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Eighth Circuit Loosens the Grip of the Bankruptcy Gag Rule, but Holds Attorneys to Advertising Disclosure Requirement, The

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The Eighth Circuit Loosens the Grip of the Bankruptcy Gag Rule, but Holds Attorneys to Advertising Disclosure Requirement

*Milavetz, Gallop & Milavetz, P.A. v. United States*

I. INTRODUCTION

The Court of Appeals for the Eighth Circuit, in a case of first impression, struck down a provision of the 2005 bankruptcy reform law that prohibits attorneys from advising their clients to incur more debt in contemplation of filing for bankruptcy. At the same time, the court upheld a provision of the Bankruptcy Code that compels attorneys to include a specified disclosure within their bankruptcy-related advertisements.

The court’s rationale for striking down the Code’s restriction on attorney advice was that its broad application restricted attorneys from rendering advice that in some situations would be entirely lawful and beneficial to their clients. This decision protects an attorney’s First Amendment right to free speech and rightfully allows consumer debtors the opportunity to be represented by counsel who may freely advise them of all their legal alternatives.

On the other hand, the court reasoned that the Code’s advertising disclosure requirement does not constitutionally infringe on attorneys’ rights. Because it only mandates that attorneys include an additional two lines of factual information in their bankruptcy-related advertising materials, it does not overly burden attorneys’ interests and may help prevent deception on the part of the consumer. Whether this requirement truly provides beneficial information to consumers, or alternatively lends confusion, is questionable, and attorneys bound by this ruling are likely to face ongoing frustrations.

1. 541 F.3d 785 (8th Cir. 2008).
2. *Id.*
3. *Id.* at 796-97.
4. *Id.* at 794.
5. *Id.* at 796-97.
II. FACTS AND HOLDING

In April of 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the BAPCPA), which amended and added multiple sections to the Bankruptcy Code (the Code), was signed into law.\textsuperscript{6} The purpose of this Act 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."\textsuperscript{7} A primary underlying goal of the Act was to curb perceived abusive or fraudulent uses of the bankruptcy system.\textsuperscript{8}

One of the more striking BAPCPA amendments added the term "debt relief agency" to the Code, defined to include "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer."\textsuperscript{9} Further amendments either restricted the actions of, or required certain actions of, debt relief agencies.\textsuperscript{10}

For example, debt relief agencies are barred from advising a client "to incur more debt in contemplation of... [a bankruptcy] filing," as codified in section 526(a)(4).\textsuperscript{11} Additionally, section 528 requires that all debt relief agencies must "clearly and conspicuously" include the following statement in their bankruptcy-related advertisements: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code[,] or a substantially similar statement."\textsuperscript{12} It thus became necessary for attorneys, such as the plaintiffs in this case, to determine whether the provisions applicable to

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\textsuperscript{8} See Zelotes v. Martini, 352 B.R. 17, 23 (D. Conn. 2006). Congress was motivated by findings suggesting widespread abuse of the present bankruptcy systems, which was found to "have loopholes and incentives that allow and sometimes even encourage opportunistic personal filings and abuse." Id. (quoting H.R. REP. NO. 109-31, pt. 1, at 5 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 92).


debt relief agencies affected them professionally. The issue revolved around whether the definition of a debt relief agency was interpreted to include attorneys.

In response to these concerns, suit was initiated by Milavetz, Gallop & Milavetz, P.A., a Minnesota law firm that practices bankruptcy law, as well as the firm's president, a bankruptcy attorney within the firm, and two clients who sought bankruptcy advice from the firm. These plaintiffs collectively brought suit against the United States seeking a declaratory judgment that the "debt relief agency" provisions of the BAPCPA were not applicable to attorneys and law firms. The plaintiffs first requested the court to declare that attorneys did not fall within the definition of "debt relief agency" as provided within the Bankruptcy Code. In the alternative, the plaintiffs specifically challenged the constitutionality of section 526(a)(4) and sections 528(a)(4) and (b)(2) of the Code as applied to attorneys.

The plaintiffs contended that it was Congress's intent to exclude attorneys from the definition of debt relief agencies because the definition does not directly reference attorneys, but does specifically include a "bankruptcy petition preparer," and the definition of a bankruptcy petition preparer expressly excludes the debtor's attorneys and their staff. The plaintiffs also argued that "the doctrine of constitutional avoidance should be used to interpret 'debt relief agency' to exclude attorneys and thus avoid the potential constitutional issues." The District Court for the District of Minnesota agreed with the plaintiffs, granting summary judgment in their favor and issuing an order excluding attorneys practicing in the District of Minnesota from the definition of a "debt relief agency" as defined by the BAPCPA.

The government, at trial and on appeal, conversely argued that the term "debt relief agency" clearly encompasses attorneys, since the term is broadly defined to apply to "any person who provides any bankruptcy assistance to an assisted person in return for . . . payment." Thus, the government con-

14. Milavetz, 541 F.3d at 789.
15. Id.
16. Id.
18. Milavetz, 541 F.3d at 790. See 11 U.S.C. § 110(a)(1) (2006) (defining "bankruptcy petition preparer" as "a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing" in bankruptcy court) (emphasis added).
19. Milavetz, 541 F.3d at 790.
20. Id. at 788.
21. Id. at 790 (quoting 11 U.S.C. § 101(12A) (defining a "debt relief agency") (emphasis added)).
tended that providing legal representation to a client filing for bankruptcy is synonymous with providing bankruptcy assistance.\textsuperscript{22}

The plaintiffs claimed that if the court held, on appeal, that attorneys are included within the Code’s definition of debt relief agencies, then section 526(a)(4) would unconstitutionally restrict their free speech by limiting their ability to properly advise their clients.\textsuperscript{23} Further, they contended that sections 528(a)(4) and (b)(2) unconstitutionally compelled them to disclose a predetermined message in their bankruptcy-related advertisements, thereby violating their First Amendment rights.\textsuperscript{24}

With regard to the claim that section 526(a)(4) restricts their free speech, the plaintiffs argued that the court should apply the strict scrutiny standard of review, because the restriction on an attorney’s ability to render advice to a client is content-based.\textsuperscript{25} On the other hand, the government urged the court to apply the more lenient standard outlined in \textit{Gentile v. State Bar of Nevada}\textsuperscript{26} — "the \textit{Gentile} standard" — reasoning that the provision’s restriction is an ethical standard that prevents abuse of the bankruptcy system.\textsuperscript{27} Moreover, in response to the plaintiffs’ claims that the advertising disclosure requirement within section 528 of the Code violates the First Amendment rights of bankruptcy attorneys through compelled speech, the government contended that the disclosure requirement serves Congress’s purpose to prevent deceitful and fraudulent advertising by debt relief agencies.\textsuperscript{28}

