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When Harry Met Sally: Client Counseling Under BAPCPA

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TABLE OF CONTENTS

I. Introduction .......................................................................................641
II. Understanding Underlying Issues in Consumer Spending Habits in the United States: Reasons to Listen Actively ......................644
III. The Credit Card Industry's Impact on Consumer Debt: Teens, Boomers, and Seniors......................................................645
IV. BAPCPA and the Pennsylvania Rules of Professional Conduct (Pa. RPC).............................................646
V. From Control to Collaboration: Counseling Clients Under DRA's Watchful Eye ..................................648
   A. Reaffirmation Agreements ...........................................................650
   B. The Mandatory Statement Under § 527(b)...................................656
   C. Informing vs. Advising Under § 526(a)(4)...................................661
VI. Conclusion...................................................................................... 666

I. INTRODUCTION

Twenty years ago Professor Gary Neustadter published an article reporting on the interaction between six anonymous bankruptcy attorneys and the clients they counseled.¹ The

¹ I thank my wife Cheryl for her patience with me as I asked her to read draft after draft after draft. Her patience, developed from teaching elementary students, was sorely tested with me. I thank Vanessa Gosa, the administrative assistant in the Consumer Bankruptcy Clinic, for her assistance in word processing this article and in putting together the power point presentation of this article. I thank Brenda Gibbs, my research assistant for the past two years, for her fine research, blue booking and editing. I thank my clinic students for making me realize that we teach best that which we need to learn. Finally, I thank all the clients the Consumer Bankruptcy clinic has represented for showing us that even with the distress of dunning creditors and a lack of money to make ends meet, one can still have great dignity.

observations contained in that article found archetypal models of lawyering, as well as systematic pressures on the lawyers arising from a "consumer bankruptcy lawyer subculture." Professor Neustadter discovered that financial, psychological, and practice constraints had a significant impact on the relationship between an attorney and her financially distressed client. These constraints, combined with specific types of lawyering behavior, influenced the type of legal services provided to the client. Neustadter's observations and findings contributed significantly to knowledge regarding how a consumer bankruptcy attorney's behavior influenced her client's decisions. It also contributed to understanding the manner in which a client comprehended and elucidated encounters with his attorney. Neustadter found that four out of the six attorneys who were observed controlled the structure, format, and content of the counseling session. These findings were not meant to suggest that the attorneys he observed were not knowledgeable and skillful in bankruptcy law. On the contrary, he found all of them to be extremely knowledgeable and well-prepared to render appropriate services for their clients.

Since that article's publication, consumer bankruptcy law has undergone dramatic legislative changes. Will these dramatic changes significantly impact how clients are counseled in consumer bankruptcies? If the objective of past Bankruptcy Commission reports and amendments to the Bankruptcy Code were to influence how consumer bankruptcy attorneys counsel their clients, they did meet the goal. Will the recent amendments

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2 Id. at 235-36 (noting that a number of events, circumstances, and pressures coalesced to create this subculture).
3 Id. at 241.
4 Id. at 229. Attorney-type behavior that controls the interview and counseling with a client has been described as the authoritarian. G. NICHOLAS HERMAN, JEAN M. CARY, & JOSEPH E. KENNEDY, LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH 10-11 (2001). See also DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 7, 13 (1974) (explaining that the type of counseling where the professional assumes most of the control is seen as the traditional model and involves a client being passive and following instructions).
5 Neustadter, supra note 1, at 229-30
6 In 1984, Congress amended the Bankruptcy Code requiring attorneys representing clients in chapter 7 or chapter 13 cases to inform their clients that
to the Bankruptcy Code, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), produce significant changes? While it may be too early to determine this, early anecdotal evidence may already point toward some impact.

The debt relief agency (DRA) sections of BAPCPA (§§ 526-528) appear to have the most significant impact on the attorney/client relationship. These provisions focus on mandatory, as well as prohibitive attorney conduct, largely ignoring the realities of the attorney/client relationship at the time of a client's financial unraveling. Before an attorney "zealously asserts [her] client's position," and before an attorney "provides a client with an informed understanding [of his] legal rights and obligations," the attorney must understand and appreciate what caused her client's past and present circumstances.

they had a choice of chapters to file under. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 § 322, 98 Stat. 333, 357-58. Federal Rule of Bankruptcy Procedure 9009 prescribes the use of the Official Forms. FED. R. BANKR. P. 9009. Official Form 1 contains in Exhibit B a place for an attorney for an individual to sign indicating that the attorney advised the client about his right to proceed in bankruptcy under Chapter 7 or 13, and that the relief under each Chapter had been explained to the client. Bankruptcy Amendments and Federal Judgeship Act of 1984, § 322, 98 Stat. 357-58. This legislative change did not result in a drastic increase in the number of Chapter 13 bankruptcies filed, as was hoped.


8 This author had a conversation with one practitioner, just prior to the new Code's effective date and was told by that practitioner that it was "not worth the hassle to continue to practice consumer bankruptcy." In another conversation with a representative from the United States Trustee's office several month's after the effective date, this author was told that consumer bankruptcy filings were way down. The decrease in filings may be the result of the consumer bankruptcy bar familiarizing itself with the new requirements of the BAPCPA before taking on any new cases.


