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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Susan B. Hersh,]
]
 Plaintiff]
]
 v.]
]
 United States of America,]
 by and through Alberto Gonzales in his]
 capacity as Attorney General of the United States]
]
 and]
]
 State of Texas, by and through Greg]
 Abbot in his capacity as Attorney]
 General of the State of Texas,]
]
 Defendants]

CASE NO. 3-05CV-2330N

MEMORANDUM OF LAW IN OPPOSITION TO
FEDERAL DEFENDANT’S MOTION TO DISMISS

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I. INTRODUCTION

This suit is not about attorney advertising. Or attorney ethics. Or Congressional power to make uniform laws concerning bankruptcies. Rather, this suit involves the heretofore sacrosanct nature of attorney client communication — communications which are now *required* to be both materially misleading and substantively incomplete because of two specific provisions of the recently-enacted bankruptcy reform laws, now codified at 11 U.S.C. §§ 526(a)(4) and 527. These two provisions impose positive requirements on attorneys such as Plaintiff to make materially misleading statements regarding the effectiveness and need for legal counsel in bankruptcy proceedings and the nature of the bankruptcy process, while at the same time, attempt to restrain attorneys from dispensing certain legal advice to their clients prior to the bankruptcy filing. The challenged statutes create the potential for civil liability each time Plaintiff has a conversation with a client related to her area of practice.

II. INITIAL MATTERS, INCLUDING JURISDICTION AND VENUE

This controversy is ripe for review since the challenged statute is resulting in the chilling of constitutionally protected speech or the abridgment of the Constitution's guarantee of due process.¹ This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff's claims arise under the Constitution and laws of the United States. Venue is proper under 28 U.S.C. § 1391(e) because this is a civil action in which a defendant is an officer of the United States, and it is brought in the judicial district in which the Plaintiff resides.

¹ *Virginia v. American Booksellers Ass'n.*, 484 U.S. 383, 392-3 (1988) (citing *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956-57 (1984)); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499-1500 (10th Cir. 1995).

III. ORAL ARGUMENT

The Plaintiff respectfully requests oral argument on this matter.

IV. PARTIES

Plaintiff is a licensed attorney in the state of Texas, residing in Dallas, Texas.

Defendant Alberto Gonzales is the Attorney General of the United States, is sued in his official capacity and in that official capacity, heads the United States Department of Justice which is the agency of the United States government responsible for enforcing the statutes at issue in this case.

Defendant Greg Abbot is the Attorney General of the State of Texas, and is sued in his official capacity and in that official capacity, heads the agency of the State of Texas which is responsible for enforcing the statute at issue in this case.

V. FACTS

Plaintiff counsels individuals whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000 (defined herein and in 11 U.S.C. § 101(3) as “assisted persons”). Most, but not all, of the “assisted persons,” have sought or are seeking legal advice as to whether they can or should file for protection under the federal bankruptcy laws. A minority of “assisted persons” seek Plaintiff’s legal advice for a matter related to a bankruptcy (e.g. as a creditor, trustee, member of a creditors’ committee, equity interest holder) but are not themselves seeking advice concerning their own bankruptcy filing. Nevertheless, these persons also qualify as “assisted persons” under the plain language of 11 U.S.C. § 101(3).

An integral part of Plaintiff’s pre-filing legal advice to those “assisted persons” who are, themselves, prospective debtors, revolves around advising clients which bills they should (or

must) pay prior to seeking bankruptcy relief, restructuring debts in contemplation of a bankruptcy filing to optimize the potential for a client to maintain and/or manage their post-bankruptcy expenses, providing legal strategies for obtaining the funds necessary to make these payments, as well as enabling clients to conform their income and expenses to established statutory guidelines.²

11 U.S.C. § 526(a)(4) prohibits Plaintiff from advising an “assisted person” to incur “more debt” *in contemplation of a bankruptcy filing* or in order to pay any sums due Plaintiff from Plaintiff’s clients.³ The statute imposes the potential for the imposition against the Plaintiff of civil penalties and damages in suits brought exclusively by the named defendants.⁴

² The guidelines, in turn, specify which chapter of relief Plaintiff’s clients may pursue if they choose to file for bankruptcy relief at all. See 11 U.S.C. § 707(b)(2); 11 U.S.C. § 1325(b)(2).

³ The statute provides in pertinent part:

(a) A debt relief agency shall not--

(1) . . .