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\textsuperscript{22} Id. (citing 11 U.S.C. § 101(4A) (2006)).
\textsuperscript{23} Id. at 792-93; see also id. at 799 (Colloton, J., concurring in part and dissenting in part) (referencing the plaintiffs’ argument that, because § 526(a)(4) restricts a debt relief agency from advising a client “to incur any debt” regardless of the purpose when the client is considering filing for bankruptcy, it effectively puts an attorney at risk of being sanctioned for “fulfilling his duty to his client to give legal and appropriate advice not otherwise prohibited by the Bankruptcy Code.”) (quoting Brief of Appellee at 30, Milavetz, Gallop & Milavetz, P.A. v. United States, No. 07-2405 (8th Cir. Aug. 22, 2007)).
\textsuperscript{24} Id. at 794-95.
\textsuperscript{25} Id. at 792 (quoting Turner Broad Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)) ("[A]pply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").
\textsuperscript{26} 501 U.S. 1030 (1991). In \textit{Gentile}, the Supreme Court balanced lawyers’ First Amendment freedom of speech interests against the state’s legitimate interest in regulating the activity in question and held that an ethical restriction imposed on attorney speech was permissible. \textit{Id.} at 1075.
\textsuperscript{27} \textit{Milavetz}, 541 F.3d at 793. Thus, the government wanted the court to "balance the First Amendment rights of the attorneys against the government’s legitimate interest in regulating the activity in question. . . and then determine whether the regulations impose ‘only narrow and necessary limitations on lawyers’ speech.’" \textit{Id.} (quoting \textit{Gentile}, 501 U.S. at 1031).
\textsuperscript{28} \textit{Id.} at 795.
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The district court found that the BAPCPA's debt relief agency provisions did not apply to attorneys. Chief Judge Rosenbaum, writing for the majority, was of the opinion that including attorneys within the definition of a debt relief agency would conflict with the state's traditional authority "to determine and enforce qualifications for the practice of law under the laws of that State." Furthermore, the court found the statute to be ambiguous enough that the doctrine of constitutional avoidance should be applied, such that the statutory language should be constructed so as to avoid serious constitutional questions such as those raised by the plaintiffs' challenges in this case.

Even though it held attorneys exempt from the debt relief agency provisions of the Act, the district court went on to evaluate the plaintiffs' claims concerning the constitutionality of section 526(a)(4) and sections 528(a)(4) and (b)(2) and determined that both of these provisions were unconstitutional as applied to attorneys. After applying the strict scrutiny standard, the court held that section 526(a)(4), barring a debt relief agency from advising a client to incur additional debt in contemplation of bankruptcy, has the potential to prevent attorneys from "adequately and competently advising their clients," such that it "unconstitutionally impinges on expressions protected by the First Amendment." Furthermore, the court determined that the advertising disclosure requirement of sections 528(a)(4) and (b)(2) failed to directly advance a substantial government interest and was not narrowly drawn to prevent deception. Therefore, it did not pass constitutional scrutiny.

In the instant decision, the Court of Appeals for the Eighth Circuit affirmed the district court's decision in part and reversed it in part. The appellate court reversed the district court's ruling on the inclusiveness of the debt relief agency definition and held that attorneys are debt relief agencies within the Bankruptcy Code, finding the plain language of the definition to unambiguously include attorneys who provide bankruptcy assistance, espe-

30. Id. at 768 (quoting 11 U.S.C. § 526(d)(2)(A) (2006) (No provision of §§ 526, 527, or 528 shall "be deemed to limit or curtail the authority or ability... of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State.").
31. Id.
32. Id. at 763-67.
33. Id. at 765-66.
34. Id. at 767. According to Chief Judge Rosenbaum, "[t]his sweeping regulation goes beyond whatever problem it was designed to address [and] broadly regulates absolutely truthful advertisements throughout an entire field of legal practice." Id.
cially in light of the fact that Congress specifically listed five exclusions from the definition and attorneys were not one of them.\textsuperscript{36}

The appellate court then held, in line with the district court, that the provision restricting an attorney’s ability to advise a client to take on debt in contemplation of bankruptcy was unconstitutionally overbroad, as such a “blanket prohibition” restricts speech beyond that which the government has an interest in restricting.\textsuperscript{37} The court noted that, in an attempt to prevent attorneys from promoting abusive prebankruptcy practices, this provision was drafted so that it also prevented attorneys from rendering prudent, lawful advice to clients contemplating bankruptcy.\textsuperscript{38} However, in contrast with the lower court, the appellate court held that the advertising disclosure requirement was constitutional as applied to all debt relief agencies, including attorneys, because it was “reasonably related to the government’s interest in protecting consumer debtors from deceptive advertising.”\textsuperscript{39} Furthermore, the court held that the disclosure requirement does not overly burden an advertiser’s protected interest in free speech, as it only requires a short statement of factual information.\textsuperscript{40}

Thus, the Eighth Circuit held that, because the Bankruptcy Code’s definition of a debt relief agency is interpreted to apply to attorneys, section 526(a)(4) of the Code is an unconstitutional restraint on attorneys’ First Amendment right to advise their clients, but the advertising disclosure requirements within section 528 of the Code were upheld as constitutional and apply to attorneys.\textsuperscript{41}

### III. LEGAL BACKGROUND

The BAPCPA has been referred to as “a sweeping 2005 federal bankruptcy-overhaul.”\textsuperscript{42} Among the many changes the Act brought to the United States Bankruptcy Code was the creation of a new entity in bankruptcy law, coined a “debt relief agency.”\textsuperscript{43} While a definition for this new category of

\begin{itemize}
  \item \textsuperscript{36} Id. at 791. The five enumerated exceptions are listed at 11 U.S.C. § 101(12A)(A)-(E) (2006).
  \item \textsuperscript{37} Milavetz, 541 F.3d at 793-94.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id. at 797.
  \item \textsuperscript{40} Id. at 796-97.
  \item \textsuperscript{41} Id. at 793, 797.
\end{itemize}
bankruptcy service provider is set forth in the Code,\(^4\) it has been less than determinative.\(^4\)

Attorneys and courts across the country have found it difficult to interpret the meaning of “debt relief agency” and the scope of the definition’s application.\(^4\) Since the BAPCPA was signed into law in 2005, there have been a myriad of lawsuits addressing this very issue.\(^4\) Unfortunately for bankruptcy attorneys seeking clarity, the district courts hearing these cases have come out on both sides.