10 Providing a client with zealous advocacy and an informed understanding of his rights are among the attorney responsibilities set forth in the Preamble to the Pennsylvania Rules of Professional Conduct. See PA. RULES OF PROF'L CONDUCT pmbl. & scope (2005).
II. UNDERSTANDING UNDERLYING ISSUES IN CONSUMER SPENDING HABITS IN THE UNITED STATES: REASONS TO LISTEN ACTIVELY

As a nation, we possess diametric personalities when it comes to money. On the one hand, some of us spend it freely with the use of credit cards.\textsuperscript{11} This free spending behavior may result in financial distress if we develop a "Spender" personality. A "Spender" uses money to buy pleasure; budgeting and saving are difficult for the "Spender."\textsuperscript{12} Some of us experience financial peril because we are "Avoiders" who feel anxious and incompetent to deal with money matters. So we avoid the chore of daily money management.\textsuperscript{13} At the opposite end of the money personality spectrum are "Amassers" and "Hoarders" who either enjoy holding on to money or are concerned with keeping large amounts of it. No matter what money personality we exhibit, a discussion of our personal financial situation is a taboo subject. Even in a psychotherapy session, patients are reluctant to discuss money issues. The ability to be objective about it seems to leave us when we are asked to openly discuss it.\textsuperscript{14} Add to this the fact that aggregate household debt has more than tripled in the last century, and one can understand why a discussion of personal debt problems with anyone is generally forbidden.\textsuperscript{15} Despite our

\textsuperscript{11} The extensive use of credit cards has been a recordable phenomenon since 1995 when, for the first time U.S. consumers paid for more goods and services with a credit cards than they did with cash. Nilson Report 632, at 6-7 (1996) (noting that in 1995 there were $753.52 billion in credit card purchases and $703 billion in cash purchases).

\textsuperscript{12} OLIVIA MELLAN, MONEY HARMONY: RESOLVING MONEY CONFLICTS IN YOUR LIFE AND RELATIONSHIPS 30 (1994). See generally id. at 17-30 (explaining that we all have identifiable behaviors and personalities when it comes to money and presenting a "Money Personality Quiz"; results can show a particular personality such as Hoarder, Spender, Money Monk, Avoider, or Amasser).

\textsuperscript{13} Id. at 30.

\textsuperscript{14} Id. at 3-4. This psychotherapist and relationship counselor notes that her patients had great difficulty in discussing money matters. Id. at 3. Couples coming to her for relationship therapy had great distress with one another when issues of money and spending habits were raised. Id.

inability to talk frankly and openly about our spending habits, individually and collectively, we have spending personalities developed by our upbringing and forged, to a great extent, by the unsecured credit industry. There can be no question that the unsecured credit industry views the United States as a fertile field for the growth of its profits. In 2001 almost half of the credit cards issued in the world were issued in the United States. In that same year, approximately five billion credit card solicitations were sent in the United States; only a decade prior, there were less than a billion mailed.

III. THE CREDIT CARD INDUSTRY’S IMPACT ON CONSUMER DEBT: TEENS, BOOMERS, AND SENIORS

Credit card usage and overspending can be seen at all ages and income levels. Forty-seven percent of today’s full time college students possess credit cards in their own names. In a prepared statement for the Senate Committee on Banking, Housing and Urban Affairs, Professor Robert D. Manning stated that surveys conducted of college students revealed the proportion of students with credit cards rose from sixty-seven percent in 1998 to eighty-three percent in 2001. And those with four credit cards or more went from twenty-seven percent to forty-seven percent. The effort to get credit cards in the hands of younger people does not

(noting that in 1949 aggregate household debt was 32.9% of personal disposable income and had risen to 114.5% by 2003).

16 MELLAN, supra note 12, at 3-4, 35-36. See also id. at 36-37 (relating author’s own family experience).
21 Id.
begin at college. It is not unusual for parents of high school students to get solicitations from credit card companies extolling the wisdom of giving their high school son or daughter a credit card of his or her own.

Baby boomers experienced a forty-seven percent increase in credit card debt between 1992 and 2001. During this same period those over the age of sixty-five self-reported an increase of eighty-nine percent in credit card debt, with those between sixty-five and sixty-nine experiencing a two hundred and seventeen percent increase!

IV. BAPCPA AND THE PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT (PA. RPC)

Articles criticizing various provisions of BAPCPA were published shortly after its enactment. However, very little was written about how the debt relief agency (DRA) requirements of BAPCPA could or should modify the way attorneys counsel their clients. Any analysis of the DRA provisions and how they impact

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22 Laurie A. Lucas, Integrative Social Contracts Theory: Ethical Implications of Marketing Credit Cards to U.S. College Students, 38 AM. BUS. L.J. 413, 414 (Winter 2001).

23 Id. at 414-15. In the 1990s, the author was sent at least two unsolicited letters from credit card companies explaining why his sons, who were in high school at the time, should have their own credit cards.


25 Id.


27 In general, a "debt relief agency" is "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration . . . ." 11 U.S.C.A. § 101(12A).