(4) 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.

. . .
(c)

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State--

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may--

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

⁴ 11 U.S.C. § 526(c).

11 U.S.C. § 527 further purports to compel Plaintiff to advise “assisted persons” as follows:⁵

IF YOU DECIDE TO SEEK BANKRUPTCY RELIEF, YOU CAN REPRESENT YOURSELF, YOU CAN HIRE AN ATTORNEY TO REPRESENT YOU, OR YOU CAN GET HELP IN SOME LOCALITIES FROM A BANKRUPTCY PETITION PREPARER WHO IS NOT AN ATTORNEY. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. ASK TO SEE THE CONTRACT BEFORE YOU HIRE ANYONE.

THE FOLLOWING INFORMATION HELPS YOU UNDERSTAND WHAT MUST BE DONE IN A ROUTINE BANKRUPTCY CASE TO HELP YOU EVALUATE HOW MUCH SERVICE YOU NEED. ALTHOUGH BANKRUPTCY CAN BE COMPLEX, MANY CASES ARE ROUTINE.

BEFORE FILING A BANKRUPTCY CASE, EITHER YOU OR YOUR ATTORNEY SHOULD ANALYZE YOUR ELIGIBILITY FOR DIFFERENT FORMS OF DEBT RELIEF AVAILABLE UNDER THE BANKRUPTCY CODE AND WHICH FORM OF RELIEF IS MOST LIKELY TO BE BENEFICIAL FOR YOU. BE SURE YOU UNDERSTAND THE RELIEF YOU CAN OBTAIN AND ITS LIMITATIONS. TO FILE A BANKRUPTCY CASE, DOCUMENTS CALLED A PETITION, SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS, AS WELL AS IN SOME CASES A STATEMENT OF INTENTION NEED TO BE PREPARED CORRECTLY AND FILED WITH THE BANKRUPTCY COURT. YOU WILL HAVE TO PAY A FILING FEE TO THE BANKRUPTCY COURT. ONCE YOUR CASE STARTS, YOU WILL HAVE TO ATTEND THE REQUIRED FIRST MEETING OF CREDITORS WHERE YOU MAY BE QUESTIONED BY A COURT OFFICIAL CALLED A 'TRUSTEE' AND BY CREDITORS.

IF YOU CHOOSE TO FILE A CHAPTER 7 CASE, YOU MAY BE ASKED BY A CREDITOR TO REAFFIRM A DEBT. YOU MAY WANT HELP DECIDING WHETHER TO DO SO. A CREDITOR IS NOT PERMITTED TO COERCE YOU INTO REAFFIRMING YOUR DEBTS.

IF YOU CHOOSE TO FILE A CHAPTER 13 CASE IN WHICH YOU REPAY YOUR CREDITORS WHAT YOU CAN AFFORD OVER 3 TO 5 YEARS, YOU MAY ALSO WANT HELP WITH PREPARING YOUR CHAPTER 13 PLAN AND WITH THE CONFIRMATION HEARING ON YOUR PLAN WHICH WILL BE BEFORE A BANKRUPTCY JUDGE.

IF YOU SELECT ANOTHER TYPE OF RELIEF UNDER THE BANKRUPTCY CODE OTHER THAN CHAPTER 7 OR CHAPTER 13, YOU WILL WANT TO FIND OUT WHAT SHOULD BE DONE FROM SOMEONE FAMILIAR WITH THAT TYPE OF RELIEF.

YOUR BANKRUPTCY CASE MAY ALSO INVOLVE LITIGATION. YOU ARE GENERALLY PERMITTED TO REPRESENT YOURSELF IN LITIGATION IN BANKRUPTCY COURT, BUT ONLY ATTORNEYS, NOT BANKRUPTCY PETITION PREPARERS, CAN GIVE YOU LEGAL ADVICE.

⁵ 11 U.S.C. § 527(b).

VI. ARGUMENT

A. The Standard for a Motion to Dismiss.

A motion to dismiss premised upon F.R.C.P. 12(b)(6)⁶ should not be granted unless it appears to a certainty that the Plaintiff would not be entitled to recover under any statement of facts which could be proved in support of her claim.⁷ In deciding the matter, the Court is required to assume all facts alleged in the complaint as true,⁸ and indulge all inferences in favor of the Plaintiff.⁹

B. Plaintiff is not a "Debt Relief Agency."

While Plaintiff concedes that the new legislation could be read to include attorneys such as Plaintiff within the scope of a "debt relief agency"¹⁰ the doctrine of constitutional avoidance suggests that such a reading does not avoid the serious constitutional questions raised herein.¹¹ On the other hand, reading the statute to exclude attorneys from the scope of the definition of "debt relief agency" furthers the statute's constitutional integrity and is consistent with the literal text of the statute.