A. Are Attorneys Debt Relief Agencies?

*Hersh v. United States* is one of the cases holding the term “debt relief agency” to include bankruptcy attorneys.\(^4\) In this case, the District Court for the Northern District of Texas focused on the plain language of the definition and found it relevant that the coordinating definition of “bankruptcy assistance” incorporated “providing legal advice.”\(^5\) Because an attorney’s profes-

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\(^4\) To reiterate, the term “debt relief agency” is defined to include “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer.” 11 U.S.C. § 101(12A). This provision then goes on to list five exceptions to the general definition:

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer; (B) a nonprofit organization . . . ; (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed . . . to the creditor; (D) a depository institution . . . or any Federal credit union or State credit union . . . or [their] affiliate or subsidiary . . . ; or (E) an author, publisher, distributor, or seller of works subject to copyright protection . . . .


\(^4\) Id. (stating that “no interpretive question has a more significant impact on consumer bankruptcy attorneys than whether they are ‘debt relief agencies’ under section 101(12A) of the Bankruptcy Code”).


\(^4\) Id. at 22-23. The definition of “bankruptcy assistance” is “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
sional aim is "to provide legal advice," the court found this to be a clear indication that attorneys are debt relief agencies for purposes of the Bankruptcy Code.\footnote{51} Additionally, the court noted that "if Congress had wanted attorneys excluded from the term 'debt relief agency'... it surely would have taken the opportunity to exclude them," as several exceptions were expressly provided.\footnote{52} Further, the court felt legislative history was indicative of Congress's intent to include attorneys within this statute.\footnote{53}

The District Court for the District of Oregon, in \textit{Olsen v. Gonzales}, reached the same conclusion under paralleled reasoning while also noting the legislative history of the bankruptcy reform.\footnote{54} Specifically, the court pointed out that the House Reports regarding the BAPCPA make reference to the fact that "[t]he bill's consumer protections include provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases."\footnote{55}

Notwithstanding these decisions, the Bankruptcy Court for the Southern District of Florida in \textit{In re Reyes} held that attorneys are not debt relief agencies, stating that "[i]f Congress wanted 'attorney' included in the definition, it could have accomplished [the] same."\footnote{56} The court further supported its opposing decision by pointing out that, if the Code's debt relief agency sections applied to attorneys, it would effectively mean that Congress had taken upon itself the authority to determine what advice attorneys can give their clients, which would infringe on the state's traditional role of regulating attorneys.\footnote{57}

Moreover, while reiterating the fact that Congress would have included "attorneys" in the definition of a debt relief agency along with "bankruptcy petition preparers," if that was its intent, the Bankruptcy Court for the Southern District of Georgia, in \textit{In re Attorneys at Law and Debt Relief Agencies}, expressed an additional rationale for excluding attorneys from the laws applicable to debt relief agencies.\footnote{58} The court reasoned that Congress intended for these provisions "to regulate that universe of entities who assist persons but

\footnote{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) (2006) (emphasis added).
\footnote{51. \textit{Hersh}, 347 B.R. at 22-23.}
\footnote{52. \textit{Id.} (referring to the five enumerated exceptions to a "debt relief agency" at 11 U.S.C. § 101(12A)(A)-(E) (2006)).}
\footnote{54. 350 B.R. 906 (D. Or. 2006).}
\footnote{56. 361 B.R. 276, 280 (Bankr. S.D. Fla. 2007).}
\footnote{57. \textit{Id.} at 279 (adopting the district court opinion of Chief Judge Rosenbaum in Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758, 768-69 (D. Minn. 2006)).}
are not attorneys," asserting that it is nonsensical to interpret the section of the Code requiring debt relief agencies to inform assisted persons that they have a right to hire an attorney, as applying in a manner that would require an attorney to tell a client "that he [or] she has the right to hire an attorney."

B. Is Section 526(a)(4) of the Bankruptcy Code Constitutional as Applied to Attorneys?

The confusion surrounding whether an attorney is a debt relief agency has stirred concern regarding whether some of the restrictions that apply to debt relief agencies are constitutional when applied to attorneys. Primarily, courts and commentators have grappled with the constitutionality of section 526(a)(4) which states that

A debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Due to the likelihood that attorneys may be considered debt relief agencies, this section, as applied to attorneys, would directly regulate attorney speech to a potentially unconstitutional degree when attorneys are advising client consumer debtors. Specifically, if attorneys are held to be debt relief agencies, this provision prohibits attorneys from advising their clients to incur additional debt even when it might be completely legal and even desirable for the client to do so. Thus, this statute's broad prohibition has been chal-

59. Id. at 70.
60. Id. at 69-70 (referring specifically to 11 U.S.C. § 527(b) (2006)).
61. Id. (suggesting that Congress's actual intent was to protect consumers who may have been harmed by a debt relief agency that may have engaged in the unauthorized practice of law).
62. See Chemerinsky, supra note 7, at 571-83; see also Wann, supra note 43.
64. Boblick, supra note 47, at 724.
65. See Chemerinsky, supra note 7, at 579 (stating that there is nothing illegal about incurring new debt before filing for bankruptcy when "the client . . . intend[s] to keep all payments fully current and . . . reaffirm such debt once the case is filed").

For example, it might be [financially] prudent for a debtor considering bankruptcy to (1) obtain a mortgage or refinance a mortgage at a lower rate in order to reduce payments, pay off various other debts or obtain a lower interest rate prior to entering bankruptcy, (2) take on secured debt, such as an automobile loan, that would survive bankruptcy while enabling the debtor to continue to get to work and make payments, (3) take out a loan to pay the filing fee in a bankruptcy case or to obtain the services of a
lenged as an unconstitutional restriction on attorneys’ free speech rights, as the Supreme Court has generally held that an attorney’s legal advice to a client is protected speech under the First Amendment. For instance, in Legal Services Corp. v. Velazquez, Justice Kennedy of the United States Supreme Court expressed that “restricting . . . attorneys in advising their clients . . . distort[ed] the legal system by altering the . . . traditional role” of attorneys.

In determining whether a law is an unconstitutional restriction on free speech, a court must first determine what type of speech restriction is involved in order to ascertain the level of scrutiny that should be applied. The arguments regarding the statutory provision at hand have centered on whether the provision is a content-based restriction, which would subject it to strict scrutiny, or whether it functions as an ethical regulation, which would subject it to the Gentile standard, a form of intermediate scrutiny.

bankruptcy attorney, (4) take out a loan to convert a non-exempt asset into an exempt asset, or (5) co-sign undischargeable student loans.


67. Boblick, supra note 47, at 723, 723 n.81. See also Chemerinsky, supra note 7, at 579 (noting that “[t]he Supreme Court has been very protective of the First Amendment rights of attorneys to advise and zealously represent their clients”).