28 Bankruptcy Judge Lamar W. Davis entered an Order on the effective date of BAPCPA (October 17, 2005) finding that attorneys who practice before the bankruptcy court for the Southern District of Georgia were not DRAs. In re
consumer bankruptcy practice in Pennsylvania cannot be done in a vacuum. It must be done in conjunction with an analysis of the Pennsylvania Rules of Professional Conduct (Pa. RPC), which guide the attorneys, protect the clients, and serve tribunals. Even BAPCPA recognizes an attorney's professional obligations. Section 526(d) notes that no provisions of §§ 526, 527, or 528 shall be deemed to curtail the authority of a state or a federal court to enforce and determine the qualifications to practice law. Clearly then, the bankruptcy attorney may not ignore her professional responsibilities to her client, even under BAPCPA.

The Preamble to the Pa. RPC states that an attorney must have a special responsibility for the quality of justice as well as an "informed understanding" of a client's rights and obligations. The Preamble requires the attorney to explain the "practical" implications of those rights and obligations. Rule 1.4 sets forth how an attorney may communicate these rights and obligations to the client. It states that the attorney must reasonably consult with the client concerning the means by which the client's objectives can be accomplished. In any type of consumer bankruptcy case a client's objectives are informed by the advice and information provided by the attorney. Providing this advice enables the client to more clearly articulate his objectives and, ultimately, his needs and desires.

In order to serve the client's needs and desires effectively, the attorney has an obligation under Rule 1.2(a) to be client centered or at least collaborative in her approach to counseling. Utilizing


30 Id. § 526(d)(1) (noting that the state and federal court authority is applicable only to the extent it is not inconsistent with BAPCPA).
32 Id.
34 Id.
35 Pa. Rules of Prof'L Conduct R. 1.2(a) (2005). An attorney "shall abide by a client's decisions concerning the objectives of representation . . . ." Id. The attorney shall also "consult with the client as to the means by which they are to be pursued." Id. See also Robert F. Cochran, Jr., John M.A. DiPippa & Matthew M. Peters, The Counselor-at-Law: A Collaborative
this approach necessitates the employment of active listening techniques and counseling techniques that acknowledge the client's stated and unstated concerns. This article will discuss how a collaborative approach to counseling, guided by the Pa. RPC, can assist consumer bankruptcy attorneys in maintaining client dignity and autonomy during the bankruptcy counseling process.

V. FROM CONTROL TO COLLABORATION: COUNSELING CLIENTS UNDER DRA'S WATCHFUL EYE

It is likely that the control model of counseling observed by Professor Neustadter was favored by the attorneys because their clients, who were likely in deep financial difficulty, had a limited sense of control due to their money personalities. These clients favored giving total control to their attorneys. Their willingness to cede control of major decisions to their attorneys was quite understandable. To them, the bankruptcy process may have seemed somewhat overwhelming with mounds of paperwork followed by a brief meeting with the trustee. Even though bankruptcy was a legal proceeding, the clients rarely ventured inside a court room. Additionally, the language of the bankruptcy process seemed foreign to the client. Words and terms were thrown around that made little sense to them. Despite the apparent benefit to the bankruptcy debtor when the attorney controls the decision-making in the case, the control model does have at least two flaws. One is its diminution of client dignity, self-determination, and autonomy. Another is its conflict with Pa. RPC 1.2, which

APPENDIX TO CLIENT INTERVIEWING AND COUNSELING 4-6 (Matthew Bender ed., Lexis Pub'l'g 1999) (noting that in the Client-Centered model and the Collaborative model the client makes or controls the decision).

36 See infra note 90.

37 HERMAN ET AL., supra note 4, at 11 (describing how many clients expect or even demand that their lawyers take control of the case); MELLAN, supra note 12, at 30.

38 Words and phrases such as discharge, reaffirmation, meeting of creditors, and automatic stay would not be readily understood.

39 COCHRAN ET AL., supra note 35, at 3; HERMAN ET AL., supra note 4, at 11.
requires an attorney to "abide by a client's decisions concerning the objective of representation."\(^{40}\)

A different approach to counseling is the collaborative model, which involves the client more explicitly in the decision-making process. It entails the client making the decision, but having the attorney direct the client through a process that will lead to the optimal solution based on the client's stated objectives.\(^{41}\) The collaborative model may serve the bankruptcy practitioner well in those uncertain situations where DRA's provisions seem to limit an attorney's appropriate role.

Client participation in the collaborative model is substantial, and the attorney's role in the process may be seen as that of a friend in various ways such as listener, evaluator, or "caring advisor."\(^{42}\) Unlike the controlling attorney, who Professor Neustadter observed manipulating the structure of the interview with forms and thus controlling the conversation,\(^{43}\) the collaborative attorney would establish a rapport with the client through the use of ice-breaking and rapport building techniques.\(^{44}\) Once rapport has been established, open-ended questions would be employed to invite more client control in the discussion and in the case.\(^{45}\) Through the use of open-ended questions, the attorney gets a preliminary identification of the problem.\(^{46}\) It is at the counseling stage that the collaborative model can best be differentiated from the controlling model because, in the former, the attorney will utilize Rule 2.1 and assist the client in taking into consideration moral, social, economic, and political factors that may impact his legal decision-making.\(^{47}\)

\(^{40}\) PA. RULES OF PROF'L CONDUCT R. 1.2(a) (2005).

