

Six Things Legal Services and Pro Bono Lawyers Should Know About the Attorney Provisions in the 2005 Act

- **No fees and costs can be assessed under new § 707(b)(4)(A) against attorneys representing debtors below the median.** The new attorney liability provision in § 707(b)(4)(A) applies only to a motion under § 707(b) brought by a trustee, not the United States trustee. This means that a debtor's attorney may not be assessed liability under this provision if the debtor's income is below the state's median family income, because only the judge or United States Trustee (or bankruptcy administrator) may file a motion under § 707(b) in cases filed by a debtor below the median. See 11 U.S.C. § 707(b)(6) (referred to as the Act's "first safe harbor," H. Rep. 109-31, 51 (2005)).
- **New attorney liability provisions in § 707(b) do not apply in chapter 13 cases.** Because the new provisions requiring additional duties and certifications of attorneys are found in § 707(b)(4)(A) through (D), they are applicable only in chapter 7 cases, and not in cases filed under chapter 11, 12 or 13. See 11 U.S.C. § 103(b).
- **Legal services attorneys who provide representation free of charge are not "debt relief agencies."** A "debt relief agency" is defined as any person who provides bankruptcy assistance to an assisted person "in return for the payment of money or other valuable consideration." See 11 U.S.C. § 101(12A).
- **Legal services and pro bono programs which are nonprofit organizations are not "debt relief agencies."** The definition of "debt relief agency" excludes a "nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code." See 11 U.S.C. § 101(12A)(B).
- **Attorneys arguably are not "debt relief agencies" when handling pro bono cases.** The definition of a "debt relief agency" in § 101(12A), by the use of the present tense, looks to whether "bankruptcy assistance" is being provided "to an assisted person," suggesting an individualized determination based on the definitional requirements for these terms. Thus, an argument can be made that an attorney is not a "debt relief agency" in those pro bono cases in which he or she is providing bankruptcy assistance to the assisted person without compensation. Hopefully, this will be clarified by the courts soon after the law takes effect.
- **Legal services and pro bono debtor assistance clinics that provide document preparation assistance free of charge are not "petition preparers."** Although the definition of a "petition preparer" in § 110(a) has been expanded by the 2005 Act to include an attorney who prepares bankruptcy documents for filing by a debtor but does not enter as attorney for the debtor, such an attorney is a "petition preparer" only if a fee is charged. A "petition preparer" is still defined as a person "who prepares for compensation a document for filing."