69. See Wann, supra note 43, at 288.

70. Content-based restrictions “focus[ ] only on the content of the speech and the direct impact that speech has on its listeners.” Boos v. Barry, 485 U.S. 312, 321 (1988). Thus, such laws, by their terms, “distinguish favored speech from disfavored speech on the basis of ideas or views expressed.” Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

71. See United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 811-13 (2000) (holding that certain restrictions regulating the broadcast of pornographic materials were content-based and thus subject to strict scrutiny). Under the strict scrutiny standard the State must have a compelling interest or reason for regulating the speech and the law must be narrowly tailored to serve that interest. Id. (emphasis added).

72. “Ethical regulations . . . serve as a form of self-regulation within professions.” See Boblick, supra note 47, at 725-26. While ethical regulations come from regulatory agencies and professional organizations, section 526, which is a product of Congress, is arguably analogous to an ethical regulation because it “purport[s] to regulate the behavior of lawyers.” Id.

73. Gentile v. State Bar of Nev. 501 U.S. 1030, 1075 (1991). The Gentile Court found that the State’s test achieved a “constitutionally permissible balance” because it served “the State’s legitimate interest in regulating the activity in question . . . and . . . impose[d] only narrow and necessary limitations on lawyers’ speech.” Id. (emphasis added).

74. See Boblick, supra note 47, at 726.
While the federal government has consistently urged that the *Gentile* standard be used in cases challenging this particular provision, most courts considering the issue have avoided expressing a preference for the selection of one standard over the other. Rather, courts have tended to find it unnecessary to determine which level of scrutiny should be applied, because, even in light of the more lenient *Gentile* standard, the regulation would not pass constitutional muster.\(^7\)

For example, the District Court for the Northern District of Texas, in *Hersh v. United States*, recognized that the government has a legitimate interest in preventing fraudulent manipulation of the bankruptcy system but found section 526(a)(4) to be overly broad and overinclusive in its application, because it also prevents attorneys from giving legitimate, prudent advice that could prove beneficial to both debtors and creditors.\(^7\) Therefore, the court held that this section of the Code imposed limitations on lawyers' speech beyond what is "narrow and necessary" to prevent abusive bankruptcy practices and thus failed to meet the intermediate, *Gentile* standard of scrutiny and was facially unconstitutional.\(^7\)

The District Court for the District of Oregon in *Olsen v. Gonzales* then expanded upon the holding in *Hersh* and found section 526(a)(4) to be overinclusive and underinclusive.\(^7\) While the regulation was held to be overinclusive for the same reasons given in *Hersh*, the *Olsen* court held it was also underinclusive, because entities excluded from the definition of a debt relief agency, such as non-profit organizations, could presumably still give advice to persons contemplating bankruptcy that did actually border on the abuses that the regulation was designed to prevent.\(^7\) Thus, the *Olsen* court also struck down this section of the Code as facially unconstitutional.\(^8\)

In *Zelotes v. Adams*, the District Court for the District of Connecticut similarly found that the statutory provision broadly "prohibits all advice regarding debt incurred in contemplation of bankruptcy rather than restricting its reach to false or fraudulent advice or advice given to assist the debtor in


\(^7\) *Hersh*, 347 B.R. at 24-25.

\(^7\) *Id.* at 25 (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Even under intermediate scrutiny, '[s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.'"')).

\(^7\) 350 B.R. at 916.

\(^7\) *Id.* (holding that the regulation is both underinclusive and overinclusive and in violation of even the *Gentile* standard).

\(^8\) *Id.* See also *Zelotes v. Martini*, 352 B.R. at 22 (holding that, as in the cases of *Hersh* and *Olsen*, "regardless of whether strict scrutiny or the *Gentile* standard is applied, 11 U.S.C. § 526 (a)(4) is facially unconstitutional").
'gaming' or 'abusing' the system." However, the court declined to find the statute so vague and overbroad as to be facially unconstitutional and held instead that, because it "restricts attorney speech beyond what is 'narrow and necessary' to further the governmental interest" in curbing abusive bankruptcy tactics, it is unconstitutional as applied to attorneys.

C. Are Sections 528(a)(4) and (b)(2) of the Bankruptcy Code Constitutional as Applied to Attorneys?

Another provision of the Code that has been challenged for constitutionality is section 528, which requires a debt relief agency to "clearly and conspicuously" disclose in any advertisement of bankruptcy assistance the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code," or a substantially similar statement. The issue is whether this advertising disclosure requirement constitutes a violation of attorneys' First Amendment rights through compelled speech.

The Supreme Court has found advertising by lawyers to be a form of commercial speech entitled to the protection of the First Amendment. However, the court must look to the nature or effect of the state's restriction on an attorney's ability to advertise in determining the level of scrutiny to be used to evaluate the particular restriction in light of First Amendment protections.

The Court acknowledged in In re R.M.J. that it is permissible for the state to impose appropriate restrictions on attorney advertising when the advertising form or method is inherently likely to deceive. Misstatements that

81. 363 B.R. 660, 666 (D. Conn. 2007).
82. Id. (emphasis added). See also id. at 667 n.9 ("The Court does not need to go so far as to find that the law is unconstitutionally vague and overbroad; it is sufficient to hold that as applied, § 526(a)(4) unconstitutionally prevents attorneys from providing lawful, truthful information to their clients."). See also Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758, 766 n.4 (expressing the Supreme Court's "preference for as-applied, as opposed to facial, challenges to the constitutionality of federal laws").
84. Id.
85. See Chemerinsky, supra note 7, at 572; see also Wann, supra note 43, at 290-93 ("The compelled speech doctrine derives from the First Amendment right to refrain from speaking at all.").
87. Chemerinsky, supra note 7, at 573.
88. In re R.M.J., 455 U.S. 191, 200-01 (1982) (recognizing that the Bates decision was narrowly focused on blanket suppression of an attorney's commercial speech
might be easily overlooked or deemed unimportant in other advertising may be relatively more harmful in attorney advertisements considering the public's general lack of sophistication regarding legal services.  

The In re R.M.J. Court announced that the Central Hudson intermediate scrutiny commercial speech test should be applied to cases regarding professional service advertising. The first prong of the Central Hudson test requires the court to determine whether the expression at issue is protected by the First Amendment right to commercial speech. The second prong then requires the court to ask whether the government has a substantial interest in regulating the expression. If both of these prongs are answered in the positive, the third and fourth prongs require the court to "determine whether the regulation directly advances the governmental interest asserted" and whether the regulation is narrowly drawn to serve that interest.

