AMERICAN BANKRUPTCY INSTITUTE

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The Ethics of the Vulnerable Client Population in Bankruptcy

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PLENARY SESSION

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Ethic Rules

All references are to the American Bar Association Model Rules of Professional Conduct

Rule 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4

(a) A lawyer shall:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise

prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.14

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Bankruptcy Code

11 U.S.C. § 109(h)

(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section other than paragraph (4) of this subsection, an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

* * *

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing

required under paragraph (1).

11 U.S.C. § 1104

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor;

Bankruptcy Rules

Rule 1004.1

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

Rule 1016

Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

Rule 7017

(a) Real Party in Interest.

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

* * *

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem-or issue another appropriate order-to protect a minor or incompetent person who is unrepresented in an action.

Rule 9010

(a) Authority To Act Personally or by Attorney. A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

Cases

In re Benson, No. 10-64761-PWB (Bankr. N.D. Ga. April 30, 2010)
Chapter 13 bankruptcy was filed by the debtor's daughter exercising a power of attorney granted at a time when the debtor was apparently competent; the debtor had also executed a POA in favor of her son, again, apparently when competent. A hearing was held to determine whether to appoint a guardian ad litem pursuant to Rule 1004.1. The evidence demonstrated that the debtor lacked the mental capacity to understand and manage her financial affairs, and did not understand that she was the debtor in a bankruptcy case. The court could not determine whether either POA authorized the filing, whether either POA authorized the daughter or son to act on debtor's behalf upon her incompetency, whether the debtor could legally ratify the filing, or if it would be in her best interest to do so. Additionally, the children lacked sufficient information about any equity in the debtor's real property and other pre-bankruptcy transactions to be able to assist in determining whether the debtor should be in bankruptcy, and if so, which chapter. The court held it was necessary to appointed a GAL because the debtor did not have a duly-appointed representative and because the appointment was necessary to protect her interests in the case. The court also granted the GAL the power to request and obtain information without the debtor's approval or ratification, the right to recommend to the probate court the appointment of a conservator, guardian or other fiduciary, and the authority to initiate and prosecute any claims or causes of action and to appear and defend on behalf of the debtor in any court, to file pleadings, and to seek conversion, and the authority to employ the debtor's attorney of record without further court approval. The GAL was allowed reasonable compensation as an administrative expense.

D.C.-B. v. Brooks (In re Brooks), Adv. Pro. No. 18-80031 (Bankr. W.D. Mich. March 23, 2018)
Father of minor child, who was not a party to the case, filed a complaint to determine dischargeablity and an objection to discharge, along with a petition to appoint a GAL, all on behalf of his daughter. FRCP 17(c)(1)(A) permits a general guardian to sue on behalf of a minor; this includes a parent. *Id., citing Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 26 F. Supp. 2d 1001, 1006 (W.D. Mich. 1998); *see also Russick v. Hicks*, 85 F. Supp. 281

(W.D. Mich. 1949) (no need to appoint next friend in action brought by father on behalf of minor children). Accordingly, the petition as to the appointment of the GAL was denied as unnecessary. However, the court further indicated that the case would be dismissed unless the father retained counsel, as a parent cannot appear *pro se* on behalf of a minor child. *Id., citing Shepherd v. Wellman*, 313 F.3d 963, 970-71 (6th Cir. 2002); *Lawson v. Edwardsburg Pub. Sch.*, 751 F. Supp. 1257, 1258–59 (W.D. Mich. 1990) (litigant has the right to act as his or her own counsel under 28 U.S.C. § 1654 but may not represent the interests of his or her minor child without counsel); *cf. Marquette Prison Warden v. Meadows*, 318 N.W.2d 627 (Mich. App. 1982) (same result under Michigan law). It is worth noting that, although the testimony established that the minor's parents, who lived separately and shared custody, generally shared in making the ususal parental decisions, the mother did not support the pursuit of the adversary proceeding.

In re Drenth, No. 15-04217, 2015 Bankr. LEXIS 3160 (Bankr. W.D. Mich. Sep. 10, 2015)
Debtor, who suffered from dementia-related cognitive impairment and psychosis, filed chapter 7 with the help of his sister, to whom he had given POA, and bankruptcy counsel. Debtor filed a motion for an order excusing him from completing the credit counseling requirement under 11 U.S.C. § 109(h). The court *sua sponte* set a hearing for the purpose of determining whether the court should appoint a GAL or enter some other order as contemplated by Rule 1004.1. The bankruptcy court held that the debtor was excused from the pre-petition credit counseling and post-petition financial management program. In determining whether it was appropriate to appoint a GAL, the court started by noting the ability of a debtor to perform an act through an authorized agent under Rule 9010(a), and the fact that "nothing in the Bankruptcy Code imposes upon a debtor a requirement of competency as a condition for relief." *1 (*citing In re Myers*, 350 B.R. 760 (Bankr. N.D. Ohio 2006) (appointing aged debtor's long-time spouse as next friend, *nunc pro tunc*). The court also made reference to the practical problems and potential for mischief in proceeding through an attorney-in-fact. However, under the DPOA, the debtor's sisters had been appointed as his attorneys-in-fact; given that, both the UST and the debtor's counsel felt that the appointment of a GAL was not necessary, and the court ultimately agreed.

