

A Calm in the Storm: Leading Stressed Debtors through the Bankruptcy Process

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**Bankruptcy and Mentally Ill Debtors:
Are there Answers to the Ethical Dilemmas?**

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The link between mental illness and financial distress is well documented. As our nation faces the current fiscal condition, and the rates of unemployment, foreclosures and bankruptcy filings continue to soar in various sections of the United States, so too do the number of mental health disorders.¹ Often, mental illness impairs one's ability to obtain employment and sustain financial stability, forcing an individual into bankruptcy. In other instances, the stress or shame of filing bankruptcy triggers mental health problems that otherwise may have remained dormant, or has a severely negative effect on someone who already battles mental health issues. Regardless of the circumstances, there is a high percentage of mentally ill individuals in bankruptcy.² Consequently, there are now many attorneys who face the added challenge of representing such clients, or as a creditor's counsel, having to deal with a mentally ill debtor on a matter, many of whom are pro se.

Attorneys can become overwhelmed with the additional needs of a client exhibiting emotional and mental instability. Bankruptcy practitioners play a vital role in steering their clients through the rough waters of bankruptcy, but they far too often are asked to also wear the

¹ www.challenges-program.com; "The Link Between Mental Illness and Financial Hardship, Expert Weighs In" 1/28/2011. Dr. Jeffrey Hutman, Chief Clinical Officer at Challenges Treatment Center, discusses the connection between financial hardship and mental illness. The article states that the country is in the "throes of a national epidemic in mental illness that is compounded by fiscal depression." *Id.* The article refers to a government report that reflects that the American population, ages 18-25, had the highest level of mental illness at 30%. *Id.* The problems are exacerbated when those with mental illnesses are unable to seek treatment because they lack health insurance due to unemployment. *Id.*

² Justice A. Thomas Small, *Mental Illness and Bankruptcy, Overview 2010, 1*. The 2010 Overview is a manuscript that supplements and updates Judge Small's original article published in 2002 in the North Carolina State Bar Journal, *Mental Illness and Bankruptcy*, N.C. State Bar J. 26 (Fall 2002). The 2010 version of Justice Small's article is also included in the American Bankruptcy Institute materials for the Northeast Consumer Forum regarding the topic: "A Calm in the Storm: Leading Stressed Debtors Through the Bankruptcy Process." Judge Small is a United States Bankruptcy Judge for the Eastern District of North Carolina.

hat of psychologist, social worker, or marriage counselor. Although the role of an attorney is by nature to be that of a problem-solver, a lawyer should not undertake these other roles. Most attorneys are not equipped with the tools and lack the necessary medical and psychological training to manage a client's mental health issues. An attorney, who attempts to overstep her knowledge base and take on issues beyond the legal aspects of the case, can put herself and her client's interests in a dangerous position.

When representing a mentally ill client, many questions and ethical concerns are raised. Some of the potential inquiries include: Do you have the tools to effectively communicate with this individual and continue effective representation? What are your obligations to this individual if you perceive that your zealous representation is threatened? Are you charged with the responsibility of notifying someone about what you perceive to be warning signs that the debtor may be a danger to him or herself, or possibly others? If you do seek assistance from a family member or mental health professional, is this a violation of attorney-client confidentiality?

Other ethical inquiries also arise when dealing with a mentally impaired, pro se debtor who is not a client, but rather an adversary in a bankruptcy case. Attorneys representing parties whose interests are adverse to those of the debtor's, specifically attorneys who represent creditors, on occasion encounter pro se debtors who behave erratically or make troubling comments, indicative of a mental health issue. What, if any, ethical obligations do attorneys representing adverse parties have to a mentally ill, pro se litigant?

This article will examine these ethical dilemmas; however, there may not be any definitive answers to these queries. The ethical issues surrounding the legal representation of a

mentally ill client have been discussed in other articles, although the commentary is mostly in the context of criminal, elder, family, or disability rights law. Given our country's current economic climate and the rising rate of mental health disorders, considerable attention should be focused on the connection between an individual's mental health and their financial circumstances. In 2010, the United States saw bankruptcy filings increase by approximately 9%, taking us back to the rates last seen in 2005 before BAPCPA's changes to the Bankruptcy Code made it more difficult to file bankruptcy.³ As previously noted, economic difficulties and mental health disturbances often go hand in hand, complicating legal representation in the bankruptcy context. The challenges and ethical issues of representing a mentally ill client in bankruptcy or being in a case with a mentally ill debtor need to be more openly acknowledged and discussed to provide guidance to attorneys. Moreover, resources and educational programs should be offered to bankruptcy practitioners, specifically those representing individual debtors, to promote more effective representation of the growing number of mentally ill debtors.

The American Bar Association adopted Model Rule 1.14 of the Model Rules of Professional Conduct (the "Rule"), which addresses representation of a client with diminished capacity.⁴ The Rule was adopted to provide guidance to attorneys facing the challenges of

³ WSWS.org "[1.5 Million Americans Filed for Bankruptcy in 2010](#)" 1/6/2011

⁴ ABA-AMRPC Rule 1.14. The Model Rule states in its entirety:

Rule 1.14 Client with Diminished Capacity

(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

representing these types of clients. Section (a) of the Rule, defines the scope of the clients covered and the manner in which an attorney must treat said individuals.⁵ Under the Rule, an attorney’s responsibilities to a client do not change because the individual’s mental capacity is diminished.⁶ A lawyer must maintain, insofar as “reasonably possible” a “normal” relationship with the client.⁷ A client’s disability does not in any way diminish a lawyer’s obligation to treat that client with respect.⁸

A “normal client-lawyer relationship” is based on the theory that the lawyer can effectively communicate with the client⁹, and the client comprehends his or her options.¹⁰ An attorney is required to provide effective communication with the client and is also required to act primarily at the direction of the client to achieve the objectives of representation.¹¹ While a mental illness presents certain obstacles, the lawyer still needs to maintain a “normal”

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.

⁵ See ABA-AMRPC Rule 1.14 (a).

⁶ See *Id.*

⁷ *Id.*

⁸ See Comment [2] to ABA-AMRPC Rule 1.14.

⁹ *Id.*; See also ABA-AMRPC Rule 1.4 (offering guidance regarding communication with a client).

¹⁰ See ABA-AMRPC Rule 1.2(a) (“[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.”)

¹¹ See ABA-AMRPC Rule 1.4; ABA-AMRPC Rule 1.2.

relationship and make special efforts to accommodate the needs of the client and make certain that the client understands the consequences of his or her own decisions.¹² Maintaining a “normal client-lawyer relationship” may require the attorney to adjust his communications and means of interacting with a client, but ultimately the attorney must ensure that the client understands the legal issues so that the client can make meaningful decisions.¹³ The attorney may not substitute his or her own judgment. Adhering to this philosophy, however, becomes a challenge when the attorney starts to question if the client is capable of making informed decisions, and if allowed to make his or her own choices, will this cause injury to the client, and at a minimum, fail to achieve the objectives of the representation.

While acknowledging the rights of a client with diminished mental capacity and requiring lawyers to maintain a traditional attorney-client relationship, the Rule does not offer straightforward guidelines to attorneys. The scope of the Rule was expanded in 2002; however it still has shortcomings.¹⁴ The threshold issue is for the attorney to determine if the client is impaired, be it from a myriad of mental illnesses. The general principle of the Rule is that impairment is “[w]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished.”¹⁵ A lawyer takes on the responsibility of discerning when a client’s disability actually triggers compliance with the Rule. The issue of one’s capacity

¹² ABA-AMRPC Rule 1.14(a).

¹³ Id.; See also ABA-AMRPC Rule 1.2; ABA-AMRPC Rule 1.4.

¹⁴ The Ethics 2000 Commission was formed in 1997 to review the Model Rules of Professional Conduct. It submitted a report to the House of Delegates at the August 2001 Annual Meeting and the changes to the Model Rules as amended during the debate were final at the end of the February 2002 Midyear Meeting. The Commission recommended additional guidance for lawyers regarding protective action lawyers can take and offered additional detail on the situations that might trigger the lawyer to consult family members, protective agencies, or other entities that have the authority to protect the client.

¹⁵ ABA-AMRPC Rule 1.14(a).

becomes a flexible concept based on the attorney's perceptions. In order to make that assessment however, a lawyer has to be educated on the characteristics and warning signs of mental illnesses. Those illnesses most prevalent in bankruptcy cases are major depression, substance abuse, and bipolar disorder.¹⁶ As noted above, most attorneys lack the necessary training to identify the characteristics of these diseases, let alone how to work with these disorders and still maintain the objectives of representation. In these instances, it would be extremely beneficial to both practitioners, and their clients, if there were more educational and instructive programs offered to bankruptcy lawyers regarding the characteristics of and tools for coping with mental health issues, specifically those illnesses most often seen in the bankruptcy context.

