

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS

SEP 11 2007

Michael N. Milby, Clerk  
By Deputy Clerk *R. Newton*

IN RE:

“PRO BONO SERVICES”

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General Order No. 2007-3

MISC. PROCEEDING NO. 07-00601

**AMENDED STANDING ORDER (I) THAT PRO BONO LEGAL COUNSEL ARE NOT DEBT RELIEF AGENCIES AND (II) THAT PRO BONO COUNSEL FOR DEBTORS ARE NOT SUBJECT TO SECTIONS 526-528 OF THE BANKRUPTCY CODE**

Upon consideration of the Motion for Order (i) That Pro Bono Legal Counsel Are Not Debt Relief Agencies and (ii) That Pro Bono Counsel Are Not Subject to Sections 526-528 of the Bankruptcy Code (the “Motion”) filed before the Court, and for referral for en banc consideration, the Court finds that proper notice has been given and no other or further notice is necessary, and determines on the Motion and evidence proffered that there is good cause to grant the relief requested in the Motion both as a matter of law and for the public benefit. It is therefore:

ORDERED that counsel representing a pro bono debtor in this district are not debt relief agencies or debt relief agents under sections 526 through 528 of the Bankruptcy Code merely because of the pro bono representation. It is further

ORDERED that counsel thus excluded from the definition of “debt relief agency” are not required to comply with the requirements applicable to debt relief agencies under sections 526 through 528 of the Bankruptcy Code.

*sk*  
Dated this 11 day of September, 2007.

*Wesley W. Steen*

Wesley W. Steen  
Chief Bankruptcy Judge

*Karen K. Brown*

Karen K. Brown  
U.S. Bankruptcy Judge

*Letitia Z. Clark*

Letitia Z. Clark  
U.S. Bankruptcy Judge

*Marvin Isgur*

Marvin Isgur  
U.S. Bankruptcy Judge

*Richard Schmidt*

Richard Schmidt  
U.S. Bankruptcy Judge

*Jeff Bohm*

Jeff Bohm  
U.S. Bankruptcy Judge

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**AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has considered, in a hearing noticed to the Southern District of Texas standing Chapter 13 and panel Chapter 7 Trustees and the U.S. Trustee, the Complaint For Declaratory Judgment filed by Elizabeth C. Freeman of Locke, Liddell & Sapp, P.L.L.C., Patrick L. Hughes of Haynes and Boone, L.L.P., and Brian W. Rogers of Anderson, Smith, Null & Stofer, L.L.P. (Plaintiffs). The Court, after review of the Complaint and considering the proffers of evidence including exhibits before the Court and judicial notice of the pleadings and orders in a prior case styled *In re Dao*, Case No. 06-37227-7, and the arguments of counsel, issues the following Findings of Fact and Conclusions of Law:

**I. Findings of Fact**

1. The Houston Volunteer Lawyers Program (HVLP) is a non profit corporation founded by the Houston Bar Association to increase legal access to residents of Harris County who could not otherwise afford representation. Each year HVLP links qualified applicants, who are first interviewed and qualified under HVLP procedures, with volunteer attorneys who, after further interview following their own conflict of interest review procedures, enter into an agreement to represent them in the referred matter. HVLP’s program has typically operated to

administer pro bono legal representation in a variety of civil matters, including family, immigration and probate. HVLP also had staff lawyers who could provide direct representation in limited circumstances, if required. However, HVLP did not include bankruptcy representation as a pro bono offering until 1999, when the courts initiated action among the bar to develop a program to enable HVLP to administer a pro bono program that could service the needs of the indigent debtor.

2. The result of these efforts was initiation of a bankruptcy pro bono program for the United States Bankruptcy Court for the Southern District of Texas (the Pro Bono Project). The goal of the Pro Bono Project was to make available pro bono legal representation in bankruptcy cases to poor and working poor debtors. A system for referring debtors who do not qualify for assistance to either the publicly funded Lone Star Legal Services (Lone Star) or the Houston Bar Association's Lawyer Referral Service (LRS), which also has a reduced fee panel, was also instituted. In addition, the program was a more formal effort to address the informal referral of indigent or other pro bono clients to a program intended to be available to the public. Until enactment of BAPCPA, the Pro Bono Project had been able to match qualified pro bono clients who satisfied threshold standards for indigent status with attorney volunteers, because the pool of volunteer attorneys included both consumer bankruptcy attorneys as well as (i) volunteer nonbankruptcy attorneys willing to undertake what was once straightforward chapter 7 representation and (ii) a significant number of business bankruptcy lawyers who volunteered to serve the program where they could. HVLP administered the Pro Bono Project in a manner similar to its other activities. Prospective debtors were interviewed and qualified as eligible to be referred under the HVLP guidelines, which entailed satisfaction of federal poverty guidelines for income. They were then matched with volunteer lawyers by HVLP staff, at which point the