Practice Pointer: The court did require the debtor's counsel to file the original petition which bears the signature of the non-debtor representative. *Id*. (*citing In re Hurt,* 234 B.R. 1, 2-3 (Bankr. D.N.H. 1999) ((the petitions and schedules must reflect that they were executed by the nondebtor in his representative capacity and a copy of the power of attorney must be filed with the petition).

In re Lane, No. 12-36873 (Bankr. D. Or. Oct. 25, 2012)
This case was filed by one given a POA, and debtors filed a motion to appoint the filer as their "next friend." The UST objected, the court set forth a very specific procedure regarding motions to appoint a next friend under Rule 1004.1, and provides extensive guidance for those preparing to file a case through a "next friend."

In re Matthews, 516 B.R. 99 (Bankr. N.D. Tex. 2014)
Debtor was an elderly, unmarried woman living in a nursing home with cognitive deficits and

physical impairments. The debtor's niece and the niece's daughter resided at the debtor's home; otherwise, the debtor had limited assets. The debtor's niece appeared at the meeting with a limited power of attorney purportedly signed by the debtor two days before the bankruptcy filing, and with the intention of testifying on the debtor's behalf. The chapter 7 trustee informed the niece that she would need a court order to testify, and a motion was filed to waive the debtor's appearance at the § 341(a) meeting and to permit the niece to testify on her behalf. In a footnote, the court noted that, given the mandatory nature of the meeting, the court lacked the authority to outright excuse a debtor from the meeting, although in some circumstances, appearance through a representative will suffice.

Although there is some difference of opinion as to whether a debtor may file a case through a representative, the Fifth Circuit has held that one may, noting that there should be a failsafe to prevent abuse. *See U.S. v. Spurlin*, 664 F.3d 954, 959 (5th Cir. 2011). In light of the facts of this case, the court expressed concern "that extended family members may have goals here that predominate." *Id.* at 105. In discussing the potential for abuse, the court stated:

> Here, or in any case where there is use of a power of attorney by one to purportedly act for an individual debtor, this court believes there must be some meaningful scrutiny regarding the facts and circumstances surrounding the power of attorney—especially if it is not a spouse that possesses the power of attorney. This court has concerns about setting precedent or endorsing a protocol that allows a family member (here a niece)—who happens to be living in the Debtor's house with her own daughter–to file a bankruptcy case by proxy for another family member, such that the court, the trustee, and the creditors (to the extent they participate) never see the Debtor, never get to hear the Debtor answer questions under oath, never see the Debtor's signature on crucial documents, and may not be completely convinced of the veracity and integrity of the whole process. There needs to be a "failsafe to prevent abuse." There also needs to be some evidence that the Debtor was informed and believed that the bankruptcy filing was proper.

Id., at 104-105.

The court opined that the presence of a guardian ad litem would make the situation more palatable, given that the LPOA put the court in an awkward situation that is better suited for a probate or family court. The court denied the motion unless a supplemental motion was filed that included evidence as to the debtor's mental capacity at the time of her signing the LPOA, a declaration from debtor's counsel regarding what had been done to confirm the debtor was informed and consented to the bankruptcy filing and a statement clarifying who signed the bankruptcy paperwork, as the electronic documents included /s/ and the debtor's signature, but the LPOA was attached to each documents, and the Declaration for Electronic Filing was signed in handwriting by the niece for the debtor.

Practice Pointer: This case is worth reading in its entirety for its discussions of the possible issues related to POAs and its discussion of *Spurlin* as well. In *Spurlin*, only the husband met with the bankruptcy counsel prior to filing, and the husband had been given a general POA that purported to give him authority to act for the wife. Both debtors did appear at the § 341(a)

meeting, and both were convicted of various bankruptcy crimes under 18 U.S.C. § 152(1) and (3). In her defense, the wife argued she should not be convicted because she did not provide any of the information for the petition, but the court disagreed.

In re McGlohon, 2016 WL 552332, at *1 (Bankr. .E.D.N.C., 2016)
Chapter 13 trustee filed an objection to confirmation and motion to dismiss. At the hearing, the court expressed concern about the use of a "next friend" (the debtor's purported wife) to sign the debtor's petition for relief, and the debtor's lack of competence was raised in response. Despite those representations, no state court order regarding competence or motion to appoint a GAL accompanied the petition. Finding that the purported wife had failed to respond to communications from debtor's counsel, failed to attend the § 341(a) meeting on behalf of the debtor, and failed to make any showing that the case was necessary, or address issues related to whether she would benefit from the case or was knowledgeable about his finances, etc., the court could not find that she was the debtor's "next friend," acting in his best interests; nor could the court determine whether the debtor was competent or not. The court re-set the hearing and required that the debtor take various steps to establish the validity of the petition and to address the matters raised, and held open the objection to confirmation and motion to dismiss.