When a lawyer reasonably believes that the client is at risk of substantial harm, whether physical or financial, the Rule does offer options.¹⁷ This section of the Rule was greatly expanded in 2002 and offers a spectrum of alternatives to attorneys.¹⁸ The Rule provides guidance as to those "protective actions" that an attorney can undertake to carry out representation of an at-risk client with diminished capacity, short of seeking a guardian, which is typically deemed appropriate only in extreme cases.¹⁹ The acceptable actions under the Rule include "consulting with individuals or entities that have the ability to take action to protect the client" and, when appropriate, "seeking . . . appointment of a guardian ad litem, conservator or

¹⁶ See Justice A. Thomas Small, *Mental Illness and Bankruptcy, Overview 2010*, 1.

¹⁷ See ABA-AMRPC Rule 1.14(b).

¹⁸ See Ethics 2000 Commission Report's explanations regarding revisions to ABA-AMRPC Rule 1.14(b).

¹⁹ ABA-AMRPC Rule 1.14(b).

guardian.”²⁰ The comments to the Rule are more instructive and offer significantly more assistance to attorneys as to what protective measures may be taken, including: “consulting family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult protective agencies or other individuals or entities that have the ability to protect the client.”²¹ The Rule does not, however, give an attorney open-ended discretion to substitute his or her own judgment for that of the client and an attorney may only take actions that are deemed “reasonably necessary” to protect the client from harm.²² In seeking any protective action, the attorney must remain cognizant of the client’s wishes, best interests and “respecting the client’s family and social connections.”²³ The ethical tenets of loyalty and confidentiality intrinsic to the attorney-client relationship must also be preserved.²⁴ Further, Section (c) adds a limitation to the protective action standard.²⁵ A lawyer may not disclose a client’s diminished capacity, unless authorized by the client to do so, and any information is protected by Model Rule 1.6.²⁶ While such disclosure could adversely

²⁰ Id.

²¹ Comment [5] to ABA-AMRPC Rule 1.14 regarding “Taking Protective Action.”

²² ABA-AMRPC Rule 1.14(b).

²³ Comment [5] to ABA-AMRPC Rule 1.14 regarding “Taking Protective Action.”

²⁴ See Comment [5] to ABA-AMRPC Rule 1.14 regarding “Taking Protective Action.”

²⁵ See ABA-AMRPC Rule 1.14(c).

²⁶ See ABA-AMRPC Rule 1.14(c); Comment [8] to ABA-AMRPC Rule 1.14(b) regarding “Disclosure of Client’s Condition.”

impact the client's interests, the lawyer is "impliedly authorized to make the necessary disclosures," when taking any protective actions pursuant to Section (b) of the Rule only.²⁷

The comments to the Rule provide some explicit direction as to what constitutes protective action, but the ABA seems to be leaving it within the hands of the lawyers to broadly interpret what constitutes support from "professional services" or "adult-protective agencies."²⁸ Under this flexible approach, a bankruptcy practitioner can reach out to those more qualified in the area of mental health disorders when she believes her client to be at risk of financial physical harm. An expert in the mental health field will be able to diagnose the symptoms presented and advise how to effectively communicate with the client to ensure that the attorney can continue representation. An attorney should not ignore the situation nor turn a blind eye to a client's mental health issues. Opting to take no action is not an alternative set forth in the Rule and is professionally irresponsible. An attorney may be reluctant to seek assistance from a mental health professional or other diagnostician due to perceived inconvenience or the concern that it will reflect badly on the attorney. These reasons should not thwart representation of a mentally ill client and the lawyer's ethical obligations to the individual.

It should be noted that the Rule is also silent as to withdrawal of representation. Withdrawing from the representation of a client with diminished capacity is typically not favored.²⁹ Although withdrawal may be an option if the attorney-client relationship has deteriorated to the point where representation cannot persist, the Rule encourages lawyers to

²⁷ ABA-AMRPC Rule 1.14(c).

²⁸ See Comment [5] to ABA-AMRPC Rule 1.14 regarding "Taking Protective Action."

²⁹ See e.g. ABA Ethics Op. 96-404 (1996) (withdrawing representation may leave disabled client vulnerable at time when client at greatest need of assistance).

carry through with representing the client. In the bankruptcy context, withdrawal can trigger further problems particularly for the court and the debtor. Withdrawal of appearance in these cases leaves mentally ill debtors to navigate the complex world of bankruptcy on their own, leading to unsuccessful cases, dismissals, repeat filings, skeletal petitions, and ultimately more dead-end cases stagnating in the bankruptcy court docket.

While the Rule offers guidelines for allowable actions when the client is at risk for “substantial harm,” it offers little guidance for non-emergency situations when a lawyer is uncertain that a normal attorney-client relationship can be maintained, or believes that the disability is so severe that a normal relationship cannot exist.³⁰ In these situations, the options are not as clear to attorneys. Rule 1.14(b) provides flexibility to attorneys. However, to interpret it so broadly to include taking protective action in cases where the client is not at risk for substantial harm seems to overreach the Rule’s intent.³¹ Again, an ethical dilemma arises that may not have a perfect response.

Those who represent creditors have on occasion appeared in a case with a mentally ill, pro se debtor. As noted above, financial distress often triggers mental illness or exacerbates a pre-existing condition. Stress levels and mental health issues are heightened when an individual is facing a motion for relief from the automatic stay that could result in a foreclosure of his or her family home. What if in this context, the debtor displays erratic behavior or makes troubling statements to creditor’s counsel that indicate the debtor may be a danger to himself or herself, or possibly others? Model Rule 1.14 offers no guidance as it is instructive only in situations where

³⁰ ABA-AMRPC Rule 1.14(b).

³¹ See Ethics 2000 Commission Report’s explanations regarding revisions to ABA-AMRPC Rule 1.14(b) (“The Commission believes the recommended change [to Rule 1.14(b)] offers the lawyer flexibility when a client faces substantial risk of harm”)

an attorney represents a mentally ill client.³² Comment 9 of the Rule suggests that “where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer.”³³ The Comment further states that an attorney should not act unless the lawyer “reasonably believes” there is no other lawyer or agent available to assist the individuals in danger.³⁴ In such circumstances, action should only be taken “to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm.”³⁵ Further, “[a] lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client”³⁶

These guidelines are not however, applicable when the attorney is already representing an adverse party. In such instances, the attorney can look to Model Rule 4.3 which addresses interactions dealing with unrepresented people.³⁷ Per Model Rule 4.3, when a lawyer knows that

³² See ABA-AMRPC Rule 1.14(b).

³³ Comment [9] to ABA-AMRPC Rule 1.14(b) regarding “Emergency Legal Assistance.”

³⁴ *Id.*

³⁵ *Id.*

³⁶ Comment [10] to ABA-AMRPC Rule 1.14(b) regarding “Emergency Legal Assistance.”

³⁷ See ABA-AMRPC Rule 4.3. Model Rule 4.3 states in its entirety:

Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable

the interests of the unrepresented person are in conflict with those of his client, the only legal advice he can offer is the advice to obtain counsel.³⁸ Model Rule 4.3 does not prohibit the parties from negotiating terms of a settlement,³⁹ such as a stipulation agreement in bankruptcy. But, the rule does not solve the ethical dilemma: If a mentally impaired, pro se debtor is making threats to cause harm to himself if relief from stay is granted and foreclosure is imminent, from an ethical perspective, what can or should creditor's counsel do?

There may not be a resolution to this ethical quandary. An attorney may feel an obligation to a personal moral code to notify a family member, the authorities, the court, or the chapter 7 or chapter 13 trustees of a dangerous situation. In these cases, an attorney's loyalty lies with his or her client, the creditor, but there may be a perceived obligation to the court to alert someone of the potential emergency.

The questions raised in this scenario, much like the other ethical dilemmas explored in this article, do not have definitive resolutions. Those in bankruptcy are inherently facing economic crisis, and this type of stressor naturally leads to mental and emotional distress. Effective representation and communication with a client becomes more difficult when the normal stresses intrinsic to bankruptcy are further complicated when representing a client you perceive to be mentally ill. As the number of bankruptcies and those with mental health issues rise, so too are the number of attorneys representing and dealing with mentally ill debtors. Model Rule 1.14 and its comments offer some assistance; however there are limits to its

efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

³⁸ See Id.

³⁹ See Comment [2] to ABA-AMRPC Rule 4.3.

guidance and it is not applicable to all scenarios involving clients with mental illness. A bankruptcy attorney should act on the side of caution to maintain a traditional attorney-client relationship and avoid the temptation to substitute their judgment for that of the client. But, most attorneys lack the necessary mental health knowledge and skills to effectively handle mentally ill debtors. Attorneys should attempt to avoid withdrawing from representation, an option not set forth in Model Rule 1.14 nor encouraged by the ABA.