First, the definition of "debt relief agency," while extremely broad, does not literally include the word "attorney" or "lawyer," which is separately defined in 11 U.S.C. § 101(4).

Moreover, even though the definition of "debt relief agency" is facially broad enough to cover

⁶ The Federal Defendant technically alleged grounds for dismissal under F.R.C.P. 12(b)(1) and 12(b)(6). However, it appears that the Federal Defendant's 12(b)(1) grounds are limited to any attempt by Plaintiff to bring this case on behalf of her clients for violations of her clients' Constitutional rights. Plaintiff hereby consents to the dismissal of any portion of the Complaint in which she alleged violations of the Constitutional rights of her clients, but solely with respect to such alleged violations of the Constitutional rights of her clients and not as to her own Constitutional rights or claims under the First Amendment and Fifth Amendment.

⁷ *Conley v. Gibson*, 355 U.S. 41 (1957); *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976); *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971).

⁸ *Davis v. Monroe County Board of Educ.*, 526 U.S. 629, 633 (1999).

⁹ *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)

¹⁰ 11 U.S.C. § 101(12A).

¹¹ *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 523 (2002); *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

bankruptcy petition preparers *and* attorneys, Congress included "bankruptcy petition preparers" in the definition of "debt relief agency," yet omitted any express inclusion of attorneys. By negative inference, this Court should conclude that attorneys are therefore not within the scope of the statute.

Second, Section 527(b) requires "debt relief agencies" to inform "assisted persons" that they have the right to hire an attorney or to represent themselves, that only an attorney can render legal advice, and how to perform services *pro se* that would be universally provided if the person hired an attorney. If attorneys are indeed included within the scope of the statute, this Court would have to conclude that the statute (which, again, conspicuously omits the word "attorney") requires attorneys to tell clients that they have the right to hire an attorney or how to prepare the documents *pro se* that the attorney is poised to prepare on that person's behalf. It is far more likely that the provision is a consumer protection provision intended to regulate that universe of entities who assist persons but are *not* attorneys. This interpretation of the statute, which is both logical and or sensible is preferred over the alternative interpretation which would be illogical and absurd.

C. Assuming *Arguendo*, that Plaintiff is a Debt Relief Agency, 11 U.S.C. § 526(a)(4) Impermissibly Impinges on the Plaintiff's Right of Free Speech

(1) *11 U.S.C. § 526(a)(4)'s Limitations are Subject to Strict Scrutiny.*

The Federal Defendant attempts to square the serious First Amendment issue associated with 11 U.S.C. § 526(a)(4) by claiming that the law simply furthers an "ethical" rule, rather than substantively limits advice that Plaintiff can give clients. In so doing, the Federal Defendant intends to convince this Court that the law falls within some "balancing" rubric, instead of the

“strict scrutiny” standard applicable to professional legal advice.¹² This approach however has a number of obvious flaws.

First, the paradigm adopted by the Federal Defendant makes a critically misleading assumption — it assumes that somewhere in the body of substantive state or federal law there actually exists a independent rule which prohibits the conduct included within the statute (that is, incurring “more debt”) for the reason set forth in the statute (that is, ”in contemplation of” a bankruptcy filing). But this so-called “ethical” rule only exists in the Federal Defendant’s pleadings. This case thus stands in stark contrast to the genuine standards which were the subject of *Gentile v. State Bar of Nevada*.¹³ Indeed, it is completely appropriate, advisable, and permitted by the bankruptcy laws, to incur more debt in contemplation of a bankruptcy filing. For example, knowing that a bankruptcy filing is approaching, many clients should be encouraged pre-bankruptcy to incur new secured debt (*e.g.* a car loan) that will survive the bankruptcy, since they may be able to obtain a better terms (*e.g.* a lower interest rate, or make less of a down payment) prior to their bankruptcy filing than afterward. It is likewise completely appropriate to incur more debt, such as a home equity based line of credit, prior to a bankruptcy filing, since such credit terms may not be available at all after bankruptcy. The litany of situations in which new credit prior to bankruptcy is a critical component of legal advice from one’s bankruptcy attorney is only as limited as the number of clients facing the bankruptcy decision.

