

Chapter 3 Commentary
Is an Attorney Who Represents an "Assisted Person" in a Bankruptcy Case
a "Debt Relief Agency?"

Among the most controversial issues resulting from the adoption of BAPCPA is whether an attorney who represents an “assisted person” in a bankruptcy case is a “debt relief agency” and therefore subject to 11 U.S.C.A. §§ 526 (restrictions), 527 (disclosures), and 528 (requirements). For instance, Section 526(a) (4) forbids a debt relief agency from advising a client to incur more debt in contemplation of filing bankruptcy; and Section 528(b) (2) requires a debt relief agency to include a disclosure in an advertisement: “We are a debt relief agency.”

Not surprisingly, attorneys have, with some success, contended that they don’t fall within the definition of debt relief agency and that one or more of the statutes dealing with debt relief agencies are unconstitutional. The term “debt relief agency” is defined in 11 U.S.C.A. § 101(12A); nowhere in that statute is the word attorney included. Moreover, it is illogical that an attorney would be a debt relief agency in interpreting Section 526 since Section 526(a) (4) restricts a debt relief agency from advising an assisted person from “pay[ing] an attorney.” Thus, some courts have held that attorneys are not debt relief agencies. *Milavetz v. United States*, 355 B.R. 758 (D. Minn. 2006); *In re Attys. at Law*, 332 B.R. 66 (Bankr. S.D. Ga. 2005)(general order entered by Chief Judge of Bankruptcy Court determining that certain provisions regulating debt relief agencies did not apply to attorneys); *In re Reyes*, 2007 WL 136934 (Bankr. S.D. Fla. 2007). But other courts have concluded that the plain language of Section 101(12A) indicates that attorneys are debt relief agencies: *Hersch v. United States*, 347 B.R. 19 (N.D. Tx. 2006), *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006).

The restrictions on the advice an attorney may give an assisted person has caused Section 526 to be declared unconstitutional. *Hersch*, 347 B.R. at 25; *Milavetz*, 355 B.R. at 766; *Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2006). Sections 527’s disclosure requirement has also been declared unconstitutional in *Milavetz*, 355 B.R. at 765, and in *Reyes*, 2007 WL 136934.

These issues will continue to evolve as cases work their way through the courts. Those attorneys and paralegals who would like to represent debtors who are “assisted persons” but are disinclined to do so because of Section 326’s restrictions and the advertising disclosure required by Section 328, should be aware of the rulings in the jurisdictions in which they practice.