other provisions of the BAPCPA are equally troubling when applied to attorneys. For example, under § 527, attorneys are required to provide assisted persons with several written notices that include specified

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[15] Further, existing provisions make incurring debt for criminal or fraudulent purposes a crime. *See* 11 U.S.C. § 523(a)(2); 18 U.S.C. §§ 152-157. Thus, the BAPCPA's overlay of prohibitions on attorneys, the ABA asserts, is unnecessary.

information.[16] Under § 528(a), attorneys are required to provide them with a written contract specifying what the attorney will do and how much it will cost. Under § 528(b), attorneys who advertise "bankruptcy assistance services" or "the benefits of bankruptcy" to the general public must include the following disclosure: " 'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement."[17]

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[16] The ABA notes that, more problematic than the fact that the required advice is sometimes wrong as applied to a client's circumstances is the fact that mandating the advice that must be given once again usurps the attorney's duties as counselor and advocate in determining the advice that is applicable to a client's circumstances.

[17] The ABA also notes that the advertising disclosures of the BAPCPA do not apply to debtors' attorneys alone. Rather, they may include creditors, non-debtor spouses, and landlords, where the person's debts "consist primarily of consumer debts" and the "nonexempt property is less than $164,250." *Connecticut Bar Ass'n*, 394 B.R. at 281; *see also* Chemerinksy, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 577 (Summer 2005) ("[A]n individual landlord, most of whose debts are consumer debts, could be an 'assisted person' even when the bankruptcy advice pertains to the landlord's rights in the bankruptcy case of a tenant.").

Where an attorney represents creditors, or represents clients who, although not filing for bankruptcy, have legal issues that result in the clients' qualification as "assisted persons," it would be patently untrue for the attorney to advertise that he or she "help[s] people file for bankruptcy relief under the Bankruptcy Code," as required under § 528(b). Simply put, "the second sentence of the required statement—'We help people file for bankruptcy relief under the Bankruptcy Code'—is only a truly accurate factual disclosure in a limited number of situations in which it is

Where an attorney fails to comply with any of these provisions—and regardless of whether the failure is through inadvertence, a reasonable belief that a provision does not apply, a conclusion that other services are more appropriate, or otherwise—serious consequences may attach. First, under § 526(c)(1), if a contract between an attorney and an assisted person fails to comply with the "material requirements" of any of the BAPCPA's debt relief agency provisions, it "shall be" declared void and unenforceable against the debtor by any Federal or State court or any other person, but may be enforced against the attorney. Second, under § 526(c)(2)-(5), violation of these provisions may also result in forfeiture of the attorney's fee and a suit in state or federal court by the debtor, the Office of the United States Trustee, or state law enforcement officials for actual damages, civil penalties, attorneys' fees and costs.[18]

Further, in the course of complying with these rules, the attorney is subject to second-guessing under § 526(a)(3)(B) by the U.S. Trustee's Office and other federal authorities, if the federal authorities believe the attorney in any way misrepresented, "directly or indirectly, affirmatively or by material omission, … the

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required to be stated, and in many other situations, it is in fact a false statement." *Connecticut Bar Ass'n*, 394 B.R. at 290.

[18] For example, in *In re Gutierrez*, 356 B.R. 496 (Bankr. N.D. Cal. 2006), an attorney was sued by his client and disgorgement of fees and payment of the debtor's reasonable attorney's fees was ordered where it was found that the attorney had violated the BAPCPA by failing (1) within three days, to provide the required Bankruptcy Truthfulness Notice, and (2) to execute a written retention agreement that described the services to be provided and the fees for the services.

benefits and risks that may result" if the client files a bankruptcy case. Enforcement under § 526(a)(3)(B) would require that an attorney's privileged communications with the client be revealed, which is directly contrary to Model Rule 1.6(a), under which an attorney may not "reveal information relating to the representation of a client unless the client gives informed consent" or "the disclosure is impliedly authorized in order to carry out the representation."

In short, if attorneys are included within the BAPCPA, they will be placed in the untenable position of being statutorily prohibited from using their legal skills and judgment in determining many aspects of their representation of clients, and from complying with state laws and ethical rules that regulate their practices.[19] And, of course, clients themselves may well be dissuaded from consulting with attorneys in the first instance where they know that an attorney cannot fully discuss an assisted person's legally available options, or may be required to reveal their communications.