Recognizing that there exists no independent basis which prohibits the attorney conduct contained in 11 U.S.C. § 526(a)(4), the Federal Defendant would have this Court look to 11

¹² *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 and 486 (1989) (stating that that legal advice would be fully protected under the First Amendment because such speech, even though uttered for profit, does not consist of speech that proposes a commercial transaction. *Id.* at 480)

¹³ 501 U.S. 1030 (1991).

U.S.C. § 707 as an “ethical” guidepost. It is not. 11 U.S.C. § 707 is a substantive rule of law, applicable in Chapter 7 cases only,¹⁴ which describes conduct which can result in denial of a debtor’s discharge in a bankruptcy proceeding or dismissal of the proceeding. It does not make such conduct illegal or otherwise subject the actor to civil penalties (as 11 U.S.C. § 526(c) imposes on the attorney). This highlights the second major flaw in the Federal Defendant’s “ethical standard” argument – even assuming that 11 U.S.C. § 707 motivated Congress to enact 11 U.S.C. § 526(a), as alleged by the Federal Defendant, 11 U.S.C. § 526(a)’s attorney speech restrictions are not coextensive with the conduct described in 11 U.S.C. § 707, or any other federal statute. Indeed, 11 U.S.C. § 526(a) operates unmoored to 11 U.S.C. § 707 since it applies to attorneys counseling “assisted persons” regarding Chapter 11, 12 and 13 cases – cases in which 11 U.S.C. § 707 is wholly inapplicable. And even as to Chapter 7 debtors to whom 11 U.S.C. § 707 is applicable, this provision does not contain even the vaguest hint that “more debt” incurred “in contemplation of” a bankruptcy filing falls within its ambit, nor does it make the incurring of such debt illegal. Yet, under 11 U.S.C. § 526(a)(4), attorneys are restricted from providing advice to clients which would not subject those clients to denial of a discharge under 11 U.S.C. § 707 and which is permitted under existing law.

Finally, the “ethical standard” paradigm adopted by the Federal Defendant is also inapposite to the case at bar since all of the cases cited by the Federal Defendant relate to public or commercial speech. In the *Gentile*, *Brown* and *Scarfo* cases, the speech at issue was made to third parties – i.e. the press. In *Ohralik*, the speech subject to regulation was solicitation of potential clients. In this case, however, the speech at issue limits Plaintiff’s advice to actual, living, breathing clients with whom Plaintiff already has an established attorney-client

¹⁴ *In re Aiello*, 284 B.R. 756 (Bankr. E.D. N.Y. 2002).

relationship. The Federal Defendant has cited to no authority for the proposition that an attorney's *advice* to a specific client concerning the client's legally-permissible activities can be subject to any regulation, other than those most narrowly tailored to achieve a compelling governmental objective.¹⁵

(2) *11 U.S.C. § 526(a)(4) Does Not Pass the Strict Scrutiny Standard.*

(a) The Government Has No Compelling Interest in the Goals Allegedly Advanced by 11 U.S.C. § 526(a)(4).

Because there exists no law prohibiting the incurring of new debt because of or in contemplation of a bankruptcy filing, this Court must conclude that there is likewise no governmental interest, let alone a compelling interest, in eliminating new debt prior to bankruptcy. Indeed, the Federal Defendant does not even attempt to argue that elimination of new debt before a bankruptcy filing is a governmental interest. Rather, the Federal Defendant suggests that the governmental interest is in promoting ratable creditor distributions; offering honest debtors a fresh start; protecting creditors from debtors who would "game" the system; and in protecting debtors from attorneys who would undertake "abusive practices" or who counsel their clients to incur debts that would result in denial of a discharge or in dischargeability litigation.

Plaintiff submits that since such terms as "honest debtors," "gaming the system," and "abusive practices" are self-defining, they are not themselves, "compelling" governmental interests; rather they are terms which merely suggest a conclusion, but fail to identify where legitimate legal strategy ends and abuse begins. Drawing that line and advocating on behalf of one's client is at the heart of the role of the attorney in the legal process, a role that is eliminated by this statute. Indeed, defining the governmental interest in subjective terms such as "offering

¹⁵ *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 and 486 (1989).