\(^{41}\) COCHRAN ET AL., supra note 35, at 113.

\(^{42}\) HERMAN ET AL., supra note 4, at 14.

\(^{43}\) COCHRAN ET AL., supra note 35, at 15.

\(^{44}\) See generally COCHRAN ET AL., supra note 35, at 35-39.

\(^{45}\) COCHRAN ET AL., supra note 35, at 50-52, 76; HERMAN ET AL., supra note 4, at 39-42.

\(^{46}\) As the client tells his story, it may be necessary for counsel to help the client recall facts in a chronological order, or coherent manner, and this may mean the attorney will have to assist the client in keeping the facts flowing in a chronological or coherent fashion. See HERMAN ET AL., supra note 4, at 41.

A. Reaffirmation Agreements

An example of the use of the collaborative model may be seen in a reaffirmation situation.

Prior to the enactment of BAPCPA, most reaffirmation agreement forms were created by creditors, except for those bankruptcy courts that adopted a form reaffirmation agreement created by the Federal Judicial Conference. Typically, the bankruptcy client and/or his attorney would be sent the proposed reaffirmation agreement. Whether the client would sign the agreement could depend on several factors. First, and foremost, was whether the debt was properly secured by property the debtor wished to keep, such as a vehicle. Second, was whether the debtor had a belief that he could, in fact, repay the debt out of future income. Creditors often tried to entice the debtor to reaffirm with a promise of future credit; if that was unsuccessful, the creditor would make coercive statements about repossessing the collateral. If the client elected to reaffirm the debt, § 524(c)(3) of the pre-BAPCPA Bankruptcy Code required the debtor's attorney

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49 Even if the item were exempt under 11 U.S.C. § 522, a properly secured creditor could recover the item under 11 U.S.C. § 362(d) of the Code. See 11 U.S.C.A. § 362(d)(1) (West Supp. 2005) (party in interest may request termination or modification of automatic stay for cause, such as "lack of adequate protection of an interest in property of such party in interest"); id. § 522 (West Supp. 2005) ("Exemptions"). A debtor may also wish to reaffirm a debt for which he has a cosigner because the automatic stay of § 362(a) would not apply to a co-obligor in Chapter 7. See id. § 101(13) (defining debtor as "person . . . concerning which a case under this title has been commenced").
50 While representing indigent clients in consumer bankruptcy cases, law students in the Pennsylvania Civil Law Clinic encountered one particular creditor that often sent a representative to the meeting of creditors with an offer of more credit if the client would pay a certain percentage of the debt over a period of time. If the client refused this offer, as they often did after consultation with and the advice of the law student, the creditor would make veiled threats to recover the items purchased on credit with the creditor. None of these threats were ever carried out.
to sign a declaration stating it would not be an undue hardship on
the debtor or the debtor's dependents to reaffirm the debt.\footnote{11 U.S.C. § 524(c)(3) (2000). Before signing the declaration the attorney is required to advise the client of the legal consequences and effect of signing the agreement. Id. § 524(c)(3)(C).}

The attorney's role in the reaffirmation process requires more
than a "rubber stamping" of the agreement with the required
declaration under § 524(c). Bankruptcy courts have determined
that they have the authority and the obligation to review
reaffirmation agreements even though the agreements have an
attorney's supporting certification attached.\footnote{See In re Hovestadt, 193 B.R. 382, 386 (Bankr. D. Mass. 1996); see also In re Melendez, 224 B.R. 252, 260 (Bankr. D. Mass. 1998).} Sanctions were
imposed pursuant to Federal Rule of Bankruptcy Procedure 9011
in those cases where courts found the debtor's attorney failed to
investigate and explain the relevant facts about a reaffirmation to
the client.\footnote{In re Bruzzese, 214 B.R. 444, 451 (Bankr. E.D.N.Y. 1997). See also FED. R. BANKR. P. 9011.} In addition, courts have found an attorney breached her
duty to zealously and effectively represent her client when she did
not investigate and explain the relevant facts about a reaffirmation
to the client.\footnote{In re Bruzzese, 214 B.R. at 251.}

Reaffirmation under BAPCPA is now a much more exotic
creature. A creditor proposing a reaffirmation under BAPCPA is
required to use a reaffirmation disclosure statement that is
substantially the same as the one set forth in § 524(k).\footnote{11 U.S.C.A. § 524(k)(3) (West Supp. 2005). This disclosure statement contained in subsection (k)(3) has numerous parts. Many of those parts contain subparts and subparts within subparts. At least one authority has found the required disclosures to be much more lengthy and confusing than the one created by the Federal Judicial Conference. HENRY J. SOMMER, JOHN RAO & SUSAN A. SCHNEIDER, NAT'L CONSUMER LAW CTR., CONSUMER BANKRUPTCY LAW AND PRACTICE: SPECIAL GUIDE TO THE 2005 ACT 87 (7th ed. Supp. 2005). The DRA requirements have put the

\footnote{SOMMER ET AL., supra note 55, at 87.}
debtor's attorney in a more tenuous position regarding compliance with § 524(k)'s requirements. A debtor represented by an attorney may now reaffirm a debt even when it appears that the reaffirmation is not in his best interest, but may in fact be an undue hardship on him or his dependents. This form states:

Part C: Certification by Debtor's Attorney (If Any).