Particularly in the bankruptcy realm, withdrawal of representation of a mentally ill debtor should be avoided to control case dismissals that may lead to repetitive filings of unsuccessful, skeletal cases by pro se debtors who are unable to find attorneys to represent them in bankruptcy because of their mental health conditions. Until lawyers are educated on the characteristics associated with mental illnesses and the communication needs of these clients, attorneys may not be equipped to provide adequate representation. Recognizing that mental illness is often an issue in a bankruptcy case, bankruptcy courts and local bar associations should offer more training and educational programs for bankruptcy practitioners. The courts and attorneys need to be cognizant of the growing number of mentally ill debtors in bankruptcy and open minded to ways to assist these individuals and the attorneys representing them. In addition to gaining more knowledge on this subject, we as bankruptcy attorneys should continue to discuss the ethical issues of representing mentally ill clients or dealing with a mentally ill debtor as an adversary. Continued thought and exploration of these issues may assist in gaining enlightenment as to possible resolutions to the ethical quandaries, and discovering new tactics to handle these cases more effectively.

MENTAL ILLNESS AND BANKRUPTCY
Overview 2010

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One out of every five Americans will, in their lifetime, suffer from a mental illness. Many will suffer from severely disabling mental disorders such as schizophrenia, major depression and bipolar disorder. The percentage of individuals in bankruptcy who suffer from mental illness may be even higher. “Poverty is depressing, and depression, leading as it does to dysfunction and isolation, is impoverishing.” Andrew Solomon, *Case Study: The Depressed Poor, Location: Washington D.C., A Cure for Poverty*, The New York Times Magazine 112 (May 6, 2001) at 114.

These materials discuss various aspects of mental illness that arise in bankruptcy cases: The areas of bankruptcy law in which a debtor’s mental illness is most often a factor, problems that counsel face in presenting a mental illness defense, the kinds of evidence on which bankruptcy courts rely in evaluating a debtor’s mental condition, and ways in which bankruptcy courts have dealt with debtors or litigants who because of mental illness are abusive and disruptive. Also included is information about the Mental Health Program in the Bankruptcy Court for the Eastern District of North Carolina.

Much of the material in this manuscript was originally published in 2002 in an article in the North Carolina State Bar Journal, though it has been updated through 2010 to include recent cases and to reflect the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). See A. Thomas Small, *Mental Illness and Bankruptcy*, N.C. State Bar J. 26 (Fall 2002).

This topic is made all the more timely by the ongoing downturn in the economy. Regardless of whether it propels a person into bankruptcy, trying economic times can create significant stress in virtually anyone who opens a newspaper, and thus have a particularly acute effect on someone who is mentally ill or has other mental health issues. It helps, then, for lawyers, given that we are by nature of our profession often involved in the most trying times of other people’s lives, to know something about mental illness and the law, bankruptcy included. Knowing more about it may enable you to provide crucial support and help for a client, a family member or even for yourself.

I. Mental Illnesses Most Frequently Encountered in Bankruptcy Cases

Major depression, bipolar disorder, and substance abuse are the mental illnesses that are most often seen in bankruptcy cases. Attention deficit hyperactivity disorder (“ADHD”), post-traumatic stress disorder (“PTSD”), dementia, schizophrenia, Asperger’s Syndrome and certain personality disorders can also be considerations.

Major depression² is chronic, but modern treatment methods make it possible to reduce its symptoms for most who suffer from this disorder. Depression can be treated through psychotherapy and medication, hospitalization, and electroconvulsive therapy for those who do not respond to other treatments. Twice as many women as men suffer from major depression.

² A major depression is a sustained period (at least two weeks) during which an individual experiences a depressed mood or a loss of interest or pleasure in most or all activities. During this period the individual may also exhibit other symptoms of depression. According to the *Diagnostic and Statistical Manual of Mental Disorders: Fourth Edition* (“DSM-IV”), as cited in the Federal Judicial Center’s *Handbook for Working with Mentally Disordered Defendants and Offenders* (FJC Revised March 1999): “For a diagnosis of major depression, at least five of the following symptoms must have been present every day, or almost all day, over a two-week period. These symptoms will represent a change from previous functioning.” The *Handbook* further provides:

A depressed mood, loss of interest or pleasure in usual activities, or both will be among the symptoms, which consist of:

- Depressed mood
- Disinterest or lack of enjoyment in usual activities
- Significant weight loss or weight gain when not dieting
- Insomnia or increased need for sleep (hypersomnia)
- Psychomotor agitation or psychomotor retardation
- Fatigue or loss of energy
- Feelings of worthlessness or excessive or inappropriate guilt
- Diminished concentration or ability to think clearly
- Recurrent thoughts of death, or suicidal thoughts, attempts, or plans.

FJC Handbook at 21.

The types of treatment for bipolar disorder³ are similar to those for depression, although the particular medications used differ. The prognosis for people with bipolar disorder is worse than for those with major depression, and treatment compliance is a significant problem because people who are manic frequently do not choose to medicate away an exhilarating state, nor are they likely to be realistic in seeing their behavior as abnormal. The situation thus becomes extremely complicated for both the person with mental illness, and for those who are interacting with them – their families, friends, employers, and the courts. Bipolar disorder is equally prevalent in men and women.

Many cases involving mental illness also involve some kind of substance abuse as well, which makes the problem worse.

³ People with bipolar disorders “suffer one or more manic episodes, usually accompanied by one or more major depressive episodes. With manic-depressive illness, mood swings are sometimes separated by periods of normal mood. Bipolar disorder affects an estimated 0.4% to 1.2% of the adult population.” *FJC Handbook* at 23. According to the DSM-IV, the diagnostic criteria for the depressive episode are the same as for major depressive disorder, while manic episodes consist of:

- A distinct period of abnormally and persistently elevated, expansive, or irritable mood lasting for at least one week has occurred.
- During a period of mood disturbance, at least three of the following symptoms have persisted and have been present to a significant degree:
 - grandiosity, inflated self-esteem;
 - decreased need for sleep;
 - increased talkativeness;
 - flight of ideas or racing thoughts;
 - distractibility, i.e., attention is too easily drawn to unimportant or irrelevant external stimuli;
 - increase in goal-oriented activity (either socially, at work, at school, or sexually), or psychomotor agitation; or
 - excessive involvement in pleasurable activities, with a lack of concern for the high potential for painful consequences, such as buying sprees, gambling, foolish business ventures, reckless driving, or casual sex.
- Mood disturbance is severe enough to cause marked impairment in occupational or social functioning or to necessitate hospitalization to prevent harm to oneself or to others.

FJC Handbook at 23.

II. When Mental Illness is an Issue in Bankruptcy Cases

Not infrequently, the issue is how a debtor's depression or bipolar disorder affects the debtor's ability to pay debts. Mental illness or depression may impair a debtor's ability to find or keep a job, which in turn affects the debtor's ability to make payments in a chapter 13 plan, or to continue the payments necessary to reaffirm a debt for an automobile. Creditors may be justifiably skeptical of a debtor's ability to keep up with required payments. Conversely, a debtor may assert an inability to pay. Both chronic depression and mental illness frequently are factors that prompt a debtor to claim that a student loan debt, which is nondischargeable, should nonetheless be discharged because repayment of the loan imposes an undue hardship on the debtor or the debtor's dependents.

A. Ability to Pay

A debtor under chapter 13 must be an individual with regular income and, pursuant to the current debt limitations in the Code, must owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$336,900 and noncontingent, liquidated secured debts of less than \$1,010,650. 11 U.S.C. § 109(e). If an individual does not have regular income, the individual may not be a chapter 13 debtor.

In In re Smith, 43 B.R. 319 (Bankr. E.D.N.C. 1984), a creditor objected to the debtor's fourth chapter 13 case, arguing that the case had been filed in bad faith. The debtor's prior cases had been dismissed for failure to make plan payments. The debtor contended that his failure to make payments was caused by his inability to hold a job due to post-traumatic stress disorder related to his military service in Vietnam. The debtor was receiving therapy, and he convinced the bankruptcy court that he had a good prospect of retaining his new employment with the U.S. Postal Service. The creditor's objection to confirmation was denied. The debtor in fact was able to retain his employment and was, when the *Bar Journal* article was published in 2002, still employed by the postal service – 18 years later.

A creditor challenging a debtor's ability to pay on the basis of the debtor's mental illness is atypical. What happens on a regular basis is the reverse: The debtor asserts that mental illness impedes the debtor's earning capacity, and makes the debtor unable to repay debts. This issue typically arises in connection with student loans, but may be a factor in other contexts as well.