‘honest’ debtors a fresh start” is only one step short of saying that it there is a “governmental interest” in helping “nice” citizens. Rather than providing a clear Federal goal, it reduces the First Amendment concerns to “a simple semantic exercise.”¹⁶

Plaintiff submits that the Federal Defendant has no legitimate governmental in regulating attorney speech. This was made clear in *Legal Services Corporation v. Velazquez*¹⁷ in which Congress attempted to prohibit legal representation funded by recipients of Federal moneys if the representation involved an effort to amend or otherwise challenge existing welfare law. The restrictions in *Legal Services Corporation* prevented attorneys working with the confines of the Federally-funded program from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute was violative of the United States Constitution.¹⁸ As in the case at bar, *Legal Services Corporation* presented an instance where the government sought to control an existing medium of private expression (specifically legal advice between private parties) in ways which distort its usual functioning; and the limitations enacted by the government foreclosed a particular type of advice or legal assistance. The *Legal Services Corporation* Court, however, dismissed the notion that the government has any legitimate interest other than in an informed, independent bar which counsels clients in an objective manner. Disabling advocates in the legal system is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of their clients’ case. By seeking to prohibit the recommendation of certain legal strategies, and thereby truncate the presentation of such strategies to the Courts, laws restricting attorney advice to clients prevents the very speech and expression upon which courts must

¹⁶ *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547 (2001).

¹⁷ *Id.* at 548 (“Where private speech is involved, even Congress’ antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government’s own interest.”)

¹⁸ *Id.* at 538-39.

depend for the proper exercise of the judicial power.¹⁹ Quoting from *Marbury v. Madison*, the *Legal Services Corporation* Court stated:

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.²⁰

11 U.S.C. § 526(a)(4) suffers from the same fatal flaw as the law in *Legal Services Corporation* and cannot even advance the same defense presented in *Legal Services Corporation* (i.e. federal funding). Here, the law impairs the judicial function by preventing private attorneys from advising their clients as to when to, whether to, and the reasons for, incurring new debt “in contemplation of” a bankruptcy filing. By so doing, the law limits Court consideration of when debts can legitimately be incurred “in contemplation of” a bankruptcy filing and the effect of such new debts on a debtor’s repayment plans, a debtor’s discharge and the bankruptcy process as a whole. The Courts and the public would have reason to doubt the adequacy and fairness of advice provided by bankruptcy attorneys and will have no alternative legal advocate to whom to turn for advice – all bankruptcy attorneys are equally muzzled from counseling their clients in the same manner.²¹ If Congress has no legitimate governmental interest in excluding certain arguments and theories Congress finds unacceptable even within a federally funded program, it certainly has no interest in similarly regulating the advice private litigants receive from their attorneys.

¹⁹ *Id.* at 545.

²⁰ *Marbury v. Madison*, 1 Cranch 137, 178 (1803).

²¹ *Legal Services Corporation*, 531 U.S. at 546.

(b) The Restrictions Contained in 11 U.S.C. § 526(a)(4) Are Not Narrowly Drawn.

Even if the Court concludes that the government has a compelling interest in the dubious and vague goals articulated by the Federal Defendant, precluding attorneys from giving advice is not a narrowly tailored method to effectuate that interest. Indeed, 11 U.S.C. § 526(a)(4) is breathtakingly broad, making no distinction between advice concerning fully secured new debt (which would presumably be paid in full irrespective of a subsequent bankruptcy filing) and unsecured new debt; or between advice concerning dischargeable and non-dischargeable new debt.

The Federal Defendant contends that the restrictions are, in fact, narrow by interpreting them to mean that they limit only advice given “because of” the prospect of bankruptcy. Plaintiff suggests that the words of the statute – “in contemplation of” – are to be given their usual and customary meaning: “*in expectation of*” or “*with the intention of*.”²² Yet under either definition, the statute encompasses a wide range of legally permissible, ethical, advisable conduct that would not result in any adverse bankruptcy implications such as denial of a discharge, dischargeability litigation, and would not affect the ratable distributions to creditors. For example, if Plaintiff recognized that her client were dependant on an unreliable car, Plaintiff might well advise that client to finance a new vehicle while his credit rating are intact, knowing that the bankruptcy would negatively affect the client’s ability to both obtain and afford a new vehicle post-bankruptcy. Under the Federal Defendant’s “narrow” reading of the statute, this advice would be prohibited since it is motivated solely by the bankruptcy filing’s affect on future financing options available to the client. Yet, this advice would neither result in a finding of abuse, nor result in discharge or dischargeability litigation, and it might not necessarily have any