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

Signature of Debtor's Attorney: Date:

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), sub-paragraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

Part D: Debtor's Statement in Support of Reaffirmation Agreement.

58 Id. § 524(k)(6)(A).
59 Id. § 524(k)(5).
1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $XXX, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $XXX, leaving $XXXX to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: XXX

So, even though the debtor's monthly income is less than the debtor's expenses, the debtor may overcome the presumption of undue hardship by explaining, to the satisfaction of the court, how he can afford to make the payment under the reaffirmation agreement. In that situation, the attorney representing the debtor may still sign a certification that states the attorney is of the opinion the debtor can make the payments. Several questions arise in this situation. If the debtor's expenses and income figures are accurate, how can the attorney certify that the debtor would be able to do this? Clearly, someone whose financial situation shows expenses exceed income is not a likely candidate for a loan in order to redeem the property, and any promises of monetary advances from a relative or friend are only as good as the actual payments that are made going forward. If an attorney signs a certification stating that in her opinion the client was able to make the reaffirmation payments, without making a reasonable investigation or reasonable inquiry into the circumstances that the client contends will help him pay the reaffirmed debt, that

60 Id. § 524(k)(6)(a).
61 Id. § 524(k)(5)(B) (2005). Under the prior law the attorney's certification that reaffirmation was not an undue hardship often meant there would not be a hearing on the reaffirmation of the debt.
62 Questions have been raised about the "reasonable investigation" standard now required under 11 U.S.C.A. § 707(b)(4)(C) (West Supp. 2005). That section now specifically incorporates Federal Rule of Bankruptcy Procedure 9011 by
attorney could face sanctions under Federal Rule of Bankruptcy Procedure 9011. Or the attorney could be the target of a malpractice action if the client defaults on the payments.\footnote{In re Bruzzese, 214 B.R. at 450-51.} The Pa. RPC and a collaborative counseling approach give some guidance in this situation.

The following hypothetical case demonstrates the collaborative approach to counseling the client who seeks to reaffirm a debt under BAPCPA.

Harry has worked on a swing shift at the local paper mill for fifteen years. His financial woes came about, in part, because he is a fanatical fan of the local professional football team. He missed too much time on his job because he called in sick to attend home football games. Delinquent on all his household bills and facing the threat of repossession of his four giant flat panel televisions, Harry makes an appointment to see attorney Sally. Harry bought the televisions at Sreas, the local department store, for a Super Bowl party he had at his apartment for fifty of his closest rabid football friends. Sreas has a valid security interest on all of the sets and has threatened to repossess them. During consultation with Harry, it appears clear to Sally that Harry cannot maintain the payments on the sets, let alone catch up on the arrears he owes on them.\footnote{By coming to that conclusion so quickly, Sally would be demonstrating controlling behavior and be inclined to give narrowly focused or tailored advice.} But Harry is adamant about wanting to keep them. Knowing that she has an obligation under her role as a DRA, Sally explains § 524(k) to Harry. When Harry learns that he can possibly requiring an attorney to perform a "reasonable investigation into the circumstances that gave rise to a petition, pleading, or written motion." § 707(b)(4)(C). See also FED. R. BANKR. P. 9011. Some practitioners wonder if this reasonable investigation standard will be applied to other Chapters. Consumer Bankruptcy Practice Under the New Law, Transcript of Panelists' Answers to Questions submitted on-line about the new law, Response of Dennis J. LeVine, ABI Online Live Bankruptcy Chats, May 3, 2005 (Mr. LeVine responds to inquiry as to "[w]hat types of things do you anticipate will or will not constitute a 'reasonable investigation' under the new 9011 rules?"), http://www.abiworld.org/consumerlive/consumerprogram.html. Cf. HENRY J. SOMMER, Consumer Provisions of S. 256, in THE NEW BANKRUPTCY LAW 16 (2005) (noting that it is unlikely courts will distinguish between the new "reasonable investigation" standard and the presently used "reasonable inquiry" standard).}
keep the sets by entering into a reaffirmation agreement with Sreas, he presses Sally to prepare one for Sreas so he can keep the sets. Harry, while still in Sally's office, calls his close friend, Laslow, and gets assurances from Laslow that he will make the payments on the sets in any month that Harry finds he cannot make the payment. Laslow is even willing to go as far as to sign a contract stating that he will make any payments Harry cannot. Sally, based upon her seven years as a consumer bankruptcy attorney, knows that the agreement with Laslow is tenuous at best and is more likely a pipe dream for Harry and Laslow.

Under Rule 2.1, Sally should exercise independent professional judgment and candid advice. If Sally were to inform Harry that, based upon her knowledge of the law and years of experience, she would not advise him to enter into a reaffirmation agreement with Sreas, her legal advice could be seen as narrowly tailored. And such advice may be of little value to Harry. This type of advice typifies the controlling model because it addresses only the legal issues in the reaffirmation and not the client's issues; it imposes Sally's legal advice on the client. While this approach may be correct in terms of the best result for the client, it may not be the best way to counsel. It takes away the client's sense of control and autonomy.