However, in Zauderer v. Office of Disciplinary Counsel, the Supreme Court chose instead to apply the rational basis test and, in so doing, upheld a state statute compelling the disclosure of possible litigation costs in attorney advertisements as constitutional. While the Court recognized that "unduly burdensome disclosure requirements [may] offend the First Amendment," it held that an "advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." The Zauderer Court hinged its decision on the fact that the regulation only required an attorney to include in his advertising material "purely factual and uncontroversial information" regarding the terms under which his services would be available and the plaintiff attorney's "con-
stitutionally protected interest in not providing . . . factual information in his advertisements is minimal.\textsuperscript{97}

Later, when the District Court for the District of Oregon first addressed a plaintiff attorney’s complaint regarding section 528 of the Bankruptcy Code in\textit{ Olsen v. Gonzales}, it found the facts to be similar to those in\textit{ Zauderer} and therefore held that the rational basis test applied.\textsuperscript{98} However, the court further stated that, even if the heightened intermediate scrutiny test of\textit{ Central Hudson} were applied, the advertising disclosure requirement in the Code would be found constitutional.\textsuperscript{99} The attorney who brought suit in\textit{ Olsen} argued that the disclosure requirement of sections 528(a)(4) and (b)(2) compelled him to make an untrue statement in his advertising, because while he occasionally advised clients to file bankruptcy, he never actually represented clients in bankruptcy matters or filed their petitions for relief.\textsuperscript{100}

In its analysis, the\textit{ Olsen} court used the prongs of the\textit{ Central Hudson} test to conclude that the challenged provision is narrowly drawn because it “only requires debt relief agencies to insert a two-line admonition into certain advertisements” and directly advances the government’s substantial interest in promoting accurate advertising and preventing fraud and deceit.\textsuperscript{101} Further, the court acknowledged that section 528 allows an attorney to substitute the required disclosure for a “substantially similar” statement, such that the attorney in this case could tailor his advertisement disclosure statement to better fit his practice but still provide consumers with accurate information.\textsuperscript{102} Therefore, in the only case to previously address this particular claim, the advertising disclosure requirement of section 528 was upheld as constitutionally sound.\textsuperscript{103}

\textbf{IV. THE INSTANT DECISION}

In the instant case the court considered three separate but related issues. First, it addressed whether attorneys are debt relief agencies under the Bankruptcy Code.\textsuperscript{104} Secondly, the court considered whether the restriction imposed on debt relief agencies in section 526(a)(4) of the Bankruptcy Code

\textsuperscript{97} \textit{Id.} (noting that disclosure requirements are not scrutinized as harshly as flat prohibitions on speech, because it may be appropriate to require that one include a warning or disclaimer in his or her advertising in order to avoid the possibility of consumer confusion or deception).


\textsuperscript{99} \textit{Id.} at 920.

\textsuperscript{100} \textit{Id.} at 919.

\textsuperscript{101} \textit{Id.} at 920-21.

\textsuperscript{102} \textit{Id.} at 920.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 789 (8th Cir. 2008).
was an unconstitutional restraint on the free speech rights of attorneys. And lastly, the court considered whether sections 528(a)(4) and (b)(2) of the Code, imposing advertising disclosure requirements on debt relief agencies, were an unconstitutional infringement on an attorney’s First Amendment rights.

A. Are Attorneys Debt Relief Agencies?

The court began its analysis by addressing the issue of whether attorneys are debt relief agencies pursuant to the Bankruptcy Code, noting that a finding they are not would render the plaintiffs’ other claims moot. The court also acknowledged that this was an issue of first impression among the federal courts of appeals.

First and foremost, the court focused on whether the language in the statute used to define a debt relief agency had a plain and unambiguous meaning when applied to the dispute at hand. Based on its reading of the plain language, the court concluded that “attorneys who provide ‘bankruptcy assistance’ to ‘assisted persons’ are unambiguously included in the definition of ‘debt relief agencies.” It further noted that Congress could have easily excluded attorneys from the definition if that was its aim, considering that it did explicitly list five exclusions. Moreover, the court felt Congress’s intent to include attorneys within the definition of debt relief agencies was evidenced by its efforts to expressly provide in the Code that nothing in the sections covering debt relief agencies “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.” In addition, the court was persuaded by legislative history referring to the provisions of the BAPCPA as a means of “strengthening professionalism standards for attorneys” who represent clients filing for bankruptcy.

105. Id. at 792.
106. Id. at 794.
107. Id. at 789 (citing Holtan v. Black, 838 F.2d 984, 986 n.3 (8th Cir. 1988) (“Federal courts must avoid passing upon constitutional questions unless they are essential to the disposition of the issues before them.”)).
108. Id. at 790.
109. Id. at 791 (referring to 11 U.S.C. § 101(12A) (2006), defining a “debt relief agency”).
110. Id. (finding the statutory language broad enough to “clearly cover[] the legal services provided by attorneys to debtors in bankruptcy”).
111. Id. (referring to the five enumerated exceptions to a “debt relief agency” at 11 U.S.C. § 101(12A)(A)-(E)).
112. Id. (quoting 11 U.S.C. § 526(d)(2)(A) (2006)). “[I]f attorneys were not included in the definition of debt relief agencies, Congress would have had no reason to include § 526(d)(2) . . .” Id.
After holding that attorneys are debt relief agencies, the court had to determine whether the challenged provisions of the Code, imposing restrictions and requirements on debt relief agencies, were constitutional as applied to attorneys.

B. Is Section 526(a)(4) of the Bankruptcy Code Constitutional as Applied to Attorneys?

The court again began its analysis by looking to the plain language of the statute and found it relevant that the statute "broadly prohibits a debt relief agency from advising an assisted person . . . to incur any additional debt when that person is contemplating bankruptcy." Significantly, this "blanket prohibition" limits an attorney from rendering advice to clients even in situations where taking on additional debt may actually "constitute[e] prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws." The court expressed that in certain situations it is arguably in a person's best interest to incur additional debt in contemplation of bankruptcy. For example, it may benefit someone contemplating bankruptcy to refinance a home mortgage in an effort to lower his or her mortgage payments and free up additional funds to pay off other debts. Additionally, a client may be wise to purchase a reliable automobile before filing for bankruptcy to ensure that he or she will have dependable transportation to get himself or herself to and from work and thus enable him or her to earn money that can be used to pay off prior debts.

Due to the fact that there are times when an attorney's ability to advise a client to incur additional debt, even in the face of bankruptcy, could actually benefit the client without harming the creditors, the court found this section to be "substantially overbroad, and unconstitutional as applied to attorneys."