²² The American Heritage Dictionary of the English Language, Fourth Edition.

effect on ratable distributions to creditors. Similarly, if a couple planning to divorce came to the Plaintiff for bankruptcy advice, Plaintiff could not advise one spouse to accelerate efforts to secure a mortgage or a lease prior to the bankruptcy, even though Plaintiff knows that a mortgage or new lease might be completely unavailable to such a person immediately after a bankruptcy is filed. Likewise, if a client were contemplating financing her education through non-dischargeable educational loans, Plaintiff would be muzzled from advising that client to obtain those loans pre-bankruptcy even though doing so would not result in a finding of abuse, dischargeability litigation or any reduction the measure of the debtor's disposable income.

If Congress is required to "narrowly tailor" a law to limit certain pre-bankruptcy conduct, it cannot do so by simply prohibiting attorney advice concerning such conduct. It must at least regulate the conduct itself. For example, if "ratable distributions" are determined to be a compelling governmental interest, a law could be made prohibiting debtors from taking any action which negatively impacts the ratable distributions that would be paid to creditors within a certain pre-bankruptcy time period. Likewise, if Congress wishes to define the incurring of any debt "because of" bankruptcy as warranting a finding of abuse, it could clearly do so. Having failed to, the Federal Defendant cannot argue that restricting legal advice by attorneys concerning these acts is a narrowly tailored way of achieving those same ends.

(3) *11 U.S.C. § 526(a)(4) Would Not Survive a More Lenient Balancing Test.*

Even if the statute were subjected to the more lenient standards applicable to speech other than legal advice,²³ the restrictions amount to an unconstitutional blanket ban, since the underlying conduct relating to the regulated speech (the incurring of new debt pre-bankruptcy

²³ *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 477 U.S. 557, 564-65 (1980).

because of the bankruptcy filing) is legal.²⁴ Indeed, Congress' choice to attempt to regulate new debt by limiting only the provision of attorney advice concerning new debt falls short of any standard of regulatory rationality when weighed against Plaintiff's First Amendment rights. Like the anti-labeling restrictions in *Rubin v. Coors Brewing Co.*²⁵ 11 U.S.C. § 526(a)(4)'s restrictions on attorney advice "cannot directly and materially advance" any asserted interest of the government because of the "overall irrationality of the regulatory scheme" made evident by Congress' decision to leave wholly unregulated the underlying conduct or any other non-attorney speech regarding such conduct.²⁶

D. Assuming *Arguendo*, that Plaintiff is a Debt Relief Agency, 11 U.S.C. § 526(a)(4) Impermissibly Impinges on Plaintiff's Right to Provide Counsel in a Civil Matter.

The Fifth Circuit Court of Appeals has previously recognized that the right to counsel in a civil matter is a fundamental right attendant to the Fifth Amendment's guarantee of due process.²⁷ This fundamental right "includes the right to choose the lawyer who will provide that representation."²⁸ Plaintiff submits that inherent in this right is the right to unvarnished advice concerning all of one's legal (and legally permissible) options, and thus Plaintiff's right to dispense such advice.

Plaintiff will not reiterate the effect of the statute on Plaintiff's legal advice to her clients. Plaintiff submits that by seeking to prohibit the recommendation of certain legal strategies by attorneys, laws such 11 U.S.C. § 526(a)(4) also improperly impair Plaintiff's role in providing due process to her clients and, by extension, partially disables the courts from considering when

²⁴ *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976)

²⁵ 514 U.S. 476 (1995).

²⁶ *Id.*

²⁷ *Texas Catastrophe Property Ins. Assoc. v. Morales*, 975 F.2d 1178; 1180 (5th Cir. 1992).

²⁸ *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1257 (5th Cir. 1983).

debts can legitimately be incurred “in contemplation of” a bankruptcy filing; the effect of such new debts on a debtor’s repayment plans, a debtor’s discharge or the bankruptcy process as a whole. Such a usurpation of the role of the attorney in advising a client and in advocating on a client’s behalf is inconsistent with the Fifth Amendment’s guarantee of due process and Plaintiff’s role in effectuating that Constitutional guarantee.