In In re Oliver, 350 B.R. 294 (Bankr. W.D. Tex. 2006), for example, the case was before the court on a motion to dismiss for abuse pursuant to § 707(b). The debtor testified

that he believed his income would likely decrease, that he lived a great distance from work, and that he suffered from depression, anxiety and bipolar disorder, for which he was required to take medications. There was no other testimony or evidence from any physicians regarding these conditions, or that medications had been prescribed. Because the debtor had been gainfully employed during the 15 years he said he had suffered from those conditions, the court did not find them to be sufficient to rebut presumption of abuse. The court found that notwithstanding his claim of mental illness, he had the ability to pay his debts, and his case was dismissed.

B. Dischargeability of Student Loans

Debtors often assert that mental illness precludes repayment of their student loans. Student loans are not discharged in chapter 7, chapter 11, chapter 12 or chapter 13 cases unless excepting the debt from discharge “will impose an undue hardship on the debtor and the debtor’s dependents.” See 11 U.S.C. §§ 523(a)(8), 727(b), 1141(d)(2), 1228(a)(2), and 1328(a)(2). Because mental illness and the inability to repay a student loan often intersect, this is a busy area of law.

The test for determining “undue hardship” under § 523(a)(8) requires a three-part showing: (1) that the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period for the student loans; and (3) that the debtor has made good faith efforts to repay the loans. Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

The Brunner test applies in the Fourth Circuit, and a recent case from the Eastern District of North Carolina discussed how “developments in this circuit have raised the Brunner bar even higher, for all debtors”:

Section 523(a)(8) of the Bankruptcy Code makes it extremely difficult for debtors to discharge student loans. “Debtors receive valuable benefits from congressionally authorized loans, but Congress in turn requires loan recipients to repay them in all but the most dire circumstances.” Educational Credit Mgmt. Corp. v. Frushour (In re Frushour), 433 F.3d 393, 399 (4th Cir. 2005) (citing Pa. Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 306 (3rd Cir. 1995)). Debtors must show “exceptional circumstances,” and must prove that “they are in the *limited class* of debtors for which § 523(a)(8) is meant to allow discharge.” Educational Credit Mgmt. Corp. v. Mosko (In re Mosko), 515 F.3d 319, 324 (4th Cir. 2008)

(citing Frushour, 433 F.3d at 404) (emphasis added in Mosko). “Congress sought to ensure repayment of educational loans through its use of the term ‘undue’ and the courts are obligated to follow its imperative.” Frushour, 433 F.3d at 396. A “garden-variety hardship” is an “insufficient excuse for a discharge of student loans.” Frushour, 433 F.3d at 399 (quoting Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001)).

* * * *

The second Brunner prong is often the most difficult of the three prongs to prove, and requires debtors to show that “additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of their student loans.” Mosko, 515 F.3d at 323. Courts have described this factor as requiring “a total incapacity . . . in the future to pay [the debtor’s] debts for reasons not within [the debtor’s] control.” In re Gerhardt, 348 F.3d 89, 92 (5th Cir. 2003) (quoting Faish, 72 F.3d at 307). The Court of Appeals for the Fourth Circuit has observed that the second Brunner prong presents “a demanding requirement,’ . . . and necessitates that a ‘certainty of hopelessness’ exists that the debtor will not be able to repay the student loans.” Frushour, 433 F.3d at 401 (quoting Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful), 267 F.3d 324, 328 (3rd Cir. 2001)). According to the Frushour court, “[o]nly a debtor with rare circumstances will satisfy this factor.” Frushour, 433 F.3d at 401.

In re Vujovic, 388 B.R. 684, 687, 690-91 (Bankr. E.D.N.C. 2008).

Health Education Assistance Loans (“HEAL loans”) are not dischargeable unless the bankruptcy court finds that nondischargeability is “unconscionable.” 42 U.S.C. § 294(g). “Unconscionability” is a higher standard than “undue hardship” under 11 U.S.C. § 523(a) (8). U.S. Dept. of Health & Human Servs. v. Smitley, 347 F.3d 109 (4th Cir. 2003).

1. Student Loans Discharged

Though the bar is high, there are many cases in which bankruptcy courts have found that a debtor’s depression or bipolar disorder prevented the debtor from being fully employed and the debtor’s student loans and HEAL loans were discharged. Some examples follow.

In In re Reynolds, 425 F.3d 526 (8th Cir. 2005), cert. denied, 549 U.S. 811, 127 S. Ct. 46 (2006), the debtor suffered from depression, panic disorder and personality disorder.

Expert testimony established that the debtor's \$142,000 student loan debt was a significant block to the debtor's recovery and that eliminating the debt might mitigate symptoms and reduce the possibility of recurrence. The appellate court held that the bankruptcy court could consider the non-pecuniary effects of continuing liability, including its effect on her mental health, as well as the effect of the debtor's mental health on her earnings. The debt was discharged pursuant to 11 U.S.C. § 523(a)(8).

In In re Jara, 2006 WL 2806556 (Bankr. D.N.J. 2006), the debtor's student loan was discharged, after the Brunner analysis, because the debtor's chronic mental illness (bipolar disorder, ADHD, and debilitating physical side effects from medications) prevented her from maintaining a minimum standard of living and was likely to persist into the future. The debtor satisfied the good faith requirement even though she never repaid any of the student loans because when they first became due she was in the throes of mental illness and was unable, through no fault of her own, to pay. Her situation did improve, but there had never been a time when she could pay the loan and also pay basic expenses and child support. All of this, taken together, warranted discharge of the student loans.

In In re Renville, 2006 WL 3206126 (D. Mont. 2006), upon *de novo* review of the record, the district court affirmed the bankruptcy court's decision discharging the debtor from repaying student loans of \$103,000 incurred after attending both the University of Montana and Yale University. The debtor suffered from PTSD, adult ADHD, major depressive disorder, and recurrent moderate and poly substance abuse, and had lost an eye in a suicide attempt while a teenager. The disorders stemmed in part from "horrific" abuse the debtor and his brother endured as children. The debtor's brother, after incurring a large tax debt, committed suicide, and the debtor also had suicidal thoughts. Both courts considered the debtor's mental illness to be extremely debilitating and of lasting duration, and concluded that the debtor satisfied all three Brunner prongs.

In Educational Credit Mgmt. Corp v. Polleys, 356 F.3d 1302 (10th Cir. 2004), the debtor suffered from debilitating emotional problems that were out of her control. The medication necessary for the debtor to function affected her memory and communication skills negatively, so her condition prevented the debtor from holding a job and affected her ability to earn more than a nominal living. The appellate court agreed with the bankruptcy court that her condition was likely to persist into the foreseeable future, even with a modest improvement in her wages, and her student loans were discharged.

For other bankruptcy court decisions discharging the student loan debts of debtors with mental illnesses, see In re Jackson, 2007 WL 2295585 (Bankr. S.D.N.Y. 2007) (bipolar disorder); In re Morse, 345 B.R. 668 (Bankr. N.D. Iowa 2006) (debtor's lengthy history of mental health problems, including bipolar disorder and major depression with frequent

hospitalizations, had adverse effect on debtor's ability to maintain employment, and stress from loans could trigger a downturn in debtor's mental health); In re Davis, 336 B.R. 604 (Bankr. W.D.N.Y. 2006) (debtor's depression contributed to inability to accept more challenging employment), rev'd, 373 B.R. 241 (W.D.N.Y. 2007) (concluding that evidence did not support finding that debtor's depression affected her ability to earn a living); In re Balm, 333 B.R. 443 (Bankr. N.D. Iowa 2005) (debtor presented expert testimony regarding her depression, anxiety, sleep disturbances, and physical problems that affected her ability to be employed); In re Quarles, 2004 WL 2191608 (Bankr. D. Kan. 2004) (debtor suffered from bipolar disorder, dissociative disorder, and PTSD; severity of illness and debtor's inability to engage in meaningful employment over any significant period of time persuaded court that debtor's failure to take part in income contingent repayment plan was not bad faith under those facts); In re Brooks, (student loan discharged where debtor suffered from alcohol dependence, depression, and post traumatic stress syndrome).

For additional cases, see In re Porrazzo, 307 B.R. 345 (Bankr. D. Conn. 2004) (debtor diagnosed as suffering from Asperger's Syndrome, a type of autism, was permanently disabled and unemployable, and entitled to undue hardship discharge of his student loan debt); In re Strand, 298 B.R. 367 (Bankr. D. Minn. 2003) (debtor suffered from multiple medical conditions including depression and PTSD resulting from his service in Vietnam; job limitations were imposed by his inability to cope with stressful settings or situations and social conflict); In re Turner, 2003 WL 21639407 (Bankr. D.N.H. 2003) (debtor presented considerable evidence of a long history of medical and mental health problems, including ADD and depression); In re Juglans, 2003 WL 23807971 (Bankr. D. Kan. 2003) (where debtor was not filling her prescriptions for antidepressants or going to therapy to treat her clinical depression due to a lack of funds, court found that any improvement in situation should be used to meet these basic necessities); In re Boots, 2003 WL 1878085 (Bankr. D.N.H. 2003) (debtor presented evidence that her depression was chronic, profound and intractable).