volunteer lawyers would personally interview the prospective clients and determine whether to represent them under approved HVLP representation agreements. Integral to this process was entry, if the matter was accepted by the lawyer, into a form of engagement letter that HVLP promulgated. In addition, HVLP monitors the progress of the matter. This procedure is essential to the availability of HVLP's insurance, which is applicable to the services rendered by the volunteer attorneys.

3. Since October 16, 2005, however, with the changes brought to the consumer practice by BAPCPA, including extensive new requirements imposed on consumer chapter 7 lawyers who charge their debtor clients a fee for their time and to comply with a litany of specific services associated with representing a fee paying debtor, few lawyers and firms who do not specialize in consumer bankruptcy law were willing to accept any pro bono consumer filings to the extent that uncertainty over their status as debt relief agencies might affect their normal practice. In particular, attorneys not specializing in consumer bankruptcy practice did not want to have imposed upon them and their other practice the status and corresponding requirements applicable to a "debt relief agency" under the Code. Moreover, informal referrals of such matters also rarely would be accepted by an attorney through other means for the same reasons.

4. Since the effective date of BAPCPA, HVLP has experienced significant difficulty in obtaining assistance for the consumers debtors who sought its help because of the shortage of volunteer lawyers willing to take such pro bono consumer bankruptcy cases. A number of volunteer lawyers who previously had been willing to serve the program before BAPCPA have refused to continue to serve as volunteers due to the complexities of the new law under BAPCPA, and in particular those associated with being a debt relief agency; moreover, many volunteers who are business bankruptcy lawyers having some familiarity with the practice area

refuse to undertake this type of consumer bankruptcy representation because of the concern that they or their firms will be labeled “debt relief agencies” under the Bankruptcy Code, thereby affecting their practices in unknown ways.

5. Under BAPCPA, certain requirements are imposed on consumer debtors who file a chapter 7 bankruptcy case, and also upon their legal counsel. These Code obligations, applicable to counsel, apply only to counsel who charge or receive a fee, as distinct from counsel who represent clients pro bono. While several courts have reviewed the issue of whether attorneys are debt relief agents, none have addressed this issue in the context of pro bono counsel. See *In re Attorneys at Law and Debt Relief Agencies*, 2006 WL 2925199 (S.D. Ga. Aug. 25, 2006) (the District Court effectively agreed with the US Trustee that there was no case or controversy to justify declaration that attorneys are not debt relief agencies, but dismissed the US Trustee’s appeal for lack of standing.); *Olsen v. Gonales*, Case No. 05-6365-HO (D. Or. Aug 11, 2006) (Court held unconstitutional the provisions prohibiting certain advice, but otherwise upheld several other provisions); *Hersh v. U.S.*, 2006 WL 2088270 (N.D. Tex. Jul. 26, 2006) (which held attorneys by plain meaning are debt relief agents, but held the same provision unconstitutional); and *Geisenberger v. Gonzales*, 2006 WL 1737405 (E.D. Pa. Jun. 19, 2006) (which declined to address the constitutional issues on standing grounds); *Milavets, Gallop & Milavets v. United States*, 2006 WL 3524399 (D. Minn. Dec 7, 2006) (attorneys are not debt relief agents).

6. The Plaintiffs contend that an attorney or law firm does not become a “debt relief agency” if its debtor representation is limited to pro bono assignments in consumer debtor cases. The Court agrees. This type of public service pro bono representation done without payment does not fit the statutory definition.