E. Assuming *Arguendo*, that Plaintiff is a Debt Relief Agency, 11 U.S.C. § 527 Impermissibly Impinges on the Plaintiff’s Right to Act as Counsel in a Civil Matter

11 U.S.C. § 527 suffers from similar flaws. Under its terms, Plaintiff is required to sanction subjective statements regarding services to be rendered in a so-called “routine” case.²⁹ Indeed, she is forced to positively disclose to her clients that many cases are “routine,” when in fact each and every case presents unique facts and circumstances and requires a different legal analysis to provide maximum value to the client and fully exhaust the legal remedies available to her clients.

The litany of false or and potentially misleading statements which Plaintiff is required to make under 11 U.C. § 527 to her clients includes the following:

- 11 U.S.C. § 527(b) requires Plaintiff to state that her client “will have to pay a filing fee to the bankruptcy court” although no mention is made that such fees can be deferred as allowed by Federal Rule of Bankruptcy Procedure 1006(b).
- 11 U.S.C. § 527(b) refers to the trustee as a “court official” when, in fact, the trustee is not employed by the Court, but rather is the “representative of the estate”³⁰ and selected by the Executive Branch.³¹
- 11 U.S.C. § 527(b) requires Plaintiff to tell her clients that they “may want help deciding whether to [reaffirm debts]” but fails to state that attorneys are the only ones authorized by law to provide such advice and misleads clients by implying that creditors can offer assistance in this process.

²⁹ 11 U.S.C. § 527(b).

³⁰ 11 U.S.C. § 323.

³¹ 11 U.S.C. § 701; 28 U.S.C. §§ 581, 586(b).

- 11 U.S.C. § 527(b) requires that Plaintiff to tell her clients that Chapter 13 cases require that they pay “what you can afford over 3 to 5 years” when in fact, the Bankruptcy Code contains no minimum requirement as to the length of certain Chapter 13 repayment plans.
- 11 U.S.C. § 527(b) requires that Plaintiff to tell her clients that Chapter 13 cases require that they pay “what you can afford over 3 to 5 years” when in fact, the statute does not take into account a Debtor’s actual expenditures in calculating repayment ability, but rather uses unrelated guidelines promulgated by the United States government.
- 11 U.S.C. § 527(b) requires Plaintiff to tell her clients that they “may want help preparing [their] chapter 13 plan and with the confirmation hearing on [their] plan” but fails to state that attorneys are the only ones authorized by law to provide such help.
- Despite the fact that 11 U.S.C. § 506 only relates to secured debt, 11 U.S.C. § 527(a)(2)(B) requires Plaintiff tell her clients to value assets at the “replacement value of each asset . . . as defined in 11 U.S.C. § 506.”³² Accordingly, in the majority of Plaintiff’s practice, Plaintiff is being required to provide materially misleading advice concerning the proper method of valuation of non-collateralized property.
- 11 U.S.C. § 527(b) requires Plaintiff to tell her clients that they “may want help preparing [their] chapter 13 plan and with the confirmation hearing on [their] plan” but fails to state that attorneys are the only ones authorized by law to provide such help.
- 11 U.S.C. § 527(b) requires Plaintiff to tell her clients that “If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief” but fails to state that attorneys are the only ones authorized by law to provide such information.
- 11 U.S.C. § 527(b) requires Plaintiff to tell her clients that “If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief” thus suggesting, contrary to applicable law, that Chapter 9, Chapter 11, Chapter 12, or Chapter 15 relief may be available to individuals not eligible for such relief.
- 11 U.S.C. § 527(b) requires that Plaintiff to tell her clients “documents called a petition, schedules and statement of financial affairs, as well as in some cases a statement of intention need to be prepared correctly and filed with the bankruptcy court” but does not mention that the Bankruptcy Code requires additional documents such as tax returns or paystubs also be filed with the Court.

³² Under 11 U.S.C. § 506, “replacement value” is defined as “the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.”