Under a collaborative approach to the reaffirmation, Sally and Harry would engage in a decision-making process that looks at what both his desired and essential objectives are. Harry and Sally

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65 PA. RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (2005) (noting that often legal advice involves "unpleasant facts and alternatives that a client may be disinclined to confront").
66 Id. R. 2.1 cmt. 2.
67 COCHRAN ET AL., supra note 35, at 111-12.
68 Another reason for Sally's advice may be that she is engaged in an effort to keep her fees reasonable. Sally's fee agreement with Harry may have excluded reaffirmation from the services she would provide in Harry's bankruptcy. And, negotiating a reaffirmation may be something Harry cannot afford. In that event, Sally should still have discussed this with Harry prior to giving her advice. The other motivating factor for Harry's attorney may be Federal Rule of Bankruptcy Procedure 9011 that could be imposed on Sally in the event an unhappy Harry loses not only the flat screen sets, but also his apartment payments. FED. R. BANKR. P. 9011; see also In re Bruzzese, 214 B.R. at 451.
would jointly compile a wide range of options, looking at the pros and cons of each option. Each option would be measured against a rating scale for satisfaction, reaffirmation would be only one option. Once an option is selected, plans for implementation of that option would be developed. Active listening would be critical at this stage of the counseling process.

B. The Mandatory Statement Under § 527(b)

Section 527(b) requires an attorney to provide her bankruptcy client, or any prospective "assisted person" who is seeking "bankruptcy assistance," with the following statement:

CHAPTER 5
CREDITORS, THE DEBTOR, AND THE ESTATE

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under [§ 527(a)(1)] the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

69 COCHRAN ET AL., supra note 35, at 119.
70 There is a danger in the collaborative model that the client, not wishing to face the responsibility and consequences of making a difficult decision, attempts to cede the decision-making to the attorney. In that situation, the attorney would replay the choices for the client and review the pros and cons of each choice, teasing out for the client what is preventing him from making a decision.
71 COCHRAN ET AL., supra note 35, at 119.
72 11 U.S.C.A. § 101(3) (West Supp. 2005). An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000." Id.
73 Id. § 101(4A) (West Supp. 2005). "[B]ankruptcy assistance" includes "services sold or otherwise provided to an assisted person with the express or implied purpose of . . . providing legal representation with respect to a case or proceeding under this title." Id.
"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."74

A review of this mandatory statement reveals that little effort was expended on making the disclosure easy for the average person to read. And it is doubtful that any concern was given to the understanding the typical debtor would have for such important information. The drafters of this section should have looked at the information from the perspective of the adult learner. Unlike children who take information and store it for use at a later time, the adult learner seeks to apply what has been learned immediately.75 In other words, there is some immediacy for the use of the knowledge.76 Adults engage in learning as a more or less direct response to life situations,77 thus they are more problem-centered in their learning approach.78 Accordingly, more thought should have been given to the experiences of adults that precipitated their seeking this type of help.

The drafters should have asked themselves the following questions: Who was most likely to read this statement? When would they most likely be reading it? The person reading the statement would in all probability be undergoing stress from debt burden, stress from dunning by creditors, or stress from the impending loss of property or services (e.g. car, home, or electric service). What would this person most likely need to know? While it may be argued that the present statement does answer these questions, its format is not "user friendly."

74 Id. § 527(b) (West Supp. 2005).
76 Id.
77 Id.
78 Id. at 330.
Perhaps most perplexing about the statement is that it contains a number of words and terms whose meaning the typical person would not know. And no definition is given for the following words or terms that are in the above statement:

**Petition Preparer**

**Petition**

**Schedules**

**Statement of Intentions**

**Statement of Financial Affairs**

**Reaffirm**

**Chapter 7**

**Chapter 13**

Critics of § 527(b) have expressed the view that most attorneys will not choose to amend the document to make it more understandable for fear they might run afoul of their DRA responsibilities and invite malpractice claims or bar association inquiries.79

Here is a more user-friendly version of the § 527(b) statement that has **NOT** been approved by any court or the United States Trustee's Office.

**IMPORTANT QUESTIONS AND ANSWERS ABOUT BANKRUPTCY**

(a) If I want to file for bankruptcy who can represent me?

You can represent yourself, or

You can hire an attorney, or

In some places you can get help from a bankruptcy **petition preparer** who is not an attorney.

**What is a petition preparer?**

A petition preparer is a person, company, or organization that will fill in or help you fill in information on the papers that must be filed with the court when you file for bankruptcy. A petition preparer cannot give you legal advice.

(b) If I want to hire an attorney or a petition preparer what should I know before I see them?

The law says that an attorney or petition preparer MUST give you a written agreement saying what they will do for you and how much it will cost. (Ask to see the agreement before you hire anyone.)

(c) What are the important steps in most bankruptcy cases?

In most cases, the court will charge a fee to file a bankruptcy case. You will have to file many papers. Some of the papers you will have to file are: Petition, Schedules, and Statement of Financial Affairs. In some cases you will need to file a Statement of Intention.