Older cases, cited in the Fall 2002 *N.C. Bar Journal* article, include: Lohr v. Sallie Mae (In re Lohr), 252 B.R. 84 (Bankr. E.D. Va. 2000) (partial discharge of student loans granted under § 523(a)(8) where physical and mental health issues caused significant medical costs); Anelli v. Sallie Mae Servicing Corp. (In re Anelli), 2000 WL 33311723 (Bankr. D. Mass. 2000) (series of illnesses, including depression, constitute undue hardship under § 523(a)(8)); Doherty v. United Student Aid Funds, Inc. (In re Doherty), 219 B.R. 665 (Bankr. W.D.N.Y. 1998) (debtor's bipolar disorder was factor in determining undue hardship under § 523(a)(8)); Binder v. United States Dep't of Educ. (In re Binder), 54 B.R. 736 (Bankr. D.N.D. 1985) (debtor's mental and emotional problems, including bipolar disorder (which could be controlled through treatment, although debtor refused medication),

prevented debtor from obtaining and keeping employment; student loan discharged under § 523(a)(8)).

See also Meling v. United States Dep't of Educ. (In re Meling), 2001 WL 670832 (Bankr. N.D. Iowa 2001) (long history of bipolar disorder resulted in inability to maintain more than part-time, low stress employment; student loan discharged under § 523(a)(8)), aff'd, 2002 WL 32107248 (N.D Iowa 2002); Kline v. United States (In re Kline), 155 B.R. 762 (Bankr. W.D. Mo. 1993) (debtor's chronic depression, panic and anxiety attacks were factors in determining that HEAL loan was dischargeable); In re Dyer, 40 B.R. 872 (Bankr. E.D. Tenn. 1984) (student loans discharged based on debtor's anxiety, agoraphobia, and panic attacks); In re Nichols, 15 B.R. 208 (Bankr. D. Me. 1981) (student loans discharged based on debtor's unspecified psychiatric disorders and related alcohol problems).

2. Student Loans Partially Discharged

In In re Stupka, 302 B.R. 236 (Bankr. N.D. Ohio 2003), the debtor suffered from bipolar disorder that was becoming progressively worse, even with medication. A report by a psychiatrist was admitted and reflected the serious nature of debtor's bipolar disorder. The court found that the debtor met the first and second elements of Brunner, but not the third, and entered a partial discharge. The Sixth Circuit later ruled that a partial discharge is only allowed where all three factors for undue hardship are shown. Miller v. Pennsylvania Higher Educ. Assist. Agency (In re Miller), 377 F.3d 616 (6th Cir. 2004)).

The Bankruptcy Code does not explicitly authorize the partial discharge of student loans, but partial discharge is allowed in most courts. See In re Ekenasi, 325 F.3d 541, 549-50 (4th Cir. 2003); Hafner v. Sallie Mae Servicing Corp., 303 B.R. 351 (Bankr. S.D. Ohio 2003) (the ability of debtor diagnosed with Asperger's syndrome and related anxiety, social avoidance, anger, and behavioral control problems, and depression, was impaired to the point that it precluded him from maintaining employment even at simple, low stress, repetitive jobs; student loans partially discharged).

3. Student Loans Not Discharged

There are many cases where a debtor's mental illness defense was not successful and the student loans and HEAL loans were not discharged. Though there are fewer of these cases included in the materials, in fact they far outnumber the cases in which student loans are discharged. As the introduction to this section makes clear, the standard for discharge of a student loan is extremely high, and appellate courts are often disinclined to discharge student loans unless the debtor clears the necessary hurdles with room to spare.

All student loan discharge cases require proof that bases warranting a discharge of the loan are likely to persist for a significant portion of the loan repayment period, which may stretch over many years. In some cases the parallel issue becomes the length of time the mental illness is likely to last, which also can be extremely difficult to establish. In In re Nash, 446 F.3d 188 (1st Cir. 2006), the debtor's student loans not discharged where the debtor failed to show that disability based on bipolar disorder II (major depressive episodes alternating with hypomania rather than full mania) was likely to continue for the requisite time into the future.

Similarly, in In re Tirch, 409 F.3d 677 (6th Cir. 2005), the debtor failed to show that physical ailments, including ADD, chronic anxiety and depression, precluded her return to work and would persist for a significant portion of the loan prepayment period. In In re Burton, 339 B.R. 856 (Bankr. E.D. Va. 2006), the debtor's bipolar disorder, personality disorder, and drug problem for which debtor received social security disability and had over 30 hospitalizations were sufficient to prove the first prong of the Brunner test, but debtor did not present evidence other than his own testimony of how long the medical condition would impact his ability to sustain future long-term employment. Some expert testimony or corroborating evidence was required, and because the second element was not met, the student loans were not discharged.

For additional cases involving mental illness in which the debtors' student loans were not discharged, see In re Wolde-Giorgis, 2005 WL 756103 (9th Cir. 2005) (debtor failed to satisfy second prong of Brunner test to discharge student loans; no evidence presented that the alleged mental health conditions precluded employment); In re Simmons, 334 B.R. 632 (Bankr. C.D. Ill. 2005) (debtor and witnesses provided evidence of debtor's current depression and anxiety regarding his financial condition, but he did not appear to have any true physical, mental or legal disability that was likely to impair his future, so second prong of Brunner not met; court allowed a four-year deferral with an opportunity to have the case revisited); In re N.M., 325 B.R. 507 (Bankr. W.D.N.Y. 2005) (mental health of debtor diagnosed with depression with suicidal thoughts might benefit if her student loans were discharged, but that benefit is an insufficient basis on which to find an undue hardship, and debtor clearly had the ability to make the payments while meeting a minimum standard of living).

See also In re Perkins, 318 B.R. 300 (Bankr. M.D.N.C. 2004) (where debtor's anxiety and depression did not impair her ability to work, only her ability to pass the bar exam and to make full use of her law school education by practicing as an attorney, they could not be considered "additional circumstances" as required by the second prong of Brunner); In re Lowe, 321 B.R. 852 (Bankr. N.D. Ohio 2004) (debtor suffered from bipolar disorder and several physical impairments, but bankruptcy court held that a nexus between

the medical condition and adverse effect on income was not shown; some corroborative evidence required); In re Pobiner, 309 B.R. 405 (Bankr. E.D.N.Y. 2004) (even if debtor suffered from ADHD, he functioned sufficiently well to prosper in his construction business).

C. Actions and Errors Attributed to Mental Illness

1. Mental Illness as Cause of Debtors' Behavior and Errors in Judgment

Though it is sometimes asserted as the cause of a debtor's behavior, courts are unlikely to excuse behavior – especially that which causes harm to others – on grounds of mental illness unless the debtor's evidence is compelling. In In re Bressler, 321 B.R. 412 (Bankr. E.D. Mich. 2005), for example, the debtor's vague, unsubstantiated statements that he lost about \$700,000 due to his gambling problem were inadequate to explain the loss of his assets for purposes of § 727(a)(5). The debtor's explanation that gamblers are “not the types of people who maintain books and records” did not avoid a judgment denying discharge under § 727(a)(3).

See also In re Duffy, 331 B.R. 137 (Bankr. S.D.N.Y. 2005) (debtor suffered from depression, emotional distress and obsessive-compulsive disorder that rendered him incapable of defending against charges of medical misconduct and thereafter successfully pursuing a new career; property settlement debt discharged pursuant to § 523(a)(15)); In re Edie, 314 B.R. 6 (Bankr. D. Utah 2004) (court found willful and malicious injury where debtor set fire to her boyfriend's home and failed to provide evidence to support her claim of mental illness); Dutreix v. Fontenot (In re Fontenot), 89 B.R. 575 (Bankr. W.D. La. 1988) (debtor's bipolar disorder explained his irrational belief that he could pay obligations he incurred; court determined that those debts were not nondischargeable under § 523(a)(2) (A)).

2. Mental Illness as Cause of Debtors' Failure to Act

Mental illness may affect the debtor's ability to participate in their case in other ways as well. Debtors sometimes claim that their illness caused mistakes or omissions in required filings, and ask the court to excuse the omission on that basis. For example, in In re Peterson, 323 B.R. 512 (Bankr. N.D. Fla. 2005), the court found that the debtor's medical status, which included medication for depression, coupled with the complexity of her finances, supported the conclusion that the mistakes and omissions in her petition and

schedules were oversights and did not support denial of discharge. In In re Bauder, 333 B.R. 828 (8th Cir. BAP 2005), the court of appeals held that the bankruptcy court clearly erred in denying the debtor's discharge for failure to list a diamond ring on his schedules. The debtor suffered from adult ADD, depression and anxiety, and, though he failed to list ring, he lacked requisite intent to deny discharge. In contrast, in In re West, 328 B.R. 736 (Bankr. S.D. Ohio 2004), the court was not persuaded that the debtor's failure to turn over a sapphire ring to the trustee was due to memory lapses caused by chronic fatigue and depression.

