

Future of Pro Bono Unclear Under New Bankruptcy Law

By Susan Nassar
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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 went into effect on October 17, 2005. The new act's title suggests a noble purpose -- to prevent deadbeats, like compulsive shoppers and gamblers, from abusing the bankruptcy system to the detriment of the national economy. Whether bankruptcy abuse is pervasive enough to warrant the new sweeping bankruptcy amendments is debatable.

Because the act is so broad in scope, some critics believe it is like using a "elephant gun to kill an ant." And, as a result, opponents fear that the new law will punish honest, hard-working people who want to pay their bills but are unable to do so because of a medical crisis or the loss of a job.

Before the new act went into effect, low-income residents of Dallas turned to organizations like the Dallas Volunteer Attorney Program, which had provided pro bono bankruptcy legal services, as well as other services, using volunteer attorneys. DVAP is a joint program of the Dallas Bar Association and the Legal Aid of NorthWest Texas. Many of DVAP's clients are young families or single parents, who have fallen on hard times due to an unexpected loss or death of a wage-earner in the family. DVAP's clients also include the elderly and disabled, many of whom are on fixed incomes and/or uninsured and have been swallowed up by medical debt.

According to DVAP managing attorney, Sara Hewitt, the program was overseeing and handling more than 100 Chapter 7 bankruptcy cases with the help of volunteer attorneys prior to October 17, 2005. This all came to a grinding halt when the act went into effect and DVAP was forced to make the difficult decision to temporarily stop providing bankruptcy legal services to its clients. Although seemingly drastic, DVAP's decision closely reflects the legal community's concerns about the new bankruptcy law.

Under the act, a new "means test" based on a debtor's income is used to determine eligibility under Chapter 7, and attorneys are required to conduct a "reasonable inquiry" to assure the accuracy of all documents filed by a debtor, at the risk of personal liability to the lawyer and sanctions for noncompliance. Attorneys must certify or swear that they have "no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect." It is unclear, though, how strictly courts will construe or apply the "reasonable inquiry" standard.

Attorneys must also certify to the court, under penalty of sanction, that a debtor will be able to repay reaffirmed debt. The new stringent document requirements, potential liability, and related costs have led some bankruptcy attorneys to question whether it is worthwhile to continue representing consumer debtors as part of their own practice or on a pro bono basis.

In an effort to ease some of these burdens and encourage attorneys to continue volunteering their services, DVAP recently accepted several “test cases” and used its paralegals to assist with the preliminary due-diligence document requirements. A common problem in these cases, however, is that many clients may have not filed tax returns in the past -- a new requirement under the act for determining eligibility. DVAP is attempting to resolve this and other problems as they arise with guidance from experts in tax and bankruptcy matters.

In addition, DVAP representatives met with members of the judiciary and the U.S. Trustee, who have expressed their support for DVAP’s pro bono efforts in this area.

It is the hope of DVAP administrators that once bankruptcy attorneys have had time to adjust to the new law and get up to speed, they will be more comfortable volunteering their services to DVAP clients and mentoring other lawyers who are willing to do the same. At this point, however, it is still unclear what the future holds for DVAP and the people it serves.

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