After you file you will have to go to a meeting called a meeting of creditors. This is a meeting of the persons or companies you owe money to. At that meeting, a person called the trustee, and those to whom you owe money, may ask you questions related to your bankruptcy.

(d) What type of bankruptcy should I file?

Before you file, you or your attorney should study which type of bankruptcy is best for you.

If you file a Chapter 7 bankruptcy, a company or person you owe money to may ask you to reaffirm a debt you owe to them. Reaffirming a debt means you will still owe that debt even though you filed bankruptcy. You may want help in deciding if you want to do this. You cannot be forced to do this.
If you choose to file a Chapter 13 bankruptcy, you will pay back some or all of the money you owe over 3 to 5 years. You may want help in making and filing a plan to do this. That plan will have to go in front of a judge at a confirmation hearing.

There are other types of bankruptcies you could file. Talk to someone who knows about those types to help you find out how they work.

(e) Is bankruptcy like a lawsuit?

Sometimes there may be something like a lawsuit in your bankruptcy, and you can represent yourself. But only attorneys, not a bankruptcy petition preparer, can give you legal advice.

C. Informing vs. Advising Under § 526(a)(4)

Section 526(a)(4) prohibits attorneys from advising a person seeking bankruptcy relief to incur more debt in contemplation of filing bankruptcy.80 However, nothing in the BAPCPA prevents a debtor from incurring the debt for a motor vehicle prior to filing bankruptcy. A debtor who has such a debt at the time of filing may be able to deduct the monthly expense of the vehicle, along with other allowed expenses under § 707(b)(2)(A)(iii)(II), and as a result pass the Means Test.81

How can the attorney inform the client of the applicable provision in § 707(b)(2)(A)(iii)(II) in a meaningful way? Simply having the client read the applicable section would be of no use to the client, given the complex nature of the language of the Means Test. Section 526(a)(4)'s prohibition directly conflicts with the attorney's duty to advise her client regarding options in filing bankruptcy. Furthermore, in numerous places in the Pa. RPC, the word advice or advise is used relating to an attorney's obligation to her client. The Pa. RPC does not define advice or advise; however, it does give guidance on what advice does entail. Comment 1 to Rule 2.1 states that the lawyer may give the client an "honest

assessment" of "unpleasant facts or alternatives." While this comment seems to be somewhat limiting in its scope, the Preamble to the Rules indicate that the attorney's role as an advisor is also to provide the client with an informed understanding of his rights. Advising a client and giving a client an informed understanding are quite different. It is through the process of giving the client an informed understanding that the client and his lawyer may overcome the dilemma of § 526(a)(4).

Advising a client may include giving the client an opinion, offering counsel, cautioning or warning a client, or recommending a course of action to the client.

Through the collaborative counseling process, it is possible for the client to gain the information needed to discover the benefits of § 707(b)(2) for himself. Unlike the controlling model, where it is more likely for the attorney to be limited by her approach, the collaborative attorney will conduct the interview and the counseling in such a way as to partner with the client in looking at options, goals, and choices. This process is much more fulfilling for the client and more likely to generate ideas that may result in the client finding the benefits of § 707(b)(2).

The collaborative counseling session might be conducted in the following manner. Initially, Harry would not have been given a form to fill out listing all of his debts. Harry's attorney would realize that establishing a rapport with her client is of critical importance in the lawyer/client relationship. Rapport helps to build

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84 See generally Sommer, supra note 26, at 193-203 (discussing various deductions allowable and noting that an attorney is obliged and allowed to explain to a client how the Means Test works and how the deduction for certain debts will affect the Means Test.)
85 All of these words are given as explanations for the word "advise" in Webster's Collegiate Dictionary. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 19 (11th ed. 2003). And while the dictionary definition does include the word "inform" as one explanation of the word "advise," the word "inform" denotes passing along information without an opinion attached to that information. Id.
86 In the controlling model, counsel is much more likely to use standard forms that may lay out the deductions or simply tell the client that she cannot advise him to incur more debt and leave it at that.
mutual trust, mutual cooperation, and mutual understanding between the attorney and her client.\textsuperscript{87} If an attorney expects her client to reveal personal information and make deeply sensitive disclosures about topics he rarely discusses, even with loved ones, the client must believe and feel that his attorney understands and empathizes with his financial plight.\textsuperscript{88} For this reason, Sally has the following statements for clients to check off if they apply to their financial condition:

- You are constantly paying your credit card bills late.
- The outstanding balance on your credit cards is growing and hardly ever decreases.
- You have received phone calls or letters about delinquent credit card bill payments.
- You have taken out the maximum cash advance on at least one credit card.
- You have lost your job or are facing a family emergency or disability and are concerned about how you will pay your bills.\textsuperscript{89}

The purpose of these questions is to show that Sally has knowledge of and an empathy for the client's dilemma. After the questionnaire has been filled out, the interview would take place during which Sally would utilize active listening techniques to further develop rapport with the client.\textsuperscript{90} As a practical matter, it may be likely that Sally does not conduct the initial interview