7. Evidence was also presented to the Court by proffer from Plaintiffs as well as from Mr. Paul Mott, who is a representative of HVLP. Proffers from Locke Liddell & Sapp, PLLC, Haynes & Boone, LLP, and Anderson, Smith, Null & Stofer, L.L.P. were offered regarding the facts set forth in the Complaint. Mr. Mott testified that since the enactment of BAPCPA, fewer volunteers are willing to accept pro bono case referral or to be engaged by such debtors after their screening by HVLP, given attorney volunteer concerns over their possible exposure to liability and requirements imposed on a debt relief agency under BAPCPA, including those associated with being a debt relief agency. Mr. Mott testified that the pool of volunteer bankruptcy lawyers is substantially less than before BAPCPA. He also provided statistics to demonstrate that despite a lower case filing rate and level of eligible debtors for the Pro Bono Project, fewer eligible pro bono debtors are able to have their cases placed with volunteer attorneys on a percentage of placement basis, and that the volunteer pool, being smaller, reaches capacity sooner. Additionally, evidence was offered by proffer of numerous law firms employing bankruptcy attorneys who previously had volunteered for the HVLP Program, but otherwise do not engage in representation of consumer debtors. Each firm testified that after an evaluation of the relevant provisions of BAPCPA, a policy prohibiting acceptance of consumer debtor representation including pro bono representation was adopted.

8. There have been recent published reports in at least one national bankruptcy newsletter that undertaking a consumer bankruptcy case is “risky” for practitioners. Exhibit 4. The Plaintiffs also proffered the results of a recent online survey taken by the American Bankruptcy Institute (ABI) that, while not statistically tested, reported that for those responding to the survey approximately half the respondents (who are attorneys and members of the ABI) agreed that there were significant risks in undertaking pro bono bankruptcy representation

because it remains uncertain whether such representation could be construed as in exchange for valuable consideration. Exhibit 5.

## II. Conclusions of Law

9. A debtor is an “assisted person” under the Code.

10. The Code in section 101 provides this definition:

(12A) The term “debt relief agency” means any person who provides any bankruptcy assistance to an assisted person *in return for the payment of money or other valuable consideration*, or who is a bankruptcy petition preparer under section 110, but does not include –

...

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

11 U.S.C. § 101(12A), (B) (emphasis supplied).

11. If a firm or attorney is a debt relief agency, then the new Code adds a number of requirements for consumer practitioners and those who are deemed “Debt Relief Agencies” to follow. New section 526 provides restrictions applicable to Debt Relief Agencies, with section 527 imposing new disclosure requirements on debt relief agencies.

12. A volunteer attorney or law firm’s acceptance of clients who are referred to them by either the HVLP Program or other similar nonprofit organizations should not render the accepting firm or lawyer a “debt relief agency” because the representation is pro bono; the lawyer or firm is not providing legal assistance in return for payment or fee, and, as set forth more fully below, the Court holds that the goodwill or other non-pecuniary benefits of civic service do not constitute “other valuable consideration” being received by the lawyer. While the facts of this case presume referral related to the Pro Bono Project, the conclusion would be the same if the pro bono service did not originate from a nonprofit organization. As a result, the



restrictions on debt relief agencies enumerated in section 526 do not apply to attorneys merely because they represent debtors on a pro bono basis.

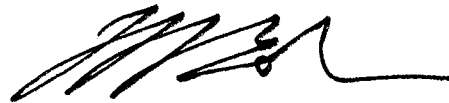
13. Pro bono counsel are not subject to the Debt Relief Agency requirements if not engaged in any paying consumer practice.

14. The plain meaning of the Code does not apply the term “debt relief agency” to pro bono attorneys. As a result, because sections 526 through 528 are directed only to debt relief agencies, these do not apply to the pro bono debtor or pro bono counsel in such cases.

15. The Court further determines that, as a matter of law, the following does not comprise valuable consideration under BAPCPA with regard to representation of assisted persons under the Bankruptcy Code on a pro bono basis: (i) gratitude, friendship, appreciation or other feelings of thanks for the assistance of pro bono counsel in a bankruptcy case by the pro bono debtor; (ii) any appreciation by members of the bar, the Court or the community for an attorney’s participation in pro bono service; (iii) any prospect that an attorney or law firm may have for future referral or other client representation from any source related to the debtor, whether for a fee or otherwise, unless the parties agree to a specific referral as a condition of the pro bono engagement; (iv) acceptance or regard from the community; (v) the potentially favorable public relations or press that the lawyer or firm may receive; and (vi) any other sense of well being or satisfaction for participation in serving the community.

16. Valuable consideration within the meaning of Section 526 requires the receipt by legal counsel of money or something having measurable and definitive value or worth, which can be converted into money or money's worth by the counsel. Service as pro bono counsel to a debtor who is otherwise an assisted person does not involve receipt by such attorney or firm of valuable consideration.

Dated this 11th day of September, 2007.

A handwritten signature in black ink, appearing to read 'Jeff Bohm', written over a horizontal line.

Jeff Bohm  
United States Bankruptcy Judge