The court reasoned that, "regardless of whether the government's interest in prohibiting the speech" was compelling (under the strict scrutiny standard argued for by the plaintiffs) or legitimate (under the Gentile standard argued for by the defendants), section 526(a)(4) was "not narrowly tailored, nor nar-
rowly and necessarily limited, to restrict only that speech that the government has an interest in restricting."\textsuperscript{121}

It is, however, noteworthy that Judge Colloton offered a dissenting opinion with respect to the majority’s holding on this particular issue.\textsuperscript{122} He contended that this challenge amounts to a facial attack on section 526(a)(4),\textsuperscript{123} such that it may only be “overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”\textsuperscript{124} Rather than consider the statute in its broadest light, Judge Colloton argued that the court has a duty “to adopt a narrowing construction that will avoid constitutional difficulties whenever possible.”\textsuperscript{125} He then attacked the majority’s use of a “few hypothetical situations” to hold the statute unconstitutionally overbroad, because “the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.”\textsuperscript{126}

Moreover, the dissenter argued that the statute should be construed only to prohibit advice that encourages a client to engage in conduct intended to manipulate the bankruptcy system.\textsuperscript{127} The argument was grounded upon the following reasons: (1) the phrase “in contemplation of,” when used in the bankruptcy context, has traditionally been interpreted to mean actions taken for the purpose of abusing the bankruptcy system;\textsuperscript{128} (2) a court is very un-

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\item \textsuperscript{121} Id. at 793.
\item \textsuperscript{122} Id. at 797 (Colloton, J., concurring in part and dissenting in part).
\item \textsuperscript{123} Id. (stating that the plaintiffs are “mount[ing] a facial attack on § 526(a)(4) [by] arguing that the section’s potential application to attorneys in hypothetical situations requires that the statute be declared impermissibly overbroad and unconstitutional”).
\item \textsuperscript{124} Id. at 798 (quoting Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1191 n.6 (2008)). Judge Colloton further notes that the overbreadth doctrine is “‘strong medicine,’” id. (quoting N.Y. State Club Ass’n, Inc. v. City of N.Y., 487 U.S. 1, 14 (1988)), that should be applied only when there is “‘a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.’” Id. (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984)).
\item \textsuperscript{125} Id. (citing Boos v. Barry, 485 U.S. 312, 330-31 (1988)). In Boos, for example, the Supreme Court narrowly construed a federal statute making it “unlawful ‘to congregate within 500 feet of any [embassy] and refuse to disperse after having been ordered to do so by the police’” to actually “permit the dispersal of only congregations that are directed at an embassy” when police have reason to believe there exists a threat to the security of the embassy, citing the “‘duty to avoid constitutional difficulties [when a narrower] construction is fairly possible.’” Id. (quoting Boos, 485 U.S. at 329-31).
\item \textsuperscript{126} Id. at 799 (quoting Vincent, 466 U.S. at 800).
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. This is reflected in the definition of “contemplation of bankruptcy” set forth in Black’s Law Dictionary, which is “the thought of declaring bankruptcy because of the inability to continue current financial operations, often coupled with
likely to sanction or find a civil penalty appropriate in situations where an attorney renders legal advice that benefits both the debtor and his creditors; and (3) a broad construction of the statute "goes beyond" the congressional purpose and "absurd[ly] ... prevent[s] an attorney from advising a client to take actions that might avoid the need for filing bankruptcy altogether."

C. Are Sections 528(a)(4) and (b)(2) of the Bankruptcy Code Constitutional as Applied to Attorneys?

The court acknowledged that, because sections 528(a)(4) and (b)(2) require debt relief agencies, including attorneys who provide bankruptcy assistance, to disclose in all of their bankruptcy-related advertisements a statement expressly declaring that "[w]e are a debt relief agency" and "[w]e help people file for bankruptcy relief under the Bankruptcy Code," or some "substantially similar statement," these statutory provisions are an example of compelled speech. Further, the court noted that "[t]he right of freedom of thought protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all."

In selecting the appropriate standard of review for measuring the constitutionality of the required disclosure, the court looked to the holding in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio for guidance. Because the disclosure requirements being challenged in this case, like those in Zauderer, are aimed at protecting consumers from potentially action designed to thwart the distribution of assets in a bankruptcy proceeding."


129. Id. at 800 (explaining that the prohibitions of this statute can only be enforced through civil remedies when the debtor or state attorney general sue the attorney, or where the court sanctions the attorney for intentionally violating the restriction, none of which will logically result in instances where the attorney's advice is beneficial to all involved). The available civil remedies are expressly provided for in 11 U.S.C. § 526(c) (2006).

130. Milavetz, 541 F.3d at 800 (referencing Brief of Appellee at 34, Milavetz, Gallop & Milavetz, P.A. v. United States, No. 07-2405 (8th Cir. Aug. 22, 2007) and noting specifically that the plaintiff-appellees even acknowledged that, because Congress's goal was to reduce abuse of the bankruptcy system, such a broad construction preventing attorneys from rendering advice that could potentially keep their clients from filing for bankruptcy altogether was "absurd").

131. Id. at 795 (majority opinion) (stating that statutes that compel speech, as well as restrict speech, receive constitutional protection under the First Amendment).

132. Id. (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

133. Id. In Zauderer, the Supreme Court "recognize[d] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech" but held "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. 626, 651 (1985) (emphasis added).
deceptive advertising, the court concluded that rational basis review was proper.134

In the court's opinion, the required disclosure of section 528 simply "ensur[es] that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy."135 The court compared the disclosure requirement at hand to the disclosure requirements in \textit{Zauderer} and similarly held that the plaintiffs had only a minimally protected interest in not providing such factual information in the advertisements they used to promote their services.136 Further, the court assessed the disclosure requirement to be "reasonably and rationally related to the government's interest in preventing the deception of consumer debtors."137

Moreover, the court pointed out that the disclosure requirement in no way prevents attorneys who meet the definition of debt relief agencies from conveying to the public any information they may wish to include in their advertising materials, but rather simply requires that they provide a little more.138 In addition, attorneys can always identify themselves as both attorneys and debt relief agencies in their advertisements if they are concerned about creating confusion.139

Therefore, the result of the instant decision is that attorneys who provide bankruptcy assistance are debt relief agencies for the purposes of the Bankruptcy Code and, thus, are required to include the disclosure set forth in sections 528(a)(4) and (b)(2) in their bankruptcy-related advertisements.140 However, section 526(a)(4) is unconstitutional as applied to attorneys because it broadly restricts their ability to appropriately advise their clients in situations where incurring additional debt may be both legal and beneficial.141

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\item 134. \textit{Milavetz}, 541 F.3d at 796 (rejecting the district court's application of the intermediate scrutiny standard to review § 528's disclosure requirements). In choosing to apply the rational basis test, the court explains that the intermediate scrutiny standard set forth in \textit{Central Hudson} would be applied if this case were, alternatively, dealing with a restriction on non-deceptive advertising. \textit{Id.}
\item 135. \textit{Id.}
\item 136. \textit{Id.}
\item 137. \textit{Id.}
\item 138. \textit{Id.}
\item 139. \textit{Id.} at 796-97.
\item 140. \textit{Id.} at 797.
\item 141. \textit{Id.} at 794.
\end{itemize}
As previously acknowledged, the issues addressed by the court have been repeatedly considered since the BAPCPA was enacted as part of the Bankruptcy Code in 2005. Clearly, some of the changes initiated by provisions of the Act have stirred things up for attorneys who practice bankruptcy law. The fact that the Eighth Circuit held attorneys to be debt relief agencies under the Code should at least provide attorneys practicing within the Eighth Circuit some peace of mind, as they no longer have to wonder whether or not the provisions regulating debt relief agencies apply to them. However, the inclusion of attorneys within that definition officially imposes multiple new burdens on those who practice bankruptcy law and even on those who don’t practice directly in the bankruptcy field but still dabble in bankruptcy-related issues with some of their clientele.