Other examples include In re Bachman, 296 B.R. 596 (Bankr. D. Conn. 2003) (debtor, an attorney, failed to list creditors as a result of his emotional and mental state (severe depression) at the time, and sought an extension of the bar date for filing nondischargeability complaints for the unscheduled client-creditors; court held failure to schedule rose to level of "excusable neglect" but did not provide a basis for extension of bar date after bar date already expired); Kemba Roanoke Fed. Credit Union v. St. Clair (In re St. Clair), 193 B.R. 783 (Bankr. W.D. Va. 1996) (debtor's depression explained the debtor's failure to list assets on his schedules, and debtor did not have the intent to hinder, delay or defraud the creditor under § 723(a)(2)(A) or to make a false oath under § 723(a)(4)(A)); In re Loflin, Case No. 07-01877-5-ATS (Bankr. E.D.N.C. Dec. 12, 2008) (denying IRS motion for summary judgment against debtor on grounds that he could not show reasonable cause for failing to file returns and pay taxes; court held that affidavit from doctor detailing debtor's "debilitating" depression created disputed issues of material fact).

In In re Moeritz, 317 B.R. 177 (Bankr. M.D. Fla. 2004), the court rejected the debtor's argument that his failure to schedule assets and asset transfers should be excused due to his extreme stress and depression at the time he was preparing to file his bankruptcy case, noting that many debtors are under stress at that time, the debtor did not seek any medical or psychological care, and stress is not an excuse for failing to disclose significant assets or transfers. For those reasons, the debtor's discharge was denied.

In In re Fletcher, 2009 Bankr. Lexis 836 (Bankr. W.D. Tex. 2009) counsel's mental illness excused the debtor's failure to answer a summary judgment motion, and summary judgment was set aside.

3. Mental Illness Plus Substance Addiction as Cause of Behavior

Debtors have not infrequently asserted that their behavior should be excused by their substance addiction, but that defense rarely is successful.

In In re Harris, 328 B.R. 837 (Bankr. S.D. Ala. 2005), the court rejected the debtor's claim that his chemical and alcohol dependency, depression and feelings of hopelessness contributed to his failure to pay taxes and to file tax returns where the debtor was able to perform the requirements of his sales job and to earn substantial income. His tax debts were declared nondischargeable. See also In re McNamara, 310 B.R. 664 (Bankr. D. Conn. 2004) (debtor did not satisfactorily explain loss of \$130,000 based on uncorroborated testimony that he lost the money in a poker game where debtor failed to provide any evidence to substantiate his claim that he was under the influence of alcohol and medication for severe depression and could not recall any details).

For older cases, see, for example, Wegmans Food Mkt., Inc. v. Smith (In re Smith), 207 B.R. 403 (Bankr. W.D.N.Y. 1997) (drug addicted debtor's debts from bad checks were nondischargeable under § 523(a)(2)(A)); McManus v. McManus (In re McManus), 112 B.R. 773 (Bankr. E.D. Va. 1990) (drug addiction did not excuse failure to retain records or to explain losses under § 727(a)(3) and (a)(5) and did not excuse making a false oath under § 727(a)(4)(A)); Dolin v. Northern PetroChemical Co. (In re Dolin), 799 F.2d 251 (6th Cir. 1986) (drug addiction and compulsive gambling did not excuse failure to retain records or to explain losses under § 727(a)(3) and (a)(5)); Sicherman v. Murphy (In re Murphy), 244 B.R. 418 (Bankr. N.D. Ohio 2000) (anger, anxiety, and depression not adequate explanation under § 523(a)(2)(A) for loss of \$54,000 during drinking and gambling spree).

But see Hutzelman v. Luhman (In re Luhman), 146 B.R. 163 (Bankr. W.D. Pa. 1992) (drug addicted debtor was not denied discharge under §§ 727(a)(3) and (a)(5)); Williams v. Illinois Student Assistance Comm'n (In re Williams), 1999 WL 1134772 (Bankr. E.D. Pa. 1999) (debtor's drug addiction was factor in determining undue hardship under § 523(a)(8)); Harris v. Unipac Serv. Corp. (In re Harris), 198 B.R. 190 (Bankr. W.D. Va. 1996) (debtor's cocaine dependency was factor in determining undue hardship under § 523(a)(8)).

III. When Mental Illness May Excuse Debtors' Obligations Under Bankruptcy Code

Even non-bankruptcy lawyers know about BAPCPA: the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The Bankruptcy Code now requires potential debtors to obtain a credit counseling briefing before filing their bankruptcy petition, and also requires debtors to take a financial management course as a condition of receiving discharge. Previously existing requirements also remain in place, such as attending the § 341 meeting of creditors and otherwise being responsive to the requirements

of the bankruptcy proceeding. Satisfying these requirements is challenging for many debtors, especially those with a mental illness or debilitating depression that interferes with their ability to get these things done.

A. Pre-Petition Credit Counseling

A debtor is required to obtain credit counseling prior to filing a bankruptcy petition. In the context of mental illness, failure to obtain the counseling can be excused only if the debtor's condition qualifies as a "disability" or "incapacity" within the meaning of 11 U.S.C. § 109(h)(4). That section specifies that "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."

In In re Jarrell, 364 B.R. 899 (Bankr. N.D. Tex. 2007), the pro se chapter 7 debtor, a serial filer, was diagnosed with bipolar disorder, schizophrenia, and clinical depression. A creditor sought dismissal for abuse and bad faith, but the court denied the motion to dismiss. The medical evidence supported a finding that the debtor had the requisite "incapacity" under § 109(h)(4) to justify waiving the pre-filing credit counseling requirement. And, despite the fact that debtor had filed at least ten bankruptcies and over a hundred lawsuits over the years, he had a legitimate reason to file the current petition and had, after filing it, hired a competent lawyer to represent him. The bankruptcy served the debtor's best interests, so despite the debtor's history of wasting vast amounts of court resources with pointless serial filings, the court denied the motion to dismiss and gave the debtor a potentially last opportunity to proceed through bankruptcy. The court noted that the debtor's wife and four young children also suffered from very serious illnesses, and that the debtor had "more problems than should be visited upon any human being." See also In re Tulper, 345 B.R. 322 (Bankr. D. Colo. 2006) (seventeen prescription medications taken by the debtor created a mental deficiency such that debtor was incapable of realizing and making rational decisions with respect to her financial responsibility; credit counseling requirement waived).

B. Pre-Discharge Financial Management Course

BAPCPA also requires debtors to take an approved course in financial management prior to the entry of their discharge. 11 U.S.C. § 727(a)(11). While the requirements are strictly enforced, mental illness may excuse a debtor's compliance if, because of the illness, the debtor is disabled or incapacitated within the meaning § 109(h)(4). The bankruptcy court for the Middle District of North Carolina noted that "[t]he purpose of the exemption is to avoid 'the absurd situation in which a debtor would be required to obtain a briefing even if suffering from Alzheimer's disease or some other disability that would make the briefing

meaningless or even impossible.” In re Faircloth, 2006 WL 3731299 n.1 (Bankr. M.D.N.C. 2006) (quoting 2 Collier on Bankruptcy ¶ 109.09[4] (Alan N. Resnick & Henry J. Sommer, eds.); see also In re Hall, 347 B.R. 532 (Bankr. N.D.W. Va. 2006) (debtor’s physical and mental impairments prevented him from meaningful participation in debtor education class; requirement waived).

C. Attending Meeting of Creditors Pursuant to § 343 and Other Code Requirements

Debtors are required pursuant to 11 U.S.C. § 343 to attend meetings of creditors, and may be required to appear for examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure. There are times when a debtor’s mental condition may make it difficult for the debtor to meet those requirements.

In Nicholls v. Jones (In re Jones), 2004 WL 826031 (Bankr. D. Colo. 2004), the court denied discovery sanctions for the debtor’s failure to attend a deposition where the defendant’s physician submitted a statement documenting her medical problems, which included dementia and depression, and opined that any effort to depose her would result in undue stress and could worsen her condition. See also In re Keefe, 7 B.R. 270 (Bankr. E.D. Va. 1980) (debtor’s mental breakdown excused his attendance at his discharge hearing).

Sometimes it is not the debtor, but a creditor who fails to act. In re Burton-Alston, 2006 WL 12904 (Bankr. M.D.N.C. 2006), the court did not find the creditor’s uncorroborated testimony regarding mental conditions, including depression, to be persuasive and denied the creditor’s motion to reopen the debtor’s chapter 13 case where the creditor’s claim was deemed to be abandoned due to the creditor’s failure to provide a proper address for distributions from the trustee and where the creditor failed to seek a determination of dischargeability while the case was pending.