Moreover, inclusion of attorneys within the BAPCPA would set a troubling precedent, since attorneys would be subject to contradictory—rather than simply additional—rules of professional responsibility, accountability, and liability based solely on the content of the advice, area of practice, and the types of clients

[19] Because the BAPCPA directly conflicts with the state laws and ethical rules governing attorneys, the ABA notes that application of the BAPCPA to attorneys would also conflict with § 526(d)(2) of the BAPCPA itself, which provides that nothing in §§ 526, 527 or 528 "shall be deemed to limit or curtail the authority or ability of a State … to determine and enforce qualifications for the practice of law under the laws of that State."

they represent. Clearly, significant public policy considerations are implicated if the BAPCPA is applicable to attorneys.

II. APPLICATION OF THE BAPCPA TO ATTORNEYS WOULD SIGNIFICANTLY AND UNNECESSARILY UNDERMINE THE ATTORNEY-CLIENT PRIVILEGE BY CREATING NEW EXCEPTIONS TO THAT PRIVILEGE

Also throughout this country's history, the courts have protected the attorney-client privilege, which is "the oldest of the privileges of confidential communication known to the common law." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (citing 8 Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)).[20] As this Court stated in *United States* v. *Louisville & Nashville Railroad Co.*, 236 U.S. 318 (1915):

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

Id. at 336; *see also Upjohn*, 449 U.S. at 389 ("[F]ull and frank communication between attorneys and their clients" serves to "promote broader public interests in the observance of law and administration of justice").

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[20] In fact, the attorney-client privilege "goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned." 8 Wigmore, *Evidence* § 2290, at 542.

Despite these long-established principles, the effect of the BAPCPA—if applicable to attorneys—is the creation of new exceptions to the attorney-client privilege, first, by directly limiting the communications between the attorney and client, and second, by expressly making those communications discoverable.

For example, § 526(a)(4), as discussed, *supra*, at 9-11, prohibits a debt relief agency from "advis[ing] an assisted person … to incur more debt in contemplation of such person filing a case under this title." If the BAPCPA is applicable to attorneys, the attorney cannot advise a client who is an assisted person contemplating bankruptcy, even if the client directly asks the attorney, about an action that would result in more debt. Further, this prohibition necessarily limits the information the attorney may solicit from the client, despite the attorney's professional judgment as to the information needed to best advise the client under the circumstances the client faces.

That is, under § 526(a)(4), privileged discussions are prohibited that would enable the attorney to learn the full financial picture facing the client at a time when the client can ill afford less than full disclosure. Such a limitation is contradictory to the "full and frank communication," *Upjohn*, 449 U.S. at 389, that is essential to the attorney-client relationship.

Similarly, if the BAPCPA is applicable to attorneys, then its enforcement would permit discovery of privileged communications between the attorney and client. For example, enforcement of § 526(a)(4) would necessarily entail inquiry into the discussions between the attorney and the client, to learn whether the attorney had, in fact, "advis[ed] an assisted person … to in-

cur more debt in contemplation of such person filing a case under this title."

Placing the BAPCPA in the best light, it is intended to create protections for the bankruptcy system. What is created, however, are new exceptions to the attorney-client privilege. As this Court stated in *Swidler & Berlin* v. *United States*, 524 U.S. 399 (1998), in concluding that the attorney-client privilege survived the death of the client, even in criminal cases:

> [T]he Independent Counsel argues that existing exceptions to the privilege, such as the crime-fraud exception and the testamentary exception, make the impact of one more exception marginal. However, … [t]he established exceptions are consistent with the purposes of the privilege, while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests. A "no harm in one more exception" rationale could contribute to the general erosion of the privilege, without reference to common-law principles or "reason and experience."

Id. at 409-410 (internal citations omitted).

As with the previously proposed posthumous exception, the exceptions to the attorney-client privilege that are mandated under the BAPCPA are new exceptions, based on a balancing of the desire for privileged information against the public policies served by the privilege. As the *Swidler* Court concluded, such a balancing "introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours

of the privilege." 524 U.S. at 409 (citing *Upjohn*, 449 U.S. at 393; *Jaffee* v. *Redmond*, 518 U.S. 1, 17-18 (1996)).

Because application of the BAPCPA to attorneys would create new exceptions to the attorney-client privilege that, like the posthumous exception considered in *Swidler*, are contrary to the goals of encouraging full and frank communication and of protecting the client's interests, the ABA submits that the BAPCPA should not be applicable to attorneys.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the holding of the Court of Appeals for the Eighth Circuit that the BAPCPA is applicable to attorneys be reversed.

Respectfully submitted.

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