There is a chance that interpreting the definition of debt relief agencies to encompass attorneys will backfire, as some of the BAPCPA provisions arguably make it more difficult for lawyers to do their jobs and, therefore, will likely discourage some attorneys from practicing in the area, thus making it harder for individuals contemplating bankruptcy to obtain competent counsel. This would seemingly be a result counterproductive to the Act’s in-
tent, considering that at least one of Congress’s inherent purposes for enacting the BAPCPA was consumer protection (hence the title).  

That said, regardless of whether labeling attorneys as debt relief agencies actually furthers or hinders Congress’s intent, the court in the instant decision found the plain language of the definition to be evidence enough that attorneys were to be included.  

The holding appears analytically sound, due to the fact that the Supreme Court favors starting with a textualist approach that examines the language on its face when interpreting statutes and has previously stated that “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent.” Accordingly, the court’s interpretation, based on the plain language of the statute, holds Congress accountable for its legal drafting and forces lawmakers to modify the law if they are not satisfied with the manner in which the court applies it.  

However, while the instant decision ruled that the plain language “unambiguously” includes attorneys, it arguably is not as obvious as the Eighth Circuit would suggest. The plausible counter-arguments that have led to opposite holdings in several federal district court decisions suggest that maybe the plain language is not actually all that clear. As such, perhaps the doctrine of constitutional avoidance should have been given more weight.  

The doctrine of constitutional avoidance is a statutory rule of construction which stands for the proposition that, where a statute could lead to alternative interpretations, courts should construe the statute in a manner that will avoid any constitutional problems, unless such construction is plainly contrary to Congress’s intent. Under this doctrine, construing the statutory definition of debt relief agencies not to have included attorneys would have new attorney liability risks in BAPCPA are likely to raise costs for bankruptcy attorneys and may well drive some out of the practice.”).  

147. See, e.g., In re Reyes, 361 B.R. 276, 279-80 (Bankr. S.D. Fla. 2007) ("Should we assume that Congress was mean-spirited and intended . . . to provide a chilling effect on lawyers’ willingness to represent persons who have suffered financial misfortune . . . ? Or should we assume that Congress was trying to provide 'consumer protection,' as the title of BAPC[P]A suggests?").  


149. Boblick, supra note 47, at 721 (citing Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)) ("As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress.").  


151. Milavetz, 541 F.3d at 791.  


prevented further analysis of the constitutionality of the challenged provisions as applied to attorneys and similarly allowed Congress the opportunity to amend the definition to include attorneys if desired.

Aside from the fact that attorneys would surely prefer a determination that they are excluded from the debt relief agency provisions altogether, the instant decision's holding that section 526(a)(4) is unconstitutional when applied to attorneys is the next best scenario. The government's interest in discouraging fraudulent practices that undermine the bankruptcy system does not justify a law that "gags lawyers," who have a constitutional right, secured by the First Amendment, to assist and advise their clients. Unless the law can be narrowly construed to apply only to advice encouraging a client to commit fraud, which the instant court and multiple district courts have shown through examples not to be true of section 526(a)(4), the prohibition should rightfully be struck down as an unconstitutional infringement on an attorney's right to speak freely when advising his or her consumer debtor clients.

In addition to First Amendment considerations, "there are strong public policy considerations implicated when the government restricts the type of advice attorneys can give their clients." Attorneys should not only be allowed but also encouraged "to represent their clients zealously by advising them of all their legal options." As a result of this decision, attorneys in the Eighth Circuit can appropriately advise their clients of all legal alternatives without fear of penalty, which ultimately benefits the client who places his or her trust in legal representation. It is commonly understood that legal proceedings are complex for lay people, such that they rely on their attorney to counsel them through the process and provide them with information about every alternative that may improve their situation.

154. See Sommer, supra note 143, at 208. See also NAACP v. Button, 371 U.S. 415, 439 (1963) (stating that a state may not, "under the guise of prohibiting professional misconduct" by attorneys, ignore constitutional rights under the First Amendment).

155. Had Congress drafted § 526(a)(4) to read "a debt relief agency shall not advise an assisted person to incur more debt in contemplation of such person filing for bankruptcy if that debt will then be discharged," the court would have likely had a more difficult time ruling that it was unconstitutional. See generally Sommer, supra note 143, at 208. Judge Colloton, dissenting on this part of the opinion, argued that the court should construe the provision to only apply in cases of fraudulent manipulation of the bankruptcy system, but this would be contrary to the plain, broadly constructed language. See Milavetz, 541 F.3d at 799 (Colloton, J., concurring in part and dissenting in part).

156. Chemerinsky, supra note 7, at 579.

157. Boblick, supra note 47, at 724 (emphasis added). See also Milavetz, 355 B.R. at 765 ("Attorneys have a First Amendment right – let alone an established professional ethical duty – to advise and zealously represent their clients.").

158. Boblick, supra note 47, at 737 (arguing that limiting attorneys' free speech rights "negates certain debtors' due process right to retain an attorney and receive a full understanding of all their legal options").
Although the government has a legitimate claim that the purpose of the provision is to put an end to the fraudulent accumulation of even more debt by dishonest filers who have no intention of paying that additional debt back,159 unfortunately the drafting fails to promote this interest effectively by unnecessarily prohibiting attorneys from providing advice that may benefit their client as well as their client’s creditors.160 Instead of expanding consumer protections as the Act proposes, section 526(a)(4) restricts consumer debtors’ ability to fully benefit from legal counsel.