\textsuperscript{87} COCHRAN ET AL., \textit{supra} note 35, at 35.
\textsuperscript{88} See HERMAN ET AL., \textit{supra} note 4, at 32.
\textsuperscript{89} DEANNE LOONIN, NAT'L CONSUMER LAW CTR., SURVIVING CREDIT CARD DEBT WORKBOOK: FOR CONSUMERS AND THEIR ADVOCATES 5 (2005).
\textsuperscript{90} Active listening techniques involve verbal and nonverbal communication that allow the person telling the story or problem know that his or her words and feelings have not just been heard, but have also been empathized with by the listener. See COCHRAN ET AL., \textit{supra} note 35, at 33 (stating that active listening involves considering a client's emotions as well); HERMAN ET AL., \textit{supra} note 4, at 32-33.
because to do so may not be the most cost effective way to deliver the legal and counseling services needed by the client. Even if the interview is conducted by a support staff member of Sally's firm, that individual would have been adequately trained to utilize active listening techniques. 91 Harry relates the following to attorney Sally.

**Harry:** I have a large amount of credit card debt. It all started when I got the NFL VISA card. After I ran it up to its maximum, other cards kept coming in with lower interest rates and all kinds of rewards if I signed up for them. Last year, I totaled my car when I ran into some black ice on the way to work. I had dropped the collision coverage on it two years ago because it was so old and worth so little. Naturally in hindsight, I wish I had kept the coverage because now I have no way of getting to and from my job. There is no public transportation to work and it is 55 minutes one way by car. I have been catching a ride with coworkers but that can’t last. I have a lot of overtime and most of the people who give me rides don’t do overtime.

**Sally:** I can understand how you might feel you are imposing on your coworkers when you are always asking for a ride. 92

During the interview and counseling session, it becomes apparent to Harry that if he files a chapter 7 he can discharge his credit card debt and stop trying to pay off these credit card bills. With the money he will now have from not making payments on the credit card bills, Harry hopes to buy another car. Unfortunately for Harry, his current monthly income puts him over the median family income for his state. However, if he has a monthly payment for a motor vehicle, along with other monthly expenses allowed under § 707(b)(2), he would fall below the state median and be able to file a chapter 7 bankruptcy. The collaborative interviewing and counseling between Harry and his attorney would continue as follows.

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91 PA. RULES OF PROF’L CONDUCT R. 5.3(a) (2005) (directing lawyers who supervise nonlawyers to make "reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of [a] lawyer").
92 See COCHRAN ET AL., supra note 35, at 32-36.
Sally: So, Harry have I explained chapter 13 and chapter 7 to you adequately?

Harry: I think so.

Sally: Would you like me to go over anything again? Or do you have some questions?

Harry: No, but I would like to go over my options again.

Sally: All right, as we discussed filing bankruptcy is just one option. Let's review your options again.93

In the collaborative process, Harry and Sally would have agreed to the criteria to be used for the evaluation of options and applied those criteria to each option. Utilizing Pa. RPC Rule 2.1, Sally would have helped Harry consider the other applicable considerations in coming to a decision, such as moral, economic, social, and political factors relevant to Harry's situation.94

Sally goes over the options with Harry again and confirms that Harry wants to get out of the debt, meet his normal monthly expenses, and keep his job. It is clear to Harry, and to Sally, that he cannot keep his job without access to a car. Harry selects that option. Sally must then explain to Harry that in order for him to file a chapter 7, he will have to have a monthly income below the state median income, and in order to get below the median, he will have to see what expenses he has that he may deduct from his monthly income. As she reviews the expenses, she references the portion of § 707(b)(2) that contains the deduction for a motor vehicle. The conversation would go something like this.

Harry: I can get a deduction for a motor vehicle?

93 Sally goes over the options again, which may include: (1) doing nothing and waiting to see what the creditors will do; (2) having Sally intercede on Harry's behalf with the debt collection agencies that are trying to collect the debt, by sending all of them a letter of representation and citing the applicable section of the Fair Debt Collection Practices Act; and (3) negotiating a payment plan with the debt collection agencies.

Sally: Yes

Harry: So what you are saying is, if I had a monthly car payment I was making, that could lower my income so I could file a chapter 7?

Sally: Yes.

Harry: Well that's a no brainer! We have decided that I would file a Chapter 7 and I want to do that. I need a car now. Then I can file the 7. How come you didn't tell me this before?

Sally: Harry, we were still in the decision-making process and you and I had not come to a decision on the best course of action for you. I agree with your decision that this may be best for you.

This dialogue has shown that a collaborative counseling process can have the client come to the conclusion without the attorney being placed in the position of violating § 526(a)(4) but, at the same time, fulfilling her professional responsibility to be diligent and zealous in the representation of her client's interests.

VI. CONCLUSION

Attorneys practicing in the largely uncharted waters of BAPCPA face many risks. Practicing consumer bankruptcy under BAPCPA means attorneys must be more aware of hidden dangers that impact methods of counseling clients. Fulfilling the professional responsibilities required under the applicable state rules is clearly an imperative. A collaborative approach to counseling the client may ensure that not only are professional responsibilities carried out, this approach insures that the client's right to autonomy and inclusion in the decision making process is respected. More important, through this approach the client has the option to be more of an equal partner with the attorney in the bankruptcy process.