In In re Mohr, 2005 WL 1532648 (Bankr. E.D. Pa. 2005), a creditor-defendant from whom the trustee sought to recover preferential transfers in a Ponzi scheme failed to respond to, or even open, the trustee’s demand letter or complaint. The court held that the defendant’s depression, which presumably could have a paralyzing effect, did not appear to have disabled him from opening mail that could benefit him or from securing counsel and fighting the judgment. Absent medical evidence or corroboration of the defendant’s diminished capacity, the court could not conclude that his chronic condition justified his conduct. The defendant’s motion to set aside default was denied except with respect to amount.

IV. Mental Illness Prompting Appointment of Guardians Ad Litem

Although infrequent, in some cases bankruptcy courts have appointed guardians ad litem to protect the interests of debtors with mental illnesses.

In In re Myers, 350 B.R. 760 (Bankr. N.D. Ohio 2006), because the chapter 13 debtor suffered from dementia and was unable to speak or communicate, the court appointed his co-debtor spouse as the debtor's "next friend" for purposes of the bankruptcy proceedings. The debtor was unable to execute a power of attorney, and the court was reluctant to appoint the non-debtor spouse as a guardian ad litem, so appointment of the spouse as his next friend was most appropriate. The spouse had knowledge of the debtor's financial affairs pursuant to their 63-year marriage. The court held that there is no explicit requirement in the Bankruptcy Code that a person be mentally competent to qualify as a debtor, as recognized by BAPCPA provisions providing for waiver of credit counseling obligations due to impairment based on mental illness or deficiency.

Other cases in which a guardian ad litem was appointed include In re Kloian, 2006 WL 1208059 (6th Cir. 2006) (guardian ad litem appointed by bankruptcy court and reappointed by district court; district court did not err in rejecting a second hearing on guardian ad litem where debtor did not provide any evidence that the effects of his mental condition had lessened); In re Whitehead, 2005 WL 1819399 (Bankr. M.D.N.C. 2005) (guardian ad litem appointed for purposes of the bankruptcy case where the debtor appeared incapable of making business decisions without the assistance of his son); In re Linehan, 326 B.R. 474 (Bankr. D. Mass. 2005) (male debtor suffered from severe depression; female debtor suffered from major chronic depression, agoraphobia, and generalized anxiety disorder. Motion to dismiss case for alleged incompetency denied where debtors had not yet been declared incompetent at time of filing and the subsequently appointed guardian ad litem ratified the bankruptcy filing); In re Bernheim Litigation, 290 B.R. 249 (D.N.J. 2003) (decision to appoint a guardian ad litem in prior matters due to the debtor's failure to cooperate with counsel was not evidence of insanity to toll the statute of limitations).

V. Issues of Proof in Mental Illness Cases

If a debtor raises a defense of mental illness, the debtor has the burden of proof. Courts prefer and often require expert testimony to establish the nature and parameters of the debtor's mental illness. In other cases, the bankruptcy court's general observations of the debtor, combined with other evidence, may suffice.

Some courts may require that debtors claiming inability to pay debts because of mental illness show that they sought treatment and that the treatment was not successful. Many people, bankruptcy judges included, are skeptical when a debtor claims an inability to

pay debts due to depression. The prevailing trend, especially in student loan discharge cases with mentally ill debtors, where the duration of the debtor's current state of affairs and the related question of the duration of the debtor's mental illness are intertwined, is to require expert testimony.

A. Is Expert Testimony Required?

Testimony from a mental health professional may not be technically required to establish mental illness, but as a practical matter expert testimony may be essential. Unfortunately, most debtors in bankruptcy cannot afford a medical expert. As a bankruptcy judge in the Western District of New York observed, "all dischargeability litigation involves real persons who are debtors under the Bankruptcy Code, and cannot afford to hire medical experts to testify to the effect of their disease on their earning capacity." Doherty v. United Student Aid Funds, Inc. (In re Doherty), 219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998); see also In re Hertzell, 329 B.R. 221 (6th Cir. BAP 2005) (debtor had multiple sclerosis, not a mental illness, but case provides a good discussion of the repercussions of debtor's financial inability to obtain expert testimony).

In recognition of the usefulness of medical testimony and also of the fact that its high cost puts it out of reach of many debtors, the Bankruptcy Court for the Eastern District of North Carolina now offers debtors pro bono or reduced cost mental health evaluations by mental health professionals. The Mental Health Project is discussed in more detail at the end of these materials.

In In re Burton, 339 B.R. 856 (Bankr. E.D. Va. 2006), the debtor's bipolar disorder, personality disorder, and drug problem for which debtor received social security disability and had over 30 hospitalizations were sufficient to prove the first prong of the Brunner test. However, the debtor did not present evidence other than his own testimony of how long the medical condition would impact his ability to sustain future long-term employment. Some expert testimony or corroborating evidence was required, and because the second element was not met, the student loans were not discharged.

Other cases are much the same. See, e.g., In re Lowe, 321 B.R. 852 (Bankr. N.D. Ohio 2004) (debtor suffered from bipolar disorder and several physical impairments, but bankruptcy court held that a nexus between the medical condition and adverse effect on income was not shown; some corroborative evidence required, so student loans not discharged); In re Norasteh, 311 B.R. 671 (Bankr. S.D.N.Y. 2004) (lack of corroborative medical evidence that debtor suffered from various physical ailments and depression prevented court from finding that present inability to repay student loans was likely to persist for a significant portion of the loan repayment period).

In In re Quarles, 2004 WL 2191608 (Bankr. D. Kan. 2004), the debtor suffered from bipolar disorder, dissociative disorder, and PTSD. Two experts testified that the illness was severe, that the debtor was unable to engage in meaningful employment over any significant period of time, and that added stress was harmful to debtor. The court found that the debtor's failure to take part in the income contingent repayment plan was not bad faith under these facts, and the student loans were discharged. See also Hafner v. Sallie Mae Servicing Corp., 303 B.R. 351 (Bankr. S.D. Ohio 2003) (debtor presented an expert report detailing his diagnosis with Asperger's syndrome, a type of autism, and related anxiety, social avoidance, anger, behavioral control problems, and depression; report concluded that his functioning was impaired to the point that it would preclude him from maintaining employment even at simple, low stress, repetitive jobs; student loans partially discharged); In re Turner, 2003 WL 21639407 (Bankr. D.N.H. 2003) (debtor presented considerable evidence of a long history of medical and mental health problems, including ADD and depression, and an expert witness who testified that debtor's current work situation was appropriate given her mental health issues; court found second prong of Brunner met and discharged student loans).

Older cases requiring that a debtor's mental illness be established by expert medical evidence include Burgess v. Bank One Cleveland, N.A. (In re Burgess), 204 B.R. 521 (Bankr. N.D. Ohio 1997) (debtor's unsubstantiated depression not grounds for undue hardship under § 523(a)(8)); Signet Bank/Virginia v. Borrer (In re Borrer), 132 B.R. 194 (Bankr. M.D. Fla. 1991) (debtor's claim of depression unsubstantiated and credit card debt nondischargeable under § 523(a)(2)(A) and (B)); Mitchell v. U.S. Dep't of Educ. (In re Mitchell), 210 B.R. 105 (Bankr. N.D. Ohio 1996) (debtor's unsubstantiated depression not grounds for undue hardship under § 523(a)(8)).

While some courts require expert testimony, other courts have recognized the existence of mental disorders based on the court's observation of the debtor and the debtor's testimony. In In re Mosley, 330 B.R. 832 (Bankr. N.D. Ga. 2005), the debtor presented letters from medical providers to substantiate his claims of depression, anxiety disorder and physical ailments. The letters were not admitted, but the bankruptcy court discharged the loans, giving leniency to the lack of evidence because the debtor was pro se. In In re Mayer, 198 B.R. 116 (Bankr. E.D. Pa. 1996), the debtor denied mental illness and refused to see the court-appointed medical expert, but the court, based on its observation of the debtor's conduct, found the debtor to be severely mentally ill and held that the debtor's student loan was dischargeable under § 523(a)(8)).

In In re Brightful, 1999 WL 1024516 (Bankr. E.D. Pa. 1999), aff'd, 1999 WL 812791 (E.D. Pa. 1999), rev'd, 267 F.3d 324 (3d Cir. 2001), the bankruptcy judge in the

Eastern District of Pennsylvania found, based on his observation of the debtor, that the debtor was emotionally unstable and had “glaring” psychiatric problems, and determined that her student loans should be discharged. On appeal to the United States Court of Appeals for the Third Circuit, the creditor argued that the bankruptcy judge’s findings should be set aside because they were not based on expert testimony. The Third Circuit held that expert testimony was not necessary to find mental illness, but the appellate court nevertheless reversed because the bankruptcy judge did not specify the nature of the debtor’s emotional and psychiatric problems or how those problems would prevent her from being gainfully employed.