The court, however, was less willing to side with attorneys when it came to the advertising disclosure requirement, applying the mere rational basis test to uphold the requirement as constitutionally sound, though the district court’s reasoning for striking down this provision seems equally, if not more, compelling. As applied at trial, the Central Hudson test would appear to be a more appropriate method of evaluating this provision than the rational basis test, considering that the statute “strikes truthful as well as false or deceptive advertising.”161 Mere rational basis scrutiny is meant to measure deceptive commercial speech, and, as the trial court noted, there was no evidence suggesting that these attorney-plaintiffs’ bankruptcy assistance advertisements were in any way deceptive.162 Under the intermediate scrutiny of the Central Hudson test, it is debatable whether this mandated disclosure can pass muster.163 Even if the government can successfully prove that the regulation directly advances a substantial government interest, it would be a hard sell to claim that it is narrowly drawn because, as was held at trial, “[i]t broadly regulates absolutely truthful advertisements throughout an entire field of legal practice,” binding anyone who advertises bankruptcy-related services.164

Further, the instant court based its reasoning for upholding section 528’s disclosure requirement on the fact that it does not really burden an attorney to simply add a sentence to his advertisements stating that he or she is a debt relief agency that helps people file for bankruptcy relief under the Bankruptcy Code.165 However, the court’s argument that the required disclosure may help inform consumers, but will not hurt attorneys, may not be true.

In upholding sections 528(a)(4) and (b)(2) as constitutionally applicable to attorneys, the court failed to acknowledge that the advertising requirement

159. Id. at 715-16.
161. See Milavetz, 355 B.R. at 766 (D. Minn. 2006).
162. Id.
163. The District Court for the District of Oregon applied the Central Hudson test to uphold the disclosure requirement, but there is no reason to assume that application was any more correct than the District Court for the District of Minnesota’s application of the same test to strike the disclosure requirement down in this case. Compare Olsen v. Gonzales, 350 B.R. 906 (D. Or. 2006), with Milavetz, 355 B.R. 758.
165. See Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 796-97 (8th Cir. 2008).
"blurs the distinction between attorneys and petition preparers, which will cause more people to fall prey to petition preparers." As a result, this disclosure requirement arguably causes more deception than it prevents, because requiring the same disclosure for both attorneys and nonlawyer petition preparers will likely mislead members of the public who fail to decipher between the two. This confusion could allow some consumer debtors to be taken advantage of by bankruptcy petition preparers who, as Congress has previously acknowledged, may "lull the unsuspecting public into thinking that they ha[ve] the expertise to offer valuable legal (or at least quasi-legal) bankruptcy assistance."

Further, this requirement seems unfair to attorneys whose professional capacity is substantially different from the bankruptcy petition preparers with whom they are effectively synonymous under the provisions. Bankruptcy petitioner preparers are not licensed to practice law and are not able to provide legal advice. Rather, they are merely scriveners who type up the debtor's information on the official bankruptcy forms for a fee. In contrast, attorneys must be licensed by the states in which they practice; are bound by rules of ethics and subject to disciplinary action by the courts; and are permitted to render legal advice, file pleadings on their clients' behalf, and represent their debtor clients in bankruptcy hearings. Additionally, the debtor's communications with his attorney fall under the protection of the attorney-client privilege while communications with petition preparers enjoy no such privilege. Consequently, lumping consumer bankruptcy attorneys together with bankruptcy petition preparers "diminishes the attorney's professional cachet, earned through extensive specialized education, screening, and licens-

166. Sommer, supra note 143, at 211.
167. Chemerinsky, supra note 7, at 578 (stating that the requirement that both attorneys and non-attorney bankruptcy petition preparers must advertise themselves as "debt relief agencies" will likely confuse the public).
168. Braucher, supra note 11, at 130.
170. Chemerinsky, supra note 7, at 578.
172. Taylor, supra note 11, at 264 n.65. See also Catherine E. Vance & Corinne Cooper, Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law, 79 AM. BANKR. L.J. 283, 328, 330 (2005) (referring to the comparison as a "slap in the face to all consumer debtors' attorneys"). The statutory definition of a bankruptcy petition preparer is "a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing." 11 U.S.C. § 110(a)(1) (2006).
173. Chemerinsky, supra note 7, at 578.
174. Id.
ing." For these reasons it seems illogical to require that attorneys and bankruptcy petition preparers represent themselves as providing the same services in their advertisements.

Furthermore, because the disclosure requirement applies to "any advertisement of bankruptcy assistance[s], services or the benefits of bankruptcy directed at the general public," including any advertising offering "assistance with respect to credit defaults, mortgage foreclosures, [or] eviction proceedings," it applies to many attorneys who do not actually help people file for relief under the Bankruptcy Code. This may not only create confusion, but also has the potential of deterring desired clients from consulting those attorneys.

Persons who do not intend to file for bankruptcy, but would otherwise be prone to consult attorneys regarding these matters, may be discouraged by the attorney's divulgence that his services include helping people file for bankruptcy, due to the negative stigma that individuals commonly attach to bankruptcy. Additionally, attorneys who represent creditors and landlords as well as consumer debtors are right to fear that publicly disclosing themselves as debt relief agencies that help people file for bankruptcy will alienate their creditor clients.

As suggested by the district court in Olsen v. Gonzales, the constitutionality of this provision partially rests on the ability of one to use a "substantially similar statement." The function of the instant holding in the future will likely depend on how much leeway is given to this alternative. As long as attorneys are allowed to tailor the required disclosure used in their advertisements to specifically address the nature of the services they provide, this provision will probably continue to be upheld as constitutional and enforced upon attorneys who fall within the definition of debt relief agencies.

VI. CONCLUSION

For the first time, a federal court of appeals has struck down a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act as an unconstitutional infringement on attorneys' right to free speech. Based on this decision, which now controls in the Eighth Circuit and is likely to have a

175. Neustadter, supra note 171, at 313.
176. 11 U.S.C. § 528(b)(1)-(2) (2006). See also Sommer, supra note 143, at 211.
177. See Neustadter, supra note 171, at 323-24.
178. 350 B.R. 906, 919 (D. Or. 2006) (stating that, because "section 528 also permit[s] a substantially similar statement," the attorney could substitute "we advise people about filing for bankruptcy assistance under the code" for "[w]e help people file for bankruptcy relief under the Bankruptcy Code" when he does not in fact file petitions for relief).
179. See Sommer, supra note 143, at 211 (stating that, absent a certain amount of leeway, this provision may well be unconstitutional, requiring speech that in some instances may not even be truthful).
significant influence on other courts, attorneys representing consumer debtors who are contemplating filing for bankruptcy can render uninhibited advice concerning all of the debtor's legal options, regardless of whether an option actually requires that the individual incur additional debt. The ability to provide complete and well-rounded advice is essential to the attorney's duty to zealously represent his or her client. However, these same attorneys must still provide a disclosure statement in their advertisements holding themselves out as debt relief agencies as mandated by the Bankruptcy Code. Whether this requirement truly provides beneficial information to consumers, or alternatively lends confusion, is debatable, but the Court of Appeals for the Eighth Circuit has held that the requirement is not such a burden as to impinge on attorneys' First Amendment rights against compelled speech.

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