Finally, 11 U.S.C. § 527(b) fails to limit its scope to clients contemplating bankruptcy themselves. Rather, the statute requires that the Plaintiff provide the foregoing notice to all “assisted persons”³³ to whom she is providing “bankruptcy assistance.” “Bankruptcy assistance,” in turn, is defined to include advice given to *any party* to a potential bankruptcy case, not simply prospective debtors.³⁴ In short, when a creditor (such as an individual landlord whose assets render him an “assisted person” under the Bankruptcy Code) seeks out the Plaintiff’s counsel to *collect or enforce a debt* against a debtor in bankruptcy, Plaintiff will now be required to counsel the *creditor* that he can, himself, seek bankruptcy relief even though such advice is completely inapposite to the client’s legal needs, thus misleading the client regarding the applicability of the advice, or more likely, his attorney’s competence.

Because all of the foregoing “disclosures” will occur when Plaintiff meets with her clients, the disclosures impact Plaintiff’s attorney client relationship with her clients, and thus the Plaintiff’s role in providing due process to her clients. Since the material is objectively incomplete, and in some cases, false, irrelevant, or misleading, Plaintiff contends that forcing her to dispense such information constitutes an obvious violation of the Constitution’s guarantee of due process.

F. Assuming *Arguendo*, that Plaintiff is a Debt Relief Agency, Section 527 of the Bankruptcy Code Impermissibly Impinges on the Plaintiff’s Right of Free Speech.

The First Amendment’s protection against government restrictions on speech extends to the government’s attempt to compel speech. The First Amendment’s protections against compelled speech also extend to speech deemed merely informational rather than political or

³³ 11 U.S.C. § 527(a)(2)(B).

³⁴ 11 U.S.C. § 101(4A).

ideological. For example, in *Riley v. National Federation of Blind of North Carolina, Inc.*,³⁵ the Supreme Court struck down a requirement that professional fundraisers disclose to potential contributors the percentage of previous contributions retained by the fundraiser rather than sent to the charity. In doing so, the Supreme Court stated that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."³⁶

When compelled speech by a professional implicates a fundamental right, the restrictions set down by the Supreme Court in *Planned Parenthood v. Casey* apply.³⁷ *Casey* involved the constitutionality of 1988 and 1989 amendments to a Pennsylvania statute which required that physicians tell every abortion-seeking patient about the health risks of abortion and childbirth and the probable gestational age of the fetus. It also mandated that physicians tell patients about the availability of printed materials, which described the fetus and listed agencies that offered alternatives to abortion; stated that the child's father was liable for financial assistance to support the child; and stated that medical assistance may be available for prenatal care, childbirth, and neonatal care.

While the *Casey* Court concluded that the speech-related provisions in that case did not violate the First Amendment, and expressly overruled prior precedent that held that government may not use doctor-patient conversation as an instrument for expressing a viewpoint or for persuading patients to opt for a governmentally preferred course of action, the *Casey* Court also

³⁵ 487 U.S. 781 (1988).

³⁶ *Id.* at 796-797.

³⁷ 505 U.S. 833 (1992).

held that coerced speech would be unconstitutional if they require the professional service provider to make statements that are false or misleading.

As stated above, the disclosures mandated by 11 U.S.C. § 527 are both false and misleading in at least eleven (11) different instances. Moreover they force Plaintiff to make a direct affirmation of belief (e.g. “Many cases are routine.”) in violation of the Supreme Court’s *Barnette*³⁸ and *Wooley*³⁹ holdings. Equally problematically, the statute requires the Plaintiff to use her resources (i.e. her billable time, and her written materials) to advance messages with which she does not agree in violation of established Supreme Court precedent.⁴⁰

VII. CONCLUSION

The statutes at issue tread upon the sacred relationship between Plaintiff and clients. They require Plaintiff to, in the case of 11 U.S.C. § 526(a), withhold relevant, often critical advice from her clients – advice which cannot only aid them financially but further the fresh start which the Bankruptcy Code provides. 11 U.S.C. § 527, in turn, requires Plaintiff to provide incomplete misleading and in certain cases erroneous advice to her clients. The Federal Defendant’s rejoinder that Plaintiff may then correct or augment the “disclosures” required by 11 U.S.C. § 527 is simply no response at all since the law impermissibly impinges on Plaintiff’s role in providing independent, accurate and unvarnished legal counsel to her clients. For the foregoing reasons, the Federal Defendant’s Motion to Dismiss should be denied.

Dated: March 6, 2006.

³⁸ *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

³⁹ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

⁴⁰ *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1, 17-18 (1986); *Wooley*, 430 U.S. at 715.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 6, 2006 a true and correct copy of the foregoing was served upon the parties on the attached service list via U.S. First Class Mail postage prepaid.

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