In re Moss, 239 B.R. 537 (Bankr. W.D. Mo. 1999)
This case is notable for being the first case that discussed in any detail the appointment of a GAL for a debtor to assist in the general administration of a case. The debtor filed for chapter 7 bankruptcy, followed by bizarre occurrences, including the filing of pleadings (apparently by the debtor) indicating that she had died, leading to the filing of criminal charges against her. The District Court later determined that she was unable to assist in her criminal defense. The trustee had filed a motion to appoint a GAL, which motion the court granted. The court noted that "[i]ncompetency, in the sense of mental incompetency, is not mentioned or defined in the Bankruptcy Code." *Moss*, 239 B.R. at 539. Only Rules 1016 and 7017 address incompetency. Because of the absence of federal law in this area, the court determined it appropriate to look to state law for guidance. Based on the facts before it, the court determined that the debtor was mentally incapable of aiding in or proceeding with the administration of her case, including an adversary proceeding filed against her. The court then determined that the appointment of a GAL would be necessary and appropriate, and since the Code itself does not specifically provide for the appointment of a GAL, looked to its equitable powers under 11 U.S.C. § 105 and found the appointment was necessary or appropriate to carry out the provisions of Title 11.

In re Myers, 350 B.R. 760 (Bankr. N.D. Ohio 2006)
Chapter 13 case in which wife motioned to become "next friend" of husband with dementia. Court looked to Black's Law Dictionary for definition of GAL, which states that it is usually a lawyer. Since the wife was not an attorney, the court was hesitant to appoint her as GAL for her husband. However, Rule 1004.1 provides that the court may make any other order to protect an incompetent debtor. The court held that the rule and § 105 together provide the court with the authority to appoint the debtor's wife as GAL in this case.

In re Palmer, No. 14-12801, 2015 Bankr. LEXIS 370 (Bankr. W.D. La. Feb. 4, 2015)
Debtor filed a chapter 13, and a motion was filed to waive the debtor's appearance at the confirmation hearing and § 341(a) meeting. The debtor had previously appointed her granddaughter as her POA, and it appeared to the court that the debtor was in a confused state. The chapter 13 trustee argued that § 341(a) meetings are under the exclusive control of the UST, and that bankruptcy courts do not have jurisdiction to waive a debtor's presence at the meeting. Noting the existence of authority which does hold that bankruptcy courts have the authority to waive a debtor's appearance at the meeting, the court ordered that a representative of the debtor attend the meeting and testify in the debtor's stead.

Note that, yet again, this is yet another court that was troubled by the documents filed in the case; here, the granddaughter testified that she had signed the petition, schedules and Chapter 13 plan, but all but one of the filed documents were filed with the electronic signature of the debtor; only the declaration regarding electronic filing reflected the POA's original signature. Consequently, the court required the debtor's attorney to re-attend the CM/ECF user training.

In re Petrano, No. 13-10052 (N.D. Fla. April 16, 2013)
The bankruptcy court entered an order directing the debtors to appear and show cause why a GAL should not be appointed for the debtor wife. In light of the debtor's actions at the hearing, and the assertion that she suffered from severe autism, the court announced at the hearing that it intended to appoint a GAL. However, after further review, the court noted that there was no statutory authority for making an initial finding or determination of whether or not a debtor is incompetent, and commented that bankruptcy courts are not designed or equipped to make such determinations. The court further noted that the debtor understood she had filed bankruptcy and that there was a fair amount of evidence to suggest the debtor understood some of the intricacies of the case. Although both debtors stated that the debtor husband could not and would not serve as GAL for the wife, the court concluded that even if the debtor were incompetent, it appeared that she was adequately represented by her husband. The court further noted that a finding of incompetency is not to be undertaken lightly, as the debtor could suffer significant consequences in other aspects of her life. Without a finding of incompetence by a court of competent jurisdiction, the court declined to proceed further with the motion, and stayed the case for a reasonable time to give the debtors time to seek an adjudication of the wife's competence.

In re Whitehead, No. 05-50136 (Bankr. M.D. N.C. July 22, 2005)
The chapter 7 trustee in this case filed a motion to sell the debtor's condominium. An attorney conducting a title search discovered that the debtor had been adjudicated an incompetent person approximately 4 months prior to her case being filed, and her son had been appointed guardian of the debtor. The trustee then filed a motion to appoint a GAL for the debtor in order to complete the sale. The court first addressed the difference between Rule 1004.1, which applies to a debtor that is incompetent pre-petition, and Rule 1016, which applies to incompetency after the filing. The court concluded that appointment of a guardian ad litem was appropriate pursuant to Rule 1004.1 and FRCP 17, and that pursuant to section 105 and those rules, appointed her son as her GAL for the limited purposes of making decisions in the administration of the bankruptcy case and executing documents necessary to effectuate the sale of the condominium.