More typically, debtors who do not present expert testimony and who instead rely on general and anecdotal evidence find that their evidence does not satisfy the court. See, for example, In re Wolde-Giorgis, 2005 WL 756103 (9th Cir. 2005) (debtor failed to satisfy second prong of Brunner test to discharge student loans; no evidence presented that the alleged mental health conditions precluded employment); In re Thompson, 329 B.R. 145 (Bankr. E.D. Va. 2005) (court considered whether debtor’s mental and emotional state provided a satisfactory explanation for lack of good faith repayment of student loans, but because there was no corroborative evidence, third prong of Brunner not met and loans not discharged); In re Simms, 328 B.R. 437 (Bankr. D. Md. 2005) (debtor provided insufficient evidence that her depression and chronic anxiety would persist indefinitely; student loans not discharged).

In Educational Credit Mgmt. Corp. v. Gouge, 320 B.R. 582 (W.D.N.C. 2005), the bankruptcy court discharged the debtor’s student loan, and the district court remanded for further findings regarding whether a partial discharge would be appropriate. The debtor suffered from bipolar disorder but he presented no evidence that it was a problem with his current employment, and the current employer was tolerant of the condition. The debtor testified that his wife was also mentally ill, but the district court observed that there was no evidence that the wife could not work. See also In re Green, 308 B.R. 677 (D. Del. 2004) (evidence that chapter 7 debtor may have been suffering from depression at the time of the hearing on a motion to revoke debtor’s discharge was insufficient to show that he was incompetent to proceed with hearing).

Finally, courts tend to be skeptical of mental health issues that are presented in overly general terms. Issues of this kind also tend to be supported by only sketchy evidence. In In re McNeely, 366 B.R. 542 (Bankr. N.D.W. Va. 2007), the chapter 13 debtors unsuccessfully sought to retain a houseboat based on mental health needs. After the untimely death of their daughter, the debtors claimed that the boat, which had been a key component of their family life, provided a therapeutic respite for them and was needed to effectively continue on in their sales and paralegal jobs. The court accepted that the

debtors' medical evidence indicated that the boat was important and beneficial to them, but concluded that the evidence did not support a finding that the boat was necessary for the debtors' effective reorganization or that the debtors would be unable to work without it. The court acknowledged the significance of mental health issues in bankruptcy proceedings, but concluded that no precedent supported the retention of "a luxury item pursuant to a Chapter 13 plan based on a mental health need." 366 B.R. at 546.

Similarly, substance abuse or gambling issues that are supported only by anecdotal evidence will not carry the day. In In re Harris, 328 B.R. 837 (Bankr. S.D. Ala. 2005), the court rejected the debtor's claim that his chemical and alcohol dependency, depression and feelings of hopelessness contributed to his failure to pay taxes and to file tax returns where the debtor was able to perform the requirements of his sales job and to earn substantial income. His tax debts were declared nondischargeable. In In re Bressler, 321 B.R. 412 (Bankr. E.D. Mich. 2005), the debtor's vague and unsubstantiated statements that he had a gambling problem and that he lost about \$700,000 gambling were insufficient to explain the loss of his assets for purposes of § 727(a)(5). The court held that the debtor's statement that gamblers are "not the types of people who maintain books and records" was insufficient to avoid a judgment denying discharge under § 727(a)(3).

B. More Time = Better Evidence

When the situation requires, bankruptcy courts may defer decisions to enable debtors to undergo treatment, or to otherwise deal with their current situation. In In re Simmons, 334 B.R. 632 (Bankr. C.D. Ill. 2005), although the debtor and witnesses provided evidence of the debtor's current depression and anxiety regarding his financial condition, he did not appear to have any true physical, mental or legal disability that was likely to impair his future. At that time, the second prong of the Brunner test was not met. The court, however, allowed a four-year deferral with an opportunity to have the case revisited rather than rule against the debtor.

In In re Marks, 301 B.R. 563 (Bankr. N.D. Cal. 2003), the debtor had a history of mental illness, alcoholism and drug abuse. The bankruptcy court did not believe that the debtor had a probability of success, but did not want to say so because at the time of trial, debtor was on an upswing and the court did not wish to harm him. The district court remanded the case for a determination of whether a partial discharge of the loans would be appropriate. By the time of remand, the debtor's situation had declined, and it was clear he was unable to make the payments. The student loans were discharged.

VI. When the Debtor's Behavior Affects the Proceedings

There are any number of ways that a debtor's mental state may affect proceedings in a bankruptcy case. For example, a debtor may be too anxious to attend a meeting of creditors or a hearing. In that situation, the court may allow the debtor to have a trusted friend sit with the debtor during the hearing. The court might also allow the debtor's testimony to be given by deposition, by proffer subject to cross examination, or by telephone.

Sometimes a party's mental illness affects or disrupts the court proceedings. In cases involving disruptive litigants, courts have used their contempt powers to bar parties from the courthouse, as in In re North Jersey Trading Corp., 177 B.R. 814 (Bankr. D.N.J. 1995), appeal denied, 66 F.3d 312 (3rd Cir. 1995). In that case, a shareholder was held in contempt and barred from the courthouse, but permitted to attend a hearing by telephone. Courts also have sanctioned litigants for frivolous pleadings and appeals. In In re KTMA Acquisition Corp., 153 B.R. 238 (Bankr. D. Minn. 1993), sanctions of \$10,000 were imposed for pro se litigant's numerous pleadings containing irrelevant, unsubstantiated, and sensational factual and legal allegations. In In re Arleaux, 229 B.R. 182 (8th Cir. BAP 1999), a litigant was sanctioned \$100 for a frivolous appeal.

A court may also enjoin further filings. In In re Martin-Trigona, 737 F.2d 1254 (2nd Cir. 1984), the appellate court affirmed an injunction prohibiting the filing of abusive litigation, and in Robinson v. Jones (In re Robinson), 152 B.R. 743 (Bankr. E.D. Ark. 1993), the clerk of court was directed to refuse adversary complaints submitted by a debtor with a history of abusing the bankruptcy system.

Paranoid pro se debtors also present problems, especially for the clerk's office. These individuals are best dealt with by one designated person to eliminate conflicting stories and to reduce accusations of conspiracy. It is also a form of damage control, as those with severe paranoia are often abusive and tend to accuse those they come in contact with of improper conduct. Courts may be tempted to allow paranoid pro se litigants to appear by telephone, but that is not a good idea because these individuals are so suspicious of everyone that if they cannot see what is happening, they often conclude that their rights are being violated.

VII. Support for Debtors with Mental Illness or Depression

In recognition that mental illness frequently is a factor in bankruptcy cases, the bankruptcy court for the Eastern District of North Carolina and the North Carolina Society of Clinical Social Work developed the district's "Mental Health Project," which has two major components: education and evaluation.

The education component seeks to inform lawyers and their clients about the symptoms of mental illnesses and resources for treatment and assistance. The project committee created a brochure that is distributed through lawyers' offices, at debtor education classes, and at § 341 meetings. The committee also participates in seminars for lawyers, discussing both mental health issues and resources and explaining the many facets of the Mental Health Project. The committee also created a seminar for mental health professionals, explaining the court system and the need for expert testimony, with the goal of making the professionals comfortable with the idea of testifying in court proceedings.

The second component of the project involves a panel of mental health professionals who have agreed to provide pro bono or low cost evaluations to debtors whose mental health is an issue in their bankruptcy proceeding. These professionals will act as witnesses for the court, rather than as an expert for the debtor, and will provide an evaluation of the debtor's mental state, his or her ability to maintain employment, the debtor's ability to make financial decisions, and other information that may be relevant to the case. The committee drafted a form application, available on the court's website, that a debtor may submit to the court for referral to the panel. The professional will then provide testimony by way of affidavit, an in-court appearance, or by telephone or videoconference, depending on the circumstances of the case. The court will make efforts to accommodate the professional's schedule to facilitate cooperation between the professions. It is anticipated that the panel will one day be available for informal consultations with counsel, as well.

A copy of an informational brochure, the application, and a proposed order all are on the bankruptcy court's website at www.nceb.uscourts.gov, under the "Mental Health Project" tab, which is prominently located on the court's internet home page. The website also includes a link to the National Mental Health Information Center run by SAMSA (the Substance Abuse and Mental Health Services Administration, a part of the United States Department of Health and Human Services).

In addition to the problem of the cost of employing a mental health professional, there are also other difficulties that arise when a mental health professional testifies. Mental health experts are often reluctant to get involved with legal proceedings; they are intimidated by courts, reluctant to disrupt their schedules, and are often unwilling to compromise the confidential relationship they have established with their patients. Therapists are also concerned that their relationship with their patients will be compromised if they testify in court. This is particularly true in situations where the therapist has worked hard to establish a relationship of trust with a patient who does not trust easily. Lawyers and judges in cases involving mental illness defenses should be sensitive to these problems.